

Document:-  
**A/CN.4/3349**

**Summary record of the 3349th meeting**

Topic:  
**<multiple topics>**

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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. Sturma, 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

seem to be concerned with the customary law status of rules, as though the Commission had been requested to develop a new law on the subject. That concern had also been expressed by some delegations, including China, in the Sixth Committee in 2016.

3. He reiterated his serious concern about the methodology applied in drafting draft article 11 on extradition. The Special Rapporteur referred to the provisions of the United Nations Convention against Corruption relating to extradition, concluding that they provided a “suitable basis” for the draft article and that their inclusion “appears warranted”. The Convention was irrelevant to crimes against humanity, and the mere enumeration of similar treaty provisions on crimes other than crimes against humanity did not provide any evidence of the existence of relevant rules of customary international law. Such a methodology would be permitted only if the General Assembly had requested the elaboration of a new convention; however, as no such request had been made, the third report as a whole, and draft article 11 in particular, seemed to deviate from the Commission’s mandate.

4. As the Special Rapporteur aptly observed in paragraph 83 of the report, “a crime against humanity by its nature is quite different from a crime of corruption”. Draft article 11, paragraph 6, by analogy with article 44, paragraph 8, of the United Nations Convention against Corruption, stipulated that extradition of an alleged perpetrator of crimes against humanity should be subject to conditions, including the minimum penalty requirement for extradition set forth in the national law of the requested State. While the minimum penalty might be relevant to extradition in cases of corruption, it was the maximum penalty, capital punishment, that was relevant in cases of crimes against humanity. As an author of the *Max Planck Encyclopedia of Public International Law* had rightly pointed out, the problem of the death penalty must be addressed in draft article 11, paragraph 6, since under most extradition treaties and statutes, surrender could be denied if the offence for which extradition is requested is punishable by death under the law of the requesting State. Perhaps the maximum penalty aspect would be better dealt with in draft article 12 on *non-refoulement*.

5. With regard to the portion of the report on dual criminality, he reiterated his earlier comment that it was not clear from draft article 5<sup>19</sup> to what extent States had an obligation to incorporate into their national laws the definition of crimes against humanity contained in draft article 3.<sup>20</sup> If States were required to incorporate the definition verbatim, he agreed with the Special Rapporteur that there was no need to include a dual criminality requirement in draft article 5, but if that was not the case it might be necessary to do so. According to draft article 11, paragraph 4 (a), a State was obliged to extradite an alleged offender on the basis of the draft articles, given that the word “shall” was used in the *chapeau* of paragraph 4. However, the Special Rapporteur had not provided sufficient evidence of the customary nature of paragraph 4 (a). Article 44, paragraph 6 (a), of the United Nations Convention against Corruption, which served as a model for the paragraph,

applied only to crimes of corruption. The word “shall” in the *chapeau* should therefore be replaced with “may”.

6. In paragraphs 62 and 71 of the report under consideration, the Special Rapporteur indicated that even if the requested State refused a request for extradition or surrender because of its national laws, it remained obliged to submit the case to its competent authorities for the purpose of prosecution, pursuant to draft article 9.<sup>21</sup> However, draft article 9 dealt with procedural rather than substantive matters, and did not refer to the penalties that the court would subsequently impose. Draft article 9 did not impose an obligation on other States that were required to establish jurisdiction over the offence to do so. While the Special Rapporteur dealt with retaliatory trials in draft article 10,<sup>22</sup> he did not seem to be concerned with sham trials. Although he addressed the problem of amnesties in chapter VIII, section C, his conclusion in paragraph 297 that “the present draft articles should not address the issue of amnesties under national law” seemed inappropriate. The conclusion that a national amnesty would not bar prosecution of a crime against humanity by a competent international criminal tribunal or a foreign State seemed to be worth mentioning in the draft articles, particularly in the light of the doubt surrounding the implication in draft article 15 that a newly established international criminal tribunal could establish a lower standard for guaranteeing international human rights.

7. According to paragraph 26 of his third report, the Special Rapporteur had decided not to make any proposal for a provision on multiple requests for extradition, leaving the ultimate decision to the requested State. However, General Assembly resolution 3074 (XXVIII) of 3 December 1973 gave priority “as a general rule” to the countries in which alleged offenders had committed crimes against humanity, because the territorial State in which the crimes had been committed had more evidence than other requesting States and was thus best placed to prosecute and punish the alleged offender. If the Special Rapporteur were to take sham trials into consideration, it would thus be preferable to give priority to the territorial State, for the sake of judicial economy and effective punishment.

8. In draft article 12, paragraph 1, the words “or extradite” overlapped with draft article 11, paragraph 11, and should be deleted. Draft article 12 should be placed after draft article 4 on the obligation of prevention,<sup>23</sup> in line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In draft article 13 on mutual legal assistance, the simple analogy with the United Nations Convention against Transnational Organized Crime was inappropriate. That instrument provided for long-form mutual legal assistance because it dealt with transnational crimes, the prosecution of which necessitated cooperation and mutual assistance between States. In contrast, crimes against humanity tended to be committed in a single State and were thus not transnational in nature. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the

<sup>19</sup> *Ibid.*, pp. 151–152 (draft article 5).

