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Summary record of the 3300th meeting

Topic:
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66. On the issue of accountability for international crimes, she wondered how the Legal Counsel envisaged the contribution of the United Nations to strengthening national criminal prosecution capacity, in particular its relationship with regional organizations in the establishment of hybrid tribunals and its relationship with the International Criminal Court in achieving positive complementarity.

67. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel), responding to Mr. Murphy's comment, said that efforts would be made to compile and publish more materials, within the limited resources available. He agreed with Mr. Forteau about the importance of linguistic diversity, as using only one language led to narrow ways of thinking.

68. He had followed with interest the discussions in the various international tribunals on the link between immunity and the right to obtain a judicial determination, although none of those tribunals had taken such a progressive approach as the national courts. There was clearly a need to be more practical in that regard. In line with section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations, on alternative modes of settlement of disputes, all employment contracts contained a clause providing for arbitration. Although that form of dispute settlement was indeed used, in certain cases the arbitration clause was ignored and cases were brought before the national courts on the basis of the national constitution, which was an abuse of the right to obtain a judicial determination. Very often national judges held the prejudice that the worker was always the weaker party, and the Organization was systematically found to be at fault. He would carefully examine the law cited by Ms. Escobar Hernández, although he already had some doubts about it, as it seemed to reflect a unilateral decision to change the international obligations arising under the Convention. He was aware that the discussion on the immunities of States had evolved and that a distinction was now made between absolute immunity and relative immunity for issues of employment law. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property was an important instrument; although it had not been widely ratified and had not yet entered into force, some of its principles might perhaps be emerging rules of customary international law. However, the same distinction between relative and absolute immunity did not apply to international organizations, and the International Court of Justice had adopted a very conservative position in *Jurisdictional Immunities of the State*. If States concluded that the immunity of the United Nations was no longer valid, the rules would have to be changed, bearing in mind that, as the Organization had a presence in almost every State, it would need legal officers able to represent it before national courts worldwide, which would significantly change the state of play.

69. With regard to Mr. Petrič's comments, his duty to exercise discretion as the Legal Counsel meant that it was difficult for him to comment on the work of a judicial body. The International Tribunal for the Former Yugoslavia had done very impressive work in a number of cases, as he had explained to Member States when they had complained that the process was too long and

expensive. He agreed that the experience built up over the last 20 years should not be wasted, and trusted that some of that expertise would be used in the process of ensuring accountability for international crimes. On the issue of accountability, the Office of Legal Affairs would be providing technical assistance to South Sudan and the African Union for the establishment of a hybrid tribunal, but work had just started and there were not yet any results. Work with the Government of Sri Lanka was also at a preliminary stage. With regard to Mr. Hmoud's question, it was clear that protection under the Convention on the Safety of United Nations and Associated Personnel ceased once the peacekeepers had become part of a conflict. International humanitarian law applied thereafter.

70. Ms. JACOBSSON drew attention to the views she had circulated on the importance of a gender-based perspective in ensuring the protection of persons in the event of disasters, for possible consideration by the Drafting Committee.

The meeting rose at 1.25 p.m.

3300th MEETING

Wednesday, 18 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, 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 members of the Commission to resume their consideration of the second report on crimes against humanity (A/CN.4/690).
2. Mr. ŠTURMA commended the Special Rapporteur on his excellent second report on crimes against humanity, which was very clear and well structured and contained numerous references to relevant treaty law, case law of international courts and tribunals and doctrine. As a debate had arisen on the nature of the topic and working methods, he wished to comment on those issues before moving on to the draft articles themselves. First, the topic was well within the Commission's mandate, part of which had always been to prepare draft articles for future

conventions, and it was thus a perfectly appropriate matter for the Commission to take up. The topic involved both codification and progressive development of international law: the definition of crimes against humanity contained in draft article 3¹¹⁶ and the general obligation to prevent and punish such acts as crimes under international law obviously involved the codification of customary international law, while most of the other draft articles proposed by the Special Rapporteur involved progressive development. The main added value of the topic was in the promotion of horizontal cooperation among States in ensuring that crimes against humanity were criminalized under national law and in investigation, mutual legal assistance and extradition. However, as such obligations could only be established by way of a convention, the debate on the nature of the topic had little meaning from a practical point of view: the obligations would either become binding on States as treaty obligations or they would not be binding at all.

3. Nevertheless, the nature of the topic had an impact on the Commission's working methods. While the first cluster of codified rules reflected a decision to maintain the established rules of international criminal law – in addition to the definition of crimes against humanity, which was consistent with the one set out in the Rome Statute of the International Criminal Court, he would add at least the principles of command or superior responsibility and superior orders – the second cluster of draft articles required the Commission to make policy choices.

4. That distinction was a key aspect of the working methods adopted by the Special Rapporteur. Since most of the draft articles presented in the second report dealt with new treaty obligations, it made sense to base them primarily on examples and comparisons of existing multilateral criminal law conventions. That approach, which allowed the Special Rapporteur to propose draft articles whose wording was based on best practices, was thus fully justified, as the Commission was aiming to develop a new, progressive, state-of-the-art convention.

5. Turning to the draft articles themselves, he noted that the criminalization of crimes against humanity under national law, as set out in draft article 5, was a key obligation. He appreciated the fact that the Special Rapporteur had included in his research the laws of many countries on crimes against humanity, although the reference to Act No. 140/1961, containing the Criminal Code of the Czech Republic, was outdated, as that law had been repealed and replaced by Act No. 40/2009. The Special Rapporteur had, however, correctly pointed out that, according to information submitted by the Government, the definition of crimes against humanity under Czech law, as provided for in section 401 of the new Criminal Code, was essentially aligned with the definition in the Rome Statute of the International Criminal Court. Moreover, in some respects the Czech Criminal Code even provided for broader criminalization: in relation to the crime of apartheid, for example, it penalized other similar acts such as segregation or discrimination based on race, ethnicity, nationality, religion or class. That illustrated the distinction between crimes under international law, as defined in article 7 of

the Rome Statute of the International Criminal Court and draft article 3, and the same crimes under national law. In his view, the treaty obligation requiring that acts constituting crimes against humanity be criminalized under national law simply amounted to the harmonization of national laws. States parties to the future convention on crimes against humanity would be free to adopt or maintain a criminalization broader than that strictly required under their international obligations.

6. He supported the inclusion of draft article 5, paragraph 2 (a) and (b) and paragraph 3 (a), which were based on the corresponding provisions of Part III of the Rome Statute of the International Criminal Court on general principles of criminal law (arts. 28 and 33). Those provisions, which were already part of general international law, as was evident in the development of practice from the Nürnberg trials to contemporary international criminal tribunals and the International Criminal Court, should perhaps form separate draft articles. He also supported the inclusion of paragraph 3 (b) on the non-applicability of a statute of limitations to crimes against humanity, which was fully in keeping with the development of international law. In addition to the international instruments cited by the Special Rapporteur in support of that rule, there was also considerable State practice on the matter. In the early 1960s, even before ratifying the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, Czechoslovakia had introduced such a rule in its national laws, and section 35 of the current Criminal Code provided for the non-applicability of statutory limitations to genocide, crimes against humanity and war crimes, *inter alia*. He supported draft article 5, although he believed it could be split into several separate provisions.

7. He agreed with the Special Rapporteur's analysis in paragraph 71 of his second report with regard to the retroactive effects of the non-applicability of statutory limitations. Even more importantly, a number of States, as had been shown in the Czech example, already had the capacity to prosecute the perpetrators of crimes against humanity without any limitations. As indicated in paragraph 73 of the report, they could continue to do so after the convention on crimes against humanity had entered into force. In his view, the prohibition of statutory limitations for crimes against humanity was now part of customary law, as had also been confirmed by the Court of Cassation of France in the *Barbie* case.

