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Summary record of the 3348th meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-NINTH SESSION

Held at Geneva from 1 May to 2 June 2017

3348th MEETING

Monday, 1 May 2017, at 3.05 p.m.

Temporary Chairperson: Mr. Gilberto Vergne SABOIA

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-ninth session of the International Law Commission.

Election of officers

Mr. Nolte was elected Chairperson by acclamation.

Mr. Nolte took the Chair.

2. The CHAIRPERSON thanked the members of the Commission for the trust they had placed in him and said that he would make every effort to ensure that the current session was productive and successful.

Mr. Valencia-Ospina was elected First Vice-Chairperson by acclamation.

Mr. Hassouna was elected Second Vice-Chairperson by acclamation.

Mr. Rajput was elected Chairperson of the Drafting Committee by acclamation.

Mr. Aurescu was elected Rapporteur by acclamation.

Introductory remarks of the Chairperson

3. The CHAIRPERSON extended a special welcome to the new members and recalled that, when he had first joined the Commission, he had wondered whether 34 independent, eminent persons from all the regions of the world would be able to agree on something meaningful. He had quickly learned, however, that they could, not least owing to the common institutional spirit, or *esprit de corps*, within the Commission. The latter's strength was due to its members' intellectual rigour and capacity, their technical knowledge and vision, their respect for each other's views, their ability to dialogue and their discipline and hard work. The Commission was also fortunate to be supported by an extremely knowledgeable and competent secretariat.

4. In 2007, before attending his first session, he had read some academic articles that had cast doubt on the future of the Commission. Some commentators had been of the opinion that the Commission had exhausted suitable topics, while others thought that a commission that dealt with general matters of international law was obsolete, on account of the multitude of special regimes that had come into being. Indeed, initially he had also felt that the Commission focused mainly on completing old topics. He had, however, discovered that the Commission, albeit slow, was receptive and creative. By 2012, the Commission had embarked upon a completely different programme of work and, since then, it had been so productive that the time might have come to review its working methods in order to ensure that its output was thoroughly considered before submission to States' scrutiny.

5. The success and productivity of the Commission depended not only on the initiative and hard work of its members, but also on whether the climate of international relations was conducive to agreement on general questions of international law. In retrospect, the history of the Commission showed that there had been phases when it had been more productive than others. Current indications from a variety of regions suggested that the world was entering a period when it might be more difficult to reach agreement among States on some significant issues. If that were true, the Commission's

responsibility as a guardian of the general rules of international law was all the greater. The Commission was not just another diplomatic negotiating venue for States. Its competitive advantage stemmed from its special rapporteurs' rigorous and impartial scientific research and from broad-minded debate among its members, to whom States had entrusted the preliminary identification and the cultivation of common legal rules and interests, including those of humankind as a whole. That task was especially important when States were reluctant to move forward and agree on the development of international law. The ability of the Commission members to reach agreement on such matters became all the more valuable when the environment outside the meeting room was challenging. He therefore hoped that the current session would set an example of how effective the Commission could be.

Adoption of the agenda (A/CN.4/702)

The agenda was adopted.

6. The CHAIRPERSON invited the Bureau and the special rapporteurs to join him to discuss the programme of work and a number of organizational matters.

The meeting was suspended at 3.35 p.m. and resumed at 4.20 p.m.

Organization of the work of the session

[Agenda item 1]

7. The CHAIRPERSON drew attention to the proposed programme of work for the first two weeks of the Commission's current session, which would begin with the consideration of the topic "Crimes against humanity".

8. The Drafting Committee on provisional application of treaties would seek to conclude the work left over from 2016 with a view to the Commission taking a decision, during the first part of the session, on the draft guidelines proposed by the Drafting Committee on the basis of the Special Rapporteur's first four reports.[1]

9. The current year would be a particularly important one for the Planning Group, which would be chaired by Mr. Valencia-Ospina, as it would have to make the necessary recommendations on events to commemorate the seventieth anniversary of the Commission in 2018. It would also have to examine the proposals for the inclusion of new items in the Commission's programme of work.

10. He took it that the Commission agreed to the proposed programme of work for the first two weeks of the session.

It was so decided.

[1] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664 (first report); *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675 (second report); *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687 (third report); and *Yearbook … 2016*, vol. II (Part One), document A/CN.4/699 and Add.1 (fourth report).

