

Provisional

For participants only

3 May 2016

English

Original: French

International Law Commission

Sixty-seventh session (first part)

Provisional summary record of the 3256th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 26 May 2015, at 10 a.m.

Contents


Crimes against humanity (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@unog.ch).

GE.15-08174 (E) 020516 030516



* 1 5 0 8 1 7 4 *

Please recycle 



Present:

Chairman: Mr. Singh
Members: Mr. Caflisch
Mr. Candiotti
Mr. Comissário Afonso
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Hassouna
Mr. Hmoud
Ms. Jacobsson
Mr. Kamto
Mr. Kittichaisaree
Mr. Kolodkin
Mr. Laraba
Mr. McRae
Mr. Murase
Mr. Murphy
Mr. Niehaus
Mr. Nolte
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Korontzis Secretary to the Commission

The meeting was called to order at 10 a.m.

Crimes against humanity (agenda item 9) (*continued*) (A/CN.4/680)

The Chairman invited the Commission to pursue its consideration of the Special Rapporteur's first report on crimes against humanity (A/CN.4/680).

Mr. Murase thanked the special Rapporteur for his comprehensive first report on crimes against humanity. Although he shared the Special Rapporteur's enthusiasm for combating the impunity of the perpetrators of such crimes wherever they were to be found, he had some concerns relating to the project's objective. He recalled that the Commission's mandate was not to prepare a new treaty, but to codify and progressively develop emerging customary law. As several members had noted, to talk about a "new convention" on crimes against humanity at the current stage might be misleading. The first report did not contain a draft article on the scope of the project, which was difficult to understand, as it was important for Commission members and the public to know what issues would be covered by the Commission's work on the topic. Clarifying the scope of the draft articles would also help to avoid or minimize possible conflicts with the Rome Statute of the International Criminal Court and with other relevant treaty regimes.

When defining crimes against humanity for the purposes of the draft articles, the Special Rapporteur reproduced the definition given in the Rome Statute, in accordance with the agreement reached by the Commission during informal consultations held in 2012 and 2013. That was for the best, since, if the Commission were to opt for a different definition, States would certainly encounter major difficulties. Given that a number of obstacles had had to be overcome in order to arrive at the definition contained in article 7 of the Rome Statute, the Special Rapporteur should not dwell too much on that aspect and should instead focus on the procedural aspects of inter-State cooperation.

He found the methodology followed by the Special Rapporteur to be problematic from the standpoint of the project's objective, which, as stated previously, was to codify and progressively develop international law. While he could agree with part III, sections A-C of the report, which stated that "the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned", he disagreed with the Special Rapporteur's repeated references to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention"), the Geneva Conventions relating to the protection of victims of international armed conflicts of 1949 ("the Geneva Conventions") and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture"), on which the Special Rapporteur based his assertion that the prohibition of crimes against humanity was a well-established rule of customary international law. Those conventions clearly had no direct evidentiary value in terms of establishing the customary nature of crimes against humanity and could not be cited as anything other than analogies.

In part V of his report, the Special Rapporteur referred to "multilateral treaties addressing transnational crimes". He was not convinced that the expression "transnational crimes" was appropriate, except in reference to organized crime. Some of the conventions listed in paragraph 86 did not address crimes against humanity *per se*. The Special Rapporteur stated in paragraph 112 of his report that article 1 of the Genocide Convention remained "a useful model" for the purposes of preparing the draft articles. However, it was debatable whether his approach was consistent with an exercise in codifying and progressively developing international law or whether it was more like an exercise in formulating a new convention, for which the Commission had no mandate. With regard to the risk of fragmentation of international criminal law, advocates for a new convention on crimes against humanity had stressed that such an instrument could serve as an intermediate

solution for those States that had not ratified the Rome Statute in that they could incorporate its provisions into their domestic law. Yet, there was no guarantee that the new convention would be ratified by a large number of States, and in that connection, he shared the view expressed by the South African delegation in the Sixth Committee in 2013 about there being a risk that States that had not ratified the Rome Statute might deem it sufficient to ratify the proposed convention on crimes against humanity and continue to remain outside the regime of the Rome Statute, as indicated in paragraph 58 of document A/CN.6/68/SR.18. While he himself fully acknowledged the importance of closing the impunity gap that existed between States parties that had ratified the Rome Statute and those that had not, he doubted that the proposed convention was capable of closing that gap because it would presumably not incorporate the principle of complementarity between States and the International Criminal Court. He only hoped that the present draft articles would not create a radically different regime from that of the Rome Statute.

The Special Rapporteur took the view that a new convention would contribute to increasing the effectiveness of inter-State cooperation. He himself agreed that the draft articles should focus on those procedural aspects, but he was not fully convinced by the Special Rapporteur's relatively rigid interpretation of the "double criminality" requirement. The Special Rapporteur explained that, owing to that requirement, differences between States' domestic legislation were an obstacle to intra-State cooperation. However, it was commonly understood that, in order for the test of double criminality to be met, the offence in question did not necessarily have to be defined the same way in both the requesting and requested States. National legal systems were diverse and they inevitably defined similar acts in different ways. In other words, it was hard to believe that imposing a treaty obligation on States to enact separate national legislation that characterized crimes against humanity as criminal offences using a pre-established definition would mean that requested States could no longer reject requests for cooperation by invoking the "double criminality" rule. In fact, differences between national legal systems had never been a serious obstacle to inter-State cooperation. Furthermore, the question of whether to impose an obligation on States to adopt legislation on crimes against humanity gave rise to the broader issue of whether, in order to punish those crimes, it was really necessary to consider them as a separate category. By way of example, Japan did not have special legislation on crimes against humanity, but that had never been considered to be an obstacle to the ratification of the Rome Statute, since, under the Japanese legal system, it was possible to prosecute and punish the perpetrators of such crimes under the Japanese Criminal Code.

With regard to draft article 1, he had doubts as to whether, apart from the Rome Statute, the prevention and punishment of crimes against humanity were well established rules of customary international law. If they were, he could agree in principle with the proposed draft text, even if it reproduced verbatim the provisions of the conventions on genocide and torture, which seemed rather odd for a provision on crimes against humanity. In addition, the use of some terms was incorrect: the word "war", for example, should be replaced with "armed conflict". The expression "in any territory under its jurisdiction" was also problematic: if the Special Rapporteur's understanding was that it referred to the sovereign territory, vessels and aircraft of the State's nationality and to the occupied and other territory under its jurisdiction, then it would be better to say under its "jurisdiction or control". The notion of "influence" referred to by the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* should also be taken into consideration in assessing such "control", depending on the nature of the acts to be prevented.

With regard to draft article 2, which contained a definition of crimes against humanity, the Special Rapporteur once again applied the "verbatim" approach and proposed to reproduce the definition set forth in article 7 of the Rome Statute with a few

minor changes. While that approach might seem ideal and convenient, it actually posed several problems. First, in a burst of optimism, the Special Rapporteur asserted in paragraph 122 of his report that that definition had “very broad support among States” and, in paragraph 176, that it represented a “widely-accepted definition of settled international law”. Yet, as revealed by a 2013 study published by the International Human Rights Law Clinic of George Washington University Law School, only 10 of the 83 sample States (around 12 per cent) had adopted the text of that article verbatim. The expression “widely-accepted” implied that the definition was contained not only in the Rome Statute but was also applied by other international tribunals and forums. Unfortunately, that was not the case, especially with regard to the requirement of a “policy element” (meaning the element of the attack being “pursuant to or in furtherance of a State or organizational policy to commit such an attack”). The International Criminal Tribunal for the Former Yugoslavia (ICTY) since 1991 had downplayed the importance of that element in the case *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, taking the view that “the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime”. In addition, the aforementioned study showed that, of the 34 States that had adopted separate legislation on crimes against humanity, only 22 had included a reference to the policy element. Given that 12 of 83 States (only 15 per cent) had incorporated that element in their legislation, one could not very well claim that the article 7 definition was widely accepted. Secondly, the Special Rapporteur stated in paragraph 122 that it would be useful to reproduce the article 7 definition in order to promote the complementarity regime of the Rome Statute. However, promoting the development of national laws that were in harmony with the Statute was not indispensable, nor did it accurately reflect the case law of the International Criminal Court. In its decision on admissibility in the case *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Sunussi*, Pre-Trial Chamber I of the International Criminal Court (ICC) had held that, in attempting to determine whether the domestic and ICC investigations covered the same case, it was not necessary for the domestic investigation to involve the prosecution of international crimes so long as it covered the same conduct. What was crucial was that the crimes prosecuted by States under their legislation sufficiently captured those that were the subject of the International Criminal Court’s proceedings. Put differently, States did not need to adopt the definition set out in article 7 in order to ensure respect for the principle of complementarity, since the Rome Statute did not require States to criminalize the acts that fell within the Court’s jurisdiction. Thus, although it might seem ideal to promote laws that mirrored the definition contained in article 7 of the Statute, to do so outside the context of the Statute would undermine the bridge between national and international crimes that had been established under the complementarity regime.