8. Some other very interesting, related questions had been raised during the plenary debate, including the issue of amnesties, raised by Mr. Murase. In Mr. Šturma's view, there was no need to include such a provision in draft article 5, as amnesties were a matter of national law that would not necessarily come within the scope of the future convention. However, there was a clear trend in international law, including human rights law, towards a restrictive approach to amnesties for crimes under international law. In that respect, *Barrios Altos v. Peru*, *Almonacid-Arellano et al. v. Chile*, *La Cantuta v. Peru* and *Gomes Lund et al. v. Brazil*, which had come before the Inter-American Court of Human Rights, and *Marguš v. Croatia*, which had come before the European Court of Human Rights, as well as general comment No. 20 of the

¹¹⁶ See *Yearbook ... 2015*, vol. II (Part Two), pp. 37–47.

Human Rights Committee,¹¹⁷ were particularly illuminating. Therefore, perhaps amnesties should be addressed, either in a draft article, such as the one on the obligation to investigate, or in the commentary.

9. The proposal by Mr. Park to add a paragraph on the irrelevance of official capacity as a Head of State or Government or a government official, based on article 27 of the Rome Statute of the International Criminal Court, should be supported, although it could be argued that the Statute and the draft articles did not have the same purpose. It should be noted, however, that similar provisions could be found in several multilateral treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, article IV of which provided that “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”. Other examples were article 7 of the 1996 draft code of crimes against the peace and security of mankind¹¹⁸ and articles 1 and 16 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

10. He agreed that there was no need for a draft article on the responsibility of legal persons, and supported the Special Rapporteur’s analysis of the matter in paragraphs 41 to 44 of his second report. Most international conventions that made reference to such responsibility dealt with organized crime, financial crime or corruption, in other words fields in which it played an important role, which was not the case in the context of crimes against humanity. Once again, the absence of a treaty obligation for States in that regard did not prevent them from introducing provisions on corporate criminal responsibility in their national law more generally.

11. With regard to draft article 6, he supported the inclusion of the main bases for criminal jurisdiction, noting that the presence of the alleged offender in any territory under the jurisdiction of the State was a condition for the exercise of jurisdiction, a principle also provided for in several conventions. He supported Mr. Park’s proposal that paragraph 1 (b) be extended to cover not only nationals but also other persons lawfully resident in the territory of the State. For example, section 6 of the Criminal Code of the Czech Republic extended the principle of personality also to stateless persons who had been granted permanent residence. He also supported paragraph 3 of the draft article, which did not exclude the establishment of other criminal jurisdiction by a State in accordance with its national law, and noted that section 7, paragraph 1, of the Czech Criminal Code provided for universal jurisdiction in respect of a limited number of crimes, including crimes against humanity.

12. The issue of international or “hybrid” criminal tribunals, raised by several members, should not be addressed in draft article 9 for a number of reasons. Hybrid tribunals differed from each other in their nature, legal basis and

level of internationalization, *inter alia*. While some were closer to international tribunals, others could be described as part of the national judicial system. Moreover, their statutes could better set rules on jurisdiction and the relationship between such courts and other, mainly national, courts. In summary, for the purpose of a general convention on crimes against humanity, the words “extradites or surrenders” seemed to be sufficient.

13. As to the future programme of work, which was ambitious yet realistic, he understood that the third report might also cover the issue of concurrent requests for extradition and surrender. Other aspects not yet expressly mentioned by the Special Rapporteur also warranted consideration. For example, a provision on the protection of victims and their right to redress might be considered. In conclusion, he recommended referring all of the proposed draft articles to the Drafting Committee.

14. Mr. WAKO said that he appreciated the Special Rapporteur’s excellent second report on crimes against humanity and his oral presentation. He also thanked the Secretariat for its memorandum on existing treaty-based monitoring mechanisms (A/CN.4/698), which would be useful to the Commission in its work on the topic. A very interesting debate had been sparked by Mr. Murase and Mr. McRae on the approach and methodology for the topic, as well as the relationship between codification and progressive development and the question of how to characterize the Commission’s work on each draft article. Mr. Murase had warned that, as the Commission had not been requested by the General Assembly to draft a convention on crimes against humanity, it would have to consider the topic under its usual mandate of codification and progressive development of international law; consequently, the issue of customary international law was likely to arise continuously. In his view, it was important that the Commission be seen to be consistent; even when it adopted a pragmatic approach, that approach should be based on reasonable justification. Everything seemed to indicate, based on the exchanges to date with the General Assembly, which was very much aware of the work being done by the Commission, that the latter was fully justified in proceeding. As indicated in paragraph 2 of the second report, 38 Member States had addressed the issue, generally supporting the Commission’s work and viewing the four draft articles as reflecting State practice and jurisprudence. In its future work on the topic, the Commission must bear in mind that Member States had expressed appreciation that the Commission considered the topic as complementary to the system established under the Rome Statute of the International Criminal Court, and had underscored the need to avoid establishing new obligations that would conflict with those existing under the Statute or other treaties. As of 2013, 104 of the 193 States Members of the United Nations had legislation expressly on crimes against humanity, in terms identical or very similar to the definition of such crimes in article 7 of the Rome Statute of the International Criminal Court. One such State was Kenya, which in 2008 had enacted the International Crimes Act, providing that the Statute had the effect of law and the offences it covered were also offences under Kenyan law, and reproducing the definition contained in article 7 of the Statute. However, as the Special Rapporteur indicated in paragraph 18

¹¹⁷ Human Rights Committee, General comment No. 20, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI, sect. A.

¹¹⁸ *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

of his second report, it did not appear that States regarded themselves as bound under customary international law to adopt a national law expressly criminalizing crimes against humanity. However, it was to be hoped that the impetus provided by the Statute and the draft convention on crimes against humanity would encourage Member States not only to criminalize such acts, but also to adopt a definition of crimes against humanity similar to the one contained in the Statute.

15. As draft article 5 dealt with an issue provided for under the Rome Statute of the International Criminal Court, the Commission should try to follow the wording of that instrument as closely as possible. The Special Rapporteur had thus rightly taken up the wording of article 25, paragraph 3 (c), of the Statute, although it was difficult to understand why he had left out the last phrase of that subparagraph. Given that crimes against humanity presupposed a group acting in concert, he wondered why the Special Rapporteur had also omitted article 25, paragraph 3 (d), of the Statute. He agreed entirely with Mr. Park's proposed amendments to draft article 5, paragraphs 1 and 2.

16. He also supported Mr. Park's proposals concerning draft article 6, and was of the view that the content of paragraph 2 should become a new paragraph 1 (d). He would have welcomed more analysis by the Special Rapporteur of the concept of universal jurisdiction, including in the draft articles themselves. With that in mind, the Commission could perhaps draw on the separate opinion of President Guillaume attached to the ruling of the International Court of Justice in *Arrest Warrant of 11 April 2000*.

