

Provisional

For participants only

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International Law Commission
Seventy-first session (first part)

Provisional summary record of the 3458th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 7 May 2019, at 10 a.m.

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Present:

Chair: Mr. Šturma

Members: 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. Ruda Santolaria
Mr. Saboia
Mr. Tladi
Mr. Valencia-Ospina
Mr. Wako
Sir Michael Wood
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

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

Mr. Saboia said that he wished to make some corrections to the statement he had made on the topic at the 3457th meeting, specifically with respect to draft articles 12 to 15 and chapter II of the report. With respect to draft article 12 on victims, witnesses and others, he noted that Mr. Grossman Guiloff had given compelling reasons to introduce at least a basic definition of the term “victim”, and had made additional observations on the issue of reparations that also deserved consideration. He had no comments on draft articles 13 to 15, and accepted the changes proposed.

With regard to chapter II, he had doubts concerning the need to introduce a new draft article 13 *bis* on the transfer of sentenced persons. He agreed with the Special Rapporteur’s treatment of the relationship between the draft articles and the international obligations of States with respect to international criminal tribunals. Despite the sound reasons put forward by France and Brazil for including a draft article on that relationship, the explanation provided by the Special Rapporteur in paragraph 301 of the report (A/CN.4/725) had convinced him that there was no need for such a provision.

He also supported the Special Rapporteur’s position, outlined in paragraphs 306 to 312 of the report, that there was no reason to revisit the decision not to propose the creation of a monitoring mechanism. Should the need arise in the future, such a body could be created under an additional protocol.

He concurred with the Special Rapporteur’s view that it was wiser not to include a provision on amnesties. However, he agreed with Mr. Grossman Guiloff that, if the matter was dealt with in the commentary, extreme caution should be taken not to introduce language that could imply that certain types of amnesty were permissible.

He had not opposed the decision taken on first reading not to consider a clause on federal States, on the ground that the Vienna Convention on the Law of Treaties already established the obligation to apply a treaty to the entire territory of a State. In the light of Mr. Grossman Guiloff’s argument that a number of important federal States were not parties to the Vienna Convention, he stood ready to reconsider the matter.

Lastly, he concurred with the Special Rapporteur that the decision taken on first reading not to include a draft article on reservations remained appropriate.

Mr. Huang said that, in view of time constraints, his oral comments would focus on just a few of his key concerns on the subject; he had submitted a more detailed written statement to the Special Rapporteur. While the Special Rapporteur’s fourth report was lengthy, it was very substantive and included a comprehensive overview of the comments made by States and international organizations on the draft articles.

In its second reading of the draft articles, the Commission should seek to absorb and digest the comments received from States, especially the critical ones. It was unfortunate that the fourth report focused primarily on the written submissions received, attaching little importance to the oral comments made by representatives of States in the Sixth Committee. He hoped that that situation would be remedied in the Commission’s forthcoming discussions.

In his opinion, the objective of the draft articles should be to codify existing rules rather than to propose new rules. However, the Special Rapporteur seemed to have taken a different approach, stating in paragraph 19 of the report that the primary objective of the work on the topic was not codification but the drafting of provisions that would be both effective and acceptable to States, “based on provisions often used in widely-adhered-to treaties addressing crimes”. The goal of seeking a breakthrough in the progressive development of international law in that field was clearly a departure from the original intention. Historically, the Commission’s achievements in many important areas, including diplomatic law, the law of treaties and the law of the sea, had almost always been attributable to its focus on the codification of rules of customary international law. If the Commission’s hope was for the draft articles on crimes against humanity to eventually

become an international convention that was widely accepted by the international community, it should keep the focus on codification. Indeed, some States had stressed that any codification in respect of crimes against humanity should reflect customary international law and the broadest possible consensus among States. As could be seen from the deliberations in the Sixth Committee, the level of enthusiasm among States about the prospect of concluding a new international convention on crimes against humanity was not yet sufficient, and quite a number had expressed concerns about the feasibility of doing so. Accordingly, the Commission should endeavour, insofar as possible, to reflect the rules of customary international law and the rules of international law on which there was a consensus among States and to propose as few new rules as possible.

During the second reading of the draft articles, greater attention should be paid to State practice. Throughout the report, the Special Rapporteur referred extensively to relevant international conventions, in particular the Rome Statute of the International Criminal Court, but provided few references to the domestic laws and judicial practices of States. It should also be borne in mind that existing international conventions did not all enjoy the same degree of acceptance. For example, there were only 123 States parties to the Rome Statute, as some States had signed but not ratified the instrument and others had withdrawn from it. Furthermore, 30 States had signed bilateral agreements with the United States of America intended to exclude the jurisdiction of the International Criminal Court. Some States had expressed strong dissatisfaction with the politicization of the Court's operations. It was thus clear that the Rome Statute was far from constituting customary international law. Drawing excessively on that instrument might give the false impression that the draft articles were an additional protocol to the Rome Statute. In his view, the Special Rapporteur should have paid more attention to the differences of opinion on relevant provisions of the Rome Statute.

He was open to the Special Rapporteur's recommendation that a diplomatic conference should be convened to conclude a convention on crimes against humanity on the basis of the draft articles. However, as others had pointed out, the final decision would lie with States. Before making a final recommendation on the draft articles, the Commission should consider some relevant questions.

First, was there a lacuna in international law with respect to the prevention and punishment of crimes against humanity? International conventions such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute contained provisions on the specific crimes that constituted crimes against humanity. The necessity and urgency of concluding a new convention was a question that warranted in-depth consideration.

Second, did States have the political will to conclude a convention dealing exclusively with crimes against humanity? Judging from the comments made by States in the Sixth Committee in recent years, that did not seem to be the case. As the draft articles went far beyond the existing rules of international law, incorporating by analogy relevant provisions of the Rome Statute and other international conventions, he was not confident that they would garner widespread support from States. Perhaps, as some States had pointed out, the time was not yet ripe for the adoption of a new international instrument on the matter.

There was no doubt that combating serious international crimes, including crimes against humanity, through the development of existing norms of international law was one of the most basic requirements for the realization of international justice. However, given the complex political, historical, cultural, religious and other factors that underlay the commission of crimes against humanity, the Commission needed to approach its work not only from the legal perspective but also, more pertinently, from the political perspective.

Turning to the draft articles themselves, he said that the Special Rapporteur's response to the doubts expressed by some States concerning the assertion in the draft preamble that the prohibition of crimes against humanity was a *jus cogens* rule seemed to avoid the substance of the issue. While he did not disagree with the judgment of the

International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, which was cited by the Special Rapporteur, he did not believe that it should form the basis for a conclusion that the prohibition of crimes against humanity fell into the category of *jus cogens*. In determining that the prohibition of torture constituted *jus cogens*, the Court had provided comprehensive reasoning and conducted a detailed analysis of treaties, declarations, General Assembly resolutions and other international instruments, as well as national legislative practice. An equivalent in-depth examination would thus be required if the Commission wished to establish that all rules concerning the prohibition of crimes against humanity constituted *jus cogens*. Furthermore, the Court had not provided a definition of “crimes against humanity” or concluded that the prohibition of such crimes, or other rules similar to the prohibition of torture, fell under *jus cogens*. Therefore, that judgment was irrelevant to the determination of whether the prohibition of crimes against humanity constituted *jus cogens*. He would welcome clarification from the Special Rapporteur on that point.

As to draft article 2, the Special Rapporteur specifically called for crimes against humanity to be decoupled from the context of armed conflict. He would advise caution on such an important issue. In his view, crimes against humanity should include, but not necessarily be limited to, those committed in the specific setting of armed conflicts. The Commission should first examine whether existing customary international law recognized that crimes against humanity were no longer confined to the traditional context of acts occurring “in time of armed conflict”. To determine whether a rule had become customary international law, it was necessary to review how States acted on a given issue. There was clearly no consensus among States on the link between crimes against humanity and armed conflict, and the report did not discuss State practice in that regard. Although the Special Rapporteur’s previous reports extensively cited the judgments of international criminal courts and tribunals, those were not the primary criteria for identifying customary international law. As some States had pointed out, the removal of the nexus with armed conflict was a deviation from the rules of customary international law and failed to take account of State practice. It could also lead to a situation in which accusations of crimes against humanity were used as an instrument for interfering in the internal affairs of States.

