

Document:-  
**A/CN.4/3312**

**Summary record of the 3312th meeting**

Topic:  
**Crimes against humanity**

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80. Mr. CANDIOTI said that he agreed with Sir Michael's proposal. The Drafting Committee had stated the previous year that some parts of the preamble were provisional; the Commission should continue to move forward on that basis.

81. Mr. MURASE (Special Rapporteur) said that he endorsed Sir Michael's suggestion.

82. The CHAIRPERSON, speaking in his personal capacity, said that he welcomed the emerging consensus with respect to the proposal that the Commission refer the draft guidelines, as proposed in the third report, to the Drafting Committee, on the understanding that other matters might be raised in the Drafting Committee; there was no need to make a general practice statement.

83. Mr. HMOUD said that the proposals contained in the third report should be forwarded to the Drafting Committee without any qualification or understanding.

84. The CHAIRPERSON said that he took it that the Commission wished to refer draft guidelines 3, 4, 5, 6 and 7, together with the fourth draft preambular paragraph, as proposed in the third report, to the Drafting Committee.

*It was so decided.*

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

[Agenda item 1]

85. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of protection of the atmosphere was composed of Mr. Forteau, Mr. Hmoud, Mr. Kittichaisaree, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Saboia, Mr. Vázquez-Bermúdez, Sir Michael Wood, together with Mr. Murase (Special Rapporteur) and Mr. Park, *ex officio*.

*The meeting rose at 1.15 pm.*

### **3312th MEETING**

*Thursday, 9 June 2016, at 10 a.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Caflich, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, 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]

#### REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the report of the Drafting Committee on the topic "Crimes against humanity" (A/CN.4/L.873).

2. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted eight meetings, from 24 May to 2 June 2016, to its consideration of the topic of crimes against humanity and had examined the six draft articles initially proposed by the Special Rapporteur in his second report (A/CN.4/690), together with the reformulations he had presented in response to the comments and concerns expressed in the plenary. At the current session, the Drafting Committee had provisionally adopted six draft articles on the topic.

3. He wished to pay tribute to the Special Rapporteur, whose guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also thanked the members of the Drafting Committee for their active participation and valuable contributions, as well as the secretariat for its invaluable assistance.

4. Draft article 5, entitled "Criminalization under national law" as proposed by the Special Rapporteur in his second report, set out several important obligations of each State relating to the establishment of crimes against humanity as offences under its criminal law. In addition to obliging the State to regard such crimes as offences under its criminal law, the draft article addressed the associated modes of liability, the responsibility of superiors for such crimes, the fact that the orders of a Government or of a superior did not exclude criminal responsibility, the inapplicability of a statute of limitations for crimes against humanity, and the issue of penalties. Those issues were addressed in turn in each of the draft article's six paragraphs.

5. Paragraph 1 read: "Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law." That provision had not been included in the draft article initially proposed by the Special Rapporteur in his second report. He recalled that, in the plenary debate, it had been proposed that a link be established between the State's obligation to make crimes against humanity an offence under its national law and the definition of such crimes set out in paragraphs 1 to 3 of draft article 5. The members of the Drafting Committee had shared the view that the obligation of criminalization under national law implied that the State should not only take account of the various modes of criminal responsibility in its legislation, but also expressly make "crimes against humanity", as such, offences under criminal law.

\* Resumed from the 3307th meeting.

\*\* Resumed from the 3301st meeting.

6. A similar approach had been followed in various existing treaties in relation to the obligation to criminalize conduct in national law, such as in article 4 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment and in article 4 of the International Convention for the Protection of All Persons from Enforced Disappearance, which had served as the model for paragraph 1.

7. Draft article 5, paragraph 2, provided:

“Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

“(a) committing a crime against humanity,

“(b) attempting to commit such a crime; and

“(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.”

8. The purpose of that provision was to ensure that States criminalized all modes of liability, including committing, attempting to commit and other forms of participation in crimes against humanity.

