

Provisional

**For participants only**

3 June 2019

Original: English

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**International Law Commission**  
**Seventy-first session (first part)**

**Provisional summary record of the 3455th meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 1 May 2019, at 10 a.m.

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***Present:***

*Chair:* Mr. Šturma

*Members:* Mr. Al-Marri  
Mr. Argüello Gómez  
Mr. Cissé  
Ms. Escobar Hernández  
Ms. Galvão Teles  
Mr. Grossman Guiloff  
Mr. Hassouna  
Mr. Hmoud  
Mr. Huang  
Mr. Jalloh  
Mr. Laraba  
Ms. Lehto  
Mr. Murase  
Mr. Murphy  
Mr. Nguyen  
Mr. Nolte  
Ms. Oral  
Mr. Ouazzani Chahdi  
Mr. Park  
Mr. Petrič  
Mr. Rajput  
Mr. Reinisch  
Mr. Saboia  
Mr. Tladi  
Mr. Valencia-Ospina  
Mr. Wako  
Sir Michael Wood

***Secretariat:***

Mr. Llewellyn Secretary to the Commission

*The meeting was called to order at 10.05 a.m.*

**Protection of the environment in relation to armed conflicts** (agenda item 4)

*Report of the Drafting Committee (A/CN.4/L.911)*

**The Chair** said that it would be recalled that, in 2018, the Commission had had before it the first report (A/CN.4/720 and A/CN.4/720/Corr.1) of the Special Rapporteur, Ms. Lehto, which had included proposals for three new draft principles. The Drafting Committee had subsequently adopted the texts of draft principles 19, 20 and 21, which were set out in document [A/CN.4/L.911](#). The Chair of the Drafting Committee at the seventieth session, Mr. Jalloh, had presented the report of the Committee on 26 July 2018 and, as there had been insufficient time to prepare commentaries at that session, the Commission had only taken note of the draft principles.

He drew attention to document [A/CN.4/L.911](#), which set out the title of Part Four and texts and titles of the draft principles 19, 20 and 21 provisionally adopted by the Drafting Committee at the seventieth session, and invited the members of the Commission to proceed to their adoption.

He took it that the Commission wished to adopt the title of Part Four.

*It was so decided.*

*Draft principles 19, 20 and 21*

*Draft principles 19, 20 and 21 were adopted.*

*The title of Part Four and the texts and titles of draft principles 19, 20 and 21, as contained in document [A/CN.4/L.911](#), were adopted.*

**Crimes against humanity** (agenda item 3) (*continued*) ([A/CN.4/725](#) and [A/CN.4/725/Add.1](#))

**Ms. Lehto** said that she wished to thank the Special Rapporteur for his thorough and clear fourth report and his helpful oral introduction, both of which laid an excellent foundation for the finalization of the draft articles on crimes against humanity at the current session. As she mostly agreed with the proposals of the Special Rapporteur where he suggested retaining existing language and addressing some of the comments made in relation to the commentary, she would not comment on individual proposals or on the provisions and issues on which she had commented in 2017 unless she had a specific reason for doing so.

The large number of written comments received from States, international organizations and their offices and, in particular, from non-governmental organizations (NGOs) and individuals attested to the great interest that the topic had raised. It was also notable that the great majority of the comments submitted had been phrased in favourable terms and expressed support for the topic, including its intended final form.

As for the parallel mutual legal assistance initiative, which had recently resulted in a first draft of a convention and might lead to the convening of a diplomatic conference, she agreed with the conclusions drawn by the Special Rapporteur in paragraph 331 of the report. First, there was substantial overlap between the latest mutual legal assistance draft text and the Commission's draft articles; second, the prevailing situation was not ideal from the point of view of either initiative; and third, it was for States, not the Commission, to draw conclusions on how to proceed. However, what the Commission could and should do in that situation was to provide States with a high-quality product. The draft articles on crimes against humanity already had, in many respects, a standard-setting quality. The Commission should ensure that that aspect was strengthened, not weakened, during the finalization process.

She welcomed the proposal to convene informal consultations during the second part of the session to discuss the wording of the recommendation to be made to the General Assembly.

With regard to the draft preamble, she agreed with the Special Rapporteur that no changes were required. If, however, the Commission wished to take up the recent proposal of the United States of America to add to the preamble language from the Rome Statute of the International Criminal Court and Protocol I additional to the Geneva Conventions of 1949, that possibility could be discussed in the Drafting Committee.