The Special Rapporteur suggested that the use of the article 7 definition would help minimize “undesirable fragmentation in the field of international criminal law” but the new convention would also have to attract the accession of many States — a difficult goal to achieve in the near future, given that even those States that had ratified the Rome Statute tended to be reluctant to incorporate the article 7 definition into their domestic law. In conclusion, the Commission should concentrate on the procedural aspects of inter-State cooperation rather than on the substantive aspects of the prevention and definition of crime against humanity, since it appeared that, with the exception of the Rome Statute, they had not been fully established as rules of customary international law. Before beginning to codify substantive rules on those aspects, the Commission must wait for the case law of the International Criminal Court to develop further. Although he had some reservations about the draft articles, he would nonetheless support their referral to the Drafting Committee, if that was the wish of the Commission.

Mr. Forteau thanked the Special Rapporteur for the excellent quality of his first report, which dealt with two fundamental issues of the project — the prevention and

punishment of crimes against humanity and the definition of such crimes. While welcoming the impressive amount of information that had been compiled on those two issues, he expressed concern at the length of the report, which would be difficult to consider in detail in only a few plenary meetings. By way of general comment, he wished to point out that the written replies submitted by some States were useful and instructive, but given the small number that had been received, the Commission should consider reiterating its request to States to provide it with information on their practice. He agreed with the Special Rapporteur that a convention on crimes against humanity was lacking in contemporary international criminal law, at least as far as the issues of the jurisdiction of national courts and inter-State cooperation were concerned. He also agreed that the formulation of such a draft convention or draft articles must be approached with caution and that special attention must be given to existing rules and instruments, especially the Rome Statute.

In that connection, it was necessary to point out a major lacuna in the Special Rapporteur's report, which made no reference whatsoever to the rights of refugees, even though the 1951 Convention relating to the Status of Refugees was directly related to the subject of crimes against humanity. Article 1, paragraph F, of that Convention, stipulated that "the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes". It would have been useful to have some guidance on that issue in the Special Rapporteur's first report, since it was important to ensure that the draft articles being prepared by the Commission did not clash with the interpretations of that article issued by the competent courts. From that standpoint, the link between refugee law, on the one hand, and judicial cooperation and extradition mechanisms, on the other, deserved to be analysed in its own right. For example, it was necessary to determine to what extent the obligation to extradite or prosecute (*aut dedere aut judicare*) applied in the case of a person who met the criteria for being granted refugee status but was denied that status on the grounds that there were serious reasons for considering that he or she had committed a crime against humanity, as provided for in article 1, paragraph F (a), of the 1951 Convention. It was also necessary to determine, at the outset of the Commission's work on the project, the degree of generality and the degree of specificity that the Commission considered necessary to achieve when formulating the provisions of the future convention. In his view, the draft convention should have a certain flexibility, in order to fit together optimally with existing legal regimes, whether domestic or international in nature; at the same time, it should impose unambiguous and firm obligations — such as the obligation of criminalization. Those two considerations — the need for flexibility and the need for firmness — should lead to the adoption of a convention whose wording was at once general, simple and direct. Mr. Gómez-Robledo's proposal to include a paragraph on the peremptory nature of the prohibition of crimes against humanity was ill-advised. That kind of specification did not have operational legal impact and risked encumbering the text unnecessarily.

With regard to draft article 1, he endorsed the inclusion of a provision on the general obligation to prevent and punish, and his comments would focus only on how to formulate such a provision. Whereas he was of the view that paragraph 1, which was modelled on article 1 of the Genocide Convention, should be adopted as it currently stood, there were three reasons why he opposed the inclusion of paragraph 2 on specific measures of prevention. First, contrary to what had been stated by the Special Rapporteur, paragraph 2 did not set forth "specific" prevention measures but rather very broad ones, inasmuch as it dealt with "effective legislative, administrative, judicial or other preventive measures". Paragraph 2 actually covered all preventive measures, making it difficult to see how it differed from paragraph 1. Secondly, it was unclear whether the Special Rapporteur intended to give the same meaning to the word "prevention" in paragraphs 1 and 2.

Paragraph 2 seemed to define prevention more narrowly than did paragraph 1, since it contained the additional qualification “to prevent crimes against humanity”, which did not appear in paragraph 1. In addition, from a more general perspective, the Special Rapporteur did not really take pains to define in his report what he meant by the “prevention” of crimes against humanity. He wondered whether the Special Rapporteur intended for the concept of prevention to be limited exclusively to those cases in which a crime against humanity was about to be committed or whether he intended for it to have a broader meaning. The Special Rapporteur’s first report did not shed much light on that point; it dealt with only one aspect of the prevention of crimes against humanity, referring to it only in the strict sense of the word — meaning, in the language of the judgment handed down in 2007 by the International Court of Justice in *Bosnia and Herzegovina v. Serbia and Montenegro*, prevention in instances in which there was “a serious risk” that a crime would be committed. The Court had also employed an even more strict definition of the prevention of the crime of genocide when it took the view in the same judgment that the obligation to prevent could be breached only if the crime was ultimately carried out. It amounted to an obligation to prevent the imminent commission of crimes, rather than an obligation to “prevent ... such conduct” in a broader sense.

However, the prevention of international crimes currently seemed to be understood, in forums other than the International Court of Justice, more broadly than the simple obligation to prevent their imminent or impending commission, as evidenced notably by the Human Rights Council resolutions on the prevention of genocide, the most recent of which had been adopted in March 2015, but also by legislative instruments on combating the condoning of crimes against humanity and their corresponding case law, such as that of the European Court of Human Rights. In addition, Council of the European Union Framework Decision 2008/913/JAI of 28 November 2008, which imposed an obligation on member States to punish “publicly condoning, denying or grossly trivializing” crimes against humanity, could be considered to be an example of the prevention of such crimes. The Special Rapporteur had failed, too, to explore national practice relating to the prevention of crimes against humanity. He alluded to it in his report but did not specify the form such prevention might take in contemporary practice. All of the foregoing points should have been part of a detailed analysis aimed at providing the Commission with a clear idea of what it would include within the concept of the prevention of crimes against humanity. As things stood, it was unclear exactly what the Special Rapporteur understood by that concept, and it was worrisome that, in his report, he had assigned it an overly restrictive meaning. Lastly, the third reason that paragraph 2 was misleading, in relation to what was stated in paragraph 1, was that paragraph 2 introduced a territorial limit to the obligation to protect, whereas the Special Rapporteur acknowledged in paragraph 113 of his report that the obligation to prevent was not limited in geographic scope. That was, in fact, what the International Court of Justice had observed in *Bosnia and Herzegovina v. Serbia and Montenegro*. The Court had taken the view that the obligation to prevent was not limited by territory, but, rather, applied to “to a State wherever it may be acting or may be able to act”. All that mattered was the “capacity” of States “to influence effectively the action of persons likely to commit, or already committing, genocide”, and that capacity depended in particular on “the geographical distance of the State concerned from the scene of the events”. Most of the conventions mentioned in paragraph 86 of the report did not prescribe any territorial limitation either. Similarly, the General Assembly resolutions to which mention was made in paragraph 94 did not prescribe any territorial limitation with regard to the obligation to prevent. While it was true that there were other conventions that restricted the territorial scope of the obligation to prevent, those conventions were irrelevant in the present case, given that they concerned international human rights law and not crimes against humanity. In fact, the obligation to prevent had to be defined more broadly in the context of crimes against humanity. As the International Court of Justice had pointed out in 2007, the content of the duty to prevent depended on “the nature acts to be prevented”, and,

in his own view, the law relating to crimes against humanity must be aligned, not with the provisions of the Convention against Torture or other human rights conventions, but with those of the Genocide Convention, because crimes against humanity fell under the same category of crimes as genocide, and there should be no territorial limitation of the obligation to prevent. For those reasons, he considered draft article 1, paragraph 1, to be sufficient and he proposed that paragraph 2 should be deleted. It was enough to state in clear terms, as did the Genocide Convention, that all States must undertake to prevent and punish crimes against humanity. Paragraph 1 should, however, be amended slightly, since it currently described crimes against humanity as “crimes under international law”, which was too weak a formulation. Although that was indeed the wording used in the Genocide Convention, back in 1948, no international crimes, other than the ones currently covered by the Rome Statute, existed, whereas presently, there were other crimes that fell “under international law”. It was for that reason that the Rome Statute used the expressions “the most serious crimes of international concern” or “crimes of concern to the international community as a whole” to define the four categories of crimes that came within the jurisdiction of the International Criminal Court. The Commission had done the same at its sixty-sixth session when it had indicated in its final report on the obligation to extradite or prosecute (*aut dedere aut judicare*) that that obligation applied to the most serious crimes of international concern. The Commission could draw on that wording, which would help to highlight the fact that crimes against humanity were not just any international crime.

