



# General Assembly

Seventy-seventh session

Official Records

Distr.: General  
20 June 2023

Original: English

---

## Sixth Committee

### Summary record of the 43rd meeting

Held at Headquarters, New York, on Thursday, 13 April 2023, at 10 a.m.

*Chair:* Mr. Afonso ..... (Mozambique)  
*later:* 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/>).

23-06918 (E)



Please recycle



*The meeting was called to order at 10 a.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 13–15 and draft annex (continued)*

2. **Mr. Cappon** (Israel) said that the issue of extradition was the subject of many bilateral and multilateral treaties, and was also governed by customary international law developed over many years. There was significant practice in international law in the areas of extradition and mutual legal assistance and the Committee should be careful about attempting to reinvent the wheel. It was important to ensure that the balance that had been created among States was respected and upheld.

3. With respect to the political offence exception, the current wording of paragraph 3 of draft article 13 (Extradition) made it sound as if the principle of non-extradition for political offences was being cancelled outright. That presented a possible loophole that could allow States to circumvent due process in extradition cases by claiming that crimes against humanity had been committed, which would erode the gravity of the term. Given that the future outcome of the draft articles could not cover every possible scenario, serious thought should be given as to whether it was appropriate to leave no room for discretion by States. The inclusion of safeguards was crucial to preventing the draft articles from being abused and to promoting their wide acceptance by States, while ensuring that they were an effective tool for the prevention and punishment of crimes against humanity.

*Draft articles 5, 11 and 12*

4. **Ms. Popan** (Representative of the European Union, in its capacity as observer), speaking also on behalf of the candidate countries Albania, Bosnia and Herzegovina, North Macedonia, the Republic of Moldova and Ukraine; the potential candidate country Georgia; and, in addition, Liechtenstein, said that, with regard to draft article 5 (Non-refoulement), the principle of non-refoulement was an essential protection under international human rights law, refugee law, humanitarian law and customary law and was not specific to the draft articles on prevention and punishment of crimes against humanity.

5. The prohibition of refoulement had been explicitly included in the Convention against Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance. The principle of non-refoulement had also been incorporated in the Geneva Convention relative to the Protection of Civilian Persons in Time of War and the Convention relating to the Status of Refugees. At the European Union level, the principle was set out in article 19, paragraph 2, of the Charter of Fundamental Rights of the European Union.

6. The European Union attached great importance to fair trial and due process rights and therefore welcomed draft article 11 (Fair treatment of the alleged offender), including the provision that the rights of a person against whom measures were being taken in connection with an offence covered by the draft articles must be guaranteed “at all stages of the proceedings”. In the European Union, the right of suspects and accused persons to a fair trial was set out in the constitutions of its member States and in the Charter of Fundamental Rights. Suspects and accused persons were presumed innocent until proved guilty. The right to a fair trial was also enshrined in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). That article had been extensively interpreted by the European Court of Human Rights, generating an entire body of due process rights. The European Union noted that a number of delegations had suggested that draft article 11 should be strengthened by making a more precise distinction between the rights of suspects and the rights of accused persons and by setting out clearly the presumption of innocence and the rights of the accused.

7. The European Union supported the inclusion of draft article 12, as the rights of victims and witnesses in criminal proceedings were of paramount importance. Victims must be empowered to report crimes, participate in criminal proceedings and claim compensation. The European Union was pleased that draft article 12, paragraph 2, stated that measures to enable the views of victims to be considered at appropriate stages of criminal proceedings should be taken in accordance with national law, as that gave States the flexibility to decide how best to implement their obligations and provide broader rights.

8. In its strategy on victims’ rights for 2020–2025, the European Union paid particular attention to victims with specific needs and vulnerable victims, such as child victims, victims with disabilities, elderly victims and victims of gender-based violence. Draft article 12 could be more ambitious and could include a separate provision on the rights of the child.

9. Victims had the right to obtain reparation for both material and moral damages. The European Union was pleased that, as explained in the commentary to the draft articles, the rights set forth in draft article 12 should not be read as excluding the existence of other rights for victims, witnesses or others under international or national law, such as the right to information or the right to truth.

10. **Ms. Laukkanen** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that, with regard to draft article 5 (Non-refoulement), the principle of non-refoulement formed a central protection and safeguard under international human rights law, humanitarian law, refugee law and customary international law. The principle was not new or specific to the draft articles on prevention and punishment of crimes against humanity, having been incorporated in a number of international instruments, including the Convention against Torture, the International Convention for the Protection of All Persons from Enforced Disappearance, the Fourth Geneva Convention and the Convention relating to the Status of Refugees. While the focus of the draft article was on preventing a person from being exposed to crimes against humanity, its provisions were without prejudice to other non-refoulement obligations arising from treaties and customary international law. The Nordic countries believed that the principle of non-refoulement was firmly rooted in existing legal obligations and looked forward to further discussions on the precise scope of draft article 5.

11. With regard to draft article 11, the Nordic countries welcomed the broad scope of the provision, which guaranteed fair treatment of the alleged offender at all stages of the proceedings, from investigation to imprisonment. The Nordic countries attached great importance to due process considerations, particularly in the context of criminal law. They agreed that, as reflected in the draft article, alleged offenders should be guaranteed, at all stages of the proceedings, fair treatment and full protection of their rights under applicable national and international law, including international human rights law. Many international human rights instruments attached particular importance to the right to a fair trial, which was a central component of fair treatment. As noted by the Human Rights Committee, that right was a key element of human rights protection and a procedural means to safeguard the rule of law.

12. Turning to draft article 12 (Victims, witnesses and others), he said that, from the 1980s onwards, the international community had begun to pay closer

attention to the central role of victims and witnesses in criminal law and proceedings. Provisions similar to those contained in draft article 12 had been included in the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption, the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance. The General Assembly had also adopted resolutions that provided guidance on the rights of victims to justice and reparation. The Nordic countries were pleased that the draft article covered many essential elements relating to the participation and rights of victims and witnesses, including the right to report crimes to the competent authorities, be protected against ill-treatment and intimidation, be heard at appropriate stages of criminal proceedings and obtain reparation. Victims of the most serious international crimes, such as crimes against humanity, also had the right to obtain reparation for the harm suffered. The Nordic countries welcomed the comprehensive concept of reparation contained in the draft article, which rightly reflected the evolution in international human rights law on the matter. They also welcomed the comprehensive but non-exhaustive list of forms of reparation contained in paragraph 3, while noting that other auxiliary rights of victims, such as the right to truth, could be important in reconciliation processes and transitional justice.

13. **Mr. Abdelaziz** (Egypt), referring to draft article 5 (Non-refoulement), said that his delegation agreed that no State should expel, return, surrender or extradite a person to another State where there were substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity, as stated in paragraph 1. However, his delegation did not agree with the approach set out in paragraph 2, which stated that, for determining the existence of such grounds, “all relevant considerations” should be taken into account, including “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law”. While similar provisions were contained in the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance, his delegation was of the view that such a provision was unbefitting of a convention on crimes against humanity. Not only did such a provision conflate an atrocious international crime with less serious violations, but it also opened the door for politicization and attempts by some States to exercise jurisdiction over alleged offenders who happened to be present in their territory, at the expense of States that had a genuine connection with the alleged

crime. It looked forward to hearing the views of other delegations on that issue.