As for the mention of the peremptory nature of the prohibition of crimes against humanity, in the third paragraph of the preamble, the relevant commentary referred to the pronouncements of the International Court of Justice and to the Commission's own work that made clear the peremptory nature of that prohibition. She noted that, already some 20 years previously, Professor Bassiouni had stated: "certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity. If both elements are present in a given crime, it can be concluded that it is part of *jus cogens*". That was notably the case of crimes against humanity, which figured in both the Commission's Draft Code of Crimes against the Peace and Security of Mankind and in the Rome Statute. Even if earlier conventions, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Rome Statute and the International Convention for the Protection of All Persons from Enforced Disappearance, did not make explicit mention of the peremptory nature of the crimes that they addressed, it was quite appropriate for the Commission's draft articles to do so, given its ongoing work on *jus cogens*, which had served to clarify the concept considerably.

With respect to draft article 3, which contained the definition of crimes against humanity, she wished to comment on three issues related to paragraph 1 (*h*) and paragraph 3.

Her first comment concerned the grounds for persecution mentioned in paragraph 1 (*h*). She considered there to be a lot of merit in specifically naming such grounds as language, social origin, age, disability, health, sexual orientation, gender identity, sex characteristics, and indigenous, refugee, statelessness and migratory status, at least in the commentary, while making it clear that the list was not exhaustive. An express mention of the grounds for persecution listed in paragraph 60 of the report would serve a purpose, given that persecution on such grounds unfortunately continued to occur.

Her second comment, also in regard to paragraph 1 (*h*), was related to the connection requirement, which followed from the formulation of article 7 (1) (*h*) of the Rome Statute. While the general approach taken to draft article 3, namely adhering to the formulation used in the Rome Statute, had met with the approval of Member States in the Sixth Committee, there were sometimes solid grounds for deviating from the provisions of that instrument. That was the case for the definition of persecution, which was tied to the occurrence of other crimes under draft article 3, or genocide or war crimes. She supported the Special Rapporteur's proposal to delete the reference to genocide and war crimes in that context. Her preference, however, would be also to delete the requirement of a specific connection to other crimes against humanity.

She recalled that the statutes of other international criminal tribunals or special courts did not require such a connection for the crime of persecution. That was true of the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Criminal Tribunal for Rwanda, the statute of the Special Court for Sierra Leone, the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, the Kosovo Law on Specialist Chambers and Specialist Prosecutor's Office and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). Moreover, no such requirement was included in the Draft Code of Crimes against the Peace and Security of Mankind. In that respect, reference could also be made to national criminal legislation in different parts of the world. Furthermore, the International Tribunal for the Former Yugoslavia had expressly rejected such a requirement, not only because it did not appear in its statute, but also because it was not deemed to be supported by customary international law. The Extraordinary Chambers in the Courts of Cambodia had likewise rejected that requirement, pointing out that it had not existed in customary law in 1975. The conclusion that was to be drawn from those

examples was that the Rome Statute formulation was narrower than existing customary law and had not been repeated in subsequent instruments or influenced further practice of international criminal tribunals.

The Special Rapporteur suggested that the requirement of a connection to other crimes against humanity roughly corresponded to the requirement of “equal gravity”, which had been confirmed, for instance, in the jurisprudence of the International Tribunal for the Former Yugoslavia and that of the Extraordinary Chambers in the Courts of Cambodia. He quoted the International Tribunal for the Former Yugoslavia Appeals Chamber statement that “[n]ot every denial of a human right is serious enough to constitute a crime against humanity” and that “acts or omissions need to be of equal gravity to the crimes listed in Article 5 [of the Statute] whether considered in isolation or in conjunction with other acts”. Although she agreed with that statement, she could not see how it made the connection requirement and the gravity requirement interchangeable. It was true that persecution was often accompanied by other inhumane acts or was a precursor to such acts; but for the underlying acts of persecution to be of equal gravity to other crimes against humanity, they did not have to be connected to other crimes.

Reference could in that regard also be made to the Office of the United Nations High Commissioner for Human Rights (OHCHR), which had pointed out that “the Rome Statute introduced an additional requirement, which goes beyond customary international law, and constitutes a jurisdiction threshold for the purposes of the International Criminal Court”. OHCHR had gone on to state that “the Draft Articles should not ... narrow the definition of persecution as crime against humanity as understood under international customary law”.

On that basis, it would be advisable either to remove the connection requirement or to replace it with language on equal gravity, as had also been proposed by OHCHR. What should be included in draft article 3 was the customary definition of persecution as a crime against humanity, not only “persecution of an especially grave nature”, a concept that appeared in paragraph 99 of the report.

