

Provisional

For participants only

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International Law Commission
Seventy-first session (first part)

Provisional summary record of the 3468th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 22 May 2019, at 10 a.m.

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Protection of the environment in relation to armed conflicts (*continued*)

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Present:

Chair: Mr. Šturma

Members: Mr. Argüello Gómez
Mr. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
Mr. Hassouna
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. Vázquez-Bermúdez
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)

Report of the Drafting Committee (A/CN.4/L.935)

The Chair invited the Chair of the Drafting Committee to present the report of the Drafting Committee on the topic “Crimes against humanity”, as contained in document A/CN.4/L.935.

Mr. Grossman Guiloff (Chair of the Drafting Committee) said that the report of the Drafting Committee contained the texts and titles of the draft preamble, the draft articles and the draft annex on the prevention and punishment of crimes against humanity provisionally adopted by the Committee, and which the Committee recommended for adoption by the Commission on second reading.

He wished to pay tribute to the Special Rapporteur, Mr. Murphy, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. Thanks were also due to the other members of the Drafting Committee for their active participation and significant contributions to the successful outcome. In particular, he wished to express his gratitude to Ms. Oral and Mr. Hmoud, who had kindly agreed to preside over two meetings of the Committee in his absence.

The Drafting Committee had devoted six meetings, from 7 to 14 May, to its consideration of the draft title, the draft preamble, draft articles 1 to 15 including draft article 13 *bis*, and the draft annex proposed by the Special Rapporteur in his fourth report (A/CN.4/725), which had been referred to it by the Commission at the conclusion of the plenary debate.

In the light of suggestions made by a number of members of the Commission during the plenary debate, the Drafting Committee had adopted the following title for the draft articles: “Prevention and punishment of crimes against humanity”. That title had been deemed appropriate in view of the scope of the draft articles, as well as their object and purpose. It was also consistent with the title of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which the draft articles were intended to complement.

The draft preamble comprised 10 preambular paragraphs. The title “Preamble” adopted on first reading had been deleted. In accordance with the Commission’s practice for texts adopted on second reading, the Drafting Committee had considered that a title for a preamble was superfluous and should be omitted.

The first paragraph was a historical reference inspired by the preamble of the Rome Statute of the International Criminal Court. It recalled that throughout history millions of children, women and men had been victims of crimes that deeply shocked the conscience of humanity. The Drafting Committee had adopted the paragraph with no changes to the text adopted on first reading.

The second paragraph, which also borrowed language from the preamble of the Rome Statute, recognized that crimes against humanity threatened the peace, security and well-being of the world. Again, the Drafting Committee had adopted the paragraph with no changes to the text adopted on first reading.

The third paragraph was an addition to the text adopted on first reading. It had been added following suggestions made by some States to refer to certain principles, such as the prohibition of the use of force and non-intervention, and should be read in conjunction with the second preambular paragraph. The Drafting Committee had concluded that such a reference was appropriate and could be made by referring generally to the principles of international law embodied in the Charter of the United Nations. The paragraph had been modelled on the preamble of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

The fourth paragraph dealt with the prohibition of crimes against humanity as a peremptory norm of general international law (*jus cogens*). It had been adopted with only

one change: the opening clause “*Recognizing further*” had been replaced with “*Recalling also*”. The Drafting Committee had considered that the word “*Recalling*” would acknowledge the *jus cogens* character of the rule prohibiting crimes against humanity, without implying that the rule had not previously been accepted and recognized as such. The paragraph had been adopted on the understanding that the commentaries thereto would indicate evidence in support of such acceptance and recognition, and would clarify that the *jus cogens* character of the overall prohibition did not imply that all the rules contained in the draft articles were of a *jus cogens* character.

The fifth paragraph encapsulated the first major purpose of the draft articles, namely the prevention of crimes against humanity, and had been adopted with no changes to the text adopted on first reading.

The sixth paragraph, which established the link between the fight against impunity and the prevention of crimes against humanity, borrowed language from the preamble of the Rome Statute and had been adopted with no changes to the text adopted on first reading.

The seventh paragraph referred to the definition of crimes against humanity set forth in article 7 of the Rome Statute. Since draft article 2 borrowed language from article 7 of the Rome Statute, it had been deemed appropriate to underline the relationship between the two texts when referring to the definition of crimes against humanity. Two changes had been made to the text adopted on first reading: the word “*Recalling*” had been replaced with “*Considering*”, and the word “as” before “set forth in” had been deleted. The Drafting Committee had found those changes to be appropriate given that draft article 2 did not replicate article 7 of the Rome Statute exactly.

The eighth paragraph emphasized another important component of the draft articles, namely the obligation of States to establish and exercise their criminal jurisdiction with respect to crimes against humanity. Since the word “*Recalling*” had been replaced in the seventh paragraph, the Committee had decided that the word “*also*” after “*Recalling*” in the eighth paragraph should be deleted.

The ninth paragraph considered the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment. It was an important reminder of the human rights of those persons, which must be respected throughout the operation of the obligations set forth in the draft articles. The ninth paragraph corresponded to the ninth preambular paragraph as adopted on first reading. The Drafting Committee had found it appropriate to reverse the order of the ninth and tenth preambular paragraphs in order to conclude the preamble with a reference to two core elements of the draft articles, namely the measures to be taken at the national level and international cooperation, notably with respect to extradition and mutual legal assistance, to ensure effective prosecution of crimes against humanity. The paragraph had been adopted with no changes to the text adopted on first reading, with the exception of the deletion of the words “*as well*” after “*Considering*”.

The tenth paragraph corresponded to the eighth preambular paragraph as adopted on first reading. The only change to the text adopted on first reading had been the addition of the word “*also*” after “*Considering*”.

Draft article 1, which was entitled “Scope” and had been adopted with no changes to the text adopted on first reading, consisted of a single sentence, which stated: “The present draft articles apply to the prevention and punishment of crimes against humanity.” The Drafting Committee had discussed whether the term “apply” was appropriate for the purposes of the draft articles, or whether it should be replaced with the term “concern”. As it was the Commission’s practice to use the term “apply” in provisions on the scope of draft articles, the Committee had concluded that the text should remain unchanged.

Draft article 2, entitled “Definition of crimes against humanity”, corresponded to draft article 3 as adopted on first reading. The Drafting Committee had decided to reverse the order of draft articles 2 and 3, so as to provide the definition of crimes against humanity first and to present in a logical sequence thereafter the draft articles concerning States’ obligations. The objective of draft article 2 was to provide a definition of crimes against humanity for the purposes of the draft articles, as well as a “without prejudice” clause

stating that the draft article was without prejudice to any broader definition provided for in international instruments, in customary international law or in national law.

The text adopted on first reading essentially reproduced article 7 of the Rome Statute in three successive paragraphs, except for three non-substantive changes, following general agreement in the Commission that it should not modify the definition of crimes against humanity contained in the Rome Statute in the context of its work on the topic. A significant number of States, international organizations and others had in their comments supported that approach and requested that the text of draft article 2 should be maintained. At the same time, a large number of calls had been made in those comments for two specific modifications to paragraph 1 (h) and paragraph 3.