Concerning draft article 3, he would welcome a response from the Special Rapporteur to the issue raised by some States regarding strict adherence to article 7 of the Rome Statute. As the United States had rightly pointed out in its written comments, the draft articles should not be developed only for parties to the Rome Statute.

He shared the concerns expressed by several States that some of the expressions used in draft article 10 were overly broad and would not facilitate codification. He would welcome clarification from the Special Rapporteur on that point, which was not directly addressed in the report.

Concerning draft article 14, the inclusion of detailed provisions on mutual legal assistance in a treaty was rare in practice. For example, over the last 40 years the Chinese Government had signed bilateral treaties on mutual legal assistance in criminal matters with only 64 States, despite the significant efforts it had made in that area. The conclusion of mutual assistance treaties was a protracted process that often involved complicated negotiations. He recognized the intention behind the Special Rapporteur’s inclusion of a provision on mutual legal assistance, but was concerned about its feasibility in practice. The Commission should revisit the advisability of including specific rules of implementation in the draft articles, which were intended as a basis for a framework treaty.

Draft article 15 on dispute settlement respected the principle of State consent in settling international disputes; that practice should be affirmed.

In conclusion, he agreed that all the draft articles should be referred to the Drafting Committee.

Mr. Laraba said that annex II to the report ([A/CN.4/725/Add.1](#)), which consisted of a table that provided the text of specific treaty provisions on which the draft articles and the commentaries thereto were based, was much more than a “road map” of precedents, as suggested by the Special Rapporteur; it was a valuable *vade mecum* for all those interested in the Commission’s work on the topic.

As the Special Rapporteur noted in the report, the written submissions by States on the draft articles focused broadly on three areas: the Commission's methodology in drafting the articles, consistency with the Rome Statute and the desirability of a convention on crimes against humanity. According to the topical summary of the discussion held in the Sixth Committee in 2017 (A/CN.4/713), States had emphasized that the draft articles should complement and be compatible with existing legal instruments and regimes relevant to the topic, in particular the Rome Statute; had acknowledged the importance of the prevention and punishment of crimes against humanity; and had welcomed the draft articles' focus on inter-State cooperation. As to the final form of the draft articles, a number of delegations had expressed support for the Commission's work in developing a draft convention on the prevention and punishment of crimes against humanity. The majority of States had welcomed the Commission's work on the topic and had commented favourably on various aspects of the draft articles, as outlined in the Special Rapporteur's report. Amendments and additions had been proposed, some of which were supported by several States, such as the suggestion that provisions prohibiting reservations and amnesties should be added. Sierra Leone, for example, had suggested that the Commission should take account of the jurisprudence of international courts and tribunals to make up for the scarcity of State practice, change the title of the topic and provide for the establishment of a monitoring mechanism. A smaller group of States had expressed criticisms or reservations in respect of the general philosophy underpinning some or all of the draft articles.

He shared the views expressed by some States on specific draft articles. For example, he agreed with Portugal that the Commission should take a careful approach in adopting or adapting solutions that had proved to be successful in relation to other types of crimes. He wished to draw attention to the view put forward by the United Kingdom that the expansion of the scope of the Commission's work into issues such as civil jurisdiction, amnesty and immunity would be unhelpful to the goal of a widely accepted convention. He also agreed with Switzerland that one of the strengths of the draft articles was that they were concise and limited to essential matters.

It was important to maintain both the general balance and the combination of rigour and flexibility that had been achieved in the draft articles. Accordingly, the Commission should resist the temptation to take account of very detailed proposals that might not garner widespread support, and should instead align the draft closely with the solutions reached in various other treaties, albeit without making such alignment an end in itself. He therefore agreed with the Special Rapporteur that the Commission should pursue the general approach it had followed since the outset and should avoid any innovations at that stage. In responding to the comments made by States, the Special Rapporteur quite rightly emphasized that the draft articles reflected existing international conventions that had been widely ratified.

He agreed with Sierra Leone that the title of the draft articles should be amended to reflect the fact that the prevention of crimes against humanity was one of the purposes of the text. With regard to the preamble, the issue that had dominated the debate thus far was the statement, in the third paragraph, that the prohibition of crimes against humanity was a peremptory norm of international law, or *jus cogens*. A number of States supported that view, but others were quite adamant that the rarity of State practice in that respect was an obstacle to the inclusion of the paragraph. According to the Special Rapporteur, the Commission had already recognized the prohibition of crimes against humanity as a peremptory norm, and the question was simply whether or not that recognition should be included in the preamble. France had put forward two arguments that raised doubts about the wisdom of doing so: first, the Rome Statute did not contain any equivalent paragraph, and second, the Commission was currently working on the topic of *jus cogens*. The United Kingdom had made the point that, since the draft articles were focused on establishing individual criminal liability for crimes against humanity, the benefits of including a statement that the prohibition of crimes against humanity was a peremptory norm of general international law were unclear. The Special Rapporteur's response, acknowledging that treaties addressing crimes generally did not include such a statement and suggesting that the reason for its omission might "relate, at least in part, to uncertainty" as to the consequences of including it, did little to dispel those doubts. Nevertheless, in his view, the third preambular paragraph could be retained as it stood. He also supported the proposal by

Brazil that the preamble should be enhanced with language recalling some fundamental principles of the Charter of the United Nations.

With regard to the possible addition of further draft articles, he was not in favour of including a prohibition of amnesty; the commentary could address the distinction between blanket amnesties and conditional amnesties, as proposed by Sierra Leone. He supported the Special Rapporteur's recommendation that a new article 13 *bis* on the transfer of sentenced persons should be included.

He was in favour of referring the draft articles to the Drafting Committee and of recommending to the General Assembly that the draft articles should serve as the basis for an international convention on the prevention and punishment of crimes against humanity, to complement the Convention on the Prevention and Punishment of the Crime of Genocide.

Mr. Jalloh said that one of the greatest challenges facing the international community was the need to achieve a balance between the imperatives of sovereignty and the prevention of impunity. Efforts in that regard had led to the remarkable development of the notion of international crimes and the nascent field of international criminal law, which had been born out of the ashes of war and a belief that, regardless of the circumstances, certain acts were so far beyond the pale as to be inadmissible. Some forms of conduct gave rise not just to crimes against the person who was the direct victim, but to crimes against all of humanity. The Commission's crimes against humanity project was part of that historical trajectory. It could lead to a potentially groundbreaking international instrument that would serve as a crucial complement to the long-standing prohibition of the crime of genocide and war crimes.

He wished to join previous speakers in congratulating the Special Rapporteur on his excellent fourth report, which provided a solid foundation for the Commission's second reading of the draft articles. The content of the compendium of comments and observations received from Governments, international organizations and others (A/CN.4/726) gave the impression that States and other observers were generally supportive of the text adopted by the Commission on first reading. At the same time, the concerns that had been raised merited careful consideration and, in a number of instances, changes to the draft articles.

He wished to make three general observations on methodology. First, as emphasized by several States, the Commission should strive for as much consistency as possible between the draft articles and the Rome Statute. Where a provision was borrowed from the Statute, the Commission should depart from that text only if there were compelling reasons for doing so. He tended to agree with the Special Rapporteur that some of the changes suggested by States and others could be better accommodated in the commentary.

Secondly, he welcomed the Special Rapporteur's general reliance on transnational crimes conventions and other existing treaties on penal matters for inspiration, since States were more likely to accept a future draft convention if it drew on legal principles that had already been incorporated into widely ratified treaties. However, as Mr. Rajput had observed earlier in the debate, it might be useful to clarify, in the general introduction to the commentary, the different considerations that had informed the Commission's choices to follow or modify text from various treaties that was used in the draft articles. Without such an explanation, the question might arise as to whether sufficient account had been taken of the specificities of crimes against humanity. Indeed, Portugal had cautioned that the Commission "should resist the temptation of simply transposing already existing regimes that were not designed for the specific context and legal nature of crimes against humanity".