Her third substantive comment on draft article 3 related to the definition of gender contained in paragraph 3. The issue had featured prominently in many of the written comments, and she had no wish to expand on it at the present juncture, especially as the Special Rapporteur had made a proposal that she could support. She recalled that the definition, which had already been contested in 1998, was blatantly outdated and did not reflect the current understanding of the notion of “gender” as used, *inter alia*, by the Office of the Prosecutor of the International Criminal Court, the International Committee of the Red Cross (ICRC), the World Health Organization (WHO) and UN-Women, which all placed emphasis on the social construction of gender, as well as recognized human rights standards. Ideally, the definition would be replaced with a more appropriate one, given the standard-setting role of the draft articles. However, a practical alternative would be to delete paragraph 3, as proposed by the Special Rapporteur. A consequential change would be the deletion, in paragraph 1 (*h*), of the words “as defined in paragraph 3”.

Lastly, as a technical point on draft article 3, she had no objection to the drafting change proposed in paragraph 88 of the report, based on comments made by Sierra Leone.

With regard to draft article 4, on the obligation of prevention, she supported the Special Rapporteur’s proposal to include an express obligation on States to refrain from committing crimes against humanity. That was an important point of principle, even though such an obligation could be seen as implicit in the obligation to prevent. The new paragraph could be drafted along the lines proposed in paragraph 118 of the report.

With respect to draft article 5, on the obligation of *non-refoulement*, she supported the proposed deletion of the words “territory under the jurisdiction of” in paragraph 1. As had been explained in the report, what was relevant in that context was whether the person was left within the control of a State or sent – whether expelled, returned, surrendered or extradited – to a State that could not protect him or her from crimes against humanity. The phrase “to a State” covered both sending a person to the territory under the jurisdiction, *de jure* or *de facto*, of a State, and leaving him or her “in the hands” of a State, to use a similarly broad notion familiar from international humanitarian law.

As for draft article 6, on criminalization under national law, she agreed that there was no reason, in general, to add detail to the text. The generic terms used in draft article 6 left room for implementation at the national level, taking into account the requirements in different legal systems. She likewise welcomed the proposal for a more streamlined formulation of paragraph 3, on the responsibility of commanders and other superiors, based on the ICRC 2005 study on customary international humanitarian law.

Turning to draft article 11, on fair treatment of the alleged offender, she noted that the Special Rapporteur proposed the deletion of the mention of human rights law at the end of paragraph 1 on the basis of comments received. However, it seemed that only one State had raised that point. Another State had proposed replacing the words “including human rights law” with the words “consistent with human rights law”. Since the right to a fair trial was a fundamental human right, she considered it highly appropriate to retain the reference to human rights law. She would have no objection to the addition of a reference to international humanitarian law, as had been proposed by the United States of America and several speakers the previous day, if the Commission wished to do so. In that regard, it would be useful to refer to the ICRC commentary to article 49 (4) of the First Geneva Convention, on safeguards of proper trial and defence. ICRC pointed out that, since 1949, the list of judicial guarantees had evolved through the development of both humanitarian and human rights law. The commentary then set out a list of minimum guarantees based on both humanitarian and human rights law, to be applied to the prosecution of war crimes.

As for draft article 12, on victims, witnesses and others, she could support the proposed amendment to paragraph 3, which sought to respond to the concern of Australia that, according to the existing wording, any State could be liable to pay reparation for crimes against humanity, irrespective of where such crimes had taken place.

With regard to draft article 13, on extradition, she found the proposed new paragraph 1 to be a useful complement. Similarly, the proposal for a new draft article 13 *bis*, on transfer of sentenced persons, was a standard feature in modern criminal law conventions and would fit well in that context.

With respect to draft article 14, on mutual legal assistance, she could support the proposed drafting changes and welcomed, in particular, the addition of a new paragraph on cooperation with international mechanisms that had a mandate to collect evidence on crimes against humanity, as proposed by the United Nations Office on Genocide Prevention and the Responsibility to Protect. The proposed draft article referred to mechanisms that were established by intergovernmental bodies of the United Nations and was broad enough to cover, for instance, commissions of inquiry mandated by the Human Rights Council, or the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. There was reason to underline the importance of timely, professional and impartial collection and documentation of evidence for crimes against humanity, which was a precondition for the establishment of credible accountability.

Before concluding, she wished to congratulate Mr. Murphy on having successfully guided the topic of crimes against humanity to its near completion.

She supported sending all the proposed draft articles to the Drafting Committee and looked forward to concluding the topic at the current session.

**Mr. Nguyen**, expressing appreciation for the Special Rapporteur’s extensive analysis of the numerous comments submitted by States and international organizations, said that the fourth report provided the Commission with a good basis on which to continue its discussion of the topic with a view to concluding its second reading of the draft articles at the current session.

In addition to strengthening the system of international criminal law, the draft articles filled gaps in the existing framework of international criminal, humanitarian and human rights law and thus contributed to ending impunity. The annexes to the Special Rapporteur’s report were an essential reference, particularly for States that were not parties to the Rome Statute of the International Criminal Court, for coordinating efforts to prevent

and punish international crimes. The draft articles together with the annexes could form the basis of a convention on crimes against humanity or they could be associated with initiatives such as that on multilateral legal assistance, spearheaded by the Netherlands and a core group of States.

