

Document:-
A/CN.4/3354

Summary record of the 3354th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2017, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

words “or membership in a particular social group” at the end of the list of factors in draft article 11, paragraph 11, as was done in the International Convention for the Protection of All Persons from Enforced Disappearance. He would go even further in providing human rights safeguards, in line with article 33 of the Convention relating to the Status of Refugees.

88. He generally agreed with draft article 14 on victims, witnesses and others, and with the explanations given by the Special Rapporteur. That was an important area, but one in which national legal traditions regarding criminal procedure and possible forms of compensation differed widely. He therefore supported the approach taken by the Special Rapporteur to leave room for the definition of “victim” in national law and of the possible forms of reparation, in particular for cases of mass atrocities. Otherwise, there was a serious risk that States would hesitate to ratify the future convention.

89. In his view, the Special Rapporteur had given a very good reason for not including a provision on immunity. Any attempt to declare immunity irrelevant, along the lines of article 27 of the Rome Statute of the International Criminal Court, would need to be explained, either as creating a new legal rule or as reflecting existing international law. In the present inter-State context, if the Commission were to say that a provision along the lines of article 27 created a new rule, many States might hesitate to ratify the future convention. If, on the other hand, the Commission said that such a provision reflected existing customary international law, then it would pre-empt the debate on the immunity of State officials from foreign criminal jurisdiction. Of course, the Commission could avoid prejudicing that debate by making it clear that the inclusion of a rule like that in article 27 of the Statute would be without prejudice to the status of that rule under customary international law. States would then be alerted and could freely choose whether to take the risk of binding themselves further than was now the case under customary international law. If the only concern was for consistency in international law, he would favour such a transparent solution, which would force States to show whether they believed that under no circumstances should they be entitled to claim immunity for their officials when crimes against humanity were alleged to have been committed. However, that was likely to make many States hesitant about ratifying the draft convention.

90. The same concerns applied with regard to the inclusion of a provision on amnesties. It would be helpful to know how many States would support a blanket prohibition or some form of prohibition of amnesties, but he would advise not risking the success of the draft convention by burdening it with that question, important as it was.

91. The question of reservations raised the same concern. He saw a deep irony in the fact that the Commission was now discussing whether to exclude or to seriously restrict the possibility of formulating reservations, as set out in articles 19 to 23 of the 1969 Vienna Convention. After all, it had been the objective of ensuring that as many States as possible ratified the Convention on the Prevention and Punishment of the Crime of Genocide that had originally led the International Court of Justice to

recognize the liberal rules on reservations that were contained in the 1969 Vienna Convention.

92. In conclusion, he said that if a convention on crimes against humanity was not widely ratified, or if the ratification process languished for a long time, it might affect the working and perception of international criminal justice more generally. The Commission had no option but to make the project a success.

The meeting rose at 6.05 p.m.

3354th MEETING

Tuesday, 9 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, 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 (*concluded*)

1. Mr. MURPHY (Special Rapporteur), summing up the discussion on his third report on crimes against humanity (A/CN.4/704), said that he wished to thank the members of the Commission for the comments and suggestions that they had contributed to what had been an exceptional debate. Although, in his summing-up, he would not be able to address each and every one of them, he had paid close attention to and recorded all the views that had been expressed.

2. With regard to the general issues raised during the debate, Mr. Murase had reiterated a view that he had expressed in 2016, at the Commission’s 3296th meeting, to the effect that the Commission was potentially overstepping its “usual mandate”⁹⁶ by drafting a new convention. The Special Rapporteur’s view, as he had noted in 2016, was that the Commission could, if it wished, pursue a topic by formulating draft articles with the intention of using them to form the basis of a convention. Article 16 of the statute of the International Law Commission allowed for the possibility of a referral by the General Assembly of a proposal along those lines, but article 17 expressly contemplated the drafting of conventions without such a referral. Given that the Commission had proceeded in that

⁹⁶ See *Yearbook ... 2016*, vol. I, 3296th meeting, p. 47, para. 42.

manner in the past, he could see no basis for claiming that the practice was improper, and no State had asserted as much in the discussions in the Sixth Committee over the last three years.