Crimes against humanity[2] (A/CN.4/703, Part II, sect. A,[3] A/CN.4/704,[4] A/CN.4/L.892 and Add.1[5])

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

11. Mr. MURPHY (Special Rapporteur), introducing his third report on crimes against humanity (A/CN.4/704), said that he wished to recall, by way of background, that the Commission had decided at its sixty-sixth session to include the topic in its programme of work[6] and that its objective, as noted in the syllabus of the topic,[7] was to draft articles for what would become a convention on the prevention and punishment of crimes against humanity. The draft articles would focus on strengthening national criminal laws on crimes against humanity, with a view to enhancing States' ability to investigate alleged offenders and to prosecute or extradite them. That outcome would not interfere with, and indeed would be complementary to, the jurisdiction of international criminal tribunals such as the International Criminal Court.

12. At its sixty-seventh session, the Commission had considered the Special Rapporteur's first report on the topic[8] and had provisionally adopted draft articles 1 to 4, together with commentaries thereto.[9] At its sixty-eighth session, the Commission had considered the second report[10] and had provisionally adopted draft articles 5 to 10, together with commentaries thereto.[11]

13. While an advance copy of his third report, in English only, had been circulated to the Commission members in January 2017, the final version in all six official languages had not been available until April 2017; he hoped that the delay had not created any difficulties. Both the Commission, at its sixty-eighth session, and the Sixth Committee, at the seventy-first session of the General Assembly, had urged him to complete his work on the topic as soon as possible. Consequently, and considering that the Commission's workload for the second part of its sixty-ninth session was likely to be lighter than usual, he had made his third report somewhat longer than he had originally intended, in the interest of enabling the Commission to complete the adoption of the draft articles on first reading by the end of the sixty-ninth session.

14. The report began with an introduction that outlined the Commission's work on the topic thus far, summarized the 2016 debate on the topic in the Sixth Committee and described the purpose and structure of the report. A total

[2] For the history of the work of the Commission on this topic, see *Yearbook … 2017*, vol. II (Part Two), chap. IV, sect. A, p. 19.

[3] Available from the Commission's website, documents of the sixty-ninth session.

[4] Reproduced in *Yearbook … 2017*, vol. II (Part One).

[5] Available from the Commission's website, documents of the sixty-ninth session.

[6] See *Yearbook … 2014*, vol. II (Part Two) and corrigendum, p. 164, para. 266.

[7] *Yearbook … 2013*, vol. II (Part Two), annex II.

[8] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/680.

[9] *Ibid.*, vol. II (Part Two), pp. 33 *et seq.*, paras. 116–117.

[10] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/690.

[11] *Ibid.*, vol. II (Part Two), pp. 151 *et seq.*, para. 85.

of 39 Member States had made statements during the relevant discussion in the Sixth Committee; their comments had been generally favourable and supportive of the Commission's work, and many States had endorsed the idea that the draft articles become a convention on the prevention and punishment of crimes against humanity. In addition, the Commission continued to receive, and to post on its website, helpful information from States on their national laws and practices.

15. Chapter I of the report dealt with the rights, obligations and procedures applicable to the extradition of an alleged offender, based on the different types of extradition provisions included in various treaties addressing crimes. Criminal law treaties that addressed extradition tended to follow one of two approaches: some treaties simply imposed a general obligation on States to consider the offences referred to in the treaty to be extraditable offences under their existing and future extradition treaties, while others set forth more detailed extradition provisions that allowed the treaty itself to be used as a basis for extradition. Treaties in the second category also tended to address a wide range of issues that could arise in the context of extradition, such as the inapplicability of the political offence exception, satisfaction of the requirements of national law in the extradition process, extradition of a State's own nationals, the prohibition on extradition when the individual concerned might face persecution after extradition, and requirements of consultation and cooperation. Chapter I also included a proposed draft article that addressed those points in the context of crimes against humanity.

16. Chapter II addressed the obligation of *non-refoulement*, which made it impermissible for a State to return an individual to a territory when there were substantial grounds for believing that he or she would be in danger of a specified harm, the nature of which varied depending on the subject matter of the treaty in question. That obligation was found in a wide range of legal instruments, including conventions relating to refugees and asylum, human rights and criminal law. While there were limited exceptions to the obligation of *non-refoulement* in the specific context of conventions on refugees, including on grounds of national security, such exceptions were not included in more recent human rights treaties or treaties dealing with specific crimes. Chapter II contained a proposed draft article providing for an obligation of *non-refoulement* in the context of crimes against humanity.