14. **Mr. Hasenau** (Germany) said that a convention on the prevention and punishment of crimes against humanity contributed to the basic idea that there was no impunity for the most serious crimes under international law. Following that logic, the proposed convention, in particular draft articles 5, 11 and 12, would be a human rights convention. Draft article 5 (Non-refoulement) prohibited States from sending persons to States where they would be at risk; draft article 11 provided for the fair treatment and due process rights of alleged offenders, including the right to a fair trial and consular access; and draft article 12 set out far-reaching standards on the rights of witnesses and victims. While it appeared that it would be necessary to address the vulnerable situation of witnesses and victims in a future convention, the details of such provisions, the depth of regulation and the role of horizontal national law would be subject to future negotiations.

15. **Mr. Ruffer** (Czechia) said that his delegation welcomed the inclusion of draft article 5 (Non-refoulement). While the principle of non-refoulement was included in refugee law, the Geneva Conventions of 12 August 1949, and extradition and other criminal law treaties, and was part of the interpretation of human rights treaties, it was important to reiterate and emphasize the prohibition on sending offenders or alleged offenders to a State where they might be at risk of being subjected to a crime against humanity.

16. Similarly, his delegation was pleased that draft article 11 expressly provided for the fair treatment of alleged offenders. The draft article reflected and referred to relevant rights and guarantees contained in universal and regional human rights instruments and aptly summarized the norms protecting alleged offenders in relation to the prosecution of crimes against humanity.

17. His delegation supported the inclusion of draft article 12 (Victims, witnesses and others), which appropriately reflected the increasing attention being paid to victims in international criminal justice, including their participation in criminal proceedings and reparation for their suffering. While his delegation was of the view that a single article on both the participation of victims and reparation was *prima facie* sufficient, as the purpose was to state basic principles, it would listen with interest to the drafting suggestions of other delegations. He noted that questions might arise concerning the differentiation between the duty of a State to provide reparation and the duty of the offender

to do so, as well as the scope of such obligations in the case of a State exercising its jurisdiction on the basis of passive personal or universal jurisdiction.

18. **Ms. Siman** (Malta), referring to draft article 5, said that the principle of non-refoulement was an essential protection under international human rights law, refugee law, humanitarian law and customary law. Generally, it prohibited States from removing a person from their jurisdiction or effective control if there were substantial grounds for believing that he or she would be at risk of irreparable harm, including persecution, torture, ill-treatment or other serious human rights violations. The prohibition of refoulement had been explicitly included in a number of universal and regional instruments, including the Convention against Torture, the International Convention for the Protection of All Persons from Enforced Disappearance, the Inter-American Convention to Prevent and Punish Torture, the American Convention on Human Rights and the Charter of Fundamental Rights of the European Union. As an inherent element of the prohibition of torture and other forms of ill-treatment, the principle of non-refoulement was characterized by its absolute nature. Accordingly, her delegation strongly supported the inclusion of the prohibition contained in draft article 5, paragraph 1.

19. The fundamental purpose of draft article 12 (Victims, witnesses and others), providing for the right of victims to obtain reparation in the form of restitution, compensation, satisfaction, rehabilitation, cessation and guarantees of non-repetition was to respond to the harm suffered by victims through the provision of direct benefits. The draft article clearly fitted into the architecture of global legal efforts aimed at ensuring justice for victims, since the right to reparation was recognized in a range of global and regional legal instruments and documents, including the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Human Rights Council resolution [22/21](#) on the rehabilitation of torture victims; rule 150, on reparation, of the rules of customary international humanitarian law of the International Committee of the Red Cross; the 2019 report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence ([A/HRC/42/45](#)), which contained information on State practice in the area of reparation; judgments on reparation issued by regional human rights bodies and courts, including the Inter-American Court of Human Rights; and general comment No. 4 on the African Charter on Human and Peoples' Rights,

adopted by the African Commission on Human and People's Rights, which stated that victims must be able to seek and obtain reparation that was appropriate for their particular circumstances and proportionate to the gravity of the harm suffered. Reparation was the indispensable complement of a failure to apply a convention. Her delegation therefore welcomed its inclusion in the draft articles.

20. When choosing between different forms of reparation, States should adopt a victim-oriented approach and put victims and their individual needs at the centre of redress procedures. While they could have a degree of flexibility in deciding which form of reparation should apply in a specific case, they should consider establishing minimum criteria that limited their discretion. For instance, they could require victims to participate in the process of determining the reparation, which would help to ensure that reparation measures were adequate to redress the damage suffered and took into consideration the specific interests, needs and vulnerabilities of victims.

21. **Ms. Solano Ramirez** (Colombia) said that the non-refoulement obligation set out in draft article 5 was without prejudice to similar obligations under treaties and customary international law. The Convention against Torture, the Inter-American Convention to Prevent and Punish Torture, the Convention relating to the Status of Refugees and the International Convention for the Protection of All Persons from Enforced Disappearance all contained similar provisions.

22. There was a lack of clarity in draft article 5 (Non-refoulement) regarding its relationship with paragraph 11 of draft article 13 (Extradition). While the commentary to draft article 13 contained a lengthy explanation on the distinction between the two provisions, her delegation was of the view that it would be preferable if draft article 5 itself were clearer, rather than the interpretation being provided only in the commentary.

23. Draft article 11 (Fair treatment of the alleged offender) focused on persons under investigation against whom measures had already been taken in connection with an investigation into crimes against humanity. While the draft article set forth the need for States to guarantee fair treatment, including a fair trial, protect the rights of the alleged offender during the investigation, and enable access to consular authorities, her delegation was of the view that stronger guarantees should be provided, covering both the judicial process and the investigation phase, such as the obligation of States to investigate and punish crimes within a reasonable period of time, the presumption of

innocence, the right of accused persons to a defence, the right not to testify against oneself or one's family members, the right to appeal, the right to public proceedings and to contest evidence, the application of the principle of non-retroactivity, the right to consular assistance, and other rights enshrined in treaties and in customary international law and recognized by international and regional courts. The Inter-American Court of Human Rights, for instance, recognized an array of criminal procedural safeguards that would be worth including in the draft article. Alternatively, the draft article could state that the safeguards listed were the minimum requirements and that States might have additional obligations under customary law, regional or national law and other instruments.

24. With regard to draft article 12 (Victims, witnesses and others), her delegation noted that the text enshrined the protection of complainants, witnesses and their relatives and representatives against ill-treatment or intimidation, as well as the rights and special treatment of victims, with States allowed to define the term "victim" in accordance with their national laws. Her delegation was pleased that the category of persons to whom protection was afforded had been expanded, in line with the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the International Convention for the Protection of All Persons from Enforced Disappearance. The draft article also required States to enable the views and concerns of victims to be presented and considered, and set out the right of victims to obtain reparation for material and moral damages, on an individual or collective basis, and the specific situations and contexts in which reparations were appropriate. States had the flexibility to decide, in accordance with their national laws, what form of reparation to provide, which was not limited to the forms listed in the draft article. That comprehensive reparative concept was also found in the International Convention for the Protection of All Persons from Enforced Disappearance.

25. Any future treaty on crimes against humanity must address the rights of victims of such crimes, as the protection of victims' rights was a fundamental aspect of the prevention, suppression and punishment of crimes against humanity. Draft article 12 was important because it established the right of victims to participate in proceedings. Her delegation suggested that, instead of leaving it up to individual States to define the term "victim", the draft article could include a definition of the term, similar to the one in rule 85 of the Rules of Procedure and Evidence of the International Criminal Court.

