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Sixty-eighth session (first part)

Provisional summary record of the 3298th meeting

Held at the Palais des Nations, Geneva, on Friday, 13 May 2016, at 10 a.m.

Contents

Crimes against humanity (*continued*)

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Present:

Chairman: Mr. Comissário Afonso

Members: Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
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. Petrič
Mr. Saboia
Mr. Singh
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

Crimes against humanity (agenda item 9) (*continued*) (A/CN.4/690 and Add.1)

The Chairman invited the members of the Commission to resume their consideration of the second report on crimes against humanity (A/CN.4/690).

Mr. Hassouna thanked the Special Rapporteur for his second report on crimes against humanity. It was a clear, well structured and well researched document that would enable the Commission to proceed with its work on the basis of the proposals made therein. While it was somewhat long, it contained detailed analyses that would assist States in deciding whether to adopt a new convention based on the proposed draft articles and then to ratify and incorporate its provisions into their national legislation. He also wished to commend the Special Rapporteur for his efforts to explain the project to States, organizations and institutions. In particular, during the International Law Seminar for Arab States held in November 2015 in Cairo, the Special Rapporteur had discussed the topic of crimes against humanity with representatives of Arab States and with the Secretary-General of the League of Arab States. Such direct contacts were very useful, since they offered an opportunity to convince Governments of the importance and relevance of a convention on crimes against humanity, so as to ensure its wide acceptance and implementation.

During the debate in the Sixth Committee in 2015, many States had indicated that they supported the drafting of articles for the purpose of adopting a new convention on crimes against humanity. Other States had referred to the initiative of developing a new convention on legal assistance and extradition, relating not only to crimes against humanity but also to the most serious international crimes. The Special Rapporteur could perhaps explain to the Commission the background to that initiative and how it would relate to the current draft articles, in order to avoid overlapping and achieve complementarity between the two texts.

As part of his general comments, he noted that the new draft articles proposed by the Special Rapporteur underlined some of the main goals of the new convention, such as introducing an obligation of States to prohibit crimes against humanity in their domestic legislation, enhancing inter-State cooperation, ensuring that all suspects, regardless of their rank or status, had to answer for their acts before the law and clarifying the content of the obligation to prosecute or extradite. Most of the provisions did not constitute codification: the Special Rapporteur had analysed existing international instruments on matters other than crimes against humanity in developing them, but the specific nature of the crimes and the special contexts in which those instruments had been adopted should be borne in mind, and the proposed draft articles should be clear and in harmony with the provisions in those instruments.

Concerning draft article 5, he said that the Special Rapporteur had indicated in paragraph 55 of the report that all jurisdictions that addressed crimes against humanity permitted grounds for excluding criminal responsibility — for instance, mental illness. The draft article should therefore stipulate that States had the discretion to allow mitigating factors to be taken into consideration in prosecuting crimes against humanity. The term “appropriate penalties” in draft article 5 (3) (c) could be explained in the commentary by indicating the nature of the penalties that could be considered proportional to the gravity of the crimes; that would help in harmonizing the penalties and preventing a State with weak legislation from becoming a safe haven for perpetrators of crimes against humanity. It should also be explained whether the principle of non-retroactivity applied in such cases, and whether the penalties could be applied to crimes against humanity that predated the entry into force of the relevant national legislation and that had continued to be perpetrated after that date.

Draft article 6 referred to different types of jurisdiction but created no hierarchy in cases when several States were able to establish jurisdiction. It should therefore establish priorities in order to resolve competing requests for extradition: that would help to promote cooperation among States and expedite the prosecution of crimes against humanity. He wished to refer to a recent case about jurisdiction over crimes against humanity, namely the trial that had opened in France on 10 May 2016 for crimes against humanity committed in Rwanda in 1994. The two accused offenders, formerly local mayors in Rwanda, had been present in French territory at the time the judicial investigation was opened. The case thus involved jurisdiction based on the alleged offender's presence in the State's territory.

Draft article 7 referred to the obligation to carry out an investigation "whenever there is reason to believe" that a crime against humanity had been committed, which raised the question of who was to make that determination and whether it was a subjective or objective determination. It might also be necessary to carry out an investigation, even though a State claimed that there was no "reason to believe" that an investigation was warranted for a crime that had been committed.

Regarding draft article 8, he said that it should be made clear that the investigation mentioned in paragraph 1 of that text was different from the investigation referred to in draft article 7 (1). He therefore proposed that different terminology should be used in order to avoid any danger of confusion. Draft article 8 (3) should include a reference to the need for the State to notify the other States of the findings of the investigation "without delay" or "within a reasonable period of time".

With respect to draft article 9, which referred to the obligation to prosecute or extradite, he noted that paragraph 161 of the report cited the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, in which the Court had pointed out that various factors, such as financial or implementation difficulties, could not be used by a State to justify a failure to comply with its international obligations. What, however, would be the factors that did justify such a failure, and should that be a matter governed by national law? It could also be mentioned that such extradition should be carried out in accordance with the relevant conventions on extradition.

Concerning the fair treatment of the alleged perpetrator of crimes against humanity and the protection of his or her rights, paragraph 192 stated that a "fair trial" was increasingly being seen to mean, in principle, that persons alleged to have committed crimes against humanity should not be tried in military court. He agreed with the suggestion that such matters should be left to the legislation of each State to resolve, as long as there were full guarantees of a transparent and fair process. He also pointed out that draft article 10 was significantly more limited than the Vienna Convention on Consular Relations. By way of example, he cited the 2004 judgment of the International Court of Justice in *Avena and Other Mexican Nationals (Mexico v. United States of America)*, in which the Court had found that the United States had breached several of its obligations under the Vienna Convention on Consular Relations by arresting, detaining, trying, convicting and sentencing 54 Mexican nationals to death, without allowing Mexico to exercise the rights accorded to it in article 36 of that instrument. The Court had said that the United States had breached its obligation to inform the Mexican nationals of their rights and its obligation to notify the Mexican consular authorities of the detention, thereby depriving Mexico of the right to communicate with its nationals, to visit them in prison and to arrange for legal representation. Since all those rights should be afforded to alleged perpetrators of crimes against humanity, he proposed that they should be mentioned in draft article 10.