9. A discussion had taken place as to how detailed such a provision should be. Most existing treaties indicated in general terms the various modes of liability to be included in national legislation in order to take account of the fact that all States already had fully functioning criminal law systems that contained long-standing and well-developed doctrine and jurisprudence defining the various forms of participation. If much more detail were provided, as was the case in the Rome Statute of the International Criminal Court, States might have difficulties in adjusting to rules that departed from their criminal law and jurisprudence.

10. The Drafting Committee had therefore decided to adopt for paragraph 2 the general formulation proposed in the Special Rapporteur’s second report for paragraph 1, without any changes. It had considered that a detailed provision, while appropriate in the context of creating an international criminal court or tribunal, was not required for a series of draft articles intended to be incorporated into an existing national criminal system. However, as the structure of the paragraph had been modified, the three principal modes of liability now appeared in three separate subparagraphs.

11. The Drafting Committee had also discussed the possibility of referring expressly to “incitement” as one of the modes of participation listed in subparagraph (c). It had acknowledged the significance of that particular mode of liability in the context of crimes against humanity, but had eventually decided not to refer to it in paragraph 2, in part because the term “incitement” had not been included in certain international treaties, such as the Rome Statute of the International Criminal Court, and in part because the concept did not exist in some national legal systems. Members of the Drafting Committee had considered that the concept of incitement was covered under the concepts of “soliciting” and “inducing” in subparagraph (c), and that would be reflected in the commentary.

12. The Drafting Committee had noted that the concept of “contributing” mentioned in subparagraph (c) covered the possibility of contributing to the commission or attempted commission of a crime against humanity by a group of persons acting with a common purpose. It had considered whether to elaborate further in the draft article on that particular mode of liability, but had considered it preferable to keep a more general reference, again given the differences in national criminal systems.

13. Paragraph 3 addressed the criminal responsibility of military commanders and other superiors for offences committed by subordinates in certain circumstances. That type of criminal liability, often referred to as “command responsibility”, was covered in a number of international instruments, in particular the statutes of international criminal courts and tribunals. Some of those instruments, such as the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), addressed the matter in general terms, while others provided more detail on situations in which acts committed by subordinates engaged the criminal responsibility of a military commander or other superior. While many national legal systems recognized the concept of command responsibility, State practice in that area was uneven and might benefit from greater harmonization based on a more contemporary definition. The Drafting Committee had thus generally agreed that it should opt for a more detailed approach, modelled on article 28 of the Rome Statute of the International Criminal Court, as the Special Rapporteur had suggested in his second report. The Drafting Committee had maintained the text proposed by the Special Rapporteur for draft article 5, paragraph 2, with a minor change to the *chapeau* in the English version, with the order of the words “also shall” being inverted to read “shall also”. Subparagraphs (a) and (b), which dealt with the criminal liability of military commanders or persons effectively acting as such, and the superior and subordinate relationships not described in subparagraph (a), respectively, then reproduced the provisions of article 28 of the Rome Statute of the International Criminal Court.

14. Paragraphs 4, 5 and 6 corresponded to the subparagraphs of the third paragraph of draft article 5 as proposed by the Special Rapporteur. Given that the three subparagraphs dealt with different, though interrelated, issues, the Drafting Committee had deemed it appropriate, in the light of the suggestions made in the plenary, to separate them into three separate paragraphs.

15. Paragraph 4 read: “Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.”

16. Since all jurisdictions addressing crimes against humanity permitted grounds for excluding criminal responsibility, the purpose of that paragraph was to exclude orders of a Government or of a superior from such grounds. For the first part of the sentence, the Drafting Committee had used the wording of the *chapeau* of paragraph 3 proposed by the Special Rapporteur

in his second report. For the sake of consistency with paragraphs 1 and 2, the Drafting Committee had decided to add the expression “under its criminal law” to paragraph 3, which also focused on an important aspect of criminalization in the national legal order. It should be noted that, in that context, the expression broadly encompassed not only legislative measures, but also other measures that a State could employ to fulfil its obligation and, in general, to all national law that was applied in the context of criminal proceedings, including the Constitution. That would be made clear in the commentary. For the same reasons, the expression in question had been used consistently in paragraphs 4, 5 and 6.