<sup>20</sup> *Yearbook ... 2015*, vol. II (Part Two), p. 37 (draft article 3).

<sup>21</sup> *Yearbook ... 2016*, vol. II (Part Two), p. 166 (draft article 9).

<sup>22</sup> *Ibid.*, p. 168 (draft article 10).

<sup>23</sup> *Yearbook ... 2015*, vol. II (Part Two), p. 47 (draft article 4).

Protection of All Persons from Enforced Disappearance provided for short-form mutual legal assistance, since such crimes were committed by State organs and the cooperation of the territorial State could not be expected. Given that the same was true for crimes against humanity, the short-form article would be preferable.

9. Concerning draft article 14 on victims, witnesses and others, he said that in general, protection of victims was dealt with in human rights law, while international criminal law focused on the prevention and punishment of particular crimes, either imposing an obligation on States parties to incorporate the crime into national criminal law as a punishable offence or else setting out priorities for the exercise of competing national jurisdictions. In contrast to draft article 13, which adopted the criminal law approach by mirroring the United Nations Convention against Corruption, draft article 14 mainly relied on the International Convention for the Protection of All Persons from Enforced Disappearance and thus took the human rights law approach. Given that the preamble to the latter Convention suggested that, due to its extreme seriousness, enforced disappearance could, in certain circumstances, constitute a crime against humanity, it seemed appropriate to draw on that Convention in formulating the draft articles.

10. However, draft article 14 was not without its problems. First, paragraphs 1 and 3 reflected the human rights approach while paragraph 2 reflected the criminal law approach, providing for the participation of victims in criminal proceedings, something which did not appear in the International Convention for the Protection of All Persons from Enforced Disappearance. Such a selective approach might risk making the whole project unacceptable to States. Allowing victims to participate in criminal proceedings might be erosive to existing judicial systems and would not be acceptable to States unless there were strong incentives for them to yield their sovereignty. Unfortunately, that did not seem to be the case with crimes against humanity, which were typically committed with the involvement of State officials. Taking provisions from both approaches might increase the effectiveness of the convention but at the same time might give States less incentive to accede to it.

11. Second, it seemed problematic to include guarantees of non-repetition, a concept that had been developed in the context of the Commission's articles on the responsibility of States for internationally wrongful acts,<sup>24</sup> in connection with the right to obtain reparations. In that text, a distinction was made between non-repetition and cessation, on the one hand, and reparation for injury, including restitution, compensation and satisfaction, on the other. In other words, guarantees of non-repetition were not generally seen as a form of reparation. Admittedly, article 24, paragraph 5, of the International Convention for the Protection of All Persons from Enforced Disappearance included guarantees of non-repetition as a form of reparation; while that might be justified for such crimes that were continuing in nature, caution had to be taken not

to transfer that unique form of reparation to a more general field without careful consideration.

12. Third, article 14, paragraph 3, referred to the right to obtain reparation on a collective basis, something that was not explicitly provided for even in the International Convention for the Protection of All Persons from Enforced Disappearance and thus seemed to fall under the category of progressive development. The Special Rapporteur must explain why he thought it important to include that form of reparation in the draft articles: in paragraph 194 of his report, he merely noted that "in some situations only collective forms of reparation may be feasible or preferable", without any explanation. That contrasted sharply with the treatment of individual reparations, which was supported by ample references. The collective forms of reparation cited, such as the building of monuments of remembrance, were measures that had been taken voluntarily or through reconciliation processes, and he was not convinced that it was appropriate to refer to them in a universal instrument.

13. With regard to chapter VIII, section A, on the concealment of crimes against humanity, he said that in a commentary to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it was stated that the terms "complicity or participation" in article 4, paragraph 1, had to be interpreted to include "concealment".<sup>25</sup> In the light of the principle of legality, he would appreciate clarification of whether or not complicity in crimes against humanity included concealment of such crimes.

14. The meaning of draft article 15 on the relationship to competent international criminal tribunals was unclear. If the rights and obligations under the constitutive instruments of the competent international criminal tribunals were to prevail over the rights and obligations under the draft articles, one might wonder about the purpose of elaborating draft articles on the topic. Draft article 15 might undermine the fight against impunity by prioritizing international criminal jurisdictions and the constitutive instruments of international criminal tribunals, which would run counter to the principle of complementarity in the Rome Statute of the International Criminal Court and leave room for interpretative confusion between the Statute and the proposed convention on crimes against humanity.