Thirdly, several States had queried the formulation of certain rules and the absence of others; in some instances, they had proposed the inclusion of new text addressing specific penal or human rights issues. A number of States had questioned whether the Commission was engaging in the progressive development or the codification of international law. The Islamic Republic of Iran, for instance, had indicated that it considered certain draft articles to be deviations from the rules of customary international law that failed to take account of State practice. In response, the Special Rapporteur had explained that while some aspects of the draft articles might reflect customary international

law, the primary objective of the topic was not to codify existing law but to draft provisions that would be both effective and acceptable to States, for use in developing a future convention.

In view of the questions raised, it might be useful to clarify in the opening commentary whether the intention was to codify and reflect existing international criminal law, as primarily embodied by the Rome Statute and the jurisprudence of international tribunals, or to engage in the progressive development of that area of law. It appeared that, for the most part, the Special Rapporteur was seeking to do the former. Still, it might be helpful to make that point explicit in order to avoid confusion and inconsistencies: for example, it was not always clearly explained why, in the commentaries, the Special Rapporteur sometimes relied on the Rome Statute and the jurisprudence of the International Criminal Court, but at other times relied on the jurisprudence of the *ad hoc* international criminal tribunals.

He agreed with Sierra Leone that the Commission should emphasize the aspects of both prevention and punishment in the title and, very importantly, in the substance of the draft articles. He noted that the suggestion was to change the title not of the topic, but of the draft articles, for reasons that he found quite convincing. The amended title would better reflect the Commission's own stated objective, in its report to the General Assembly on its sixty-fifth session (A/68/10), of producing draft articles for what would become a "convention on the prevention and punishment of crimes against humanity". Moreover, the idea that the topic concerned both the prevention and the punishment of crimes against humanity was expressed in the preamble and in a number of draft articles. However, he did not agree with Sierra Leone that those two goals were equally important: in his view, an ounce of prevention was worth more than a pound of cure. It should also be noted that the proposed title would more closely reflect that of the Convention on the Prevention and Punishment of the Crime of Genocide.

The preamble would be a vital part of the text, because it would offer important guidance for the interpretation of any future convention. The preamble should situate the Commission's work against the wider backdrop of international criminal justice and the Rome Statute. As the United Kingdom and others had noted, a new convention could facilitate national prosecutions, thereby strengthening the complementarity provisions of the Statute. Although a relatively large group of States had welcomed the inclusion of the third preambular paragraph recognizing the prohibition of crimes against humanity as a peremptory norm of general international law (*jus cogens*), a handful of other States had questioned its inclusion. Like most Commission members, he agreed with the Special Rapporteur that the paragraph should be retained, since the idea that the prohibition of crimes against humanity, like the prohibition of genocide, had the status of *jus cogens* was generally accepted. The International Court of Justice had confirmed that status in judgments such as *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. The same position was reflected in the separate opinions of various judges of the Court and in the prior work of the Commission. As a number of colleagues had pointed out, the Commission should retain the paragraph to ensure consistency with that prior work.

Belgium had raised an important issue, namely the implications of the peremptory character of that prohibition for the immunity from criminal jurisdiction of an individual accused of crimes against humanity. The Commission was already addressing that specific issue in the context of its separate topic on *jus cogens*. Indeed, the third report of the Special Rapporteur for that topic (A/CN.4/714) included a draft conclusion on the irrelevance of official position and the non-applicability of immunity *ratione materiae*, which was broadly supported by the Commission and had been referred to the Drafting Committee.

With regard to the fifth, sixth and ninth preambular paragraphs, he generally concurred with the Special Rapporteur that no changes to the text were warranted, though some changes to the commentary should be considered. Beyond that, he proposed that the last part of the second preambular paragraph should be modified to read "the peace, security and well-being of the peoples of the world"; that the wording of the eighth preambular paragraph should be amended to make it less cumbersome; and, that, in the

same paragraph, the reference to “effective prosecution” should be amended to read “effective investigation and prosecution”.

He was quite attracted by the Belgian proposal that the commentary to the preamble should emphasize that international organizations were also required to cooperate in the investigation and prosecution of crimes against humanity. The experience of the International Criminal Court in its investigations of crimes in various African countries supported that argument. Such cooperation could be critical for avoiding accountability gaps in efforts to prevent impunity.

He agreed with the Special Rapporteur that there was no need to delete draft article 1, as proposed by Spain. Still, he agreed with the comment by Spain that the draft articles should be said to “concern” rather than “apply to” the prevention and punishment of crimes against humanity. That language would also be more consistent with the Commission’s practice.

The changes proposed by Turkey to draft article 1 could be addressed in the commentary. The Special Rapporteur’s explanation concerning article 28 of the 1969 Vienna Convention on the Law of Treaties and the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* seemed sufficient to address the concerns of Chile. Nonetheless, he suggested that the commentary should specify that a State’s choice to join, or not to join, a future convention based on the draft articles would not impede its ability to investigate and prosecute crimes against humanity that had been committed before the entry into force of the convention, on the basis of the pre-existing prohibition of crimes against humanity under customary international law.

He shared the view of Sierra Leone and Mr. Tladi that the scope of the draft articles could have been broader, given that genocide, crimes against humanity and war crimes were often perpetrated at the same time. One way in which States could address that issue, especially in light of the separate State-led mutual legal assistance initiative, would be to adopt a stand-alone “crimes against humanity” convention based on the draft articles, in order to complete a triad of multilateral conventions on the most serious crimes of concern to the international community. That would put the future convention on the same plane as the Genocide Convention and the Geneva Conventions of 12 August 1949. Thereafter, with the three separate multilateral treaties in place, an optional protocol providing for a robust inter-State cooperation regime for the investigation and prosecution of those core crimes could be adopted. The Commission might well be asked to assist in the preparation of such an optional protocol.

Given that draft article 2 was based largely on article I of the Genocide Convention and that the wording of that article was well known and firmly entrenched, he could agree to retain a comparable formulation in the draft articles. In fact, it might be better to align the draft text even more closely with that wording by providing simply that “States confirm that crimes against humanity, whether committed in time of peace or in time of war, are crimes under international law which they undertake to prevent and to punish.” Doing so would have the added benefit of confirming the prohibition of crimes against humanity as a crime under customary international law. If that suggestion was not taken up, he would be in favour of the language proposed by New Zealand.

He agreed with the Netherlands and Sierra Leone that draft article 2 was connected to draft article 4 but that the latter was not just an elaboration of the former. Rather, draft article 2 was a free-standing and autonomous provision that possessed as much independent legal value as that attributed by the International Court of Justice to article I of the Genocide Convention in its judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The relevant clarifications should be included in the commentary.

Draft article 3, on the definition of crimes against humanity, had generated a considerable number of comments from States. He was inclined to agree with the Special Rapporteur that the wording “other grounds” in paragraph 1 (*h*) of draft article 3 was sufficiently broad. Enumerating those other grounds could stunt the development of law in that area. Paragraph (38) of the commentary to draft article 3 should include some

explanation not only of “persecution” but also of the other underlying crimes listed in draft article 3 (2).

Regarding the last phrase in paragraph 1 (*h*), he noted the Special Rapporteur’s arguments in favour of deleting the words “or in connection with the crime of genocide or war crimes” and retaining the words “in connection with any act referred to in this paragraph”. However, like a number of States, he believed that the Commission should revisit that part of the definition. Like Ms. Lehto, he would prefer to delete the entire second half of paragraph 1 (*h*) to bring the definition of persecution as a crime against humanity into line with the one contained in the draft Code of Crimes against the Peace and Security of Mankind, as well as the definition of the term in customary international law. Indeed, the requirement that persecution must be committed in connection with another crime in order to constitute a crime against humanity was unique to the Rome Statute and could not be found in most statutes of *ad hoc* international or internationalized tribunals, the national legislation of States or authoritative case law. As the Trial Chamber of the International Tribunal for the Former Yugoslavia had ruled in *Kupreškić et al.*, “although the Statute of the [International Criminal Court] may be indicative of the *opinio juris* of many States, Article 7 (1) (h) is not consonant with customary international law”. Furthermore, the application of the provisions contained in part 2 of the Rome Statute, including article 7 on crimes against humanity, was restricted by article 10 of the Statute, which stated that “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” The Trial Chamber had thus concluded in *Kupreškić et al.* that the framers of the Statute had not intended to affect *lex lata* in relation to such matters as the definition of war crimes, crimes against humanity and genocide.

