



# General Assembly

Seventy-seventh session

Official Records

Distr.: General  
23 June 2023

Original: English

---

## Sixth Committee

### Summary record of the 40th meeting

Held at Headquarters, New York, on Tuesday, 11 April 2023, at 3 p.m.

*Chair:* Ms. Romanska (Vice-Chair) ..... (Bulgaria)

## Contents

Agenda item 78: Crimes against humanity (*continued*)

---

This record is subject to correction.

Corrections should be sent as soon as possible, under the signature of a member of the delegation concerned, to the Chief of the Documents Management Section ([dms@un.org](mailto:dms@un.org)), and incorporated in a copy of the record.

Corrected records will be reissued electronically on the Official Document System of the United Nations (<http://documents.un.org/>).

23-06685 (E)



Please recycle



*In the absence of Mr. Afonso (Mozambique), Ms. Romanska (Bulgaria), Vice-Chair, took the Chair.*

*The meeting was called to order at 3.05 p.m.*

#### **Agenda item 78: Crimes against humanity (continued)**

1. **The Chair** invited the Committee to resume its exchange of views on the draft articles on prevention and punishment of crimes against humanity adopted by the International Law Commission.

#### *Draft articles 2–4 (continued)*

2. **Ms. Siman** (Malta) said that her delegation applauded the progressive decision of the Commission to exclude the limitative definition of gender from draft article 2, thereby extending the protections provided under the draft articles to all people. Furthermore, as the Commission clearly explained in its commentaries, the Rome Statute of the International Criminal Court was just one of the sources from which the Commission had drawn inspiration. Delegations should therefore focus on the document at hand rather than repeatedly referring to the Statute.

3. **Ms. Hutchison** (Australia), responding to the comments made at the previous meeting by the representative of Egypt about the “without prejudice” clause contained in draft article 2, paragraph 3, said that her delegation did not see the clause as creating ambiguity because it did not provide that, by becoming a party to a future convention based on the draft articles, a State would be bound by other legal definitions of crimes against humanity. Rather, the provision would ensure that States were not precluded from including broader definitions of crimes against humanity in their national laws or in other international instruments. Indeed, as explained in the commentary to the draft article, the “without prejudice” clause was inspired by similar provisions in other instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and was intended to ensure that the rest of the draft article did not call into question any broader definitions that might exist in international law. It was thus sufficiently clear from the draft article what the meaning of crimes against humanity was in the context of the draft articles as opposed to any other broader definitions of such crimes that fell outside the scope of the draft articles.

4. **Mr. Nyanid** (Cameroon) said that it was no surprise, given the reference in the draft preamble to the definition of crimes against humanity set out in article 7 of the Rome Statute, that that definition had been reproduced *mutatis mutandis* in draft article 2. His

delegation continued to have serious concerns with regard to the Statute. Moreover, even though paragraph 3 of article 7 had been intentionally omitted from the definition in draft article 2, its absence was an illusion, because the preamble to an instrument was an integral part of the instrument. Therefore, for the purpose of defining crimes against humanity, the reference in the draft preamble was what counted. Furthermore, draft article 2, paragraph 3, confirmed his delegation’s concerns because it stated that the draft article was “without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law”. That was a more subtle way of reproducing the Statute.

5. His country was not a party to the Rome Statute and had serious reservations about the inclusion of the “without prejudice” clause, just as it rejected the definition alluded to in the draft preamble. The Statute was not a universal instrument and could not therefore be used as the basis of a text that dealt with such a weighty topic as crimes against humanity.

6. With regard to the meaning of the term “gender”, his delegation reiterated its well-known and unequivocal position that the term “gender” referred to the male and female sexes. His country’s legislature shared that view and had not mandated any change to the laws and regulations of Cameroon on the subject.

7. In addition, the draft article did not reflect the evolution of the concept of crimes against humanity. The lethality of an action could be immediate, or it might become apparent only over time, and thus be even more destructive in the long term. The definition of crimes against humanity should therefore include culpable intent in respect of the unsustainable exploitation or pillage of resources that jeopardized the lives and livelihoods of future generations and drove them to risk their lives as they fled their own lands in search of a better life overseas. Any acts that compromised the enjoyment by current and future generations of their ancestral heritage imperilled the future existence of humanity. Similarly, the destruction of world heritage sites designated by the United Nations Educational, Scientific and Cultural Organization and the theft, confiscation and destruction of objects d’art and other cultural artefacts should also be regarded as crimes against humanity, given that such acts constituted an attack on the dignity and identity of the peoples concerned.

8. **Mr. Abdelaziz** (Egypt), responding to the comments made by the representative of Australia, said that his delegation still considered the “without prejudice” clause in draft article 2, paragraph 3, to be

problematic. In a hypothetical scenario where country X and country Y were both parties to a treaty based on the draft articles, and country X enacted a law containing a broader definition of crimes against humanity than that set out in paragraph 1 of the draft article – in other words, a definition that included a crime not listed in that paragraph – it was unclear what the obligations of country Y would be under the treaty in respect of that crime, in particular whether country Y would also have to enact laws to criminalize and prevent the crime in question. More importantly, it was also unclear what the relationship between country X and country Y would be as parties to a treaty based on the draft articles.

9. **Mr. Kanu** (Sierra Leone) said that his delegation generally supported the Commission's approach of aligning the definition of crimes against humanity in draft article 2 with article 7 of the Rome Statute. The most significant difference was that the Commission had decided not to retain article 7, paragraph 3, which contained a definition of the term "gender" for the purposes of the Statute. In a future treaty on crimes against humanity, which would apply at the horizontal level, the absence of the definition of gender might appear to serve nothing more than a pragmatic purpose. However, his delegation was not persuaded by the explanation provided in the commentary to draft article 2 and wished to see general consistency between the draft articles and the Statute, inter alia, to safeguard the complementarity principle that underpinned the Statute and to ensure that a future treaty was universal, complementary to existing obligations and implementable.

10. On other issues relating to the definition of crimes against humanity, his delegation recalled the written comments that it had submitted following the Commission's adoption of the draft articles on first reading (see [A/CN.4/726](#)), including with regard to the contextual threshold taken from article 7, paragraph 2 (a), of the Rome Statute, namely that a crime against humanity was an "attack directed against any civilian population" that was committed "pursuant to or in furtherance of a State or organizational policy"; the scope of the definition of enforced disappearance of persons and the vagueness of the phrase "prolonged period of time" used in that definition; and the narrowness of the definition of persecution.

11. His delegation supported the inclusion of draft article 2, paragraph 3, and agreed with the views expressed by the representative of Australia in that regard. The paragraph stated that the draft article was without prejudice to any broader definition of crimes against humanity provided for in any international instrument, in customary international law or in national

law, and thus allowed for definitions such as that set out in article 28C of the statute of the African Court of Justice and Human and Peoples' Rights contained in the annex to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), which was yet to enter into force.

12. With regard to the comments made by the representative of Egypt, it was important to keep in mind that a future treaty on crimes against humanity would apply horizontally. The State of jurisdiction and proximity would have to either investigate and prosecute the crime concerned or extradite the person in question, as reflected in extradition law and several judgments of the International Court of Justice.

13. Noting the suggestion made by the representative of Cameroon that the definition of crimes against humanity be expanded to include the exploitation or pillage of natural resources and the destruction of cultural heritage, he said that his delegation had similarly pointed out in its written comments that the definition of crimes against humanity contained in the Rome Statute and reproduced in draft article 2 was narrower in some respects than the definition of crimes against humanity under customary international law. His delegation had therefore raised the question of whether minor adjustments could be made to the definition in the draft article to reflect the fact that case law interpreting the crimes listed in article 7 of the Statute had begun to accumulate. In particular, although the definition in the Statute included enslavement and sexual slavery, it did not include the slave trade, which involved the intent to bring a person into, or maintain him or her in, a situation of slavery. Sierra Leone, in view of its experience with forced marriages, which constituted a form of slavery, and the phenomenon of "bush wives", whose treatment amounted to slave-trading, was in the process of submitting a proposal to amend article 7 of the Statute to include the slave trade as a crime against humanity and would submit the same proposal in connection with any future treaty on crimes against humanity.

14. His delegation generally supported draft article 3 (General obligations), including paragraph 1 thereof, in which the Commission had drawn inspiration from the judgment 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)* concerning the interpretation of article I of the Genocide Convention. His delegation also noted with approval that, under paragraph 2 of the draft article, "each State undertakes to prevent and to punish crimes against humanity", and it welcomed the clarification in the commentary that the

word “undertake” was intended to express a legally binding obligation, in the same way as the Court had determined, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, that the word “undertake” imposed a clear obligation on the parties to do all in their power to prevent the commission of acts of genocide. His delegation supported the statement in paragraph 3 that “no exceptional circumstances whatsoever” could be invoked as a justification of crimes against humanity, which was inspired by similar provisions in other international instruments, including the Convention against Torture.