15. The Special Rapporteur's approach to immunity left something to be desired. Although his analysis of the immunity of State officials arguably corresponded to the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, he did not properly explain why the draft articles simply ignored the treaty provisions referred to in paragraph 281 that provided that State officials had international criminal responsibility or should be punished. Draft article 5, paragraph 4, surely implied the irrelevance of acts of States or of the superior orders defence, in line with article 2, paragraph 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

<sup>24</sup> The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

<sup>25</sup> M. Nowak and E. McArthur (eds.), *The United Nations Convention against Torture: a Commentary*, Oxford University Press, 2008, p. 238, para. 25.

nevertheless, such a provision might not be strong enough to prevent impunity for those responsible for the gravest crimes against humanity. True, simultaneous efforts were being made by the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction, but one of the purposes of drafting a convention on crimes against humanity must surely be to fill the impunity gap. The Commission needed to promote the progressive development of international law in the area of immunities, especially immunity *ratione personae*, in order to keep pace with the Rome Statute of the International Criminal Court and build a truly complementary system of international criminal justice. It should therefore include in the draft articles an “irrelevance of official capacity” provision, based on article IV of the Convention on the Prevention and Punishment of the Crime of Genocide. Noting that the draft articles were silent on the issue of reservations, he said that such silence went against the spirit of the Statute and would be a threat to the integrity of the proposed future convention on crimes against humanity.

16. He was not opposed to sending the draft articles to the Drafting Committee if the majority of members so wished.

17. In closing, he drew attention to the disparities in the length of the reports by the special rapporteurs on different topics. For example, he had been obliged to reduce his own report to meet the limit of 30,000 words, having been told that failure to do so would mean that it would not be translated and issued as an official document. It had been his understanding that this rule applied to all the special rapporteurs’ reports, but it seemed that Mr. Murphy had been allowed to submit a report more than three times as long as his own.

18. The CHAIRPERSON said that the secretariat would look into the issue of word limits.

19. Mr. HASSOUNA thanked the Special Rapporteur for his clear, comprehensive and well-researched third report and for his continued efforts to reach out to Governments and NGOs in different regions. Indeed, the Commission should aim not only to prepare draft articles but also to convince Governments of their importance and relevance so as to ensure their eventual acceptance and implementation.

20. Although the report was considerably longer than recommended by the Commission, the detailed analysis that it contained would enable significant progress to be made at the present session. There was an urgent need to formulate and codify legal rules on the topic, as crimes against humanity were being committed with increasing frequency.

21. As he had stated at the previous session, his preference would be for the draft articles to form the basis of a new convention, a view seconded by several States in the Sixth Committee in 2016. Renowned international criminal lawyer Cherif Bassiouni had said that it had long been time for a special convention on crimes against humanity to regulate not only the hierarchical relationships between States and international tribunals but also the horizontal relationships among States; such a convention would enhance harmonization among

national legislations and ensure greater compliance with the Rome Statute of the International Criminal Court by both States parties and non-parties.

22. In the third report, the Special Rapporteur analysed treaties on matters other than crimes against humanity and used them as models for elaborating the draft articles, rather than for codifying existing custom. When taking such an approach, due consideration must be given to the different nature of the crimes addressed by, and to the special context of, each convention. As a result, the Special Rapporteur had introduced stylistic and substantive modifications to the language of the conventions that he had studied, a move that he himself welcomed. However, the proposed legal rules on crimes against humanity should clearly be in harmony with the rules laid down in other treaties.

23. Referring to the very welcome commentary on the third report by Amnesty International,<sup>26</sup> he said that in general, he agreed with many of the concerns raised with regard to some of the proposed draft articles. It should be borne in mind, however, that the draft articles were intended not to cover in great detail all issues related to the topic, but to focus on the basic, non-controversial ones. After all, the Commission’s objective should be to formulate a universally accepted convention that complemented existing international regimes, especially the Rome Statute of the International Criminal Court.

24. Turning to the proposed draft articles and preamble, he said that draft article 11 did not include a provision on multiple requests for extradition. In such cases, requests could be handled by a central authority, perhaps the same body or one similar to the authority mentioned in draft article 13 on mutual legal assistance. An important provision in draft article 11 related to the establishment of a default rule whereby the draft articles should be used as a basis for extradition unless the State in question notified the depositary to the contrary. The provision could help to harmonize the approaches of various States to extradition law. Another provision in draft article 11 subjected the draft article to the conditions or requirements set out in the law of the requested State. He agreed with that principle, which allowed the national laws of States to continue to operate. Anyone who objected to acknowledging the requirements for extradition under national laws overlooked the fact that the draft articles did not actually create an obligation to extradite, the real obligation being to prosecute if extradition was not granted. Given that the purpose of draft article 11, paragraph 11, was to ensure that individuals were not extradited when there was a danger of their rights being violated, he would support the inclusion in that paragraph of references to other categories of persecution and human rights concerns that would justify the denial of an extradition request.