3. It was heartening that the vast majority of Commission members supported the goal of completing the topic on first reading at the current session. Only two had cautioned against rushing to a first reading. He appreciated the comments made by several members to the effect that the Commission must continue striving to craft draft articles that were meaningful and effective but were also acceptable to States. The Commission was aiming to produce not an obscure hortatory instrument, but a full-scale treaty that was welcomed by States and civil society alike.

4. An interesting discussion had taken place on the advantages and disadvantages of the so-called “long-form” provisions that he had proposed for the purpose of addressing extradition and mutual legal assistance under the draft articles. Several members had questioned whether those provisions were necessary or appropriate; others had endorsed them and, in relation to mutual legal assistance, had said that they were important for contemporary law enforcement cooperation. Still others had endorsed them but said that they should be streamlined.

5. Having carefully considered all the views expressed, he did not believe, first of all, that the nature of the offence to which particular long-form provisions referred was relevant when considering the usefulness of such provisions. When one State sought legal assistance from another, for example, the value of having effective procedures that were set out in such provisions did not change based on the criminal offence concerned. In particular, he did not agree with the notion that crimes against humanity were, as a general rule, confined to a single State’s internal affairs, thus making transnational cooperation less relevant. To take just one example, it would be entirely plausible for members or victims of Islamic State in Iraq and the Levant, also known as Daesh, to turn up in any number of countries, creating a need for transboundary cooperation in investigating and prosecuting the alleged offenders for crimes against humanity.

6. Second, he wished to respond to what perhaps had been the most pertinent question on the issue, namely whether the long-form provisions in the United Nations Convention against Transnational Organized Crime (2000) and the United Nations Convention against Corruption (2003) had, in practice, actually been useful. There were some data that suggested that those provisions were, in fact, working quite well. To save time, he would focus primarily on the second of the two conventions. Of the 181 States parties to the United Nations Convention against Corruption, none had filed a reservation to its provisions on extradition or mutual legal assistance, and only 19 had informed the United Nations Secretary-General that they would not use the extradition provisions as the legal basis for their cooperation with other States in relation to extradition. In addition, UNODC had issued a report in 2015, entitled *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement*

and *International Cooperation*,⁹⁷ which contained a number of favourable findings concerning the use of such provisions.

7. Those findings included the fact that most States had reported having fulfilled their obligations under the United Nations Convention against Corruption to deem corruption offences to be included as extraditable offences in any extradition treaty existing between them and other States and to include such offences as extraditable offences in future extradition treaties. Those provisions were analogous to draft article 11, paragraph 1, of the Commission’s draft articles on crimes against humanity. Furthermore, the majority of States parties to the Convention had confirmed that under no circumstances would an offence established in accordance with the Convention be treated as a political offence (a matter covered by the Commission’s draft article 11, para. 2). Only a minority of States parties required a treaty for extradition to occur; however, in practice, most States parties relied on treaty-based processes. The majority of States parties had confirmed that they allowed the relevant article of the Convention to be used as the legal basis for extradition in cases where they had no extradition treaty with the other State party concerned (as provided for in the Commission’s draft article 11, paras. 3 and 4).

8. Given that the average duration of judicial or administrative extradition proceedings reported by States parties ranged from 1 to 18 months, the relevant provision of the Convention (corresponding to the Commission’s draft article 11, para. 7) appeared to be valuable in encouraging expeditious processing. Although the possible grounds for refusal of extradition were provided for under national law, most countries could reject extradition requests based on the same types of grounds as those referred to in the Convention (corresponding to the Commission’s draft article 11, para. 11). Furthermore, the obligation set forth in the Convention’s provision on consultations before refusing extradition (which was analogous to the Commission’s draft article 11, para. 12) already existed in the national law or practice of some States parties, according to the UNODC report, while other States parties viewed it as useful because it was “directly applicable and self-executing in their own legal systems”.⁹⁸ In contrast, the report indicated that States parties had reported relatively little practice under the Convention provisions corresponding to the Commission’s draft article 11, paragraphs 9 and 10. Thus, if the Commission was looking for places to cut text, those paragraphs represented one possibility.