26. **Mr. Al-edwan** (Jordan) said that the wording of draft article 5 (Non-refoulement), and the obligation contained therein, did not reflect customary international law. The draft article was proposed as *lex ferenda* and would put a significant burden on the State in whose territory the person was present. Draft article 5 should either be deleted or redrafted to ensure that it would not be unlawful for a State to return a person to a part of the territory of another State where he or she would not be in danger of being subjected to a crime against humanity. The risk of crimes against humanity being perpetrated did not always affect all parts of a State, particularly in situations of non-international armed conflict. A State should not be prevented from returning an individual to those parts of another State where no such danger existed.

27. **Mr. Hollis** (United Kingdom) said that his delegation welcomed the wording of draft article 11 (Fair treatment of the alleged offender), since fair treatment, the right to a fair trial and full protection of one's rights were fundamental tenets of the rule of law, and the ability of any person against whom measures were being taken to contest those measures was essential to the proper functioning of justice. His delegation took note of the Commission's decision to include a reference to human rights law and international humanitarian law in paragraph 1, and welcomed the reference, in paragraph (7) of the commentary to the draft article, to the specific standards set forth in article 14 of the International Covenant on Civil and Political Rights, as well as to the 1949 Geneva Conventions and their Additional Protocols. It was important to ensure that the provisions of paragraph 2, in respect of the State of nationality, were fully consistent with those of article 36 of the Vienna Convention on Consular Relations. Furthermore, the wording of paragraph 2 (a), which provided that a State could exercise a consular function over a stateless person, appeared to be novel in international law. It was not clear to his delegation how that process would work in practice.

28. Turning to draft article 12 (Victims, witnesses and others), he said that the real cost of crimes against humanity was the devastating impact on victims and their families and communities. It was important to listen to and engage with victims, for whom ensuring accountability for such crimes might be broader than bringing criminal proceedings. The absence of a crimes against humanity framework meant that victims and survivors of such crimes did not get the recognition and redress they deserved. For justice to be delivered, victims, survivors and witnesses must be empowered to have their voices heard in proceedings, and must not be

prevented from obtaining appropriate reparation. His delegation welcomed the extensive work undertaken by the International Criminal Court to place the participation of victims at the heart of its policy approach, as set out in its 2010 policy paper on victims' participation.

29. With regard to paragraph 1 (a), his delegation welcomed the statement that "any person" alleging that crimes against humanity had been or were being committed had the right to complain to the competent authorities. Paragraph (8) of the commentary to the draft article clarified that "any person" included but was not limited to victims and witnesses, and might include legal persons such as religious bodies or non-governmental organizations. His delegation had previously supported the Commission's decision not to define the term "victim", given the differing approaches at the national level. However, as some States, experts and organizations saw benefits in including such a definition, his delegation was considering its position and would be interested in hearing the views of other Committee members on that point. A definition of "victims" was provided in rule 85 of the Rules of Procedure and Evidence of the International Criminal Court. He noted the calls by some for such definitions to be broadened to include persons who had witnessed traumatic crimes against humanity or who had suffered indirect harm years after the commission of such crimes, such as children born of sexual violence.

30. Paragraph 1 (b) stated that complainants, victims and witnesses, their relatives and representatives, as well as other persons, must be protected against ill-treatment and intimidation. In that regard, paragraph (11) of the commentary to the draft article helpfully clarified that the term "ill-treatment" related not just to physical well-being, but also "psychological well-being, dignity or privacy". His delegation wondered whether it would be preferable to state that in the draft article itself, as in article 68 of the Rome Statute of the International Criminal Court. The draft article could also set out the need for States, when considering the protection of witnesses and victims, to have regard to all relevant factors, including the person's age, gender and health and the nature of the crime. That was particularly important if the crime involved sexual or gender-based violence or violence against children.

31. His delegation supported the Commission's decision to frame the right to obtain reparation in broad terms and its focus on a comprehensive reparative concept. For example, in his delegation's view, the right to reparation should not necessarily be dependent on the conclusion or result of criminal proceedings. The

non-exhaustive list of forms of reparation contained in paragraph 3 should ensure that victims' ability to obtain reparation was not limited. Paragraphs (17)–(24) of the commentary to the draft article listed the various ways in which reparations could be provided and explained that the list of forms of reparation in the draft article was preceded by the words “as appropriate” to acknowledge that States must have some flexibility and discretion to determine the appropriate form. Given that the reparation of harm was paramount to survivors and victims, his delegation was open to exploring the proposals of other Committee members, in consultation with survivors, with a view to seeing whether the wording on reparations could be further strengthened.

32. **Mr. Ghorbanpour Najafabadi** (Islamic Republic of Iran), referring to draft article 5 (Non-refoulement), said that the current wording could lead to the requested State arbitrarily refusing to grant extradition to the requesting State. Non-refoulement was a principle of international human rights law, according to which no person should be expelled, returned or extradited to another State if there were reasonable grounds for believing that he or she would be subjected to acts such as torture, degrading treatment or execution. The attempt to extend the principle of non-refoulement to crimes against humanity on the basis of texts relating to international human rights law was not acceptable. In addition, his delegation wondered how a court that did not have access to evidence could refuse to grant extradition based on the suspicion that a person might be subjected to crimes against humanity, a crime with specific characteristics committed over time. The Convention on the Prevention and Punishment of the Crime of Genocide did not refer to non-refoulement. Accordingly, his delegation saw no added value in including draft article 5.

33. With respect to draft article 11 (Fair treatment of the alleged offender), his delegation suggested that paragraph 3 could be amended to state that the rights referred to in paragraph 2 should also be exercised in conformity with the Vienna Convention on Consular Relations.

34. Concerning draft article 12 (Victims, witnesses and others), his delegation's general recommendation was that the topic be left to the jurisdiction of States. However, with respect to the issue of reparation, covered in paragraph 3, his delegation believed that only the State under whose jurisdiction the crime had taken place had the competence to consider a request for reparation. When compensating alleged victims of crimes against humanity, the competent authorities must abide strictly by the principle of the immunity of States

and their property. That principle should also be reflected in draft article 12.

35. **Mr. Boerma** (Kingdom of the Netherlands) said that his delegation welcomed draft article 5 as drafted, as non-refoulement was an essential protection under international law. The Kingdom of the Netherlands also attached great importance to the right to a fair trial and due process, as set out in the European Convention on Human Rights and various United Nations human rights treaties, and was a proponent of strong wording in that regard.

36. With respect to draft article 12 (Victims, witnesses and others), his delegation recognized that there was a general development in both national and international criminal law aimed at strengthening the legal position of victims of serious crimes. His delegation wished to recognize the important contribution of civil society, including Amnesty International, which had proposed a number of amendments to the draft articles in its 17-point programme for a convention on crimes against humanity, with a view to ensuring that the rights of victims were fully recognized.