Lastly, with regard to the future programme of work detailed in chapter VII of the report, he took note of the issues that the Special Rapporteur considered should be the subject of future reports and proposed the addition of the following: State responsibility, *jus*

cogens, immunities and amnesties, the liability of legal persons (which was only partly covered in the second report), reservations, the enforcement of the mandatory rules of the convention and rules of interpretation. All of those issues should be examined on the basis of their relevance and importance to the subject of crimes against humanity. In that context, it would also be useful to address the relationship between a convention on crimes against humanity and the concept of responsibility to protect, as well as the relationship between the convention and other instruments, resolutions of the Security Council and judicial decisions covering terrorism. In conclusion, he recommended that all the draft articles proposed by the Special Rapporteur should be referred to the Drafting Committee.

Mr. Niehaus commended the Special Rapporteur on his excellent report, the outcome of meticulous, in-depth research on a particularly important topic. He likewise commended the Secretariat for its memorandum on treaty-based monitoring mechanisms (A/CN.4/698), a valuable contribution to the work of the Commission.

As a general remark, he said that, like the Special Rapporteur, he considered it crucial for crimes against humanity to be punishable under domestic law — it would greatly facilitate compliance with the relevant rules, even though on that point there were no ironclad guarantees. Ancient and recent history was replete with evidence of bias among States and the international community with regard to persons who committed crimes against humanity during armed conflicts, depending on whether they were on the side of the victors or the losers. It went without saying that thanks to the development of international law and its institutionalization, anyone who wished to accuse a person of crimes against humanity could go to an international body or a competent regional or international institution like those listed in paragraph 11 of the Secretariat memorandum, irrespective of the person's State of nationality. Nevertheless, mention should be made in draft article 5 of the risk that persons who committed crimes against humanity during armed conflict might not be accused and brought to justice if they belonged to the side of the victors. Moreover, the criminal responsibility of corporate entities must be taken into account, despite the objections of some, since behind such entities stood individuals who would otherwise go unpunished.

Draft article 5, which he thought was too long, addressed two interrelated but distinct matters: firstly, the definition of the offences *per se*, and second, the listing of the various measures to be taken in respect of them. It would be preferable to split the draft article into two, with paragraphs 1 and 2 becoming draft article 5 and paragraph 3, which dealt with the measures that States must take, to become draft article 5 *bis*.

Regarding draft article 6, he proposed that the phrase “or on board a ship or aircraft registered in that State” should be deleted, since it might be seen as excluding other physical spaces, such as the territorial sea; instead, the words “or space” should simply be inserted after “in any territory”. Draft article 6 (1) (a) would thus read: “the offence is committed in any territory or space under its jurisdiction or control”.

Concerning draft article 7, he agreed that the obligation to cooperate could be extended to all States affected in any way by any aspect of the offence, as Mr. Hmoud had suggested. As to draft article 8, he agreed with Mr. Murase that a preliminary investigation based on rumours of human rights violations might become problematic if the person under investigation proved to be innocent. Everything depended on the extent to which the information received was reliable and on the way in which the State reacted to such information. The matter needed further consideration, taking into account the possibility that an accusation might be groundless and the importance of respect for the human rights of the person concerned.

He had no specific comments on draft article 9, which dealt with the principle of *aut dedere aut judicare*. Lastly, with regard to draft article 10, he said that while the principles

set out therein were perfectly valid and logical, since they corresponded to the fundamental principles on which all civilized criminal justice systems were based, there was no need for them to be included in a separate draft article, and draft article 9 could be deleted.

Mr. Saboia, noting that chapter I of the report emphasized the importance of criminalization at the national level and of harmonization among national legislations, said that he fully agreed with that goal, since proceedings undertaken in national courts were often more efficient and less costly than those in international courts. However, that required that the procedures should be in accordance with international norms, that the rule of law prevailed and that the judicial system was independent and capable of conducting a fair trial, with respect for the international norms and principles regarding the prosecution of grave crimes of international concern. When those conditions were present, national courts might well be a preferable option. Footnote 35 in fact seemed to suggest that national courts had greater legitimacy than international ones. However, the legitimacy of a national court, or even of an international court, was a rather subjective factor that was difficult to assess: it depended mostly on respect for national and international norms concerning the independence and impartiality of the judiciary and its capacity to hold fair trials, particularly in cases of crimes against humanity.

The study on crimes against humanity cited in paragraph 18 of the report pointed to the fact that 34 per cent of States parties to the Rome Statute had not adopted national laws relating to crimes against humanity, and that was regrettable. Nevertheless, the conclusion reached by the Special Rapporteur that such States did not consider themselves to be bound by the rules of customary international law concerning international crimes was not necessarily correct. In Brazil, for instance, a bill providing for the incorporation of the relevant definitions was still pending approval by Congress, but that had not prevented judges from accepting and referring to the rules of customary international law on international crimes.

Turning to the draft articles, he said that draft article 5, according to which States were under an obligation to qualify as offences the acts defined in draft article 3 as crimes against humanity, was a central provision. While he had no particular objections to draft article 5 (2), which set out the various acts or omissions that formed the basis for responsibility, he did think, as other members of the Commission had suggested, that paragraph 3 (a) should explicitly mention orders emanating from Government authorities, as was the case in the Rome Statute and other instruments. Lastly, the non-applicability of a statute of limitations with regard to crimes against humanity was rightly mentioned in paragraph 3 (b).

As to draft article 6, he considered the criteria for establishing national jurisdiction to be broad enough to provide a basis for prosecution of alleged perpetrators of crimes against humanity. He had no comments on draft articles 7 and 8, both being based on treaty law and both having been convincingly defended by the Special Rapporteur. As to draft article 9, it should be entitled "Obligation to extradite or prosecute," as Mr. Kittichaisaree had rightly pointed out. Lastly, the wording of draft article 10 (2) should be more closely aligned with that of article 36 of the Vienna Convention on Consular Relations through the use of the terms "prison, custody or detention". It should also include a provision regarding assistance by consular agents to a foreign national in establishing legal representation. In conclusion, he recommended that all of the draft articles should be submitted to the Drafting Committee.