9. Overall, the UNODC report revealed a significant amount of State practice showing that the extradition provisions of the United Nations Convention against Corruption were operating quite well. States were familiar with and had accepted the approach set out in those provisions, and they had tailored international laws and practices to reflect it. Consequently, he considered it appropriate for the draft articles to include a long-form provision on extradition.

⁹⁷ UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, United Nations, New York, 2015.

⁹⁸ *Ibid.*, p. 199.

10. According to the same report, the value of the long-form provision was even more apparent in the area of mutual legal assistance. Many States parties had mentioned that the provision on that subject in the United Nations Convention against Corruption (a provision analogous to the Commission's draft article 13) was important because it provided for international cooperation between them and other States in the absence of a bilateral or regional mutual legal assistance treaty. Although bilateral treaties took precedence, several States had reported that, on numerous occasions, they had expressly invoked the Convention in their requests for mutual legal assistance, including through the use of the "mini-treaty" provisions contained in the Convention.

11. Third, many scholarly commentators had also noted the value of the long-form provisions in the United Nations Convention against Corruption and its predecessor conventions, highlighting the impact of those provisions in promoting cooperation even on matters that went beyond the specific crimes covered by the particular treaty in which they appeared. According to one UNODC official, the success of the Convention had been due, in large part, to its detailed provisions on extradition and mutual legal assistance.

12. Fourth, the Commission should not overlook the fact that many States viewed extradition and mutual legal assistance as critical elements in addressing the most serious crimes of concern to the international community. Indeed, the initiative launched by Slovenia, together with Belgium and the Netherlands, focused on creating a multilateral treaty exclusively on those two issues and had attracted the interest of a number of States. It was therefore a mistake to downplay the value of robust provisions on those issues; the Commission risked having its draft articles perceived as being out of step with contemporary practice if it aimed for substandard provisions in that area.

13. Lastly, his impression was that some of the concerns expressed about the long-form provisions related not so much to their substance as to their "packaging" and to the possibility that they might "drown out" the other draft articles when placed alongside them. Some members had proposed to solve the problem by placing them in an annex. He was open to ideas in that regard; one possibility might be to simply move draft articles 11 and 13 to the end of the other draft articles or just before draft article 17 on dispute settlement. Ultimately, that matter could be sorted out in the Drafting Committee.

14. The specific comments and suggestions advanced by Commission members during the plenary debate could also be taken up in the Drafting Committee. With regard to draft article 11 on extradition, several members, noting that it did not contain any provisions on multiple or competing requests for extradition, had proposed that the matter should be addressed in either the draft articles or the commentary thereto, perhaps drawing inspiration from article 90 of the Rome Statute of the International Criminal Court or from General Assembly resolution 3074 (XXVIII) of 3 December 1973. Others were of the view that the issue should not be addressed in the draft articles at all. Obviously, in any given context, the optimal State for prosecuting an offender could differ; it could be the

State where the crime had occurred, the State where the alleged offender was located or some other State. With the Commission's approval, he would craft a commentary for its consideration that laid out a series of factors to be taken into account by requested States in any given situation.

15. Most Commission members had said they agreed that draft article 11 did not need to address the issue of dual criminality, given that the draft articles required all States to ensure that crimes against humanity constituted offences under their criminal law. One member had expressed concern, however, in relation to a possible transition period during which States were amending their laws, while another had noted that, even with the definitions set forth in draft article 3,⁹⁹ there could be differences between the national laws of States. Yet another had made the point that draft article 3, paragraph 4, acknowledged the ability of States to establish a broader definition of crimes against humanity than that set forth in the draft article. Paragraph (41) of the commentary to draft article 3, which had been provisionally adopted by the Commission in 2015, indicated that "[a]ny elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance".¹⁰⁰ The Commission could continue to discuss the issue of dual criminality in the Drafting Committee, but the prevailing view seemed to be that draft article 11 should not include any provision along those lines.

