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Summary record of the 3296th meeting

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3296th MEETING

Wednesday, 11 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forneau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaiseree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šurma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (*continued*) (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on the protection of persons in the event of disasters to summarize the debate on his eighth report (A/CN.4/697).

2. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the debate had shown that the Commission was ready to complete the second reading of the draft articles during the current session, since all the members had been in favour of referring the draft articles and the preamble to the Drafting Committee. Once the latter had finished its work, the Commission could adopt the complete set of draft articles together with the preamble as a framework instrument, which it could transmit to the General Assembly with the recommendation that this document serve as the basis for drafting a future convention. It went without saying that the General Assembly would not be bound by that recommendation and that it would take such action upon it as the States Members of the United Nations deemed appropriate.

3. During the plenary meetings, the Commission had once again engaged in the perennial debate stemming from its erroneous assumption that the first task entrusted to it by the General Assembly, namely the progressive development of international law, was distinct from its second task, in other words the codification of that branch of the law. In the constructive spirit of compromise that had characterized its debate, it had reached consensus on drawing up a final text that reconciled the opinions expressed by its members. For example, it had agreed to state in the commentary to the preamble that, in accordance with its practice, it had proceeded on the basis of a composite idea of the progressive development and codification of international law. That solution would avoid having to make it clear in the commentary into which category each article fell.

4. The members of the Commission had put forward many valuable suggestions on the contents of a number of draft articles. In some cases, they had wished to revert to

the text adopted on first reading;⁶⁷ in others they had suggested amendments to the current text. He would therefore submit to the Drafting Committee a new version of the draft articles and preamble incorporating those proposals. In order to save time, he would not embark upon a detailed explanation of the changes made, but he did think that it would be worth explaining why he had recast some of the draft articles, which he would identify by using the number given to them in the annex to his eighth report.

5. Draft article 2 (Purpose) expressly referred to the reduction of the risks of disasters. In draft article 3, which had become subparagraph (a) of draft article 4 (Use of terms), the phrase “calamitous event or series of events” had been qualified by “physical” and the reference to economic damage had been retained, because the proposal to delete it seemed to rest on a misconception of what, for the Commission, constituted the core of the definition. By deliberately reversing the approach adopted in other contexts, the Commission considered that a disaster was primarily the event which caused it and not its consequences, as was plain from the use of the term “resulting in”. The character of the event, either natural or human-caused, was made clearer by the addition of the adjective “physical”. Hence “economic damage” was seen as a consequence of a calamitous physical event or series of physical events making up the disaster. Calamities such as an earthquake or the meltdown of a nuclear plant could therefore give rise to economic damage within the meaning of the draft article, whereas a financial crash, although calamitous, was not a physical event entailing that effect.

6. In draft article 4, the phrase “at its request” had been deleted from the definitions of “assisting State” (b) and “other assisting actor” (c), for it seemed obvious that a State which requested assistance had given its prior consent thereto. The new wording was also more consistent with that of the other draft articles, especially those concerning the duty to seek assistance and offers of assistance, which made no mention of a duty to request that assistance. The phrase “any other entity or individual external to the affected State” had also been deleted from the definition of “other assisting actor”, for the rights and obligations of States and international organizations could not be extended to entities or individuals.

7. The phrase concerning the use of military assets was no longer contained in the definition of “relief personnel” (e) and the requisite explanation would be inserted in the commentary to draft article 17. In that connection, attention must be drawn to the fact that the Oslo Guidelines⁶⁸ applied only after natural, technological and environmental emergencies in peacetime and it was the Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies⁶⁹ that governed operations in humanitarian crises resulting from internal or external conflict. Both texts laid down that any humanitarian operation using

⁶⁷ Yearbook ... 2014, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

⁶⁸ United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

⁶⁹ OCHA, Inter-Agency Standing Committee, Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies, 2003—Revision 1, 2006.

military assets must retain its civilian nature and character and that humanitarian operations must be conducted by humanitarian organizations. The key idea in both sets of guidelines was that it was vital to avoid reliance on military resources. Although the scope of “last resort” had not been precisely defined, it was plain that this notion was specifically related to United Nations operations. Draft article 4 (e) no longer referred to it and again employed the initial wording adopted on first reading.

8. Draft article 5 had not become part of the preamble, but remained a separate provision. In that connection, it should be remembered that in the draft articles on the expulsion of aliens, which the Commission had adopted at its sixty-sixth session,⁷⁰ draft article 13 had been devoted to the obligation to respect the human dignity and human rights of aliens subject to expulsion. For the sake of consistency with that provision, the words “and protect” had been deleted from draft article 5. Moreover, draft article 6 no longer contained the words “and fulfillment”.

9. As had been the Commission’s general wish, draft article 7, the title of which again became “Humanitarian principles”, no longer mentioned the principles of no harm and independence. In any event, both principles were closely connected with the Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies. According to the handbook on United Nations humanitarian civil-military coordination, the provisions of which applied in natural disasters and complex emergencies, the principle of “do no harm” presupposed recognition that any humanitarian assistance constituted an external intervention which could considerably affect the local economy, power balance and population movements and could also contribute adversely to crime and misuse of power.⁷¹ The handbook clearly distinguished between those negative consequences and malpractice or collateral damage. In order to comply with the “no harm” principle, humanitarian actors must carefully examine the cultural, economic and social situation in a given area and adapt their response accordingly. When those actors were soldiers, the recipients of assistance must not be put at risk of becoming targets. The fundamental principle of operational independence, which was mentioned in the manual alongside impartiality, humanity and neutrality, meant that humanitarian action must be independent of the political, economic, military or other objectives pursued by anyone in the area where that action was necessary. However, that definition was specific to the humanitarian operations of the United Nations, and in international humanitarian law the principle of independence could have other connotations.

10. Given that the definitions of the above-mentioned principles were not yet clearly established and could vary depending on the context, the wording of draft article 7 had been modified so that it referred only to the three cardinal and universally recognized principles of humanity,

⁷⁰ The draft articles on the expulsion of aliens adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2014*, vol. II (Part Two), pp. 22 *et seq.*, paras. 44–45.

⁷¹ United Nations Humanitarian Civil–Military Coordination (UN-CMCCoord), “UN-CMCCoord Field Handbook (v1.0)”, p. 31. Available from: <https://reliefweb.int/sites/reliefweb.int/files/resources/CMCCoord%20Field%20Handbook%201.0.pdf>.

neutrality and impartiality. That amendment was warranted by the Commission’s decision to try to ensure the systemic harmonization of norms and by the fact that draft article 20 specified that the draft articles were without prejudice to the rules of international humanitarian law. It was clear that resting the draft articles and those rules on the same foundations would make for coherent interpretation which would be in the interests of victims of disasters.

