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Summary record of the 3257th meeting

Topic:
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basic issues that were not covered by the Statute. However, it was imperative that such a convention not undermine the Statute.

67. 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 of the International Criminal Court. As indicated in paragraphs 22 to 25 of the first 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.

68. 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 first 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 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (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” (para. 86 of the judgment). 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 first report, or at least the commentary thereto, adequately reflected the essence of the obligation to prevent.

69. In paragraph 81 of his first 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 first 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.

70. 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.

71. 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.¹¹⁹ 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 of the International Criminal Court, 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 Statute and to avoid any legal confusion that could lead to the fragmentation of international law. The key elements of article 7 of the Statute, which were discussed in chapter V of the first report, could serve as useful materials for the preparation of the commentaries to the definition.

72. In conclusion, he recommended that the draft articles be referred to the Drafting Committee.

The meeting rose at 1.05 p.m.

3257th MEETING

Wednesday, 27 May 2015, at 10 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kitchaisaree, 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. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

¹¹⁹ General Assembly resolution 66/99 of 9 December 2011, annex. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/678, Part II, sect. I,¹²⁰ A/CN.4/L.868¹²¹)

[Agenda item 11]

1. The CHAIRPERSON said that, following consultations, a consensus had been reached on the inclusion of a new topic, “*Jus cogens*”, in the Commission’s current programme of work and on the appointment of Mr. Tladi as Special Rapporteur for that topic.

The Commission decided to include the topic “Jus cogens” in the current programme of work and to appoint Mr. Tladi as Special Rapporteur for the topic.

Crimes against humanity (continued) (A/CN.4/678, Part II, sect. I, A/CN.4/680, A/CN.4/L.853)

[Agenda item 10]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. McRAE commended the Special Rapporteur on his comprehensive, well-researched first report (A/CN.4/680). Of course, it was just an introduction to the topic, and many fundamental questions still required consideration. First, by referring in the report to “treaty regimes”, was the Special Rapporteur seeking to convey something broader than a reference to the specific terms of the treaty? Second, it would be helpful to have some clarification of the remark in paragraph 15 of the first report that “ultimately it [was] for States to decide whether the scope of the Commission’s work [was] optimal”. States could not normally veto the scope of a topic. Might the Special Rapporteur be referring to the final product of the Commission’s work which could, of course, be accepted or rejected by States? Recalling that the objectives of the project were those of enhancing national legislation, encouraging inter-State cooperation and promoting the prevention and punishment of crimes against humanity, he said that the Special Rapporteur should provide more details of the draft articles he would be proposing in order to attain those objectives. It was doubtful whether the project could be an exercise in a “cut and paste” from existing treaties, as he seemed to imply at times.

3. He agreed with Mr. Park and others that draft article 1 covered three separate matters, all of which did not, perhaps, belong in a single article. Paragraph 2 was unbalanced, because it set forth a specific obligation to prevent without a corresponding obligation to punish. Perhaps the Special Rapporteur should turn each of the paragraphs in draft article 1 into separate, self-standing articles on prevention and punishment. It was questionable whether the wording of paragraph 1 was still appropriate, as it was modelled on the Convention on the Prevention and Punishment of the Crime of Genocide, which had been adopted back in 1948. It appeared to suggest that there was some doubt as to whether crimes against humanity were contrary to international law. It might therefore

be wiser simply to declare that States had an obligation to take measures to prevent and punish crimes against humanity. The use of the term “State party” seemed to prejudice the issue of whether the outcome of the Commission’s work would be a convention, although that was a matter for the General Assembly to decide.

4. The reference to territory in paragraph 2 of draft article 1 was too limiting. It was inappropriate to claim that territory included ships and aircraft, as the “floating island” principle had been abandoned long ago. He agreed with Mr. Forteau that this paragraph should be deleted and re-emerge in a different form in a section on prevention.

5. Further thought should also be given to the wording of draft article 1, paragraph 3. A non-derogation clause (“No exceptional circumstances ... may be invoked”), it initially appeared to apply to individuals accused of crimes against humanity. However, as it was part of a draft article that was concerned with obligations of States, it might be interpreted as applying to States as well, meaning that the obligation of States to prevent and punish crimes against humanity was subject to a non-derogation clause. That might be another reason to separate paragraph 3 from draft article 1.