37. **Mr. Muniz Pinto Sloboda** (Brazil) said that his delegation commended the Commission for its balanced drafting of draft article 5 (Non-refoulement), which reflected the widely shared understanding that States should not expel or return people to territories where their lives or freedom would be at risk. The principle of non-refoulement was enshrined in various international and regional instruments, including the Fourth Geneva Convention, the Convention relating to the Status of Refugees, the Convention against Torture, the International Convention for the Protection of All Persons from Enforced Disappearance, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

38. The principle of non-refoulement now had a broader scope than when it had initially been envisaged in the 1951 Convention relating to the Status of Refugees. Many human rights monitoring bodies had interpreted their respective instruments as establishing an absolute prohibition of expulsion or return, normally based on the risk of “irreparable harm”. It was his delegation's view that draft article 5 should follow a similar approach and include, as grounds for applying the non-refoulement principle, not only the risk that a person would be subjected to a crime against humanity, but also the risk of genocide, war crimes and torture.

39. Draft article 11 (Fair treatment of the alleged offender) could be strengthened in order to bring it closer to the fair trial guarantees provided in, for instance, the Rome Statute. Some of the guarantees

contained in articles 55 and 67 thereof, on the rights of persons during an investigation and the rights of the accused, respectively, were not included in the draft articles. While paragraph 1 of the draft article did establish the right to fair treatment, the text would benefit from more precision, which could be attained by using the wording of the Rome Statute.

40. Draft article 12 (Victims, witnesses and others) had a major role to play in ensuring justice for victims of crimes against humanity. His delegation welcomed the inclusion, in paragraph 3, of a comprehensive list of forms of reparation for material and moral damages and of the concept of collective reparations. Such provisions reflected the centrality of victims, the evolution of international human rights law and the jurisprudence of regional tribunals, including the Inter-American Court of Human Rights.

41. **Mr. Amaral Alves De Carvalho** (Portugal) said that the human rights provisions contained in draft articles 5, 11 and 12 were of central importance within the general framework of the draft articles. Referring to draft article 5, his delegation welcomed the explicit reference to the principle of non-refoulement, which constituted an essential protection under international human rights law, refugee law, humanitarian law and customary law. While that principle was not new or specific to the draft articles on prevention and punishment of crimes against humanity, his delegation supported the inclusion of a provision that clearly prohibited States from expelling, returning, surrendering or extraditing a person to another State where there were substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity. With respect to the concerns raised by the representative of Egypt, namely that the provisions of the draft article were too vague and left room for politicization, he noted that the Human Rights Committee and the Committee against Torture had developed guidance on how to implement similar provisions, which might help to address those concerns.

42. With regard to draft article 11 (Fair treatment of the alleged offender), his delegation welcomed the inclusion of the draft article and the clarification that the rights of the alleged offender must be guaranteed “at all stages of the proceedings”. Respect for the rules of fair treatment and the rights of alleged offenders under applicable national and international law was indispensable for ensuring the legitimacy of national courts’ efforts to end impunity for crimes against humanity. His delegation noted that the formulation “fair treatment at all stages of the proceedings” was intended to incorporate all the guarantees generally recognized to a detained or accused person under

international law, including those contained in article 14 of the International Covenant on Civil and Political Rights. His delegation also welcomed the reference to “a fair trial”, a concept that, under human rights law, included the need for an independent judiciary to investigate and judge crimes, defendants’ access to lawyers of their choosing, and the ability to confront evidence. That appeared to be incompatible with investigations conducted by and judgments handed down by military courts. His delegation also welcomed paragraph 2, which included a reference to the right to consular access, in line with article 36 of the Vienna Convention on Consular Relations and with international law. His delegation was open to considering the inclusion of wording stating that the safeguards listed were the minimum requirements and were without prejudice to other safeguards applicable under national or international law, as suggested by the representative of Colombia.

43. With regard to draft article 12, measures to ensure the protection of the rights of victims, witnesses and other persons affected by the commission of crimes against humanity were not only consistent with international law, but also instrumental in empowering victims to speak up, report crimes and participate in criminal proceedings, and in promoting the necessary conditions to ensure accountability and justice. His delegation noted that the obligation contained in paragraph 2 was to be implemented in accordance with national law, giving States the flexibility to tailor the requirements of that provision to the characteristics of their criminal law systems, without prejudice to any additional obligations that each domestic system had established or might establish.

44. His delegation supported the principle contained in paragraph 3, according to which victims of a crime against humanity had the right to obtain reparation for material and moral damages; however, it would be supportive of a stand-alone article dealing specifically with that right. His delegation was also open to exploring how the provision on reparations could be further strengthened.

45. **Mr. Milano** (Italy) said that his delegation supported draft article 5 (Non-refoulement) as currently drafted. The principle of non-refoulement in the event that a person faced the risk of being subjected to a crime against humanity reflected a general principle of international human rights law found in the Fourth Geneva Convention, the Convention relating to the Status of Refugees, the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance.



46. Draft article 11 was of great importance as it expressly recognized the right of alleged offenders to fair treatment, including a fair trial, in accordance with constitutional guarantees and international human rights standards. Regardless of the gravity of the offence, States had an obligation to fully respect that right. The provisions set out in paragraph 2 of the draft article, on the consular rights of persons in prison, custody or detention in a foreign State, were fully in accordance with article 36, paragraph 1, of the Vienna Convention on Consular Relations. Paragraph 3 of draft article 11 made provision for the more detailed requirements and conditions established under the national criminal law of the State concerned, similar to article 36 of the Vienna Convention.

47. His delegation welcomed the inclusion of draft article 12 on the rights of victims of crimes against humanity, in line with recent international human rights treaties and the statutes of international criminal courts and tribunals, including the Rome Statute. Such rights included the right to participate in criminal proceedings in accordance with the law of the State where criminal jurisdiction was being exercised. His delegation could also support the provisions set out in paragraph 3 of the draft article, concerning the right of victims to obtain reparation, as the provisions were drafted in broad terms and encompassed various forms of reparation that could be provided under national law.

48. **Mr. Nyanid** (Cameroon) said that his delegation welcomed the inclusion in the draft articles of the safeguards provided for in draft articles 5, 11 and 12. It was interesting to hear States' differing views on non-refoulement. He wondered what would happen to genuine refugees if the principle of non-refoulement was not recognized. His delegation, which was in favour of broadening the topic of crimes against humanity, agreed with the representative of the United Kingdom that draft article 11 should be consistent with the provisions of the Vienna Convention on Consular Relations and that the definition of the term "victim" could be broadened to include persons who had witnessed traumatic crimes against humanity or who had suffered indirect harm. However, his delegation did not agree that the right to reparation should not necessarily be dependent on the result of criminal proceedings. What would be the legal basis for reparations if criminal proceedings did not result in a guilty verdict?

49. The principle of non-refoulement set forth in draft article 5 was derived from refugee law and provided that States must systematically admit to their territory any person fleeing his or her country of origin if there was a risk of that person being subjected to a crime against

humanity. However, the application of the principle was subjective and could give rise to abuse and legal uncertainty because the requested State was responsible for assessing the situation in another State's territory. Draft article 5 weakened the measures to be taken by States under draft articles 6–10. The latitude given to the requested State to make a value judgment about the social and political situation of the requesting State was questionable and a matter of concern for weaker States, which were often, owing to preconceived ideas, characterized in ways that did not reflect reality.