17. With regard to draft article 7, the expression "[g]eneral investigation" had created some confusion, and several members had proposed replacing it with "specific investigation" or "preliminary investigation", although the latter would not be appropriate, as it was already used in draft article 8. Draft article 7 did not deal with specific offenders. As the Special Rapporteur indicated in paragraph 121 of his second report, the investigation in question was intended to establish whether crimes against humanity had been or were occurring, in order to allow the State to take immediate measures to prevent further occurrence and to establish a basis for more specific investigations in accordance with draft article 8. The Special Rapporteur cited a number of sources in support of that argument, including article 12 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment and article 8 of the Inter-American Convention to Prevent and Punish Torture. However, the word "general" was not used to describe the "investigations" in either of those articles. The emphasis was not on the "general" nature of the investigations, but on the urgency of dealing with the matter not only to put an immediate stop to the crimes being committed, but also to ensure that those responsible for crimes already committed were investigated, prosecuted and punished. He therefore proposed deleting the word "general", which was confusing, and retaining simply "investigation", or adding the qualifier "initial". It would also be useful to add that such investigations must be carried out promptly in order to stop any further criminal acts from being committed and to punish the perpetrators.

18. With regard to draft article 9, he did not have any particular comments to make at that stage, although consideration should be given to concurrent extradition requests or competing interests. Draft article 10 could be expanded with elements of article 14 of the International Covenant on Civil and Political Rights on the right to a fair trial. Investigation, extradition and prosecution were critical for combating impunity and filling the gaps left by the Rome Statute of the International Criminal Court, since the International Criminal Court obviously did not have a police force or prison system of its own. The Statute did not deal with investigations conducted by States, except to the extent that they triggered the initiation of an investigation by the Prosecutor in accordance with article 53. The Statute had an entire part on international cooperation and judicial assistance, but such cooperation was between the Court and States parties. He was therefore glad that the Commission would be discussing those issues under its future programme of work.

19. He shared the view of Mr. Kittichaisaree, Sir Michael and other members that, as the Special Rapporteur had prepared two very comprehensive reports and participated in various seminars and consultations, the Commission should speed up its work on the topic, which could probably be shortened by a year. He supported referring all the proposed draft articles to the Drafting Committee.

20. Ms. JACOBSSON, welcoming the fact that draft articles 5 and 6 were intended to be comprehensive, said that the success of the fight against impunity obviously depended on the willingness of States to criminalize certain acts and establish national jurisdiction. Given the gravity of crimes against humanity, such jurisdiction should be as wide as possible so as to avoid any doubt about the rights and obligations of States in that area. Like other members of the Commission, she would like to see the right of States to exercise universal jurisdiction expressly mentioned in draft article 6.

21. The Special Rapporteur had mentioned that draft article 5, paragraph 1, covered participation in an act or in an attempt to commit an act, but did not reproduce other terms, such as planning and instigation, that were used in the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia¹¹⁹ or the statutes of other tribunals. For obvious reasons, it was not possible or useful to list all the terms used in various national laws and statutes of tribunals. It should nonetheless be made clear that the list was not exhaustive, but endeavoured to cover all types of attempts, and that it was for each State to legislate in accordance with its own legal terminology, which could certainly be done in a manner that did not challenge the *nulla poena sine lege* principle. However, the concept of incitement should not be ignored: the *Radio Télévision Libre des Mille Collines* broadcasts were a prime example of the terrible effects that incitement could have. Even if the Special Rapporteur considered that the concept was covered in draft article 5, paragraph 1, she was of the view that it should be listed expressly. With regard to the

¹¹⁹ 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).

Special Rapporteur's choice of the formulation "appropriate penalties" in paragraph 3 (c), with the aim, it seemed, of avoiding the issue of the death penalty, it went without saying that a person accused of crimes against humanity would be in a better position if referred to the jurisdiction of the International Criminal Court than if prosecuted by a State that allowed the death penalty. However, the solution proposed was not satisfactory, even for those who were not opposed to the death penalty. A majority of States – more than 100 – had abolished the death penalty, and that figure was increasing, albeit slowly. It must therefore be made clear in the draft article, and in the commentary, that no body of the United Nations General Assembly, including the Commission, encouraged the death penalty in any way. She therefore proposed adding the phrase "and the obligations of States under other international instruments" to the end of the sentence.

22. With regard to draft article 6, as noted by the Special Rapporteur in paragraph 41 of his second report, criminal responsibility mostly concerned the liability of natural persons, for obvious reasons. However, legal persons were represented by natural persons, who could be held responsible for violations of financial regulations, environmental law or labour law. It was therefore not sufficient to leave States to deal with the responsibility of corporations as they saw fit. On the contrary, a modern draft convention on one of the most heinous crimes must also reflect the ambitions of the international community to combat such crimes at all levels. It might be difficult to establish clear criminal intent on the part of an executive director while, at the same time, it could be very clear that actions taken by a company could aid or abet the commission of crimes against humanity. In many States, close ties between the State, corporate representatives and corporations themselves could make it even more difficult to establish intent. The transnational structures of many corporations called for closer inter-State cooperation. At the same time, many, if not most, States had legislation that held representatives of corporations responsible for breaches of the law. The Commission could perhaps take inspiration from the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, although it was not yet in force. Even if it was not possible to establish the existence of a rule of customary international law on the matter, it would be overly cautious not at least to attempt to put pressure on States to hold corporations responsible for their part in crimes against humanity, as the role of corporations in the commission of such crimes had already been recognized after the Second World War. The Special Rapporteur had mentioned I. G. Farben, but Krupp was another example.

23. The responsibility of international organizations during peace operations should also be more clearly stated. When the Commission had dealt with the issue of the responsibility of international organizations, it had avoided taking a real decision on the subject of criminal responsibility. She wondered how article 7 of the draft articles on the responsibility of international organizations¹²⁰ and the "without prejudice" clause in article 66

of those draft articles related to the draft articles under consideration, and said that the matter should be considered in the current context. The wording of draft article 6, paragraph 3, was too passive, as it allowed States to establish jurisdiction but did not oblige or encourage them to do so. However, States should be encouraged to establish jurisdiction broader than that provided for in paragraphs 1 and 2, so as to cover jurisdiction over legal persons.

24. With regard to draft article 7, the obligation to cooperate should be at the heart of the new convention on crimes against humanity. Historically, the softly-worded obligation to cooperate in the context of international criminal law had prevented forward-looking provisions on the *aut dedere aut judicare* principle from working effectively. That had already been the case with the provisions on grave breaches in the Geneva Conventions for the protection of war victims, and it had not been until the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) that a cautious article on mutual assistance in criminal matters and a very restrained article on cooperation had been adopted. She would therefore welcome the inclusion in the draft article of a clear and compulsory obligation to cooperate. The implications of draft article 7, paragraph 2, which seemed to require a decision on the part of the State, were unclear. She believed that communication should be established at an earlier stage, when it was suspected that a crime against humanity had been or was likely to be committed, as that might even make it possible for the crime to be prevented.

25. With regard to draft article 9 on the *aut dedere aut judicare* principle, the Special Rapporteur had raised the very relevant question of the appropriate terminology for referring to the extradition or surrender of the perpetrator to another State, a competent international tribunal or a "hybrid" tribunal. In general, she believed that, as currently worded, the draft article risked establishing a legal loophole that must be closed. While it was perfectly legitimate to do whatever was possible to establish a system in which a suspect could not be tried or convicted twice for the same crime, it was also legitimate to ensure that a draft convention did not allow a State to escape its responsibility by handing over the alleged offender to an international tribunal that was less likely to hand down a conviction for the crime in question. It was well known that proceedings before international tribunals were extremely long and costly, and that the questions of evidence and witnesses were complicated because the international tribunal was dependent on the State in whose territory the crime had been committed and on the other States whose cooperation and contributions were needed for the criminal investigation. Draft article 9, paragraph 1, gave the impression that the State was relieved of its primary responsibility if it extradited or surrendered the suspect; the former was less problematic, in her view. It was to be assumed that surrender was preceded by a request from the international tribunal. She agreed that it was relevant to address the situation in which a State decided to transfer a case to a competent international tribunal. However, the circumstances in which that occurred or was likely to occur raised so many legal questions that the matter should be dealt with in a separate draft article.