25. In connection with chapter II, section A, of the report and draft article 12, he said that the definition of a “real risk” of being subjected to human rights violations such as torture, and the standard for examining evidence of that risk, required further clarification. He supported the inclusion of non-State actors in draft article 12, paragraph 1,

<sup>26</sup> Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, London, 2017.

particularly in the light of the growing number of trans-boundary crimes committed by such actors. However, extending the principle of *non-refoulement* of a person at risk of falling victim to a crime against humanity to other serious crimes under international law might lead to overlapping with existing treaties that addressed those crimes.

26. Concerning draft article 13, he said that the Special Rapporteur seemed to favour the adoption of a provision on a detailed form of cooperation among States, as doing so would provide them with more guidance. He himself, however, believed that a less detailed provision, such as those already contained in some treaties, would offer States greater flexibility. Moreover, some paragraphs of draft article 13 seemed unnecessarily long and could be shortened by the Drafting Committee. The list of grounds for the refusal or postponement of mutual legal assistance by the requested State required further clarification, including as to whether the list was exhaustive.

27. In draft article 14 on victims, witnesses and others, the recognition of the right to complain to the competent authorities was essential. The rights to the truth and to the protection of evidence by the State could likewise be included. It could be emphasized that the protection of witnesses was not limited to physical protection, but encompassed wider measures similar to those provided for in article 68, paragraph 1, of the Rome Statute of the International Criminal Court. In draft article 14, paragraph 3, it would be appropriate to define the scope and extent of the reparation to which victims were entitled, and it should be made clear that the list of forms of reparation in that paragraph was not exhaustive.

28. Draft article 15, the provision addressing potential conflicts, contained a reference to a “competent” international criminal tribunal. It could be clarified in the commentary that such a tribunal must comply with the fundamental principles of international criminal law.

29. Draft article 16 rightly did not include a “territorial clause” that would limit the application of the draft articles, since they should cover all parts of federal States.

30. Draft article 17 described a comprehensive, multi-step process for the settlement of disputes concerning the interpretation or application of the draft articles. The question arose as to whether a monitoring mechanism should be created for crimes against humanity. Such a mechanism would certainly help to ensure that States fulfilled their commitments under the future convention. However, because of the variety of legal, policy and financial factors at play in the selection of such a mechanism, he considered that its creation could best be envisioned in a future protocol.

31. He shared the Special Rapporteur’s view that the issues of immunity and amnesty were controversial and should therefore not be addressed in the draft articles, but left to relevant treaties and the evolution of customary international law. Although the Special Rapporteur had chosen not to include a provision on concealment of crimes against humanity, the Commission could reconsider the issue in the context of the draft article on victims’ rights.

32. Lastly, he agreed with the wording of the preamble, particularly the emphasis on inter-State cooperation, the reaffirmation of the purposes and principles of the Charter of the United Nations and the assertion that crimes against humanity threatened international peace and security. While the Commission should not overburden the preamble with additional paragraphs, he did think that the notion of justice should be included: the objective of achieving justice for victims could be mentioned in the fourth preambular paragraph, for instance.

33. With regard to the future programme of work, the Special Rapporteur raised the question of whether it was necessary to undertake additional work, which would then be dealt with in a fourth report to be submitted in 2018. At a previous session, he himself had referred to a number of additional issues that might be addressed by the Special Rapporteur, including State responsibility, the retroactive application of the convention, the enforcement of the mandatory rules under the convention, the principle of double jeopardy and the party empowered to determine that a crime against humanity had been committed.<sup>27</sup> He had made clear, however, that such issues should be examined by the Special Rapporteur on a selective basis, according to their relevance and importance to the subject matter of the convention, and that the Special Rapporteur should be given full discretion in that regard. He now considered that, since the Special Rapporteur had determined that all relevant key issues related to the topic had been covered in his three reports,<sup>28</sup> the Commission should endorse his proposal to complete the consideration of the draft articles on first reading in 2017. He wished to remind the Special Rapporteur, however, that it would be a challenge to revise the draft articles and prepare the commentaries thereto by the end of the current session.

34. In conclusion, he recommended that the proposed draft articles and preamble be referred to the Drafting Committee.

35. Mr. TLADI asked what Mr. Hassouna had meant by “fundamental principles of international criminal law” and whether he knew of any existing international criminal tribunals that did not conform to those principles.

36. Mr. HASSOUNA said that it was worth specifying in the commentary that competent international criminal tribunals should, in a general sense, comply with the well-established fundamental principles of international criminal law. It had not been his intention to imply that some tribunals currently failed to do so.

37. Mr. PARK said that the draft articles set out in the Special Rapporteur’s report appeared to be largely based on the United Nations Convention against Corruption, particularly with regard to extradition and mutual legal assistance. While that might be the most desirable approach, crimes against humanity, unlike the act of corruption, occurred on a large scale and could involve multiple individuals. Moreover, some States recognized

<sup>27</sup> See *Yearbook ... 2015*, vol. I, 3258th meeting, p. 106, para. 22.