15. With regard to draft article 4 (Obligation of prevention), the statement in the chapeau that each State undertook to prevent crimes against humanity “in conformity with international law” was fundamental to ensuring conformity with the provisions of the Charter of the United Nations on the use of force. The goal of preventing crimes against humanity must never be a pretext for intervention in the internal affairs of other States in violation of international law. The modes of prevention listed in draft article 4 (b) were helpful in putting into perspective the general obligations set out in draft article 3. The Commission had provided helpful guidance in its commentary to draft article 4 regarding preventive measures that should be taken, including the adoption of laws criminalizing crimes against humanity, the investigation of credible allegations and the education of governmental officials. However, sufficient capacity was needed in order to take such measures. A future treaty on crimes against humanity must therefore include provisions on capacity-building to ensure effective horizontal cooperation. His delegation looked forward to hearing the views of others on that issue and to the elaboration of provisions that might address it.

16. **Ms. Hutchison** (Australia) said that her delegation generally supported the definition of crimes against humanity set out in draft article 2 and was interested in hearing from those Member States that were not parties to the Rome Statute regarding any specific concerns they might have. Nonetheless, there were benefits to drawing on the definition in the Statute, in that it had broad, cross-regional acceptance and had been implemented in national laws. In the draft article, the Commission had achieved an appropriate balance between the need to prevent unnecessary fragmentation of international law and the need to ensure that the definition was fit for purpose by making only minor amendments to the definition taken from the Statute. Specifically, her delegation supported the Commission’s

decision not to include the definition of gender contained in article 7 of the Statute, thereby allowing the term to be applied on the basis of an evolving understanding of its meaning, an approach similar to that taken with other important terms, such as “religious” and “racial”, which had been left undefined in the Statute and were also undefined in draft article 2.

17. Her delegation also supported the inclusion of the “without prejudice” clause in paragraph 3 of the draft article, which would ensure that any future convention would complement existing or developing rules of international law. Australia was considering how gender equality could be integrated as a cross-cutting issue throughout the draft articles, and took note of the suggestions made by several other delegations in that regard. Overall, her delegation considered the draft article to be a valuable basis for consideration by States of the definition of crimes against humanity. While it was cautious about any significant changes to the definition, it was open to considering adjustments that would ensure that any future convention remained fit for purpose.

18. Her delegation supported the characterization of the general obligations of States set out in draft article 3, which was consistent with the principle that it was the primary responsibility of each territorial State to prevent and punish serious international crimes that occurred within its jurisdiction. Her delegation also supported the confirmation in paragraph 2 of the draft article that crimes against humanity could be committed both in peacetime and during armed conflict, if they were committed as part of a widespread or systematic attack directed against any civilian population.

19. Her delegation welcomed the Commission’s approach to draft article 4, which provided high-level, non-exhaustive guidance on the scope of the obligation of States to prevent crimes against humanity, while allowing States the flexibility to implement the preventive measures that were most appropriate for their national systems. It was also clear from the draft article that all preventive measures and inter-State cooperation must be in conformity with international law. Some delegations had suggested that the draft article should be expanded to ensure greater clarity or precision. Her delegation remained open to specific ideas in that regard.

20. With regard to the territorial scope of a State’s obligations under the draft articles, which was defined in draft article 4 and other draft articles as extending to “any territory under its jurisdiction”, her Government considered that international obligations were primarily territorial, and that a high degree of control over

territory was required for territory to be considered under a State's jurisdiction. Her delegation welcomed the confirmation by the Special Rapporteur in his fourth report ([A/CN.4/725](#)) that he shared that view. Any future convention on crimes against humanity should be explicit on that point.

21. **Mr. Ruffer** (Czechia), responding to the comments made by the representative of Egypt, said that it was his delegation's understanding that if a broader definition of crimes against humanity than the one set out in draft article 2 was adopted in a national law or another international instrument, any additional criminal act included in the broader definition would fall outside the scope of the draft articles and of any future convention based on the draft articles. The Commission had clearly stated in paragraph (46) of its commentary to draft article 2 that any elements adopted in a national law, which did not fall within the scope of the draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance, unless the States concerned so agreed.

22. **Mr. Nyamid** (Cameroon), responding to the comments made by the representative of Australia, said that his delegation had reservations regarding the inclusion of provisions of the Rome Statute in the draft articles because, first, a legal rule should be general and impersonal in nature and, second, because under international law, an instrument could not be applied to a State that had not consented to be bound by it. Yet, as indicated in article 13 (b) of the Statute, the International Criminal Court could exercise its jurisdiction with respect to a crime referred to in article 5 of the Statute if a situation in which one or more of such crimes appeared to have been committed was referred to the Court's Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. That provision demonstrated a desire to impose the Rome Statute even on States that were not parties to it. His delegation had rejected the Statute and would continue to reject any provision related to it that could have unknown consequences for his country.

23. **Ms. Rubinshtein** (Israel) said that, in order to secure universal acceptance of the draft articles, the definition of crimes against humanity set out in draft article 2 should be as widely accepted as possible. A definition that reproduced word for word the definition found in the Rome Statute might not be widely accepted by States that were not parties to the Statute. Furthermore, a convention based on the draft articles would be applied by domestic courts, whereas the Statute was applied by an international tribunal. There was a risk of a confusing overlap between the draft articles and the Statute, which belonged to two different

legal systems. Separate treatment of the prohibition of crimes against humanity would benefit the international community and provide domestic legal systems with better tools for coping with such crimes. It was also important to ensure that the draft articles were focused on the most serious crimes by including safeguards against their potential abuse or misuse.

24. **Mr. Alavi** (Liechtenstein) said that his delegation supported the elaboration of a convention on crimes against humanity, which would close a gap in the international criminal justice system and promote justice for the victims of all atrocity crimes. The draft articles provided an excellent basis for such a convention. His delegation noted that, under draft article 2, paragraph 1 (h), the act of persecution was considered a crime against humanity only if it was committed in connection with any of the other acts considered crimes against humanity under paragraph 1. By contrast, under article 7, paragraph 1 (h), of the Rome Statute, persecution could constitute a crime against humanity not only if it was committed in connection with any other act that might constitute a crime against humanity but also if it was committed in connection with any crime within the jurisdiction of the International Criminal Court. The same approach had been taken in the Charter of the International Military Tribunal established at Nuremberg. The other core international crimes within the jurisdiction of the Court were war crimes, genocide and the crime of aggression. Therefore, a reference to all three of those crimes should be included in draft article 2, paragraph 1 (h). In the draft articles adopted on first reading (see [A/72/10](#), ch. IV), paragraph 1 of draft article 3 [3] (Definition of crimes against humanity) referred to "persecution ... in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes". That phrasing could be reinstated in the current draft article 2, with the addition of the crime of aggression to the list of crimes.

25. **Mr. Al-edwan** (Jordan) said that the draft articles addressed lacunae in the legal regime for combating and preventing the most serious international crimes and bringing the perpetrators of crimes against humanity to justice. His Government therefore supported the elaboration of a convention or other legally binding instrument based on the draft articles. If adopted, such a convention would not infringe on State sovereignty or on the immunities of States under international law. Instead, it would strengthen the ability of a State to exercise jurisdiction over crimes against humanity and facilitate inter-State cooperation in preventing such crimes and punishing their perpetrators. Furthermore, the draft articles did not infringe on the jurisdiction of

the International Criminal Court; rather, they assisted the Court in the exercise of its mandate.

26. The draft preamble embodied the object and purpose of the draft articles and would play an important role in their interpretation and implementation. It was appropriate that the scope of the draft articles included both prevention and punishment of crimes against humanity, as both elements were needed in order to combat such crimes effectively.

27. His delegation welcomed the fact that the definition of crimes against humanity contained in draft article 2 largely reproduced the definition contained in the Rome Statute, which reflected customary international law, as well as relevant jurisprudence and developments in international criminal law since the establishment of the international military tribunals at Nuremberg and Tokyo. The case law of the International Criminal Court and of other international and national courts and tribunals should also be taken into account in interpreting the definition. Paragraph 3 of the draft article contained an important safeguard that would ensure that the definition of crimes against humanity set out in the draft article did not limit the development of the definition of such crimes in general international law and provided additional protection against those crimes. Nonetheless, States' obligations would be measured against the definition in the draft article.