11. As far as impartiality, non-discrimination and particularly vulnerable persons were concerned, the Netherlands and the IFRC had endorsed his argument that it was unnecessary to refer to the principle of non-discrimination, since it was already inherent in that of impartiality. That interpretation derived directly from the definition of impartiality given in the commentary to the Fundamental Principles of the Red Cross which stated that impartiality “makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress”.⁷² The notion of impartiality encompassed non-discrimination, proportionality and the personal qualities of the agent responsible for acting for the benefit of those who were suffering. According to the commentary, proportionality presupposed that the help available would be apportioned according to the relative importance of individual needs.⁷³

12. As for vulnerable persons in the context of international armed conflicts, article 70, paragraph 1, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) provided that “[i]n the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection”.

13. With regard to occupation, Part II of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), on the general protection of populations against certain consequences of war, laid down in article 16 that “[t]he wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect”. That instruction was fleshed out in articles 89 and 132. The latter stated that “[t]he Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time”.

14. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) did not contain any comparable provisions. It was however

⁷² J. Pictet, *The Fundamental Principles of the Red Cross proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary*, Geneva, Institut Henry-Dunant, 1979, p. 5.

⁷³ Resolution 33, Amendments to the Principles and Rules for Red Cross and Red Crescent Disaster Relief, adopted by the 25th International Conference of the Red Cross, held in Geneva from 23 to 31 October 1986, *International Review of the Red Cross*, No. 255 (1986), para. 1.

plain from reading article 132 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) and the commentary to the Fundamental Principles of the Red Cross that impartiality manifested itself through non-discrimination in providing the most vulnerable persons with the special protection to which they were entitled. There was therefore no reason to amend the wording of draft article 7.

15. Draft articles 8 and 10 had been merged in a single draft article entitled “Duty to cooperate” from which the reference to the United Nations Special Coordinator for Emergency Relief had been deleted. The title and wording of draft article 11 became those adopted on first reading. In the title of draft article 12, the word “role” was replaced with “function”. The beginning of draft article 13 adopted on first reading had been restored with the addition of the adverb “manifestly”, so that it read “To the extent that a disaster manifestly exceeds its national response capacity, the affected State has ...”.

16. In draft article 14, the words “good faith” had been deleted from the third paragraph. With respect to the second paragraph, it had been stressed in plenary meetings that the notion of the arbitrary withholding of consent did not appear in article 18 of Protocol II and that the Commission should refrain from establishing rules which were not consonant with the rules applicable in times of armed conflict. Article 18, paragraph 2, of that Protocol had, however, been construed as comprising a duty of consent. According to the commentary to Protocol I, the fact that consent was required did not give the authorities the discretion to refuse relief without good grounds and such a refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat. In addition, article 59 of Convention IV expressly provided that “the Occupying Power shall agree to relief schemes on behalf of the ... population, and shall facilitate them by all the means at its disposal”.

17. Article 70 of Protocol I stated that “[i]f the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with ... supplies ... , relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts”.

18. It was well settled in international humanitarian law that the consent of the State was required. Associating the notion of an obligation with that of consent was tantamount to saying that consent was obligatory and could be refused only for valid reasons, in particular in the event of military necessity. In fact, article 71, paragraph 3, of Protocol I provided that “[o]nly in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted”. Hence, draft article 14, paragraph 2, merely supplemented the existing rules of international humanitarian law by providing an additional legal basis for the prohibition on arbitrarily refusing external assistance.

19. In principle, there was no incompatibility between the draft articles under consideration and international

humanitarian law, as the aim of both was to ensure the protection of human rights while at the same time achieving a delicate balance with the principle of State sovereignty. A problem might arise only when humanitarian assistance was provided in a complex emergency by military personnel. That scenario was envisaged in paragraph 19 of the Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies.

20. A second paragraph had been added to draft article 16 (Offers of external assistance). In the first paragraph, in order to underscore the idea of a right, the words “may address an offer” had been replaced with the phrase “have the right to offer” from the text adopted on first reading. The second paragraph was entirely new and had been drafting in light of a suggestion made during a plenary meeting. It introduced a new element, the limited duty of the actor who might possibly be required to give assistance. In addition, it was worded in such a way as to bring out the difference between the duty of the affected State to seek external assistance and the actual making of a request for assistance, which was not a duty. The proposed second paragraph would read: “When external assistance is sought by an affected State by means of a request, States, the United Nations and other potential assisting actors shall expeditiously consider and inform the affected State of the decision on such a request.”

21. Draft article 19, entitled “Termination of external assistance” comprised two sentences, the second of which concerned solely the duty of appropriate notification, whereas the first dealt with the right to terminate external assistance and the duty of those concerned to consult with respect to that termination. For the sake of clarity, the text had been reworked to cover the ideas of notification and consultation in a single sentence and in that order, which was the most logical. In addition, the phrase “in the exercise of their right to terminate external assistance at any time” had been replaced with “may terminate”. Draft article 19, as amended, therefore read: “The affected State and the assisting State and, as appropriate, other assisting actors, may terminate external assistance at any time. The affected State, the assisting State and other assisting actors wishing to terminate shall provide notification and shall consult among themselves, as appropriate, with respect to such termination and its modalities.”

22. As they stood, draft articles 20 and 21 concerned the relationship of the draft articles on the protection of persons in the event of disasters to special or other rules of international law and to international humanitarian law. Both stated that the draft articles were without prejudice to other rules. The relationship between those two draft articles and more generally the relationship between the draft articles as a whole and international humanitarian law had given rise to a lively debate in plenary meetings. Opinions on how to express that relationship had been divided; some members had wanted to go back to the wording adopted on first reading, while others preferred a streamlined version merging the two draft articles to read: “The rules contained in the present draft articles are without prejudice to other rules of international law.” He personally was in favour of the simplified formula, provided that it was supplemented by two important additions,

namely an express reference to international humanitarian law and the reintroduction of the term “regional and bilateral treaties” which was contained in the current wording, for those treaties constituted an indispensable guarantee for States parties, especially when they were adopted in the context of a regional political or economic integration scheme. He therefore proposed that draft articles 20 and 21 be combined in a single draft article to read:

“Article ... Relationship to special or other rules of international law

“The present articles are without prejudice to regional and bilateral treaties and special or other rules of international law, in particular the rules of international humanitarian law otherwise applicable in the event of disasters.”

23. The draft preamble had been supplemented with two new paragraphs, the first of which reproduced the language of article 1 of the statute of the International Law Commission, while the second set forth the principle of the continuous applicability of the rules of international customary law. He warmly thanked all the members of the Commission for their constructive and positive attitude during the second reading of the draft articles which should make it possible to complete the work on a highly relevant topic at the current session.

24. Mr. PARK said that it would be useful for the Drafting Committee to receive the exact wording of the proposed amendments read out by the Special Rapporteur and asked the secretariat to distribute the text of his statement to the members of the Commission.

25. The CHAIRPERSON thanked the Special Rapporteur for his summing up which had provided a clear synopsis of the Commission’s debates on his eighth report and the proposals made therein. He took it that all the members wished to refer the draft articles to the Drafting Committee, as recommended by the Special Rapporteur.