As they drew heavily on the language of the Rome Statute, the draft articles might not sufficiently reflect the concerns of States that had not ratified or acceded to the Rome Statute and therefore did not accept the jurisdiction of the International Criminal Court. To gain the broad acceptance of the international community, the draft articles and the commentary thereto should further clarify the legal positions and attitudes of States regarding all aspects of crimes against humanity. Any future convention on the topic must be founded on three principles: respect of sovereign equality, non-abuse of international jurisdiction and eradication of impunity for perpetrators of crimes under international law. The draft articles must be flexible and apply universally to all national legal systems.

The draft preamble provided a more solid basis for eradicating crimes against humanity than the preambles of existing international instruments relating to international crimes, by recognizing the prohibition of crimes against humanity as a peremptory norm of general international law (*jus cogens*). It reflected the aspiration of the whole international community to eliminate one of the most serious crimes. A decision not to include that preambular paragraph would represent a step backwards in the Commission's development of international criminal law. The survey of sources and the analysis by the Special Rapporteur on peremptory norms of general international law (*jus cogens*) in his fourth report provided support for the Commission to reaffirm its position on such norms. One way for it to do so would be to include the *jus cogens* nature of crimes against humanity as one of the most serious crimes under international law, thus complementing the description of the nature of crimes against humanity in draft article 2.

Measures taken to comply with the general obligation to prevent and punish any crime against humanity were aimed at upholding fundamental values and the dignity of humankind. Crimes against humanity, irrespective of whether they were committed in times of peace or of armed conflict, were crimes under international law, which States must undertake to prevent and punish. Such a preventive obligation, however, must not overrule the principle of sovereignty, especially with regard to the obligation to cooperate with other States and international organizations as stated in draft article 4 (2).

He supported the Special Rapporteur's proposal to delete, at the end of draft article 3 (1) (h), the phrase that began "or in connection with", as it deviated from the scope of the draft convention described in draft article 1 and of article 7 of the Rome Statute and would lead to controversy if other crimes, such as the crime of aggression, were to be included.

Noting the many comments submitted with regard to the definition of the term "gender" provided in draft article 3 (3), he said that he supported the proposal to delete the entire paragraph in question, as the definition of "gender" in the Rome Statute did not reflect more recent developments in international human rights law. Accordingly, the question of gender-based and sex-based crimes remained, since the terms "sexual slavery" and "sexual violence" in draft article 3 (1) (g) did not necessarily cover violence against persons that did not fall under the strict categories of "male" and "female". As there had in fact been cases of intersex slavery and gender-based violence, among others, it would be advisable to consider the suggestion by American University to incorporate the broader description "any other deprivation of sexual autonomy or sexual integrity of comparable gravity".

The definition of the term "crimes against humanity", drawn verbatim from the Rome Statute, might not address States' concerns that had arisen over the two decades of the Statute's implementation. For instance, the qualification of destruction of the environment as a crime against humanity remained in question. He noted in that connection that article 1 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques stated: "Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction,

damage or injury to any other State Party.” A commentary on draft article 3 (1) (k) could be a useful addition in order to prevent abuse in that regard.

Regarding draft articles 5 (1) and 13 (1), since extradition or return proceedings only concerned persons alleged to have committed crimes against humanity, the phrase “a person” should be reconsidered in view of its broad meaning. He noted that the phrase “a person alleged to have committed ...” was used not only in the International Convention for the Protection of All Persons from Enforced Disappearance but also in the Commission’s draft article 9 on the topic at hand. In addition, for the sake of consistency, a reference to ships and aircraft should be included in draft article 5 (1), as proposed by Mr. Murase, at the Commission’s 3453rd meeting, with regard to the new subparagraph (2) (a) of draft article 4.

Regarding draft article 6, he was in favour of adding to the commentary a survey of national laws providing for penalties for crimes against humanity. The standardization of sentences was one of the objectives of criminal law, both national and international. Currently, punishment varied from one national criminal code to another, and could be as different as life imprisonment and the death penalty. The most serious international crimes warranted the harshest penalties. Furthermore, those who committed similar crimes must receive similar sentences, regardless of the nationality of the offender or where the offence was committed.

With regard to draft article 8, whereas the Special Rapporteur invoked article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to illustrate the phrase “prompt and impartial investigation”, a different formulation was to be found in the International Convention for the Protection of All Persons from Enforced Disappearance, namely, “the competent authorities ... shall ... where necessary, undertake without delay a thorough and impartial investigation”. The words “without delay” meant “within a reasonable period of time”, clearly taking into account the technical and material capacity and levels of the various competent authorities, leaving States discretion in defining the parameters of “promptness”. In his view, the phrases “without delay” or “within a reasonable period of time” should be considered as substitutes for the word “prompt” and furthermore should be clarified in the commentary.