17. Paragraph 4 referred not only to orders of a superior but also to those of a Government. It had followed from the plenary debate that such a reference, which already appeared in article 8 of the Charter of the International Military Tribunal<sup>278</sup> and was firmly established in international law, needed to be made explicitly.

18. Paragraph 5 provided that: “Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.” The purpose of the provision was to ensure that States did not include in their legislation a rule forbidding prosecution of an alleged offender for a crime that had been committed more than a specified number of years prior to the initiation of the prosecution. A rule on statutes of limitations had not been systematically included in all treaties dealing with crimes. However, article IV of the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted in 1968, required States parties to adopt “any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment” of those two types of crimes. It had been agreed in the Drafting Committee that such a provision was necessary in the draft articles.

19. Paragraph 5 corresponded to the proposal made in the second report under draft article 5, paragraph 3 (b). The expression “under its criminal law” had been added for the reasons already explained. Moreover, the word “offence” was used in the plural instead of the singular.

20. Finally, paragraph 6 read: “Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.”

21. As indicated in the second report, international treaties on crimes did not dictate the penalties to be imposed or not to be imposed but, rather, left to States parties the discretion to determine the appropriate punishment, taking into account the particular circumstances of the offender and the offence. The purpose of that provision was to ensure that, while recognizing that the penalties attached to crimes against humanity might

vary under the criminal law of each State, such penalties must be proportionate to the gravity of the offences. The formulation used in paragraph 6, which appeared in numerous treaties, such as article 4 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, thus allowed a balance to be struck between, on the one hand, allowing States a certain degree of discretion in terms of punishment, taking into account the particular circumstances of the offence, and, on the other, indicating to them that such punishment must be proportionate to the gravity of the crime against humanity in question.

22. Paragraph 6 corresponded to the text of draft article 5, paragraph 3 (c), as proposed in the second report. As in paragraph 5, the expression “under its criminal law” had been added, and the word “offence” had been replaced with the plural.

23. Draft article 6, entitled “Establishment of national jurisdiction”, as proposed in the second report, set out the obligation of States to establish their jurisdiction over crimes against humanity in certain circumstances. It comprised three paragraphs.

24. Paragraph 1 read:

“Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in the following cases:

“(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

“(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State’s territory;

“(c) when the victim is a national of that State if that State considers it appropriate.”

25. That paragraph concerned the obligation of States to establish several types of national jurisdiction. In particular, it addressed the establishment of territorial jurisdiction, active personality jurisdiction and passive personality jurisdiction. The provision, which appeared in a number of treaties, including article 5 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, sought to make it difficult for an alleged offender to escape a State’s jurisdiction.

26. Following the model of existing treaties, such as the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, draft article 6 provided that each State should “take the necessary measures to establish its jurisdiction over” the relevant offences in three cases.

27. The first case, set out in subparagraph (a), concerned establishing jurisdiction based on the location of the commission of the crime, often referred to as “territorial jurisdiction”. Consistent with the terminology used in

<sup>278</sup> 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.

draft article 4,<sup>279</sup> the proposal made in the second report referred to any territory under “the jurisdiction or control” of a State. The Drafting Committee, however, had considered it appropriate to refer to “any territory under [the State’s] jurisdiction”. The change was not substantive in nature, as the expression “any territory under its jurisdiction” was intended to encapsulate the *de jure* territory of the State, as well as the territory under its *de facto* control. Rather, the drafting change had been made to align the terminology used in the draft articles with that used in relevant treaties on the subject, such as article 5, paragraph 1 (a), of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which referred only to “territory under its jurisdiction” to cover both situations. The text of draft article 4 would therefore need to be reviewed in the future to ensure consistency.