It was so decided.

Crimes against humanity⁷⁴ (A/CN.4/689, Part II, sect. C,⁷⁵ A/CN.4/690,⁷⁶ A/CN.4/698,⁷⁷ A/CN.4/L.873 and Add.1⁷⁸)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

26. The CHAIRPERSON invited the Special Rapporteur to present his second report on crimes against humanity (A/CN.4/690). He also drew the Commission members’ attention to the memorandum by the Secretariat

⁷⁴ At its sixty-seventh session (2015), the Commission provisionally adopted draft articles 1 to 4 and the commentaries thereto (*Yearbook ... 2015*, vol. II (Part Two), pp. 33 *et seq.*, paras. 116–117).

⁷⁵ Available from the Commission’s website, documents of the sixty-eighth session.

⁷⁶ Reproduced in *Yearbook ... 2016*, vol. II (Part One).

⁷⁷ *Idem*.

⁷⁸ Available from the Commission’s website, documents of the sixty-eighth session.

(A/CN.4/698) containing information on existing treaty-based monitoring mechanisms which might be of relevance to the Commission’s future work on the issue of crimes against humanity.

27. Mr. MURPHY (Special Rapporteur) said that he had sent his second report to the Secretariat on 11 January 2016 and that, in view of the length of the document, an advance copy had been circulated to members on 26 January so that they might have sufficient time to read it. He greatly regretted that not all the language versions had been quickly available, a situation for which the Secretariat was plainly not responsible and he hoped that future reports would be translated faster. Moreover, in the course of producing the final version of the report, the language services of the United Nations had introduced numerous regrettable errors into the English version, for example in paragraphs 56 to 61, where the word “defence” had been changed to “defines”. He had originally intended to write a shorter report, but the explanations and commentaries accompanying the six new draft articles had required an in-depth examination of various issues connected with treaty law, case law and national statutes. Early submission had meant that the second report did not unfortunately cover some new developments, such as the publication in 2016 by the ICRC of a new commentary to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.⁷⁹

28. The second report was divided into an introduction, seven chapters and two annexes, one of which contained the first four draft articles provisionally adopted by the Commission at its sixty-seventh session and the other, six new draft articles which he was submitting to the Commission for adoption.

29. In the introduction, he had taken stock of work on the topic of crimes against humanity, described the debate he had held with the Sixth Committee in 2015 and outlined the purpose and structure of the report. During the debate in the Sixth Committee, most of which he had observed in person, 38 States had addressed the topic. He had been pleased to note that they had generally been in favour of and had supported the Commission’s work. Several States had subscribed to the idea of turning the draft articles into a new convention on the prevention and punishment of crimes against humanity. Chapter I of the second report dealt with States’ obligation to punish crimes against humanity in their domestic law. Some States had adopted the requisite legislation, but many others had not yet done so. In addition, the nature and scope of the crime as defined in municipal laws varied considerably. Some reproduced the definition to be found in article 7 of the Rome Statute of the International Criminal Court, but many had decades-old definitions that were incomplete. Consequently, draft article 5 had merit in that, like several international instruments concerning other crimes, it obliged States to take all the necessary steps to criminalize the acts referred to in draft article 3. It comprised three paragraphs, the first of which stipulated that each State

⁷⁹ ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Cambridge, Cambridge University Press, 2016.

must take the necessary measure to establish criminal responsibility for the commission of the act – national law sometimes referred to the “direct” commission or “perpetration” of the act, or to someone being the “principal” in the commission of the act – or for an attempt to commit, participate in the commission of or attempt to commit the act, which was then termed “ordering”, “soliciting”, “inducing” or “aiding and abetting” someone else to commit the act, in which case that person was called the “accessory” or “accomplice” to the act. Other terms such as “planning” or “instigating” the offence, which were used in article 7 of the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia⁸⁰ and article 6 of the Statute of the International Tribunal for Rwanda,⁸¹ could have been employed in draft article 5, but he had decided to refrain from doing so, because they did not appear in the Rome Statute of the International Criminal Court, which was more recent.

30. Draft article 5, paragraph 2, set out that, in some circumstances, military commanders and other superiors were criminally responsible for acts committed by their subordinates. Initially, he had intended to base himself on shorter language, such as that of article 6, paragraph 1 (a), of the International Convention for the Protection of All Persons from Enforced Disappearance, or that of article 86, paragraph 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). In the end, he had opted for longer wording reproducing article 28 of the Rome Statute of the International Criminal Court. The members of the Commission might wish to comment on that choice. On 21 March 2016, Trial Chamber III of the International Criminal Court had convicted Mr. Jean-Pierre Bemba Gombo, former Vice-President of the Democratic Republic of the Congo and leader of the Movement for the Liberation of the Congo, of crimes against humanity in the form of murder and rape. That had been the first conviction handed down by the International Criminal Court under the principle of command responsibility. Although Mr. Bemba had not physically committed the crimes of which he had been found guilty, the Court had held that he was personally liable for the acts committed by the troops under his command and had placed him on the same footing as a military commander within the meaning of article 28 of the Rome Statute of the International Criminal Court. It had taken the view that he knew that the forces of the Movement for the Liberation of the Congo under his effective command had committed or were about to commit the crimes charged and that he had failed to take the necessary and reasonable measures to prevent or repress the commission of those crimes by his subordinates.

31. Draft article 5, paragraph 3 (a), provided that the fact that a crime against humanity had been committed on the orders of a superior was not, in itself, a ground for excluding the criminal responsibility of a subordinate.

⁸⁰ The Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by the Security Council in its resolution 827 (1993) of 25 May 1993, is annexed to the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1).

⁸¹ The Statute of the International Tribunal for Rwanda is annexed to Security Council resolution 955 (1994) of 8 November 1994.

The Commission might wish to supplement that provision by making it clear that those orders could come from a Government. Subparagraph (b) stipulated that the crimes referred to in draft article 5 could not be statute-barred and subparagraph (c) made it clear that those crimes must be punished by penalties appropriate to their grave nature.

32. In his second report, the Special Rapporteur also dealt with the possibility of introducing the obligation for States to provide for the criminal responsibility of corporations. The perpetrators of the acts referred to in the draft articles were commonly understood to be natural persons. If it was the Commission’s wish that legal persons could also be held criminally responsible, it would therefore have to make it clear that this category of persons could also potentially commit crimes against humanity. The last footnote to paragraph 44 of the second report listed examples of provisions of international instruments on that subject. As State practice varied in that area, he had preferred not to mention legal persons explicitly in draft article 5. Members might wish to express their standpoint on that matter as well.