The complexity of defining “persecution” seemed to have caused some confusion in the Commission’s debate. That, in itself, suggested that there was a need for further clarification in the commentary, since the retention of a connecting link to “any act referred to in this paragraph”, as the Special Rapporteur suggested, could be read as requiring a link to one of the underlying crimes set out in article 3 (1), such as murder. That would be a high threshold but would be consistent with the general understanding of that paragraph in the Rome Statute and in most of the academic literature. Some academics had speculated that, if the required connection could be satisfied by a linkage to even one other recognized act, the requirement should not pose a significant obstacle for legitimate prosecutions of persecution. In any event, as explained by the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Kupreškić et al.*, that restriction could be circumvented if persecution was charged in connection with “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” under article 7 (1) (k) of the Rome Statute.

It seemed entirely possible to contemplate a serious form of persecution that was not connected to another underlying crime. The International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda had, for the most part, considered persecution in situations where they had considered whether crimes for which an accused had already been found responsible had been committed with a discriminatory intent and thus amounted to the crime of persecution. That showed gravity without a connection. He wondered whether the Special Rapporteur had read the process backwards when discussing the issue of gravity in the report.

There had also been instances, such as in the context of the Nuremberg trials, where persecution had been treated almost as a residual crime with no connection whatsoever to other residual crimes, particularly hate speech and property crimes. To require a connection in the current draft articles would stop that development altogether.

The concern that “persecution” might be interpreted as encompassing acts that were too minor to constitute crimes against humanity could perhaps be alleviated through the inclusion of a reference to the statement of the International Tribunal for the Former Yugoslavia, in its judgment in *Kupreškić et al.*, that the notion of persecution being applied was more stringent than the concept under international human rights law or international refugee law. He saw no reason not to use the words “of a similar character” in relation to persecution, as they were used in relation to “inhumane acts” in draft article 3 (1) (*k*).

While he would have preferred to include a more modern definition of “gender” in draft article 3 (3), he could fully endorse the Special Rapporteur’s proposal to delete the definition altogether. He also agreed with the Special Rapporteur that draft article 3 (4) should include a reference to customary international law.

With regard to draft article 4, on the obligation of prevention, he fully endorsed the Special Rapporteur’s proposal, in paragraph 118 of the report, on the addition of a new paragraph explicitly clarifying a notion that was already implicit in the commentary. The obligation to prevent crimes against humanity would then be broadly consistent with the manner in which the International Court of Justice had interpreted the obligation to prevent genocide under article I of the Genocide Convention.

Like Mr. Grossman Guiloff, he firmly believed that the Commission should specify that the obligation to prevent crimes against humanity entailed two dimensions, one concerning a positive obligation to anticipate and avert crimes against humanity before they occurred, and the other concerning a negative obligation to refrain from committing such crimes. The international community was developing early warning systems as part of a broader institutional architecture for preventing the commission of crimes against humanity and fighting impunity, but when prevention efforts failed, it should be clear that States must take steps to investigate and punish the perpetrators or extradite them to a State or international tribunal that was willing and able to do so. He therefore fully supported Mr. Grossman Guiloff’s suggested addition to the language proposed by the Special Rapporteur for paragraph 2, requiring that States should undertake to prevent crimes against humanity in an appropriate and effective manner.

It could also be made clear in the commentary that States’ obligation to prevent was not only an internal matter, but also applied externally, in relation to other States. As Brazil had emphasized, measures to prevent crimes against humanity must be in conformity with the purposes and principles of the Charter of the United Nations and international law. The Commission should also note the existence of regional arrangements and practice aimed at a more proactive approach to the prevention of serious violations of international law. In the African region, for example, article 4 (h) of the Constitutive Act of the African Union provided for the right of the Union to intervene in a member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. Perhaps some consideration of the implications of the 2005 World Summit Outcome and the emerging doctrine of “responsibility to protect” for the proactive duty to prevent crimes against humanity might be warranted in the commentary, as suggested by Sierra Leone.

Concerning draft article 5 (1), he agreed with the Special Rapporteur that the words “territory under the jurisdiction of” should be deleted. Building on the recommendation by Brazil and Uruguay, he suggested that the phrase “or any other crime under international law” should be added at the end of paragraph 1. The explanation in the commentary could then reflect the examples mentioned by Uruguay, namely genocide, war crimes, torture, enforced disappearance and extrajudicial execution.

In order to further align the text of draft article 5 with the texts on which it was based, while at the same time addressing the concerns raised by States, the expression “territory under the jurisdiction of” could also be removed from paragraph 2. The resultant wording would be more closely aligned with article 16 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance and article 3 (2) of the Convention against Torture, both of which focused on the exercise of jurisdiction rather than on territoriality. That could help bolster the effectiveness of the application of the principle of *non-refoulement* in the context of the draft articles. He noted that the wording of draft article 5 was inconsistent with the wording of article 6 (b) of the Commission’s articles on the expulsion of aliens, which was based on article 33 (1) of the 1951 Convention relating to the Status of Refugees.

On draft article 6, he agreed with the comments made by the Caribbean Community, Liechtenstein, Sierra Leone and other countries regarding immunity, as referred to in paragraphs 144 and 145 of the report. In respect of the absence of provisions explicitly mandating the prohibition of incitement and conspiracy to commit crimes against humanity, he suggested that certain aspects of the judgment issued the previous day by the Appeals

Chamber of the International Criminal Court concerning the appeal filed by Jordan against the decision on its non-compliance with the Court's request for the arrest and surrender of Omar Al-Bashir could be taken into account in the Commission's deliberations. He had proposed in 2017 that the Commission should include the equivalent of article 27 of the Rome Statute in the draft articles, as, even if that was a form of progressive development, it could offer a regime complementary to that of the International Criminal Court. The Commission had agreed instead to include the equivalent of article 27 (1). The Appeals Chamber of the International Criminal Court had ruled that article 27 (2) of the Statute constituted customary international law, which meant that, even at the horizontal level between States, the Sudan could not have invoked the immunity of President Al-Bashir, who had been its Head of State at the time, *vis-à-vis* Jordan, should the latter have proceeded to arrest and surrender him to the Court to answer charges of crimes against humanity.

The decision appeared to be consistent with rulings such as the International Court of Justice judgment in *Arrest Warrant* and the Special Court for Sierra Leone judgment in *The Prosecutor v. Charles Ghankay Taylor*. Such case law should be taken into account in the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction. Regrettably, the Commission appeared to have taken a step back from the strong position it had adopted in principle III of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (the Nuremberg Principles) and the draft Code of Crimes against the Peace and Security of Mankind. Given the rough parity between genocide and crimes against humanity in terms of their grave nature, he would have preferred to include the standard reflected in article IV of the Genocide Convention, which was already widely accepted by States in all regions. Consent would still be integral to the process, since such a rule would apply only to States that decided to subscribe to the treaty, as 123 of them had done in relation to the Rome Statute, thereby waiving the immunity of their officials under international law in relation to crimes against humanity.

On incitement, he agreed only partially with the Special Rapporteur's argument, in paragraph 138 of the report, that draft article 6 (2) (c) encompassed incitement to commit a crime against humanity when the crime was consummated. The reason was that incitement was inherently an inchoate crime, meaning that it could be committed even if the main crimes incited, such as murder or extermination as a crime against humanity, failed to be consummated. Incitement had been described as a form of "verbal criminality", which was expressly provided for in the Genocide Convention but not in the draft articles. Inciting others to commit international crimes was a hallmark of genocide and atrocity crimes, as recognized in rulings relating to Rwanda issued by the International Criminal Tribunal for Rwanda and the Supreme Court of Canada. The prohibition of incitement should be reflected in the draft articles on crimes against humanity, particularly because such crimes were easier to prove than the crime of genocide, which required special intent.