28. The second case, set out in subparagraph (b), concerned “active personality jurisdiction”, a common form of jurisdiction in national law based on the nationality of the alleged offender. He recalled that proposals had been made in the plenary for the consideration of the closely related issue of stateless persons. The Drafting Committee had therefore included in draft article 6 an optional basis of State jurisdiction relating to “a stateless person who is habitually resident in that State’s territory”. The adopted formulation was based on the language of existing conventions, such as article 5, paragraph 1 (b), of the 1979 International Convention against the taking of hostages.

29. The third case, mentioned in subparagraph (c), concerned “passive personality jurisdiction”, which was based on the nationality of the victim. Although that type of jurisdiction existed in many national criminal systems, it remained controversial, which was why, as in many existing treaties, it was provided for on an optional basis, as reflected by the words “if that State considers it appropriate”.

30. Paragraph 2 read: “Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.”

31. The paragraph indicated that a State should also establish its jurisdiction over the offences based solely on the presence of the alleged offender on its territory. The text of paragraph 2 had been amended, following the model of article 3 of the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, and article 5 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, in order to use the phrase “cases where” and to refer to territory in the same manner as previously indicated. As in other treaties, under paragraph 2, States were obliged to establish such jurisdiction, while acknowledging the possibility that they could extradite or surrender the alleged offender to another jurisdiction, a matter that was addressed in greater detail in other draft articles, such as in the context of exercising jurisdiction under article 9.

32. According to paragraph 3, “[t]he present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law”. The purpose of that provision was to indicate that the draft articles did not preclude a State from adopting other types of criminal jurisdiction under its national law relating to crimes against humanity. The Drafting Committee had deleted the opening part of paragraph 3, as proposed in the second report, which contained a “without prejudice” clause referring to “applicable rules of international law”. The members of the Committee had agreed that, given the ongoing debate on the exercise of national criminal jurisdiction, it would be more appropriate, at that stage, for the Commission not to include such a clause in a draft article. The Drafting Committee had therefore adopted a formulation used in many existing and widely adhered to international instruments.

33. Draft article 7, entitled “Investigation”, consisted of a single paragraph. Its purpose was to trigger an investigation by the State where crimes against humanity were occurring or had occurred. It read: “Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.”

34. He recalled that the draft article, as proposed in the second report, had given rise to a number of comments and suggestions during the plenary debate. The proposal made in the second report had addressed two issues, namely investigation by certain States and cooperation among States. In the light of the plenary debate, the Drafting Committee had considered that the issue of cooperation among States should be dealt with in other draft articles. The Committee members had also agreed that it was for the State in whose territory crimes against humanity had occurred or were occurring to deal with the issue of investigation, an approach that followed models of existing international instruments. For that reason, the formulation of draft article 7 was modelled on article 12 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. In particular, the Drafting Committee had deemed it appropriate to use the expressions “proceed to a prompt and impartial investigation” and “reasonable ground to believe”, which were accepted standards in international practice and jurisprudence. In addition, for the sake of consistency with the other draft articles, draft article 7 was applicable when “crimes against humanity have been or are being committed in any territory under [the] jurisdiction” of the State.

35. The purpose of draft article 8, entitled “Preliminary measures when an alleged offender is present”, was to set forth the obligation of a State to exercise its jurisdiction when an alleged offender was present on any territory under its jurisdiction. Each of the draft article’s three paragraphs addressed a category of measures, namely the obligation to take the alleged offender into custody if necessary to ensure his or her presence, the obligation to carry out a preliminary inquiry and the obligation to notify other relevant States.

<sup>279</sup> *Yearbook ... 2015*, vol. II (Part Two), pp. 47–52.