In draft article 12, he suggested that the Commission should reconsider the word “participating”, which implied an active role for the concerned individuals, whereas in fact such individuals were usually reluctant to take part in an investigation. The word “engaging” might be a more appropriate choice in such context; moreover, the same word had been suggested by the Special Rapporteur himself in respect of draft article 4 (1). In addition, regarding draft article 12 (3), the right to obtain reparation must be extended to the victim’s family members or their legal representatives in cases where the victim had died. In Cambodia, for instance, investigations into crimes against humanity had been so prolonged that most victims were no longer alive and therefore could not receive reparation.

Draft article 13 was meant to facilitate cooperation in extradition proceedings with a view to preventing impunity for persons alleged to have committed crimes against humanity. According to the customary rule, the State in whose territory the alleged offence had occurred had priority of jurisdiction. The addition of a new paragraph 1 in draft article 13 must clarify such primacy in accordance with the content of draft article 10. Cooperation between the requesting and requested States in the extradition of alleged offenders would be undertaken only when both States were parties to an extradition treaty or the requested State was incapable of exercising its jurisdiction or was willing to surrender the alleged offender to the requesting State or competent international criminal tribunal. Both States must, subject to their national laws, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto. They should designate a national authority or focal point to take charge of all the stages of the extradition proceedings. The phrase “without prejudice to draft article 10” might be incorporated into a chapeau for draft article 13 in order to avoid any conflict in meaning and implementation of the two draft articles in question.



In the draft annex, the second part of the first sentence of paragraph 2 should be deleted or replaced with the phrase “in accordance with its national law” – found also in paragraph 6 – since the function and responsibility of the central authority was to be determined by national law. Moreover, the meaning of the phrase in question was reproduced in the third sentence of the paragraph. While paragraphs 3 and 4 did not provide for the possibility of making plural requests, such possibility existed in practice. Furthermore, in paragraph 7, the phrase “any deadlines suggested by the requesting State” did not reflect the primacy of the requested State in establishing its jurisdiction in the territory where the alleged offence had occurred, nor did it refer to its capacity to meet the request. He proposed that the phrase should be replaced with “reasonable deadlines”. In paragraph 8 (c), he would be in favour of replacing the phrase “be prohibited by its national law” with “not be allowed by its national law”, as the new phrase allowed for the possibility of future changes in the mutual legal assistance of the requested State. Noting that subparagraph 8 (a) referred to procedural matters, whereas subparagraphs (b), (c) and (d) set forth the substantial grounds on which mutual legal assistance could be refused, he suggested placing subparagraph (a) after subparagraphs (b), (c) and (d), in order to underline the requested State’s concern regarding compliance with national law. Logically, he said, a State would consider any action that might prejudice its sovereignty, security, *ordre public* or other essential interests before any procedural aspects. In paragraph 15, it should be made clear that the witness, expert or other person consenting to give evidence in a proceeding or to assist in an investigation could be found “either in the territory under the jurisdiction of the requested State or on board a ship or aircraft registered in that State”. The idea, set out in the first sentence of paragraph 20, that the ordinary costs of executing a request should be borne by the requested State, was not reasonable. The sharing of costs was necessary unless otherwise agreed by the States concerned. He further suggested that the phrase “unless otherwise agreed by the States concerned” should be inserted at the end of the last sentence of the paragraph.

Regarding the final form of the draft articles and the Commission’s recommendation to the General Assembly, the Commission must consider several closely linked factors. The development of international cooperation to prevent and punish crimes against humanity more severely was an expectation of the whole international community. The draft treaty circulated by the Netherlands and core group of States, together with the Commission’s draft articles, illustrated the desire of some States to adopt a uniform international regulation applicable to all serious international crimes, including crimes against humanity, genocide, torture and war crimes. The international cooperation proposed with a view to preventing and punishing those crimes through mutual legal assistance and extradition procedures was similar in both documents, as illustrated in the useful table provided in paragraph 329 of the Special Rapporteur’s report comparing the two. Although the fact that some 40 Member States had, at the General Assembly’s past three sessions, made statements in the Sixth Committee in support of a future convention on crimes against humanity, the number of States represented by the draft treaty initiative led by the Netherlands was ever-expanding. Furthermore, some States still had not become parties to the Rome Statute. The recent decisions by the Philippines and Malaysia to withdraw from the Rome Statute and the attitude of the United States of America to the Statute had further weakened the international criminal justice system. Given the close links of the current topic with others under consideration by the Commission, such as “Immunity of State officials from foreign criminal jurisdiction”, “Peremptory norms of general international law (*jus cogens*)” and “Universal jurisdiction”, the Commission should act prudently, owing to the topic’s political sensitivity and complexity. In his first report on crimes against humanity, the Special Rapporteur had stated that the purpose of the report was “to address the potential benefits of developing draft articles that might serve as the basis of an international convention on crimes against humanity”. The focus on a single draft convention on crimes against humanity made it possible to shorten the negotiations process and to continue the tradition of building international criminal law through conventions on specific crimes. The Commission might wish to report to the Sixth Committee that the purpose of the topic was fulfilled and that the decision on any future outcome of the articles on crimes against humanity would belong to States. In that regard, he supported the Special Rapporteur’s position as expressed in his introduction of the fourth report at the Commission’s 3453rd meeting.