6. It was difficult to object to a text like draft article 2, which defined crimes against humanity in terms drawn from the Rome Statute of the International Criminal Court. Despite the concerns raised in the Sixth Committee about deviating from the definition set out in article 7 of the Statute, the Commission should not shy away from seeing if it could enhance, but not undermine, that definition: for instance, it might consider improving upon the rather dated and confusing reference to gender in draft article 2, paragraph 3. He agreed with the suggestions made by Mr. Forteau and Sir Michael about introducing a clause, like that in article 10 of the Statute, enabling the definitions to be extended to future developments.

7. Given that the definitions set out in draft article 2 were intended to be used in national legislation and interpreted by national courts, some guidance would be needed in the commentaries as to whether the interpretation of the definitions given by international courts was to be regarded as authoritative.

8. On a more general point, he said that, since the Special Rapporteur proposed recognizing the jurisdiction of States to punish perpetrators of crimes against humanity committed by non-nationals present in their territory, the questions of universal jurisdiction and *aut dedere aut judicare* would have to be addressed. Furthermore, as Mr. Valencia-Ospina had pointed out, the issue of the immunity of State officials also arose. Such immunity could not be used as a defence before the International Criminal Court, but would it be possible to invoke it to avoid the application of a future convention against crimes against humanity? That would run counter to the objectives of the project, which were to reinforce the work of the International Criminal Court by ensuring that perpetrators of crimes against humanity were called to account.

9. In conclusion, he recommended that both draft articles should be sent to the Drafting Committee.

¹²⁰ Mimeographed; available from the Commission’s website, documents of the sixty-seventh session.

¹²¹ *Idem*.

10. Mr. ŠTURMA commended the Special Rapporteur on his excellent first report. He shared the view of other speakers that the main added value of a future convention on crimes against humanity would be in the promotion of inter-State cooperation with respect to such crimes.

11. With regard to draft article 1, he said that paragraph 1 accurately reflected the current state of international law regarding the prohibition of crimes against humanity. As he understood it, the phrase “crimes under international law” meant under general international law, an interpretation that was supported by the statutes and practice of international criminal tribunals. Any future codification convention on crimes against humanity would differ from a number of other international criminal law instruments that provided only for the harmonization of national laws with a view to introducing a new crime or offence. Like Ms. Escobar Hernández and Mr. Gómez Robledo, he believed that crimes against humanity were punishable at the international and not only the national level.

12. Although the status of crimes against humanity as a core crime under international law could be deduced from a careful reading of the first report, such a characterization was not conveyed sufficiently clearly by draft article 1. The reason for that might lie in the fact that the draft article sought to encompass three elements that differed in object and purpose; while those elements were acceptable when considered separately, they were likely to lead to confusion when taken together. He therefore joined Mr. Park and Mr. McRae in recommending that the current text of draft article 1 be split into three separate articles. Paragraph 1 of the draft article constituted an essential statement regarding the status of crimes against humanity as crimes under international law and included a general obligation to prevent and punish such crimes. He supported the current text.

13. Turning to paragraph 2 of draft article 1, he expressed support for the formulation of the obligation to prevent crimes against humanity, which was based on the wording of article 2 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. However, while the phrase “in any territory under its jurisdiction” correctly reflected the narrow scope of application *ratione loci* of the obligation to prevent such crimes, he agreed with other speakers that the obligation of States to employ all means reasonably available to them should not be subject to a territorial limitation.

14. Paragraph 3 appeared to have a twofold purpose: first, to stress the non-derogable nature of the provisions of any future convention on the prevention and punishment of crimes against humanity, and second, to refer to the non-invocation of exceptional circumstances as a justification of crimes against humanity in the context of criminal proceedings. If it was indeed the Special Rapporteur’s intention to encompass both purposes, then it was appropriate to place the provision at the start of the draft articles. A purely criminal-law provision should be included later, perhaps in connection with the non-invocation of an order from a superior officer or public authority.

15. He welcomed draft article 2, which reproduced *mutatis mutandis* the text of article 7 of the Rome Statute

of the International Criminal Court. However, in order to avoid any potential conflict with that instrument, he would suggest the introduction of a “without prejudice” clause, either at the beginning or at the end of the draft articles.