The notion of indirect perpetration or joint criminal enterprise was familiar in civil law, if not in common law. It had been developed to extend liability to persons who were involved in the commission of a crime but whose participation could not be captured by forms of liability such as aiding and abetting. That had been made clear, for instance, by the judgment of the Special Court for Sierra Leone in *The Prosecutor v. Charles Ghankay Taylor*, where the judges had resorted to the use of aiding and abetting only when they had been unable to find joint criminal enterprise based on the prosecution evidence. Some other forms of liability, such as command responsibility, were much more difficult to pursue from an evidentiary point of view: the International Tribunal for the Former Yugoslavia had tended to use joint criminal enterprise instead of that form of liability, and the dangers of a strict interpretation of the concept had been seen the previous year in the judgment of the Appeals Chamber of the International Criminal Court in *The Prosecutor v. Jean-Pierre Bemba Gombo*. Indirect perpetration was related to direct commission, rather than a derivative form of criminal liability such as aiding and abetting, and would usually result in a heavier sentence reflecting the greater degree of moral and societal opprobrium against those who directly committed crimes.

Recognizing the wish not to be too prescriptive in the draft articles, which were to become an international instrument intended for use at the domestic level, he noted that most of the notions referred to were well established at the domestic level. For instance, co-perpetration, a concept well known in civil law jurisdictions, where it had been used in trials of high-ranking officials who had committed international crimes, was also familiar in common law. Consequently, the use of more inclusive language, such as “committing in all its forms”, might be preferable in draft article 6 (2) (a).

For all those reasons, he did not agree, in respect of draft article 6 (3), that common purpose, as set out in article 25 (3) (d) of the Rome Statute, could be considered a variant of aiding and abetting, notably because its hallmark feature was agreement to carry out an international crime. Thus, persons who participated only in the preparatory phase, and not the executory phase, of the crime could be held responsible.

It was important to highlight several issues related to the Rome Statute, which provided for joint criminal enterprise and command responsibility as forms of liability. The Commission as well, in the 1954 draft Code of Offences against the Peace and Security of Mankind and the 1996 draft Code of Crimes against the Peace and Security of Mankind, had provided separately for incitement and conspiracy to commit crimes against humanity, war crimes or genocide. The Commission had thus explicitly contemplated different forms of criminal participation for, *inter alia*, crimes against humanity, and had pointed out in the commentary to the draft Code of Crimes that, whereas incitement covered speeches made in public, an agreement made in private to carry out such crimes was punishable as conspiracy, which was recognized in principle VI of the Nuremberg Principles as a form of participation.

With respect to the Special Rapporteur’s proposal to streamline the wording of draft article 6 (3), he noted that article 28 of the Rome Statute used language that, in view of the more hierarchical and disciplined nature of military structures as compared to civilian organizations, provided for a stricter standard of *mens rea* for civilian superiors than for military commanders. While that differentiation was not reflected in the Statute of the International Tribunal for the Former Yugoslavia, it had been elucidated in the Tribunal’s jurisprudence, which had then been codified in article 28 of the Rome Statute. For that reason, and to retain as much consistency as possible with the provisions of the Rome Statute, he would prefer that the proposed amendments should not be made to draft article 6 (3); however, if the Commission decided otherwise, the language could be streamlined to some extent, provided that the different *mens rea* standards for civilian and military superiors were maintained.

He supported the Special Rapporteur’s proposal that the words “as appropriate” should be inserted after the word “shall” in draft article 9 (3) and that other concerns should be addressed in the commentaries.

With respect to draft article 10, he agreed that the current title should be retained but not that the text adopted on first reading should be more closely aligned with article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft (the “Hague formula”). The proposed new language changed the emphasis in respect of where the primary obligation lay; in his view, the existing text was more appropriate for the context of crimes against humanity.

As to the proposed changes to draft article 11, although he did not believe that the provision necessarily needed to be consistent with the paired reference to “human rights” and “international humanitarian law” in draft article 5 (2), he agreed that “including human rights law” should be retained and the words “international humanitarian law” added, to cover contexts in which crimes against humanity were committed in a situation of armed conflict. He also supported the proposal by Sierra Leone that the title should be changed to “Fair treatment of suspects and alleged offenders”, since that wording captured the substance of the provision more accurately.

With respect to draft article 12, he agreed, but would not insist, that a basic definition of “victim” should be provided, to establish a floor rather than a ceiling, meaning that it would be without prejudice to any broader definition that might be available under national law. To ensure greater consistency across different national jurisdictions, the

definition should encompass natural persons only and should be in line with rule 85 of the Rules of Procedure and Evidence of the International Criminal Court.

He also supported the proposal that the right to know the truth should be clarified and should be expanded upon in the commentary. He did not consider the proposed new language in draft article 12 (3) to be necessary, since, under the normal rules of State responsibility, a State was under an obligation to provide reparation only if internationally wrongful acts, such as the commission of crimes against humanity, were attributable to it under international law or were committed in any territory under its jurisdiction.

On draft article 13, he agreed with the inclusion of the proposed new paragraph 1 to address the concerns expressed by several States, but would be interested in hearing the Special Rapporteur's comments on the potential added value of the proposed wording, given that it appeared only to state the obvious.

In draft article 14, he supported the proposed changes to paragraphs 2 and 7 and especially the proposed new paragraph 9, which would better facilitate State cooperation with intergovernmental bodies mandated to investigate crimes against humanity. He wondered whether the reference to "international mechanisms" in the new paragraph was intended to exclude regional arrangements, which were recognized in Article 53 of the Charter of the United Nations and often played an important role in the maintenance of peace and security. For example, the African Union Commission of Inquiry on South Sudan had investigated human rights violations and abuses committed during the armed conflict in South Sudan and had uncovered evidence of international crimes, including crimes against humanity. He therefore proposed that the words "or regional" should be added before "mechanisms" and that the phrase "intergovernmental bodies of the United Nations" should be replaced with "intergovernmental bodies or the United Nations".

For draft article 15, in the interest of parity between the draft articles and the Genocide Convention with regard to dispute settlement, he would have preferred wording that reflected article IX of the Genocide Convention.

Concerning the possible additional draft article on amnesties, he preferred the suggestion of an outright prohibition but also saw merit in drawing a distinction between blanket, unconditional amnesties and narrow, conditional amnesties. There was sufficient State practice at the national, regional and international levels and a substantial body of cases, comments and rulings affirming the existence of a rule that blanket amnesties, such as the one included in the 1999 Lomé Peace Agreement between Sierra Leone and the Revolutionary United Front, were impermissible for core crimes under international law such as crimes against humanity, genocide and war crimes. If those were considered *jus cogens* crimes and their prohibition was a peremptory norm with which all States must comply, no State must have the power to undermine their prohibition and punishment by means of such an amnesty. That legal position was reflected in article 10 of the Statute of the Special Court for Sierra Leone and in the rulings of that Court's Appeals Chamber in *Prosecutor v. Moinina Fofana and Allieu Kondewa* and *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*. He saw some value in distinguishing amnesties for ordinary crimes, to which a statute of limitations might apply, from those for core international crimes, to which such limitations should not apply.

With respect to an institutional mechanism, he would be in favour of making use of an existing international body; for instance, the United Nations Office on Genocide Prevention and the Responsibility to Protect could perform preventive and early warning functions, as well as the functions mentioned in paragraph 309 of the Special Rapporteur's report with regard to States' obligations under a future convention on crimes against humanity.

He noted the risk of confusion, inefficiency and duplication raised by the separate State-led initiative to conclude a mutual legal assistance convention, but stressed that the political interest expressed by the States involved represented a great opportunity for the Commission, as a body of independent legal experts, to address the needs of the international community and work with those States to end impunity for such odious crimes as crimes against humanity, genocide and war crimes. The suggestions made by Ms. Galvão Teles for ways of reconciling the two initiatives were particularly interesting.