16. One interesting question that had arisen in the discussion was whether draft article 11 should refer to the offences set forth in draft article 5¹⁰¹ or the definition of crimes against humanity set forth in draft article 3, or to both. The Commission's practice in earlier draft articles, such as draft articles 6, 8, and 10,¹⁰² had been to refer to draft article 5, because that was the draft article that set out the offences constituting crimes against humanity. Draft article 3 was important but was merely a definition clause. He was inclined to continue with the Commission's past practice. In any event, the matter could be discussed further in the Drafting Committee.

17. There had been numerous suggestions for additions or deletions to draft article 11, in particular paragraph 6 on the role of national law in the extradition process and paragraph 11 on grounds for refusing to extradite. All those suggestions could be considered in the Drafting Committee. At the same time, it was important to keep in mind that the draft articles did not impose an obligation to extradite, but rather set forth an *aut dedere aut judicare* obligation. Subject to its other obligations, a State could decline to extradite for whatever reasons it wished, but it was still bound by its obligation to prosecute.

18. Although most members appeared to support the referral of draft article 12 on *non-refoulement* to the Drafting Committee, some had queried its relationship to

⁹⁹ *Yearbook ... 2015*, vol. II (Part Two), p. 37 (draft article 3).

¹⁰⁰ *Ibid.*, p. 47 (para. (41) of the commentary to draft article 3).

¹⁰¹ *Yearbook ... 2016*, vol. II (Part Two), pp. 151–152 (draft article 5).

¹⁰² *Ibid.*, pp. 162, 165 and 168 (draft articles 6, 8 and 10).

draft article 11, paragraph 11, especially in regard to the term “extradite”. In fact, draft article 11, paragraph 11, was best seen as a safeguard clause for persons accused of committing crimes against humanity, in that it clearly indicated that a State was not under an obligation to extradite under certain egregious circumstances. By contrast, draft article 12 was intended to prevent persons from being sent to a place where they might be exposed to crimes against humanity. The two draft articles therefore served completely different purposes.

19. Some members had put forward the interesting idea of switching the position of draft article 12 to immediately follow draft article 4¹⁰³ in order to highlight its preventive nature. Another member had suggested that it should be placed after draft article 14. Both proposals merited consideration in the Drafting Committee.

20. While a number of members were content with the language of the draft article as it stood, various suggestions had been made for amending the grounds for *non-refoulement*. Some members had urged broader coverage of all serious human rights abuses, while others were in favour of a targeted reference to the underlying constituent elements of crimes against humanity set forth in draft article 3. Several members had cautioned against possible overlap with other treaty regimes. Further suggestions concerning draft article 12 had included altering or clarifying the references to “territory”.

21. Many useful modifications, additions and deletions had been suggested to draft article 13 on mutual legal assistance, such as amendments to the list of types of assistance in paragraph 3. Some members had queried the need to refer to bank secrecy and bank records, although another had urged the retention of those provisions. Three members had expressed concern about the grounds for refusing assistance set forth in paragraph 16. Two members had asked whether the draft articles would allow existing mutual legal assistance treaties to continue in operation, or whether they would require States to use draft article 13 instead. Since existing mutual legal assistance treaties were usually much more detailed than draft article 13, it would probably be better to harness existing treaties than to force States to use the provisions of the draft article, which were really intended for use in cases where the States concerned had no treaty relationship. All those matters could be discussed in the Drafting Committee.

22. While all members had said that they welcomed draft article 14, various proposals had been made with a view to refining its wording. Some members had suggested that paragraph 1 (a) on the right to complain be amended to impose an obligation on States to examine complaints in order to determine, in accordance with draft article 7,¹⁰⁴ whether there were reasonable grounds to believe that crimes against humanity had been or were being committed. Two members had proposed the inclusion of the right to truth or the right to protection of evidence, while others had suggested that the term “victim” should be defined either in the draft article itself or in the commentary thereto; one member had said that there was no need to provide a definition.