28. With regard to draft article 3 (General obligations), his delegation was of the view that paragraph 1 was not necessary and might be counter-intuitive. Individuals, not States, committed crimes against humanity, but the wording used in the paragraph gave the impression that States did in fact commit such crimes, even though it was intended to avoid doing so. The paragraph should be deleted because it was inconsistent with the core purpose of the draft articles, which was to serve as a law enforcement instrument for bringing individual perpetrators to justice. It was important to ensure that judges and prosecutors in a given country could not bring charges against a foreign State on the basis of the draft articles.

29. Paragraph 2 of the draft article encapsulated the general obligation of each State to prevent and punish crimes against humanity. The assertion in the paragraph that crimes against humanity were crimes under international law reflected the characterization of such crimes in customary international law, which produced legal consequences arising from the fact that the prohibition of such crimes was a peremptory norm of general international law.

30. The obligation of prevention set out in draft article 4 was a core component of the draft articles. A State

could take only preventive measures that were lawful under international law, such as the adoption of laws criminalizing crimes against humanity and providing for punishments that could serve as deterrents. The parties to armed conflicts and the occupying Powers in situations of occupation must ensure that their armed forces were subject to, and complied with, the necessary preventive measures. Military codes should contain specific prohibitions, obligations and punishments with regard to the commission of crimes against humanity. The duty of cooperation set out in draft article 4 (b) was important. However, there was a need to specify what the duty of cooperation with intergovernmental and other organizations entailed; otherwise, the provision would be a source of contention between States and such organizations.

31. **Mr. Aron** (Indonesia) said that draft article 2 was essential. Paragraphs 1 and 2 reproduced, almost verbatim, the first two paragraphs of article 7 of the Rome Statute, while the "without prejudice" clause set out in paragraph 3 gave States, in particular States that were not parties to the Statute, the flexibility to use either the customary international law definition or the definition of crimes against humanity contained in their national laws. It was well known that the definition of crimes against humanity in international legal instruments had evolved since the adoption of the Nuremberg Charter to become the current definition, as reflected in article 7 of the Statute. The evolving jurisprudence of international criminal courts and tribunals would continue to clarify for national authorities, including national courts, the meaning of "crimes against humanity", thereby promoting the harmonization of national approaches. In Indonesia, a definition of crimes against humanity and the prohibition of acts constituting such crimes were already enshrined in the Penal Code of 2023 and in Law No. 26 of 2000 establishing the Human Rights Court.

32. The Committee should address the concerns expressed by several delegations with regard to paragraph 1 (k) of the draft article, and also discuss whether the list of offences that fell within the definition of crimes against humanity should be open in nature or be restricted to crimes that could be characterized as "acts ... committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

33. Draft article 4 (Obligation of prevention) was consistent with similar provisions in other treaties, including multilateral treaties. As indicated in the judgment 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*), a State engaging in measures of prevention could only act within the limits permitted by international law. While it was true that States must take proactive steps to prevent crimes against humanity through effective legislative, administrative and judicial measures in the territory under their jurisdiction, the phrase “or other appropriate preventive measures” was overly broad and imposed an excessive obligation of prevention on States. It was also open to multiple interpretations. If the draft articles eventually became an international legal instrument, a State’s failure to take “other appropriate preventive measures” could result in the invocation of its responsibility for internationally wrongful acts if crimes against humanity were committed. It was therefore important to clarify the scope and meaning of that phrase in order to ensure legal certainty.

34. **Ms. Lungu** (Romania), referring to draft article 2, said that her delegation welcomed the Commission’s decision not to depart from the definition of crimes against humanity in the Rome Statute so as to prevent normative fragmentation. For the 123 States parties to the Statute, which included Romania, the current wording avoided conflicts with their existing obligations. Furthermore, beyond its connection with the Statute, the draft article reflected a solid contemporary definition of crimes against humanity that was widely endorsed and accepted and was the product of historical evolution, as detailed in the Commission’s commentary. Her delegation was aware that elements of the definition might need to be updated to reflect developments since the negotiation of the Statute and was interested in hearing other views in that regard. At the same time, it was vital to minimize risks to the stability of the definition and to avoid undermining critical elements of established international criminal law. In the light of the explanations provided in the commentary, her delegation endorsed the Commission’s decision not to include in the draft articles the definition of gender contained in article 7, paragraph 3, of the Rome Statute. While the term was left undefined in the draft articles, her delegation noted that the same applied to various other terms used in draft article 2, paragraph 1 (h). Her delegation also welcomed paragraph 3 of the draft article, under which States would have the flexibility to adopt a definition of crimes against humanity in their national law that went beyond the definition in the draft article, although they could not adopt a more restrictive definition. The paragraph also allowed for broader definitions in other international instruments and in customary international law.

35. With regard to draft article 3, her delegation shared the view that the general obligation not to engage in acts

that constituted crimes against humanity comprised two components: an obligation on States not to commit such acts through their own organs or persons within their control and an obligation not to aid or assist another State in the commission of an internationally wrongful act. Her delegation welcomed the clarification in paragraph 2 of the draft article that crimes against humanity were offences under international law, whether they were committed in time of armed conflict or during peacetime. Her delegation also supported the inclusion of the statement that no exceptional circumstances whatsoever could be invoked as a justification of crimes against humanity.

36. Draft article 4 was an important pillar of the text, as it reflected two ways in which a State could fulfil the obligation to prevent the commission of crimes against humanity: through specific legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction, and through cooperation with other international actors. Similar provisions relating to the obligation to take preventive measures had been included in a number of multilateral treaties since the 1960s, as listed in detail in the commentary to the draft article. The Commission’s approach was therefore consistent with existing treaty practice. The Commission had also avoided being overly prescriptive in the drafting of the provision, giving States significant flexibility to determine the precise measures that they would take to prevent crimes against humanity.

37. **Mr. Nyanid** (Cameroon), responding to the comments made by the representative of Romania, said that his delegation agreed that there was a need to avoid undermining important elements of international law. However, noting her references to the Commission’s commentaries, he said that, although the commentaries could shed light on how the Commission had arrived at the text of the draft articles, their legal value was questionable. In any case, neither the commentaries nor the draft articles were set in stone.

38. The draft articles needed to be more specific. In particular, in draft article 2, paragraph 2 (j), racism and xenophobia should be listed alongside the crime of apartheid. Furthermore, no definition of the term “murder” was provided in the draft article; rather, paragraph 2 (a) gave a definition of the phrase “attack directed against any civilian population” contained in the chapeau of paragraph 1. That definition should characterize such an attack as having been planned in advance and should also mention the scale of the attack. The entity that had perpetrated the attack was less important; therefore, the reference to a State or organizational policy should be removed. The definition of extermination given in paragraph 2 (b) was too soft.

As for the definition of enslavement in paragraph 2 (c), his delegation proposed replacing it with the following wording: “‘enslavement’ means the establishment or exercise of the powers attaching to the right of ownership over any person or group of persons and includes the exercise of such power in the course of trafficking in persons whoever they may be”.

39. **Ms. Marubayashi** (Japan) said that it was desirable for draft article 2 to gain broad support. The Committee needed to engage in a careful, in-depth discussion on the draft article, bearing in mind that it should clearly reflect the elements of crime in accordance with the general principles of criminal law.

40. **Mr. Waterman** (United States of America) said that draft article 2 was the most important provision in the draft articles, as the definition of crimes against humanity had implications for all the obligations and rights set forth in the other provisions. In particular, the chapeau was a critical element of the definition: certain acts were crimes against humanity only when they were committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. That characteristic made such acts, if they were not already violations of international law, a matter of international concern and was consistent with international humanitarian law, under which making the civilian population the object of attack was prohibited and punishable as a war crime. It also distinguished crimes against humanity from other international crimes, such as genocide.

41. Noting that the draft article was drawn nearly verbatim from the definition of crimes against humanity contained in article 7 of the Rome Statute, he said that States parties to the Statute had an interest in ensuring that the definition in the draft articles was consistent with the definition in the Statute. While the United States was not a party to the Statute, it recognized that the definition in article 7 provided the most comprehensive list of acts constituting crimes against humanity in any multilateral instrument and included rape and other forms of sexual violence, which were often overlooked in efforts to hold accountable those responsible for atrocities. Nonetheless, his delegation believed that there was value in giving further consideration to the definition of crimes against humanity in the draft articles. Some of the terms used in the definition lacked clarity and could complicate national prosecutions under a future convention based on the draft articles. In view of the important role that the International Criminal Court’s publication *Elements of Crimes* had played in clarifying the definition of crimes against humanity in the Rome Statute, further consideration should be given to whether aspects of that

publication could be drawn on to help clarify the definition in draft article 2. Lastly, noting that the draft article differed in certain respects from article 7 of the Statute, he said that his delegation viewed the decision not to include the definition of gender found in article 7 as a positive change.