17. Chapter III addressed the rights and obligations of States regarding mutual legal assistance in connection with criminal proceedings. In some treaties, mutual legal assistance provisions were minimal, typically consisting of just a general obligation to afford the greatest possible measure of assistance. Other treaties contained more detailed provisions that placed a general obligation on all States parties but also amounted to what might be described as a "mini mutual legal assistance treaty" that essentially created a detailed bilateral mutual legal assistance treaty relationship between States parties that did not otherwise have such a relationship or that elected to use the mini mutual legal assistance treaty to facilitate cooperation. Such provisions addressed topics such as the transfer of detained persons to another State to provide evidence, the designation of a central authority to handle mutual legal assistance requests, the option of having witnesses testify via videoconference, and permissible and impermissible grounds for refusing mutual legal assistance requests. Chapter III contained a proposed draft article on mutual legal assistance in the context of crimes against humanity.

18. Chapter IV addressed the participation and protection of victims, witnesses and others in relation to proceedings within the scope of the draft articles, as well as reparation for victims. Unlike many earlier treaties addressing crimes under national law, more recent treaties contained provisions concerning victims and witnesses, typically in relation to the protection of victims and witnesses appearing before courts and tribunals and the provision of reparations to victims and their families. Chapter IV contained a proposed draft article addressing those points.

19. Chapter V addressed the relationship between the draft articles and the rights and obligations of States with respect to competent international criminal tribunals, such as the International Criminal Court. While the draft articles had been crafted so as to avoid any conflict in that regard, a provision that made clear that the rights and obligations of States under the constitutive instruments of competent international criminal tribunals prevailed over their rights and obligations under the draft articles would nevertheless be valuable. Chapter V contained a proposed draft article establishing such a provision.

20. Chapter VI dealt with the issue of federal State obligations. It reviewed the practice by some States of making a unilateral declaration when signing or ratifying a treaty to exclude its application to parts of their territory. Some treaties drafted in recent years had included articles precluding States from making such declarations. Chapter VI contained a proposed draft article addressing the issue.

21. Chapter VII addressed monitoring mechanisms and dispute settlement. Various mechanisms existed for the monitoring of situations of crimes against humanity, either as such or in the context of the types of violations, for example torture, that might occur when such crimes were committed. In addition, numerous treaties, in particular human rights treaties, provided for the creation of a monitoring mechanism body, which could take the form of a committee, commission, court or meeting of States parties. One interesting development in that regard, which had not been discussed in the third report, had been the creation by the General Assembly in December 2016 of a new body to collect evidence of international crimes in the Syrian Arab Republic, the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.[12]

22. If the draft articles were transformed into a convention on the prevention and punishment of crimes against humanity, consideration might be given to the selection of one or more monitoring mechanisms to supplement existing mechanisms. The Secretariat's 2016 memorandum

[12] See General Assembly resolution 71/248 of 21 December 2016.

on existing treaty-based monitoring mechanisms[13] offered an excellent survey of the various mechanisms used in international law. The development of a new mechanism for crimes against humanity might help to ensure that States parties fulfilled their commitments under the convention, for example their commitments concerning the adoption of national laws and appropriate preventive measures, the prompt and impartial investigation of alleged offenders and compliance with their *aut dedere aut judicare* obligation. However, in his view, the selection of a particular mechanism or mechanisms depended largely on factors other than legal reasoning. In addition, choices would have to be made with regard to structure: a new monitoring mechanism might be incorporated immediately or might be developed at a later stage, as had occurred with the creation of the committee to monitor implementation of the International Covenant on Economic, Social and Cultural Rights. Lastly, a monitoring mechanism could be developed in tandem with a monitoring mechanism for the Convention on the Prevention and Punishment of the Crime of Genocide, for which there had been periodic calls in recent years. In his view, it might be best for States to select the most appropriate mechanism for a new convention on crimes against humanity. He had therefore not made a proposal for a specific mechanism.