23. With respect to paragraph 1 (b), several members had submitted that it was important to extend victim protection to include emotional and psychological well-being, privacy and dignity, thereby echoing article 68, paragraph 1, of the Rome Statute of the International Criminal Court. One member had recommended the addition of a sentence encouraging States to hold *in camera* proceedings, particularly for vulnerable witnesses. Two members had said they were in favour of specifically mentioning children and victims of sexual and gender-based violence, and another member had referred to the need to protect whistle-blowers.

24. Some members had said that paragraph 2 on victim participation was insufficiently prescriptive and had proposed drawing on article 68, paragraph 3, of the Rome Statute of the International Criminal Court, while others had cautioned against allowing victim participation to impede the functioning of national judicial systems. One member would have preferred paragraphs 2 and 3 to be cast as recommendations rather than as strict requirements.

25. In paragraph 3, some members had advocated the insertion of adjectives such as “prompt”, “full” or “effective” before the noun “reparation”, along the lines of the wording of article 24, paragraph 4, of the International Convention for the Protection of All Persons from Enforced Disappearance. Other members had said that it should be made clear that the list of reparations was not exhaustive. On the other hand, a number of members had said that they welcomed the flexibility offered to States in order to take account of the disparity in their ability to provide reparations. A few members considered it unwise to include guarantees of non-repetition, while others supported the inclusion of all the forms of reparation listed in paragraph 3.

26. There had been considerable disagreement among members with regard to the retention of draft article 15 (Relationship to competent international criminal tribunals). Several members had expressed uncertainty about whether the draft article was really necessary or appropriately formulated. It had been argued that the draft articles did not conflict with the obligations owed to international criminal tribunals, that the Commission should be wary of giving priority to unknown future tribunals, and that it was inadvisable to override legal rules that would otherwise operate with respect to complicated issues concerning international tribunals, such as non-parties to international tribunals and Security Council decisions. It had also been maintained that, even in the context of the Rome Statute of the International Criminal Court, it was confusing to overlay the principle of complementarity, which gave precedence to national systems, with a rule that seemed to contradict it.

27. Some members had suggested that a solution might lie in making it plain that the competent international criminal tribunal must comply with the fundamental principles of international criminal law. That proposal had led other members to express concerns about what exactly such a standard meant and who would determine whether it was being met. Two members had suggested that the Commission might resort to a “without prejudice” clause. Another member was of the opinion that such a provision

¹⁰³ *Yearbook ... 2015*, vol. II (Part Two), p. 47 (draft article 4).

¹⁰⁴ *Yearbook ... 2016*, vol. II (Part Two), p. 164 (draft article 7).

was usually found not in the kind of treaty the Commission was crafting, but in treaties creating a quasi-constitutional international organization.

28. In the light of the debate, he was personally of the view that draft article 15 should be referred to the Drafting Committee on the understanding that the Committee would consider whether such an article was really needed, given the lack of identified conflicts with international criminal tribunals. Attempting to find language dealing with the issue of unspecified and unknown conflicts carried risks that might not be offset by any great benefits. Existing treaties that dealt with crimes against humanity contained no such provisions and did not appear to encounter any difficulty in relation to international criminal tribunals.

29. Members' views on draft article 16 (Federal State obligations) were divided. A large group thought that it should be retained, perhaps in revised form, but another substantial group doubted its value or necessity, since the principles established in article 29 of the 1969 Vienna Convention already accomplished its underlying objective. On balance, the draft article had sufficient support to be referred to the Drafting Committee, which would determine whether to retain it and, if so, how to word it.