16. As to the future programme of work, the Special Rapporteur might consider incorporating a provision on the protection of victims and their right to redress, including compensation, rehabilitation and satisfaction.

17. In conclusion, he recommended that both draft articles be referred to the Drafting Committee.

18. Mr. NIEHAUS commended the Special Rapporteur on his first report, which provided an excellent basis for the Commission’s work on a topic of vital importance.

19. With reference to the relevance of the topic, he said it was hard to understand why there was still no comprehensive convention on the prevention and punishment of crimes against humanity. Although the terrible events of the twentieth century had spurred the international community into taking action to prevent and punish war crimes and genocide, it had not responded in the same way in the face of crimes against humanity, which had been a constant feature of human conduct throughout history. In the nineteenth and early twentieth centuries, the international community had, either through ignorance or lack of concern, condoned the actions of colonial Powers that had led to the commission of unimaginable atrocities. The atrocities committed in the Belgian Congo, for example, had actually been concealed by both the perpetrators themselves and friendly Governments. It was therefore important that the present topic address, as a matter of priority, the concealment of crimes against humanity, both by States collaborating together and by one State collaborating with the perpetrators of such crimes.

20. Many speakers had referred to the fact that most States lacked legislation on crimes against humanity. However, in Costa Rica, the implementing legislation for the Rome Statute of the International Criminal Court had led to the inclusion in the Criminal Code of provisions relating to crimes against humanity.

21. Turning to the draft articles, he endorsed the comments made by various members of the Commission to the effect that paragraphs 1 and 2 of draft article 1 overlapped substantially. It would be preferable to merge the two paragraphs into a single one that clearly expressed the common idea that crimes against humanity, regardless of the time of their commission, were crimes under international law that must be prevented and punished by States. He agreed with those who had suggested that, in the first paragraph, the word “war” be replaced with “armed conflict”. As to the third paragraph, he fully supported the inclusion of a reference to the impossibility of invoking exceptional circumstances as a justification for crimes against humanity.

22. With regard to draft article 2, he joined other speakers in endorsing the reproduction, with only minor changes, of the definition of crimes against humanity set out in article 7 of the Rome Statute of the International Criminal Court, inasmuch as it was a definition that was

widely accepted under international law. Furthermore, although that definition was not by any means exhaustive, its reproduction in the present draft articles would avoid any potential prejudice to the status of the International Criminal Court that might result from the inclusion of a conflicting definition.

23. In conclusion, he was in favour of referring both draft articles to the Drafting Committee.

24. Mr. KOLODKIN thanked the Special Rapporteur for his substantive first report which correctly delimited the scope of the topic. He was in favour of referring the two proposed draft articles to the Drafting Committee.

25. A convention on crimes against humanity would be the appropriate means to consolidate criminalization of crimes against humanity at the national level and expand inter-State cooperation in order to prevent and punish it. States had different ways of resolving issues arising from the interrelationship of international and domestic law and of applying domestic law based on international law. In many States, cooperation in investigations or for the purpose of extradition was possible only if there was an international treaty to that end: the rules of customary international law were insufficient for such purposes. The Rome Statute of the International Criminal Court was not a panacea, because not all States were parties to it and, above all, because it sought to implement international, rather than national, jurisdiction. There was therefore room for international regulations on inter-State relations in dealing with crimes against humanity.

26. He did not see a future convention as strengthening, but rather as complementing the Rome Statute of the International Criminal Court, since it would cover different aspects. However, it would have self-standing value because, as a codification of customary rules, it could articulate their content and promote some progressive development of international law in that sphere. To that end, the draft articles would have to be realistic and take account of the fact that the sphere of application of a convention was politically sensitive. The Commission should set out to produce draft articles that enjoyed wide support from States.