¹²⁰ The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

Draft article 9, paragraph 1, should therefore end after the words “for the purpose of prosecution” and a new draft article should be prepared, which should begin: “If a State extradites or surrenders a suspect to another State or international tribunal, the following must be taken into account”. It could also be explained in the commentary that other forms of transfer might be legitimate as long as they were in accordance with international law, in particular human rights law.

26. With regard to draft article 10 on the fair treatment of the alleged offender, she welcomed the inclusion of the basic rules of *jus protectionis*, which protected the rights of a State’s nationals abroad, as formulated by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. It should be recalled, however, that those rules had not originally had the same aims as the rules on human rights and that, although *jus protectionis* was increasingly used to safeguard human rights, the two sets of rules had not yet merged. One conferred rights on the State of nationality, while the other imposed an obligation on the detaining State to ensure that the human rights of the individual were respected. A State could waive its right to act under the rules of *jus protectionis*, but it could never be relieved of its human rights obligations; that point would be clearer if draft article 10 was split in two. In her view, draft articles 8 and 10 did not overlap, but it should be made clearer that they referred to different rights and obligations. It should also be made clear that the suspect was always entitled to be represented by counsel. Furthermore, additional guarantees of due process under the rule of law, such as access to an interpreter, needed to be elaborated. Specific guarantees should be provided to safeguard the rights of stateless persons.

27. In conclusion, she recommended sending the proposed draft articles to the Drafting Committee.

28. Mr. CAFLISCH said that he appreciated the Special Rapporteur’s excellent, in-depth second report and oral presentation. However, he was not convinced that such a degree of detail had been necessary since, as Mr. Tladi had pointed out, the main purpose of treaty and other practice was not to prove the existence of a particular rule, but rather to provide examples. In the elaboration of the draft articles, it would be appropriate to follow the wording of the provisions of the Rome Statute of the International Criminal Court very closely. Any significant divergence between the draft articles and the Statute, to which there were 124 States parties, could prevent those States from becoming parties to the new treaty or could give rise to conflicts between the two instruments. For that reason, the Commission had noted with satisfaction, at its preceding session, that draft article 3 was almost identical to article 7 of the Statute. As two members had noted, certain provisions of draft article 5 as proposed in the second report departed somewhat from articles 25 and 28 of the Statute. It was nevertheless reassuring that, in the last chapter of his second report, the Special Rapporteur indicated that he planned to address means of avoiding conflict with treaties such as the Rome Statute of the International Criminal Court. Mr. Calfisch agreed with Mr. Tladi that it was regrettable that the topic was limited to crimes against humanity, as it would have been more

effective for the Commission to extend the topic to cover genocide and war crimes.

29. With regard to draft article 5, which was acceptable in principle, he believed it would be useful and necessary to impose on States parties an obligation to criminalize crimes against humanity, including the different ways of contributing to and being associated with the commission of such crimes, under their domestic law. He would like clarification of the distinction between “aiding” and “assisting” that appeared to be made in paragraph 1. He agreed generally with the Special Rapporteur’s approach to dealing with relations between hierarchical superiors and subordinates, and with what was said about the non-applicability of statutes of limitations and the proportionality of the punishment to the seriousness of the crime, although that requirement seemed to go without saying, except in respect of the death penalty problem raised by Ms. Jacobsson.

30. The points made by the Special Rapporteur concerning the capacity of legal persons to be held accountable and punished for crimes against humanity seemed to have led to a decision not to include such persons, with which he agreed, even though certain types of penalties (fines, seizure, dissolution) would be possible. The proposed solution seemed to be in line with article 25 of the Rome Statute of the International Criminal Court. That said, it was still possible, of course, to punish natural persons who sought to shield themselves behind legal persons, even though, as Mr. Kolodkin had noted, it should be left to each State to find a solution to that problem.

31. As to whether the prosecution of crimes against humanity could come under the jurisdiction of military courts, he did not see why that should not be possible, provided that the situation in question came under military jurisdiction at the domestic level and the military courts had the necessary independence and impartiality, which was not always the case, as could be seen from the jurisprudence of the European Court of Human Rights. With regard to the interesting issue of amnesty raised by Mr. Murase, there seemed to be no reference to the matter in either the draft articles or the Rome Statute of the International Criminal Court. However, persons granted amnesty at the national level would remain unpunished only so long as they were not prosecuted. In other words, a person could commit a crime against humanity and be exempt from any punishment at the national level, but that would not prevent the competent international tribunal from taking action. It therefore seemed that amnesties were possible but were not sufficient to allow perpetrators to escape punishment.

32. As to the three subparagraphs of draft article 6, paragraph 1, the links mentioned by the Special Rapporteur seemed to reflect the traditional rules on the matter. As Mr. Park had proposed adding, in paragraph 1 (b) on active personality, a reference to persons residing in the State in addition to the nationals of the State concerned, it would be interesting, before proceeding in that direction, to know whether at least some domestic legal orders provided for jurisdiction based on “active personality” resulting from residence. Another solution might be to limit that link to stateless persons and refugees. Noting

that Mr. Hmoud had proposed deleting the words “and the State considers it appropriate” in paragraph 1 (c) and replacing that subparagraph with a new paragraph 2 indicating that each State could establish jurisdiction if the victim was one of its nationals, he said that he would support that amendment, even though States that made use of that possibility did so because they considered it useful, and it therefore did not need to be spelled out.

33. He agreed with the Special Rapporteur that draft article 7, paragraphs 2 and 3, contained “useful innovations”, and thus elements of progressive development – if that expression was still permitted – that were useful and even necessary. He had only two minor comments to make in relation to that draft article: first, the expression “preliminary investigation” should be used in the title and in the first paragraph in order to distinguish more clearly between such an incomplete initial inquiry and the full investigation (which was no longer “preliminary”) described in article 8. Second, the second sentence of paragraph 2 could be deleted, as it was understood, and could be presumed, that the State would proceed promptly and impartially, and there was thus no need to lecture States in that regard.

34. He had no particular comments concerning draft article 8, but would recommend avoiding the expression “preliminary investigation”, as the draft article dealt with an “investigation” to establish the relevant facts.

35. Draft article 9 dealt with the principle of *aut dedere aut judicare*. Paragraph 1 addressed the options available to the State, namely to submit the matter to its competent authorities “for the purpose of prosecution”, or to “extradite” the person to another State or “surrender” him or her to an international criminal tribunal. The question that had been raised was whether a transfer to a “hybrid” tribunal would constitute “extradition” or “surrender”. Like other Commission members, he considered that the issue should be dealt with on a case-by-case or, better yet, on a tribunal-by-tribunal basis. He shared the doubts expressed by Mr. Forteau concerning paragraph 2. They were perhaps due to the translation, but, in any case, the paragraph should be clarified or deleted.

36. Despite its seeming banality, draft article 10 was of utmost importance: throughout the proceedings, alleged offenders benefited from all the legal protections afforded to individuals under national and international law, including human rights law, regardless of whether they themselves had failed to respect human rights. The provision seemed appropriate, on two conditions. First, it should be specified that the “representative” of the State mentioned in subparagraphs (a) and (b) of draft article 10, paragraph 2, was one of the officers mentioned in article 36, paragraph 1 (c), of the 1963 Vienna Convention on Consular Relations. Second, it should be noted, preferably in the commentary, that one of the rights protected under draft article 10 was the right to proceedings of a “reasonable duration”. It would not always be easy to comply with that requirement, as investigations into crimes against humanity could be long and difficult for reasons that were beyond the control of the State and its authorities, and that element must be borne in mind when determining whether proceedings had exceeded a “reasonable duration”.