30. Virtually all of the members had expressed support for the inclusion of a provision along the lines of draft article 17 on inter-State dispute settlement, which was regarded as reflecting a tried and tested three-tier process of negotiation, arbitration and judicial settlement, although it might be possible to leave the issue for States to address as part of the final clauses. Several interesting improvements had been proposed. For example, several members preferred to place greater emphasis on judicial dispute settlement, with some of them voicing scepticism about the role that arbitration could play in settling disputes concerning an instrument addressing crimes against humanity. Some members had suggested the incorporation in paragraph 2 of language concerning State responsibility similar to that contained in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. A number of members had recommended that the open-ended phrase "within a reasonable time" be replaced with a reference to a specific time period, such as six months, within which States must negotiate a settlement. A few members took the view that allowing States to opt out of a judicial settlement provision would hinder the effective implementation of the treaty, although others were in favour of an opt-out provision, on the ground that participation in dispute settlement should be on a voluntary basis.

31. His proposal that the Commission leave the question of a possible monitoring mechanism to a diplomatic conference had been welcomed by some members, but others had said that the Commission should make some sort of proposal, concerned that a new convention would be ineffective without such a monitoring mechanism. While he understood their unease, it was premature for the Commission to address the matter before it knew what States' preferences might be. To that end, it might be wise to await States' comments on the matter in the Sixth Committee and perhaps to include a request for their views in the report on the work of the Commission at its sixty-ninth session.

32. None of the members had said that they opposed the referral of the draft preamble to the Drafting Committee. The debate had produced some useful suggestions, such as tailoring that part of the treaty to reflect the need for inter-State cooperation and the development of rules in national legal systems. Other proposals had encompassed the inclusion of references to "achieving justice for victims", to the *jus cogens* nature of rules related to crimes against humanity, to international human rights law and international humanitarian law and to the Rome Statute of the International Criminal Court. Some members had proposed the deletion of one or both of the final paragraphs. One member was in favour of adding wording to the effect that any international cooperation must be based on the independence and equality of States, mutual respect between them and the consent of the countries concerned. All those suggestions could be discussed in the Drafting Committee with a view to developing a thoughtful and useful preamble.

33. Concerning the three issues raised in chapter VIII of his third report, namely concealment, immunity and amnesty, he recalled that he had decided not to propose any draft articles or draft provisions on those matters. Several members had expressed support for that decision with regard to the concealment of crimes against humanity, noting, *inter alia*, that existing treaty practice left that issue to the operation of national laws. Notwithstanding the questions that had been raised as to whether concealment was covered by the concept of complicity and whether it could be addressed under draft article 14 on the rights of victims, witnesses and others, his view was that, under existing treaties, concealment was not considered to rise to the level of an international crime. For example, lying about the location of an alleged offender was not deemed to constitute participation or complicity in an international crime; to the extent that it represented an obstruction of justice, it was left to national law.

34. Views were more sharply divided, however, with respect to immunity. While his position was that other treaties addressing international crimes under national law likewise did not contain provisions on the matter, some members had said that there should be a draft article establishing that officials, including diplomats and Heads of State, did not have immunity from prosecution for crimes against humanity. Other members preferred an approach that focused on the irrelevance of official capacity, using language that was found in article IV of the Convention on the Prevention and Punishment of the Crime of Genocide and was echoed in article 27, paragraph 1, of the Rome Statute of the International Criminal Court; some of those members had said that such a provision would prevent individuals from avoiding substantive responsibility based on their official position, but would not address the question of whether such officials might enjoy procedural immunity. Another view was that the Commission should refrain from addressing immunity in the draft articles so as to avoid conflict with the topic on the immunity of State officials from foreign criminal jurisdiction. Given the wide range of views expressed in the discussions, he proposed that the Drafting Committee discuss various options, such as a new draft article, a new provision in an existing draft article, a preambular paragraph, guidance in the commentary or some other solution.