42. His delegation welcomed the fact that draft article 3 (General obligations) drew inspiration from article I of the Genocide Convention by providing that States undertook to prevent and punish crimes against humanity and clarifying that such crimes were crimes under international law, whether or not they were committed in time of armed conflict. His delegation also welcomed the clear statement, inspired by article 2 of the Convention against Torture, that no exceptional circumstances whatsoever could be invoked as a justification of crimes against humanity. Those provisions were of critical importance if States were to effectively prevent and punish crimes against humanity.

43. With regard to draft article 4 (Obligation of prevention), his delegation welcomed the clarification that efforts to prevent crimes against humanity must be undertaken in conformity with applicable international law. It would be useful to clarify, where appropriate, that efforts to punish such crimes must also be undertaken in conformity with applicable international law, including fair trial guarantees. With regard to draft article 4 (a), his delegation noted the obligation of States to take effective legislative, administrative and judicial measures to prevent crimes against humanity, including crimes against humanity committed by their personnel outside their territory. His delegation was pleased that draft article 4 (b) drew attention to the significant role that international cooperation played in efforts to prevent crimes against humanity. However, it still had questions and concerns, as previously expressed in his Government’s written observations, about the scope of the obligation to cooperate with other States and relevant international organizations, given that there might be circumstances in which such cooperation might not be warranted.

44. **Ms. Chang Wun Jeung** (Republic of Korea) said that a comprehensive convention on prevention and punishment of crimes against humanity was needed in order to fill a major gap in international law and facilitate cooperation among States to prevent and suppress such crimes. A convention based on the draft articles would provide a suitable legal basis for strengthening law enforcement cooperation among States, in particular in the absence of bilateral treaties on mutual legal assistance or extradition. Her Government had drawn on the Rome Statute to elaborate a law on punishment of crimes under the jurisdiction of

the International Criminal Court, including crimes against humanity, and to raise public awareness in that regard. A convention based on the draft articles would similarly help to promote the adoption of laws in other countries.

45. Although diverse opinions had been expressed with regard to draft article 2 (Definition of crimes against humanity), its content generally reflected customary international law and existing treaties. The divergence of opinions could be overcome through constructive dialogue among Member States and by putting in place a sound instrument based on the draft articles. In that regard, it was important for the draft articles to be consistent with the provisions of the Rome Statute, in particular with regard to the definition of crimes against humanity, so as to prevent any confusion. Her delegation therefore generally supported the use of the definition set out in the Statute. However, persecution was characterized in paragraph 1 as a crime against humanity when committed in connection with one of the other acts listed in that paragraph. The provision as currently worded could be misunderstood to mean that persecution could not be a crime against humanity unless it was directly connected with other acts mentioned in that paragraph. Her delegation therefore proposed the deletion of the phrase “in connection with any act referred to in this paragraph”.

46. Her delegation agreed with the view that the inclusion of paragraph 3 did not create ambiguity but rather gave States flexibility to adopt a broader definition of crimes against humanity than that set out in the draft article. States might also refine their own laws to strengthen the investigation, prosecution and punishment of such crimes.

47. While it was not possible for a single convention to please everyone, it was time for Member States to show their collective will to prevent egregious crimes against humanity and protect innocent victims by elaborating a dedicated convention on prevention and punishment of such crimes.

48. **Mr. Mainero** (Argentina) said that, although not all States were parties to the Rome Statute, his delegation agreed with the Commission's decision to use the widely accepted definition of crimes against humanity set out in article 7 of the Statute as a basis for draft article 2. That definition was the product of a long process of evolution of customary law. It also reflected extensive national and international jurisprudence and represented a consolidation of the process of codification of crimes against humanity. However, it was not set in stone, since the essence of international law was that it evolved together with State practice.

Furthermore, the wording offered by the Commission was merely a model. There was nothing to prevent another definition from serving as a basis for the negotiation of a future convention. Some elements of the definition might have evolved in the light of developments in international law since the adoption of the Rome Statute in 1998. For example, the definition of enforced disappearance of persons in draft article 2, which was based on the definition in the Statute, differed from the definition of enforced disappearance contained in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. The definition in the Convention did not refer to the intention of removing the person in question from the protection of the law or to the period of time involved in the commission of the crime. It would be preferable for a future instrument on prevention and punishment of crimes against humanity to include a definition of enforced disappearance similar to that contained in the Convention, since the Convention reflected the current understanding of that crime. It was true that paragraph 3 of the draft article established that the draft article was without prejudice to other broader definitions provided for in other international instruments or in national law. However, bearing in mind that one of the objectives of a future convention on crimes against humanity was to promote the harmonization of national laws, the definition of enforced disappearance contained in such a convention should reflect the latest developments in international law.

49. **Mr. Gómez Robledo Verduzco** (Mexico) said that, in general terms, draft articles 2, 3 and 4 reflected the evolution of the definition of crimes against humanity and the general obligations of States with regard to both prevention and punishment. Draft article 2 reflected the definitions set out in the Rome Statute and in other instruments such as the Convention against Torture and the statutes of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia. For example, the definition set out in article 5 of the statute of the latter Tribunal featured a striking number of similarities with the definition contained in draft article 2. That was worth noting because all 15 members of the Security Council, including its five permanent members, had voted to establish that Tribunal.

50. One example of the evolution of the definition was the requirement in paragraph 1 of the draft article that, in order to constitute crimes against humanity, the acts listed in the paragraph must be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. That wording was taken directly from the Rome Statute and

was reflected in the jurisprudence not only of the International Criminal Court but also of other international criminal tribunals. Another important example of normative evolution was the exclusion from the draft articles of a definition of gender. Mexico welcomed that important change, as it allowed for developments in international human rights law and international criminal law to be taken into account in the future interpretation of the term. A future convention based on the draft articles should reflect the fact that crimes against humanity might affect persons in different ways depending on their gender. Mexico also welcomed the inclusion of the “without prejudice” clause in paragraph 3 of the draft article, as it allowed for the possibility of broader definitions in other instruments, including regional human rights instruments and national laws.

51. With regard to draft article 3, his delegation agreed that there were general obligations not to engage in acts that constituted crimes against humanity and to prevent and punish such crimes, whether or not committed in time of armed conflict, and that no exceptional circumstances could be invoked as a justification of crimes against humanity. The obligations of prevention and punishment had been analysed by the International Court of Justice with respect to the crime of genocide in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The same analysis should be applied to crimes against humanity. The draft articles had the added value of contributing to the identification of a *jus cogens* norm.

52. The wording of draft article 4 (Obligation of prevention) was sufficiently general to allow for broad interpretation. In negotiations on a future treaty, States might wish to consider whether to include an illustrative list of specific measures a State was expected to take, such as those indicated in paragraph (11) of the commentary to the draft article, without prejudice to other, broader measures that it might take. Preventive measures must fully respect international law, including the provisions of the Charter of the United Nations relating to the threat or use of force.

53. Responding to the comments made by the representative of Cameroon regarding the legal value of the commentaries to the draft articles, he said that, as a former member of the International Law Commission, he could affirm that the Commission assigned the same importance to the commentaries as to the draft articles themselves, and that it negotiated and adopted them one by one. The draft articles should be read in the light of the commentaries and vice versa. The output of the Commission had great legal value because its methods

of work ensured legal rigour by involving not only the member of the Commission who was taking the lead on a topic, but the entire membership working in a collegial manner.

54. **Mr. Nyanid** (Cameroon), responding to the comments made by the representative of Mexico, said that, once a set of draft articles was adopted, the commentaries could serve only as a means of understanding the spirit of those draft articles, in the same way as dissenting opinions could shed light on the spirit of a judgment of the International Court of Justice. A commentary could not, therefore, be used to explain the legal value of a provision. The same applied to treaties, which were interpreted by looking at the letter of the treaty, even though the *travaux préparatoires* could help to explain the spirit of the treaty as well.

55. **Mr. Al-thani** (Qatar), referring to draft article 2, said that, in order to establish a precise definition of crimes against humanity, it was important to maintain the phrase “widespread or systematic”, which indicated that, in order to constitute a crime against humanity, an attack should have a large number of victims and have been planned in advance. In the interests of building consensus, the definitions of such terms as slavery, torture and enforced disappearance should be consistent with existing international instruments. Lastly, his delegation understood the term “gender” in paragraph 1 (h) as referring to the male and female sexes; it should not be interpreted as having any other meaning.