Ms. Escobar Hernández thanked the Special Rapporteur for his excellent second report, well researched and well balanced, as well as for his illuminating introductory statement. She agreed with Mr. Forteau that the report raised a range of difficulties, due to its vast scope and the numerous issues it canvassed. Above all, it was the Special Rapporteur's desire to formulate draft articles on each of those issues that caused problems.

Although his wish to advance rapidly in the work was entirely laudable, the consequences of such rapidity for the final result of the work needed to be kept in mind. It was not always possible to give in-depth analysis to each of the issues, especially as they were multifaceted in themselves, and it was an open question whether the Commission and the Drafting Committee would have sufficient time to debate the topic in detail. In any event, the complexity of the issues raised by the second report on crimes against humanity called for the most painstaking analysis possible; she was certain that such an analysis would be undertaken by the Commission, both at the current session and in future, and that such an in-depth study of the issues relating to crimes against humanity would yield a solid result that was useful to States in an area that was linked first and foremost to the protection of the values and principles underpinning contemporary international society, including the fight against impunity for the perpetrators of the most grave international crimes.

Turning to the draft articles themselves, she drew attention to the disparity between the Spanish text of the title of draft article 5, "*Tipificación en el derecho nacional*," and the content of the draft article. The provision was not just about "*tipificación*", which according to the dictionary of the Royal Spanish Academy (*Diccionario de la lengua española de la Real Academia Española*) meant to define a specific act or omission and to set a penalty or punishment for it. Instead, the Special Rapporteur had incorporated a general obligation of States to take legislative measures, of which there were four aspects: to ensure that crimes against humanity were offences under national law; to adopt rules on the various types of individual responsibility (all aspects of commission or participation and the particular cases of responsibility on the part of the military commander and of the hierarchical superior) and on grounds for excluding responsibility ("due obedience"); to ensure the non-applicability of a statute of limitations; and to envisage consequences of individual responsibility (the obligation to apply penalties proportionate to the grave nature of the acts).

All of those aspects, which went well beyond the notion of criminalization, were generally dealt with separately in international treaties. Certainly that was the case in the Rome Statute, where they were addressed from three different angles covered in separate provisions relating to: the jurisdiction of the Court; individual criminal responsibility; and the general principles of criminal law that were applicable. The Special Rapporteur had opted for a different approach, combining into a single draft article all the aspects of the obligation incumbent upon States of criminalization, except for aspects relating to the adoption of the requisite legislative measures for the establishment of national jurisdiction and to the obligation to extradite or prosecute. There was nothing wrong with that approach, but it could lead to errors and above all it was debatable from the technical point of view. The Commission should consider breaking the long draft article into several provisions, by analogy with the Rome Statute. If it decided not to change the wording or structure of the draft article, then it should at least change the title in Spanish to make it reflect the content, by replacing the term "*tipificación*" with "*incriminación*", the latter term being frequently used in general international law to designate the whole set of legislative measures on the basis of which a given (criminal) act could give rise to the exercise by the State of its jurisdiction for the purpose of determining the criminal responsibility attributable to the perpetrator of the offence.

As to the content of draft article 5, she was not wholly convinced by the distinction drawn in paragraph 2 (a) and (b) between the responsibility of a military commander and that of a superior. Whether the distinction could be applied to crimes against humanity, the military component of which was fortunately no longer required, was especially debatable. If the Special Rapporteur's intention was to use that distinction to set up entirely separate legal regimes and distinct forms of responsibility for military commanders and their hierarchical or civilian superiors, she would be opposed to such an approach. It would undoubtedly be preferable to simply refer to a "superior, whether civilian or military", and to combine the provisions in paragraph 2 (a) and (b) into a single provision.

Draft article 5 (3) should contain an express reference to an “order of a Government”, the phrase used in the 1996 Draft Code of Crimes against the Peace and Security of Mankind that had subsequently been taken up in the Rome Statute. The inclusion of that phrase was essential in order to close the loophole in enforceability created by the wrongly named exception of “due obedience” and, more importantly, it would be in line with the Rome Statute, which excluded such a cause for exoneration of responsibility in connection with the manifestly unlawful crimes against humanity. Lastly, she pointed out that draft article 5 did not cover the full range of aspects of individual responsibility that States must take account when fulfilling the obligation to criminalize. As Mr. Park had indicated, draft article 5 did not prohibit immunity for crimes against humanity. The decision not to make such a pronouncement might be seen as prudent at the present stage of the work, since the Commission had not yet examined the issue of exceptions to the immunity of State officials to foreign criminal jurisdiction and would do so only later in the current session. The fact remained that immunity was a very important matter that must not be skirted, and if draft article 5 was adopted at the current session, that would not, as she saw it, prevent the Commission from reverting to the matter later.

As to draft article 6, which set out the general obligation incumbent on a State to take the necessary measures to establish its jurisdiction over crimes against humanity, she noted that the Special Rapporteur had followed the model of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The draft article established three clearly delineated categories of jurisdiction: compulsory jurisdiction based on the link of territoriality and the nationality of the offender; optional jurisdiction based on certain specific criteria (passive personality, victim); and optional jurisdiction based on undefined criteria (“the establishment of other criminal jurisdiction by the State in accordance with its national law”). Although she supported the general thrust of the draft article, she wished to point out that it entailed a jurisdictional policy decision that was not entirely in line with the Commission’s previous work. The Draft Code of Crimes against the Peace and Security of Mankind called for the establishment of universal jurisdiction over crimes against humanity, in order to prevent the perpetrators of such crimes from evading responsibility and enjoying impunity simply because no State had been able to or wished to establish its jurisdiction. It was true that universal jurisdiction was always the highest level of jurisdiction and as such must have different rules compared to other systems in which jurisdiction was attributed based on territoriality or the nationality of the perpetrator or of the victim. Nevertheless, she could not go along with what the Special Rapporteur said on that subject, especially in paragraph 119 of his report, where he seemed to argue that although the establishment of universal jurisdiction must take place in conformity with international law, that did not mean that draft article 6 (3) was “authorizing” that form of “national” jurisdiction. However, unless she was mistaken, that argument was a contradiction in terms: a provision could not say one thing and its opposite simultaneously. The Drafting Committee should therefore look into the advisability of retaining the phrase “in accordance with its national law”, and the Special Rapporteur should make sure to provide an explanation in the commentary that did not seem to go against logic.