27. The draft articles should provide *expressis verbis* for the obligation of States parties not to commit acts that were qualified as crimes against humanity, so that there would be no need to deduce that obligation from the obligation to prevent. That would create a treaty basis for State responsibility in the event of such crimes being committed. The obligation would be one of result, whereas the obligation to prevent such crimes would remain an obligation of conduct. The obligation to prevent, contained in draft article 1, paragraph 2, should be further detailed. The question was, however, to what extent. Draft article 1, paragraph 2, seemed to cover not only the immediate prevention of crimes against humanity, but also more long-term measures for that purpose. The provision should further stipulate that preventive measures had to be in accordance with, or permitted by, international law. Such specific wording would not be superfluous in the light of ongoing discussions on the use of force, humanitarian intervention and the responsibility to protect. Not only

did international law limit the burden of obligations on prevention, as the Special Rapporteur pointed out in paragraph 80 of his first report, but it also restricted the rights to take measures of prevention. As was pointed out in the last footnote to paragraph 80, the obligation to prevent did not create new rights of intervention. The International Court of Justice had found that to be true with respect to genocide in the 2007 judgement in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.

28. The need to spell out further details of preventive measures in the draft articles was not obvious.

29. He supported draft article 1, paragraph 3, although with reference to the title of the relevant section of the first report ("Non-derogation provision"), he questioned whether non-derogation and non-justification were the same thing. As it stood, paragraph 3 might be construed as meaning that, while crimes against humanity could not be justified on any grounds, only the obligation not to commit such crimes was non-derogable. In that case, it was all the more fitting that it be formulated as an obligation of the State. It might, however, be necessary to clarify the extent to which a derogation could be made from the obligations to prevent and punish or to engage in legal cooperation. That issue was linked to the question of the permissibility of reservations to the convention: since not all the provisions of draft article 1 were non-derogable, reservations to some of them could not be excluded.

30. It might be better to place the confirmation that crimes against humanity were crimes under international law in the preamble rather than in the operative section of the convention.

31. While the obligations to cooperate with respect to investigations, punishment and extradition were important, they must be formulated in such a way as not to adversely affect the legal regimes or the rights of States under other international agreements. Even though the prohibition of crimes against humanity was a peremptory norm and States must cooperate if it was infringed, such cooperation had to be in accordance with international law and other peremptory norms. The prohibition of crimes against humanity did not deprive States of their rights based on other rules of international law that did not conflict with the prohibition.

32. The definition of crimes against humanity in the draft articles must faithfully reproduce the provisions of article 7 of the Rome Statute of the International Criminal Court, with some minor corrections. There was no need to amend them in line with judicial decisions rendered after the adoption of the Statute. States and learned writers disagreed as to the extent to which such decisions were consistent with the definition of crimes against humanity in article 7. The practice of international criminal tribunals in that context had not always been consistent, and their role in shaping customary international law should not be held in higher regard than the role of States.

33. Caution was required in considering the inclusion in the draft articles of any provisions that might encourage

States to widen the definition of crimes against humanity in their domestic law. That could give rise to situations where acts committed in the past that did not constitute crimes against humanity under international law would fall within the ambit of a newly introduced national definition of such crimes. If States adopted definitions of crimes against humanity that were inconsistent with the definition contained in the convention, that would also hamper legal cooperation between them.

34. When the Commission considered the question of jurisdiction over crimes against humanity and measures to give effect to that jurisdiction, it should take account of debates in the Sixth Committee concerning universal jurisdiction. Those debates reflected States' positions, practice and *opinio juris* on the exercise of national jurisdiction with respect to the most egregious international crimes. The Commission should focus on drawing up specific provisions on jurisdiction for the purposes of the draft articles and should not become immersed in discussions as to whether that jurisdiction should or should not be universal.

35. There might be no need to touch on the issue of immunity in the draft articles, as the Commission was already considering the topic of immunity of State officials from foreign criminal jurisdiction in a more general context, within the framework of general customary international law. If a decision were taken to include substantive provisions on immunity in the draft articles on crimes against humanity, they would have to be seen as *lex specialis*. In his view, even though the ban on crimes against humanity was of a *jus cogens* character, that did not invalidate immunity.

36. Mr. HMOUD said that mention had been made of the introduction into the draft articles of an obligation on States not to commit crimes against humanity. It must be borne in mind, however, that the proposed convention was about individual criminal responsibility, not State responsibility. Accordingly, the issue of State responsibility should be kept separate from the present draft articles.