He supported the proposal that the General Assembly should recommend the draft articles to Member States with a view to their considering it, together with other initiatives, as part of efforts to seek an appropriate way to elaborate a convention at a later stage.

He wished to pay tribute to the Special Rapporteur, whose expertise, guidance and cooperation had greatly facilitated the Commission's work. He supported the referral to the Drafting Committee of the set of draft articles contained in the fourth report and the commentaries thereto.

**Mr. Nolte** said that the Special Rapporteur's fourth report was impressive, not only because of its – justified – length but also because of the Special Rapporteur's meticulous description and fair and consistent assessment of the many comments and observations made by States, international organizations, non-governmental organizations and individuals. The report demonstrated that the draft articles and the recommended changes thereto were a solid basis for a possible multilateral convention establishing common standards and inter-State cooperation with respect to the prevention and prosecution of crimes against humanity.

The draft articles adopted by the Commission on first reading in 2017 had generated much interest among States, international organizations and others. The overwhelming majority of the comments received by the Commission had been positive and, very importantly, most proposals for change had been constructive and concerned specific points.

The fact that there was a separate initiative to draft a mutual legal assistance convention on crimes against humanity, genocide and war crimes was noteworthy and important, but it would be for States to determine the relationship between that initiative and the outcome of the Commission's work. In any case, he agreed with Ms. Lehto that the Commission's draft articles were standard-setting.

Before making specific comments, he wished to respond to the methodological criticism expressed by Mr. Rajput, who had said that it was not clear why the draft articles borrowed language from certain treaties, in particular the United Nations Convention against Corruption, but not others, and whose preference was for the Commission to use more language from the Rome Statute of the International Criminal Court. His own explanation for the Commission's choices on first reading was that the aim of the project was not to set up a fully fledged institution like the International Criminal Court but to facilitate international cooperation by providing for a degree of harmonization and for procedures for cooperation. Consequently, treaties on transnational criminal cooperation often provided a fitting model, and it was not necessary to spell out many of the rules and guarantees contained in the Rome Statute.

Turning to the title of the project, he said that he agreed with Sir Michael Wood's proposal to place a title above the draft preamble referring to the prevention and punishment of crimes against humanity, which would, in his view, address the concern voiced by Mr. Tladi in that respect.

Regarding the draft preamble, he understood that some States and previous speakers were concerned about the possible implications of the reference to *jus cogens* in the third preambular paragraph, and the assertion, in the fourth preambular paragraph, that crimes against humanity "must be prevented in conformity with international law". He was open-minded in respect of both concerns. If the reference to *jus cogens* was retained, it should be explained in the commentary that the *jus cogens* character of the prohibition of crimes against humanity had certain undisputed effects, whereas other possible effects were less certain. He would not be opposed to adding a paragraph on the prohibition of the use of force and the principle of non-intervention, as proposed by the United States of America, Mr. Park and Mr. Rajput. Alternatively, it should be emphasized more strongly in the commentary that the reference to "conformity with international law" concerned primarily the prohibition of the use of force and the principle of non-intervention.

He agreed with the Special Rapporteur that draft article 2 had an important expository function, like article I of the Convention on the Prevention and Punishment of the Crime of Genocide, and that, therefore, “the meaning and explanation of the general obligation set forth in draft article 2 is to be found not in draft article 2 itself ... but in the other more specific obligations set forth in the draft articles”. That point could be further emphasized in the commentary. The term “crimes under international law” was clearly explained in the commentary and should be retained.

With regard to draft article 3, he agreed with the Special Rapporteur that “the very strong support in favour of closely adhering to the definition of crimes against humanity that appears in article 7 of the Rome Statute of the International Criminal Court warrants few, if any, changes to that text”. Nevertheless, he also agreed with the Special Rapporteur’s carefully reasoned proposal to delete the final part of paragraph 1 (*h*), which read “or in connection with the crime of genocide or war crimes”. The equivalent provision in article 7 (1) (*h*) of the Rome Statute established a form of jurisdiction that was specific to the International Criminal Court, and there was no such clause in the definitions of crimes against humanity laid down in the national laws of States or in the statutes of contemporary international criminal tribunals.