Lastly, she had a number of comments to make about the relationship between draft article 6 and draft articles 7, 8 and 9. True, the Special Rapporteur had opted for a model of jurisdiction based on the link of territoriality and the nationality of the perpetrator or the victim, but the model was not at all clear. For example — and she would return to that point — the way the notion of the “custodial State” was introduced raised questions about its legal status and whether or not it constituted a jurisdictional link.

Draft articles 7, 8 and 9, which were closely interrelated, could be commented on all together. The texts were the foundation for the exercise of jurisdiction according to the model sketched out in the report. Specifically, the first two draft articles defined successive

stages in the exercise of jurisdiction. Draft article 7 provided for an initial investigation that enabled the identity of each suspect to be established and criminal jurisdiction exercised. There, the Special Rapporteur appeared to be following the model of the Rome Statute, according to which jurisdiction was exercised in two separate stages: the investigation of a situation in which a crime might have been committed, followed by the institution of individual criminal proceedings against the perpetrator of such a crime. It was noteworthy that although the two stages were separated by the laying of charges by the Prosecutor, that in no way contradicted the unity of the exercise of jurisdiction, since both stages took place before a single institution, the International Criminal Court. However, that model was difficult to apply when a number of courts might have jurisdiction, because the State carrying out the initial investigation mentioned in draft article 7 was not necessarily the one carrying out the preliminary investigation and prosecuting the perpetrators under draft articles 8 and 9.

Although such a variety of overlapping jurisdictions was not unusual in international practice, the fact that it existed and the problems that it generated were not handled properly in draft articles 7 and 8 — in general, more substance and appropriate clarification of the procedure were required. For example, a hierarchy had to be established among the overlapping jurisdictions, something that was not immediately visible upon reading the draft articles. Draft article 9 supplemented the two previous draft articles and dealt with modalities for applying the principle of *aut dedere aut judicare*.

Commenting in detail on each of the draft articles, she said that, as worded in Spanish, draft article 7 (1) imposed on a State in whose territory there was reason to believe a crime against humanity had been or was being committed no obligation whatsoever to carry out an investigation: the expression “*velará*” was obviously devoid of any binding quality. That was a point that needed to be further considered, because an investigation had to occur before jurisdiction could be exercised, either by the territorial State or by any other State of jurisdiction. It might be possible to replace “*velará*” with “*se asegurará*” in Spanish, but she would actually prefer to see a clear statement that States were under an obligation to take the necessary measures, legislative or other, to ensure that an investigation was carried out. There was some doubt as to whether the obligation set out in paragraph 7 (2), namely to communicate to any other State the findings of the investigation, had any basis whatsoever in international law: certainly, the analysis produced by the Special Rapporteur in chapter III of the report did not permit such a conclusion. Moreover, imposing the obligation to communicate the findings of the investigation solely upon the State of nationality of the alleged perpetrator of a crime against humanity seemed at variance with draft article 6, as well as with draft article 8 (3). It was legitimate for the State that received the findings to be obligated to investigate the matter, as stipulated in draft article 7 (3), but that was hard to reconcile with the structure set up by draft articles 6, 7, 8 and 9. Lastly, although the obligation to cooperate to establish the identity and location of alleged perpetrators of an offence was absolutely essential to the effective suppression of crimes against humanity, the relevant provision, being written in very general terms, was not conducive to such an end. The scope of the obligation to cooperate should be much more clearly delineated, and the activities to be carried out in fulfilling that obligation needed to be better defined in terms of whether the obligation could be fulfilled by “all States”, independently of their other obligation to take the necessary internal measures to establish their jurisdiction over crimes against humanity.

Draft articles 8 and 9 had one thing in common: they were applicable only when a suspect was present in the territory of a State. If that was the case, then the State was required to perform certain acts involving the exercise of jurisdiction — carry out a preliminary investigation to establish the relevant facts, locate the person and take him or her into custody, as draft article 8 indicated, or decide to prosecute the person, extradite him or her to another State that wished to exercise its jurisdiction or surrender the person to an

international tribunal, as stated in draft article 9. Without going into a more extensive textual analysis, she wished simply to point out that both imposed on the “State of detention” precise obligations that entailed acts of jurisdiction. Since that State was not necessarily the one in which the offences were committed or the State of nationality of the perpetrators, the draft articles could have the surprising effect of imposing upon a State the obligation to perform certain acts that did not fall within its competence — unless the custodial State had a jurisdictional link that took priority over that of all the other States listed in draft article 6 (1). However, that interpretation was hard to reconcile with the model apparently espoused by the Special Rapporteur in his second report. It would be useful to look into the matter further, in order to avoid potential gaps and ambiguities that might make it impossible to prosecute the perpetrator of a crime against humanity. Moreover, the same problem arose with the surrender of a person to an international criminal tribunal. In addition, the various modalities for attributing competence to such tribunals or recognizing their competence should be given closer scrutiny.

Thus, although the second report addressed various ways in which States could establish their jurisdiction over crimes against humanity, there was no rule governing the interrelations among States: the report simply set out obligations to communicate and to cooperate, described in very abstract terms. The Special Rapporteur and the Commission must therefore look more closely at the two draft articles in order to determine the order of priority among the overlapping jurisdictions and ensure that the system set up by draft articles 6, 7, 8 and 9 did not leave any gaps that might open the way to impunity.