<sup>28</sup> *Ibid.*, vol. II (Part One), document A/CN.4/680 (first report); *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/690 (second report); and *Yearbook ... 2017*, vol. II (Part One), document A/CN.4/704 (third report).

so-called “universal jurisdiction” for crimes against humanity, while such a broad form of jurisdiction was generally not recognized for acts of corruption. Although the Special Rapporteur did seem to take those differences into account, a more careful review was still necessary.

38. Commenting on the first paragraph of draft article 11, he said that, under the established principles of international law, extraditable offences were substantive offences. In the draft articles provisionally adopted to date, the provision that set out the underlying acts or offences of substantive crimes against humanity—murder, extermination, enslavement, deportation and so forth—was not draft article 5, but draft article 3. The first sentence of draft article 11, paragraph 1, should therefore be amended to begin “Each of the offences referred to in draft article 3”.

39. Draft article 5 actually dealt with modes of liability. For the purpose of extradition, what mattered most were the substantive criminal offences provided for in draft article 3, not the modes of liability set out in draft article 5. Thus, draft article 11, paragraph 8, should refer not to the items set out in draft article 5, such as committing, ordering or failing to prevent a crime against humanity, but to the items listed in draft article 3, such as murder, torture or enslavement. Similarly, draft article 11, paragraph 2, should refer to draft article 3, not draft article 5: States might refuse to extradite a person on the basis of the political offence exception in relation to the substantive offences set out in draft article 3, but for the purpose of claiming that exception, the differing manners of participating in a crime listed in draft article 5, paragraphs 2 or 3, were of limited relevance.

40. He agreed that it was necessary for a new convention on crimes against humanity to contain a provision on extradition to fill the gaps where no treaty-based extradition relationships existed. Although some States had concluded extradition agreements on a bilateral level, there was currently no global or regional convention on the extradition of alleged offenders, and many States would not extradite in the absence of an extradition agreement.

41. He also agreed that it was appropriate to broaden the political offence exception along the lines of article 13, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance. Any room for exceptions, particularly of a political nature, should be limited as much as possible, for the sake of effective implementation. According to draft article 11, paragraph 8—a new paragraph that was not to be found in either the United Nations Convention against Corruption or the United Nations Convention against Transnational Organized Crime—an offence should be treated as having been committed not only in the State where it physically occurred, but also in any State that was required to establish jurisdiction over the offence in accordance with draft article 6, paragraph 1. While such a broad approach could avoid conferring primary jurisdiction on certain States, the scope of such jurisdiction needed to be better clarified. For example, could that form of jurisdiction go beyond the territorial, nationality or passive personality principle, since draft article 6, paragraph 3, did not exclude the establishment of other forms of criminal jurisdiction by a State?

42. In relation to draft article 11, paragraph 13, he would find it helpful to further discuss the relationship between the draft article on extradition and other multilateral agreements aimed at enhancing the effectiveness of extradition, including a possible treaty on mutual legal assistance and extradition that was being promoted by Belgium, the Netherlands and other States.

43. His last point on draft article 11 was that, since paragraphs 6 and 7 both concerned extradition procedures subject to national laws, it might be worth considering combining the two paragraphs.

44. Turning to draft article 12, he said it was appropriate to include a provision on the principle of *non-refoulement*, as it was a well-established principle under international law and was contained in many international treaties. Nevertheless, that principle must be carefully reviewed in relation to draft article 11, paragraph 1, to ensure there was no conflict between the two provisions. Moreover, there was a high threshold requirement of being “widespread or systematic” for an act to constitute a crime against humanity, and there might be instances in which individuals faced other forms of serious human rights abuse that did not meet that threshold. It might be desirable to review further whether the principle of *non-refoulement* should be applied only to crimes against humanity, or also to other forms of serious human rights abuse. Furthermore, it would be helpful to explain in the commentary the standard for assessing what constituted “substantial grounds” for believing that a person would be in danger of being subjected to a specific crime based on international jurisprudence and practice of States.

45. Draft article 13 reflected the Special Rapporteur’s view that a long-form mutual legal assistance article was preferable to a short-form one. However, because of its length, the text seemed to create an imbalance within the set of draft articles. Perhaps draft article 13 could be turned into a separate protocol. Moreover, although a long-form article was quite detailed, there was still a possibility that it would conflict with international obligations under other bilateral or multilateral treaties on mutual legal assistance, notwithstanding the provisions of draft article 13, paragraphs 8 and 9: specifically, States might disagree on which provisions were effective and facilitated cooperation. In any case, there would need to be a careful review of long-form mutual legal assistance in other model treaties and prospective multilateral treaties on mutual legal assistance.

46. He fully agreed with the need for provisions on the protection of victims and witnesses of crimes against humanity. Draft article 14 well reflected the idea behind other relevant international provisions, particularly article 68 of the Rome Statute of the International Criminal Court. That said, he would suggest three modifications to draft article 14.