56. **Mr. Pieris** (Sri Lanka) said that, while the draft articles successfully captured the important features of crimes against humanity, they should be approached as a working draft that would be moulded over time, taking into account the growing body of contemporary international law. Draft article 3 (General obligations) served as a stark reminder of the obligation to prevent crimes against humanity, which States had often evaded. Regarding the definition of crimes against humanity, consideration should be given to the process of attributing responsibility for such crimes. The definition set out in draft article 2 was not exhaustive. The definition of extermination set out in paragraph 2 (b) should be revisited. As currently drafted, the definition was too broad and appeared to refer to an act whose character differed from other crimes against humanity and which occurred in situations of blockade or siege. It might therefore be worth considering whether the act of extermination should be treated as a separate offence from crimes against humanity.

57. Parallels between genocide and crimes against humanity had taken over the current discussion, while the crime of aggression, which often led to atrocity

crimes, was overlooked. His delegation therefore suggested considering the inclusion of the crime of aggression as a crime against humanity. The prevention of war was one of the principal objectives of international law, as enshrined in the Charter of the United Nations.

58. Paragraph 3 provided that the draft article was without prejudice to broader definitions of crimes against humanity that might be found elsewhere. While that provision offered flexibility, it also left room for arbitrariness. The law governing the prevention of crimes against humanity should be clear, easily understood and predictable.

59. **Mr. Liu Yang** (China) said that it would be difficult for the international community to reach consensus on the current text of draft article 2 (Definition of crimes against humanity), given that it was drawn almost verbatim from article 7 of the Rome Statute. Lengthy debates on the definition of crimes against humanity had taken place during the negotiation of the Statute, revealing widely differing views among States, many of which had decided not to become parties to the Statute. His delegation disagreed with the view that article 7 of the Statute reflected customary international law. In fact, there was a lack of widespread, let alone consistent, State practice with regard to the definition of crimes against humanity. Indeed, even many States parties to the Statute had not incorporated a definition of crimes against humanity into their domestic law, and among those that had done so, the definitions varied. Under such circumstances, the basis for claiming that article 7 of the Rome Statute reflected customary international law was unclear.

60. The provisions of draft article 2 were too broad. For example, in paragraph 1, torture, enforced disappearance and the crime of apartheid were listed as crimes against humanity, when in fact there were already international conventions pertaining to those crimes. In that context, the issue of whether it was necessary to elaborate a stand-alone convention on crimes against humanity merited further discussion. In addition, some provisions of the draft article were vague and could create legal uncertainty, such as paragraph 1 (k), which provided that “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” constituted crimes against humanity.

61. The acts constituting crimes against humanity set out in the draft article required further elaboration. During the negotiation of the Rome Statute, some States had expressed the view that crimes against humanity should be limited to certain crimes that took place

during war or periods of conflict and should exclude acts that took place during peacetime. Furthermore, a review of existing judicial practice revealed that the majority of prosecutions of crimes against humanity involved acts that had taken place in time of war or armed conflict. The question of whether crimes against humanity existed during peacetime and what acts constituted such crimes during peacetime therefore warranted further discussion. It was also worth noting that armed conflicts were generally defined as either international or non-international, and that there were differences in the legal regimes applicable to each. Those differences and their implications as to what acts constituted crimes against humanity were another topic worthy of discussion. In particular, careful consideration was required concerning what acts constituted crimes against humanity in non-international armed conflicts.

62. His delegation had concerns regarding draft article 3 (General obligations). According to paragraph 1, “each State has the obligation not to engage in acts that constitute crimes against humanity”. That wording gave the impression that States could be perpetrators of crimes against humanity, even though, as stated by a number of delegations and by the Commission in its commentary to the draft article, States themselves did not commit crimes. In that context, the paragraph should be deleted, as it could be misleading. Neither the Genocide Convention nor the Convention against Torture contained such a provision. Removing the paragraph would not affect his delegation’s interpretation or application of the draft article.

63. With regard to draft article 4, his delegation was of the view that the prevention of crimes against humanity was an international obligation of each State. However, the ways and means of fulfilling that obligation fell under the scope of national sovereignty; States could adopt appropriate measures in accordance with their national conditions and legal systems. In order to avoid a one-size-fits-all approach and ensure respect for national sovereignty, his delegation therefore suggested adding a phrase to the draft article to indicate that each State would take measures within its legal framework.

64. **Mr. Jaiteh** (Gambia) said that his delegation welcomed the general obligations set out in draft article 3 not to engage in crimes against humanity and to prevent and punish such crimes, whether or not committed in time of armed conflict. During armed conflicts, it was the responsibility of every actor to observe the rules-based order that governed such conflicts. His delegation further welcomed the statement that no exceptional circumstances could be used as justification to commit crimes against humanity. The obligation placed on

States in draft article 4 to prevent crimes against humanity through legislative, administrative, judicial or other preventive measures, as well as through cooperation with other States and intergovernmental organizations, was also welcome. Crimes against humanity were among the most heinous atrocity crimes; States therefore had a duty not to commit them and to prevent and punish them.

65. The Gambia was fully committed to the promotion and protection of human rights both domestically and internationally, including the campaign to end impunity and seek accountability for victims of human rights abuses whenever and wherever they occurred. That commitment was informed by the values inherent in the country's beliefs and culture. The population was comprised of Muslims and Christians and its values were conservative in nature. In line with those values, his delegation found unacceptable the decision of the Commission not to include in the draft articles the internationally negotiated and widely accepted definition of gender contained in article 7, paragraph 3, of the Rome Statute. His delegation would therefore reserve judgment on paragraph 1 (h) of draft article 2 (Definition of crimes against humanity) until the definition of gender provided in the Statute was given further consideration and gender was established as referring to men and women. The rationale provided by the Commission for its decision was also unacceptable. Gender was not a social construct but a biological fact, which went back to the roots of the creation of man and woman. His delegation did not subscribe to the notion that much had changed since the Statute had been adopted in 1998, and that, therefore, the world was ready to evolve and accept a new meaning of gender. Gender referred to men and women only. That view was informed by his country's values, drawn from science, faith and culture.

66. His delegation found paragraphs 1 (k) and 3 of the draft article to be ambiguous and lacking in clarity but would continue to follow the debate to see if their meaning became clearer. His delegation welcomed proposals to expand the list of crimes in the draft article to include other acts that States deemed to reach the threshold of crimes against humanity under paragraph 1.

67. **Ms. Russell** (New Zealand) said that her delegation was pleased to note that the definition of crimes against humanity set out in draft article 2 was in line with the definition in the Rome Statute. The insights provided at previous meetings by other delegations on the negotiation of the Statute offered useful context for the Committee's discussions. The elaboration of a new convention on crimes against humanity would not affect the status of States that were not parties to the Statute.

68. Her delegation supported the Commission's decision not to include in the draft article the definition of gender provided in the Rome Statute, given that the understanding of the concept of gender had evolved since the adoption of the Statute. Her delegation supported the inclusion of a "without prejudice" clause in the draft article in order to ensure that the definition of crimes against humanity did not call into question broader definitions that might exist in international law or in States' own laws. Her delegation would carefully consider the comments made and amendments suggested by other delegations with regard to the draft article. On draft article 3 (General obligations), her delegation welcomed the clear statement that States had an obligation to prevent and punish crimes against humanity and that such crimes were crimes under international law, whether or not they were committed in time of armed conflict.

69. **Ms. Solano Ramirez** (Colombia), referring to draft article 2 (Definition of crimes against humanity), said that not only was it clearly useful to have a precise definition, in an international criminal law instrument, of the crimes covered by that instrument, it was also necessary to have such a definition in domestic law. In order for a State to fulfil its obligations under a convention based on the draft articles, the substantive definition of the punishable act in its law must be completely compatible with the generic definition in draft article 2.

70. The core of the definition, set out in paragraph 1, was made up of three elements: first, the crime must be committed as part of a widespread or systematic attack; second, it must be directed against a civilian population; and, third, it must be committed with knowledge of the attack. The Commission's commentary to the draft article provided an exhaustive examination of the three elements, taking into account the major legal precedents, including the Rome Statute, the Charter and jurisprudence of the Nuremberg Tribunal, the Commission's 1954 draft Code of Offences against the Peace and Security of Mankind and its 1996 draft Code of Crimes against the Peace and Security of Mankind, the statutes and decisions of various ad hoc criminal tribunals, and the practice and jurisprudence of the International Criminal Court. In other words, the three elements of the definition emanated from State practice in respect of criminal law and not from a particular treaty or tribunal; they reflected what the international community had recognized as correct and acceptable.