Draft article 10 corresponded to the absolute necessity of guaranteeing the fundamental rights of persons who were being investigated or prosecuted in connection with a crime against humanity. Its preparation was thus perfectly justified, because any criminal responsibility that might arise from such a crime must be established in the context of respect for the rules on a fair trial and the procedural guarantees set out in international human rights law, at both the international and regional levels. However, there were a number of problems with its wording and structure. Firstly, one might wonder why the Special Rapporteur combined in a single text all the provisions guaranteeing human rights. To deal simultaneously with, on the one hand, the right to a fair and impartial trial, procedural guarantees and the right to a defence, as did paragraph 1, and on the other hand, with the very specific regime of the right to consular assistance, as did paragraph 2, was perhaps not the best solution. Although those legal institutions had the same objective of protection, there were major differences between them, in terms both of the substance of the protection and of the nature of the rights. It should not be lost from sight that while the rights and guarantees set out in paragraph 1 were autonomous substantive rights applicable in relations between the State and the individual, the right to consular assistance was an instrumental right relating more to recognition that all States were entitled to offer protection and assistance to their nationals abroad, and applicable in a triangular relationship — as the International Court of Justice had demonstrated in the *LaGrand* and *Avena* cases. In addition, the international systems for the protection of human rights and the rules regarding consular assistance occupied very different places in contemporary international law. Consequently, for substantive reasons, the two systems must be dealt with in two separate texts, and the essential nature of consular assistance with regard to the protection of the rights of the individual must be highlighted.

Draft article 10 (1) should be amended for two separate but complementary reasons: firstly, to align the terminology used to refer to the person who was being investigated or prosecuted with the terms commonly employed in international human rights instruments, for example, by listing the rights involved; and second, to make more specific reference to the applicable international law that must be used to frame the rights recognized, something that did not emerge from the phrase “under applicable national and international law”, which failed to indicate that internal rules must always conform to international law, and

particularly to international human rights law. Moreover, draft article 10 (2) should be written in prescriptive terms, emphasizing rights, rather than simply stating that the person being investigated or prosecuted “shall be permitted” to communicate with “the nearest appropriate representative of the State or States of which such person is a national” or to be visited by such a representative. More clarity should be provided in order to dispel any ambiguity in the current wording of the paragraph. The protection regime set up must also be altered to reflect all the elements set out in the applicable rules of international law, particularly the right to receive legal assistance. The Drafting Committee could draw for that purpose on article 36 (1) (c) of the Vienna Convention on Consular Relations.

She wished also to alert members of the Commission to a common feature of the two paragraphs, namely that they both granted rights and protection to the perpetrator without simultaneously envisaging any obligations for the State in whose territory or control the person was being investigated or prosecuted. That was all the more striking in that the texts proposed by the Special Rapporteur generally placed obligations upon States, as was clear from draft articles 4, 5, 6, 8 and 9. The same held true for draft article 10, which should clearly set out the obligation of the State to take the necessary measures in internal law, legislative or otherwise, to guarantee respect for the rights envisaged.

Lastly, she wished to comment briefly on the controversial subject of military tribunals which the Special Rapporteur discussed in paragraphs 188 to 192 of the report. She agreed in general with his approach of saying that recourse to such courts was not in itself a violation of the right to a fair trial, as long as it was strictly limited to cases when the accused person was a member of the military and was accused of crimes committed in the context of armed conflict.

Military tribunals should not be seen as “special” courts in the pejorative sense of the term. In general, the extent to which they were conducive to a fair trial depended on three factors: their composition, their independent and impartial functioning and the susceptibility of their decisions to appeal before a civilian judicial institution. When those three criteria were met, and as long as civilians were not subject to their jurisdiction, military tribunals were true judicial bodies and there was no reason why they could not exercise jurisdiction over crimes against humanity without it being a violation of the right to a fair trial. In conclusion, she supported the referral of the draft articles to the Drafting Committee.

Mr. Kolodkin congratulated the Special Rapporteur on the report and its very rich content. He also welcomed the memorandum by the Secretariat on treaty-based monitoring mechanisms. In general terms, although he had some reservations on the wording of the draft articles proposed by the Special Rapporteur, he endorsed nearly all the positions of principle on which they were based. In particular, he agreed with the idea in draft article 5 (1) that States had the obligation to take the necessary measures to criminalize crimes against humanity, although he was not convinced of the need to describe the offences in detail. Recalling that, as he had stated at the sixty-seventh session, the main point was to harmonize the definition of crimes against humanity in national law with the one set out in the relevant instruments of international law, he proposed that draft article 5 should be amended to specify that States had the obligation to make the acts listed in draft article 3 criminal offences.

He agreed with the idea of including in draft article 5 a provision establishing criminal responsibility for military commanders or persons acting in that capacity when the forces under their command committed crimes against humanity, and of a provision on the non-applicability of a statute of limitations to crimes against humanity. Indeed, it would be surprising if, nearly half a century after the adoption of the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, that principle was not set out in the text.

Similarly, it would be appropriate for the draft articles to include a provision placing States under an obligation to ensure that crimes against humanity were punishable by penalties that took into account their grave nature. In that connection, he shared the Special Rapporteur's view that there was no need to impose upon States an obligation to establish the criminal responsibility of legal persons in respect of crimes against humanity. In view of the diversity of legal systems, it was preferable to leave it to States to regulate the matter themselves.

He endorsed the grounds for establishing national jurisdiction set out in draft article 6, and the Special Rapporteur's innovative proposal in draft article 7 (2) and (3) concerning the obligation of States to cooperate in an investigation. He likewise endorsed the grounds for the exercise by the State of its national jurisdiction specified in draft article 8, and draft article 9 on the obligation to prosecute or extradite, although he thought the provisions of the latter text should be based on the "Hague formula". Lastly, he supported draft article 10 on fair treatment of the perpetrator of crimes against humanity and was in favour of referring the entire set of new draft articles proposed by the Special Rapporteur to the Drafting Committee.