However, the deletion of the entire second half of subparagraph (*h*) would, in his view, go too far in broadening the definition of crimes against humanity. It was of fundamental importance that the definition remained grounded in universal consensus, particularly if the reference to *jus cogens* in the preamble was retained. He therefore continued to agree with the Special Rapporteur that the clause “in connection with any act referred to in this paragraph” should remain. Even though no such connection was established in the constituent instruments of some international criminal tribunals, such tribunals did not typically require persecution to be of “equal gravity” to other acts that could constitute crimes against humanity. Claus Kreß and Sévane Garibian had argued persuasively that the deeper reason for the importance of certain limits in the definition and interpretation of crimes against humanity was expressed in the opening words of the elements of crimes against humanity as defined in article 7 of the Rome Statute:

Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole ... and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

It should thus be highlighted, in the commentary to draft article 3 (1) (*h*), that persecution must be of “equal gravity”. In that connection, the United States of America appeared to be justified in warning against “an overly broad definition of [crimes against humanity] in which ordinary criminal activity by gangs and other organized criminals would qualify as crimes against humanity”.

He agreed that paragraph 3, which defined “gender”, and the words “as defined in paragraph 3” in paragraph 1 (*h*), should be deleted, given the developments that had occurred, and the manner in which viewpoints had evolved, since the adoption of the Rome Statute. It should be clarified, in the commentary, that the interpretation of the term “gender” must be in accordance with international law, particularly international human rights law. The commentary should also provide an overview of current understandings. Lastly, he agreed that the first sentence of paragraph 4 should include a reference to customary international law.

Concerning draft article 4, he was not entirely convinced by the Special Rapporteur’s proposal – made in response to a request from certain States – to introduce a new paragraph 1 that would begin: “Each State undertakes not to engage in acts that constitute crimes against humanity”. He wondered whether such an explicit undertaking of what was already an undisputed *jus cogens* obligation might weaken, or call into question, the firmly established nature of that obligation. The term “undertake” would, after all, seem to suggest the establishment of a new obligation. However, should the Commission wish to

include such an undertaking, it would be better to do so in draft article 2, entitled “general obligation”.

He was also not convinced that the inclusion of a reference to “education and training programmes” in paragraph 2 (a) would remedy the perceived lack of specificity of the draft article. Given the diversity of situations that existed, the measures that might be necessary or desirable to prevent crimes against humanity could be equally diverse, and thus an obligation to take preventive measures could and should not be too specific. In any event, mentioning a measure by way of example did not make the provision more specific. Rather, it pointed the reader in a particular direction, in the current case towards softer measures. In his view, the examples of “other preventive measures” in the commentary provided sufficient clarification. He did, however, agree with the Special Rapporteur that the reference to “territory under a State’s jurisdiction” and the obligation to cooperate with “others” “as appropriate” struck the right balance.

In draft article 5, the phrase “territory under the jurisdiction of” should be deleted, as proposed by the Special Rapporteur. Regarding draft article 6, he agreed with the Special Rapporteur’s recommendation to replace paragraph 3 on command/superior responsibility with a text inspired by Protocol I additional to the Geneva Conventions of 1949, while bearing in mind more recent formulations by the International Committee of the Red Cross.

It was clear, from paragraphs 145 to 147 and paragraph 151 of the report, that the relationship between “irrelevance of official capacity”, on the one hand, and possible immunities, on the other, was a sensitive issue for States. In his view, it was important for the Commission to maintain the delicate balance that it had achieved with regard to possible immunities in the commentary to draft article 6 (5). Should that balance be upset, the readiness of many States to ratify a possible convention would be put at risk. Therefore, although it would be better, for the purposes of clarity and transparency, to address the issue of immunities explicitly in one way or another, he would leave draft article 6 and the commentary thereto as they stood.

He supported the proposal made by the Special Rapporteur in paragraph 161 of the report to replace paragraph 3 with a text that built upon Protocol I additional to the Geneva Conventions of 1949.

He agreed with the concern expressed by some States that the duty to notify in draft article 9 (3) should not be formulated too strictly, as other legitimate interests in the pursuit of justice might thereby be prejudiced. The Special Rapporteur’s proposal to add the words “as appropriate” after “shall” took care of that concern.

The Special Rapporteur’s proposal to replace the text of draft article 10 with a formula that was more closely aligned with the standard “Hague formula” was satisfactory. It should be clarified, in the commentary, that the duty to prosecute could also be fulfilled through an investigation that concluded that allegations had already been investigated elsewhere and had been found to be without basis.