Paragraph 1 (h) provided a definition of persecution as an underlying act of crimes against humanity for the purpose of the draft articles. Following suggestions made by States, the Special Rapporteur had recommended in his fourth report the deletion of the clause “or in connection with the crime of genocide or war crimes”, since that formulation had been designed to establish a type of jurisdiction that was unique to the International Criminal Court, not to indicate the ambit of what constituted persecution as a crime against humanity. The Special Rapporteur’s proposal had met with the agreement of the majority of the Drafting Committee. However, some members had suggested that the entire second half of subparagraph (h) should be deleted, including the words “in connection with any act referred to in this paragraph or in connection with”, arguing that the connection element was too stringent and not reflective of customary international law or the definition of persecution contained in other international instruments. Nevertheless, most members of the Drafting Committee had come to the conclusion that it would be preferable not to alter the text of the Rome Statute in a manner that could expand the scope of the definition of crimes against humanity to include a wide range of discriminatory practices that did not necessarily amount to crimes against humanity, such as prohibiting an ethnic group from establishing a trade union. The Special Rapporteur’s proposal had therefore been accepted, on the understanding that the commentary would note other aspects of the definition relevant to the concerns expressed, such as the inclusion of “other inhumane acts” in paragraph 1 (k). In addition, the words “as defined in paragraph 3” had been deleted from subparagraph (h).

With regard to paragraph 3, a significant number of States, international organizations and others had expressed the view that the definition of gender was outdated and should be deleted or replaced. The proposal made by the Special Rapporteur in his fourth report to delete paragraph 3 had met with general agreement during the plenary debate; the paragraph had therefore been deleted by the Drafting Committee. As had been mentioned, the reference to paragraph 3 in paragraph 1 (h) had therefore been deleted. Some members of the Drafting Committee had emphasized that the reason for that deletion and the substantive meaning of “gender”, as reflected in international practice, should be carefully explained in the commentary.

Some States and others had also called for a change to paragraph 2 (i), which provided a definition of “enforced disappearance of persons” for the purpose of paragraph 1. Although that definition reproduced verbatim the definition provided in the Rome Statute, it was not the same as that which appeared in certain other instruments, such as the International Convention for the Protection of All Persons from Enforced Disappearance. Several members of the Drafting Committee had urged the deletion or modification of the final clause of the definition concerning the intention of removing the persons concerned from the protection of the law for a prolonged period of time. It had been expressed that international law had evolved since the adoption of the Rome Statute, and that such element was not present in the International Convention for the Protection of All Persons from Enforced Disappearance. Most members had felt, however, that the definition provided for in the International Convention, or in other international instruments or national laws, would be preserved by the “without prejudice” clause that appeared in paragraph 3. In view of the general request made by many States and others not to alter the definition contained in article 7 of the Rome Statute in the present draft articles, it had been deemed preferable to retain the text adopted on first reading, on the understanding that it would be stressed in

the commentary that doing so was without prejudice to other instruments or to customary international law in that regard.

Draft article 2 (3), which corresponded to draft article 3 (4), as adopted on first reading, had been amended to include a reference to customary international law, as had been suggested by some States. It would be clarified in the commentary that the term “international instruments” referred to instruments adopted by States or in the context of international organizations.

The Drafting Committee had adopted draft article 3, which corresponded to draft article 2 as adopted on first reading, with changes to the text adopted on first reading, in the light of proposals made by States, the Special Rapporteur and members of the Commission. Although all elements of the text adopted on first reading had been retained, the structure of the draft article had been changed, and elements of draft article 4 as adopted on first reading had been moved to draft article 3. In addition, express language on the obligation of States not to engage in acts that constituted crimes against humanity had been added. As a result, the word “obligation” in the title of the draft article as adopted on first reading had been replaced with “obligations” in the plural.

The first paragraph was new language that had been added to the text adopted on first reading. In the light of the suggestions made by some States, the Special Rapporteur had proposed that the obligation of States not to commit acts that constituted crimes against humanity should be explicitly mentioned in the draft articles. Such an obligation had been considered implicit in the first reading text under draft article 4 on the obligation of prevention. The Drafting Committee had agreed that express language confirming each State’s obligation “not to engage in acts that constitute crimes against humanity” could be added for the sake of clarity. That formula appropriately recognized that States themselves did not commit crimes – rather, crimes were committed by persons – but that acts constituting such crimes could be acts attributable to States under the rules on the responsibility of States for internationally wrongful acts. After the debate in plenary and in the Drafting Committee, the Committee had found it appropriate to add the language contained in paragraph 1 to draft article 3, as part of the general obligations of States, rather than to draft article 4. The opening clause “[e]ach State has the obligation” was intended to emphasize that the obligation was pre-existing, thus distinguishing it from the obligations to prevent and punish crimes against humanity elaborated throughout the remainder of the draft articles.

The second paragraph corresponded to the sole paragraph of draft article 2 as adopted on first reading, with one non-substantive structural change. The paragraph was an umbrella provision identifying the general obligation to prevent and punish crimes against humanity, which was to be implemented through the specific obligations set forth in more detail throughout the remaining draft articles. The Drafting Committee had found that reformulating the provision such that it began with “[e]ach State undertakes to prevent and punish crimes against humanity”, followed by the language adopted on first reading, expressed that general obligation more clearly.

The third paragraph was a “no exceptional circumstances” clause and corresponded to the second paragraph of draft article 4 as adopted on first reading. The Drafting Committee had concluded that the paragraph, which had been adopted with no changes to the first reading text, would be better placed in draft article 3, as it was directly relevant to the general obligation of States that had been relocated to paragraph 1 of that draft article. It had been maintained as a separate paragraph, since it was also relevant to the acts of non-State actors, such as rebel groups, with respect to crimes against humanity.

The purpose of draft article 4, entitled “Obligation of prevention”, was to set forth the various elements that collectively contributed to the prevention of crimes against humanity. As the second paragraph of draft article 4, as adopted on first reading, had been moved to draft article 3, the current draft article 4 had been left with only one paragraph, which had been adopted with two changes to the text adopted on first reading in the light of proposals made by States. The word “including”, which had previously appeared before the word “through” in the chapeau, had been deleted, since the Drafting Committee had concluded, in the light of comments by States, that it made the obligation of States under

the provision too broad and open-ended. Additionally, the word “appropriate” had been added before “preventive measures” in subparagraph (a), as the Committee had considered that its inclusion afforded States some flexibility by allowing them to tailor other preventive measures to their particular circumstances.

The Drafting Committee had adopted draft article 5, on *non-refoulement*, with two changes to the text adopted on first reading, following proposals by States and some members of the Commission. The words “territory under the jurisdiction of” had been deleted from the first paragraph. That change, which had been proposed in the Special Rapporteur’s fourth report and had met with general agreement in the plenary, was intended to reflect the fact that paragraph 1 dealt with the transfer by a State of a person to the control of another State regardless of whether or not that involved a transfer to a different territory, which meant that the “territorial” formula used elsewhere in the draft articles was not appropriate for the purposes of the paragraph at issue. The paragraph had been adopted on the understanding that the commentary would note the broad range of situations in which a person might be surrendered from one State to another. The commentary would also explain that the provision was without prejudice to other *non-refoulement* obligations under customary international law or contained in treaties.

In addition, the words “territory under the jurisdiction of the”, in the second paragraph as adopted on first reading, had been deleted. That change had been proposed by members of the Commission in order to better align the second paragraph with the amended first paragraph. The Drafting Committee had concluded that the change was warranted in light of the amended first paragraph and the provisions on *non-refoulement* in the treaties on which draft article 5 had been modelled, namely article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and article 16 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance.