He agreed that the draft articles should be put forward as a basis for the negotiation of a future convention on the prevention and punishment of crimes against humanity, and welcomed the Special Rapporteur's proposal to hold informal consultations on how best to formulate the recommendation to the General Assembly. He agreed that all the draft articles and the draft annex should be referred to the Drafting Committee and would welcome any opportunity to discuss and contribute to the Special Rapporteur's proposals on the commentary. The Special Rapporteur was to be commended for his excellent work and the speed with which it had been done. The draft articles would be a signal contribution to the global effort to end impunity.

The Chair, speaking as a member of the Commission, said that while the intention behind the Commission's consideration of the topic was not, for the most part, to codify rules of customary international law, but rather to propose to States draft articles for a future convention on the prevention and punishment of crimes against humanity, the result did nevertheless offer some general rules of customary international law.

The preamble was an important component of the draft articles. He strongly agreed that the third preambular paragraph, which recognized the prohibition of crimes against humanity as a peremptory norm of general international law (*jus cogens*), should be maintained. However, the peremptory nature of the prohibition of crimes did not mean that all the provisions of the draft articles had the status of *jus cogens*, as the provisions on criminalization under national law and mutual legal assistance, for instance, were of a different nature. That distinction could, if necessary, be explained in the commentaries. He also saw some merit in Mr. Zagaynov's proposal that the word "recognizing" should be replaced with "recalling" or "emphasizing", which might better capture the idea of pre-existing peremptory norms of customary international law.

He supported the current wording of draft article 2 (General obligation), as the meaning was well established in international law. The words "whether or not committed in time of armed conflict" should be retained.

On draft article 4, he agreed with the proposed inclusion of a clear statement that States must not engage in acts that constituted crimes against humanity, which was justified in view of the 2007 ruling of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. However, the use of the word "undertakes" in paragraph 1 might convey the misleading idea that the prohibition of crimes against humanity was not of a customary and *jus cogens* nature, but needed to be established by a treaty provision. The words "Each State has an obligation" might be clearer. The provision could be retained in draft article 4 as proposed or, alternatively, be moved to draft article 2. If it remained in draft article 4 (1), it would have to be accompanied by the stipulation that no exceptional circumstances could be invoked as a justification of crimes against humanity. In his view, however, that stipulation should apply to both States and individual perpetrators. In other words, neither State responsibility nor the individual criminal responsibility of natural persons, or even of legal persons, could be excluded. He therefore proposed that the rule disallowing justifications should appear in paragraph 2, as in the draft adopted on first reading. The paragraph 2 proposed by the Special Rapporteur in paragraph 119 of the report would then become paragraph 3.

He supported the proposed deletion of the reference to genocide and war crimes from draft article 3 (1) (h). The reference, in article 7 (1) (h) of the Rome Statute, to "any crime within the jurisdiction of the Court" differed significantly from the wording in other legal instruments and had been included as a compromise, because of concern that "persecution" might be interpreted as including any type of discriminatory practice. It seemed that the definition of "gender" in article 7 (3) of the Statute had also been the result of compromise, and he agreed with the Special Rapporteur that it should not be included in the draft articles.

He supported the proposed deletion of the words "territory under the jurisdiction of" from draft article 5 (1). He welcomed the shorter version of the paragraph on command responsibility in draft article 6, and continued to support the inclusion of draft article 6 (5) on the irrelevance of official capacity.

Regarding the additional provisions that States had proposed for inclusion in draft article 6, he recognized the importance of the principle of legality (*nullum crimen sine lege*) and/or possible exceptions to that principle, but was not convinced that it or other general principles of criminal law should be included in the draft articles. They had been included in the Rome Statute because it had established a new international judicial institution that, unlike States, was not bound by the international instruments on human rights. The draft articles, in contrast, were intended to become a convention on the prevention and punishment of crimes against humanity and mutual legal assistance among States. On the one hand, treaty obligations did not apply retroactively, unless such an intention was clearly indicated in the treaty in question. Draft article 6 suggested that crimes against humanity would be included as criminal offences in the national law of States parties, and would thus be subject to the general principles of national criminal law. On the other hand, the definition and prohibition of crimes against humanity also formed part of general international law, and so existed prior to any future convention. That implied that if a provision on legality was inserted, it would need to include an exception similar to the one set out in article 15 (2) of the International Covenant on Civil and Political Rights or article 7 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

After thorough consideration, he agreed with the Special Rapporteur that such provisions should not be included, particularly as the original version of draft article 11, on fair treatment of the alleged offender, included a reference to human rights law. That reference should not be deleted; even though the sense might be captured by the words “applicable national and international law”, the specific reference was still useful. Like a number of other members, he supported the addition of a reference to international humanitarian law.

He agreed with the proposed inclusion, in draft article 12 (3), of wording that would clarify that only victims of a crime attributable to the State under international law or committed in any territory under its jurisdiction should be entitled to reparation from that State. The provision would otherwise be too vague and unlikely to be acceptable to States, as it might lead to a kind of forum shopping. At the same time, the notion of “victim” should not be interpreted too restrictively; that could be explained in the commentary.

He shared the Special Rapporteur’s view that the possible additional draft articles should not be included. On the subject of amnesties, he thought, like Mr. Nolte and others, that the Commission had found a delicate balance in its commentary to draft article 10. He did not support the inclusion of a new draft article, although he agreed with Mr. Tladi that the distinction between blanket amnesties and conditional amnesties could be mentioned in the commentary.

Concerning the separate initiative on a mutual legal assistance convention and its relation to the draft articles, he shared the concerns expressed by some members of the Commission. He had no doubt that the Commission should continue and successfully complete its work to adopt draft articles for a future state-of-the-art convention. States would then decide how to proceed in relation to the two partially overlapping projects. However, the Commission should bear the issue in mind during future consultations and when drafting its recommendation to the General Assembly.

In conclusion, he recommended that the full set of draft articles should be referred to the Drafting Committee.

Mr. Murphy (Special Rapporteur), summing up the discussion on his fourth report on crimes against humanity, said that he wished to thank the members of the Commission for their contributions to what had been an exceptional debate. He was grateful both for their kind words and support and for their suggestions and criticisms. Although he would not be able, in his summing-up, to address each and every one of the views expressed, he had paid close attention to all of them and would take them into account in the context of the Drafting Committee and in revising the commentaries.

One of the general issues that had arisen in the discussion concerned methodology. Since the outset of its work on the topic, the Commission had sought to base its draft articles on prior treaties addressing specific crimes, which tended to share a common

constellation of provisions, including a definition of the crime in question and obligations to establish and exercise jurisdiction in certain circumstances. However, there were also variations among such treaties with regard to matters ranging from the choice of wording to the establishment of monitoring bodies. He believed that, during its work on the topic, the Commission had adequately analysed and explained its decisions to select certain variations over others.

It was also important to recall the approach that the Commission had taken with respect to the Rome Statute. As Mr. Nolte had emphasized, the Commission was not seeking to create an international court, and its aim in drafting articles on the topic had never been to replicate the Rome Statute. The Commission had certainly sought to avoid the possibility of any conflict with that instrument and had at times looked to it for guidance. The definition of crimes against humanity set out in draft article 3, for example, was based on the definition provided in article 7 of the Rome Statute.

In the debates in the Sixth Committee and in their written comments and observations, States had largely supported the Commission's methodology, emphasizing that the draft articles should complement and be compatible with existing legal instruments and regimes of relevance to the topic. He would welcome any suggestions from Commission members for improvements to the commentaries that would serve to clarify the choices that had been made.

A second general issue that had arisen concerned the possibility of changing the title from "draft articles on crimes against humanity" to "draft articles on the prevention and punishment of crimes against humanity". Mr. Tladi had been the first to raise that issue, proposing a change in the title of the topic, but support had subsequently emerged for a proposal to change the title of the final product of the Commission's work on the topic but not the title of the topic itself. He proposed that the title of the draft articles should be referred to the Drafting Committee so that the proposed change could be discussed.