37. Mr. KOLODKIN said that some guidance and clarification from the Special Rapporteur would be helpful in that regard. As he saw it, a future convention would seek, among other things, to establish an obligation for States to prevent and punish crimes against humanity; consequently, State responsibility could be invoked for a breach of such obligations. In view of the current tendency to conclude that there was an obligation upon States under customary international law not to commit acts that were qualified as crimes against humanity, it would be preferable to establish a clearly articulated treaty basis for that customary law obligation.

38. Mr. CANDIOTI said that the question of whether the scope of the topic encompassed wrongful acts committed by States or was limited to those committed by individuals was an important one that should be clarified before the Commission proceeded any further.

39. Mr. MURPHY (Special Rapporteur) said that he had understood there to be a consensus among Commission members that the project should not deal with the

commission of crimes by States. Any reformulation of draft article 1 should therefore take that consensus into account. That said, he recalled that the current proposal for draft article 1 was modelled on article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, which imposed an obligation on States to prevent genocide. That obligation was regarded, and had been interpreted by the International Court of Justice, as meaning that States themselves must not engage in conduct that would constitute genocide. In parallel fashion—and there was some value in having a parallel between the two regimes—draft article 1 of the current project imposed an obligation on States to prevent crimes against humanity. It was therefore implicit in that obligation, by analogy with article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, that States must not engage in conduct which, if considered in the context of an individual being prosecuted, would be regarded as a crime against humanity. Several members had been in favour of reformulating draft article 1 in order to make it more explicit in that regard. Consequently, the Commission had to decide whether and to what extent it wished to alter the language of draft article 1.

40. Mr. SABOIA said that he agreed that, in the context of its work on the current topic, the Commission should not engage in a debate on the commission of criminal violations by States. Nevertheless, the draft articles should address the issue of the participation of a State in the commission of wrongful acts or conduct that could be characterized as crimes against humanity. That issue could be addressed either in the text of the draft articles or in a detailed commentary that incorporated the comments of Mr. Murphy and Mr. Kolodkin and described how the commission of such acts by States implied a breach of the obligation to prevent, thereby entailing the responsibility of States.

41. Mr. CANDIOTI said that the Commission had spent many years discussing wrongful acts of States that affected the international community as a whole. It had included provisions on such acts, as well as on the legal consequences to which they gave rise, in its draft articles on the responsibility of States for internationally wrongful acts.¹²² Irrespective of whether or not the acts described therein were labelled “crimes”, they constituted very serious wrongful acts on the part of States. If the Commission decided not to extend the scope of the draft articles to include the responsibility of States, then it would be necessary to include a “without prejudice” clause in the text.

42. Ms. ESCOBAR HERNÁNDEZ said that, although she agreed that States could not be held criminally responsible for committing acts characterized as crimes against humanity, that did not mean that they bore no responsibility for them. Based on the fact that such acts constituted grave violations of a peremptory rule of international law, namely the prohibition of crimes against humanity, it could be deduced that those acts engaged the responsibility of the State. Accordingly, the draft articles might need to address, in parallel fashion, both the criminal

¹²² The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

responsibility of the individual and the international responsibility of the State in relation to the commission of crimes against humanity, since they were essentially two sides of the same coin. From that perspective, she fully endorsed Mr. Candioti's proposal to consider including a "without prejudice" clause in the draft articles. Such a clause would guarantee the existence of dual responsibility, inasmuch as it would stipulate that the draft articles were without prejudice to either the criminal responsibility of the individual or the responsibility of the State for the commission of crimes against humanity.

43. Mr. PETRIČ said that there were certain aspects of the topic that concerned the obligations of States, such as to prevent crimes against humanity and to cooperate in bringing perpetrators to justice, and others that concerned the obligations of individuals. If the State failed to fulfil its obligations, then it, too, bore responsibility—even if it was not criminal responsibility. Therefore, the draft articles should address both types of responsibility.

44. Mr. CAFLISCH said that it was perfectly legitimate, and even necessary, for the draft articles to clarify the two types of international responsibility to which crimes against humanity could give rise, as well as to explain their interrelationship.