The purpose of draft article 6, entitled “Criminalization under national law”, was to set out several important obligations of each State relating to the establishment of crimes against humanity as offences under its law. In addition to obliging each State to regard such crimes as offences under its criminal law, the draft article addressed the associated modes of liability. With the exception of paragraph 3, the text adopted on first reading had been maintained. The new text adopted by the Drafting Committee for paragraph 3 reflected a proposal advanced by the Special Rapporteur in his fourth report, following concerns expressed by States, international organizations and others. The first reading text, which had been modelled on article 28 of the Rome Statute, had been streamlined in the light of the comments submitted so that it would not be overly prescriptive. It had been felt that the detailed formulation contained in the Rome Statute might be more appropriate for the statute of an international court than for addressing national criminal jurisdiction. The new text of the third paragraph built upon article 86 (2) of Protocol I additional to the Geneva Conventions of 1949, the statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and rule 153 of the 2005 study by the International Committee of the Red Cross on customary international humanitarian law. The text had been deemed to constitute a general standard already largely accepted by States in their national laws, military manuals and jurisprudence; it would not foreclose the possibility that a State could use a detailed rule that was closer to article 28 of the Rome Statute should it wish to do so.

Draft article 7, entitled “Establishment of national jurisdiction”, set out the obligation on States to establish their jurisdiction over crimes against humanity in certain circumstances. The Drafting Committee had not made any changes to the title or text adopted on first reading but had agreed that the commentary should address some of the concerns raised by States with respect to that provision, as described in the fourth report.

Draft article 8 was entitled “Investigation”, as adopted on first reading. Its purpose was to trigger an investigation by the State whenever it was believed that acts constituting crimes against humanity had occurred or were occurring. The Drafting Committee had made only one change to the text adopted on first reading, adding the word “thorough” before “and impartial” at the suggestion of some States and Commission members. It had considered that adding the word “thorough” would help to ensure that the State pursued a

serious and meaningful investigation. At the same time, the word “prompt” had been retained and helped to balance the word “thorough”; while the investigation must be thorough, it must also be conducted promptly and not last any longer than was necessary. It had been agreed that the commentary should note that the amount of time needed to conduct a thorough investigation must be considered in relation to the nature of crimes against humanity; since such crimes occurred on a widespread or systematic basis, any investigation of such wide-ranging acts might well take much longer than would the investigation of a single act.

The title of draft article 9, “Preliminary measures when an alleged offender is present”, remained the same. The purpose of the provision was to set forth the obligation of a State to exercise its jurisdiction when an alleged offender was present on any territory under its jurisdiction by taking certain measures. Three categories of measures were identified in three paragraphs: the obligation to take the alleged offender into custody if necessary to ensure his or her presence, the obligation to carry out a preliminary inquiry and the obligation to notify other relevant States.

In their submissions, some States had expressed concern regarding the potential impact of the obligation set out in paragraph 3 on ongoing investigations. The Special Rapporteur had noted that a State’s obligation to report its findings to other States was included in a number of treaties that were widely adhered to but had acknowledged that caution would be required in that regard in the context of crimes against humanity, bearing in mind both the potential need to protect the identity of victims and witnesses and the potentially large scope and complexity of investigations of such crimes. On the basis of a proposal by the Special Rapporteur, the Drafting Committee had therefore decided to add “as appropriate” in the second sentence of paragraph 3, which now read: “The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall, as appropriate, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.”

Draft article 10, entitled “*Aut dedere aut judicare*”, as adopted on first reading, set forth the obligation that appeared in a number of existing treaties whereby the State in whose jurisdiction an alleged offender was present had to submit the alleged offender to prosecution within its own national system, unless it extradited or surrendered him or her to another State or to an international criminal court or tribunal.

At the suggestion of some States, the Special Rapporteur had proposed a non-substantive realignment of the text with a view to following more closely the “Hague formula” used in various treaties. The Drafting Committee had supported the proposal, on the understanding that the stylistic change would not shift the emphasis of the provision away from the obligation to submit the case to competent authorities for the purpose of prosecution. The Drafting Committee had also decided that the word “court” should be added to the draft article to complement the existing reference to “competent international criminal tribunal” and more appropriately encompass all international judicial institutions that dealt with criminal cases. The provision had been adopted on the understanding that the commentary would address concerns raised by some States and Commission members regarding the surrender of persons to international criminal courts and tribunals.

Draft article 11, entitled “Fair treatment of the alleged offender”, comprised three paragraphs and focused on the obligation of the State to accord fair treatment, including a fair trial and full protection of his or her rights, to an alleged offender who was present in territory under its jurisdiction. The draft article acknowledged the right of an alleged offender who was not a national of the State but who was in prison, custody or detention to have access to a representative of his or her own State. Only one change had been made to the version adopted on first reading.

In his report, the Special Rapporteur had suggested deleting the clause “including human rights law” from the first paragraph, since it was superfluous and could be interpreted as downplaying the possible role of international humanitarian law. During the plenary debate, Commission members had not supported the deletion of the reference to human rights law, although they had acknowledged that the role of international humanitarian law should not be diminished. The Special Rapporteur had thus proposed

maintaining the reference to human rights law and adding a similar reference to international humanitarian law; it could then be clarified in the commentary that crimes against humanity could be committed in peacetime or during an armed conflict, in which case one or the other source of law would be more dominant. The Drafting Committee had accepted the proposal and revised the first paragraph so that the final phrase of that paragraph now read: “including human rights law and international humanitarian law”.

Draft article 12, entitled “Victims, witnesses and others”, consisted of three paragraphs and dealt with the rights of such persons affected by crimes against humanity. Paragraph 1 covered the right to complain to the competent authorities and protection from ill-treatment or intimidation for those who complained or otherwise participated in proceedings within the scope of the draft articles. Paragraph 2 addressed the presentation and consideration of the views and concerns of victims at appropriate stages of the criminal proceedings and paragraph 3 related to the issue of reparation. The title and paragraphs 1 and 2 had been adopted by the Drafting Committee with no changes to the version adopted on first reading.

One change had been made to paragraph 3, however, as several States had indicated that it was too open-ended and might imply an obligation for all States, even in the absence of any connection with the crimes, to ensure that their legal systems would provide a right of reparation for the victims of those crimes. Based on a proposal made by the Special Rapporteur in his report, the Drafting Committee had decided to address that concern by limiting the obligation to two types of States: the State that had committed the acts that constituted crimes against humanity and the State where the crimes had occurred.

Members of the Drafting Committee had suggested that the commentary should acknowledge the variety of situations that could arise with respect to crimes against humanity and potentially affect the types and scale of reparations. In particular, it was understood that, in some situations, it might not be possible for a Government to provide full reparations, including compensation, to all victims. At the same time, it was also understood that the relative flexibility of the provision was not to be exploited by States in order to avoid providing meaningful and effective forms of reparations.

The Drafting Committee had also considered whether it would be appropriate to include a definition of “victims” in draft article 12. Several members had been of the view that it was necessary to include such a definition and that it would therefore be desirable to establish a baseline for the definition to be included in national laws, given that it was a matter governed by international law. However, most members had been of the opinion that, while such a definition might be of value for ensuring that a core definition of “victim” operated for proceedings at the national level, it was not usually included in treaties addressing crimes, and there was a risk of crafting a definition that was narrower than some States currently applied. Such a definition appeared to be better left for States to address in their respective legal systems, as they did for crimes generally. At the same time, the definitions used in international instruments should be indicated in the commentary so as to provide guidance to States in that regard.