36. The Drafting Committee had considered that the structure and text of draft article 8 should be modelled on article 6 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, whose provisions could be reproduced, *mutatis mutandis*, in the context of crimes against humanity.

37. Paragraph 1 read: "Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence referred to in draft article 5 is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted."

38. The purpose of that provision was to set forth the obligation of each State to take into custody any person suspected of having committed a crime against humanity, if necessary to ensure his or her presence pending an investigation to determine whether the matter should be submitted to prosecution. Such prosecution could be carried out by the authorities of that State, or of other relevant States, as well as by international criminal courts or tribunals. The provision was modelled on article 6, paragraph 1, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which had been reproduced with some minor editorial changes. In line with the approach taken for other draft articles, paragraph 1 referred to the territory under the jurisdiction of the State and also made a distinction between criminal, extradition and surrender proceedings.

39. Paragraph 2 read: "Such State shall immediately make a preliminary inquiry into the facts." That type of preliminary investigation was common in most national criminal systems and a provision of that kind appeared in many international instruments. In essence, the provision set forth the obligation of a State to conduct a preliminary investigation when it had information that an alleged offender was present in any territory under its jurisdiction. The adopted text was exactly the same as article 6, paragraph 2, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

40. Finally, paragraph 3 read: "When a State, pursuant to this draft article, has taken the person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction." The purpose of that provision was to identify an obligation for a State exercising its criminal jurisdiction to notify other States that had or might have established jurisdiction over the offences so that they could consider whether to request extradition of the alleged offender. The Drafting Committee had deemed it appropriate to reproduce the formulation of article 6, paragraph 4, of the Convention against torture and other cruel, inhuman or degrading treatment

or punishment, with only minor editorial changes to bring the text into line with the draft articles.

41. Draft article 9, entitled "*Aut dedere aut judicare*", set out the obligation to extradite or prosecute, which appeared in a number of treaties, according to which a State in whose jurisdiction an alleged offender was present was obliged either to prosecute him or her itself or to extradite the alleged offender to another State or to an international criminal court or tribunal. The draft article consisted of a single paragraph, which read: "The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

42. The first sentence set forth the obligation to extradite, surrender or prosecute, as proposed in draft article 9, paragraph 1, of the Special Rapporteur's second report. The members of the Commission had generally supported the provision in the plenary. The Drafting Committee had therefore introduced only linguistic changes, using the expression "territory under whose jurisdiction" for the sake of consistency between the draft articles.

43. The formulation adopted drew upon the provisions of a number of existing instruments, in particular article 11, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance, in which the concept of "surrender" of the offender appeared. The introduction of that concept expressly recognized the possibility that States might surrender the alleged offender to a competent international criminal tribunal. On reflection, the Drafting Committee had decided not to limit the concepts of "extradition" and "surrender" to association solely with a State or an international criminal tribunal, respectively. Given that the terminology used in national criminal systems varied, the Committee had considered it preferable to use a formulation that covered all possible situations, including sending the alleged offender to the authorities of another State or to an international tribunal.

44. The Drafting Committee had also considered whether it should be specified, as was the case in article 11, paragraph 1, of International Convention for the Protection of All Persons from Enforced Disappearance, that the sending State must have recognized the jurisdiction of the "international criminal tribunal". It had been decided, however, that such a qualification was not necessary, as a State that was not already bound under international law to send a person to an international criminal tribunal could choose to submit the matter to prosecution in its own national criminal system.

45. The Drafting Committee had also considered whether to state, as was done in some treaties, that the obligation contained in the draft article applied to States "without exception whatsoever and whether or not the offence was committed in a territory under its jurisdiction". The Committee had concluded, however, that the unequivocal nature

of the obligation did not need to be stressed in the draft article itself, but rather in the commentary.