With regard to the draft preamble, most members had been satisfied with all or virtually all of the current text, and several had indicated either explicitly or implicitly that no changes were required. He was open to the possibility of discussing, in the Drafting Committee, the specific changes to the preamble that had been suggested by Mr. Hassouna, but he was not persuaded that they were necessary.

Although Sir Michael Wood, supported by Mr. Zagaynov, had proposed that the third preambular paragraph should be deleted, echoing comments and observations made by China, France, the Islamic Republic of Iran, Turkey and the United Kingdom, the dominant view in the Commission, reflecting the comments and observations of Belgium, Estonia, Mexico, Panama, Peru and Sierra Leone, was that the paragraph should be retained. Mr. Zagaynov, supported by Mr. Šturma, had proposed that the introductory verb "Recognizing" should be replaced with either "Recalling" or "Emphasizing" in order to avoid giving the impression that the prohibition of crimes against humanity had never before been recognized as a peremptory norm of general international law (*jus cogens*); that suggestion merited discussion in the Drafting Committee. In accordance with Mr. Huang's comments, he was prepared to consider making further clarifications in paragraph (4) of the commentary to the draft preamble, which set out the rationale for the recognition of the peremptory nature of that prohibition.

He agreed with Mr. Cissé that the sixth preambular paragraph, which recalled the definition of crimes against humanity as set forth in article 7 of the Rome Statute, should be retained. Sir Michael Wood had proposed its deletion, and Mr. Murase had noted that a degree of tension arose from the fact that, in draft article 3, the Commission had altered the definition of crimes against humanity as set forth in the Rome Statute. However, in his view, the paragraph struck a good balance between recalling a relevant portion of the Rome Statute, which had guided the project, and avoiding the impression that the draft articles were to be viewed as embedded in that instrument.

Several members had expressed support for or openness to the suggestion made by Brazil and the United States that the draft preamble should be amended so as to address the obligations of States to refrain from using force against or intervening in other States. In that context, reference had been made to certain preambular paragraphs of the Rome Statute

and of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). Other members had expressed their opposition, with one proposing that the issue could be addressed in the commentary.

To some extent, the non-use of force against and non-intervention in other States was already dealt with in the draft articles and the commentary. The words “in conformity with international law” had been added to the fourth preambular paragraph as an indication that the prevention of crimes against humanity must not involve the threat or use of force. Indeed, paragraph (5) of the commentary to the draft preamble stated that the fourth preambular paragraph foreshadowed obligations that appeared in subsequent draft articles, including the obligation of prevention in draft article 4. That draft article provided that States undertook to prevent crimes against humanity “in conformity with international law”, and paragraph (8) of the commentary to that draft article explained that the measures undertaken by a State to fulfil that obligation must be consistent with the rules of international law, including the rules on the use of force set forth in the Charter of the United Nations, international humanitarian law and human rights law, and that the State was expected to take only such measures as it legally could take under international law to prevent crimes against humanity.

The obligations of States to refrain from using force against or intervening in other States could be developed further in the draft articles or in the commentary. However, to do so in the draft preamble might produce an effect opposite to that intended: if the Commission placed excessive emphasis in the draft preamble on the rules governing the use of force and non-intervention, such an abundance of caution could give the impression that extraordinary measures were being called for in the draft articles. He was not persuaded that preambular paragraphs of the kind found in the Rome Statute, the purpose of which had been to create a global institution with certain powers with respect to States parties, were warranted in the draft articles. Preambular paragraphs of that kind did not appear in other treaties addressing the prevention and punishment of specific crimes.

With regard to draft article 1, several members had expressed support for the current text, and he had taken note of the proposed changes to the commentary.

The one substantive proposal made in the discussion on draft article 1 had been to include a non-retroactivity clause, as suggested by Chile and Turkey. While Mr. Rajput had proposed a provision prohibiting the conviction of individuals for acts committed before the “entry into force” of the draft articles, two other members had seemed to favour a broader provision, perhaps based on article 28 of the 1969 Vienna Convention on the Law of Treaties.

The matter of non-retroactivity was addressed in paragraphs 43 and 44 of the fourth report. On a technical point, it would be inappropriate to speak of the “entry into force” of the draft articles. Moreover, by including language of that kind, the Commission would be pre-empting a decision by States to move towards a future convention. It was also unclear whether the “entry into force” referred to a specific point in time or to the time at which a particular State or States would become bound by a future convention. Although it might be possible to resolve those various drafting problems, he remained of the view that article 28 of the 1969 Vienna Convention constituted a default rule of treaty law and therefore did not need to be replicated. However, the commentary to draft article 1 could be revisited with a view to ensuring that appropriate emphasis was placed on the non-retroactivity rule. The suggestions made for improvements to the commentary had been duly noted.

With regard to draft article 2, he, like other members, was opposed to the proposal, made by Mr. Murase and Mr. Park on the basis of comments received from France and the Islamic Republic of Iran, that the phrase “crimes under international law” should be replaced with “the most serious crimes of concern to the international community as a whole”. The purpose of the reference to “crimes under international law”, which appeared in article I of the Genocide Convention, was to emphasize that the conduct in question existed as a crime whether or not it was criminalized under national law. In the fourth preambular paragraph, crimes against humanity were identified as being among the most serious crimes of concern to the international community as a whole. Mr. Huang’s

comments regarding the reference to armed conflict could be discussed in the Drafting Committee.

He agreed with those members who had argued that draft article 2 would read better, and the “general obligation” announced in its title would be captured more clearly, if it was restructured in the manner suggested by New Zealand. Nevertheless, the Commission should bear in mind that the suggested restructuring would represent a departure from article I of the Genocide Convention, on which the formulation adopted on first reading had been based.

On a separate point, an alternative or additional way of addressing the obligations of States to refrain from using force against or intervening in other States would be to insert the words “in conformity with international law”, as a separate clause set apart by commas, after the word “undertake”.

Concerning draft article 3, many members had spoken in support of his proposal to delete the phrase “or in connection with the crime of genocide or war crimes” from paragraph 1 (*h*). Some members had wished to go even further by deleting the requirement for a connection with any act referred to in the paragraph as a whole, but others had argued that the deletion of that requirement would create too broad a crime. Ms. Lehto, supported by Mr. Saboia, had indicated that, if the connection requirement could not be deleted, language should be introduced to require the underlying acts of persecution to be of “equal gravity” in relation to other acts that amounted to crimes against humanity.

His position was that the deletion of the connection requirement would be an inappropriate deviation from the definition set out in the Rome Statute, as it would expand the scope of paragraph 1 (*h*) to include acts that were not usually regarded as crimes against humanity. Regarding the specific argument advanced by Ms. Lehto, he pointed out that the connection requirement had been omitted from the Statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda because they defined “persecution” much more narrowly than the Rome Statute.

A very large number of members had expressed support for his proposal to delete draft article 3 (3), which contained a definition of the term “gender”, and the cross reference thereto in paragraph 1 (*h*). In response to the concern expressed by Mr. Park, he noted that many of the other terms used in paragraph 1 (*h*), including “racial”, “political”, “ethnic” and “cultural”, were not defined either.

Several members had said that they were in favour of his proposed change to the “without prejudice” clause in draft article 3 (4), with only Mr. Hmoud opposed. In response to Mr. Zagaynov’s request for clarification as to whether a prohibition of crimes against humanity deriving from any broader definition provided for in any international instrument or national law would have the status of a peremptory norm of general international law (*jus cogens*), he drew attention to the arguments advanced in the commentary to draft article 3, especially paragraphs (39) to (41). In essence, any elements adopted in a national law that did not fall within the scope of the draft articles would not benefit from the provisions set forth within them.