The purpose of draft article 13, entitled “Extradition”, was to set out the rights, obligations and procedures applicable to the extradition process. As adopted on first reading, draft article 13 had comprised 10 paragraphs. Based on comments received from States, the Special Rapporteur had proposed the adoption of an additional paragraph 1. The first sentence of that new paragraph would provide a better introduction to the overall purpose of the draft article, which was to apply to the offences covered by the draft articles whenever a requesting State sought the extradition of a person who was present in a requested State. The second sentence would indicate that States should endeavour to expedite their extradition procedures. The language proposed for the two sentences was based on the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. A third sentence based on the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts would address the concerns raised by some States that due consideration should be given to an extradition request from the State where the alleged offences had occurred.

There had been a general agreement in the Drafting Committee that the new paragraph should be added but that the three sentences should be broken into stand-alone paragraphs and positioned so as to fit well into the sequence of the paragraphs of draft article 13. Accordingly, the three sentences were split into three new paragraphs of draft article 13. Paragraph 1 of draft article 13 thus read: "This draft article shall apply to the offences covered by the present draft articles when a requesting State seeks the extradition of a person who is present in territory under the jurisdiction of a requested State." The new paragraph 8 of draft article 13 read: "The requesting and requested States shall, subject to their national law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto." The new paragraph 12 of draft article 13 read: "A requested State shall give due consideration to the request of the State in whose territory the alleged offence has occurred."

Two stylistic changes had been made to paragraph 13, which corresponded to paragraph 10 as adopted on first reading. The term "where appropriate" had been replaced with "as appropriate" for the sake of consistency with the rest of the draft articles. The word "consult" had been placed immediately after the word "shall".

All the other nine first-reading paragraphs had been adopted without any change.

Concerning the additional draft article 13 *bis* proposed by the Special Rapporteur in his report, such a provision, which appeared in the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, would encourage States to consider entering into bilateral or multilateral agreements or arrangements on the transfer of sentenced persons. In practice, States had concluded numerous agreements for that purpose. The Drafting Committee had debated the appropriateness of including such a provision at that stage. While some members had supported the draft article, others had noted that it touched upon a policy question and that it might have adverse effects, such as empowering national courts in undesirable ways. Those other members had also considered that, since States had not had the opportunity to comment on the provision before the second reading, their support for such a provision was unclear. The Drafting Committee had therefore decided not to adopt draft article 13 *bis* on the transfer of sentenced persons.

Draft article 14, entitled "Mutual legal assistance" as adopted on first reading, contained nine paragraphs setting out general obligations with respect to mutual legal assistance that were binding on every State, regardless of whether it had a mutual legal assistance treaty with the other State when a request for mutual legal assistance arose. Paragraphs 2 and 7 had been amended and a new paragraph 9 introduced.

Paragraph 2 had been adopted with the non-substantive change proposed by the Special Rapporteur in his fourth report, aimed at sharpening the distinction between the first and second paragraphs, since the second concerned only legal persons. The final clause of paragraph 2, as adopted on first reading, had been moved to the beginning of the paragraph.

Paragraph 7 had also been adopted with the changes proposed by the Special Rapporteur. The last phrase of the paragraph, as adopted on first reading, which had read "except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance", had been replaced with "between the States in question". The Drafting Committee had considered that change necessary to clarify the provision and avoid legal uncertainty. The change would also bring the language of the paragraph closer to that used in treaties that were widely adhered to, such as the United Nations Convention against Corruption. It had been understood that the commentary would explain that the amended draft paragraph allowed the provisions of an existing mutual legal assistance treaty between the States concerned to continue to govern their relationship, but also left in place the provisions of draft article 14 to supplement that relationship with respect to any issues not addressed in the treaty.

Following a proposal of the Special Rapporteur contained in his fourth report, the Drafting Committee had adopted a new paragraph 9, the purpose of which was to facilitate State cooperation with international mechanisms that had a mandate to collect evidence of crimes against humanity. The Drafting Committee had concluded that such a paragraph

would complement the cooperation on prevention foreseen in draft article 4 (b). The Special Rapporteur's proposal had been revised to encompass not just mechanisms established by the United Nations but also by other international organizations, including at the regional level. The Drafting Committee had also considered that the beginning of the sentence should be more prescriptive. The formula "as appropriate" would qualify the obligation and capture the diversity of situations governing the relations of States with such international mechanisms. At the same time, it was understood that such mechanisms did not include international criminal courts or tribunals. Paragraph 9 read: "States shall consider, as appropriate, entering into agreements or arrangements with international mechanisms that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity."

The Drafting Committee had adopted draft article 15, entitled "Settlement of disputes", with no changes to the text or title adopted on first reading. The purpose of the draft article was to govern the settlement of inter-State disputes concerning the interpretation or application of the draft articles.

The draft annex consisted of 20 paragraphs and was designed to complement draft article 14, in accordance with paragraph 8 of that draft article. The draft annex applied to requests made pursuant to draft article 14 if the States in question were not bound by a mutual legal assistance treaty. The Drafting Committee had adopted the draft annex with no changes to the text adopted on first reading.

The Drafting Committee recommended that the Commission should adopt, on second reading, the draft articles on prevention and punishment of crimes against humanity for the topic "Crimes against humanity".

The Chair invited the members of the Commission to proceed with the adoption of the texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading, as set out in document [A/CN.4/L.935](#).

Prevention and punishment of crimes against humanity

Draft preamble

The draft preamble was adopted.

Draft article 1

Draft article 1 was adopted.

Draft article 2

Draft article 2 was adopted.

Mr. Jalloh said that as, during the debate in the Drafting Committee, he had reserved his position regarding the definition of crimes against humanity as set out in draft article 2, he wished to place on record his views on the matter. The definition of crimes against humanity provided in that draft article, which had essentially been borrowed from article 7 of Rome Statute of the International Criminal Court, had generated considerable interest among States and other observers. His comments concerned only draft article 2 (1) (h) regarding the definition of persecution, to which the Drafting Committee had made some changes based on a suggestion of the Special Rapporteur that sought to reflect the comments of some States proposing the deletion of the words "in connection with the crime of genocide or war crimes", while – problematically, in his view, – recommending the retention of the phrase "in connection with any act referred to in this paragraph". The deletion of the phrase "in connection with the crime of genocide or war crimes" had removed the requirement for a link to be established between persecution and two other Rome Statute crimes, a requirement that made sense in the context of the International Criminal Court but not in a treaty on crimes against humanity intended to apply at the national level. He had supported the Special Rapporteur's proposal, but the problem, as he

and other members had observed, was that the Commission had left intact the phrase “in connection with any act referred to in this paragraph”, which meant that there was still a requirement for a connection between persecution and another prohibited act in order for it to qualify as a crime against humanity.