50. The provisions of draft article 5, while drafted in good faith, were misguided. It was hard to imagine how a small requested State could cite the existence in a large requesting State of "a consistent pattern of gross, flagrant or mass violations of human rights or serious violations of international humanitarian law", even if there was proof that such assertions were true. In addition, the process of gauging respect for human rights was full of value judgments and depended on the circumstances and the interests involved. Full respect for human rights remained an ideal, the achievement of which was no easy feat for any country.

51. States had a legitimate right to refuse extradition, but the grounds for refusing extradition should be better developed and based on unambiguous processes. In their current form, the draft articles could legitimize the right of States to refuse to extradite a person who had committed a criminal offence. The decision to refuse to extradite a person should be based on an objective assessment of the laws of the requesting State, not a subjective assessment of the political situation therein.

52. While his delegation welcomed draft article 11 (Fair treatment of the alleged offender), which reflected due process as recognized in international and national law, it had doubts about paragraph 3, regarding the means by which the rights referred to in paragraph 2 should be exercised, given that under the laws of some countries, such rights were so strictly regulated that they had no real meaning. The phrases "communicate without delay" in subparagraph 2 (a) and "to be informed without delay" in subparagraph 2 (c) were vague and relative. It was left up to the State under whose jurisdiction the person was present to decide whether such entitlements had indeed been granted "without delay", which was in any case difficult to measure. If those provisions, which underpinned due process, were not well regulated, the spirit and the letter of paragraph 1, which sought to guarantee at all stages of the proceedings the fair treatment of the alleged offender, and the full protection of his or her rights, would be flouted.

53. Draft article 12 contained standard measures for the protection of victims and witnesses. His delegation supported paragraph 3, which was in line with article 4 of the draft Code of Crimes against the Peace and Security of Mankind. Regulation No. 17 implementing Articles 85 and 86 of the Treaty establishing the European Economic Community also reflected some interesting developments in that regard. The paragraph did not address the issue of prison sentences, but covered forms of reparation such as restitution, compensation, satisfaction, rehabilitation, cessation and guarantees of non-repetition.

54. **Ms. Hutchison** (Australia) said that draft articles 5, 11 and 12 contained an array of fundamentally important protections for victims, witnesses and those at risk of being subjected to crimes against humanity, as well as alleged offenders.

55. Her delegation appreciated the intention behind draft article 5 (Non-refoulement). While some States felt that the draft article overlapped with existing obligations under international law, her delegation was of the view that compliance with those existing obligations would, in the majority of instances, constitute compliance with its provisions. The Special Rapporteur appeared to share that view, having observed in his fourth report ([A/CN.4/725](#)) that draft article 5 was consistent with non-refoulement provisions contained in numerous treaties and strengthened such provisions in the context of crimes against humanity.

56. With respect to the specific threshold that would give rise to the non-refoulement obligation, her delegation was of the view that for there to be “substantial grounds” for believing a person to be in danger of being subjected to the conduct in question, there must be a personal, present, foreseeable and real risk to that person. That standard, established by various expert treaty bodies and international courts, should apply in respect of non-refoulement arising in relation to a crime against humanity. While the commentary reinforced that point with a number of examples, draft article 5 itself could be clarified.

57. Her delegation was supportive of draft article 11 (Fair treatment of the alleged offender), which set out important protections and safeguards that were critical for ensuring the legitimacy of accountability efforts. The draft article appeared to strike the right balance in relation to the wide array of rights to which a suspect or defendant before a national court was entitled under international law, without being too prescriptive. It was not necessary for the draft articles to elaborate on the well-established body of international human rights law

that defined the meaning and scope of the terms “fair treatment” and “fair trial”.

58. Her delegation was also supportive of draft article 12, which addressed the rights of victims and witnesses in a way that was consistent with other treaties concerning crimes. Paragraph 1 could be clarified to make it clear that the obligations contained therein would apply with respect to alleged crimes against humanity occurring within the territory under a State’s jurisdiction, an interpretation that seemed to be reflected in the commentaries to the draft articles. Her delegation was considering how to strengthen the integration of gender equality and First Nations perspectives into the draft articles, in particular draft article 12, and would welcome further discussion on the matter.

59. **Ms. Lungu** (Romania), referring to draft article 5, said that her delegation supported the inclusion of a non-refoulement provision in the draft articles, as it was important to establish a general prohibition on returning, surrendering or extraditing a person to a State where he or she might be in danger of being subjected to a crime against humanity. As noted in the commentary, the principle of non-refoulement was included in a number of human rights and humanitarian treaties.

60. With regard to draft article 11 (Fair treatment of the alleged offender), her delegation supported its inclusion in the draft articles. Guaranteeing the fair treatment, including a fair trial, of alleged offenders and respecting their due process rights was essential for establishing the legitimacy of national courts’ efforts to end impunity. The principle of fair criminal proceedings was expressly included in article 8 of the Criminal Procedure Code of Romania.

61. With respect to draft article 12 (Victims, witnesses and others), Romania supported the inclusion of extensive provisions addressing the rights of victims, witnesses or other persons, on issues ranging from the right to complain to the competent authorities to protection against ill-treatment and intimidation as a consequence of any complaint, information, testimony or other evidence given. The right of victims to be heard during criminal proceedings and to obtain reparation for material and moral damages, in the forms indicated in paragraph 3, was crucial. Her delegation was open to suggestions aimed at strengthening the provisions of draft article 12.

62. *Ms. Romanska* (Bulgaria), *Vice-Chair*, took the Chair.

63. **Ms. Marubayashi** (Japan) said that her delegation hoped that draft article 5 (Non-refoulement) would gain

broad support. With respect to the application of the non-refoulement principle, the Committee needed to discuss in more depth the exact means of determining the existence of “substantial grounds” for believing that a person would be in danger of being subjected to a crime against humanity.

64. Turning to draft article 12 (Victims, witnesses and others), she said that her delegation proposed that the words “where appropriate” be added to paragraph 1 (b), as the scope of the actions envisaged to protect victims was not clear.

65. **Mr. Kelly** (United States of America) said that, with regard to draft article 5, the principle of non-refoulement played an important role in protecting individuals from certain acts prohibited under international law. The non-refoulement provisions contained in the Convention relating to the Status of Refugees and the Convention against Torture, for instance, were critical to ensuring that individuals around the world were protected from being returned to countries where they would face persecution or torture. While draft article 5 would provide complementary protection, his delegation was aware that some States faced challenges in implementing their existing non-refoulement obligations. Unlike article 33 of the Convention relating to the Status of Refugees, draft article 5 provided for no exceptions. Accordingly, his delegation was of the view that the non-refoulement obligation set out therein, including its potential scope, should be considered further by States.

66. Draft article 11 (Fair treatment of the alleged offender) reflected an important principle recognized by the International Military Tribunal at Nuremberg, namely that any person charged with a crime under international law must be treated fairly at all stages of the proceedings. That principle was also included in other instruments, including the International Covenant on Civil and Political Rights and the Convention against Torture. A reference to fair-trial guarantees would be an important element of any future convention on crimes against humanity. Nevertheless, draft article 11 would be clearer and more effective if it were to specify which rights under applicable national or international law, including international human rights law and international humanitarian law, were included.