47. First, some text should be included on the protection of vulnerable witnesses, especially victims of sexual violence and children, following the example of article 68, paragraphs 1 and 2, of the Rome Statute of the International Criminal Court. Such measures as holding proceedings *in camera* could be very effective in protecting

victims of sexual violence and children who were participating in the proceedings as witnesses. Accordingly, a sentence encouraging States to implement *in camera* proceedings should be added to draft article 14.

48. Second, he would suggest adding a paragraph corresponding to article 70 of the Rome Statute of the International Criminal Court, urging States to criminalize offences against the administration of justice. Although such offences were not considered core international crimes, they had become an issue in almost every case before the International Criminal Court. In that respect, the Court's judgment of 19 October 2016 in the *Bemba Gombo* case—the first-ever conviction under article 70—was noteworthy. Witness intimidation had serious consequences beyond the immediate case it affected. In view of the varying degrees of witness protection currently available in each State, coordinated efforts worldwide to criminalize offences against the administration of justice in domestic legislation were crucial for the successful implementation of the draft convention in general, and draft article 14 in particular.

49. Third, the regime of victim participation and reparation established by the Rome Statute of the International Criminal Court had been widely praised as one of the Statute's major innovations and achievements. After a decade of practice, however, many commentators recognized the gap between the high expectations on the part of victims and the lack of resources available to the Trust Fund for Victims established pursuant to article 79 of the Statute. With regard to the mechanism for victim participation, it appeared that, in its jurisprudence since 2012, the Court had started to reduce the temporal scope of victim participation by generally excluding the investigation stage. In that context, paragraphs 2 and 3 of draft article 14 should be recast as recommendations rather than strict obligations. More specifically, given the varying financial situations of States around the world, paragraph 3 of draft article 14 should be reworded to begin "Each State shall endeavour to ensure" rather than "Each State shall take the necessary measures to ensure".

50. While it was appropriate to specify, in draft article 15, that the rights or obligations of a State under the constitutive instrument of a competent international criminal tribunal prevailed over its rights or obligations under the draft articles, there were questions as to how that would apply in relation to the principle of complementarity as set out in article 17 of the Rome Statute of the International Criminal Court, under which the primary responsibility for prosecuting international crimes lay with States and national courts. A careful review was needed to determine whether draft article 15 might conflict with the principle of complementarity.

51. Draft article 16, on federal State obligations, also seemed appropriate. However, it would be more effective to include a clause that expressly denied any accommodation to federal States.

52. In chapter VII of his report, the Special Rapporteur went into some detail about monitoring mechanisms and dispute settlement but refrained from making any concrete proposals, on the grounds that the selection of a particular

mechanism turned less on legal reasoning than on policy factors, the availability of resources and the relationship of any new mechanism with those that already existed; and that, moreover, a monitoring mechanism could be incorporated immediately in a new convention or developed at a later stage. Such a conclusion might be based on a realistic approach, but it seemed rather passive in view of the important role played by monitoring mechanisms in the protection and promotion of human rights. In drafting a new convention on crimes against humanity, it would be better to aim for the maximum protection against such crimes. The Special Rapporteur should therefore propose a possible monitoring mechanism.

53. Regarding draft article 17, the effect of paragraph 3 would be to allow States to enter a reservation regarding the procedures set out in paragraph 2 and thus to opt out of any inter-State dispute mechanism, which could hinder the effective implementation of the convention.

54. On the remaining issues addressed in chapter VIII of the report, he broadly agreed with the Special Rapporteur's conclusions regarding the concealment of crimes against humanity (para. 277), immunity (para. 284) and amnesty (paras. 296–297). More specifically, he believed that the issue of granting amnesties under national law was closely related to transitional justice, so that it was not an appropriate subject to be regulated in the draft articles.

55. In his view, the last paragraph of the draft preamble should be deleted, even though it was adapted from the preamble to the Rome Statute of the International Criminal Court. It did not fit the topic under discussion, for two reasons: first, the scope of the Statute and that of the topic before the Commission were different; and, second, the paragraph could give rise to a debate on humanitarian armed intervention, the responsibility to protect, the right to self-determination and, especially, the right of peoples to seek and receive support from other countries in pursuit of the exercise of their right to self-determination, as set out in General Assembly resolutions 2625 (XXV) of 24 October 1970 and 3314 (XXIX) of 14 December 1974.

56. Mr. NGUYEN commended the Special Rapporteur on his well-prepared, comprehensive reports on crimes against humanity, a topic corresponding to the urgent requirement to prevent and punish any act of terrorism, genocide or torture, war crime or crime against humanity. The work would fill the gap between different national jurisdictions and provide an effective global tool for achieving justice and fairness. He agreed with the Special Rapporteur that there was considerable interest in developing national capacity to address serious international crimes and to ensure a well-functioning principle of complementarity.