Like several other members and several States, especially Chile, France, Peru, Sierra Leone and Uruguay, he believed it would have been preferable for the Commission to have brought the part of the definition of persecution in draft article 2 that was not consistent with customary law into line with its work on the 1996 draft Code of Crimes against the Peace and Security of Mankind. The connection requirement contained in the Rome Statute definition did not appear in most of the statutes of the ad hoc criminal tribunals. In fact, a broader definition of persecution on political, racial or religious grounds had been included as a crime against humanity in, *inter alia*, the Charter of the Nürnberg Tribunal, the statute of the International Tribunal for the Former Yugoslavia and the statute of the International Criminal Tribunal for Rwanda. In that regard, reference could be made to those broader definitions articulated in article 6 (c) of the Charter of the Nürnberg Tribunal, article II (c) of Control Council Law No. 10, article 5 of the statute of the International Tribunal for the Former Yugoslavia, article 3 of the statute of the International Criminal Tribunal for Rwanda, article 2 (h) of the statute of the Special Court for Sierra Leone, as well as principle VI of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Nürnberg Principles) and article 2 (11) of the 1954 draft Code of Offences against the Peace and Security of Mankind.

Nor was the requirement that had been retained in the Commission’s definition reflected in the national legislation of States or the authoritative leading case law. In the *Kupreškić et al.* judgment, dated 14 January 2000, the Trial Chamber of the International Tribunal for the Former Yugoslavia had found that the definition of persecution in article 7 of the Rome Statute was not consonant with customary international law. Moreover, article 10 of the Rome Statute made it clear that the definitions of crimes therein, including that concerning crimes against humanity, were without prejudice to other definitions under customary international law. There had also been many instances in which crimes of persecution had been used as a residual crime with no other connection to the content of other crimes, specifically in the areas of hate speech and property crimes. In his view, requiring such a connection in the draft articles would halt that development altogether.

He had not wished to stand in the way of the consensus on the adoption of draft article 2 but wished to leave no doubt that the Commission’s decision to use the definition of persecution as contained in the Rome Statute was based purely on a pragmatic consideration, namely to ensure consistency with the International Criminal Court, which he, of course, also supported. It should not be read as a statement of the Commission’s view on the status of the definition of persecution as a crime against humanity under customary international law. Indeed, draft article 2 (3) unequivocally stated that the draft articles were without prejudice to other broader definitions.

Ms. Escobar Hernández said that, in requesting the floor only after the adoption of draft article 2, her intention was not to break the consensus that had been reached within the Drafting Committee. However, she wished to place on record that, while she was not opposed to the use in draft article 2 (2) (i) of the definition of “enforced disappearance of persons” that appeared in the corresponding article of the Rome Statute of the International Criminal Court, she was of the view that the definition of the term in the International Convention for the Protection of All Persons from Enforced Disappearance, which had been drafted after the Rome Statute, should also have been duly taken into account by the Commission. As she had stated during the Drafting Committee deliberations, the removal of a person from the protection of the law was an automatic consequence of the crime of enforced disappearance. Such removal could not therefore be seen merely as a matter of intention, something that would require account to be taken of the perpetrator’s intent to place a person outside the protection of the law in order for an act to qualify as an act of enforced disappearance of persons – a requirement that would make it practically impossible for such instances of that crime as occurred in States to constitute a criminally punishable act. She recalled that there had been intense debate on the matter during the development of both the Rome Statute and the Convention.

Mr. Grossman Guiloff (Chair of the Drafting Committee), speaking in his personal capacity as a member of the Commission, said that he did not believe that the requirement of “intention” and the requirement of “a prolonged period of time” reflected current international law. Furthermore, the “without prejudice” clause in draft article 2 (3) did not provide adequate protection, particularly for individuals in countries that had not ratified the International Convention for the Protection of All Persons from Enforced Disappearance. In addition, he had been unable to find any examples of national legislation that reflected the above-mentioned requirements as set out in the Rome Statute. While he did not oppose the text as adopted by consensus, he would like his position on that matter, which was the same as that expressed by Ms. Escobar Hernández, several States and the United Nations High Commissioner for Human Rights, to be placed on record.

Mr. Ruda Santolaria said that he aligned himself with the position expressed by Ms. Escobar Hernández and Mr. Grossman Guiloff regarding the “intention” and “prolonged period of time” requirements. While he did not oppose the consensus reached in the Drafting Committee, he was of the view that developments concerning the crime of enforced disappearance reflected in the most recent international instruments should have been taken into account.

Mr. Saboia, agreeing with the position expressed by Ms. Escobar Hernández and Mr. Grossman Guiloff, said that the presence of the terms “intention” and “prolonged detention” weakened the protection provided by the provisions of the draft article.

Mr. Murphy (Special Rapporteur) said, as a general matter, that it was the Commission’s usual practice for participants whose views had not prevailed in the Drafting Committee to refrain from restating their position in plenary, unless they had reserved their position. He hoped that the Commission would continue to follow that practice. That said, he realized that some members had strong views, notably on the issue of enforced disappearance, and he respected their wish to make those views known in plenary. If his understanding was correct, Mr. Jalloh in his comments had asserted that the Commission as a whole had decided to adopt the language of draft article 2 (1) (h) simply because of a wish to maintain consistency with the Rome Statute. If that was indeed what Mr. Jalloh had said, that was not the case. Many members had expressed the view, both in the plenary and in the Drafting Committee, that the text in question was consistent with customary international law. He understood that that was not Mr. Jalloh’s position and he had no problem with Mr. Jalloh’s expressing his own personal view. However, many members had stated that in their view the connection requirement in draft article 2 (1) (h) was not only predicated on the Rome Statute, but also was consistent with many aspects of the relevant sources, as discussed in paragraphs 91 to 100 of his fourth report. In that regard, it was mentioned therein that, although no such connection requirement was included in the constituent instruments of the International Tribunal for the Former Yugoslavia or the International Tribunal for Rwanda, equally those instruments did not contain the broad form of persecution that existed in the Rome Statute. Further, in their jurisprudence, those tribunals had proceeded to develop a gravity element in order to limit the scope of what otherwise their statutes might allow. In sum, the Commission was not simply reproducing the Rome Statute in that regard, as was clear not only from the statements made in the plenary by members who had preferred to keep the connection requirement but also from the statement of the Chair of the Drafting Committee.

Ms. Escobar Hernández said that she agreed with Mr. Murphy that there was an unwritten practice followed by the Commission according to which members did not usually take the floor in the plenary to restate views expressed in the Drafting Committee. However, she wished to place on record that, in the Drafting Committee, she had specifically reserved her position so as to be able to express it in plenary.

Mr. Jalloh said that he wished to reiterate that he had clearly indicated in the Drafting Committee that he had reserved his position on the definition of “persecution” because of his strong reservations in that regard. His interpretation of the discussions in the Drafting Committee on that issue differed from that set out in the statement of the Committee’s Chair: his understanding was that members had considered the connection element contained in draft article 2 (1) (h) to be too stringent and not reflective of either customary international law or the definition of persecution contained in other international

instruments. Nevertheless, most members of the Drafting Committee had concluded that it was preferable not to alter the text of the Rome Statute; the Commission had decided to maintain the wording in the interests of consistency. He noted however that, in previous work of the Commission, persecution had been defined as a crime against humanity without the qualifiers contained in the present draft article; furthermore, it was stated very clearly in article 10 of the Rome Statute that nothing in Part 1 of the Statute, which included the definition of crimes against humanity in article 7, should be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than the Statute.

Mr. Murphy (Special Rapporteur) said that the statement of the Chair of the Drafting Committee indicated that some members of the Committee had viewed customary international law in a particular way and that such view had not been accepted by other members. Most members of the Committee had agreed that it was preferable to retain the language of the draft article, partly, but not only, for the sake of consistency with the Rome Statute. While Mr. Jalloh had every right to express his view and to interpret the statement of the Chair of the Drafting Committee, it should be made clear that it was not the view of the Commission as a whole.