46. The second sentence of the paragraph related to an issue addressed in draft article 9, paragraph 2, as proposed in the Special Rapporteur's secpmd report. For ease of reading, the Committee had simplified the formulation put forward by the Special Rapporteur, using the wording of several existing instruments to signal that, if the State submitted the matter to its competent authorities for prosecution, the latter must take their decision in the same manner as for any other offence of a grave nature under the law of that State.

47. The title of draft article 10, "Fair treatment of the alleged offender", had been kept. The draft article consisted of three paragraphs, the first of which read: "Any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law."

48. The purpose of that provision was to set forth the obligation of a State to guarantee fair treatment to an alleged offender against whom it had taken certain measures. The text provisionally adopted by the Drafting Committee was close to the text proposed by the Special Rapporteur. The members of the Drafting Committee had considered, however, that, in the light of the relevant treaties, a general formulation was appropriate, rather than a very detailed one modelled on the provisions of the International Covenant on Civil and Political Rights and the Vienna Convention on Consular Relations.

49. The term "legal measures" had been simplified to "measures" in order to avoid restricting the rights of the alleged offenders to certain limited situations. Moreover, the word "provided" had been replaced with "guaranteed", in line with the terminology generally employed in existing treaties.

50. The text of the second paragraph was:

"Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

"(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

"(b) to be visited by a representative of that State or those States; and

"(c) to be informed without delay of his or her rights under this paragraph."

51. Under that paragraph, a person detained in a State of which he or she was not a national for offences referred to in draft article 5 was entitled to the rights listed in subparagraphs (a), (b) and (c).

52. A proposal had been made in the plenary to reproduce the wording of article 36 of the Vienna Convention on Consular Relations. The members of the Drafting Committee had considered, however, that it was not a matter of aligning the provision with that article but rather of ensuring that certain key steps were taken so that the alleged offender's rights to consular assistance, under that Convention, other relevant conventions and customary international law, could be applied as they normally would. The formulation used therefore drew on treaties adopted after the Vienna Convention on Consular Relations, including the 1997 International Convention for the Suppression of Terrorist Bombings, which provided for the right to consular assistance in more general terms.

53. It was to be noted that, in the *chapeau* of paragraph 2, reference was made to a person "in prison, custody or detention". The purpose was to cover all possible situations in which a person accused of crimes against humanity could be deprived of his or her liberty and, consequently, of external communication. Under subparagraph (a), the detainee was entitled to communicate with a representative of the State of which he or she was a national or, in the case of a stateless persons, with a representative of the "State which, at that person's request, is willing to protect that person's rights". That allowed for the possibility for a stateless person to communicate with a representative of his or her State of residence or any other State willing to offer assistance. Subparagraphs (b) and (c) drew on the provisions of existing treaties, such as article 7, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings.

54. Paragraph 3 was a new provision. The members of the Drafting Committee had considered it appropriate to add it to cover cases in which the State might limit the alleged offender's right to communicate for the sake of protecting witnesses or preserving evidence. The paragraph read: "The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended."

55. The provision was modelled on the text of existing conventions, such as article 7, paragraph 4, of the International Convention for the Suppression of Terrorist Bombings.

56. He recalled that it had been suggested in the plenary that the Special Rapporteur draft a concept paper on the issue of criminal responsibility of legal persons so that the Drafting Committee could examine the issue when considering the six draft articles. The requested document, which put forward three options, had been prepared in advance of the Drafting Committee's first meeting. However, due to a lack of time, the Committee had had to postpone consideration of the paper until the second part of the current session.

57. In conclusion, he said that he hoped that the Commission would be in a position to adopt the draft articles on crimes against humanity, as presented.

58. The CHAIRPERSON invited the members of the Commission to adopt the draft articles, starting with draft article 5.

Draft article 5. *Criminalization under national law*

59. Ms. ESCOBAR HERNÁNDEZ proposed that, in the title of the draft article in the Spanish version, the word *Tipificación*, which was incorrect, be replaced with *Incrimación*.