With regard to draft article 11, while it might technically be correct to say that human rights law was part and parcel of international law, and that it was therefore unnecessary to mention human rights law explicitly, in a provision that concerned the “fair treatment” of persons, it was, in his view, appropriate to include such a reference. Like Mr. Hassouna, Mr. Rajput and Mr. Tladi, he proposed that, instead of deleting the reference to “human rights law”, the Commission should include an additional reference to “international humanitarian law”, and thereby mention both areas of law, as it did in draft article 5 (2).

Concerning draft article 12, he agreed with the reasons given by the Special Rapporteur in paragraph 223 of his report for not attempting to define, in the draft articles, the concept of “victim”. The Special Rapporteur touched upon an important point in paragraph 230 of his report, in his reaction to the wish of Australia “to clarify that a State would not be under an obligation to provide compensation for victims of crimes against humanity perpetrated by a foreign government outside of the said State’s territory or jurisdiction”. He supported the Special Rapporteur’s proposal to clarify that the right to obtain reparation was linked to crimes against humanity “committed through acts

attributable to the State under international law or committed in any territory under its jurisdiction”.

He agreed, in principle, with the Special Rapporteur’s proposal, in paragraph 256 of his report, to reformulate draft article 13 (1) to include the sentence “a requested State shall give due consideration to the request of the State in whose territory the alleged offence has occurred”. He would, however, replace the term “in whose territory” with “the territory under whose jurisdiction”, which would keep the terminology consistent with the first sentence of draft article 13 (1) and a number of other provisions of the draft articles.

As to draft article 14, he agreed with the Special Rapporteur’s proposal, which had been supported by Mr. Park, to delete the phrase “except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance”. The deletion would reduce the complexity of paragraph 7 and adapt it to more widely used models in other treaties. Although he supported the aim of improving standards of mutual legal assistance, the paragraph as it stood would lead to legal uncertainty, since, as stated by Germany, “it is practically significant that specific bilateral or (regional) multilateral agreements, where they exist, take priority in co-operation on crimes against humanity”.

Concerning possible additional articles, he supported the proposal, in paragraph 299 of the report, to include a new draft article 13 *bis* entitled “Transfer of sentenced persons”. Such transfers could contribute to the fair treatment and effective rehabilitation of sentenced persons. To address the concerns of Mr. Tladi and Sir Michael Wood, it should be confirmed, in the commentary, that draft article 13 *bis* was fully discretionary.

Although he was attracted to the proposal by France to include a provision on the relationship between the draft articles and the obligations of States in respect of international criminal tribunals, he ultimately agreed with the reasons given by the Special Rapporteur for not doing so. There was no real need for such a provision, and its inclusion could create difficulties and undesired side effects.

Regarding a possible provision on amnesties, the Commission had, on first reading, succeeded in finding a delicate balance in the commentary to draft article 10. In the interests of wide acceptance, by States, of a possible convention, it was not advisable to introduce a draft article providing for a blanket prohibition on amnesties. A more nuanced solution would currently be very difficult to achieve.

As stated by the Special Rapporteur, there were good reasons for not having additional articles on an institutionalized mechanism, the application of the draft articles to all parts of the territory of a State or the possibility of reservations. He looked forward to discussing, with other members of the Commission, the final form that the draft articles should take.

In conclusion, he wished to thank the Special Rapporteur again for his outstanding work in persuasively assessing an extraordinary number of comments from States, international organizations and others, and for sensitively indicating a reasonable path forward. The foundations for the successful completion of what was an important project had been laid. He recommended sending all the draft articles to the Drafting Committee.

#### **Immunity of State officials from foreign criminal jurisdiction** (agenda item 2) (A/CN.4/722)

**Mr. Al-Marri** said that he wished to thank the Special Rapporteur for her sixth report and the energy with which she had been pursuing her work on what was a highly complex topic that addressed issues on which State practice was either not sufficiently developed or, where it did exist, not uniform. Problems that States faced in gathering evidence across national boundaries and in seeking detention, extradition and judicial assistance were all the more difficult in cases involving the immunity of State officials under customary international law.

The Commission’s work on the topic and its efforts to strike a balance between protecting the immunity of foreign State officials and fighting impunity were timely and appreciated. However, discussions within the Commission and the United Nations General Assembly, coupled with the reactions and comments from States, showed that there was no

consensus in sight. The topic was therefore not ripe for codification, or even a suitable subject for the progressive development of international law, and would best be dealt with through the issuance of guidelines and broad policy recommendations. Nevertheless, he wished the Special Rapporteur and the Commission every success.

*The meeting rose at 11.25 a.m.*