23. Chapter VII also discussed dispute settlement clauses, which required States parties to a treaty to negotiate in the case of a dispute and, if those negotiations failed, to make use of further methods of compulsory dispute settlement, including arbitration and resort to the International Court of Justice. Chapter VII contained a proposed draft article on inter-State dispute settlement.

24. Chapter VIII addressed other issues that had arisen in the course of the Commission's discussions, specifically concealment of crimes against humanity, immunity and amnesty.

25. Chapter IX proposed a preamble highlighting a number of core elements that motivated and justified the draft articles.

26. Chapter X addressed the issue of final clauses and discussed the options open to States, in particular their options for a final clause on reservations. Although the report did not contain proposals in that regard, as the Committee did not usually include final clauses among its draft articles, chapter X would be particularly useful in the event that the draft articles were transformed into a convention.

27. Chapter XI addressed the future programme of work. In his view, if the Commission managed to conclude its work on the draft articles at the current session, it would be possible to complete the first reading. To achieve that goal, the Drafting Committee would have to complete its work on the draft articles and revisit some of the previously adopted draft articles. One issue that might be discussed, and one that had been raised in the Drafting Committee in 2016, was whether to retain draft article 5[14] as a single article or to split it into a series of draft articles. If all went well, the full set of draft articles and the commentaries thereto would be ready for the Commission's approval in the second part of the session.

28. Before ending his statement, he wished to note that the topic continued to attract considerable interest beyond the Commission. He was regularly approached by Governments, international organizations, treaty bodies, nongovernmental organizations (NGOs) and scholars. Over the previous year, he had briefed representatives of the Office on Genocide Prevention and the Responsibility to Protect and members of the Committee on Enforced Disappearances, had met with Mr. Santiago Villalpando, the Chief of the Treaty Section of the Office of Legal Affairs, had participated in an interactive dialogue with members of the Sixth Committee, had chaired a panel at the Assembly of States Parties to the Rome Statute of the International Criminal Court and had participated in various university events. He hoped to continue those efforts over the following year. Indeed, Amnesty International had invited him to participate in an upcoming workshop in Geneva at which many NGOs, the Committee on Enforced Disappearances and the Office of the United Nations High Commissioner for Human Rights would be represented. Amnesty International had published an analysis of his report,[15] which had been made available to the members of the Commission.

29. In response to the request by Mr. Hassouna at the previous session[16] for an update on the initiative launched by Belgium, the Netherlands and Slovenia to develop a mutual legal assistance and extradition treaty for the prosecution of the most serious international crimes, he said that he was not aware of any notable progress in that regard. He could, however, report that an expert group meeting might take place in late June. In the Netherlands, the Advisory Committee on Issues of Public International Law had recently recommended that the Government should support the initiative for a convention on crimes against humanity. It remained his view that those two initiatives were not in conflict.

30. Mr. HMOUD, noting that the Special Rapporteur planned to complete the first reading at the current session, said that some of the issues raised in the third report, for example monitoring mechanisms and dispute settlement, were usually left to a diplomatic conference. He wished to know whether there would be further draft articles and why the issue of inter-State dispute settlement had been addressed in the draft articles. In addition, the relationship between monitoring mechanisms and dispute settlement might require further discussion.

31. Mr. MURPHY (Special Rapporteur) said that certain issues had been addressed in the report because they had previously been discussed, at least informally, in the Commission. For several of those issues, he had concluded that a corresponding draft article should not be adopted. For example, while it had been useful to survey existing and potential monitoring mechanisms, he had not selected a specific mechanism. He agreed that, like

[13] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698.

[14] *Ibid.*, vol. II (Part Two), pp. 151–152 (draft article 5).

[15] Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, London, 2017.

[16] See *Yearbook … 2016*, vol. I, 3301st meeting, p. 88, para. 14.

final clauses, such issues were usually left to a diplomatic conference. The only draft articles that he was proposing were those contained in annex II. The Commission might decide that other issues should be addressed, in which case it might no longer be possible to complete the first reading at the current session, as a fourth report on the topic might be required.

32. Mr. SABOIA said that he would be grateful for clarification regarding the status of the "remaining issues" discussed in the third report, namely concealment of crimes against humanity, immunity and amnesty.

33. Mr. MURPHY (Special Rapporteur) said that, in chapter VIII of the report, he had considered how those three issues, which had previously been discussed in the Commission, at least informally, had been dealt with in treaties relevant to the topic. He had concluded that the Commission should not address those issues in the draft articles.