Nevertheless, he wished to make a number of remarks on methodology. Although the report contained abundant examples of the provisions of international instruments, it was sometimes difficult to see why the Special Rapporteur had chosen a given formulation to include in the new draft articles. In the chapters referring to each article, he cited various provisions in the international instruments in force to show how diverse the existing wording was, but he then made a proposal without explaining his choice. For example, the English text of draft article 10 (2) stated that any person taken into custody "shall be permitted to communicate" — in other words, was authorized to communicate with or be visited by a representative of a State of which the person was a national. However, the many international instruments cited in paragraph 199 of the report proclaimed the right of the perpetrator of an offence to communicate with or be visited by a representative of a State of which he or she was a national. That divergence in wording was far from the only one in the draft articles and it would be useful for the Drafting Committee if the Special Rapporteur could explain his choices.

According to paragraphs 95 to 100 of the report, the main link enabling the criminal jurisdiction of a State to be established was the fact that the offence was committed in the territory of the State in question. Such territorial jurisdiction could also be extended to offences committed on board a vessel or aircraft registered to the State. However, the corresponding provisions in draft article 6, contained in paragraph 1 (a), referred to any territory under the jurisdiction or control of the State. Without wishing to enter into a debate on whether a wider notion than that of the territory of a State should be used in the text, he wished nevertheless to emphasize that in the explanatory paragraphs of the chapter relating to draft article 6 (1) (a), the Special Rapporteur did not address the question of whether the fact that an act was committed in a territory under the jurisdiction or control of a State could be invoked to establish the jurisdiction of that State. The same remark applied to paragraphs 109 to 116 of the report and draft article 6 (2). Certainly, one might argue that draft article 4, already adopted by the Commission, indicated that each State undertook to prevent crimes against humanity by taking measures "in any territory under its jurisdiction or control", but prevention and the establishment of jurisdiction were two separate things. It would therefore be useful for the Special Rapporteur to explain why the reference to jurisdiction or control was used in draft article 6.

With regard to draft article 7, he said that cooperation among States in the struggle against crimes against humanity was an important matter that should be the subject of a separate article rather than of two paragraphs in an article on general investigation; otherwise, it would be preferable to insert the two paragraphs into draft article 8, which

dealt with mutual legal assistance. Furthermore, the notion of general investigation did not exist in all legal systems, and that might complicate the ratification of a future convention for certain States, not to mention the fact that paragraph 1 dealt with a matter that in fact entailed the exercise of national jurisdiction. For all those reasons, he proposed that draft articles 7 and 8 should be merged, with the necessary modifications, into a single text on the exercise of national jurisdiction. Lastly, he said that he was prepared to participate in the work of the Drafting Committee on the draft articles.

Mr. McRae said that, like Mr. Forteau, he was not sure that a magnum opus like the Special Rapporteur's second report was the most effective way of moving the Commission's work forward, although it obviously made a major contribution to the study of the subject.

With regard to the Commission's working methods, Mr. Murase had said that the Commission seemed to be departing from its usual methods by developing draft articles on the basis of what was perceived to be a desirable outcome — namely, a convention — after looking at various treaties and national laws. In fact, the report was an excellent compendium of comparative national law provisions, as Mr. Forteau had pointed out. That the Commission was not following its traditional approach had been made clear when the Special Rapporteur had referred to draft article 7 (2) in his introductory statement as a “useful innovation”. It did not suffice to say that the process was different because the Commission was setting out to draft a convention, however. Other draft articles, for example, those on the protection of persons in the event of disasters, on aquifers and on the responsibility of international organizations, had been prepared with a view to the adoption of a convention, but that had not prevented the Commission from going through the process of identifying the law on the subject, crafting rules that reflected that law and proposing appropriate extensions of it. It was not a process of selecting provisions because they were found in other conventions or simply because they seemed appropriate. In fact, at the sixty-seventh session there had been a debate over whether the term “common concern of mankind” could be used, and the conclusion had been that it could not, because it was not generally accepted by States and was contained in no treaties. Should that test not be applied to the use of terms in the draft articles now under consideration?

Some members had been analysing the draft articles in terms of whether they reflected existing international law — in other words, they had been using the Commission's normal methodological approach. The Special Rapporteur himself seemed somewhat ambivalent about it, since he rejected the inclusion of legal persons within the scope of the draft articles because of a lack of agreement among States on the criminal liability of corporations. However, if the Commission did not need to concern itself with the established law or what was widely agreed among States, then surely it would include the wrongdoing of corporations in the scope of the draft articles; after all, the example of corporations that provided ground or air transportation for troops that were going to commit atrocities was not so far-fetched. The problem with the open-ended approach, as had become evident in the debate at the two previous meetings, was that there was no objective basis for deciding what should be included and what should not. Mr. Kolodkin had rightly raised the question of which sources should be used for the draft articles. Should something be included because it was found in other treaties, or because it seemed to be a good idea? That was the problem with the corporate liability issue: on what basis should it be included or excluded?

He raised those matters, not to criticize the Special Rapporteur's text, which provided an excellent coverage of the topic, even though, as Mr. Kolodkin had pointed out, the source cited did not always exactly match the formulation that was supposed to emerge from it. Without wishing to reignite the discussion about the relationship between codification and progressive development, he did think it odd that the Commission had

debated how to characterize its work on the draft articles on protection of persons in the event of disasters, but not its work on crimes against humanity, when in both cases both codification and progressive development were involved. Of course, there was no need to state in every instance whether the Commission was engaged in progressively developing the law or in codifying it, but nevertheless, the distinction between the work on the two topics was striking.

What was clear was that the members of the Commission did not have an agreed view about the methodology to be followed and what it meant to undertake the preparation of a draft. That had perhaps not been so important when the Commission was preparing draft articles, but it was now pursuing other objectives, and the problem was exacerbated. In order to retain its credibility and to provide a clear explanation of how it intended to go about its work, the Commission must address those questions of methodology. To analyse using one method a report structured using another method was of little utility. The Commission should take up that question when undertaking its annual consideration of its methods of work. As he had already suggested, the Commission would benefit from setting up a working group at the next session to consider its methods of work and the final form of its work in more detail, if only to establish an agreed approach.