67. With respect to draft article 12 (Victims, witnesses and others), his delegation welcomed the focus on the rights of victims, their relatives and representatives, and witnesses, who played a key role in proceedings relating to crimes against humanity. Ensuring that victims and witnesses were heard, were able to obtain redress, as appropriate, and were not subjected to retaliation was

critical to holding accountable those responsible for such crimes and to providing victims and their families with some measure of justice. While draft article 12 was an important step in that regard, his delegation had questions about the “right to obtain reparation”. Given that States addressed issues relating to remedies in a range of ways in their domestic legal systems, and that the provisions of widely ratified treaties, such as the Convention against Torture, provided useful models, his delegation saw value in discussing the concept of reparation further and would be interested in hearing the views of other States.

68. **Ms. Padlo-Pekala** (Poland) said that her delegation, having previously strongly advocated a victim-oriented approach to the prosecution of international crimes, welcomed draft article 12. However, the provisions for the protection of victims, witnesses and others could be further strengthened by including a direct reference to States’ obligations towards victims in draft article 3 (General obligations). In addition, the draft articles could be made even more ambitious by the inclusion of a separate provision on the protection of the most vulnerable category of victims, namely children. Such a provision could be modelled on articles 1 and 39 of the Convention on the Rights of the Child, article 24 of the International Covenant on Civil and Political Rights and article 25 of the International Convention for the Protection of All Persons from Enforced Disappearance. It should emphasize that the best interests of children must be a primary consideration during their physical and psychological recovery and social reintegration, a process that should take place in an environment that fostered their health, self-respect and dignity.

69. The wording of the draft articles in general should not depart from that of widely ratified human rights instruments. In particular, the wording of the anti-discrimination clauses – draft article 2, paragraph 1 (h), and draft article 13, paragraph 11 – should be harmonized with that of the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention against Torture and the Fourth Geneva Convention, all of which referred, *inter alia*, to sex, race, religion, nationality, ethnic origin, culture and membership of a particular social group. Her delegation did not view the exclusion of a definition of the term “gender” from draft article 2 as a positive change. The definition codified in the Rome Statute should be retained in the draft articles to enhance terminological consistency and coherence in international law.

70. **Mr. Gómez Robledo Verduzco** (Mexico) said that his delegation supported the inclusion of draft article 5 as the principle of non-refoulement was an essential component of efforts to prevent crimes against humanity and was included in a number of widely ratified conventions, including the Convention against Torture, the Convention relating to the Status of Refugees and the Cartagena Declaration on Refugees. The wording of draft article 5 was consistent with several international treaties, which enabled a better understanding of the draft article as various courts and committees of experts had already interpreted the principle, as explained in the commentary.

71. With regard to draft article 11 (Fair treatment of the alleged offender), the legitimacy of any investigation or punishment depended on the human rights of the accused being fully respected, regardless of the seriousness of the crime in question. Due process was a fundamental component of the administration of justice. Paragraph 1 must be interpreted in the broadest sense to encompass all stages of the proceedings, from arrest to the end of a person's prison sentence, where applicable, with respect for all procedural safeguards under national and international law, in particular the presumption of innocence. The application of the draft article would allow States, in their domestic jurisdiction, to build on the important developments in relation to procedural rights reflected in the case law of various regional courts, including the Inter-American Court of Human Rights. With respect to paragraphs 2 and 3, his delegation reiterated the importance of the rights contained in article 36 of the Vienna Convention on Consular Relations and the interpretations of the International Court of Justice on the scope and nature of such rights in the cases *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *LaGrand (Germany v. United States of America)*, *Avena and Other Mexican Nationals (Mexico v. United States of America)* and *Jadhav (India v. Pakistan)*. He recalled that the Vienna Convention on Consular Relations, which was close to being universally accepted, had originated as an output of the International Law Commission.

72. Turning to draft article 12 (Victims, witnesses and others), which contained provisions fundamental to ensuring the success of a future convention on crimes against humanity, he said that his delegation generally supported its content. The central importance of the rights of victims, witnesses and other affected persons must be recognized. The wording of paragraph 3 reflected the evolution of the concept of reparation in various international instruments. His delegation supported the Commission's decision to refer to the

"right to obtain reparation", reflecting a comprehensive concept of reparation, and to include a non-exhaustive list of forms of reparation, given that States must have the flexibility to determine the form based on the specific context. Rehabilitation for victims, witnesses and other affected persons should include mental health care.

73. **Mr. Hernandez Chavez** (Chile) said that draft article 5 (Non-refoulement) would be a useful and necessary element of a future convention. The inclusion of such a provision was consistent with the approach taken in other relevant conventions, including the Convention against Torture. His delegation welcomed the removal of the reference to "territory under the jurisdiction of" another State from paragraph 1, since the purpose of the provision was not to prevent people from being sent to particular physical locations but rather to prevent them from being handed over into the control of particular States, where there were substantial grounds for believing that they would be subjected to a crime against humanity. His delegation also welcomed the inclusion of the reference to international humanitarian law in paragraph 2. However, since international humanitarian law was only applicable in the context of armed conflict, it might be advisable to add the words "as appropriate".

74. Draft article 12 (Victims, witnesses and others), setting out the basic conduct required of States in their treatment of victims, was a balanced provision with an appropriate scope. However, the drafting could be improved. His delegation welcomed the inclusion of paragraph 3, concerning reparation, without which it was impossible to ensure the effective and lasting restoration of the rule of law or to establish the conditions necessary to prevent the recurrence of crimes against humanity. His delegation appreciated the fact that the text clarified which States were obligated to provide reparation. The Commission would have the opportunity to examine the question of reparation in more detail when it came to consider the topic "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law", which was currently on its long-term programme of work.

75. **Mr. Khng** (Singapore), referring to draft article 11, said that his delegation welcomed the inclusion of a succinct provision indicating that the alleged offender was entitled to fair treatment, which was consistent with relevant international conventions. His delegation agreed with the view of the Commission, reflected in the fourth report of the Special Rapporteur on crimes against humanity (A/CN.4/725), that it was not necessary to replicate in the draft article the wide

array of rights to which a suspect or defendant before a national court was entitled under international law. His delegation noted that, pursuant to paragraph 1 of the draft article, the State must afford the accused the legal protection to which he or she was entitled under national and international law.

76. Turning to draft article 12 (Victims, witnesses and others), he said that the reference to moral damages was unnecessary. The scope of damages for which reparation was available should be determined by each individual State, in keeping with the approach taken in many international conventions on crimes. His delegation welcomed the explanation in the commentary that the obligation set forth in paragraph 3 could be fulfilled through the use of regular civil claims processes in national courts, but suggested making that possibility explicit in the draft article itself.

77. **Ms. Bourdon** (Canada), referring to draft article 5 (Non-refoulement), said that it might be worth considering further improvements, taking into particular consideration the wording used in the Convention relating to the Status of Refugees. The title of the draft article might also need to be changed, since “non-refoulement” could be understood to apply only to refugees and asylum-seekers. With regard to paragraph 1, her delegation noted that “surrender” meant handing a person over to a court or international tribunal, while “extradite” meant handing a person over to another State. Since the draft article referred exclusively to the return of individuals to another State, the use of the term “surrender” should be reconsidered.

78. Draft article 11 enshrined the right of the alleged offender to fair treatment and was thus important for the legitimacy of the law. However, it was crucial to enhance the draft article by including references to protection from arbitrary arrest or detention and a person’s rights to liberty and security. Furthermore, paragraph 2 should be amended to make it clear that it concerned the right of States to visit their nationals, rather than the right of an individual to be granted such a visit. It might also be appropriate to include a clear reference to the application of international humanitarian law, if such a reference did not occur earlier in the text. Her delegation considered that the drafting of paragraph 3 could be clearer, although it did not disagree with the substance.