35. Several members had said they agreed that the issue of amnesty should not be addressed in the draft articles. One argument in support of that view was that it was not possible to foresee future situations that might make it necessary for States to use amnesty, in limited circumstances, as part of a transitional justice process even with respect to crimes against humanity. Other members, however, took the view that either the draft articles or the commentary should contain provisions that precluded amnesties in whole or in part. For example, it had been suggested that the draft articles include at least a limited clause providing that States should not conclude agreements granting blanket amnesties in respect of crimes against humanity. One member had suggested that a clause on amnesty be included in the preamble to the draft articles. The dominant view seemed to be that the Commission should take a position on the subject, but that it should do so in the commentary, not in the draft articles themselves. He understood that the Drafting Committee was to consider the possibility of requesting the Secretariat to prepare a study on the matter. The commentary to draft article 5 should include some paragraphs on the overall impermissibility of amnesties for crimes against humanity, having regard to the obligations set out in that draft article, while also leaving States some leeway in the event of exceptional circumstances.

36. Concerning reservations, his third report laid out a series of options for States to consider when drafting the final clauses of the future convention on crimes against humanity. Most members had said that they supported that approach, although a few had expressed a preference for a “no reservations” clause. Other suggestions included a mixed reservations system and the identification of specific provisions to which reservations would be permitted. In general, the Commission seemed inclined to refrain from proposing a draft article on reservations and to follow its previous practice of leaving the issue for States to determine in the negotiations on the future convention. The Commission could revisit the issue on second reading if States requested it to provide further guidance.

37. He proposed that the Commission refer draft articles 11 to 17 and the draft preamble to the Drafting Committee, which would include the issues of immunity and amnesty in its discussions, taking account of the various positions expressed in the Commission’s debate. Should the Commission agree to that proposal, he hoped that the Drafting Committee would be able to revise those articles and finalize draft articles 1 to 10 by the end of the first part of the current session. He would then prepare a full set of commentaries for consideration during the second part of the session.

38. Mr. TLADI said that the discussions in the Drafting Committee were likely to resemble a second plenary debate, in view of the many issues that would have to be revisited. He wondered why the Special Rapporteur had said that the Drafting Committee would discuss the issue of amnesty, since such committees did not normally deal with commentaries, and he understood that the Special Rapporteur intended to refer to amnesty only in the commentary.

39. Mr. MURPHY (Special Rapporteur) said he agreed that commentaries were not normally referred to the Drafting Committee; he had meant only to indicate that the discussions in that body would help him to ascertain what approach he should take in crafting the paragraphs on amnesty so as to reach the widest possible agreement.

40. Mr. JALLOH said that in the light of the Special Rapporteur’s view, set out in paragraph 297 of his report, that the draft articles should not address the issue of amnesties under national law, he was not sure why the Drafting Committee was considering the idea of requesting a Secretariat study on the subject.

41. Mr. MURPHY (Special Rapporteur) said that part of the discussion in the Drafting Committee would relate to the question of what additional information was needed in relation to amnesty, whether further study would be useful and whether the Secretariat was in a position to undertake such a study.

42. Mr. SABOIA said his understanding was that the purpose of the Drafting Committee’s discussions on amnesty was to determine how the Commission’s views and concerns regarding certain kinds of amnesty should be reflected in the commentary, so as to make Governments aware of the Commission’s position.

43. Mr. MURPHY (Special Rapporteur) said that he shared Mr. Saboia’s understanding. Several Commission members had said that the commentary should go beyond the considerations set out in the report and provide a more thoughtful analysis of the problems associated with amnesty, especially in view of the criminalization requirement in draft article 5, which made blanket amnesties impermissible.

44. Mr. GROSSMAN GUILLOFF said that it would be worthwhile to attempt to reach consensus on the issue, which was very sensitive. In any event, the Commission should leave open the possibility of requesting information on State practice with regard to amnesty at a later stage of its work.

45. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 11 to 17 and the draft preamble to the Drafting Committee.

It was so decided.

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

[Agenda item 1]

46. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of crimes against humanity would be composed of the following members: Mr. Murphy (Special Rapporteur), Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Jalloh, Mr. Kolodkin, Ms. Lehto, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Reinisch, Mr. Saboia, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

* Resumed from the 3349th meeting.