45. Mr. FORTEAU said that the question of whether to include State responsibility in the draft articles needed to be resolved at the current session, since it pertained to the scope of draft article 1. It should be stated, either in the commentary to draft article 1 or in a new paragraph, that the commission of a crime against humanity by the State could engage its responsibility. The Special Rapporteur's statement that States must not engage in conduct which, if considered in the context of an individual being prosecuted, would be regarded as a crime against humanity, was somewhat perplexing. In its 2007 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice had been much more direct, taking the view that the effect of article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide was to prohibit States themselves from committing genocide. That view implied a strict prohibition of the commission of genocide by States. He proposed that a sentence borrowing certain elements from the draft articles on State responsibility be added as a new paragraph under article 1 or in the commentary thereto, along the following lines: "States parties themselves are prohibited from committing grave violations of peremptory norms of general international law that constitute crimes against humanity, within the meaning of the present draft articles" [*Tout État partie a l'interdiction de commettre lui-même des violations graves de normes impératives de droit international général constitutives de crimes contre l'humanité au sens du présent projet d'articles*]. The commentary could elucidate the fact that what was referred to was the responsibility of States for internationally wrongful acts and that the acts in question were characterized as crimes against humanity. That might provide a solution to the problem.

46. Mr. KITTICHAISAREE said that, in defining the expression "Attack directed against any civilian

population", article 7, paragraph 2 (a), of the Rome Statute of the International Criminal Court referred to it as "a course of conduct ... pursuant to or in furtherance of a State or organizational policy to commit such attack". That meant that, in order for an act to qualify as a crime against humanity, it must have been committed pursuant to a State or organizational policy. However, various international courts and tribunals had ruled that this requirement did not form part of customary international law and was unique to the Statute. When considering the elements of crimes against humanity, the Commission could consider that aspect of the State's involvement in their commission.

*The meeting was suspended at 11.45 a.m.
and resumed at 12.10 p.m.*

47. Mr. PETRIČ said that on 12 July 2015, 20 years would have elapsed since the crime of genocide was committed in Srebrenica. The establishment of the International Criminal Court was a historic breakthrough in humanity's efforts to prevent and punish the most heinous and massive crimes, even though the Rome Statute of the International Criminal Court was still not universally accepted. As stated in paragraph 26 of the Special Rapporteur's report, a well-designed convention on crimes against humanity could help to fill a gap in existing treaty regimes and simultaneously reinforce them. But could it fill the gap completely?

48. It had been suggested that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide needed to be updated. Its definition of genocide, drafted in the aftermath of the Holocaust, did not cover any mass murders other than those of persons belonging to a particular racial, ethnic or religious group—*dolus specialis*. Consequently, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice had not been able to characterize the mass murders in Bosnia and Herzegovina, elsewhere than in Srebrenica, as genocide, because they failed the *dolus specialis* test. Similarly, the mass murders in Cambodia were not genocide, under a *strictu sensu* interpretation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. And what of "cultural genocide"—the destruction of the cultural or ethnic identity of a group? Mr. Gómez Robledo had asked whether weapons of mass destruction, which did not discriminate between civilians and members of the military, should not also be addressed under crimes against humanity.

49. The "responsibility to protect", although not a legal concept or a legal obligation, gave States the authority to intervene, subject to the approval of the Security Council, to protect the civilian population of another country. That concept had now become a reality, with the recent military intervention in Libya. That raised the question whether the obligation to prevent crimes against humanity meant their prevention only at home, or also abroad.

50. To date, the reactions of the international community to the commission of massive crimes had been reactions to specific historical events and specific massive crimes. In contrast, the proposed convention would be part of

a general regime for the prevention and punishment of crimes against humanity, whose two main thrusts would be international cooperation and national prosecution. As was pointed out in paragraph 24 of the first report, the International Criminal Court was a key institution for the prosecution of high-level persons who had committed an international crime, but national courts were the proper place for the prosecution of all other offenders. A new convention could reinforce the Court by developing greater national capacity for the prevention and punishment of the most heinous crimes. It should ensure, not only that States parties criminalized crimes against humanity, but also that alleged offenders had a fair trial with procedural guarantees. There were several guarantees that were relevant if the definition of crimes against humanity contained in article 7 of the Rome Statute of the International Criminal Court was to be transplanted into national criminal law. No one should be tried or sentenced for a crime that was not clearly defined by law beforehand, and any punishment should be within the limits prescribed by the law (*lex certa*); the court should neither extend nor liberally apply the definition of the crime (*lex stricta*); and in case of doubt, the rule of *pro dubio reo* should prevail.