33. Chapter II of the second report concerned the establishment of national jurisdiction over crimes against humanity. In that chapter, he had examined the provisions of international instruments on other crimes which were designed to ensure that perpetrators could not evade justice, in particular article 5 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. Draft article 6 adopted the same approach. Draft article 6, paragraph 1, provided that each State must take the necessary measures to establish its jurisdiction over crimes against humanity that had been committed in its territory or when the alleged offender was one of its nationals and, if the State considered it appropriate, if the victim was one of its nationals. The word “and” should be deleted at the end of paragraph 1, because the requirements in subparagraphs (a), (b) and (c) were not cumulative. Paragraph 2 laid down that each State must take the necessary measures to establish its jurisdiction when the alleged offender was present in any territory under its jurisdiction or control, while paragraph 3 stated that, without prejudice to applicable rules of international law, the draft article did not exclude the establishment of other criminal jurisdiction in accordance with a State’s national law.

34. Chapter III addressed a State’s obligation to open an impartial investigation as soon as there was reason to believe that crimes against humanity had been or were being committed in any territory under its jurisdiction or control. That issue formed the subject of draft article 7, paragraph 1. Some international instruments, including the Convention against torture and other cruel, inhuman or degrading treatment or punishment in its article 12, expressly established the obligation for a State to hold an investigation “whenever there is a reasonable ground to believe” that the crime in question had been committed in its territory. Even if that was not true of all instruments addressing crimes, that matter should be covered in draft article 7. Paragraphs 2 and 3 of draft article 7 were not prompted by any existing treaty provisions, but they were useful innovations. Paragraph 2 provided that if a State determined that a crime against humanity had been or was

being committed in any territory under its jurisdiction or control, it must notify, if appropriate, other States whenever there was reason to believe that nationals of those States had been or were implicated in the commission of the crime. That provision would enable the States concerned to investigate the acts ascribed to their nationals. Paragraph 3 required all States to cooperate, as appropriate, to establish suspects' identity and whereabouts.

35. Chapter IV of the second report discussed the exercise by a State of its national jurisdiction when the alleged offender was present in its territory, in other words when the measures provided for in draft article 7 had made it possible to identify and locate the person concerned. That obligation was generally set forth in international instruments addressing crimes and was often accompanied by three conditions, which formed the subject of draft article 8, paragraphs 1, 2 and 3. The State was expected to conduct a preliminary investigation. It must then take all the necessary steps to ensure the availability of the alleged offender for the opening of criminal proceedings against him or her, or his/her extradition or surrender to another State. That might necessitate taking the person into custody. Lastly, the State must inform any other State with jurisdiction over the matter of the action that it had taken and whether it intended to refer the case to its competent authorities for prosecution.

36. Chapter V of the second report addressed the obligation to submit the matter to the competent authorities for the prosecution or extradition of an alleged perpetrator of crimes against humanity, or for that person's surrender to another State or competent international tribunal. As the Commission had discovered during its own recent work, international instruments on crimes generally provided for an *aut dedere aut judicare* obligation. That was the reason why it had been incorporated in draft article 9, paragraph 1, which made it clear that a State could honour that obligation by surrendering the alleged offender to a competent international criminal tribunal.

37. In order to guarantee due process in those circumstances, existing international instruments often specified that, if a State referred the case to its competent national authorities for the purpose of prosecution, the latter must consider whether and how to prosecute in the same way as they would for any ordinary serious crime under its national law. That issue formed the subject of draft article 9, paragraph 2. In that connection, the Commission members might wish to examine the position with regard to hybrid tribunals, in other words courts that formed part of the national legal system of a State, but which comprised members of the judiciary of the State concerned as well as international judges and which could adjudicate in cases concerning breaches of municipal and international law. In the context of an *aut dedere aut judicare* obligation, the question arose of whether sending someone suspected of the commission of crimes against humanity for trial before a hybrid court could be regarded as extradition to another State or surrender to an international court. That issue might be of relevance when drawing up a new draft article providing that obligations under the draft articles under consideration were without prejudice to States' obligations in respect of a "competent international criminal court or tribunal".

38. Chapter VI of the second report concerned the obligation to give "fair treatment" to suspected perpetrators of crimes against humanity at all stages of proceedings against them, an obligation which was generally embodied in international instruments on crimes. Draft article 10, paragraph 1, expressly provided that the alleged offender must receive a fair trial and, more generally, the protection afforded by international human rights law. That chapter focused on the question of whether, under international law, military courts could try persons, including civilians, suspected of the commission of crimes against humanity. Practice in that area varied considerably from one State to another. While he had not wished to propose any language on that issue in draft article 10, in paragraph 192 of his second report, he had pointed to an emerging view that the requirement of a "fair trial" meant that someone accused of a crime against humanity should not be tried by a military court or commission unless that person was a member of the armed forces and had committed the offence in connection with an armed conflict. Draft article 10, paragraph 2, stipulated that when the alleged offender did not have the nationality of the State in which he or she was detained, the State in question must allow him or her to communicate with and receive visits from a representative of the State of his or her nationality.

39. Chapter VII of the second report, devoted to the future programme of work, explained that a third report might look at extradition procedures, mutual legal assistance and dispute settlement and monitoring mechanisms. In that connection, he noted that in March 2016 the Secretariat had published an excellent memorandum entitled "Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission" (A/CN.4/698). He was endeavouring, through the secretariat, to organize meetings with the staff of the Office of the United Nations High Commissioner for Human Rights and with members of various treaty monitoring bodies. The purpose of those meetings, which would take place during the current session, was to assess the advantages and disadvantages of a monitoring mechanism for a future convention on crimes against humanity. A fourth report, which would be submitted in 2018, might be devoted to other questions such as a draft preamble and draft concluding articles.

40. Before concluding, he stressed that the Commission's work on crimes against humanity was arousing considerable interest and that he was regularly contacted by representatives of Governments, international organizations, NGOs and universities who wished to learn more about the topic and share their views on it. He had been invited by Radio 4 of the British Broadcasting Company to take part in a programme called "Law in Action", which showed that the media were also interested in the Commission's work, which he strove to publicize all over the world. To that end, he had given lectures in several institutes and universities and had held meetings with the legal advisers of ministries for foreign affairs and other officials, including the Secretary-General of the League of Arab States. He had likewise taken part in a two-day workshop organized by the International Nuremberg Principles Academy. Lastly, with the assistance of two other members of the Commission, he had held an informal briefing with a number of Sixth Committee delegates prior to the session.

41. He and three other members of the Commission would be going to Bosnia and Herzegovina on Friday, 13 May 2016, at the invitation of the Association of Victims and Witnesses of Genocide, to participate in a workshop on atrocity prevention and punishment in order to discuss the difficulty of sending perpetrators of crimes against humanity to trial. That workshop would be an opportunity to provide information about the Commission's work. On Saturday, 14 May 2016, he would also be attending a workshop in Geneva on the prevention of torture, which would bring together several major human rights organizations, including Amnesty International, which had published an analysis of the report under consideration.⁸² He was trying to organize a meeting on crimes against humanity as a side event at the Assembly of States Parties to the Rome Statute of the International Criminal Court, which would be convened in The Hague in November 2016. A workshop on the same subject, sponsored by the National University of Singapore and Washington University in Saint Louis (United States) would be held in Singapore in December.