With regard to draft article 1, paragraph 3, he had no definite opinion as to whether or not it should be included, but was of the view that the explanation it contained belonged in the draft article that the Special Rapporteur intended to draft on the measures each State must take in order to ensure that crimes against humanity constituted an offence under its internal law. The question of possible justifications for such crimes pertained more to the field of criminal law than to the general obligation to prevent and punish. Ultimately, he felt that draft article 1 should be limited to what was stated in paragraph 1. Lastly, the Special Rapporteur was quite right to consider, in paragraph 113 of the report, that the obligation to prevent and punish crimes against humanity presupposed that the State had a customary obligation not to commit such crimes itself. If that stipulation was not added in paragraph 1 — and it perhaps deserved to be, as Mr. Gomez-Robledo had proposed — then it must, in any case, be clearly indicated in the commentary.

With regard to draft article 2, which concerned the definition of crimes against humanity, he fully agreed that the Commission should not call into question the definition adopted in 1998 in the Rome Statute. At the same time, merely reproducing that definition could give rise to two kinds of problems. For one thing, some States had included the crimes defined in the Rome Statute as offences under their national law, but they had sometimes done so after slightly adapting the definition, as evidenced by the comments submitted by States. That said, it followed from the case law of international criminal courts that what was essential for ensuring that domestic courts appropriately punished international crimes was not that the national legislation providing for the criminalization of such crimes should be identical in every way to what was applied at the international level; rather, what was essential was for national criminal legislation to be worded in such a way as to lead to the same result as the one that would be reached if the matter had been referred to an international court. It was important to allow for such flexibility, or leeway, in the wording of the draft article. That was also what the European Court of Human Rights had observed when it had taken the view, in the case of *Jorgic v. Germany*, that it was for national courts to decide how to interpret the provisions of domestic law relating to international crimes in cases referred to them and that the national authorities had a certain degree of discretion in that regard. Although that particular case was about genocide, the principle was equally valid for crimes against humanity. In addition, instruments that had been adopted after the Rome Statute contained a broader definition of crimes against

humanity. For instance, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance provided that the widespread or systematic practice of enforced disappearance constituted a crime against humanity, while employing a definition of enforced disappearance that differed from that of the Rome Statute in two respects: it did not contain the element of intent to commit enforced disappearance and did not specify that the disappearance had to have occurred “for a prolonged period of time”, making it broader than that of the Rome Statute. Thus, by simply reproducing the definition contained in the Rome Statute, the Commission risked placing itself at odds with post-1998 normative developments. For that reason, he proposed to keep the draft article proposed by the Special Rapporteur as a threshold, while adding a new paragraph to the draft article that would allow for the inclusion of broader definitions of the term “crime against humanity”, which, when all was said and done, would be consistent with article 10 of the Rome Statute. If the Commission wished to include a faithful reproduction of the Rome Statute definition in its draft convention, it must include not only the substance of article 7 but also that of article 10. In a recent commentary on article 10, Judge Bennouna had said that that article was intended to avoid the perception that the Statute of the International Criminal Court limited or affected existing or emerging rules pertaining to forums other than the Court, highlighting in particular that the Statute primarily represented the lowest common denominator, which did not prevent national laws and courts from going further and enlarging the scope of crimes against humanity that fell within their exclusive jurisdiction. To that end, he himself proposed that a new paragraph, modelled on article 1 of the Convention against Torture, should be added to draft article 2 to read: “This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”. It would be a constructive way of refraining from calling into question the definition contained in the Rome Statute, while simultaneously providing a definition that was without prejudice to existing national or international law or their future development. Such a definition would be permissible if, and only if, it served to expand and not restrict the one adopted in Rome in 1998. Lastly, it was necessary to say a few words about the issue of double criminality, specifying that the characterization of a given act as a crime against humanity was without prejudice to its characterization as a war crime or a crime of genocide. In conclusion, he recommended referring the draft articles to the Drafting Committee.

Mr. Nolte thanked the Special Rapporteur for his first report, which was both rich and constructive and which, although it could have been shorter, was headed in the right direction. In particular, he welcomed the Special Rapporteur’s efforts to position his work as a continuation of the Rome Statute and the practice of the International Criminal Court. He endorsed the general remarks made by Ms. Escobar Hernández about the need to put the Commission’s work into the larger context of the prevention and punishment of international crimes as objectives pursued by the international community. He shared the view expressed by other members that the Commission’s intention to elaborate a draft convention on crimes against humanity must complement existing normative and institutional mechanisms at the national and international levels — in particular the International Criminal Court — whose aim was to prevent and suppress international crimes. The Commission must therefore also bear in mind the cumulative effect of collective measures.

With regard to draft article 1, paragraph 2, it was unclear why the Special Rapporteur limited the obligation imposed on each State to take effective measures to prevent the commission of crimes against humanity to “any territory under its jurisdiction”, whereas in paragraphs 95-101 of his report, he highlighted the judgment of the International Court of Justice (ICJ) in *Bosnia and Herzegovina v. Serbia and Montenegro*, in which the Court had taken the view that the obligation to prevent that arose from the Convention was not limited to the territory under the jurisdiction of the State but was determined to a greater

extent by “the State’s capacity to influence ... within the limits permitted by international law”. Since genocide and crimes against humanity were very similar in nature, the duty to prevent described in paragraph 2 should not have a more limited territorial scope than that prescribed by the Genocide Convention. While he agreed with Mr. Forteau that the duty to prevent should not be restricted to those cases in which the commission of a crime against humanity was imminent, he felt that draft article 1, paragraph 2, adequately addressed that concern. The Commission should also bear in mind that some human rights treaties required States parties to respect and guarantee the rights they embodied “within their jurisdiction”, without that obligation being explicitly limited to the territory of the State party concerned, or at least, without it being interpreted in that way. In light of those considerations, he proposed, in paragraph 2, either that the words “in any territory” should be deleted or that the paragraph should be reformulated by reproducing the language of the aforementioned ICJ judgment, so that it would read: “Each State party shall take effective legislative, administrative, judicial or other measures to prevent crimes against humanity according to its capacity to influence and within the limits permitted by international law”. It was true that, with that amendment, the stated obligation would be a “more open-ended and therefore perhaps less clear obligation with respect to the adoption of specific measures”, which the Special Rapporteur had precisely sought to avoid, as he had noted in paragraph 115 of his report. However, it was not a sufficient reason to implicitly reject the important development represented by the aforementioned ICJ judgment in the area of protection against violations of basic human rights and the most heinous international crimes.

Turning to draft article 1, paragraph 3, he expressed support for the inclusion of a non-derogation clause, while noting that it was necessary to clarify the relationship of that clause with article 31 of the Rome Statute, which concerned grounds for excluding criminal responsibility. If, as he believed to be the case, paragraph 3 was not intended to exclude the grounds for exclusion set out in article 31, then perhaps that paragraph should constitute a separate draft article. That would make it more clear that it was addressed to States and did not concern the criminal responsibility of individuals. Like Mr. Gomez-Robledo, he was of the opinion that the draft convention should expressly provide that States had the duty not to commit crimes against humanity and that the prohibition against committing such crimes did not apply solely to individuals, as the International Court of Justice had established in its case law relating to the Genocide Convention.