Turning to the draft articles, he said that the level of detail that must be included in provisions on criminalization by national courts should be considered. A treaty that was to be interpreted by an international tribunal established under the same treaty did not need to be particularly detailed, but an instrument that required States to enact legislation to criminalize certain offences must be more explicit. Care had to be taken in the use of language in criminal law, insofar as the rights of individuals were involved. That explained in part the amount of detail contained in draft article 5. But would all States interpret the obligations set out in that text in the same way? Some had already queried the differences between the terms “soliciting” and “inducing” and questioned whether all domestic courts would apply the legislation in the same way.

While repeating provisions found in the Rome Statute had its attractions, the question was whether that would lead to a patchwork of interpretations in the different national courts. The Special Rapporteur had said that in his next report he would discuss the relationship of the draft articles with the Rome Statute. As the Special Rapporteur had pointed out on previous occasions, a treaty on crimes against humanity could not be an alternative normative regime in relation to the Rome Statute.

With reference to draft article 6 (1) (c), he found it strange to say that a State would establish its jurisdiction if a victim was one of its nationals and it considered such a step to be appropriate. Of course, a State could establish jurisdiction on any grounds that it considered appropriate, but the real question was whether such grounds were permitted under international law. The Special Rapporteur had apparently tried to use a tactic often employed by the Drafting Committee, namely to strike a compromise by tacking wording on to an existing provision, in the present instance an article from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, rather than rewriting the provision to give it more substance. But why restrict the jurisdiction of the State to situations when the victim was one of its nationals? Why not add the phrase “or on any other jurisdictional basis recognized by law” at the end of the draft article? That left open the possibility of asserting universal jurisdiction where a State considered it appropriate to do so, and it avoided awkward terminology. Perhaps such was the purpose of paragraph 3: if so, then paragraph 1 (c) was superfluous.

In respect of draft article 9, he shared the views of others that paragraph 2 needed some attention. It was not appropriate to try to direct the way prosecutorial discretion was exercised, and the concept of an “ordinary offence of a serious nature” was confusing. By definition, an offence of a serious nature could not be characterized as an ordinary offence,

especially not in the context of crimes against humanity. The fact that the concept might have different meanings in different legal systems must also be taken into account.

With respect to article 10, he said he had some reservations about paragraph 2. The Special Rapporteur pointed out in his report that the most recent conventions dealing with criminal matters included provisions of that nature, notwithstanding the wide acceptance of the Vienna Convention on Consular Relations. What was not made clear, however, was why it had been seen necessary to include such provisions, how those provisions had been interpreted in practice and whether they established a regime different from the Vienna regime. Absent some good reason for a separate legal regime, it might be wiser, in the interests of coherence, to simply incorporate the rights established under the Vienna Convention.

Subject to those remarks, he said that he supported sending the draft articles to the Drafting Committee.

Mr. Tladi said that if the draft articles under consideration had been prepared using a methodology that differed from the one used for other texts, it was because Special Rapporteurs usually sought to develop a text that reflected internal law, whereas in the present case, the Special Rapporteur had clearly signalled from the start that he had other intentions. That approach had been approved by the Commission, and the General Assembly had not objected to it.

Ms. Escobar Hernández said that she did not feel that the draft articles under consideration followed a different approach than did others or that the Commission had ever agreed to develop some sets of draft articles solely in order to reflect existing practice, like the text on the protection of persons in the event of disasters, and others in order to set out the law as a given Special Rapporteur believed it should be, necessitating different working methods. As Special Rapporteur on immunity of State officials from foreign criminal jurisdiction, she had never intended to restrict her work to the compilation of existing practice. In any case, the final form of the draft articles and the working methods used were two different things. At previous sessions, she had indicated that even if the Commission should decide to recommend to the General Assembly the preparation of a convention based on the draft articles she was preparing, she could not take it for granted that the text would give rise to a convention, or still less, change her methods of work.

Mr. McRae said that, having not been present when the Commission had decided to take up the topic currently under consideration, he could not say whether or not there had been consensus on the subject of working methods. Nevertheless, the discussion and commentary to which the draft articles had given rise clearly showed the disparity of views. It would therefore be useful for the Commission to look into the matter: that could only bolster the efficacy of its work.

Mr. Candiotti said that watching the Commission still debating its own working methods now, as the quinquennium drew to a close, was somewhat disconcerting. In 2011, he had proposed that the Commission should ask a working group made up of old and new members to analyse its working methods. He now recommended that the matter should be taken up as a matter of priority at the start of the next quinquennium.

Sir Michael Wood said that in studying its own working methods, the Commission should perhaps look into the role played by the debates, which were not always very constructive. While congratulating the Special Rapporteur for the clarity and thoroughness of his report, he suggested that, when a lengthy chapter discussed a range of issues, each leading to a single text, that text should be set out immediately after the relevant section of the chapter, and not at the end of the chapter. Also, as Mr. Forteau had pointed out, it was not always clear why the Special Rapporteur had chosen one formulation instead of another.

That having been said, there were convincing reasons for the Commission to work on a set of draft articles with a view to proposing a convention on the prevention and punishment of crimes against humanity. Such an instrument would fill a significant gap in international criminal law. Moreover, the interaction between the Commission and the General Assembly revealed that the latter was perfectly aware of what the Commission was doing and which working methods it had established for itself. No purpose would be served by analysing those working methods, since the Commission had so far fulfilled its tasks very well. In addition, it would be wrong to assume that the draft articles under consideration must reflect customary international law. The whole purpose of having such a text was to propose to States the adoption of an instrument under which they would undertake greater and more specific obligations than they currently had, either under treaties or under customary law.