Programme, procedures and working methods of the Commission and its documentation (*continued*)* (A/CN.4/703, Part II, sect. G)

[Agenda item 9]

47. The CHAIRPERSON proposed, in the light of the consensus that had emerged from consultations, that the topic “Succession of States in respect of State responsibility” should be included in the Commission’s programme of work and that Mr. Šturma should be appointed as Special Rapporteur.

It was so decided.

The meeting rose at 11.30 a.m.

3355th MEETING

Wednesday, 10 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Argüello Gómez, Mr. Aureescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, 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.

Protection of the atmosphere¹⁰⁵ (A/CN.4/703, Part II, sect. B,¹⁰⁶ A/CN.4/705,¹⁰⁷ A/CN.4/L.894¹⁰⁸)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the protection of the atmosphere (A/CN.4/705).

2. Mr. MURASE (Special Rapporteur) said that he would first like to express his appreciation to the members of the Commission for their active participation in the informal dialogue session with atmospheric scientists on 4 May 2017, a summary of which would shortly

* Resumed from the 3350th meeting.

¹⁰⁵ At its sixty-seventh and sixty-eighth sessions (2015 and 2016), the Commission provisionally adopted five preambular paragraphs and draft guidelines 1 to 8, and the commentaries thereto (*Yearbook ... 2015*, vol. II (Part Two), pp. 19–26; and *Yearbook ... 2016*, vol. II (Part Two), pp. 172–179).

¹⁰⁶ Available from the Commission’s website, documents of the sixty-ninth session.

¹⁰⁷ Reproduced in *Yearbook ... 2017*, vol. II (Part One).

¹⁰⁸ Available from the Commission’s website, documents of the sixty-ninth session.

be uploaded on to the website of the International Law Commission. Unfortunately, in order to meet the 30,000-word limit imposed on reports, he had had to delete, among other things, the two annexes, a number of footnotes and references and two subparagraphs from draft guideline 9. As a result, there were some discrepancies in the cross-referencing between paragraphs. In addition, paragraph 65 had been included by mistake and should be ignored.

3. The report addressed the interrelationship between the law relating to the protection of the atmosphere and other branches of international law, notably the law of international trade and investment, the law of the sea, and human rights law. Those areas had been highlighted because of their intrinsic links with the law relating to the protection of the atmosphere.

4. In chapter I of the report, he discussed the general guiding principles of interrelationship. The real strength of international law, as an integral system of law, lay in interrelationships. The law relating to the protection of the atmosphere was not a sealed or autonomous law: it existed and functioned in relation to other fields of international law, as had been stressed by the Study Group on fragmentation of international law in its 2006 report.¹⁰⁹ Guided by the conclusions of the Study Group,¹¹⁰ the Special Rapporteur discussed in his fourth report the question of interrelationship as a matter of ensuring coordination when there were overlaps or conflicts between two multilateral treaty regimes. In cases of conflict between two multilateral treaties, the interpretation of those treaties should be guided by the rules set out in article 30 of the 1969 Vienna Convention. He had also considered the question of a “systemic interpretation” of multilateral treaties under article 31, paragraph 3 (c), of the 1969 Vienna Convention. The concept of “mutual supportiveness” had been considered the most basic guiding principle for coordination, as confirmed by the relevant international instruments and judicial decisions. Those considerations were reflected in draft guideline 9 concerning the guiding principles on interrelationship. It should be noted that all the draft guidelines proposed in the report employed the hortatory “should”, rather than binding expressions.

5. Chapter II of the report dealt with the interrelationship between the law relating to the protection of the atmosphere and international trade and investment law. In the area of international trade law, there had been heated debates and abundant jurisprudence since the early 1990s on “trade and the environment” in the context of article XX of GATT, which provided that environmental measures by States should not be applied in a manner which would constitute “a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade”.

6. The most important decision in relation to the atmosphere in that context was that of the Appellate Body of the World Trade Organization (WTO) in the 1996 *United States–Standards for Reformulated and Conventional Gasoline* case, in which it declared that “clean air was a

¹⁰⁹ *Yearbook ... 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

¹¹⁰ *Ibid.*, vol. II (Part Two), pp. 177–184, para. 251.