37. He believed that the proposed draft articles should be referred to the Drafting Committee, but recalled that, in his view, the outcome of the Commission’s work should be a series of clear, concise articles that were as simple as possible and aimed at complementing, without contradicting, the Rome Statute of the International Criminal Court and fully realizing the subsidiarity inherent in the jurisdiction of the International Criminal Court.

38. Mr. PETRIČ said that the six draft articles proposed by the Special Rapporteur in his second report touched upon the most important topics that arose in the elaboration of a convention on the prevention and punishment of crimes against humanity and thus decisively contributed to that endeavour. Accordingly, all the draft articles should be sent to the Drafting Committee, which would have sufficient time to discuss them and to make changes and improvements. As a member of the Drafting Committee, he would make specific comments and drafting proposals concerning the draft articles in that context rather than in the plenary.

39. Similarly, it was not necessary to discuss the legal background and basis in customary international law of the Commission’s exercise in codification and progressive development of international law. Although it was true, as indicated in paragraph 18 of the second report, that it did not appear that States regarded themselves as bound under customary international law to adopt a national law expressly criminalizing crimes against humanity, there was a clear trend in that direction in international law, from the International Military Tribunal at Nürnberg and the International Military Tribunal for the Far East to the special international courts established by the Security Council, such as the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, the Rome Statute of the International Criminal Court and the establishment and work of the International Criminal Court, several international treaties, statements by States, resolutions of the United Nations and other international organizations, and the jurisprudence of international and national courts dealing with crimes against humanity. The general consensus, based on the commonly recognized need to prevent and punish such crimes also in international law by establishing the obligation of States to criminalize them in their national laws and establish jurisdiction over them, seemed to be crystallizing. In that context, paragraph 138 of the 2005 World Summit Outcome document, in which the General Assembly declared that “[e]ach individual State has the responsibility to protect its populations from ... crimes against humanity”,¹²¹ was worthy of mention. The need for and appropriateness of the Commission’s endeavour to draft a convention to prevent and punish crimes against humanity had been confirmed in 2015, and when the topic had been added to the Commission’s programme of work, by positive reactions from States in the General Assembly’s Sixth Committee. Thus, there was increasing practice and *opinio juris* to support the prevention and punishment of such crimes at the international and national levels, including in the context of inter-State cooperation. The adoption of a convention would be an important step towards ending impunity and safe havens for the perpetrators of those crimes.

¹²¹ General Assembly resolution 60/1 of 16 September 2005.

40. The proposed draft articles were crucial and sensitive, as they addressed issues that were often dealt with differently in national legislation as a consequence of significant differences in legal traditions, cultures, concepts and institutions in various States. In the proposed draft articles, in particular draft article 5, but *mutatis mutandis* in all of them, the Commission should not go too far in obligating States to harmonize their legislation. The Commission should not develop unduly concrete and specific stipulations that might dissuade States from acceding to the new convention. It was crucial to encourage States to accept the international legal obligation to criminalize crimes against humanity in their national laws, but it was necessary to show flexibility in order to do so. It was a question of harmonization and not standardization.

41. It had been said during the debate that the Special Rapporteur should make clear why he had opted for a specific solution or wording taken from an existing international legal instrument; it would no doubt be useful for him to do so in the commentaries. It would be safest and most convenient to follow, whenever necessary and possible, the wording of the most authoritative and generally accepted international instruments, such as the Rome Statute of the International Criminal Court. For example, in draft article 10, paragraph 2, it would be appropriate to reflect the wording of the Vienna Convention on Consular Relations.

42. Given that the distinguishing characteristic of crimes against humanity was that they were committed systematically and had more profound criminal goals and wider dimensions than other offences, special attention should be paid not only to those who murdered, raped or tortured, but also to those who “solicited” or “induced” others to commit such crimes. He therefore strongly supported the wording of draft article 5, paragraph 1. Those who had not personally committed murder, rape or torture but had, through their political activities, statements, propaganda campaigns and calls for “action” or “revenge”, solicited and induced others to commit such crimes were more dangerous than those who responded to their solicitation and inducement.

43. As crimes against humanity were the most heinous crimes, he supported draft article 5, paragraph 3 (b), which provided for the non-applicability of statutes of limitations to such crimes. Most States were in agreement that the most serious crimes, such as genocide, torture and crimes against humanity, were not subject to any statute of limitations, and a failure to stipulate that in the draft convention would represent an unnecessary departure from general practice and consensus.

44. During the debate, the interesting problem of competing claims for extradition had been raised. The Commission should proceed with caution in trying to stipulate any order of priority. While it might, *prima facie*, appear that the extradition claim of the perpetrator’s State of nationality should be given priority, that could result in more favourable treatment of the perpetrator as a national of that State; on the other hand, giving priority to the extradition claim of the State in which the crimes had been committed also had its drawbacks, bearing in mind, for example, the pressure of public opinion on the State.

Besides, States had different constitutional and legal limitations concerning the extradition of their nationals and of foreigners. It would therefore be wise to leave it to the extraditing State to decide, in each case, which of the competing claims for extradition should prevail.

45. The provision concerning the principle of fair treatment in draft article 10 should not be overly detailed. The Commission members and some States had expressed doubts about military courts. Indeed, the independence of the courts was the main guarantee of fair treatment, but such independence was contingent on many factors, ranging from legal culture and traditions to the political and even ideological context of the State and the personal freedom and independence of the judge, which was crucial. Was the judge ready and able to take decisions independently, in accordance only with the law, ignoring the pressures and consequences he or she might face, and in spite of his or her own political, ideological or other views or preferences? In other words, both civil and military courts could either be independent or lack independence. Since institutions, guarantees and safeguards concerning fair treatment varied from country to country, it was important not to go too far in regulating “fair treatment” in draft article 10. However, the principle should be strongly affirmed for the perpetrators of crimes against humanity. He would not support a provision disqualifying military courts simply because they were military.

46. Another issue to which due attention should be paid, and which concerned all the draft articles, was the ratification by States – in other words, the acceptability – of the future convention. In order to avoid delays in ratification or refusals to ratify, the provisions should be clear and should avoid dealing with matters that remained controversial and would best be regulated under national law. Corporate responsibility for crimes against humanity seemed to be one such matter. In trying to regulate it in the draft articles, the Commission might be venturing into extremely controversial territory, at least at the current stage. He was stressing the issue of ratification because, in his view, if it took decades for the draft convention to be ratified by a significant number of States and to enter into force, that could be considered proof that its provisions were not accepted by States as international law.

47. Decisions concerning future work should be left to the Special Rapporteur. Nevertheless, more in-depth research and wisdom would be required in relation to the problem of retroactivity and especially the problem of reservations to ensure that the draft convention was attractive to States while at the same time making an important contribution towards the prevention and universal prosecution of crimes against humanity. It was clear that existing international courts, and any new courts that might be established at the regional level, could not achieve those objectives alone. Without effective criminalization, prosecution, jurisprudence and engagement at the national level, many such crimes would remain unpunished, as shown by the examples of Bosnia, Cambodia, Kosovo, Rwanda and Sierra Leone.