42. Mr. MURASE thanked the Special Rapporteur for his excellent second report on crimes against humanity, which was comprehensive and well researched. As he had said previously, the topic had an intrinsic difficulty. The Commission could take up new subjects in two different ways. The first classical method consisted in codifying and progressively developing international law in pursuance of its mandate. The second consisted in responding to an express request of the General Assembly to draft new conventions on a given subject, as had been the case of the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents and the 1998 Rome Statute of the International Criminal Court. When responding to such a request, the Commission did not need to concern itself with the customary law status of the rules that it formulated. If necessary, it could set forth new rules, which it generally did by resorting to analogies. As no specific request had apparently been made by the General Assembly with regard to the topic under consideration, it must be considered under the Commission's usual mandate to codify international law on the basis of *a priori* "established" customary rules, or to develop that branch of law on the basis of "emerging" customary rules. The Special Rapporteur did not seem, however, to have bothered to determine the customary nature of the rules forming the basis of his work and merely drew analogies from conventions such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide or the 1949 Geneva Conventions for the protection of war victims. In other words, he was acting as if the Commission had been asked by the General Assembly to draw up new legal rules on crimes against humanity.

43. The second report made frequent reference to the Convention against torture and other cruel, inhuman or degrading treatment or punishment. However, merely mentioning international instruments on crimes other than crimes against humanity did not afford a sufficient legal

basis for the proposed draft articles, even though torture might be regarded as a crime against humanity, provided that the acts in question had been committed as part of a "widespread and systematic attack", that being one of the elements of the definition of a crime against humanity.

44. In light of the foregoing, he wished to comment on draft article 5. None of the provisions of the Rome Statute of the International Criminal Court obliged the States that had ratified it to adopt criminal law punishing crimes against humanity. How they implemented the Statute was left to their discretion. The existing treaties mentioned in paragraphs 20 to 23 of the second report, which obliged States to criminalize certain acts in their domestic law, covered other crimes, namely genocide, war crimes and torture. While those instruments might serve as a basis for analogical reasoning, it must be noted that customary international law did not establish any obligation to punish crimes against humanity in municipal law. Consequently, as the Commission was not in a position to impose any new duties on States, the verb "shall" should be replaced with "should" in the aforementioned draft article. Moreover, as the Commission was supposed to abide by its mandate to codify and progressively develop law, most of the draft articles proposed by the Special Rapporteur should be worded as recommendations.

45. If, however, the Commission decided to go beyond its mandate by approving the Special Rapporteur's approach of creating new legal rules or drafting a new convention, he had some concerns about draft article 5. First, it must be emphasized that, unfortunately, the scope of the obligation set forth in that draft text was, to say the least, obscure. At its previous session, the Commission had provisionally adopted draft article 3 on the definition of crimes against humanity. That definition was borrowed from that which was to be found in article 7 of the Rome Statute of the International Criminal Court and reproduced its contextual elements, including the reference to "a widespread or systematic attack". Draft article 5 did not, however, indicate to what extent States were obliged to incorporate the definition in draft article 3 into their legislation. In paragraph 19 of the second report, the Special Rapporteur seemed to regret that some States parties to the Convention against torture and other cruel, inhuman or degrading treatment or punishment had not criminalized torture as defined in that instrument. If that was indeed the Special Rapporteur's position, it would be necessary to determine at least whether the States that ratified the proposed convention would be bound to incorporate the contextual elements of crimes against humanity in their domestic law. Unless the scope of States' obligation to adopt domestic law rules was clarified beforehand, they would probably find it difficult to ratify the new convention. The relationship between draft articles 5 and 3 must be spelled out, because States must know exactly what obligations they were going to bear.

46. In addition, in draft article 5, paragraph 1, the phrase "soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission" of a crime against humanity was insufficiently clear. If the scope of the crime remained ambiguous, that would certainly cause problems owing to the principle of *nullum crimen sine lege*. In Japan, the lack of a distinction in criminal

⁸² Amnesty International, "International Law Commission: Second Report on Crimes against Humanity: Positive Aspects and Concerns", London, 2016. Available from: www.amnesty.org/en/documents/ior-40/3606/2016/en/.

law between “conspiracy” and “complicity” had prevented the country from ratifying the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

47. The Special Rapporteur made only a passing reference to the question of corporate responsibility for crimes against humanity, although that issue could be a salient feature of the future convention. As he had said earlier, the contextual elements of crimes against humanity, *inter alia* “a widespread or systematic attack”, had been incorporated in draft article 3, paragraph 1. In paragraph 2 (a) of draft article 3, the phrase “pursuant to or in furtherance of a State or organizational policy” covered only “State-like” organizations, or at least organizations with the capacity to order crimes against humanity. Although judicial and scholarly views were divided on what type of policy had to be followed in order to give rise to the contextual elements of crimes against humanity, that policy encompassed the participation of legal persons in the commission and/or planning of a crime against humanity and their corporate liability therefor. In any event, it would be necessary to look closely at the relationship between the contextual elements of crimes against humanity and the conditions under which corporate criminal liability could be incurred alongside individual criminal responsibility.

48. Chapter II, on the establishment of national jurisdiction, which listed the three types of national jurisdiction resting on the principles of territoriality, active personality and passive personality, prompted similar concerns. Naturally, under customary international law States could establish their jurisdiction over crimes committed in their territory and they could likewise establish their extraterritorial jurisdiction to try cases involving crimes of which their nationals had been victims. He therefore failed to understand why no mention was made anywhere in the second report of the “objective territoriality principle” as a form of extraterritorial jurisdiction of the State in the territory of which a crime planned in another State had been committed. In any event, the question was not whether States could establish their jurisdiction, but whether they were bound under customary international law to establish their jurisdiction over crimes against humanity. The few examples given in that respect in the second report were of national laws and conventions that were of no direct relevance to crimes against humanity and it was difficult to rely on them in order to state categorically that the establishment of jurisdiction over crimes against humanity constituted a rule of customary international law.

49. The Special Rapporteur was right to mention briefly the principle of universal jurisdiction in paragraph 113 of his second report without describing it as a form of extraterritorial jurisdiction, for it was still too early to consider that principle to be a rule of customary international law which was applicable to crimes against humanity. The without prejudice clause in article 6, paragraph 3, might lead to the opposite conclusion.

50. Chapter III and the wording of draft article 7 on general investigation and cooperation for identifying alleged offenders posed fewer problems, although the term “general investigation” was too vague. It might be better not to use the word “investigation” in order to avoid any confusion with the specific investigation of a suspect.

51. He had reservations about chapter IV on the exercise by a State of national jurisdiction when an alleged offender was present in its territory. Draft article 8, paragraph 1, was too categorical and should be more nuanced. Opening an investigation, even of a preliminary nature, could give rise to substantial injury and violate the human rights of an alleged offender who might prove to be innocent. In Japan, for example, the police could not initiate an investigation unless there were reasonable grounds for believing that a person had committed a crime. Mere “rumours” would not warrant the immediate opening of an investigation.