Mr. Huang said that he wished to associate himself fully with the Special Rapporteur's statement, which reflected the Commission's normal practice according to which reservations expressed during Drafting Committee discussions were noted in the Chair's statement; accordingly, it was not necessary to reopen the debate in plenary. However, he wished to place on record his position regarding the definition of crimes against humanity set out in draft article 2. He was of the view that, in formulating such definition, the Commission should not rely too much on existing international conventions, such as the Rome Statute, which was far from representing customary international law, given that currently only 123 States had become parties to it.

The Chair invited the Commission to continue its consideration of the draft articles on crimes against humanity.

Draft articles 3 to 15

Draft articles 3 to 15 were adopted.

Draft annex

The draft annex was adopted.

The Chair said that he took it that the Commission wished to adopt, on second reading, the texts and titles of the draft preamble, the draft articles and the draft annex on crimes against humanity, as a whole, as contained in document [A/CN.4/L.935](#).

It was so decided.

Mr. Murphy (Special Rapporteur), thanking the members of the Commission, the Secretariat and assistants for their contributions to the work on the topic, said that he would revise the proposed commentaries in the light of the changes made and the additional points raised during the second reading of the draft articles, with a view to submitting them to the Commission for adoption during the second part of its seventy-first session. It was also planned to hold an informal meeting during that part of the session to discuss the recommendation to be made when the draft articles were submitted to the General Assembly.

Protection of the environment in relation to armed conflicts (agenda item 4) (*continued*) ([A/CN.4/728](#))

The Chair invited the Commission to resume its consideration of the second report on protection of the environment in relation to armed conflicts ([A/CN.4/728](#)).

Mr. Huang said that he would like to thank the Special Rapporteur for her informative report, which contained an in-depth elucidation of the remaining issues. Before commenting on the draft principles themselves, he wished to make some general comments.

First, regarding methodology, as he had repeatedly emphasized during debates on other topics, the Commission should focus its attention on empirical studies rather than the application of analogy when working towards the progressive development and codification of international law in specific areas. The current topic was no exception in that regard. Although there was little relevant State practice and few treaties or legal precedents, the current study should nevertheless be based as far as possible on the existing rules and principles of international law and on State practice, rather than on excessive reliance on the application of analogy. He welcomed the inclusion of extensive references and copious quotations in the report, but noted that the footnote citations referred mostly to works of Western scholars, and that almost all the cases cited were from developed countries. It would have been useful for the purposes of the topic if reference had been made to the State practice and legal precedents of developing countries, as well as theoretical works published in those countries.

Second, the position he had taken the previous year against the Special Rapporteur's intention to expand the scope of the topic to cover non-international armed conflicts remained unchanged. Not only was there little practice in that regard, there was also uncertainty with regard to the applicable laws. Many of the issues involved were controversial, and any discussion of non-international armed conflicts might exacerbate existing controversies. Given the completely different nature of international and non-international armed conflicts, the applicable laws were also different. Accordingly, the rules governing international armed conflicts should not be applied to non-international armed conflicts without distinction, as had regrettably been done at several points in the report.

Third, protection of the environment was an important issue in relation to armed conflicts, and parties to those conflicts bore different degrees of responsibility for it. However, there were also other major factors that had to be taken into account. One such factor concerned the legality of the use of force. In ascertaining parties' responsibility for protecting the environment and liability for damage, a distinction should be drawn between legitimate and illegitimate use of force. Under the general rules of the law on State responsibility, self-defence was a circumstance where wrongfulness was precluded, whereas a party that used force illegally was in serious violation of international law. Accordingly, the obligations and responsibilities incumbent on the parties were bound to be different. Furthermore, in extreme circumstances, and notably when one party was faced with a far more powerful aggressor or when the sovereignty, security or even survival of a nation was in grave danger, it was neither realistic nor morally plausible to impose the responsibility to protect the environment on the party acting in self-defence. Another major factor to consider was the application of international humanitarian law. Acts that were in accordance with international humanitarian law would not entail any obligation to protect the environment or liability for damage; however, parties were not exonerated from responsibilities arising from other rules. Although the report made some reference to such circumstances in paragraphs 107, 110 and 111, the draft principles proposed on the basis of the analysis contained therein seemed to focus only on the protection of the environment *per se*, without fully reflecting the above-mentioned two major factors; he hoped that they would be considered further in the Drafting Committee.

Turning to the draft principles proposed in the report, he said, with regard to draft principle 8 *bis*, that the Martens clause, whereby civilians and combatants should be accorded certain protection even in the absence of express provisions in existing treaties, was used mainly to address the challenges to existing international humanitarian law posed by new technologies, weapons and methods of warfare. The International Court of Justice had pointed out in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* that the Martens clause had proved to be an effective means of addressing the rapid evolution of military technology. Moreover, that clause had also featured in recent discussions of States regarding lethal autonomous weapons systems and other new weapons. Nevertheless, it could not necessarily be used to regulate every issue related to armed conflicts. For instance, the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I additional to the Geneva Conventions of 1949), made clear that it was "civilians and combatants" that were under protection, which was consistent with the Hague Convention respecting the Laws and Customs of War on Land. In draft principle 8 *bis*, however, the

phrase “civilians and combatants”, as set out in the above-mentioned instruments, had been replaced with “the environment”, without sufficient legal basis. In that connection, the Special Rapporteur referred in the report to the guidelines for military manuals and instructions on the protection of the environment in times of armed conflict of the International Committee of the Red Cross and one resolution of the World Conservation Congress of 2000. However, as neither of those texts constituted sources of international law, they could not be used to prove that the practice reflected in the draft principle was an existing rule under international law. In her report, the Special Rapporteur provided two reasons for protection being extended to the environment, namely that references to “principles of international law” and “dictates of public conscience” were general and not intrinsically limited to one specific meaning and that humanitarian and environmental concerns were not mutually exclusive. However, in his view, those reasons were not sufficient.

The reasons advanced in the report for extending such protection to the environment were insufficient: civilians and combatants had been clearly specified in Protocol I additional to the Geneva Conventions of 1949 and, in most circumstances, humanitarian and environmental concerns were different or even mutually exclusive and certainly could not be equated. Clarification on the matter would therefore be welcome.

With regard to draft principle 13 *bis*, reference was made in the report to both the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Environmental Modification Convention) and Protocol I additional to the Geneva Conventions of 1949 to prove that the prohibition of the use of environmental modification techniques in armed conflicts was a rule recognized in international law. The Special Rapporteur compared and summarized the differences between the Convention and the Protocol, without explaining why the draft principle followed the wording of the Convention. Although the Convention related directly to the subject matter of the draft principle, more than twice as many States had become parties to the Protocol as had to the Convention, indicating wider support for the former from the international community. Moreover, as the Convention applied specifically to international armed conflicts, it was not in his view appropriate to apply its provisions by analogy to non-international armed conflicts.

The prohibition of pillage, the subject of draft principle 13 *ter*, was a principle that was clearly stated in article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War. Given the general acceptance of the Convention worldwide, he had no objection to the draft principle. That said, the relationship between pillage and the illegal exploitation of natural resources, mentioned several times by the Special Rapporteur in her report, should be clarified in the commentary to the draft principle.