48. In conclusion, he wished to make two suggestions to the Special Rapporteur. First, since some States, including Slovenia, were working on a parallel project to promote

legal cooperation among States in prosecuting the most serious crimes, including crimes against humanity, the Special Rapporteur should try to coordinate his activities with those of the States concerned, as the two endeavours sought, albeit in different ways, to achieve the same goal, namely effective cooperation among States to combat such crimes. At a later stage, perhaps on completion of the first reading, the Special Rapporteur or even members of the Commission might wish to consult experts on criminal procedure with regard to the procedural provisions of the draft articles.

49. Mr. VÁZQUEZ-BERMÚDEZ said that he appreciated the Special Rapporteur's excellent second report and that, unlike some members who considered it excessively long, he did not find it particularly lengthy, bearing in mind that it served as the basis for six draft articles, which themselves were fairly well developed. That said, the Commission's maximum word count should ideally not be exceeded; to that end, limiting the number of draft articles covered in each report would be one way of reducing the length of reports and making their consideration easier for the members.

50. With regard to the approach adopted by the Special Rapporteur in dealing with the topic, he stressed that, while the draft articles were intended to serve as the basis for a future draft convention and the Commission would make a recommendation to that effect to the General Assembly, that did not mean that the work being done did not constitute part of the Commission's primary mission, namely the progressive development and codification of international law. To illustrate that point, he recalled that, at the Commission's sixty-seventh session, during the introduction of the Drafting Committee's report (A/CN.4/L.853), the Chairperson had noted that, in draft article 2, the phrase "whether or not committed in time of armed conflict" had been maintained because customary international law had evolved since the time of the International Military Tribunal at Nürnberg,¹²² and it was now established that the existence of a link between such crimes and an armed conflict was no longer required.¹²³ That clearly would not prevent the Commission from drawing inspiration from the provisions of relevant international instruments and taking up those it considered most appropriate, bearing in mind the primary objective of the draft articles, namely the general obligation of States to prevent and punish crimes against humanity. In that regard, he recalled that, at the sixty-seventh session, he had highlighted that the prohibition of crimes against humanity was a rule of *jus cogens*, which had been recognized by the Commission and the International Court of Justice and other courts; that fact should be stated expressly in the preamble to the draft articles.

51. Turning to draft article 5, he noted that paragraph 1 consisted of a list of acts to be criminalized by States, including various forms of participation in the commission of an offence. It would be helpful if the Special Rapporteur could explain why he had drawn largely on the provisions of the International Convention for the

Protection of All Persons from Enforced Disappearance rather than on article 25 of the Rome Statute of the International Criminal Court. With regard to paragraphs 2 and 3, he supported the Special Rapporteur's decision to more or less reproduce article 28 of the Statute. Unlike paragraphs 1 and 2, paragraph 3 did not expressly specify, as it should do, that the measures to be adopted were legislative in nature. He was in favour of the proposal made orally by the Special Rapporteur to add to paragraph 3 (a) by citing, in addition to the order of a military or civilian superior, the order of a Government, as in article 33 of the Statute. In the same subparagraph, the words "or other" should be added after "military or civilian", so as to also extend the application of the provision to the commanders or superiors of non-State armed groups, who could not be considered either military commanders or civilian superiors. As amended, subparagraph (a) would read: "(a) the fact that an offence referred to in this draft article was committed pursuant to an order of a superior, whether military, civilian or other, is not a ground for excluding criminal responsibility of a subordinate".

52. In paragraph 51 of his second report, the Special Rapporteur noted that some States, including Ecuador, had recently adopted laws to implement the Rome Statute of the International Criminal Court that did not address the issue of command responsibility. Mr. Vázquez-Bermúdez pointed out that command responsibility was covered under article 80 of the Constitution of Ecuador, which provided that several serious offences, such as genocide and crimes against humanity, were not subject to statutes of limitations; that the perpetrators of such acts could not be granted amnesty; and that superiors could not argue that the offences had been committed by a subordinate, nor could subordinates argue that they had acted on the orders of a superior.

53. Given that crimes against humanity were among the most serious crimes and had consequences for the international community as a whole, he proposed amending draft article 5, paragraph 3 (c), to the effect that all offences referred to in the draft should be punishable by "appropriate penalties that take into account their extremely grave nature", in line with article 7 of the International Convention for the Protection of All Persons from Enforced Disappearance and article III of the Inter-American Convention on Forced Disappearance of Persons. In addition, although he supported the substance of paragraph 3 (b), he proposed amending the wording to make it clear that the non-applicability of any statute of limitations to crimes against humanity was valid for both prosecution and enforcement of sentences. The draft article could be completed with the addition of a new provision to the effect that the perpetrators of crimes against humanity could not be granted amnesty.

54. He noted that, in paragraph 41 of his second report, the Special Rapporteur indicated that, in recent years, corporate criminal responsibility had become a feature of many national jurisdictions, in some cases extending to international crimes, which had prompted calls for developing the law in that area. Mr. Vázquez-Bermúdez said that, in 2014, Ecuador had adopted a Criminal Code that provided for corporate criminal responsibility for international crimes. Furthermore, as the Special Rapporteur

¹²² The Charter of the International Military Tribunal is annexed to the 1945 Agreement for the prosecution and punishment of the major war criminals of the European Axis.

¹²³ See *Yearbook ... 2015*, vol. I, 3263rd meeting, p. 141, para. 9.

indicated in paragraph 42 of his second report, the Charter of the International Military Tribunal authorized it to designate any group or organization as criminal if one of its members had committed an offence covered by the Charter, thus enabling the Tribunal to convict several Nazi organizations. A provision establishing corporate responsibility had not been included in the Rome Statute of the International Criminal Court so as not to unduly expand the jurisdiction of the International Criminal Court, which dealt with individual criminal responsibility. The 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which gave the Court jurisdiction over offences committed by corporations, was an important new development in that regard.

55. Many national laws and various international instruments already contained provisions establishing corporate criminal responsibility. However, those instruments gave States leeway to establish corporate criminal responsibility in their legislation in accordance with their domestic legal principles. That flexibility was afforded by several international instruments, such as the International Convention for the Suppression of the Financing of Terrorism, the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the Council of Europe Convention on the Prevention of Terrorism. The establishment of corporate criminal responsibility in those instruments had not deterred States from becoming parties to them. In the light of the development of international law in that area, he was of the view that the draft articles should include a provision on that matter. Legal persons could be used to commit crimes against humanity, and the establishment of their criminal responsibility could help to prevent such crimes, punish the perpetrators and make reparations to the victims. It would thus be appropriate to add a new draft article based on article 26 of the United Nations Convention against Corruption, which reads:

Article 26. Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

56. Although he supported the substance of draft article 6, it would be useful to add a new paragraph providing that the State could exercise its jurisdiction when the alleged offender was resident in its territory, which would include stateless persons and refugees. Furthermore, the beginning of paragraph 3 should be amended, based on provisions such as article 22 of the International Convention for the Suppression of the Financing of Terrorism, so as to make it clear that the establishment by the State of other criminal jurisdiction in accordance with its national law must be compatible with international law.

57. Although international instruments did not generally establish a hierarchy of grounds that would justify the exercise of criminal jurisdiction by States, it would be useful to draft a provision on which States could rely when there were several competing grounds for establishing criminal jurisdiction. Ecuadorian criminal legislation, for example, provided that, in the case of offences that might give rise to the exercise of universal jurisdiction, the judge could determine which court was best placed to hear the case, ensure the protection of the victim and grant reparation. The draft articles should also include provisions on mutual legal assistance. If the State in which the alleged perpetrator of crimes against humanity had been arrested did not agree to extradite or surrender the latter to an international court and decided to submit the matter to its own competent authorities for prosecution, its authorities must request assistance from the judicial authorities of other States, in particular the State in the territory or under the jurisdiction or control of which the crimes against humanity were committed, and actively cooperate with them.