34. Mr. TLADI said that he wished to congratulate the Special Rapporteur for his well-written and well-researched third report. He was of the view, however, that it could have been much shorter, even allowing for the fact that it covered much ground and presented many draft articles. Given the Commission's approach to the topic, which was not necessarily to codify existing rules of customary international law but rather to develop a proposed convention based on existing instruments, none of the options chosen by the Special Rapporteur could be wrong.

35. The report itself provided an illustration of the one concern that he had with the Commission's approach to the topic, which ran contrary to what he had been advocating since the topic was first included in the Commission's long-term programme of work,[17] namely, that, in addition to crimes against humanity, the topic should cover war crimes and genocide. He remained unconvinced by the responses of the Special Rapporteur and other Commission members, who had pointed out that those crimes had their own regimes and were thus not in need of augmentation. Indeed, none of the proposed draft articles in the report had an equivalent in either the Geneva Conventions for the Protection of War Victims and the Protocols Additional thereto or the Convention on the Prevention and Punishment of the Crime of Genocide.

36. That point was further illustrated in chapter I (Extradition). In paragraph 21 of his report, the Special Rapporteur noted that there was currently no global or regional convention devoted exclusively to the extradition of alleged perpetrators of crimes against humanity. Such a convention would have clearly set forth the rights, obligations and procedures applicable to the extradition of such alleged offenders. However, that very point also applied to the extradition of alleged perpetrators of war crimes and genocide. To begin with, there was no provision at all in the war crimes regime that was applicable to extradition in the case of war crimes committed during a non-international conflict, a gap that could reasonably be filled by the Commission through its work on the topic. More importantly, article 88, paragraph 2, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) established no more than a rudimentary obligation for the High Contracting Parties to cooperate in the matter of extradition. It called on them to do so when circumstances permitted, and to give "due consideration" to the request for extradition of the State in whose territory the alleged offence had occurred. That obligation was by no means equivalent to what the Special Rapporteur referred to in his report as "clearly stated rights, obligations and procedures" with regard to the extradition process. Nor did the Convention on the Prevention and Punishment of the Crime of Genocide provide much more detail, apart from the fact that the obligation laid down in its article VII was for the Contracting Parties to pledge themselves to grant extradition in accordance with their laws and treaties in force. His observation applied equally to draft articles 12, 13 and 14, which were the substantive provisions proposed by the Special Rapporteur in his report.

37. The statement contained in paragraph 22 of the report that "many States would not extradite in the absence of an extradition agreement" might or might not be correct. It would have been useful for the Special Rapporteur to back up that statement with examples of practice and perhaps even statistics, where those were available.

38. Although the Special Rapporteur had decided not to propose a provision on addressing conflicting requests for extradition, it was important to do so, even if such a provision did nothing more than outline the broad principles to be taken into account by the State in whose territory the alleged offender was found. While questioning whether it was true that many extradition treaties did not seek to regulate which requesting State had priority in the event of conflicting requests for extradition, he recalled that the purpose of looking at other instruments and regimes was not simply to reproduce their provisions but rather to seek inspiration from them. From that perspective, the Commission ought not to feel constrained by what had or had not been done in the past.

39. In drafting a provision that detailed how a State should exercise its sovereign right to take a decision regarding extradition, it might be relevant to identify and take into account factors such as the State (or entity) that had made the first request; the State in which the alleged crimes had been committed; the State that possessed the majority of the evidence; the State where most of the witnesses lived; and the State that was more likely to engage in genuine prosecution of the alleged offender. In the case of an international criminal tribunal that was seeking the surrender of an alleged offender, one relevant factor might be whether other requesting States were parties to the statute of that tribunal and were thus obliged to respect its provisions.

40. The Special Rapporteur seemed to suggest that the reason for not including in the draft articles a provision on how to address conflicting requests for extradition was that such provisions were not usually included in other treaties. That was not a sufficient reason because the offences covered by most of those other treaties were, by and large, transnational crimes, and not core crimes, like

[17] See *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 170.

the ones covered by the draft articles. It was also possible that there were fewer States with jurisdiction over transnational crimes, so that the question of competing requests either did not arise or arose less frequently. It might be possible to draw inspiration for a provision on that subject from article 90 of the Rome Statute of the International Criminal Court. Lastly, for the reasons stated in the report, he fully agreed that it was unnecessary to spell out the dual criminality requirement.