51. Although it was a single instrument, the Rome Statute of the International Criminal Court, that regulated the International Criminal Court, national courts were strictly bound by their own criminal procedures and constitutional guarantees. States classified murder in many different ways and penalized each type of murder differently. According to the International Criminal Court's *Elements of Crimes*, murder meant that “[t]he perpetrator killed one or more persons” and the term “killed” could be used interchangeably with “caused death”.¹²³ That was very vague from the standpoint of *lex certa* and *lex stricta*. In the list of the acts under draft article 2, paragraph 1, as proposed by the Special Rapporteur, the terms “[o]ther inhumane acts” or “any other form of sexual violence of comparable gravity”, were similarly vague. While such definitions could work well in a specialized international court like the International Criminal Court, States would have difficulty transposing them into their legislation.

52. Thus, while he endorsed the definition of crimes against humanity proposed by the Special Rapporteur in draft article 2, he thought that in order to comply with *lex certa* and *lex stricta*, States needed the necessary flexibility to define crimes against humanity in their own criminal legislation. He was therefore in favour of adding a paragraph to draft article 2 along the lines proposed by Mr. Forteau: States should be bound, not to use the Commission's definition as such, but to incorporate its substance in their national criminal codes.

53. It might also be appropriate to include the organization of a crime in the list of acts in draft article 2, paragraph 1: persons who organized crimes against humanity could be far more dangerous than those who executed them. He particularly welcomed the fact that, in draft article 2, paragraph 1, “when committed as part

of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”, was cited as one of the elements that distinguished ordinary crimes from crimes against humanity.

54. Draft article 1 was well drafted, and thus ready for referral to the Drafting Committee. However, the expression “in time of war” in paragraph 1 was not quite accurate, since other armed conflicts were relevant too. He questioned the statement in paragraph 2 that each State party should take effective measures “in any territory under its jurisdiction”. Did it mean that States had no responsibility outside their jurisdiction over crimes against humanity or should have no interest in preventing them?

55. He endorsed draft article 1, paragraph 3, but suggested that it could be expanded to take into account issues such as *jus cogens*, statutes of limitations, reservations and retroactivity in the context of crimes against humanity. Statutes of limitations were particularly important, since investigations and prosecutions might well take place many years after the alleged crime occurred.

56. In order to draft a convention that would be really useful for national courts and also provide guidance for both the Commission and States, he suggested that a few Commission members or at least the Special Rapporteur should solicit input from experts on international and national criminal law. He also considered that given the sensitive nature of the topic, it would be helpful to take a broader approach to the issues it raised.

57. Mr. EL-MURTADI SULEIMAN GOUIDER said that he wished to make four general observations on the first report. First, while it was the responsibility of the General Assembly to decide on the final form of the Commission's work, he was confident that it would heed the Commission's recommendations that it become a convention, given the importance of the topic and its historical background. It had been well established under international law for some time that responsibility for the most heinous crimes could be attributed to individuals, resulting in several high-profile trials, notably in France. Given that the concept of crimes against humanity had evolved over the years through the statutes and case law of various international criminal tribunals, not least of the International Criminal Court, it was surprising that an international convention on crimes against humanity had not already been framed.

58. Second, on the relationship between the proposed convention and other treaties, he recalled that some States and members of the Commission had advocated a cautious approach to the proposed convention so as to avoid any conflict with existing treaty regimes, including that of the International Criminal Court. In that regard, the report explained that crimes against humanity were distinct from the crime of genocide, because they did not require the intent to destroy in whole or in part a particular group; nor did they necessarily occur in situations involving armed conflict, like war crimes.

59. Third, in his first report, the Special Rapporteur reviewed the various definitions of crimes against humanity in different international instruments, all of which established two basic criteria: crimes against humanity were acts

¹²³ Preparatory Commission for the International Criminal Court, *International Criminal Court, Elements of Crimes*, The Hague, 2013. Available from the Court's website: www.icc-cpi.int/Publications/Elements-of-Crimes.pdf.

of violence directed against a specific group of individuals, irrespective of whether they were nationals or non-nationals of a State; and they could take place both in times of peace and war. Fourth, according to various studies conducted, the majority of States, even those that were parties to the Rome Statute of the International Criminal Court, did not have specific legislation on crimes against humanity.