57. Regarding the methodology and approach to the study, he believed that the Commission should carefully consider the more detailed approach, especially with regard to extradition and mutual legal assistance. The Special Rapporteur proposed to model the future text after articles 44 and 46 of the United Nations Convention against Corruption, because 181 States had signed the Convention and the issues arising were largely the same. In his own opinion, the draft articles should be based on existing treaties

and State practice, instead of on a single convention: the issues arising under the United Nations Convention against Corruption and the future convention on crimes against humanity differed in substance. The former prevented and punished economic offences committed by individuals and legal persons under national law. In contrast, the future convention on crimes against humanity sought to prevent and punish criminal and political offences committed by individuals, in violation of international and national law. Crimes against humanity and corruption differed in their very nature, their level of severity and their psychological impact on the global community.

58. In the Special Rapporteur's view, expressed in paragraph 125 of his report, article 46, paragraph 2, of the United Nations Convention against Corruption provided a suitable basis for draft article 13, paragraph 2, on mutual legal assistance. However, it rekindled the debate on the liability of a "legal person" for the commission of a crime against humanity. A "legal person" could be held liable for offences related to economic crimes such as corruption, tax fraud and evasion. In reality, most of the draft articles in the third report referred not only to the United Nations Convention against Corruption, but also to the provisions of the Rome Statute of the International Criminal Court, the United Nations Convention against Transnational Organized Crime, the International Convention for the Protection of All Persons from Enforced Disappearance and other texts. His recommendation was to name some important international texts, while emphasizing the guidance of the United Nations Convention against Corruption and other instruments in respect of particular crimes.

59. Draft article 11 underlined the State's obligation to extradite alleged perpetrators of crimes against humanity. It would read better, however, if paragraphs 1 and 2 were combined to read: "For the purposes of extradition between States, States undertake to include the offences referred to in draft article 5 as extraditable offences in every extradition treaty to be concluded between them." Dual criminality was precluded, in view of the obligation of extradition set out in draft articles 2<sup>29</sup> and 3, draft article 11, paragraphs 3 and 6, and the obligation of criminalization of such offences in national law contained in draft article 5. That approach should be carefully considered, however. The terms "extraditable offence" and "extradition conditional" indicated that the obligation was subject to the State's willingness and decision: the State could enter a reservation to the identification of an act as a crime against humanity. Moreover, the preclusion of dual criminality might have an impact on a State's possible accession to the future convention. In order to criminalize certain offences in national laws, time was required for amending or adjusting broad domestic criminal legislation, potentially including the State's Constitution, and, in such cases, extradition was temporarily not feasible. For all of those reasons, the decision not to include the dual criminality principle in draft article 13 should be reconsidered.

60. Draft article 12 referred to the principle of *non-refoulement*. While in previous conventions, the terms "places", "frontiers of territories" and "to another State"

had frequently been used, draft article 12, paragraph 1, replaced them with the term "territory under the jurisdiction of another State", a more precise formulation. However, there were some territories under the jurisdiction of the State that were effectively controlled by another force due to political reasons or civil war, and the State could invoke that reason to justify its refusal of the obligation of *non-refoulement*. Therefore, the phrase "territory under the jurisdiction or effective control of another State or Administration" should be used.

61. He welcomed the references in the three reports on crimes against humanity to Asian practice, specifically the Bangkok Principles on Status and Treatment of Refugees<sup>30</sup> and the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.<sup>31</sup> More should be written about regional practice on the principle of *non-refoulement*.

62. Turning to draft article 13, he said he supported the adoption of a long-form article on mutual legal assistance. The transmission of information without prior request was not a new initiative in legal proceedings regarding crimes against humanity. It had been mentioned in a number of instruments, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. He supported that initiative to facilitate proceedings. However, in order to avoid replication of information, he recommended encouraging the use of a two-step procedure for the transmission of the information: when the sending State considered that certain information was necessary and useful for the proceedings carried out by the receiving State, it could send an alert and a list containing the information. The receiving State would immediately respond by a written confirmation or an oral declaration. After receiving the confirmation, the information would be transmitted in full.

63. Article 46, paragraph 8, of the United Nations Convention against Corruption had been taken as the basis for draft article 13, paragraph 4: under both instruments, States were not permitted to decline to render mutual legal assistance on the ground of bank secrecy. However, the fiscal matters referred to in article 46, paragraph 22, of the Convention had not been included in draft article 13 among the grounds on which a request for mutual legal assistance could not be refused. Bank secrecy and fiscal matters were usually taken into consideration for economic offences. The possibility of taking one or both of them as grounds to refuse mutual legal assistance in investigations, prosecutions and judicial proceedings relating to crimes against humanity was left open and depended on the State's practice. The Special Rapporteur suggested that some of the grounds in article 46, paragraph 3 (f) ("including government, bank, financial, corporate or business records") not be included, because they related to

<sup>30</sup> "Final Text of the AALCO'S 1966 Bangkok Principles on Status and Treatment of Refugees as adopted on 24 June 2001 at the AALCO's 40th Session, New Delhi". Available from the AALCO website: [www.aalco.int](http://www.aalco.int).