41. With regard to paragraphs 37 to 41 of the report, it was unclear what purpose would be served by including in the draft articles a provision making it an obligation for States parties to recognize crimes against humanity as an extraditable offence in existing and future treaties. That was because the obligation to extradite or prosecute (*aut dedere aut judicare*) established by the Commission in draft article 9[18] implied a duty to extradite if no submission to prosecution occurred. Even though it was phrased as a duty to submit to prosecution, that provision clearly implied that the offence of crimes against humanity was an extraditable offence. If the Special Rapporteur did not consider that implication to be clear, then perhaps that point should be made in paragraph 1 of draft article 11, instead of seeking to regulate the content of existing and future treaties. On the reasoning that the Commission's aim ought to be to add value rather than simply incorporate provisions from existing instruments, the best approach seemed to be to specify in the draft articles that, for the purposes of the draft articles or a future convention, whichever was appropriate, crimes against humanity were extraditable offences. That would eliminate the need for the interpretation (and possible misinterpretation) of future treaties.

42. With regard to paragraphs 42 to 49 of the report, he agreed with the general thrust of the Special Rapporteur's proposal that the political offence exception should not apply to extradition for crimes against humanity. It would, however, be useful to provide examples of practice where the exception applied. There was no mention of crimes against humanity in the examples of practice identified by the Special Rapporteur in paragraph 46, nor were crimes against humanity, as such, included in the antepenultimate footnote to the same paragraph, which provided examples of bilateral treaties that specified particular offences that should not be regarded as political offences. It might be worth considering the reasons why that was so. He agreed with the Special Rapporteur's point that it was the conduct of committing a crime against humanity that could never be regarded as a political offence. It was a wholly different matter, however, when the request for extradition was made with a political motive.

43. With regard to paragraphs 50 to 55, which related to the circumstances in which a State's national law made extradition conditional on the existence of a treaty, he failed to see the value that would be added by a provision in draft article 11 specifying that the draft articles—or eventual convention—would serve as the legal basis for extradition. The only justification would be that it was reflected in other extradition instruments. In that case as well, draft article 11 ought to be read in conjunction with draft article 9. The latter clearly provided that, if a requested State did not submit the case of an alleged offender to its competent authorities for the purpose of prosecution, it must proceed to extradite the offender. That obligation was not dependent on the existence of another treaty, as was clear from the judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. It was therefore unclear which cases such a provision would address. It was noteworthy that, in paragraph 71 of his report, the Special Rapporteur recognized the relevance of draft article 9 in relation to the extradition by a State of one of its own nationals, which obviated the need for a special provision on extradition in such cases. The same considerations applied to the other cases he had mentioned.

44. In the light of those comments, draft article 11 as proposed by the Special Rapporteur should be significantly streamlined. At the outset, a clear link should be established between draft articles 11 and 9. The first paragraph should thus simply state that draft article 9 provided for the extradition of an alleged offender in the event that a State did not submit the offender for prosecution; alternatively, it could state that the draft article set forth the rules and procedures relating to extradition. Paragraphs 3, 4 and 5 of draft article 11 were superfluous; the rest of the draft article should focus on the detailed procedures for extradition.

45. With respect to paragraphs 9 and 10 of draft article 11, the Commission should consider including broader language that permitted a requested State to set the necessary conditions for the extradition of the alleged offender. It could, for example, stipulate that the extradited person should not be subjected to the death sentence or to other cruel, inhuman or degrading treatment or punishment in the requesting State. Although he did not propose to spell out that particular condition, he would not be opposed to doing so. The inclusion of a general recognition of the requested State's prerogative to set conditions for extradition and to have them respected by the requesting State, if the latter accepted the extradition on the basis of those conditions, and the inclusion of the death penalty as an example in the commentaries, would be sufficient. Draft article 9 should also include a provision that addressed competing requests for extradition.