52. Chapter V, concerning the *aut dedere aut judicare* principle, also raised the basic question of the latter’s customary law status when it was applied to crimes against humanity. As indicated in paragraphs 151 to 153 of the second report, the International Court of Justice and the Commission had not recognized that status. In 2014, in the course of its work on that topic, the Commission had taken the view that there was some uncertainty on that point. It was hard to see how, only two years later, it could be said that States were bound, under customary international law, to extradite or prosecute perpetrators of crimes against humanity, as draft article 9 suggested. Perhaps the Special Rapporteur had based his thinking on a case where the alleged offender had committed some crimes constituting a crime against humanity which were covered by a treaty providing for prosecution or execution. Proceeding by analogy on that basis would not be justified in view of the general rule laid down in article 22, paragraph 2, of the Rome Statute of the International Criminal Court, according to which the definition of a crime must be strictly construed and must not be extended by analogy, a principle which was also held to apply to criminal proceedings.

53. Chapter V was also silent on two points. The first concerned competing requests for extradition. While article 90 of the Rome Statute of the International Criminal Court dealt with that matter in vertical relations between the International Criminal Court and States, in the draft articles under consideration it might be necessary to clarify the question of horizontal relations between States, especially as draft article 6 established several possibilities of extraterritorial jurisdiction. The second point concerned the question of whether the prosecution of crimes against humanity was obligatory or whether an amnesty was possible. Some writers denied that it was possible, but it was difficult to substantiate that answer on the basis of customary international law. Draft article 9, paragraph 2, described the procedure to be followed once a State had referred a case to its competent authorities, whereas amnesties were often granted at an earlier stage. Under the Rome Statute of the International Criminal Court, such amnesties did not prevent the International Criminal Court from exercising its jurisdiction, since they did not qualify as judgments for the purposes of article 20 of the Statute. Generally speaking, it was debatable whether perpetrators of crimes against humanity (other than acts of torture) could be amnestied, especially when those amnesties had been granted by a truth and reconciliation commission.

54. Chapter VI of the second report and draft article 10 did not pose any particular problems. It might be preferable

to provide for specific protective measures for persons who were alleged to have committed crimes against humanity, rather than broadly ensuring their “fair treatment”. Lastly, he drew attention to a typographical error in the report: the last footnote to paragraph 133 should refer to “Security Council resolution 1894 (2009)”. The best way for the Commission to proceed with the topic of crimes against humanity would be to obtain a General Assembly resolution requesting it to draft a new convention on the subject, otherwise the position under customary international law would continue to be an issue.

55. Mr. KITTICHAISAREE thanked the Special Rapporteur for his very detailed second report on crimes against humanity and said that he wished to comment on the proposed draft articles. He approved of draft article 5, paragraph 3 (a), although it could mention “an order of a Government”, the wording employed in article 33, paragraph 1, of the Rome Statute of the International Criminal Court. There was no good reason to depart from the Statute, especially if a conflict of norms was to be avoided. The title of draft article 9, “*Aut dedere aut judicare*”, should be amended. That title had been used by the Special Rapporteur on the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)” for the sake of convenience. It should be remembered that the report of the Working Group on that subject⁸³ had recorded the doubts of several members, including the Special Rapporteur on the topic himself, on the advisability of using the Latin formula *aut dedere aut judicare*, especially the word “*judicare*” which did not precisely reflect the scope of the verb “prosecute”.

56. Draft article 10, paragraph 2, was much more restrictive than the corresponding provision of the 1963 Vienna Convention on Consular Relations which, in its article 36, paragraph 1 (c), provided that consular officers had the right to visit a national of the sending State who was in prison, custody or detention. Since there were no grounds for such a difference, article 10, paragraph 2, should be amended to bring it into line with article 36 of the 1963 Vienna Convention on Consular Relations. Moreover, as it stood, the draft article made no provision for the legal representation of the alleged offender, or for several other rights embodied in article 36 of the aforementioned Convention. The Commission should explain why those rights had been excluded. The time frame set out in the future programme of work was too long and was likely to lead to the international community losing its enthusiasm for a convention on crimes against humanity. It would therefore be preferable for the Commission to complete its work on the topic within two years. Lastly, he was in favour of referring the proposed draft articles to the Drafting Committee.

57. Mr. TLADI commended the Special Rapporteur on his excellent and comprehensive second report on crimes against humanity. He also thanked him for his oral presentation of the second report, which had provided welcome clarification on a number of points. While he was in favour of referring the proposed draft articles to the Drafting Committee, he wished to make a few comments on the report. As he had said at the previous session, he

remained unconvinced by the arguments put forward by the Special Rapporteur and endorsed by the Commission for limiting the topic under consideration to crimes against humanity to the exclusion of other core crimes, such as war crimes and genocide. The general approach adopted by the Special Rapporteur and accepted by the Commission meant that the draft articles which had already been adopted and those which would be adopted later on did not necessarily constitute codification of international law. The Special Rapporteur certainly did not consider the draft articles which he had proposed in line with that approach to be rules of international customary law. It was essential to make that clear because domestic courts might be tempted to rely on the Commission’s work even though it was not finished.

58. Members’ comments on the second report and the proposed draft articles had mainly focused on the question of whether the practice recorded by the Special Rapporteur substantiated the draft text, no matter what form it might take (guidelines, conclusions, articles or principles). However, as the Commission’s avowed purpose was not to codify the pertinent rules of international law, but to draw up draft articles, there was no need for the text to be supported by practice. The question was not even whether practice reflected written law and was accompanied by the requisite *opinio juris*. In fact, the existence of relevant practice was fairly unimportant; the Commission and therefore the Special Rapporteur was simply expected to make choices. For that reason, the Special Rapporteur could have refrained from engaging in such an exhaustive, in-depth survey of practice of such little importance.

59. In paragraph 15 of the second report, the Special Rapporteur stated that prosecution and punishment of persons for crimes against humanity might be possible before international criminal courts and tribunals, but must take place at the national level in order to be fully effective. Generally speaking, that statement encapsulated the principle of subsidiarity, but it was not always true in practice. A network of international and regional tribunals with jurisdiction to try crimes against humanity and other international crimes could conceivably be fully effective. Since there were much fewer of those kinds of crimes than ordinary crimes, there was no reason to think that such a network would not be of comparable effectiveness to that ascribed to national courts and tribunals. However, in the absence of such a set-up, the Special Rapporteur was quite right to focus on national investigation and prosecution.

60. In paragraph 19 of his second report, the Special Rapporteur correctly noted that States which had not adopted a national law on crimes against humanity as such could punish individual acts that constituted such crimes, namely rape, murder and torture, but that the sentences passed on the perpetrators might well not be commensurate with the gravity of the crimes against humanity which had been committed. In reality, that would depend on the applicable national laws. It was to be hoped that the constituent elements chosen by the Commission in order to define crimes against humanity, above all the fact that the act in question had to be committed as part of a widespread and systematic attack, would be incorporated as aggravating circumstances in States’ legislation.