60. Mr. CANDIOTI said that he supported the adoption of the draft article, but wished to make a comment in relation to subparagraphs (a) (ii) and (b) (iii) of paragraph 3. Those provisions provided for the criminal responsibility of military commanders or superiors who failed to report the commission of a crime to the competent authorities to enable them to conduct the necessary investigations and prosecutions. However, as the provisions criminalized the concealment of a crime – an act that was often considered as serious as attempt, incitement and complicity – there was no reason that they should apply only to military commanders and superiors. In the context of crimes against humanity, anyone could be involved in concealment, as had been seen during the period of enforced disappearances and during the Second World War, when extermination camps had been made to look like accommodation and leisure centres to Red Cross inspectors. Since the concealment of crimes against humanity was a serious crime in its own right, the Commission might consider it appropriate to examine the matter in greater depth on second reading.

61. Mr. MURPHY (Special Rapporteur) thanked Mr. Candiotti for having raised the important issue of concealment of crimes against humanity and said that he planned to discuss it even before the second reading, in the context of new draft articles that would be developed.

62. Mr. CANDIOTI stressed that, as had been seen in the case of Argentina, it was sometimes the competent authorities themselves, in particular the judicial organs of the Governments responsible for crimes against humanity, who endeavoured to cover up the facts.

63. Mr. HMOUD said that treatment of the issue of cover-up varied depending on the national law of the State. Under Jordanian criminal law, for instance, concealment was considered one of the possible forms of participation in the commission of the crime and, in his view, that was also true in the draft articles as they stood. That said, the Commission could revisit the issue on second reading.

64. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that draft article 5, paragraph 2 (c), which set out the various modes of participation, including aiding, abetting or otherwise assisting in the commission of a crime against humanity, seemed to cover the concept of concealment.

65. Mr. VÁZQUEZ-BERMÚDEZ recalled that, during the debates on the Special Rapporteur's report, he had pointed out that concealment should be mentioned in the draft articles as an act that constituted a crime against humanity. However, some members of the Drafting

Committee had not supported that proposal, as they considered that the concept was covered by draft article 5, paragraph 2. The Commission should resume its discussion of the issue when it examined the new draft articles to be submitted by the Special Rapporteur or on second reading of the draft articles.

66. Mr. CANDIOTI said that the acts listed in subparagraph 2 (c) of draft article 5 took place before or after the commission of the crime, whereas concealment necessarily happened after the act had been committed. It could therefore not be considered to be covered by that subparagraph.

67. The CHAIRPERSON thanked Mr. Candiotti for his explanations and said that the discussion of the issue would be resumed in the second part of the session. In the light of the rich debate that had just taken place, he did not consider it necessary to adopt draft article 5 paragraph by paragraph, but instead proposed adopting it as a whole.

*Draft article 5 was adopted subject to an amendment in the Spanish version.*

Draft article 6. *Establishment of national jurisdiction*

Paragraph 1

68. Mr. KITTICHAISAREE said that, although he did not object to the adoption of paragraph 1, he wished to place on record his opinion concerning subparagraph (c), which was modelled on a formulation used in several existing international instruments, and made the establishment of passive personality jurisdiction optional. In that regard, he wished to cite an extract from the joint separate opinion by three judges of the International Court of Justice, Judges Higgins, Kooijmans and Buergenthal, attached to the judgment handed down by the Court in the *Arrest Warrant of 11 April 2000* case, which read: "Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries [including the United States of America and France], and today meets with relatively little opposition, at least so far as a particular category of offences is concerned" (para. 47 of the joint separate opinion).

69. Given that this opinion had been published more than 14 years earlier and that the establishment of passive personality jurisdiction for serious crimes had become a principle of customary international law, he was of the view that subparagraph (c) should have been formulated such that the establishment of jurisdiction over crimes against humanity was an obligation rather than a choice for the State of nationality of the victim. In that way, the Commission could have filled the legal void left in 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which had chosen not to adopt a provision authorizing the State of nationality of the victim to exercise jurisdiction under the Rome Statute of the International Criminal Court.