With regard to paragraph 2 (*i*), support had been expressed for his recommendation that the definition of the term “enforced disappearance of persons” should not deviate from the one set out in the Rome Statute. However, three members had called for the deletion of the final clause of that definition, beginning with the words “with the intention”. While that clause did not appear in the International Convention for the Protection of All Persons from Enforced Disappearance, it did appear in the Rome Statute, to which more than twice as many States were parties. Furthermore, in a statement issued in June 2018 in relation to the Commission’s draft articles, the Committee on Enforced Disappearances had argued that the overall consistency of the draft articles with the Rome Statute “ought to be paramount”, for the sake of effective cooperation between States parties in the criminal prosecution of those crimes. The Committee had welcomed the “without prejudice” clause as a way of allowing the International Convention to operate in accordance with its established terms. The other suggestions made by members could be taken up in the Drafting Committee.

With regard to draft article 4, several members had voiced support for his proposal on the inclusion of an express obligation not to engage in acts that constituted crimes against humanity. Mr. Nolte had suggested that, if such an obligation was necessary, it should not be formulated as an “undertaking” and should be moved to draft article 2, and Mr. Hmoud had suggested that it should be moved to the preamble. Mr. Park and Mr. Šturma were in favour of making the sentence beginning with the words “No exceptional circumstances” into a separate paragraph in the same draft article, while Mr. Tladi had urged that it should be moved to draft article 4. With regard to his proposals on the deletion of the word “including” and the insertion of the words “such as education and training programmes”, divergent views had been expressed and could be discussed further in the Drafting Committee.

Most members had seemed comfortable with his decision to place the obligation not to engage in acts that constituted crimes against humanity alongside the obligation to prevent such crimes. The International Court of Justice, in its judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, had taken the position that the obligation to prevent genocide necessarily implied the prohibition of the commission of genocide.

Concerning the “territorial” formulation, after much deliberation at the time of the first reading, the Commission had settled on the words “territory under a State’s jurisdiction”. He would urge the members not to deviate from that approach, which seemed to have been accepted by the vast majority of States that had submitted comments and observations.

As for draft article 5, various suggestions had been made in relation to the proposed deletion of the words “territory under the jurisdiction of”. He was confident that the Drafting Committee would be able to produce an appropriate formulation.

Most of the members who had commented on his proposal for a more streamlined version of draft article 6 (3), which concerned command responsibility, had expressed support for that change. However, a few preferred the highly prescriptive standard adopted on first reading, which was derived from the Rome Statute. In that regard, the comments made by Mr. Hmoud could lead the way towards a middle ground: the Commission could use the standard derived from Protocol I additional to the Geneva Conventions of 1949, while explaining in the commentary that a distinction had been drawn in the Rome Statute between military commanders and civilian superiors and that it was important, when applying that standard, to assess the circumstances at the time of the crime.

Members seemed to be generally in favour of the current wording of draft articles 7 and 8, and the specific suggestions made could be discussed in the Drafting Committee.

With regard to draft article 9, several members had expressed support for his proposal to add the words “as appropriate”. Mr. Hmoud’s concerns in that regard could be addressed in the draft article or in the commentary.

Many members had supported his proposal to align draft article 10 with the *aut dedere aut judicare* obligation set out in article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft (the “Hague formula”). However, Mr. Jalloh preferred the text adopted on first reading, and Mr. Huang had questioned the draft article in general. The Drafting Committee could consider those comments and other proposed changes.

With regard to draft article 11, most members had rejected his proposal to delete the words “including human rights law”. However, as members agreed that the provision should not be seen as displacing international humanitarian law, an acceptable solution might be to insert the words “and international humanitarian law” instead. The other changes suggested by members could be considered in due course.

In his fourth report, he had argued that the term “suspect” should not be used in the title of the draft article because it was not used in the draft article itself. If members nevertheless wished to insert that term into the title, as proposed by Mr. Tladi, they would need to consider the implications of not using it in other places, including the last preambular paragraph, draft article 12 (1) (b) and draft article 14 (3). If a change to the title

was necessary, he would prefer “Fair treatment of any person against whom measures are being taken”.

Several members had expressed support for the proposed change to draft article 12 (3). Divergent opinions had been voiced with regard to the question of whether a definition of the term “victim” should be included. Those opinions and the various proposals by members could be discussed in the Drafting Committee.

As for draft article 13, several members had spoken in favour of the proposed new paragraph. Mr. Murase’s suggestion that the paragraph should be divided into three separate paragraphs, Mr. Huang’s concern regarding the breadth of paragraph 10 and the various drafting proposals made by other members could be discussed in the Drafting Committee.

Although several members had expressed support for the newly proposed draft article 13 *bis*, Mr. Petrič, Mr. Reinisch, Mr. Saboia, Mr. Tladi and Sir Michael Wood had expressed doubts about the provision or had opposed it on the ground that it was hortatory. Mr. Tladi, for example, had argued that it might empower domestic courts in ways that were not desirable.

He was in favour of retaining the provision, as it mirrored provisions found in existing multilateral agreements. In addition, many other bilateral and multilateral agreements on the transfer of sentenced persons had been concluded. Further information on such agreements could be found in the 2012 *Handbook on the International Transfer of Sentenced Persons* produced by the United Nations Office on Drugs and Crime. It was his hope that draft article 13 *bis* could be referred to the Drafting Committee with a view to its ultimate adoption, perhaps with additional language stressing the discretionary nature of the transfer of sentenced persons.

Members had generally expressed support for the three changes proposed to draft article 14, which, together with various other changes suggested by members, could be taken up in the Drafting Committee.

Members largely supported draft article 15, although Mr. Petrič had argued that the matter of dispute settlement should be left for States to decide at a negotiating conference.

Three members had suggested changes to the draft annex, which, although not clearly motivated by comments received from States, could be examined in the Drafting Committee.

Members seemed to have agreed that, with the exception of draft article 13 *bis*, the Commission should not create any new draft articles on issues such as the relationship to international criminal tribunals, amnesties and institutional mechanisms. Accordingly, he did not envisage that such issues would be taken up in the Drafting Committee.

As for the separate State-led initiative for a convention addressing crimes against humanity, genocide and war crimes, nothing was to be gained from attempting to expand the Commission’s topic to include genocide and war crimes. He did not accept the claim that a conflict with that initiative could have been avoided if the Commission had expanded the scope of its topic at an earlier stage. Although the Commission’s project might have garnered support from the States involved in that initiative if its intended outcome had been a treaty dealing purely with mutual legal assistance, it was not obvious that a more robust treaty addressing crimes against humanity, genocide and war crimes would have been attractive to them.

In any case, as Ms. Lehto had noted, the Commission’s draft articles would be “standard-setting”. Once completed, they would be a very high-quality product that States could use as they saw fit, whether to develop a future treaty of the kind envisaged by the Commission or to develop a treaty of a different kind.

Although there had been nearly unanimous support in the Commission for the referral of all the draft articles to the Drafting Committee, three members opposed the referral of draft article 13 *bis*.

He proposed that the title of the draft articles, the draft preamble, draft articles 1 to 15, including draft article 13 *bis*, and the draft annex should be referred to the Drafting Committee, taking into account the various positions expressed in the debate. If the Commission agreed to that proposal, the Drafting Committee could attempt to revise the full set of draft articles during the remainder of the first part of the current session. Any necessary “*toilettage*” could then be undertaken. If the plenary took note of the full set of revised draft articles during the first part, he would prepare a revised set of commentaries for consideration during the second part. The Commission could then aim to approve the commentaries and complete the second reading by the end of the current session. Members would also hold informal consultations during the second part to discuss the recommendation that should be made in the Commission’s annual report to the General Assembly.

The Chair said he took it that the Commission wished to refer the title of the draft articles, the draft preamble, draft articles 1 to 15, including draft article 13 *bis*, and the draft annex to the Drafting Committee, taking into account the comments and observations made in the debate and the Special Rapporteur’s recommendations.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Grossman Guiloff (Chair of the Drafting Committee) said that the Drafting Committee on the topic of crimes against humanity was composed of Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Hmoud, Mr. Huang, Ms. Lehto, Mr. Murase, Mr. Nguyen, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Sir Michael Wood and Mr. Zagaynov, together with Mr. Murphy (Special Rapporteur) and Mr. Jalloh (Rapporteur), *ex officio*.

The meeting rose at 1.05 p.m.