With regard to draft principle 13 *quater*, the concepts of the responsibility and liability of States needed to be clarified. He presumed – on basis of the assertion in paragraph 116 of the report that “State responsibility only comes into play as a result of a violation of a relevant international legal obligation, while environmental damage in armed conflict may also result from lawful military activities” – that the term “responsibility” referred to State responsibility in the general theory of international law, whereas “liability” was inspired by liability *sine delicto stricto sensu* in the Commission’s articles on the prevention of transboundary harm from hazardous activities. If that was indeed what the Special Rapporteur meant, then he would like clarification as to whether that particular form of State responsibility was widely recognized, whether it applied during armed conflicts and whether such rule excluded the circumstances precluding wrongfulness, such as consent, self-defence, countermeasures, *force majeure*, distress and necessity. While he had no objection to the specific content of the first paragraph of the draft principle, based on the Commission’s practice it seemed more appropriate and more logical to place the “without prejudice” clause at the end of the principle. The second paragraph was puzzling and seemed out of place inasmuch as the point raised therein – namely that when the source of environmental damage in armed conflict was unidentified, or reparation from the liable party unavailable, States should take appropriate measures to ensure that the damage did not remain unrepaired or uncompensated – had not been discussed extensively in the report.

Since draft principle 13 *quinquies*, on corporate responsibility, and draft principle 6 *bis*, on corporate due diligence, were closely related and had similar structures, they could be merged and the resultant text placed in Part One, on general principles. The title should also be adjusted to reflect the fact that both principles actually addressed State responsibility.

It was worth noting that were some problems common to both those draft principles. The first problem was the lack of sufficient legal basis: the supporting materials referenced by the Special Rapporteur were either not legally binding, had little relevance to armed conflicts or did not specifically mention environmental protection. On that basis, it was very difficult to substantiate the obligation of States to ensure that corporations exercised due diligence and assumed their responsibilities, and to apply of the rule of piercing the corporate veil. It would be very difficult to prove that those requirements were customary international law. It was even questionable whether they constituted existing norms of international law. The second problem was that the two draft principles imposed excessive obligations on States. The wide scope of the obligation of States “to take the necessary legislative and other measures” to regulate all “corporations registered or with seat or centre of activity in their jurisdiction” would entail considerable difficulties, especially where corporations were registered in one State and operated in another State or States. The third problem concerned the rule of piercing the corporate veil, which constituted a negation of the independent legal personality of a corporation, and was a rare practice, rather than a general rule, aimed at preventing abuse of power by shareholders. The Special Rapporteur cited court cases in the United States of America and the United Kingdom, but those cases all concerned violations of human rights by corporations and had little to do with armed conflicts or environmental protection. Furthermore, as two separate legal subjects, the parent company and the subsidiary had their respective legal personalities; consequently, the requirement that parent companies were to be held responsible for ascertaining that their subsidiaries exercised due diligence and precaution might be contrary to the law. Those issues should be further discussed in the Drafting Committee. Lastly, he had a reservation concerning the apparent requirement that States should actively exercise extraterritorial jurisdiction over relevant corporate activities. That was a sensitive issue strongly opposed by many States, and the Commission should consider prudently the appropriateness of including it in the draft principle.

He had found the justification given by the Special Rapporteur for draft principle 14 *bis* unconvincing. First, the draft principle enjoyed insufficient legal support. The Draft International Covenant on Environment and Development mentioned in the report was not a legally binding instrument and the commentary thereto did not refer to the paragraphs therein related to human displacement. Furthermore, although human displacement was mentioned in the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), the latter was a regional instrument and thus did not reflect the practice of the international community as a whole. It seemed, then, that draft principle 14 *bis* was derived neither from the widely accepted rules of international law, nor from State practice. Secondly, in the draft principle the subject of responsibility, identified as “States and other relevant actors”, was inappropriate, since the word “States” might refer to a State involved in an armed conflict or any other State that had no connection with such armed conflict; clarification would be appreciated in that regard. Thirdly, article 9 (2) (j) of the Kampala Convention made it clear that the subject of responsibility was States; it might be problematic if responsibility was attributed to non-State actors simply by analogy.

In conclusion, he supported the referral of the proposed draft principles to the Drafting Committee and the adoption of the draft principles on first reading at the current session.

Ms. Galvão Teles said that she welcomed the Special Rapporteur’s well-researched second report, which greatly facilitated the Commission’s discussion of the topic. It was important to bear in mind the complementary nature of the report and to consider the newly proposed draft principles in conjunction with those already provisionally adopted.

The protection of the environment in non-international armed conflicts was an important aspect of the topic under consideration, since most recent and ongoing armed

conflicts were of a non-international character and the existing treaty regime for such conflicts was much less developed compared to that for international armed conflicts. Given the severe stress placed on the environment in recent and current non-international armed conflicts, it was important to develop principles, even in the nature of progressive development, on the ways in which international rules and practices concerning natural resources could enhance the protection of the environment during and after such conflicts, even though such issues were not exclusive to non-international armed conflicts.

She supported draft principle 13 *ter*, which had a solid basis in the law of armed conflict. She would, however, be open to the possibility of further developing the text of the draft principle or of the commentary to better explain what the International Court of Justice, in its judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, referred to as “looting, plundering and exploitation of natural resources”. In that context, she also supported draft principle 6 *bis*, which was not framed as a binding legal obligation but as a mere recommendation; she would agree, in principle, to its placement in Part One, which concerned general principles that were not tied to any particular phase of armed conflict and which were more of preventive nature. Nevertheless, adding a phrase such as “as appropriate”, as suggested by other members, might be useful. The last sentence of draft principle 6 *bis*, which had been called into question by other members, might instead be included in the commentary to the draft principle, as it was somewhat unclear and less directly connected to the core of the topic.

The question of the unintended environmental effects of human displacement was a crucial one, especially as movements of human displacement due to armed conflict, among other causes, were on the rise. The Special Rapporteur had successfully illustrated the destructive effect that human displacement, as a common effect of armed conflict, could have on the environment – an effect that could at times be even more destructive than actual combat operations. She therefore strongly supported draft principle 14 *bis*, which had been inspired in part by the Kampala Convention and dealt with an issue that some Member States in the Sixth Committee had considered to be an important aspect of the topic. She suggested that the language of the draft principle might be adjusted so as to encompass the environmental degradation caused by the movement of displaced persons, since the report made clear that the movement of people could cause environmental harm that was not restricted to the areas in which the displaced persons were located. She also supported the suggestion by Mr. Murphy and Mr. Nolte to move the final phrase, which began “while providing relief ...”, to the beginning of the draft principle. She agreed with the extensive comments made on the same issue at the Commission’s 3466th meeting by Mr. Valencia-Ospina.

It was valuable for the Commission to consider issues of State responsibility, including reparation for environmental damage, *ex gratia* payments and victim assistance, but it was also crucial for it to discuss the responsibility of non-State actors, including armed groups, and the issues of individual criminal responsibility and corporate responsibility. Although many categories of non-State actors might be present in a conflict zone, she agreed with the Special Rapporteur’s suggestion that she should limit her analysis to the working definition used by the International Law Association in its final report on non-State actors. It was an important point that should be clarified in the commentary. She further agreed with the Special Rapporteur’s assessment that the international responsibility of non-State armed groups was still an emerging concept and that individual criminal responsibility continued to be the primary basis for holding leaders and members responsible for violations of international humanitarian law or international criminal law. She thus agreed in general with draft principle 13 *quinqies*, on corporate responsibility, although she viewed it as more closely connected to draft principles 9 and 14 and therefore suggested that the Commission should reconsider its placement. The same was possibly true for draft principle 13 *quater*, in respect of which she supported the inclusion of the “without prejudice” clause contained in paragraph 1. It might be useful, as other members had pointed out, to explain in the commentary the notions of responsibility and liability – two issues that the Commission had worked on extensively. She also supported the ideas expressed in paragraphs 2 and 3 of the draft principle, but suggested that they should be redrafted for additional clarity.