71. Her delegation considered that, in general, the definitions of crimes in the draft article should be at least as broad as those in the Rome Statute. However, if other international treaties or customary law offered

broad definitions, those should preferably be used, as the text did not confer jurisdiction on a court, but rather contained obligations for States, to be implemented in their own tribunals and systems. In that regard, her delegation believed that the definition of persecution, for example, might be too restrictive, and it would be better to use broader concepts from customary international law and the jurisprudence of regional tribunals, such as the Inter-American Court of Human Rights. In addition, it would be preferable to use the definition of enforced disappearance set out in the International Convention for the Protection of All Persons from Enforced Disappearance or the Inter-American Convention on Forced Disappearance of Persons. Her delegation agreed with the Commission's decision to dispense with the definition of gender in the Rome Statute, which was too restrictive.

72. Paragraph 1 (k), which made clear that the list of acts in paragraph 1 was not exhaustive, was useful because it offered scope for additional acts to be considered under domestic law, and, as international criminal law continued to develop, new categories of crimes against humanity could in future be covered by the draft article. However, there was a possibility that the provision could lend itself to an overly broad interpretation that did not meet the high standards applied by the Commission when identifying the acts listed. Indeed, the Commission had not simply copied the text of the Rome Statute; it had also analysed customary international law, assessed whether the definitions of the acts listed were broadly supported by State practice and reviewed the jurisprudence of international and regional courts and tribunals. In order to ensure legal certainty and respect for the principle that there could be no crime without law, it would be appropriate to refer to the adoption of a restrictive approach to interpretation and to the principles of *nullum crimen sine lege* and *in dubio pro reo*, perhaps in the preamble to the draft articles.

73. Without prejudice to the criminal nature of acts that constituted crimes against humanity, draft article 3 (General obligations) expressly prohibited States from engaging in such acts. Her delegation agreed with that prohibition and appreciated the fact that the draft article not only addressed crimes against humanity from a punitive perspective, but also recognized every State's obligation not to engage in the acts concerned. Paragraph 2 of the draft article attempted to accomplish too much in a single sentence. The key phrase established that crimes against humanity were international crimes, whether or not they were criminalized in national law. That phrase should be placed in a separate sentence in order to make clear its

significance. Furthermore, while her delegation agreed that the obligation set out in the paragraph was an obligation of means and not of result, and that it was measured by a standard of due diligence, the explanation of those ideas appeared only in the commentary to the draft article, and the obligation was described with reference to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, in which the International Court of Justice had considered a treaty pertaining to genocide rather than to crimes against humanity.

74. There was an ongoing discussion regarding whether the Commission, in its commentary to the draft article, had fully and exhaustively considered all the aspects of State responsibility with regard to prevention in relation to peremptory norms of general international law. Furthermore, it was still a matter of debate as to whether the content of the draft article itself represented customary international law. While it made sense for the Commission not to address the other State obligations to prevent *jus cogens* crimes that it had considered in its work on the topic of peremptory norms of general international law (*jus cogens*), her delegation considered that it would be advisable for any potential treaty on crimes against humanity to fully incorporate the ideas discussed in the context of *jus cogens*. Her delegation understood that paragraph 3, which provided that no exceptional circumstances could be invoked as a justification of crimes against humanity, referred to the conduct of both States and non-State actors. That provision was both natural and welcome.

75. Her delegation believed that the obligation of prevention established in draft article 4 also extended to the prevention of acts that could constitute crimes against humanity and was a feature of most of the multilateral treaties that dealt with those crimes. Indeed, decisions of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, the Rome Statute, the Convention against Torture and the Inter-American Convention to Prevent and Punish Torture all contained references to the obligation to take effective measures to prevent crimes against humanity. At the same time, her delegation agreed with the view that the obligation of prevention could never be used to justify aggression. However, the obligations established in the draft article were perhaps too vague, given the lack of clarity regarding how preventive acts would be deemed to be "in conformity with international law", particularly with regard to the role of third States. The jurisdictional scope of draft article 4 (a) and (b) was unclear, particularly compared to the more detailed provisions in draft article 7 (Establishment of national

jurisdiction). Furthermore, in a similar vein to her delegation's comments on the relationship between the draft articles and the Commission's prior work on State responsibility and peremptory norms, draft article 4 was relatively vague. In that regard, States had the opportunity to introduce additional elements to a possible convention rather than leaving that responsibility to a court or tribunal in the future.

76. Draft articles 2, 3 and 4 would all be essential components of a future convention on crimes against humanity. However, all of them could benefit from greater clarity and more detail. Her delegation was willing to discuss each provision further, although it believed that the Commission was generally heading in the right direction.

77. **Mr. Silveira Braoios** (Brazil), referring to the comments made by the representatives of Colombia, Liechtenstein and the Republic of Korea concerning the definition of persecution, said that the description given in paragraph 1 (h) of draft article 2 (Definition of crimes against humanity) implied that persecution was not a stand-alone crime but rather a means to commit another crime against humanity. If it were a stand-alone crime, there would be a risk of double jeopardy when prosecuting persecution if it was not absorbed, in line with the merger doctrine, by the crime it enabled. In that context, his delegation wondered whether persecution in itself should be designated a crime against humanity, as it was in the statutes of other international tribunals. The Commission had expressed concern about the risk of bringing within the definition of crimes against humanity a wide range of discriminatory practices that did not necessarily amount to such crimes. That concern could potentially be addressed by stating, along the lines indicated by the Commission itself in the commentary, that persecution that constituted a crime against humanity was an act of a similar character and severity to those acts listed in paragraph 1 of the draft article.

78. **Mr. Skachkov** (Russian Federation) said that the definition of crimes against humanity contained in draft article 2 had been borrowed in its entirety from the Rome Statute, a treaty that could not serve as a basis for future work in view of the limited number of States that were parties to it. As pointed out by a number of delegations, the definition of crimes against humanity contained in the Statute did not necessarily reflect the practice of States or existing national laws. In addition, the definitions of specific acts did not reflect the fact that some of those acts were not recognized as crimes under some national laws. The Statute was not the only international instrument that contained a definition of crimes against humanity; the 1968 Convention on the Non-Applicability of Statutory Limitations to War

Crimes and Crimes against Humanity, which had been elaborated on the basis of the Charters of the Nuremberg and Tokyo Tribunals, also contained a definition. His delegation wondered why that definition had not been used as the basis for the definition set out in the draft article.

79. As currently formulated, the draft article contained a number of disparate elements that did not make clear what constituted a crime against humanity. In particular, there was no clear explanation of what constituted criminal intent. Furthermore, paragraph 1 provided that the acts listed therein were considered crimes against humanity when committed as part of an attack that was characterized as either widespread or systematic. In his delegation's view, attacks should have both of those characteristics to be considered crimes against humanity. The issues described could greatly complicate prosecutions in States that already had a detailed and unambiguous national law on crimes against humanity. In that context, the idea of elaborating a new convention raised many questions.

80. The list of acts constituting crimes against humanity in the draft article was far from complete. The suggestions made in that regard by a number of delegations should be given further consideration. The list should include the use of unilateral coercive measures, the consequences of which could amount to crimes against humanity, such as when a population was deprived of access to foodstuffs, medications and aircraft parts, and should also include crimes such as neo-Nazism, sedition, the organization and funding of armed uprisings and coups d'état, and other acts aimed at unconstitutional regime change in a foreign State. The catastrophic consequences of such acts were well known. Furthermore, a number of the definitions of individual acts contained in the draft article differed from the definitions of those same acts in other international instruments. For example, the definition of enforced disappearance of persons differed from the definition set out in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. In other cases, the wording used in the draft article was vague, which was unacceptable in a text dealing with such serious crimes. For example, in the phrase "any other form of sexual violence of comparable gravity", it was unclear what other forms of sexual violence were being referred to. In paragraph 1 (k), the phrase "other inhumane acts of a similar character" was similarly unclear.

81. In draft article 3 (General obligations), it was unclear what the phrase "exceptional circumstances" in paragraph 3 meant. It might allow for the justification of acts that constituted crimes against humanity and

create a loophole that allowed the perpetrators to escape responsibility. His delegation supported the proposals made by others to include a reference in the draft article to the obligation to refrain from interfering in the internal affairs of other States.

82. In draft article 4, it should be stated that States undertook to prevent crimes against humanity not only in conformity with international law, but also in conformity with their own national laws. Lastly, there was no basis for including cooperation with international organizations as part of a State's obligation of prevention under draft article 4 (b).

83. **Ms. Grandjean** (Belgium) said that her delegation was pleased to note that draft article 2 defined crimes against humanity in line with article 7 of the Rome Statute. Belgium had introduced that same definition into its Penal Code in 1999. Her delegation also welcomed the omission in the draft articles of the definition of gender provided in the Statute. As explained in the commentary to draft article 2, the developments in international human rights law and international criminal law that had taken place over the past 25 years with regard to sexual and gender-based crimes should be taken into account. A convention that did not reflect in its definition of gender the current state of international law could marginalize lesbian, gay, bisexual, transgender and intersex persons as well as other groups, and could lead to greater impunity for sexual and gender-based crimes that constituted crimes against humanity.