With regard to draft article 2, he welcomed the fact that the Special Rapporteur had reproduced article 7 of the Rome Statute in his definition of crimes against humanity and had based the explanations of each element of the definition on specific restatements of the pertinent case law of the International Criminal Court and other international criminal tribunals. That case law was nevertheless likely to develop further, as were the elements of crimes, as pointed out by Ms. Escobar Hernández. There was therefore a risk, if nothing was done, that a future convention on crimes against humanity might be interpreted in a way that deviated from the case law of the International Criminal Court that had since evolved. In addition, when applying the convention, States might decide that they would confine themselves to the case law as it stood on the date on which they had signed the instrument. Therefore, in order to ensure, as far as was reasonably possible, the continuing harmonious and parallel development of the future convention and the system of international criminal law, he proposed to add a paragraph 4 to draft article 2 that would read: “In the interpretation of this provision account shall be taken of the case law of the International Criminal Court”. Such a provision would impose an obligation on those applying the convention, rather than to comply with the case law of the International Criminal Court, to “take into account” that case law, which, according to article 31 of the Vienna Convention on the Law of Treaties, was merely a duty to consider it as one means of interpretation among others.

In relation to the future programme of work, in order to draft a convention, which seemed to be the goal of the project undertaken by the Special Rapporteur, the Commission did not need to distinguish between progressive development and mere codification. He failed to understand Mr. Murase's point that the Commission had no mandate to draft a convention, when that was precisely its purpose: to draft conventions by codifying existing law and progressively developing the law. The Commission could make as many innovative proposals to States as it wished; States were free to adopt them or not in the form of a convention. Thus, in the current project, the Commission would not have to specify whether each draft article reflected *lex lata* or *lex ferenda*, as it had to do in other projects aimed at identifying existing customary international law for the benefit of the national courts. On the other hand, it must choose between drafting a convention that many States would be prepared to ratify without much delay but that would not establish a very demanding standard and drafting a convention that established stringent — and perhaps in some instances, innovative — obligations that some States might hesitate to accept, at least in the foreseeable future. It was obviously impossible to resolve that question in the abstract, but it would be useful for the Commission to consider, at a relatively early stage of its work, the general orientation it wished to give the project and the level of ambition it envisaged for the future convention, by listing possible options. To that end, it could engage in some form of preliminary consultations that could be conducted by the Special Rapporteur. One of the questions to be addressed in that context might be whether crimes against humanity should be excluded from the jurisdiction of military courts.

Mr. Cafilich thanked the Special Rapporteur for his comprehensive and detailed report on crimes against humanity, which was a concept that was difficult to define in many respects. He welcomed in particular the attention given to existing rules, especially the provisions of the Rome Statute. Although he was not fully convinced of the need for a convention on crimes against humanity or of the benefits that such an instrument would offer, it was premature, at the current stage of the Commission's work on the topic, to take a definite stand on that question. He would therefore limit his statement to a few general remarks before commenting on the proposed draft articles. He agreed with the Special Rapporteur that States must prevent crimes against humanity and, where applicable, punish the perpetrators, insofar as it had the possibility to do so; that the foregoing constituted an obligation of conduct, and not of result, that existed in both time of peace and time of war; and that the crimes in question must have been committed against the "civilian population". He would add that, when such acts were sponsored by a State, it was the State that bore international responsibility, which was independent of, but concomitant with, that of the individual who had committed the proscribed acts.

He agreed with the substance of draft article 1, paragraph 1, but was of the view that the words "Each State party confirms that" could give the impression that a confirmation of that obligation was necessary and could be given only by contracting parties, whereas it was, in fact, an obligation incumbent upon all States. In addition, it would be preferable to refer to "armed conflict" rather than to "war" and to qualify the matters it referred to as "international crimes" rather than "crimes against humanity". The paragraph would then read: "Crimes against humanity, whether committed in time of peace or during armed conflict, are international crimes which States undertake to prevent and punish." With regard to draft article 2, the Special Rapporteur had done well to retain the substance of article 7 of the Rome Statute, but one might question the utility of devoting a new convention to crimes against humanity if the definition it contained was virtually identical to the one set out in the Statute, which was the case with draft article 2, give or take a few words. He recalled the four main elements of the definition set out in the draft article. First, the offence could be committed by anyone — civilian State officials, military servicemen or non-State actors, including individuals who were not connected in any way with the State. Secondly, it must be part of a "widespread" or "systematic" attack. That suggested,

as the Government of Switzerland had argued in its message relating to the Rome Statute of the International Criminal Court, that such an attack must have been committed at all events several times and as part of a policy, which must necessarily exclude isolated acts that bore no relationship to an attack against the civilian population. Thirdly, the offences must have been committed against the civilian population, which, in the case of an armed conflict, referred, broadly speaking, to all persons who did not participate directly in the conflict, including, once more according to the Swiss Government, members of armed forces who had laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause. The Special Rapporteur took the view that the term “civilian population” could include even isolated individuals who did not come within the definition of “civilian population” and that the attack in question must not necessarily have targeted an entire civilian population (paras. 135 and 136 of the report). Lastly, in addition to those objective requirements, there was a subjective element, which was that the presumed perpetrators of the crimes against humanity must have been aware that they were acting as part of a widespread or systematic attack. However, they did not have to have been aware of all the details of the attack, nor did they have to have had a personal motive for their actions. The elements that qualified and defined the notion of crime against humanity were not all easy to understand and apply, especially the subjective element. He shared Mr. Forteau’s view that a provision incorporating the terms of article 10 of the Rome Statute should be added to the draft articles. In conclusion, he was in favour of referring the two draft articles to the Drafting Committee.

Mr. Valencia-Ospina said that he wished to commend the Special Rapporteur for his first report, which was comprehensive and thoroughly researched. Since the importance of the topic had been duly recognized by the Commission during its debates in 2013 and 2014, he saw no need to dwell on the question raised in part II of the report. Returning to part I (Introduction), he endorsed the approach taken by the Special Rapporteur, whose intention was to prepare “draft articles that might serve as the basis of an international convention on crimes against humanity”. That approach was fully consistent with the provisions of the Statute of the International Law Commission and with the practice that had been developed on the basis of them. In due course, it would be up to the Commission to recommend the adoption of a convention on the basis of its draft articles and up to the General Assembly to take the action it deemed appropriate in relation to that recommendation.

The general information contained in parts III and IV of the report concerning crimes against humanity and the existing multilateral conventions that were relevant for the purposes of the Commission’s work on the topic were very useful, and he had no particular comment to make on those points at the current stage of the deliberations, except to note with approval the Special Rapporteur’s observation that conventions grouped under the heading of “other potentially relevant conventions” could “provide important guidance with respect to those issues” and that “the value and effectiveness of particular provisions must be assessed in context”.

Nor did he have any particular comment to make on the developments described in part VI of the report, which was devoted to the definition of the term “crimes against humanity”. With regard to draft article 2, which reproduced the text of article 7 of the Rome Statute, the Commission should follow the Special Rapporteur’s example and not try to improve a provision that had been widely accepted by States. Turning to part V of the report, which concerned prevention, he recalled that he had carried out a thorough analysis of the principle of prevention in international law in his sixth report as Special Rapporteur on the topic “Protection of persons in the event of disasters”. In that report he had considered mitigation and preparedness to be “specific manifestations of the overarching principle of prevention, which lies at the heart of international law” and had demonstrated that “the existence of an international legal obligation to prevent harm finds support in

human rights law and environmental law". During the debate on that report, Mr. Murphy had expressed the opinion that to suggest that prevention *per se* was a general principle of international law was an unduly broad assertion, since any principle of prevention must have the effect of preventing a specific act, and it would be better simply to recognize that a duty of preventive action existed in other fields of international law and to view them as possible analogies. However, the only specification concerning the content of the obligation to prevent that was to be found in Mr. Murphy's first report was the limitation in draft article 1, paragraph 2, and paragraph 115 of the duty to prevent to the territory under the jurisdiction of the State concerned. He therefore seemed to assume that restricting the territorial scope of the obligation was what made it possible to give States the freedom to determine which measures they needed to take in order to fulfil their obligation, whereas that freedom actually arose from a lack of specifics regarding what States were expected to do to ensure effective prevention.