60. In conclusion, he endorsed the proposed future programme of work and recommended the referral of the draft articles to the Drafting Committee.

61. Mr. VÁZQUEZ-BERMÚDEZ said that in his first report, the Special Rapporteur made a good argument for drafting a set of articles on crimes against humanity that could serve as a basis for a future convention. He agreed with the Special Rapporteur that draft articles with particular emphasis on inter-State cooperation would assist States in their efforts to prevent and punish such crimes. A new international instrument dealing specifically with crimes against humanity should encourage more States to adopt or harmonize relevant national laws and enhance the system of complementarity on which the Rome Statute of the International Criminal Court rested.

62. The *jus cogens* character of the prohibition of crimes against humanity gave rise to a number of legal consequences that should be analysed, in terms both of the responsibility of States for internationally wrongful acts and of the responsibility of perpetrators. Moreover, States had the obligation to cooperate to bring an end, by internationally lawful means, to any violation of a *jus cogens* obligation. He proposed that this point be explicitly made either in a specific draft article or in a paragraph in the preamble. If the latter option was preferred, he proposed that the preambular paragraph read: “Reaffirming that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)” [*Reafirmando que la prohibición de los crímenes de lesa humanidad es una norma imperativa de derecho internacional general (jus cogens)*].

63. Turning to specific comments on the two draft articles, he agreed that the phrase “[e]ach State party confirms”, in draft article 1, paragraph 1, should be deleted. It was modelled on article 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, but it seemed unnecessary in the current historical context. He also shared the view that it would be more appropriate to refer to “armed conflict” rather than “war” and that it should be made clear, either in the draft article or in a commentary, that the term “armed conflict” referred to both international and non-international armed conflicts. He preferred the term “international crimes” to “crimes under international law” and was in favour of the wording for draft article 1, paragraph 1, proposed by Mr. Caflich.

64. Generally speaking, he endorsed the Special Rapporteur’s reasoning on the obligation to prevent, as set out in paragraph 80 and those that follow of the first report. He agreed with other members that since that obligation required prevention of the commission of crimes against humanity by State bodies, it must be clearly explained that the draft articles encompassed both the responsibility of States for internationally wrongful acts and the criminal

responsibility of individual perpetrators. In that connection, Mr. Forteau’s proposal to refer explicitly to the obligation of “States” rather than “States parties” in the proposed convention warranted consideration. Draft article 1, paragraphs 2 and 3, ought to convey the *jus cogens* character of the prohibition of crimes against humanity. He supported the view that the issues covered in those paragraphs should be dealt with in separate draft articles.

65. He concurred with the Special Rapporteur that the definition of crimes against humanity in draft article 2 should be virtually the same as that contained in article 7 of the Rome Statute of the International Criminal Court. However, more flexible wording could be found to allow for the expansion of the provision in future, to keep pace with customary international law. Referring to the crimes against humanity listed in paragraph 1 (*k*) as “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body integrity or to mental or physical health”, he pointed out that biological experiments might well come under that category. They were not necessarily confined to situations of armed conflict, and thus did not always constitute war crimes.

66. The Special Rapporteur should analyse the relationship with crimes against humanity of refugee and migration law with reference to the obligation to prosecute or extradite and with a view to combating impunity. Rather than denying an alleged perpetrator refugee status in or entry to its territory, the State in question should seek to prosecute or extradite the person concerned.

67. In conclusion, he said that the proposed future programme of work seemed feasible and that he recommended the referral of the draft articles to the Drafting Committee.

Organization of the work of the session (*continued*)*

[Agenda item 1]

68. Mr. FORTEAU (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of crimes against humanity was composed of Ms. Escobar Hernández, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Tladi, Mr. Wako, Sir Michael Wood and Mr. Vázquez-Bermúdez (*ex officio*).

The meeting rose at 1.05 p.m.

3258th MEETING

Thursday, 28 May 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflich, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba,

* Resumed from the 3250th meeting.