⁸³ Document A/CN.4/L.844, available from the Commission’s website, documents of the sixty-sixth session.

61. The second report then usefully addressed various kinds of individual criminal responsibility for crimes against humanity. The Special Rapporteur considered several instruments that identified those forms of responsibility, and it seemed that almost all of them covered not only the actual commission of the crime against humanity but also various forms of participation, apart from “attempt” which was not mentioned in the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia,⁸⁴ the Statute of the International Tribunal for Rwanda⁸⁵ or the Statute of the Special Court for Sierra Leone.⁸⁶ The fact remained that the terms used to describe forms of participation were many and various, such as “ordering”, “soliciting”, “inducing”, “aiding and abetting”, “conspiracy” and “being an accomplice”. Those myriad options naturally raised the question of what terms the Commission should use. The approach set out by the Special Rapporteur in paragraph 39 of the second report seemed to be the best option. Of course, he realized that some members would prefer greater standardization. The Special Rapporteur’s choice of listing all or at least many of the possible terms seemed sufficient for that purpose and it also enabled States to choose the terms that were best suited to their legal system.

62. As Mr. Murase had noted, in paragraphs 41 to 44 of his second report, the Special Rapporteur examined the issue of corporate criminal liability. His analysis could be summed up in three points: the number of national laws recognizing corporate criminal liability had risen, but the texts varied; no international criminal court, not even the proposed criminal chamber of the African Court of Justice and Human Rights, had recognized corporate criminal liability, and that form of liability had not been incorporated into many treaties relating to crime.

63. The Special Rapporteur did not draw any conclusions from that analysis in his second report, but he had done so when he had presented it. In fact, although draft article 5 made no provision for corporate criminal liability, it could be presumed that a director (or anyone else behind the corporate veil) could be held criminally responsible as an individual for one of the forms of participation in the crime. That point could be made in the commentary. In addition, in view of the nature of the draft text and the approach discussed earlier, there was nothing to say that corporate criminal liability should be disregarded solely because of scant practice. After all, the latter was merely a source of inspiration in the draft articles and must not determine the content of the provisions that the Commission was putting together.

64. The question then arose of why corporate criminal liability should be included. The answer might be that it would serve the underlying purpose of the draft articles. If the Special Rapporteur found on balance that, despite the dearth of practice, it was desirable to include corporate criminal liability as that would further the objective of

the draft text, the Commission should follow that recommendation. If, on the contrary, after analysis, that would prove too complicated, or would not serve the purpose of the draft articles – and perhaps that was what the Special Rapporteur was alluding to when he said that those crimes were inherently committed by individuals – that form of responsibility should not be dealt with in the draft articles. He had no opinion on the matter and he doubted that the Commission could take a decision on the basis of the second report. That might be an issue which the Special Rapporteur might like to consider in a subsequent report.

65. The Special Rapporteur had studied the practice of national courts and international law on the prescription of crimes against humanity and, after a very detailed analysis, he had concluded that the draft articles should rule out the application of the statute of limitations. In order to form an opinion on the subject, it was worth recalling the reason for the rule of prescription. The technical reason given in paragraph 63 of the second report was that prosecution should be initiated while physical and eyewitness evidence was still fresh and intact. That was, of course, a valid reason, but the more fundamental reason was that the statute of limitations was an essential element of the right to a fair trial. Defence witnesses might no longer be around or able to remember; the accused might have forgotten important details or have thrown away the hotel bill proving that he was not at a meeting where he had allegedly ordered crimes. That was not to say that prescription should be recognized. The case of Nazi Germany showed that it could occasionally take a long time for justice to be meted out. What was needed was an appropriate balance between the right to a fair trial and the need to ensure that justice was ultimately done. For example, it could be stipulated that the statute of limitations did not apply in cases where, for any reason, it was impossible to initiate prosecution (for example when the perpetrator was a member of a Government that was committing crimes against humanity). The text should also lay down that prescription no longer ran once an investigation had been opened and certainly not after an indictment, in order to prevent a fugitive evading justice through that rule.

66. Draft article 6 did not call for any particular comments. He approved of the content and thrust of draft article 7, despite the disjuncture between the paragraphs of the second report which related to that text and the text itself, especially paragraphs 2 and 3 thereof. In his second report, the Special Rapporteur gave several detailed examples of practice establishing a duty, whereas the draft article which, at first sight, did not call for any objections, essentially concerned cooperation.

67. In paragraph 139 on chapter IV and the scope of the topic, which was of particular interest to him personally, the Special Rapporteur drew attention to the gaps which he had also identified in the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims and noted that the international law framework relating to genocide and war crimes contained “no obligation to conduct a preliminary investigation”.

68. The provisions relating to cooperation, especially the principle of *aut dedere aut judicare*, were the most

⁸⁴ See footnote 80 above.

⁸⁵ See footnote 81 above.

⁸⁶ The Statute of the Special Court for Sierra Leone is annexed to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (signed at Freetown on 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

important elements of the topic under consideration. He therefore approved of the content of draft article 9, even if it bore an uncanny resemblance to draft article 6, paragraph 2. As the Commission's final report on the obligation to extradite or prosecute (*aut dedere aut judicare*) had indicated, that duty could take different forms, all of which had different legal consequences.⁸⁷ He supported the formula proposed in the draft articles and he hoped that, as the Special Rapporteur had said, the detailed terms and conditions of applying the principle of *aut dedere aut judicare* could be worked out, especially with regard to competing requests, including those from international courts and tribunals.

69. Mr. PARK said that he fully agreed with the Special Rapporteur that crimes against humanity must be punished under the domestic law of every State or of every State party to the future convention. He disagreed with Mr. Murase that a crime against humanity was a violation of a *jus cogens* rule in the same way as genocide or ethnic cleansing. While States could, of course, use different terminology and formulae in accordance with their legal systems and practice, it would be desirable and reasonable for them to adopt laws and regulations that were as close as possible to the standards of the Rome Statute of the International Criminal Court, the International Criminal Court and the future convention. Moreover, the question of corporate criminal liability, which was discussed in paragraphs 41 to 44 of the second report, was extremely interesting and should be examined in greater depth.

70. In draft article 5, the Commission should refrain from employing the term "offence" in relation to the various forms of responsibility listed in paragraph 1, for States recognized divers kinds of participation in a crime in their criminal law. It would be better to follow the wording of article 25, paragraph 3, of the Rome Statute of the International Criminal Court and to refer to a person "criminally responsible and liable for punishment". Since the Special Rapporteur had used the term "criminal responsibility" when presenting his second report, it would be wise to amend paragraphs 1 and 2 of draft article 5 to bring their language into line with that of the articles of the Statute. As Mr. Kittichaisaree and the Special Rapporteur had suggested, the phrase "order of a Government" could be inserted in draft article 5, paragraph 3 (a). In addition, when the person responsible for crimes against humanity was a Head of State or a Head of Government, the State concerned might not be willing or able to take the necessary steps to bring him or her to trial, because he or she enjoyed immunity from jurisdiction. For that reason, the future convention should include a provision on immunity along the lines of article 27 of the Rome Statute of the International Criminal Court, which could become draft article 5, paragraph 3 (d), and which would apply to everyone regardless of their official status. Although it was plain that the question of the constitutionality of such a provision would arise in many countries, it would nevertheless be a safeguard against impunity.