58. He agreed with the substance of draft article 7, particularly the emphasis on the temporal aspect. Since crimes against humanity were committed in the context of systematic and widespread attacks against the civilian population, they often took place over long periods. Consequently, bearing in mind the obligation of States to proceed to a prompt and impartial investigation, the State must investigate even while the crimes were being committed.

59. Regarding draft article 9, although the Special Rapporteur expressed a preference for the Hague formula concerning the obligation to extradite or prosecute, the wording of the draft article departed somewhat from it, and was less strict. In addition to the two options mentioned, exercise of national jurisdiction and extradition, a third should be given, namely the surrender of the alleged offender to a competent international criminal court. As that third option was not covered by the expression “obligation to extradite or prosecute”, since a person could not be extradited to an international criminal court, the expression *aut dedere aut judicare* should be kept in the title, as *dedere* covered both extradition to another State and surrender to an international criminal court. In that regard, paragraph 1 should be reworded to link “extradites” only to “another State” and “surrenders” only to “a competent international criminal tribunal”. The point of making that distinction was to prevent misinterpretations and avoid a situation in which, for example, a State whose national had been arrested by another State requested the latter to surrender the person to it, when in fact its objective was to shield the person from legal proceedings in the detaining State or prevent him or her from being surrendered to an international criminal court.

60. He supported the content of draft article 10, subject to any improvements the Drafting Committee might wish to make, such as including an express reference to the right of consular officers of the State of nationality of alleged offenders to communicate with them, visit them if in detention, converse with them and arrange for their legal representation, in accordance with article 36 of the Vienna Convention on Consular Relations. The Spanish-speaking

members of the Commission would have to closely examine the Spanish version of that draft article, particularly the use of expressions such as *trato justo* and *trato equitativo*, as well as *juicio justo*, *juicio imparcial* and *juicio con las debidas garantías*, as the Spanish versions of universal and regional human rights instruments were characterized by the diversity of terms used.

61. Concerning military courts, draft article 10, or at least the commentary thereto, should mention the tendency of national legal systems to limit the jurisdiction of military courts by restricting it to cases involving acts committed by military personnel in the exercise of their duties, and to exclude international crimes. Paragraph 192 of the second report could prove helpful in that regard. In conclusion, he said that he was in favour of sending all the new draft articles to the Drafting Committee.

62. Mr. SINGH said that he appreciated the Special Rapporteur's very thorough second report and oral presentation, as well as his efforts to bring the Commission's work on the topic of crimes against humanity to the attention of a range of stakeholders. He also thanked the Secretariat for its detailed memorandum on existing treaty-based monitoring mechanisms (A/CN.4/698). With regard to the scope of the draft convention, he agreed with other members who were in favour of confining it to crimes against humanity, and dealing with genocide and war crimes in a separate draft.

63. Noting that the Special Rapporteur had decided not to address corporate criminal responsibility, considering it more appropriate to leave it to each State to legislate on the matter, he said that this important matter should be addressed in a draft article providing that persons responsible for the management and control of a legal person that committed a crime against humanity must be held accountable.

64. Draft article 5, paragraph 1, was an important component of the draft articles. However, in order to more clearly distinguish between the main offence – crimes against humanity as defined in draft article 3 – and ancillary offences such as attempt, abetment and participation, the latter should be listed in a separate paragraph or subparagraph. The Commission had decided at its sixty-seventh session to reflect the definition of crimes against humanity contained in the Rome Statute of the International Criminal Court; it should do the same for ancillary offences, as had been proposed by some members. He supported the substance of draft article 5, paragraph 3 (b), which was in line with the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity.

65. The provisions of draft article 6 concerning the exercise of jurisdiction by a State in cases where the victim was one of its nationals were not clear. It would be preferable to adopt wording based on the provisions of the United Nations counter-terrorism conventions, such as the International Convention for the Suppression of Terrorist Bombings. Those provisions could also serve as a model to improve draft article 8 and draft article 9, paragraph 1. He shared the concerns of Sir Michael Wood regarding the appropriateness of including draft article 7.

66. In relation to draft article 9, paragraph 2, the Special Rapporteur had raised the question 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. However, as the Special Rapporteur had also noted, a future draft article could provide that obligations under the draft articles were without prejudice to States' obligations in respect of a competent international criminal court or tribunal. In any case, if a person suspected of crimes against humanity were surrendered to an international court or tribunal, it would probably be under the rules applicable to the court or tribunal in question. It was thus not necessary for the draft article to include a provision on that point.

67. With regard to draft article 10, paragraph 2, he agreed with other members that the provisions on consular protection should be brought into line with the relevant provisions of the Vienna Convention on Consular Relations. In closing, he supported sending all the draft articles proposed by the Special Rapporteur to the Drafting Committee.

68. Mr. KAMTO said that his comments would focus on three points: the approach taken to dealing with the topic, the scope of the topic and the draft articles proposed in the Special Rapporteur's second report.

69. On the first point, he noted that the interest in the topic among certain States had generated enthusiasm among the members and prompted them to call for the Commission to speed up its work. He had a number of comments concerning that approach. First, as several members had already recalled, the Commission had not been mandated by the General Assembly to develop a draft convention on the topic. In paragraph 4 of his second report, the Special Rapporteur noted that “[m]any States [had] indicated that they supported the drafting of the articles for the purpose of a new convention”, but the actual number of States in question, according to the first footnote to the paragraph, was only 13. That did not even amount to a majority of the States that had expressed their views on the topic, and represented only a fraction of the 193 States Members of the United Nations. He recalled the uncompromising positions of some members who, when discussing the draft articles on the expulsion of aliens adopted on first reading, had defended to the hilt the idea that the Commission should not develop a set of draft articles to be used as a basis for a convention, on the grounds that some of the provisions involved progressive development rather than codification of the law.

70. However, the provisions proposed to date constituted, for the most part, progressive development. They essentially involved the adaptation, or transposition, of existing treaty regimes on certain serious international crimes to the topic of crimes against humanity. He was not criticizing the Special Rapporteur on that score, but it was important to bear that fact in mind. In order to maintain its credibility, the Commission should be careful not to vary its policy depending on the topic or to give the impression that it was particularly sensitive to the views not of States in general – which would be entirely legitimate and commendable – but of certain States thought to

have too much influence not only on the Commission's programme of work but also on its working methods. Although he would personally prefer that the draft articles on the topic serve as the basis for a convention that could contribute to the peace and security of humankind, the Commission must show consistency.

71. With regard to the scope of the topic, further discussion was required on the issue of the liability of legal persons, including corporations, which was addressed in paragraphs 41 to 44 of the second report, albeit in insufficient detail. The prohibition of crimes against humanity was a rule of *jus cogens* that applied to all, not only to State authorities in their individual capacity, but also to States themselves as legal persons. Already in 1974, General Assembly resolution 3314 (XXIX) of 14 December 1974 on the definition of aggression, which was considered to reflect customary law, had established the principle of State responsibility. In those circumstances, it was difficult to see why the Commission would hesitate to admit that this rule of *jus cogens* also applied to corporations. By excluding them, the Commission would be making a political rather than a legal choice, or, more specifically, would be expressing a political preference without any legal justification. Moreover, such a choice would not only ignore the contemporary reality of corporate participation in the commission of certain serious international crimes, but would also run counter to the current evolution of international law.