84. Paragraph 2 of draft article 3 (General obligations) provided that States undertook to prevent and punish crimes against humanity. In view of the judgment 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)*, her delegation considered prevention and punishment to be two distinct obligations, even though the prosecution of crimes against humanity undoubtedly contributed to their prevention by having a deterrent effect. Furthermore, it was particularly useful that paragraph 3 explicitly stated that no exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, could be invoked as a justification of crimes against humanity.

85. With regard to the obligation of prevention, draft article 4 (b) was particularly important, as it emphasized the need for States to cooperate with other States as well as with relevant intergovernmental organizations. Such organizations not only had a role to play in terms of

prevention but also bore significant responsibilities in terms of punishing crimes against humanity.

86. **Mr. Hernandez Chavez** (Chile) said that his delegation supported the general approach in draft article 2, which provided a definition of crimes against humanity that was in line with the Rome Statute. However, as mentioned by other delegations, the provision could be adjusted to take into account developments in law since 1998 and reflect the fact that the purpose of the draft articles was different from that of the Statute: the draft articles had been developed not to establish or define the jurisdiction of an international tribunal, but rather to ensure the prevention and punishment of crimes against humanity. Indeed, the wording of the Statute, which was sometimes broad, served as a single basis for the development of the jurisprudence of the International Criminal Court; no such court was provided for in the draft articles. On the contrary, national courts would have responsibility for implementing a future convention on crimes against humanity, which would provide the jurisdictional basis to prosecute all such crimes. His delegation was not suggesting entirely departing from the text of the Rome Statute, as the Statute constituted a reasonable basis for discussing a definition of crimes against humanity. However, his delegation did believe that in future negotiations, States could discuss expanding on the acts listed in the draft article, with the aim of ensuring consistent implementation of what would be a legally binding instrument.

87. His delegation considered that paragraphs 1 (k) and 3 should be retained, as they facilitated the implementation of national laws and did not prevent States from adopting a more detailed definition of crimes against humanity. However, the implementation of a future convention would also involve a number of challenges that should be considered. Greater detail and coherence would provide States with more certainty when they requested cooperation. In that regard, the two provisions also did not prevent or discourage the inclusion of greater detail in the text of a future convention so as to offer clarity to the national courts that would implement it.

88. Draft article 3 (General obligations) was an acceptable starting point for a discussion on how to implement the obligations to prevent and punish crimes against humanity that derived from the prohibition of such crimes under customary law. The phrase "each State has the obligation" at the beginning of paragraph 1 appropriately reflected the fact that, pursuant to international law, States were already obligated not to commit crimes against humanity. However, paragraph 2 began with the phrase "each State undertakes to",

despite the fact that States were already obligated to prevent and punish such crimes when they were committed on their territory. The wording of the paragraph should adequately communicate that idea by using an opening phrase similar to that used in paragraph 1.

89. **Mr. Khng** (Singapore), referring to draft article 4 (b), said that his delegation agreed with the principle that States should undertake to prevent crimes against humanity “through cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations”. However, as other delegations had observed, it would be beneficial to clarify the scope of that obligation, for example, the nature of its relationship to the obligations under draft article 9 to take preliminary measures when an alleged offender was present and under draft article 14 to render mutual legal assistance. His delegation had also noted with interest the view of other delegations that draft article 4 expressed a general undertaking rather than an independent obligation to take specific actions.

90. **Ms. Crockett** (Canada), referring to draft article 2 (Definition of crimes against humanity), said that her delegation supported the Commission’s decision not to define gender therein, as it was a concept that had continued to evolve over time. Given the different views on the issue, excluding a definition seemed to be the best way to bridge the divide.

91. Her delegation recognized that the Rome Statute definition had created harmonization, but also acknowledged the need to build on that definition and propose additional elements for consideration. In that regard, it might be appropriate to broaden the definitions of certain crimes against humanity set out in the draft article to include the concept of omission where relevant. The draft article also offered an opportunity to clarify the definition of sexual violence and to include certain acts that had been recognized as constituting crimes against humanity, such as forced marriage, so as to better support States in their efforts to prevent and punish sexual and gender-based violence where it constituted a crime against humanity.

92. Her delegation, like others, questioned whether the definition of persecution should retain the requirement that, in order to constitute a crime against humanity, persecution be committed in connection with another act that also constituted a crime against humanity. Her delegation also recommended against implying that persecution constituted a crime against humanity only if it was committed on the basis of grounds universally recognized as impermissible under international law, given that international law included not only customary

international law but also treaties, which had differing groups of States parties that were subject to differing obligations.

93. Concerning the definition of an attack directed against any civilian population, delegations should consider, in the light of existing customary international law and the decisions of international tribunals, whether to retain the requirement that the act be committed in furtherance of a State or organizational policy. The definitions of other terms included in the draft article had also evolved over time or were understood slightly differently in customary international law, such as the definition of torture, which under customary international law did not require the person to be in the custody or control of the accused. In addition, the definition of forced pregnancy did not, in her delegation’s view, protect all potential victims, and it contained a reference to the impact on the national laws of States, which was arguably not required. Concerning the definition of enforced disappearance of persons, her delegation agreed with others that had questioned whether it was necessary to include the requirement that the crime be committed with the intention of removing the disappeared person from the protection of the law for a prolonged period of time.

94. Her delegation supported the inclusion in the draft article of the “without prejudice” clause, which made it clear that States retained the flexibility to include broader definitions of crimes against humanity in their national laws or to be bound by broader definitions in treaties to which they were parties, without imposing any additional obligations on other parties to the potential future convention on crimes against humanity.

95. Her delegation appreciated the fact that paragraph 1 of draft article 3 (General obligations) was based on the view of the International Court of Justice that the duty to prevent atrocity crimes included a duty not to commit them. However, it would be useful to clarify that a convention based on the draft articles would not operate to modify international humanitarian law, which constituted *lex specialis* applicable in armed conflict. Her delegation believed that draft article 4 (Obligation of prevention) could enhance international cooperation, in particular inter-State cooperation, but also considered that it could be broadened to encourage States to cooperate with international courts and tribunals.

96. **Mr. Erkan** (Türkiye) said that the definition and elements of crimes against humanity were complex. Moreover, the key requirements included in draft article 2 for an act to be considered a crime against humanity, such as the requirement that an attack be “widespread or systematic”, “directed against any civilian population”

and committed in furtherance of an “organizational policy to commit such attack”, were ambiguous. As Türkiye had stated during the preparatory work on the Rome Statute, an attack should be both widespread and systematic to qualify as a crime against humanity; in order to avoid over-inclusiveness and ambiguity, the two characteristics should not be presented as alternatives. Some delegations had argued that a major deviation from the definition of crimes against humanity provided in the Statute might cause a dilemma for States parties to the Statute. However, if the concerns of non-States parties were disregarded, it was possible that only States parties to the Statute would accept a convention based on the draft articles.

97. Both the Rome Statute and the Genocide Convention stipulated that “persons” were responsible for the crime of genocide, yet paragraph 1 of draft article 3 (General obligations) provided that “States” had the obligation not to engage in acts that constituted crimes against humanity. Given that States could not be perpetrators of the crime of genocide, they also could not be perpetrators of crimes against humanity. His delegation considered that the reasons for including the paragraph, set out in the Commission’s commentary to the draft article, were insufficient and unconvincing. The paragraph should therefore be deleted. In addition, further clarification was needed regarding the obligation of prevention referred to in draft article 4. His delegation shared the concerns of others that the current approach established a broad and potentially ever-expanding set of obligations for States in relation to crimes against humanity.

98. **Ms. Llano** (Nicaragua) said that there were still divergent positions among States that prevented them from reaching consensus on a possible convention on crimes against humanity. In her delegation’s view, it was premature to consider the adoption of a convention based on the draft articles. The issue therefore required further consideration.

99. International criminal justice should be impartial and non-selective and should complement national justice systems, without politicization or double standards. It was a matter of concern that many of the draft articles were linked to the Rome Statute, given that many States were not parties to it. Several States that strongly advocated for progress on the issue of crimes against humanity, even without international consensus on it, did not promote with the same zeal the urgent need to respond to terrible situations of underdevelopment and poverty, including by tackling their root causes, or to address the structural problems that led to the outbreak of conflicts.