79. Turning to draft article 12, she said that while her delegation fully recognized the rights of victims, witnesses and others to report acts constituting crimes against humanity to the competent authorities, it was important to make it clear in the text that the measures that States were required to take were limited to those

falling within the scope of their jurisdiction. In paragraph 1 (b), States should be given more flexibility in relation to the establishment of protection procedures, which might require a case-by-case analysis and might differ between States. References to sexual and gender-based violence, conflict-related sexual violence and violence against children should also be incorporated into paragraph 1 (b), with a view to preventing the retraumatization of victims and witnesses. It might be worth expanding the scope of paragraph 2 to apply not only to victims but also to their families and representatives. The general principle of international law whereby national laws could not take precedence over international legal obligations must be respected in the application of the provision. However, the stipulation that the measures provided for could be taken in accordance with national law was important. Given that the right to restitution was not the same in all States, her delegation suggested that reference be made in paragraph 3 to the right to seek restitution, in line with the articles on responsibility of States for internationally wrongful acts. That approach would ensure a degree of coherence in the definition.

80. **Mr. Skachkov** (Russian Federation), referring to draft article 5, said that the provision on non-refoulement was not an element of international criminal law, but rather was derived from human rights law, as evidenced by the fact that no such provision had been included in the Genocide Convention. There was therefore no reason to include the draft article. That position aside, the phrase “substantial grounds for believing”, in paragraph 1, provided States with too much latitude, which could lead to abuses and politicization in matters of extradition and mutual legal assistance. The provision could also undermine bilateral and multilateral extradition and mutual legal assistance agreements. The draft article was also subject to politicization and non-uniform interpretation and application owing to the reference in paragraph 2 to “gross, flagrant or mass violations of human rights” as a separate category from “serious violations of international humanitarian law”.

81. Draft article 11 (Fair treatment of the alleged offender) contained provisions that did not appear to be specific to the treatment of an offender alleged to have committed a crime against humanity. Their inclusion could give the incorrect impression that investigations of such crimes were held to different standards with regard to the treatment of alleged offenders. Instead, reference should be made to national law. The draft article also did not specify any consequences for not guaranteeing fair treatment, including a fair trial, and full protection of the alleged offender’s rights. Although

it did provide for the right of alleged offenders to communicate with representatives of their State of origin, it did not specify a time frame, which could result in the exercise of those rights being delayed or denied.

82. Draft article 12 (Victims, witnesses and others) had no added value and included wording that lent itself to different interpretations, such as the phrase “shall be protected against ill-treatment or intimidation”, which could lead to disagreements regarding what types of protective measures were appropriate depending on the situation. Although the draft article provided for some protection for victims and other persons participating in investigations, that protection could be insufficient. For example, the draft article contained no mention of the provision of legal assistance to victims or witnesses; such measures would be important for ensuring the protection of their rights but were best left regulated under national law. Lastly, it should be made clear that the protection of the rights of victims should not be used to justify the violation of international law on the jurisdictional immunities of State property.

83. **Mr. Pieris** (Sri Lanka), referring to draft article 5, said that the principle of non-refoulement was an element of sound public policy. It had been incorporated into several international treaties in the twentieth century. Notably, common article 3 of the 1949 Geneva Conventions implicitly included a non-refoulement obligation. The principle had been applied in respect of all aliens, not only refugees, and was often included in extradition treaties. It was also reflected in draft articles 11 (Fair treatment of the alleged offender) and 13 (Extradition) of the draft articles under consideration.

84. Draft article 11 enshrined the rights of persons in custody in a State that was not of their nationality, and the protections set out therein were guaranteed at all stages of the proceedings. The standards to be applied to ensure fair treatment were set out in article 14 of the International Covenant on Civil and Political Rights.

85. Draft article 12 addressed the protection of victims, witnesses and others affected by the commission of a crime against humanity, a topic that had not been given sufficient consideration until recently. While efforts had been made in the 1980s to provide for such protection in treaties, it was not until the adoption of the Rome Statute in 1998 that the matter of the rights of victims and witnesses had been addressed effectively. Regrettably, many treaties did not define the term “victim”, which allowed States to apply their own laws and practices, as long as they were consistent with international law. However, it was worth noting that the International Convention for the Protection of All Persons from Enforced Disappearance and the

Convention on Cluster Munitions did provide definitions. Furthermore, although the Convention against Torture did not contain a definition, the Committee against Torture had, in its general comment No. 3 (2012) on the implementation of article 14 by States parties, provided guidance on who should be treated as victims for the purposes of the Convention. Similarly, while the statutes of the International Criminal Court and international tribunals did not define the term, guidance was supplied in relevant documents of those bodies, including the Rules of Procedure and Evidence of the International Criminal Court.

86. In a post-crime scenario, it was important to provide reparation to victims for material and moral damages, on an individual or collective basis, in the form of restitution, compensation, satisfaction, rehabilitation, cessation and guarantees of non-repetition. One of the first steps towards establishing restorative justice systems had been the adoption of General Assembly resolution 3 (I) of 13 February 1946, aimed at ensuring that war criminals were brought to trial for crimes committed during the Second World War. The adoption of the Charter of the Nuremberg Tribunal, and of General Assembly resolution 95 (I) affirming the principles set out therein, had built upon that progress. Later developments included the adoption of the Genocide Convention; the adoption of a number of General Assembly resolutions, including resolution 3074 (XXVIII) of 3 December 1973 on the principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity; and the adoption by the General Assembly of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005. It was also worth bearing in mind that in 1997, pursuant to General Assembly resolution 52/135, a group of experts had been established to evaluate evidence and address the issue of individual accountability in connection with the situation of human rights in Cambodia. Thereafter, a series of procedures had been adopted to address the issue in different parts of the world.

87. Responding to the comments made by the representative of Cameroon at the previous meeting, concerning the question of whether resolution 3074 (XXVIII) was being implemented in practice, he said that the drafters of instruments that had formed the foundation of international law must have intended them to be effective and meaningful. Pursuant to paragraph 3 of that resolution, States were required to cooperate with each other on a bilateral and multilateral basis with a



view to preventing crimes against humanity, and to take the domestic and international measures necessary for that purpose. More recently, in its resolution 1674 (2006), the Security Council had recognized the responsibility of States to protect civilians in times of armed conflict. Many Member States had incorporated the obligations provided for in those resolutions into their domestic law. Recognition of the duty of States to exercise universal jurisdiction was increasing, and a growing number of States were enacting the domestic legislation necessary for the exercise of such jurisdiction.

88. If accountability were to be codified formally, other rights relevant to transitional justice – namely, the rights to truth, reparation and guarantees of non-repetition – should also be taken into account and considered as human rights. Victims of crimes against humanity who had individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights must be given easy access to the procedures designed to ensure that they received fair treatment, restitution, compensation, reparation and assistance in regaining their humanity and the ability to live their lives with dignity. His country, as part of its own post-conflict reconciliation process, had adopted many measures related to reparation and other restorative justice mechanisms.

89. **Mr. Ekren** (Türkiye) said that the wording on compensation in paragraph 3 of draft article 12 (Victims, witnesses and others) should indicate that the obligations set out therein could be satisfied by the availability of civil claims processes in the national law of the State.