71. Draft article 6 established three forms of national jurisdiction based on the principles of territoriality, active personality and passive personality. If the draft articles

were to establish an effective system for the prosecution and punishment of crimes against humanity, they would have to preclude any possibility that persons suspected of having committed crimes might escape justice. As questions of jurisdiction might, however, give rise to disputes between States, they must be regulated in accordance with the principles of international law, customary international law and the Rome Statute of the International Criminal Court.

72. The jurisdiction for which draft article 6 made provision seemed to rest largely on article 5 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, especially paragraph 1, which showed that international agreement already existed on that matter. Even so, draft article 6, paragraph 3, might have the effect of authorizing wider jurisdiction than that recognized in the Rome Statute of the International Criminal Court. That was why the Special Rapporteur had used the expression "without prejudice to applicable rules of international law". Given that article 21, paragraph 1 (c), of the Statute, which covered the law applicable by the International Criminal Court, authorized the latter to apply national laws provided that the principles set forth therein were not inconsistent with "international law and internationally recognized norms and standards", it would be preferable to use a similar phrase such as "without prejudice to international law and internationally recognized norms and standards". Furthermore, in draft article 6, paragraph 1 (b) and (c), the Special Rapporteur used the phrase "one of its nationals" to cover cases where the alleged offender had two or more nationalities, whereas most international treaties employed the term "its nationals". If the Commission retained the phrase "one of its nationals", it would be more difficult to identify the link, hence it might perhaps be preferable to replace it with the phrase "when the alleged offender is a national of that State", which was taken from article 5, paragraph 1 (b), of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. As the draft articles proposed a minimum model for domestic laws, he suggested that draft article 6, paragraph 1 (b), be amended to read, "the alleged offender is a national or has his or her principal residence in its territory". That amendment would enable States to establish their jurisdiction over crimes committed by stateless persons or refugees.

73. Draft article 7 was drawn almost word for word from article 12 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, except that the latter required States only to investigate but not to cooperate with other States. The Rome Statute of the International Criminal Court made provision for the latter duty only in respect of the cooperation of States parties to the Statute with the International Criminal Court. In draft article 7, paragraphs 1 and 2, the phrases "reasonable ground to believe" or "well-founded reason to believe" would be more consonant with international treaties than the expression "reason to believe". For example, the expressions "reasonable basis to believe" and "reasonable grounds to believe" were to be found in articles 53 and 58 of the Rome Statute of the International Criminal Court. While paragraph 2 might be useful, whether it could be applied in a State's domestic law was a moot point, because the last sentence concerned the duty

⁸⁷ See *Yearbook ... 2014*, vol. II (Part Two), pp. 92 *et seq.*, para. 65.

of other States. Moreover, since that sentence might give rise to competing jurisdiction among States, it might be wise to draft a separate provision on that matter. The first sentence could be simplified to read: "Any State which determines that a crime against humanity is being or has been committed shall communicate, as appropriate, to any other State or relevant international organization the general findings of that investigation." A new paragraph stating that the purpose of a general investigation was to determine whether a situation might be described as a widespread or systematic attack on the civilian population would likewise be useful, in that it might guide States' investigative activities, especially those of States which were unfamiliar with the legal framework with regard to crimes against humanity.

74. With regard to draft article 8, States should, as provided for in draft article 7, open a preliminary investigation when the alleged offender was present in their territory or under their jurisdiction, in order to establish an effective system of criminalization and prosecution of crimes against humanity. However, States' obligations – to conduct a preliminary investigation, to ensure the alleged offender's continuing presence in its territory by taking that person into custody and to notify other interested States – must be carried out in compliance with its legal system and practice. The question could be asked whether the obligation to notify other interested States under draft article 7, paragraph 2, and draft article 8, paragraph 3, had been established under customary international law, as it might create a burden on the State concerned.

75. Although the *aut dedere aut judicare* principle that formed the subject of draft article 9 appeared to be necessary in order to fill in the gaps in the existing treaty-based regime, sufficient consensus would have to be reached among States on its inclusion, for there was nothing to say that this principle had been recognized as a rule of customary international law, as Mr. Kittichaisaree and Mr. Murase had noted. As stated in the second report, although draft article 9 was based on the "Hague formula", which had already been incorporated into many international treaties, there had to be a sufficient legal basis for the application of that principle to crimes against humanity as part of customary international law. Lastly, he suggested the insertion of the phrase "whose jurisdiction it has recognized" at the end of draft article 9, paragraph 1, for that was an essential prerequisite.

The meeting rose at 1.05 p.m.

3297th MEETING

Thursday, 12 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forneau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy,

Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/689, Part II, sect. C, A/CN.4/690, A/CN.4/698, A/CN.4/L.873 and Add.1)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of crimes against humanity (A/CN.4/690).

2. Mr. FORTEAU said that he had been impressed by the quality of the Special Rapporteur's second report. However, it was perhaps unreasonable to expect the Commission members to have had time to fully grasp all the implications of the report, which, at more than 100 pages, was more than double the maximum length recommended by the Commission in 2011. While the English version of the second report had been informally distributed to the Commission members in January 2016, the regrettable delay in the issuance of the other language versions until April 2016 had added to the difficulties in examining the report, especially in view of the highly technical nature of the topic, which required a particular focus on specific legal terminology. Moreover, the second report contained six new draft articles on fundamental, diverse and, in some cases, controversial issues.

3. He was concerned that the length of the second report might result in excessively detailed commentaries, like those adopted the previous year, even though experience had repeatedly shown that short and succinct commentaries were more useful. He therefore called for moderation and suggested that the Commission might perhaps draw inspiration from the explanatory reports to Council of Europe treaties. Given that the draft convention was primarily intended for incorporation into national law, and bearing in mind the diversity of domestic legal systems, the Commission should also be careful not to elaborate overly detailed draft articles.

4. In the light of the foregoing, his comments on the Special Rapporteur's proposals were necessarily very selective and, in some respects, provisional in nature. With regard to draft article 5, some caution was perhaps required in relation to the Special Rapporteur's conclusion that the failure to criminalize crimes against humanity as such might preclude prosecution and punishment, bearing in mind that international criminal law allowed States a margin of discretion with regard to how they should punish international crimes. A study of the case law of the International Criminal Court in relation to the principle of complementarity might have been useful in determining the type or degree of criminalization under national law that would be required in order for a State