100. It was the sovereign right of every State to make decisions regarding its own laws and the definitions of concepts such as violence, crime and gender. Any international legal instrument must respect the principles and provisions of the Charter of the United Nations and the sovereign equality of every State. Furthermore, to be acceptable to Nicaragua, such instruments must be consistent with the country’s Constitution and laws.

101. **Ms. Beriana** (Philippines) said that in 2009 the Philippines had adopted Republic Act 9851, which dealt with crimes against international humanitarian law, genocide and other crimes against humanity. The definition of crimes against humanity set out in draft article 2, which was an almost verbatim copy of article 7 of the Rome Statute, was also generally consistent with the definition provided in Republic Act 9851, which included as crimes against humanity, *inter alia*, wilful killing, extermination, torture, prosecution and other inhumane acts of a similar character. The definitions of terms provided in draft article 2, paragraph 2, were also generally consistent with those in Philippine law. Her delegation could therefore support the draft article, with some suggested amendments, including replacing “murder” with “wilful killing” in paragraph 1 (a); adding the word “arbitrary” before “deportation or forcible transfer of population” in paragraph 1 (d); and adding “sexual orientation” to the list of the impermissible grounds for persecution in paragraph 1 (h). Her delegation could also support paragraph 3, on the understanding that, should a State wish to adopt or retain a broader definition of crimes against humanity in its national law, the draft articles would not preclude it from doing so.

102. Her delegation supported the inclusion in draft article 3 of the general obligations of States not to engage in acts that constituted crimes against humanity and to prevent and punish such crimes. Those obligations were in line with Philippine law. Furthermore, under Philippine law, as in paragraph 3 of the draft article, no exceptional circumstances whatsoever could be invoked as a justification of crimes against humanity.

103. Her delegation supported the inclusion of draft article 4 (Obligation of prevention). The Philippines had complied with the obligation set out in draft article 4 (a) to take legislative measures to prevent crimes against humanity, in particular by enacting Republic Act 9851. Cooperation for the effective prevention of crimes against humanity must always be undertaken in conformity with international law.

104. **Ms. Falconi** (Peru), referring to the draft articles adopted by the Commission on first reading (see [A/72/10](#), ch. IV), said that her delegation welcomed the clear indication in draft article 2 [2] (General obligation) that crimes against humanity could be committed in peacetime as well as during an armed conflict. That principle had also been established by international practice, the Statute of the International Tribunal for Rwanda and the Rome Statute. Regarding the description of persecution provided in paragraph 1 (h) of draft article 3 [3] (Definition of crimes against humanity), her delegation noted that persecution against any identifiable group or collectivity should in itself constitute a crime against humanity and should not need to be committed in connection with any act referred to in that paragraph or in connection with the crime of genocide or war crimes. In addition, the definition of enforced disappearance of persons in paragraph 2 (i) should not include the phrase “for a prolonged period of time”. Lastly, her delegation noted that, by focusing both on prevention, through legislative, administrative, judicial or other appropriate preventive measures and cooperation with other States, and on the effective punishment of crimes against humanity, the draft articles covered both of the dimensions that a future convention on the topic should address.

105. **Mr. Khaddour** (Syrian Arab Republic), referring to draft article 2, said that, when defining crimes against humanity, the main issue was not the types of acts or violations that could be included, such as murder, rape, extermination, enforced disappearance or enslavement, because there was consensus among delegations that those acts, whether individual or collective in nature, were already criminalized under both domestic law and international law. His delegation believed that the list of violations could be expanded to include the imposition of embargoes, starvation, adoption of unilateral coercive measures, fomenting of conflict and internal strife, and destabilization of any State. The main issue was rather the mechanism for deciding when an act qualified as a crime against humanity. Specifically, it was unclear what criteria would be used to determine whether a “widespread or systematic” attack had occurred and who would make that determination. It was unclear whether a judicial authority could do so, in the absence of a specific law that said so, or whether the issue could be left to the discretion of each State, court or judicial authority.

106. It was not enough to continue repeating vague concepts as though they were a given. The definition of crimes against humanity under consideration was relatively new; it had gained currency only in the 1990s. In the statute of the International Criminal Tribunal for

the Former Yugoslavia, crimes against humanity were characterized as acts committed in armed conflict, whether international or internal in character; the question of their widespread or systematic nature had not arisen. In the statute of the International Criminal Tribunal for Rwanda, crimes against humanity were characterized as widespread or systematic, but also as having been committed on national, political, ethnic, racial or religious grounds. In both cases, the definition of crimes against humanity was more specific than the definition now under consideration, which was broader and vaguer: it required only that an attack be widespread or systematic and that it be directed against any civilian population, with no reference to the concepts set out in the above-mentioned instruments. Indeed, the characterization of any given attack as widespread or systematic remained controversial in international jurisprudence and had been applied inconsistently by different courts and tribunals. It was difficult to see how that characterization could be taken for granted as part of customary international law, let alone a peremptory norm. Moreover, even the concept of “civilian population” needed to be defined clearly and precisely, as was the case in the 1949 Geneva Conventions, particularly when considering potential crimes against humanity in both international and non-international armed conflicts.

107. In paragraph 2, attacks directed against a civilian population were given the same definition as in the Rome Statute, which implied that the provisions of a future convention might not apply to crimes committed by rebel groups, irregular factions, or other ethnic or religious entities that were not under the authority of the State or that were operating outside State policy, thus suggesting that they could be committed only by a State or in accordance with State policy. That vague definition was the main cause of inconsistent State practice with regard to the prosecution of the perpetrators of such crimes. There might be a situation, for example, where, following a coup or insurrection, both the Government and the insurrectionists committed acts that could, under the definition under consideration, be deemed crimes against humanity. If the coup was successful, the coup leaders could exercise victor’s justice by prosecuting officials of the Government for crimes against humanity. If the Government prevailed, it could prosecute the coup leaders for treason or some similar crime under domestic law. It might even charge them with crimes against humanity, something that would amount to a different form of victor’s justice. However, other States might decide to intervene and their stance would, of course, depend on their political position: if they supported the rebels, they would gladly prosecute officials of the Government for crimes against humanity,

but if they supported the Government, they would simply say that the coup was an internal matter to be governed by domestic law. The proposed definition would thus create unprecedented conflicts of jurisdiction and laws which would reflect political interests rather than the interests of justice or the victims.

108. **Ms. Sayej** (Observer for the State of Palestine) said that her delegation saw value in considering article 7 of the Rome Statute in relation to the draft articles, without prejudice to any State's position. In order to maintain the international regime for the prevention and punishment of crimes against humanity, it was necessary to ensure substantive consistency with existing international instruments. Regarding the definition of crimes against humanity in draft article 2, without prejudice to ongoing discussions, her delegation supported a broad definition of the phrase "any civilian population" and was pleased to note that the Commission, in the commentary to the draft article, relied on international humanitarian law, including Protocol I Additional to the Geneva Conventions of 1949, and on extensive jurisprudence to affirm that the phrase should be interpreted broadly, in particular with regard to the characterization of a population as civilian in time of armed conflict and the collective nature of the crime.

109. Regarding the requirement that a perpetrator commit an act "with knowledge of the attack", her delegation agreed that, as established by jurisprudence and noted in the commentary to the draft article, the motive of the perpetrator for taking part in an attack was irrelevant. There was no justification for widespread or systematic attacks against any civilian population. Regarding the requirement that an attack be committed "pursuant to or in furtherance of a State or organizational policy", her delegation was of the view that such a policy need not be formalized and could be deduced from the way in which the acts occurred. In addition, it was important to note that a policy adopted by regional or local organs of the State could meet the requirements for being considered a State policy.

110. With respect to the acts defined as crimes against humanity, the requirement that a population subject to deportation or forcible transfer from an area should be lawfully present in that area must be in conformity with international law. It was also not necessarily appropriate to restrict the scope of prevention and punishment of persecution, since the draft articles did not confer jurisdiction on an international tribunal. Indeed, the intentional and severe deprivation of human rights by reason of the identity of a group was in itself a crime against humanity. In that regard, her delegation

supported the submission from the Working Group of Experts on People of African Descent and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to the International Law Commission on additional relevant authority to the draft articles, in which the authors recommended that the definition of persecution include the concepts of racial profiling, racial violence, acts of racial hatred, racial segregation and racial subordination. Her delegation was closely following the ongoing discussions on paragraph 3 of the draft article and was still examining the text.

111. With regard to draft articles 3 (General obligations) and 4 (Obligation of prevention), her delegation affirmed that their central aim was to support the development of national laws and national jurisdiction with respect to crimes against humanity and to encourage States to cooperate in order to prevent and punish such crimes. Domestic measures must not themselves violate the rules of international law, including rules related to the use of force and human rights law.

*The meeting rose at 6.05 p.m.*