<sup>31</sup> Law No. NS/RKM/1004/006 (27 October 2004), available from the website of the Extraordinary Chambers in the Courts of Cambodia: [www.eccc.gov.kh/en, Legal documents, Law on ECCC](http://www.eccc.gov.kh/en_Legal_documents_Law_on_ECCC).

<sup>29</sup> *Yearbook ... 2015*, vol. II (Part Two), p. 35 (draft article 2).

corruption rather than to crimes against humanity. However, the brief explanations given in paragraphs 131, 149 and 162 of the report were unsatisfactory: they should be reconsidered and clarified in the commentary.

64. Paragraph 1 of draft article 17, on inter-State dispute settlement, underlined the priority to be given to negotiation. One rule in inter-State dispute settlement was that resort to negotiation preceded any other means or mechanism, including compulsory settlement. However, in some cases, a State could invoke that rule to prevent another State from seeking other peaceful means to overcome a deadlock. Since States had the obligation to resort to all peaceful means, not merely negotiation, the Commission should consider replacing the term “negotiation” in paragraph 1 with the phrase “peaceful means, notably negotiation and arbitration”.

65. Paragraph 2 also emphasized the importance of negotiation and indicated that if a dispute could not be settled by such means, it must be submitted to arbitration. The option of arbitration should be covered in greater detail, in order to explain why an attempt should initially be made to organize bilateral arbitration of a matter concerning a crime against humanity, with the subsequent accordance of priority to the International Court of Justice if negotiation fell through.

66. Regarding the other issues discussed in chapter VIII, he agreed with the Special Rapporteur’s preference for not including concealment of crimes against humanity in the draft articles. In a century of advanced technology and public media, it was no longer easy to conceal a crime against humanity. Moreover, such concealment might involve a document, a piece of evidence or the ownership of property, factors that were addressed in other draft articles. He likewise endorsed the Special Rapporteur’s proposal not to include immunity and amnesty in the draft articles. Crimes against humanity were grave acts that must be punished, and any immunity or amnesty should therefore be excluded. Principle III of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal<sup>32</sup> stated that the commission of an act that constituted a crime under international law while one was acting as Head of State or responsible government official did not relieve the person from responsibility under international law. That principle was increasingly recognized in treaties and judgments of international courts as a customary international rule. However, in practice, States were reluctant to accept explicit text on the exception of immunity *ratione personae*.

67. The question of amnesties was also ambiguous. At the international level, crimes against humanity had acquired the nature of peremptory norms (*jus cogens*): no amnesty could therefore be granted for perpetrators of crimes against humanity, since such crimes were contrary to *jus cogens*. At the national level, however, the prevailing political party might resort to amnesty for the purposes of national reconciliation and to avoid separation and civil war, and the possibility of amnesty depended on national jurisdiction. In fact, amnesty had played a role in national

reconciliation and in ending violence in some cases: the political decision to grant amnesty to Khmer Rouge leaders after the genocide in Cambodia was an example.

68. The Special Rapporteur had presented a useful and detailed summary of the five approaches to reservations taken in existing treaties. However, no specific approach to reservations was proposed for the future convention on crimes against humanity. In order to reconcile the integrity of international treaties with the objective of gaining the broadest participation of States, the third approach to reservations should be considered. Under that approach, the convention would contain a provision identifying the articles to which reservations could be formulated, while prohibiting all other reservations. A reservation could thus be made for a limited number of provisions, without prejudice to the purpose and objective of the treaty and to the fundamental rights and obligations of member States.

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

[Agenda item 1]

69. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of provisional application of treaties was composed of the following members: Mr. Gómez Robledo (Special Rapporteur) Mr. Argüello Gómez, Ms. Galvão Teles, Mr. Jalloh, Mr. Kolodkin, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Šturma, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

70. The CHAIRPERSON noted that Mr. Grossman Guiloff, Mr. Nguyen and Mr. Park had also expressed a wish to be part of the Drafting Committee on the provisional application of treaties. He recalled that in 2016, the Commission had taken note of some of the draft guidelines on that topic that had been provisionally adopted by the Drafting Committee,<sup>33</sup> but that the Drafting Committee had not had time to complete its work. With a view to the completion of a set of draft guidelines based on the proposals made by the Special Rapporteur so far, he proposed that the Commission refer back to the Drafting Committee the draft guidelines it had provisionally adopted in 2016, namely draft guidelines 1 to 4 and 6 to 9.

*It was so decided.*

*The meeting rose at 12.30 p.m.*

## 3350th MEETING

*Wednesday, 3 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,

<sup>32</sup> *Yearbook ... 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

<sup>33</sup> See *Yearbook ... 2016*, vol. II (Part Two), pp. 219–220, para. 257, and footnote 1430.