46. With regard to draft article 13 on mutual legal assistance, he expressed a preference for a shorter text, noting that paragraphs 1 and 2 could easily be merged. Paragraph 5 did not appear to express a genuine obligation, and the draft articles would not at all be impoverished if it were excluded. Although he agreed with the principle concerning the transmission of information by States without a prior request, he felt that in those circumstances, a State should be permitted to set such reasonable conditions as it deemed necessary. The caveat in paragraph 7 concerning the disclosure of information of an exculpatory nature without first seeking the concurrence of the requested State was problematic; he had a similar difficulty with the related caveat set out in paragraph 21.

47. He agreed with the Special Rapporteur's statement in paragraph 199 that, as such, there did not appear to be any conflict between the rules set forth in the current draft

[18] *Yearbook … 2016*, vol. II (Part Two), p. 166 (draft article 9).

articles and those set forth in the instruments establishing international criminal tribunals. However, he was uncomfortable with the content of draft article 15: first, it seemed unlikely that such a conflict would arise, given that the subject matter of the draft articles was the facilitation of national-level jurisdiction; and second, even if it did, it was not altogether clear that the provisions of the constitutive instrument of the international criminal tribunal in question should prevail. Draft article 15 had obviously been drafted with the Rome Statute of the International Criminal Court in mind. However, other international criminal tribunals might well be established in the future, and the Commission should consider whether it could agree to allow provisions established by those unknown entities to prevail over its carefully drafted instrument. The Statute itself had been based on the principle of the primacy of national jurisdiction, and draft article 15 seemed to be in direct conflict with that principle. Consequently, he did not support sending draft article 15 to the Drafting Committee.

48. With regard to draft article 16, which provided that the draft articles applied to all parts of federal States, he was of the view that, as a matter of law, that provision was self-evident and therefore unnecessary, and it ought not to be included in the draft articles. As a matter of fact, chapter VI, as a whole, was also unnecessary and ought not to have been included in the third report. He therefore did not support the referral of draft article 16 to the Drafting Committee.

49. With respect to the chapter on monitoring mechanisms, he felt that it could have been shorter. Moreover, there did not appear to be any real distinction between commissions and committees, as they were described in the report. The Special Rapporteur's decision not to propose any mechanism but simply to provide a range of options that States could, at the appropriate time, select, was a sensible one. On the other hand, given the myriad existing mechanisms identified by the Special Rapporteur as being potentially applicable to crimes against humanity, the adoption of a convention that did not provide for a monitoring mechanism would also be acceptable.

50. Given his long-held view that the most important contribution of the Commission's work to the development of international law was the establishment of rules on inter-State cooperation mechanisms, he agreed that such mechanisms were likely to be more useful than monitoring mechanisms. He fully endorsed the Special Rapporteur's decision to propose a draft article on inter-State dispute settlement and agreed with him that it should include a requirement for negotiation, failing which arbitration and settlement before the International Court of Justice should be provided as options. He further agreed that provision should be made for the possibility of opting out of inter-State dispute settlement. He did not agree, however, with the Special Rapporteur's policy preference in paragraph 2 of his proposed draft article 17, which designated arbitration as the default inter-State dispute settlement mechanism and the International Court of Justice as a fallback when States were unable to agree on the organization of the arbitration. That choice by the Special Rapporteur appeared to be based on article 12 of the Convention for the Suppression of Unlawful Seizure of Aircraft. Yet other options, not considered by the Special Rapporteur, provided a different and better formula. They included article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations and article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, which designated the Court as the default mechanism for the settlement of disputes, with other modes, notably arbitration, provided for if the parties agreed.

51. In conclusion, he was in favour of referring draft articles 11, 12, 13, 14 and 17 to the Drafting Committee. He had no problem with the draft preamble, and he supported the Special Rapporteur's intention to complete the set of draft articles at the current session.

The meeting rose at 5.45 p.m.

3349th MEETING

Tuesday, 2 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on crimes against humanity (A/CN.4/704).

2. Mr. MURASE said that he remained concerned about the difficulty inherent in the topic of crimes against humanity. In taking up a topic, the Commission could either engage in codification and progressive development or respond to specific requests by the General Assembly to elaborate new conventions. In the latter case, the Commission did not have to concern itself with the customary law status of the rules that it was elaborating and could simply make a new law, often resorting to analogies with similar treaty regimes. As there had been no such specific request by the General Assembly, the topic should be considered to fall under the Commission's usual mandate, based on the "established" rules of customary law for codification and "emergent" customary rules for progressive development. The Special Rapporteur, however, did not