72. The individual responsibility of business leaders was not a matter of particular debate, even in international law. The precedents set by the trials resulting from the Second World War were enlightening on that point. In the Nürnberg trials and the trials before the Allied military courts, 50 corporate leaders had been prosecuted. Not all of them had been convicted. The American military courts had held 12 trials involving corporations suspected of war crimes or complicity in such crimes, 3 of which had involved the leaders of the companies Krupp, I. G. Farben and Flick. It had been with those precedents in mind, as well as other more recent cases of involvement by corporations in the commission of serious crimes in countries in conflict, that former United Nations Secretary-General Kofi Annan had appointed a Special Representative on the issue of human rights and transnational corporations and other business enterprises. In a series of reports, the Special Representative had highlighted the increasing responsibility of major corporations and their leaders, particularly in conflict zones in which the worst international crimes were committed and in which the main actors were often financed by the illegal exploitation and export of natural resources. The recent cases of the Democratic Republic of the Congo and Sierra Leone were prominent examples, and the relevant reports submitted to the Human Rights Council in June 2008 had received overwhelming support, following which the Special Representative's mandate had been extended until 2011.¹²⁴ Among the Special Representative's tasks had been the consideration of how to improve access to justice and remedies for victims of such international crimes and mass human rights violations. In that regard, he recalled that, at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the States members of the Southern African Development Community had already called for

the jurisdiction of the International Criminal Court to be extended *ratione personae* to corporations and other legal persons and that, as mentioned by the Special Rapporteur in paragraph 43 of his second report, the Protocol on the Statute of the African Court of Justice and Human Rights had been amended in 2014 to expand the Court's jurisdiction to corporations.

73. It was already possible to take action under some national legal systems. For example, in the civil law of the United States, the Alien Tort Claims Act provided for a range of class actions and remedies for groups of victims who were non-nationals to apply for reparations from the United States federal authorities for harm suffered outside the country.

74. Furthermore, in September 2008, the International Commission of Jurists had published an extensive three-volume study¹²⁵ on the subject, which examined various aspects of corporate complicity in relation to the development of international criminal law and international humanitarian law. During the Commission's 2014 debate on the protection of the environment in relation to armed conflicts, some members had strongly argued, no doubt rightly, that corporations should be subject to criminal prosecution as legal persons when they caused environmental damage. It seemed strange, then, that they should be spared when they committed crimes against humanity or participated in the commission of such crimes, given that the principle of corporate liability was clearly acknowledged in the various conventions cited by the Special Rapporteur. The provision of the International Convention for the Suppression of the Financing of Terrorism on which the provision of the United Nations Convention against Corruption read out by Mr. Vázquez-Bermúdez was based could serve as a model for drafting an article on the matter. For those reasons, and for the ones lucidly explained by Ms. Jacobsson at the current meeting, a set of draft articles the scope of which did not extend to corporations would seem sclerotic and would contribute almost nothing new in relation to existing treaty regimes on the most serious international crimes.

75. In his view, the draft articles proposed by the Special Rapporteur were sometimes difficult to understand, but that was perhaps due to the French translation. In any case, he was in favour of referring them to the Drafting Committee, and would like the Commission to give the Committee a clear mandate to include corporations in the scope of the draft articles.

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

[Agenda item 1]

76. The CHAIRPERSON invited the Second Vice-Chairperson to announce the composition of the Planning Group on behalf of Mr. Nolte.

* Resumed from the 3292nd meeting.

¹²⁵ International Commission of Jurists, *Corporate Complicity and Legal Accountability*, vol. 1, *Facing the Facts and Charting a Legal Path*, vol. 2, *Criminal Law and International Crimes*, and vol. 3, *Civil Remedies*, Geneva, 2008. Available from the website of the International Commission of Jurists: www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes.

¹²⁴ Human Rights Council resolution 8/7 of 18 June 2008, para. 4.

77. Mr. SABOIA (Vice-Chairperson) said that the Planning Group would be composed of Mr. Nolte (Chairperson), Mr. Cafilisch, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Petrič, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Mr. Park, *ex officio*, and himself.

The meeting rose at 1 p.m.

3301st MEETING

Thursday, 19 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kamto, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, 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 (*concluded*)

1. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to congratulate the Special Rapporteur on his detailed and comprehensive second report (A/CN.4/690), which dealt with a topic whose relevance could not be underestimated. The regrettable frequency with which crimes against humanity occurred in today's turbulent and dangerous world called for strong measures, legal or otherwise, aimed at preventing such crimes and punishing their perpetrators. A convention on crimes against humanity, solely by virtue of its existence, would help to stir the conscience of humankind and promote efforts to that end. His conviction about the need for the Commission to deal with the topic in a serious and profound manner was strengthened by, among others, cases of crimes against humanity in his own country, Mozambique. In that connection, he would strongly recommend that the Special Rapporteur should consult the report entitled "Summary of Mozambican refugee accounts of principally conflict-related experience in Mozambique", also known as the "Gersony report", which had been commissioned and published by the United States Department of State in April 1988.

2. In general, he agreed with the six new draft articles proposed by the Special Rapporteur in his second

report. Draft article 5, which dealt with criminalization under national law, was of crucial importance, since, as stated by the Special Rapporteur in paragraph 15 of his second report, the prosecution and punishment of persons for crimes against humanity must operate at the national level to be fully effective. Furthermore, as other Commission members had correctly pointed out, clearly established measures to criminalize and punish crimes against humanity under national law were also necessary in order to abide by the fundamental criminal law principles of *nullum crimen sine lege* and *nulla poena sine lege*.

3. With regard to the wording of draft article 5, paragraph 2, he agreed that the most appropriate language to use was that of article 28 of the Rome Statute of the International Criminal Court. The Statute had become a landmark in the history of treaties and a yardstick against which to measure other legal instruments that aimed to punish the perpetrators of heinous crimes. It was therefore important that, whenever possible, the Commission should adhere to its letter and spirit. As to draft article 5, paragraph 3 (*b*), he concurred with the Special Rapporteur that the offences referred in the draft article should not be subject to any statute of limitations.

4. The issue of corporate criminal liability, to which the Special Rapporteur devoted paragraphs 41 to 44 of his second report, was an important one that warranted closer examination. While some members had argued that the matter should be left to the discretion of national legislators, he agreed with Ms. Jacobsson, Mr. Kamto and Mr. Vázquez-Bermúdez that it should be addressed in the body of the draft articles. The Commission must be guided by the object and purpose of the future convention and ensure that all impunity gaps were completely closed. He saw no reason why a corporation that had engaged in the acts defined in draft article 3¹²⁶ should escape liability under that convention; no corporate veil or indirect immunity should be allowed to cover any company that benefited from conflicts around the world. In order for the Commission to develop a more solid position on that issue, it would be helpful if a brief concept note could be prepared, together with a proposal for a draft article on corporate criminal responsibility.

5. In paragraphs 150 to 167 of his second report, the Special Rapporteur had provided an excellent overview of the all-important principle of *aut dedere aut judicare*, the core objective of which was to promote and enhance international cooperation in the fight against impunity. He therefore welcomed its inclusion in draft article 9, paragraph 1, which closely followed the so-called "Hague formula" and previous work of the Commission. He had no problem with draft article 9, paragraph 2, which was perfectly acceptable.

6. He endorsed the road map for the future programme of work, outlined by the Special Rapporteur in paragraphs 202 to 204 of his second report. The topic rested on a firm political and legal footing; any change of direction at the current juncture would be unwise. In conclusion, he supported the referral of the six draft articles to the Drafting Committee.

¹²⁶ *Yearbook ... 2015*, vol. II (Part Two), pp. 37–47.