Even if, as analysed in part V, section A, of the report, existing conventions in the fields of international criminal law and human rights contained provisions on prevention, those provisions often took a back seat to the issues of criminalization and prosecution. While it was true that criminalization and prosecution played an important role in prevention and created a strong deterrent, prevention could not be reduced to punishment, as stated by the International Court of Justice in *Bosnia and Herzegovina v. Serbia and Montenegro*. The duty to prevent the perpetration of crimes against humanity posed some particular challenges. For example, the primary preventive approach taken by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was to visit any place where persons might be deprived of their liberty and might therefore be vulnerable to torture or to cruel, inhuman or degrading treatment, could not be applied in the context of crimes against humanity for the simple reason that there were no identifiable places that had a high density of potential victims of such crimes. Another aspect of primary prevention often found in conventions and treaties concerned the specific measures that States must take, such as the adoption of laws or the establishment of institutions and policies, to raise awareness of the criminality of a particular act or the organization of training for government officials. That aspect of prevention was of limited use in the context of crimes against humanity, especially if, as proposed by the Special Rapporteur, the obligation to prevent was restricted to the territory under the jurisdiction of the State concerned. Indeed, when applied to such crimes, which, according to the definition contained in draft article 2, were acts committed as part of a widespread or systematic attack — meaning, with the participation of the State or an organization with a State-like structure — the obligation to prevent, as seen from that perspective, would imply in practical terms that States were required to prevent themselves from committing crimes against humanity by educating and training their own personnel. An explicit provision on such measures in a future convention on crimes against humanity was certainly worth considering, but its preventive effects would probably be limited. In sum, if the Convention against Torture was to be a source of inspiration for the prevention of crimes against humanity, the focus needed to be on the eradication of safe havens for international criminals.

As explained by Lord Browne-Wilkinson in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet (No 3)*, the Convention against Torture had been agreed, not to create an international crime that had not previously existed, but to provide an international system under which torturers could find no safe haven. The report seemed to reflect that same idea. As indicated in paragraph 39 of the report, the prohibition of crimes against humanity and, more concretely, of certain acts such as State-sponsored torture, had the character of *jus cogens*. The establishment of an international system that would provide for the prosecution of the perpetrators of such crimes wherever in the world they were to be found would reduce their chance of enjoying a safe haven and would

strengthen deterrence. The result would be, at the international level as well, what might be called a tertiary preventive approach, which was much more effective than equivalent systems at the national level.

For such a system to work, several prerequisites needed to be met. First, crimes against humanity must constitute offences under the internal law of States, failing which, the obligation to exercise universal jurisdiction, which was the second prerequisite, could not be met. In that respect, the Special Rapporteur was in favour of requiring States to exercise jurisdiction over alleged offenders who were present in any territory under their jurisdiction. Complying with such an obligation would eradicate safe havens for international criminals. Taking into account the increasingly complex nature of the international conflicts in the context of which the majority of crimes against humanity were committed, it might be advisable, with a view to preserving evidence, to widen the scope of universal jurisdiction to situations in which only the witnesses to an alleged crime against humanity were present in the territory of a State.

The obligation to exercise universal jurisdiction had as its corollary the obligation to extradite or prosecute, a topic on which the Commission had decided the previous year to conclude its consideration. Mr. Kittichaisaree, who had chaired the Working Group on that topic, had already explained the close connection that existed between the two topics. He supported Mr. Kittichaisaree's suggestion that the Commission should discuss that topic further, provided that it considered the need to extend universal jurisdiction to crimes against humanity only in the strict context of the draft articles and in the light of the international conventions already adopted on the subject. Such a discussion could also provide an opportunity to address the question of whether the fact that multiple States possessed jurisdiction over those crimes was likely to be problematic and whether investigations in cases where a State had no jurisdiction could be feasible or worth pursuing with a view to preserving evidence.

Finally, States should be required to remove all potential barriers to prosecution, in particular amnesty measures that extended to crimes against humanity and broad-ranging invocations of immunity. In her third report, Ms. Escobar Hernández, Special Rapporteur on the topic "Immunity of State officials from foreign criminal jurisdiction", had provided a long list of State officials who had enjoyed immunity from criminal prosecution *ratione materiae* at the national or international level, which clearly demonstrated that, far from being limited to high-ranking officials, immunity applied to anyone who acted on behalf of the State. In other words, and taking into account the requirement in the definition of crimes against humanity for such crimes to have been committed as part of a widespread or systematic attack, a decision to allow immunity for crimes against humanity, as well, in all the cases listed would leave little or no room for actual prosecution. Moreover, in order to ensure the complementarity of the draft articles in relation to the Rome Statute — which did not unambiguously resolve the question of the scope of immunity of State officials — the level of protection from prosecution afforded State officials to be recognized by the Commission should not be greater than that recognized under the Rome Statute. Recent developments seemed to indicate that an even more narrow approach to immunity might find support among States. Indeed, in its judgment of 2002 in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the International Court of Justice, while upholding immunity *ratione personae* in the specific circumstances of the case, had found that immunity was not without limits and could not always shield the perpetrators of international crimes from responsibility. It was therefore important for the Commission to limit the scope of the immunity it recognized, in order to enable prosecution at the national level. Doing so would help, by virtue of the principle of complementarity, to lighten the load of the International Criminal Court, thereby allowing it to concentrate on the most high-profile cases.

He shared the view that it was important to ensure that the obligations imposed on States in the draft articles were thoroughly clear, particularly when it came to controversial matters such as immunity. That matter was not covered in the first report and should be included in the Special Rapporteur's future programme of work so as to enable the Committee to arrive at an unambiguous solution that could be applied to both the present topic and that of immunity of State officials from foreign criminal jurisdiction. Lastly, he supported the referral of the two draft articles to the Drafting Committee, provided that the debate and proposals concerning the two draft articles were taken into account.

Mr. Kittichaisaree thanked the Special Rapporteur for his report, which was a testament to his expertise on the subject, and expressed appreciation for the in-depth summary he had provided of how the concept of crimes against humanity had developed over the past few decades. He agreed that the aim of the project was to complement previous efforts at both the national and international levels in order to close the gaps enabling perpetrators of crimes against humanity to escape justice, giving priority to international cooperation in prosecuting or extraditing such perpetrators. As stated previously, the draft articles should provide for universal jurisdiction, which was imperative for the purposes of punishing crimes against humanity. Yet neither paragraph 5 nor paragraph 13 of the report mentioned the concept or that of quasi-universal jurisdiction based on treaty obligations. With regard to those issues, the Commission might find it useful to refer to paragraphs 17-20 of its final report on the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)". It was regrettable, too, that draft article 1 did not address the obligation to punish, despite the fact that its title referred to the "prevention and punishment of crimes against humanity". Lastly, the obligation to prevent that was discussed in paragraph 84 of the report was not adequately substantiated, and its legally binding nature, which emerged from the analysis described in paragraphs 99, 101 and 116, seemed weak.

The Special Rapporteur had rightly chosen to base the definition of crimes against humanity, which had been proposed to the Commission as a starting point for its discussion, on the definition contained in article 7 of the Rome Statute. Although that instrument was not an exact codification of the law on crimes against humanity, it could be taken as constituting an authoritative expression of the legal views of a great number of States, as indicated by the Trial Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY) in its judgment in the case *Prosecutor v. Anto Furundžija*. In addition, the Special Rapporteur had pointed out that several delegations in the Sixth Committee had also cautioned that the Commission's work on the topic should avoid any conflict with existing legal instruments.

With regard to the definition of crimes against humanity contained in article 6, paragraph (c), of the Charter of the International Military Tribunal (Nuremberg Charter), it should be noted — which the report failed to do — that the Charter had been amended by the Protocol signed in Berlin on 6 October 1945, whose effect was to require that the link between the acts covered by that provision, on the one hand, and crimes against peace or war crimes, on the other, applied to the entire provision. That amendment could be described as "victor's justice", inasmuch as only Nazis accused of crimes against peace or war crimes could be prosecuted for crimes against humanity. Therefore, paragraph 34 of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal should be read in the light of that consideration. More generally, the Special Rapporteur should have highlighted the specific contexts that prevailed at the time of the adoption of the various definitions of crimes against humanity contained in the respective charters of the international criminal tribunals. Thus, the requirement originally contained in the Tokyo Charter to the effect that the crimes it covered had to have been directed against a civilian population had been deleted in order to enable the prosecution of Japanese suspects accused of the wholesale killing of foreign

soldiers in an unlawful war waged by Japan. The same was true of article 5 of the Updated Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), which required the acts in question to have been committed “in armed conflict, whether international or internal in character”, which was justified by the circumstances of the conflict in the former Yugoslavia. In its judgment in the case of *The Prosecutor v. Duško Tadić*, the Tribunal had specified that that requirement was a jurisdictional element, not a legal ingredient of the subjective element of the crime. The requirement of discriminatory intent that appeared in the definition of crimes against humanity contained in article 3 of the Statute of the International Criminal Tribunal for Rwanda had also been in response to the particular context of the Rwandan crisis, namely the confrontation between two ethnic groups. The discriminatory motive requirement was not found anywhere outside the specific provisions concerning the crime of persecution contained in the ICTY Statute, the Statute of the International Criminal Court and the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. Once again, that was an attempt to prosecute perpetrators of acts that had been committed for national, political, ethnic, racial or religious reasons. Yet, the draft articles on the present topic were intended to encompass all types of crimes against humanity committed in any context, provided that they were part of a widespread or systematic attack against a civilian population. The requirement of discriminatory intent should exist in relation to the crime of persecution only. The specific contextual requirements for crimes against humanity set out in other international instruments that did not correspond to the requirements under customary international law had no place in the draft articles.