70. Mr. MURPHY (Special Rapporteur) said that he had taken note of Mr. Kittichaisaree's comments and was grateful to him for not requesting an amendment to subparagraph (c). One of the reasons why the Drafting Committee

had decided to use the formulation that appeared in the current version of the draft was that, even though, according to the opinion of the three judges cited by Mr. Kittichaisaree, the principle of passive personality jurisdiction was broadly accepted, that formulation appeared in the international instruments adopted since the publication of that opinion, including the International Convention for the Protection of All Persons from Enforced Disappearance – which suggested that States continued to have a preference for a provision that did not make the attribution of jurisdiction to the State of nationality of the victim obligatory.

71. The CHAIRPERSON thanked the Special Rapporteur for his explanations but said that he shared the views expressed by Mr. Kittichaisaree. As there were no comments on the other paragraphs of draft article 6, he took it that the members wished to adopt the draft article as a whole.

*Draft article 6 was adopted.*

Draft article 7. *Investigation*

*Draft article 7 was adopted.*

Draft article 8. *Preliminary measures when an alleged offender is present*

*Draft article 8 was adopted.*

Draft article 9. *Aut dedere aut judicare*

*Draft article 9 was adopted.*

72. Mr. KITTICHAISAREE said that it should be noted in the commentaries to draft articles 7, 8 and 9 that those articles should be read in parallel with the Commission's final report on the obligation to extradite or prosecute (*aut dedere aut judicare*), published in 2014.<sup>280</sup>

73. Mr. MURPHY (Special Rapporteur) said that this proposal would be taken into account in the commentary.

Draft article 10. *Fair treatment of the alleged offender*

*Draft article 10 was adopted.*

*The report of the Drafting Committee on crimes against humanity, as a whole, as contained in document A/CN.4/L.873, was adopted.*

74. Mr. PETER said that the issue of responsibility of legal persons, which the members had discussed during their consideration of the Special Rapporteur's second report, had not been addressed in the Drafting Committee's report.

75. The CHAIRPERSON said that the issue would be considered by the Drafting Committee during the second part of the session and that the Special Rapporteur would present his concept paper on the issue at that stage.

76. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that, as he had indicated in his oral presentation,

the Drafting Committee had not had time to address the issue of the responsibility of legal persons, but would do so during the second part of the session since, according to the provisional programme of work drawn up by the secretariat, it should have a meeting allocated to preparing a draft article on the issue, which would then be submitted to the plenary for consideration.

*The meeting rose at 11.20 a.m.*

### 3313th MEETING

*Friday, 10 June 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, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### **Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*concluded*)\* (A/CN.4/689, Part II, sect. D, A/CN.4/694, A/CN.4/L.874)**

[Agenda item 4]

#### REPORT OF THE DRAFTING COMMITTEE

1. Mr. ŠTURMA (Chairperson of the Drafting Committee) introduced the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Drafting Committee on first reading and as contained in document A/CN.4/L.874. He said that the Committee had devoted four meetings, from 1 to 6 June 2016, to its consideration of the draft conclusions. It had examined two draft conclusions originally proposed by the Special Rapporteur in his fourth report (A/CN.4/694), together with a number of amendments to respond to suggestions made or concerns raised during the debate in plenary; it had also considered the structure of the entire set of draft conclusions, of which there were 13, in light of proposals made by the Special Rapporteur.

2. He commended the Special Rapporteur, whose constructive approach and flexibility had greatly facilitated the work of the Drafting Committee. Thanks were also due to the other members of the Committee and the Secretariat for their significant contributions.

3. The draft conclusions provisionally adopted by the Drafting Committee had been divided into four parts, on

<sup>280</sup> *Yearbook ... 2014*, vol. II (Part Two), pp. 92 *et seq.*, para. 65.

\* Resumed from the 3307th meeting.