As for the scope of the convention, it should be confined to crimes against humanity, because to address crimes against humanity, genocide and war crimes in one and the same text would make it far more complicated. While the criminal responsibility of corporations was certainly an important issue, it should not be covered in the future convention, because it fell under national law.

In order to maximize the participation of States in an eventual convention, it should be focused on the criminalization of crimes against humanity in domestic law as well as on the investigation and prosecution, or extradition or surrender, of an alleged offender. As Mr. Hmoud had said, while it might be tempting to deal with the various aspects of crimes against humanity, it was important to develop an effective law enforcement instrument, and thus to concentrate on the criminal responsibility of the perpetrators of crimes against humanity and the measures that States could adopt to punish and prevent such crimes. The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft was a good model, and one that had been used as a basis for drawing up new instruments, such as the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the draft of which had been prepared by the Commission.

However, the Special Rapporteur had suggested that some additional elements that did not appear in the earlier conventions should be included in the Commission's text. That was unlikely to give rise to too many difficulties for States, so long as the additional elements were drawn from widely ratified instruments, such as the Rome Statute, and were suited to national criminal law. In general, however, the draft should not be overloaded with elements whose inclusion might make it harder for States to join a future convention.

Turning to the six new draft articles, he said that the terms used in draft article 5 (1) to define participation were rather unclear. In order to avoid contradictions, the Commission should use the definition set out in the Rome Statute, as it had done at the previous session for crimes against humanity. As to the definition of command responsibility in draft article 5 (2), the language there should also be taken directly from the Rome Statute, as the Special Rapporteur had proposed.

Draft article 6 was aligned closely on earlier treaties and called for no comments of substance. By contrast, the innovations introduced in draft article 7 needed careful thought. Was it appropriate or not to place even a weak legal obligation on a State to communicate "the general findings of [an] investigation" to the State of nationality of those who were "involved in the crime"? As the words "as appropriate" seemed to acknowledge, many factors might come into play, making the communication of such information not the right thing to do. The competent authorities of the State concerned should have a free hand to decide what should be done, based on domestic legal provisions and human rights commitments. The communication of information was not a matter to be regulated by treaty provisions. If the draft article was referred to the Drafting Committee, it was to be hoped

that it would approach it with a view to its appropriateness for inclusion in the text to be proposed to the General Assembly.

The relationship between draft articles 7 and 8 was difficult to understand. In their current form, they seemed to overlap somewhat. Draft article 7 dealt with the obligation of States to carry out “general investigations”, while draft article 8 addressed the conduct of “preliminary investigations” in the exercise of national jurisdiction, but the reason for that distinction was not immediately apparent. In paragraph 121 of his report, the Special Rapporteur stated that there was value in conducting general investigations, as they allowed immediate measures to be taken to prevent the further occurrence of crimes and to establish a general basis for more specific investigations. That would not necessarily be the case, however. Moreover, the instruments to which the Special Rapporteur referred to support his proposal did not necessarily make a distinction between a “general investigation” and a “preliminary investigation in the exercise of national jurisdiction”.

The lack of a clear distinction between draft articles 7 and 8 was apparent, for example, in draft article 7 (2), where it was stipulated that the State of nationality was to investigate the matters communicated to it by the State that carried out the initial general investigation. Given that the Special Rapporteur indicated in paragraph 125 of his report that only the State in which offences might have occurred was under the obligation to carry out general investigations, the State of nationality must be required to carry out not general but preliminary investigations under draft article 7 (2). However, that obligation was also covered by article 8. If article 7 was retained, a clearer link should be made between it and draft article 4, so as to emphasize the preventive nature of general investigations, and the ways in which a general investigation might be carried out should be specified. Another point was that it was not clear why under draft article 8 (3) the State that carried out a preliminary investigation had to notify of its general findings all the States referred to in draft article 6 (1), while the State that carried out a general investigation under draft article 7 (2) had to notify only the State of nationality.

Draft articles 8 and 9 were central to the text. The obligation to extradite or prosecute was central to all recent criminal law treaties. The corresponding provisions in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had been the subject of careful consideration by the International Court of Justice in its 2012 judgment in *Questions concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*; they had also been the subject of the secretariat’s excellent survey, done in 2010, on multilateral conventions that might be of relevance for the Commission’s work on the topic of the obligation to extradite or prosecute (A/CN.4/630). Such materials could prove useful to assist the Commission in framing the draft articles, and the Drafting Committee would no doubt examine them very carefully, particularly insofar as the Special Rapporteur’s proposals departed significantly from the provisions of certain conventions that had already gained wide acceptance.

In connection with draft article 9 (2), the Special Rapporteur had asked for views on whether the sending of an alleged perpetrator of crimes against humanity to be prosecuted before a “hybrid” court or tribunal constituted “extradition” to another State or “surrender” to an international jurisdiction. The reason why the question needed to be asked was not clear, at least not in the context of the Commission’s work. In any event, the answer would depend on having a look at each “hybrid” court individually, and in particular, at what its place was within the legal system of the country concerned.

Although draft article 10 might seem superfluous, other criminal law instruments contained comparable provisions and there might be good reasons for wanting to ensure fair treatment of accused persons. It therefore seemed apt to include it in the draft articles.

Regarding the future programme of work, the Special Rapporteur had suggested that his third report should address, among other things, the rights and obligations applicable to extradition. He himself hoped that he did not intend to go into detail on the subject but would propose instead a simple but important provision that was found in other criminal law conventions, for example, in article 8 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

Like Mr. Kittichaisaree, he would have preferred to see the Commission move more quickly on what he himself saw as an urgent, important and yet relatively straightforward topic. He recalled in that connection that in 1972, in the course of just one session, the work on the draft Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, had been completed, and the Convention had been adopted by the General Assembly one year later.

As to the commentaries that should accompany the draft articles, he said there was no need to repeat all that was said in the report. The Commission's task, after all, was not to write a treatise on international criminal law, and it would be better if the commentaries were concise.

In conclusion, he supported referring the draft articles to the Drafting Committee.

The meeting rose at 12.55 p.m.