With regard to paragraph 39 of the report, after mentioning that the International Court of Justice had indicated in its judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* that the prohibition of certain acts, such as State-sponsored torture, had the character of *jus cogens*, the Special Rapporteur had deduced that a prohibition of that act on a widespread or systematic basis would also have the character of *jus cogens*. He himself recalled, however, that the Commission had stated, in paragraph 46 of its final report on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, that the Court had held in that particular case that the Convention against Torture gave rise to obligations *erga omnes partes* instead of *jus cogens* norms. Consequently, if the draft articles were intended to put an end to impunity for perpetrators of torture and other crimes against humanity, the Commission should focus its work on the obligation to criminalize, prosecute or extradite such perpetrators and not on the *jus cogens* nature, if any, of the prohibition of such crimes. It might also be recalled that, when considering the topic *aut dedere aut judicare*, most members of the Commission, as well as some delegations in the Sixth Committee, had disagreed with any suggestion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes.

In paragraph 141 of his report, the Special Rapporteur based the considerations intended to justify the introduction of a policy element into the definition of an “attack directed against a civilian population” on article 7 of the Rome Statute and on the *Elements of Crimes* of the International Criminal Court. However, it should be borne in mind that the adoption of the aforementioned *Elements of Crimes* and the footnote that accompanied it had been the result of a compromise. In short, the footnote provided that, only in exceptional circumstances could a deliberate failure to take action be equated with a policy to commit an attack against a civilian population; its wording had been formulated in order to address concerns by several States that their officials might be prosecuted, in violation of the principle of legality, for their inaction in ending long-standing customary practices that were henceforth likely to be criminalized under the Rome Statute — for instance, sexual

slavery or enslavement — and that their officials might be subject to human rights standards that were foreign to their culture or religion.

Lastly, given the importance of the present topic and the seriousness of the crimes that were being committed around the world, the 2020 deadline proposed by the Special Rapporteur for the completion of the work on the topic seemed too long. The international community needed a convention on crimes against humanity sooner rather than later. In conclusion, he was in favour of referring the two draft articles to the Drafting Committee, subject to the comments made by Commission members.

Mr. Tladi commended the Special Rapporteur for the quality and comprehensiveness of his first report, which was informative and would serve as a useful guide for the Commission's substantive discussions on the topic. Generally speaking, he endorsed the content of the two draft articles and supported their referral to the Drafting Committee, which would make any necessary editorial changes. For the time being, he would confine himself to a few general comments.

While expressing strong support for the project the Commission had undertaken, he continued to disagree with its approach of addressing only one of the three core international crimes, which deprived the international community of the opportunity to make an even more meaningful contribution to international law and to the fight against impunity. He was surprised that some members had questioned the usefulness of the topic during its consideration, when they had failed to do so during discussions in the Working Group on the Long-term Programme of Work or when adopting the report of the Commission on the work of its sixty-sixth session. He had been the only one who had expressed reservations that the scope of the project was too narrow — a view also shared by some delegations during the debate in the Sixth Committee. In light of those considerations, the members of the Commission should ask themselves what the real benefit was of the draft articles. Was it really to proclaim a duty to criminalize and prosecute? While that would be a useful aspect, it was not very innovative and was simply not what the world was expecting. Moreover, it was likely that most States already took the view that they should criminalize crimes against humanity and prosecute perpetrators, whether or not the law required them to do so. What would be of real practical value would be the establishment of comprehensive inter-State cooperation mechanisms that included the duty to prosecute or extradite. In other words, it would be, in the words of Mr. Valencia-Ospina, to ensure that, through those mechanisms, criminals could not find a safe haven anywhere. Although that was indeed the objective of the Commission's work in relation to crimes against humanity, it was inaccurate to suggest that similarly robust mechanisms already existed for the other core international crimes.

A reading of part II of the report reaffirmed his view that, like those in the prevention and punishment of crimes against humanity, legal gaps also existed for the other core international crimes, even if they were the subjects of global treaties. The primary reason for considering the current topic was that there were legal gaps, whether resulting from the total lack of a legal regime or the insufficiency of existing regimes. It was therefore critical to fill them while at the same time observing existing treaty regimes and refraining from seeking to amend the Geneva Conventions or the Genocide Convention. At any rate, a convention on crimes against humanity offered only a limited remedy to a much wider, systemic shortcoming in the field of international criminal law.

The Special Rapporteur stated in paragraphs 3 and 13 of his report that the criminalization of the offence in its entirety in national legislation was a key element in efforts to promote the prevention and punishment of those crimes and he agreed that the adoption of new national legislation and the harmonization of existing legislation on international crimes should be priorities for the international community.

While it was true that, as emphasized by the Special Rapporteur, war crimes and genocide were covered by existing treaty regimes, the latter were rudimentary at best. The Genocide Convention, for example, did not establish an obligation to exercise universal jurisdiction, while the obligation to exercise universal jurisdiction laid down in the Geneva Conventions applied only to grave breaches and was limited to international armed conflicts. The work on the present topic could therefore give rise to a new treaty regime relating to crimes against humanity and help to improve existing treaty regimes, all in the same draft articles. That was indeed a broader endeavour and the kind to which he had always presumed the draft articles on the obligation to extradite or prosecute (*aut dedere aut judicare*) were aimed.

The Amnesty International study cited in footnote 127 of the report applied to universal jurisdiction more broadly and not exclusively to crimes against humanity. A careful reading of that study confirmed that there were gaps in national laws in relation to all three core international crimes. In the first place, the difference between the number of States that had laws relating to crimes against humanity and the number of those with legislation on the other serious crimes was not as great as one might expect, particularly if one took into account the length of time that the Geneva Conventions and the Genocide Convention had been in existence, together with their wide ratification. Secondly, the number of States whose courts could exercise universal jurisdiction over crimes against humanity was significantly higher than that of States whose courts could exercise universal jurisdiction over war crimes and the crime of genocide. It was also clear from the study that, generally speaking, the definitions of the core international crimes included in national laws were seriously flawed and fell short of those set out in international law. One of the key issues that the project was intended to provide for was universal jurisdiction, and there were wide gaps in that area in relation to all three crimes.

With regard to inter-State cooperation, the main contribution of a draft convention, as had been noted previously, would be to provide a legal framework for such cooperation. That view was shared by the Special Rapporteur, in particular in paragraphs 22 and 64 of his report, where he referred to mutual legal assistance in the area of crimes against humanity. That term could be considered to include the question of extradition and the principle of *aut dedere aut judicare*, which, technically, were distinct from it. In that case, as well, the statistics cited by the Special Rapporteur showed that the unevenness in the adoption of national laws on inter-State cooperation mechanisms applied just as much to war crimes and the crime of genocide as it did to crimes against humanity. Neither the Geneva Conventions and their additional protocols, nor the Genocide Convention, properly established a precise and comprehensive duty to cooperate. Although the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), for example, merely provided that the parties “shall afford one another the greatest measure of assistance in connection with criminal proceedings”, he was sure that the Commission had something more ambitious than that in mind. Similarly, without any further precision, that Protocol established a duty to cooperate in matters of extradition but not a duty to extradite, and the Commission’s project would therefore also be useful in that regard. The Genocide Convention was even more rudimentary because it merely provided that the parties must undertake to grant extradition in accordance with their laws and treaties in force, without going any further, not even to provide for a general duty to cooperate in that context.