She generally supported draft principle 13 *bis*, and would agree to the alternative formulation proposed by the Special Rapporteur in the introduction of her report, which emphasized States' international obligations.

She also generally supported draft principle 8 *bis*. Reference to the Martens clause was appropriate in the context of the current topic, not because it added a new dimension to the clause, but because "dictates of public conscience" was a term that had to be interpreted in an evolutionary manner and that now also encompassed environmental protection. She therefore supported the formulation proposed by the Special Rapporteur which followed closely that contained in the guidelines for military manuals and instructions on the protection of the environment in times of armed conflict of the International Committee of the Red Cross. If there was insufficient support for a reference to the "interest of present and future generations", the matter could perhaps be addressed in the commentary. As for the placement of the draft principle, she suggested that the Commission should revisit the matter once it could consider a complete set of draft principles.

She supported the Special Rapporteur's proposal not to include a definition of the term "environment" in the draft principles. Such a decision was consistent with the Commission's practice; moreover, the special nature of the term could be addressed in the commentary to the draft principles. As to the use of terms, she agreed with the Special Rapporteur's proposal to use the term "environment" throughout the draft principles. Where appropriate, it could be explained in the commentary when the term referred to the natural environment. It could also be explained that such an approach had been adopted only for the purposes of the draft principles and that it was without prejudice to the application and interpretation of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts.

In conclusion, she supported the referral of the seven proposed draft principles to the Drafting Committee, which should take account of the Commission's debate. It might be useful for the Drafting Committee to consider the full set of draft principles when analysing and determining their final order. She agreed with the Special Rapporteur's suggestion that the Commission should provisionally adopt the draft principles on first reading at its current session; indeed, doing so would be an important contribution to the general legal framework that regulated or was related to armed conflict, in the same year that marked the seventieth anniversary of the Geneva Conventions of 1949 – the main piece of that framework.

Mr. Ruda Santolaria, welcoming the Special Rapporteur's second report, said that the illegal exploitation of natural resources was an important subject that covered activities by States, non-State armed groups and other non-State actors. However, in terms of the law of armed conflict, it was important to highlight the prohibition of pillage as an established customary rule, which was applicable to all categories of property, whether public or private, in international or non-international conflicts. In that connection, he supported the Special Rapporteur's emphasis on States' permanent sovereignty over natural resources and her reference to the attention drawn by the Security Council to the connections between transnational criminal networks, terrorist groups and armed conflicts, including in relation to illicit trade in natural resources.

It should be noted that non-binding norms and regional initiatives adopted to ensure that natural resources were purchased and obtained responsibly had in fact fostered the adoption of binding rules in some States' national legislation in respect of businesses under their jurisdiction that carried out activities in areas affected by armed conflict. Furthermore, as pointed out by the Special Rapporteur in her report, massive conflict-induced displacement of civilian populations associated with protracted conflict could have even more destructive effects on the environment than actual combat operations. Non-international armed conflicts, in particular, were seen to cause the most important effects in terms of displacement, including the environmental strain in the affected areas. The reference in paragraph 60 of the report to the connection established by the Office of the Prosecutor of the International Criminal Court between genocide and the deliberate destruction of the environment was particularly noteworthy.

As stated in paragraph 72 onwards of the report, extraterritorial obligations arose when a State could influence a situation located outside of its territory, and required that the State took steps to prevent and redress violations of the rights provided under the Covenant resulting from activities of business entities over which it could exercise control. Courts in the United States of America had found that a parent company could be held liable for acts of a subsidiary corporation if there was an agency relationship between the parent and the subsidiary. In that connection, the behaviour of both was crucial in determining whether the distinction between the two had become blurred in the case in question.

As pointed out by the Special Rapporteur in paragraph 92 of the report, legally binding obligations could be imposed on corporations in the domestic law of the State in which they were domiciled or in which they conducted their operations. He agreed that it was possible that, in situations of armed conflict or in the aftermath of a conflict, the host State might not be in a position to effectively enforce its legislation. Such situations could arise specifically in respect of private military and security companies that operated in the territory of the host State, including when that State had contracted said companies. A particularly delicate situation arose when third States intervened in an ongoing internal conflict, either in support of a State actor, or one or more non-State armed groups, or against such groups; thus, several armed conflicts might exist in parallel and the applicable rules of the law of armed conflict might vary depending on the nature of the relationship that each belligerent had with each of the others. Thus, the rules regulating non-international armed conflicts, international armed conflicts, and situations of occupation might be applicable in parallel.

He agreed with the applicability of article I (1) of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques to a non-international armed conflict if the environmental modification caused damage in the territory of another State party.

He further supported including a reference to the Martens clause, which was part of customary international law and, moreover, had a dynamic aspect in that it could be applied to new situations that were not specifically addressed in treaty law. While the objective of the Martens clause related to the protection of human beings and its application with regard to norms of humanitarian law, it was important to take account of its evolving character and the close connection between human beings and the environment, which could be seriously affected by armed conflicts that produced, either during or after the conflict, situations that were not expressly provided for under existing international agreements.

He generally supported draft principle 6 *bis*, on corporate due diligence; however, he would suggest deleting, in the last sentence, the words “equitable and”. Regarding draft principle 8 *bis*, given that the Martens clause was aimed at protecting human beings rather than the environment, he proposed adding language to indicate that human beings were protected when the environment they lived in was protected. Thus, a phrase such as “and considering the close relationship between human beings and the environment in which they live” [*y considerando la estrecha relación de los seres humanos con el medio ambiente donde se desenvuelve su existencia*] might be added after “In cases not covered by international agreements”.

He supported draft principles 13 *bis* and 13 *ter*, but proposed that the commentary thereto might elaborate on the meaning of “pillage” and the various situations in which it might occur. Regarding draft principle 13 *quater*, he suggested that the commentary might detail the situations that would give rise to the responsibility or to the liability of States. As for draft principle 13 *quinqüies*, it would be useful to mention in the commentary that, in principle, it was the role of the territorial State to adopt the necessary measures, without that affecting the possibility that the State under whose jurisdiction the corporations in question were registered or had a seat or centre of activity might hold responsible the parent companies that exercised *de facto* control over their subsidiaries in cases of harm caused to human health and the environment in areas of armed conflict or in post-conflict situations. Regarding draft principle 14 *bis*, he supported the various proposals made by other members of the Commission for inclusion in the commentary.

He agreed that there was no need to provide a definition of “environment”, since it was a scientific category that was constantly evolving; he also supported using the term “environment”, rather than “natural environment”, throughout the draft principles, because although the latter term was used in some treaties, the former had a broader scope and thus encompassed the latter.

In conclusion, he was in favour of referring the draft principles to the Drafting Committee and of completing the adoption of the draft principles on first reading at the Commission’s current session.

The meeting rose at 12.55 p.m.