Although, generally speaking, the content of the draft articles was appropriate, it might be useful to specify, in draft article 1, paragraph 3, that no exceptional circumstances whatsoever could be invoked as justification for the commission of crimes against humanity, genocide or war crimes. That might seem insignificant, given the wide acceptance of the Geneva Conventions and the Genocide Convention, yet it could perhaps

help to avoid ambiguity with regard to the applicable grounds for exoneration in the case of the most serious international crimes.

He shared the Special Rapporteur's concern about the importance of avoiding any conflict between the draft articles and the Rome Statute. Any inconsistencies could be avoided by ensuring that the Commission's definition closely tracked the wording of the Rome Statute, deviating from it only when necessary to reflect the different context pertaining to the Commission's draft articles and to explain that it applied to horizontal relationships between States, whereas the Rome Statute applied to the vertical relationship between the International Criminal Court and States. However, the question also arose whether the draft articles might have an impact on the goal of universality pursued by the International Criminal Court. He was not convinced that that was the case and he agreed with the Special Rapporteur's statement that the adoption of a convention could enhance the complementarity principle. Nevertheless, the Commission should be aware of that criticism since the different treatment of the so-called "Rome Statute crimes" could contribute to the fear that was implicit in that criticism.

It was to be hoped that, if the General Assembly decided to submit the draft convention to States for adoption, it would take a broader and more ambitious approach than the Commission had and amend the draft to include the other core international crimes. He asked whether the Special Rapporteur was of the view that the draft articles he had proposed, or intended to propose, represented an expression of customary international law — in other words, if the current project was an exercise in codification or progressive development. Finally, on the question of whether the title of the project should be changed to "Draft convention", it might be preferable to continue referring to "draft articles", which was consistent with the Commission's practice, but there was no reason why the Commission could not decide to use the term "convention".

Mr. Saboia said that, in stating the aims of a convention on crimes against humanity, the Special Rapporteur had pointed to the fact that, unlike war crimes and genocide, that was the only category of international crimes that was not the subject of "a global treaty that requires States to prevent and punish such conduct and to cooperate among themselves towards those ends". While he could agree with Mr. Tladi that the treaties concerning the prevention and punishment of war crimes and genocide were characterized by gaps and deficiencies that needed to be addressed in relation to inter-State cooperation and States' obligations, it was up to the General Assembly, and not the Commission, to decide to do so.

In line with comments by several delegations in the Sixth Committee in 2014, the Special Rapporteur stressed that the project should build upon existing treaties and the constituent instruments of international courts and tribunals, in particular the International Criminal Court, and avoid conflict with those instruments. Accordingly, the definition of crimes against humanity contained in draft article 2 followed the language of the corresponding article of the Rome Statute. In that connection, he had taken note of comments by Mr. Forteau and other Commission members who were in favour of including a "without prejudice" clause that would allow national legislation to develop in the direction of increasing the prosecution and punishment of other acts, and he supported that proposal.

Draft article 1 referred to the obligation of States parties to prevent and punish crimes against humanity and to take legislative and other measures to prevent the commission of such crimes on their territory. He endorsed Mr. Forteau's proposal not to limit jurisdiction over such crimes to that of the territorial State and agreed with other members that it would be preferable to use the term "armed conflict" instead of "war". He was in agreement with the objectives set out in the report but considered that, since the Commission was only at the beginning of what promised to be a long-term project, it must proceed cautiously and have at least a general idea of what it aimed to achieve. The

Commission's debate had already shown that, although there seemed to be broad agreement on the goals, there were differences of opinion as to what concepts should or not be included in the draft articles and what wording should be used. With regard to language, for instance, he concurred with the comments made by at least two previous speakers, one of whom was Ms. Escobar Hernández, that the reference made by the Special Rapporteur in some paragraphs of the report to "State-sponsored torture" seemed unusual. While he was aware that article 1 of the Convention against Torture referred to torture inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, whether that was equivalent to "State-sponsored torture" was open to question. That expression was not found in other parts of the report and its inclusion in the draft articles or commentaries would require clarification.

The future convention should include provisions relating to universal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*). The Commission should, however, avoid engaging in a theoretical debate on those concepts and should choose provisions that had found acceptance in widely ratified instruments, such as the Convention against Torture. In addition, persons accused of having committed crimes against humanity should not be able to invoke any form of immunity, as had been stressed by Mr. Valencia-Ospina. Reservations should not, in principle, be admitted, as they could affect the object and purpose of the convention and disturb the balance of obligations among States.

Mr. Park had mentioned how difficult it could be to enact national legislation that was consistent with the provisions of international conventions, given the differences in domestic legal systems. There should be a degree of flexibility with regard to other aspects, although central elements, such as the definition of the crimes, must be consistent.

Regarding future work, he did not see the importance of a dispute settlement procedure, particularly a mandatory one, that might constitute an obstacle to the ratification of the future convention. On the other hand, as one of the main goals was the promotion of inter-State cooperation, particularly judicial cooperation, provisions should be made for some kind of monitoring mechanism or institutionalized dialogue. Establishing a full-fledged monitoring body would be too cumbersome and expensive a solution; however, relying on reporting procedures and an expert overview might be necessary. A decision on that matter might be premature but perhaps deserved some thought. In conclusion, he commended the Special Rapporteur for his excellent work and was in favour of referring the two draft articles to the Drafting Committee.

Sir Michael Wood, after thanking the Special Rapporteur for his excellent report and presentation, said that he considered crimes against humanity to be a good topic for the Commission and that it should be possible to obtain useful results within a relatively short time frame. With regard to that point, he supported Mr. Kittichaisaree's comments. The doubts expressed within the Commission and outside it concerning the need for a convention on crimes against humanity or the scope of such a convention were not well founded. Mr. Tladi had said it was unfortunate that the project was limited to crimes against humanity. Although the Commission could obviously take up the topics of genocide and war crimes and the gaps to be found in the treaties that prohibited them, it risked ending up with an extremely complex text. In any case, it was the General Assembly that would have to decide on that matter. In the Sixth Committee, some delegations had argued that a convention was not necessary and that it would be better to promote universal accession to the Rome Statute. Yet, the future convention and the Rome Statute were not mutually exclusive and both were necessary. Some had indicated doubts about a potential clash between the two treaties and differences in their interpretation. The Special Rapporteur was aware of those problems and, as clearly indicated in his first report, he planned to orient the work on the topic in such a way as to avoid undermining the Rome Statute or contradicting

it. The idea that the development of the future convention could be invoked as an excuse for not acceding to the Statute seemed fanciful. Like Mr. Forteau, he shared the Special Rapporteur's view that there were obvious gaps, in particular with regard to inter-State cooperation and the obligation to extradite or prosecute.

Mr. Nolte had asked what the Commission intended to achieve. In order for the adoption of a convention to enjoy the widest possible support, the draft articles should remain focused on the core criminal law provisions, as had been done in many of the conventions cited by the Special Rapporteur. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft seemed to be a good model and it had, in fact, subsequently been used as a model, for example, by the Commission itself, when drafting the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. The Commission's work on that Convention showed that such an endeavour was well within its mandate; although that work had been specifically requested by the General Assembly, in the present case, the Assembly had, by means of resolution 69/118, taken note of the International Law Commission's decision to include the topic of crimes against humanity in its programme of work on the basis of the syllabus of the topic included in Annex B to its report on the work of its sixty-fifth session (A/68/10). However, paragraph 3 of the syllabus stated that the objective of the International Law Commission on that topic would be "to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity". The Commission was therefore not overstepping its mandate by formulating a draft convention.

The Commission should address the issues of jurisdiction and extradition and, above all, include the obligation to extradite or prosecute in its project. Jurisdiction should be based on the territoriality principle and active and passive personality, as well as, most importantly, on the presence of the suspect in the territory of the State. States parties should be required to enact laws providing for jurisdiction over the offender when the latter was present in their territory and to make crimes against humanity extraditable offences. In terms of jurisdiction and scope, the future convention would have a better chance of acceptance by States and thus enjoy wider applicability if, instead of dealing with universal jurisdiction in the abstract, it followed a well-trodden path. In the same vein, broadening the scope of the draft articles to include such matters as immunity or the prohibition of amnesty could have a negative impact on State support for the convention.

With regard to draft article 1, he thanked the Special Rapporteur for his careful analysis of earlier texts and the extensive case law that interpreted those texts. The analysis was convincing, and, in the three paragraphs that the Special Rapporteur had proposed, he had selected appropriate formulations, subject to some drafting changes proposed by members. Mr. Forteau's analysis was also convincing, and for the sake of simplicity, he himself was not opposed to the deletion of the Special Rapporteur's proposed article 1, paragraph 2.

With regard to draft article 2, he, like most of the other Commission members, was firmly convinced that the Commission should not seek to amend the wording of article 7 of the Rome Statute. Each member could no doubt think of improvements that he or she would like to make to that wording, given that article 7 bore the scars of a hard-fought negotiated compromise. For example, many members would prefer for paragraph 3 not to be there, but it was there and had apparently been inserted in order to make the Statute acceptable to certain Governments. On the other hand, he endorsed Mr. Forteau's proposal, supported by Mr. Caflisch, to include in draft article 2 a paragraph modelled on article 10 of the Rome Statute or article 1, paragraph 2, of the Convention against Torture.

In his report, the Special Rapporteur had helpfully explained in some detail the background against which the definition contained in the Rome Statute had been developed, the elements of crime constituting that definition and the case law related to it. But that had

led him to two thoughts concerning the commentary to draft article 2. First, the Special Rapporteur seemed to consider that, if article 2 of the new convention had the same wording as article 7 of the Rome Statute, the two provisions would be interpreted in the same way. If that was the Special Rapporteur's view, he agreed with it. However, he wondered whether the Commission could take for granted that all those interpreting the new convention, for example States, prosecution authorities or courts, would necessarily see it that way. There could be cases in which identical wording in parallel texts was, in fact, interpreted differently. In its recent advisory opinion, the International Tribunal for the Law of the Sea had cited and applied its own statement in the *MOX Plant Case*, namely that "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*" (*MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 106, para. 51). Thus, if the Commission intended the same meaning to be given to its draft article 2 as the meaning of article 7 of the Rome Statute, then perhaps it should make that explicit in the commentary.

While he shared the concerns expressed by Mr. Nolte on that point, he was not sure he agreed with his proposed solution, which was to specify that anyone who interpreted draft article 2 "must take into account" the case law of the International Criminal Court. The expression "take into account" was perhaps not very prescriptive, but its use in a provision of the Human Rights Act 1998 of the United Kingdom of Great Britain and Northern Ireland, stipulating that the courts of the United Kingdom "must take into account" decisions of the European Court of Human Rights, had led them to follow the decisions of the latter rather slavishly, which had caused considerable political problems in the United Kingdom. The same point arose in relation to draft article 1, insofar as the language followed that of earlier conventions.

His second thought concerning the commentary to draft article 2 was to question how much detail the Commission should include. He was in two minds on that issue and would be interested to hear the Special Rapporteur's views. It would be possible to include the kind of detail that was found in his first report, which would be very informative for the reader of the draft articles; at the same time, it might be misleading, as it would present a snapshot of the status of the elements of crime and case law on the date of the adoption of the commentary. Of course, that was the case with most of the commentaries produced by the Commission, and insofar as they referred to case law, in particular, they became progressively out of date. But that perhaps mattered more for an article concerning substantive criminal law. Moreover, a detailed commentary to draft article 2 might distinguish it from article 7 of the Rome Statute, which had not been accompanied by any such official commentary when it had been adopted. Perhaps the Commission should find a middle way, and perhaps different considerations applied to the first and second reading commentaries.

The Special Rapporteur had concluded his first report with a brief workplan. While he agreed with that workplan, he was of the view that the deadlines it provided for were too generous and should be reduced. In conclusion, he recommended that the two draft articles should be referred to the Drafting Committee.

Mr. Tladi asked Sir Michael whether it was necessary for the crime to have been committed in the forum State in order for the presence of the suspect in the territory of the forum State to serve as the basis for that State's jurisdiction.

Sir Michael Wood said that the answer to that question was easy; it was "no".

Mr. Wisnumurti said that a convention on crimes against humanity that would complement the Rome Statute was an essential part of the international community's efforts

to combat impunity. In fact, the Rome Statute was one of the international community's main achievements in that regard and had proved its usefulness. And yet one had to recognize that it had its weaknesses and that, as noted by the Special Rapporteur in paragraph 12 of his report, a global convention on crimes against humanity appeared "to be a key missing piece in the current framework of international law and, in particular, international humanitarian law, international criminal law and international human rights law". The new convention would strengthen the call for national legislation to prevent and punish persons who committed crimes against humanity and to promote inter-State cooperation for reaching those objectives. It could complement the Rome Statute by addressing four basic issues that were not covered by the Statute. However, it was imperative that such a convention should not undermine the Rome Statute.

The debate in the Sixth Committee of the General Assembly in 2014 had revealed that, although delegations had generally expressed support for considering the topic, some had advised caution, particularly in relation to avoiding conflict with existing legal instruments, including the Rome Statute. As indicated in paragraphs 22-25 of the report, the value of such a convention was that it would fill the gaps in those instruments. Even more importantly, it would regulate inter-State relations in addressing crimes against humanity — focusing on the obligation of States to prevent such crimes and promote national capacity-building to that end — and their obligation to exercise jurisdiction when the perpetrator of one of those crimes, including a non-national, was present in their territory. There was a need to ensure that such a convention was realistic and workable and to prevent possible challenges, such as those being faced by the International Criminal Court.

He agreed with the Special Rapporteur that the study should focus more on the obligation to prevent, which, as explained in detail in paragraph 80 of the report, manifested itself in two ways. Moreover, that obligation was non-derogable; nonetheless, it was essential to take all aspects into account. The realities of the contemporary world were complex, and internal and regional conflicts occurred in different parts of the world in which Governments, often weak ones, did not all have the same resources or capabilities. It was difficult to expect all States to have the same ability to detect the risk that crimes against humanity might be committed and to effectively prevent their commission. In that connection, it was important to bear in mind what the International Court of Justice had stated in its judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*, which was cited in paragraphs 95 and 97 of the report. In addition, it was worth noting that, in the judgment of the European Court of Human Rights in *Mahmut Kaya v. Turkey*, referred to in paragraph 103 of the report, the Court had found in part that "the positive obligation ... must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities". What those courts had stated should be borne in mind so that the wording of the draft article on the general obligation to prevent and punish crimes against humanity, proposed by the Special Rapporteur in paragraph 120 of his report, or at least the commentary thereto, adequately reflected the essence of the obligation to prevent.

In paragraph 80 of his report, the Special Rapporteur referred to the issue of State responsibility and stated, citing the aforementioned judgment of the International Court of Justice, that a breach of the obligation to prevent was not a criminal violation but rather concerned a breach of international law that engaged the responsibility of the State. It was important for the future convention to contain provisions clarifying the criteria for determining to what extent a failure to prevent crimes against humanity engaged the responsibility of the State. In that regard, the views of the International Court of Justice to the effect that "it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed", which was cited in paragraph 99 of the report, helped to shed light on the issue of State responsibility in relation to the obligation to prevent, which deserved further elaboration by the Special Rapporteur and discussion by the Commission.

Another important aspect of prevention that should be provided for in the future convention was the obligation of States parties to take legislative, executive, administrative, judicial or other measures to prevent crimes against humanity in any territory under their jurisdiction. Those measures were essential in terms of building the capacity of States parties to more effectively prevent the commission of such crimes.

With regard to the draft articles proposed by the Special Rapporteur, in draft article 1, paragraph 1, it would be preferable to replace the word “war” with “armed conflict”, which was the term used in the Commission’s draft articles on the effects of armed conflicts on treaties. In draft article 1, paragraph 2, the jurisdiction of States parties in the area of prevention should be geographically broader and should not be limited to the territories under their jurisdiction. In paragraph 3, as in paragraph 1, the word “war” should be replaced with the expression “armed conflict”. Draft article 2 posed no problem, since it reproduced the definition contained in article 7 of the Rome Statute, subject to certain non-substantive changes. It was necessary in that connection for the future convention to maintain a complementary role with regard to the Rome Statute and to avoid any legal confusion that could lead to the fragmentation of international law. The key elements of article 7 of the Rome Statute, which were discussed in part VI of the report, could serve as useful materials for the preparation of the commentaries to the definition. In conclusion, he recommended that the draft articles should be referred to the Drafting Committee.

The meeting rose at 1.05 p.m.