90. **Ms. Grandjean** (Belgium) said that her delegation attached great importance to the inclusion of safeguards in the draft articles. The principle of non-refoulement as set forth in draft article 5 was an essential tool for the protection of human rights. It was reflected in various widely ratified conventions, including the Convention against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance, and had been reaffirmed many times by international and regional courts. A large number of States, including hers, had incorporated it into their national law.

91. With regard to draft article 11 (Fair treatment of the alleged offender), the guarantees set forth in paragraph 1 must be maintained at every stage of the proceedings, in accordance with the highest international standards. The right to fair treatment had been enshrined in many international and regional conventions on the protection of human rights and was

crucial in the fulfilment of the obligation to punish crimes against humanity. In keeping with recent conventions related to international criminal law, paragraphs 2 and 3 recalled the right of detained persons to communicate with representatives of their State of nationality or a State otherwise entitled to protect their rights, which was provided for in the Vienna Convention on Consular Relations.

92. Turning to draft article 12 (Victims, witnesses and others), she said that accountability for the most serious crimes was essential in order to restore public trust in inclusive institutions and thereby bring about lasting peace. Therefore, it was important to adopt a victim-centred approach, ensuring that those affected by crimes against humanity were able to benefit from protection measures, if necessary, and to submit complaints and have their opinions and concerns taken into account during judicial proceedings. It was essential for States to enable victims to enjoy their right to full reparation for the material and moral damages suffered. To that end, States must put in place effective independent judicial bodies with the authority to rule on the right to reparation and ensure that all victims had access to those bodies. Accountability processes must be inclusive in nature, in order to ensure that they were effective and credible.

93. **Mr. Mainero** (Argentina), referring to draft article 12 (Victims, witnesses and others), said that his delegation fully supported its inclusion in the draft articles. However, the draft article could be further strengthened through the inclusion of a definition of the term “victim”, in order to avoid fragmentation. While States approached the issue of victims differently, a definition in a future convention could establish a minimum basis for the treatment of victims in national law.

94. The right of victims to know the truth regarding the circumstances of the crime against humanity should be enshrined in draft article 12. It was important to establish the truth, since widespread or systematic attacks against civilian populations often involved the spreading of misinformation encouraging or justifying the crimes, and the gravity of the crimes meant that they were usually concealed or refuted. Safeguarding the right to truth was linked to the protection of other rights of victims, such as the right to judicial guarantees and the right of access to information. It also entailed an obligation for States to clarify, investigate, prosecute and punish the crimes.

95. The draft article could also be amended to address certain practical problems that had arisen in relation to witnesses. In some cases, witnesses had been unable to

travel to the State investigating the crimes to provide statements because they did not have travel documents. In particular, stateless persons, refugees living in camps and asylum-seekers often did not have passports or any identity documents from their countries of origin. The draft article should therefore provide that the State in which a person in such a situation was living should work with the State that required the person to travel for the purposes of making a witness statement to ensure that he or she was able to obtain the necessary documents. It would also be useful for the draft article to require the collaboration of transit countries.

96. **Ms. Machatine Honwana** (Mozambique), commending the interactive nature of the discussions on the draft articles, said that crimes against humanity constituted a serious offence to human dignity and integrity and posed a threat to the peace, security and well-being of the world. It was therefore important to prevent and punish those crimes at the national and international levels, while respecting the principles governing the relationship between domestic and international law.

97. It was also important to protect the victims of such heinous crimes. Her delegation therefore supported draft articles 11 (Fair treatment of the alleged offender) and 12 (Victims, witnesses and others) and welcomed the consideration that had been given to international law, including human rights law and international humanitarian law. In that regard, it should be borne in mind that the mandate of the United Nations to maintain international peace and security encompassed the protection of human rights. Mozambique had enacted specific laws to protect victims, witnesses and others, including in connection with crimes against humanity, and the country's Penal Code contained provisions on the prevention and punishment of crimes against humanity, as well as genocide, torture and war crimes.

98. With regard to draft article 5 (Non-refoulement), the reference to a "consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law" could be difficult to interpret, as currently worded, and should be further refined. In particular, it would be useful to clarify the meaning of "consistent patterns", perhaps by adding the phrase "according to international standards" at the end of the sentence.

99. Her delegation strongly supported the elaboration of a convention on prevention and punishment of crimes against humanity. The adoption of such a convention would represent a major contribution to the progressive development and codification of international law.

100. **Ms. Siman** (Malta) recalled that there was a definition of "victim" in paragraph 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which the General Assembly had adopted by consensus in its resolution 60/147.

101. **Ms. Dime Labille** (France) said that the text of the draft articles on prevention and punishment of crimes against humanity should be adopted as an international convention with the widest reach possible. The Commission had, within a reasonable time frame, produced a text of high quality that was intended to become an international instrument meeting the needs of States. Such a convention was much needed, given the importance of combating impunity. Her delegation was pleased that the Committee had agreed by consensus to further consider the text. Delegations should ensure that the interactive discussions at the resumed sessions resulted in progress towards the adoption of a convention.

102. With regard to draft article 5 (Non-refoulement), while the wording of the draft article was based on that in relevant existing conventions, her delegation was not opposed to improving the drafting if necessary. It was absolutely crucial to include a provision on non-refoulement in the future convention. The fact that the related Genocide Convention contained no such provision should not prevent States from fulfilling their wish to strengthen protection against refoulement.

103. **Ms. Bhat** (India) said that the word "shall" in paragraph 1 of draft article 5 (Non-refoulement) made non-refoulement an obligation, whereas the word "believing" in the same paragraph opened the door to non-compliance by giving States discretionary powers. Moreover, the draft article would override existing bilateral treaties on extradition and mutual legal assistance.

104. **Ms. Russell** (New Zealand) said that her delegation supported the inclusion of the safeguards provided for in draft articles 5 (Non-refoulement), 11 (Fair treatment of the alleged offender) and 12 (Victims, witnesses and others), which were important for ensuring consistency with the obligations of States under international human rights law and with well-established principles of the rule of law, such as the right to a fair trial.

105. Her delegation was pleased that draft article 12 provided for the protection and consideration of the rights of victims, which were crucial elements in the prevention and punishment of crimes against humanity.



New Zealand also welcomed the explicit treatment of the question of reparation in paragraph 3 of the draft article. Given the various scenarios that might arise in the aftermath of the crime against humanity, it was appropriate for that provision to provide flexibility for States in determining the appropriate form of reparation and tailoring it to the specific circumstances.

106. **Mr. Xi Yang** (China) said that the principle of non-refoulement referred to in draft article 5 had been enshrined in international human rights instruments and played a positive role in the protection of human rights. However, there was no widespread State practice or international consensus to confirm its applicability in relation to crimes against humanity, and States might misuse the principle as an excuse not to return or extradite criminals. Further deliberation regarding its inclusion in the draft articles was therefore warranted.

107. His delegation generally supported draft article 12, as it considered that strengthening protections for victims, witnesses and other relevant persons was crucial to ensuring that judicial processes were effective and that crimes against humanity were punished. However, the provision should be amended to take into account the different legal systems of the world and give States some discretionary powers. For instance, paragraph 3 provided that each State must take the necessary measures to ensure in its legal system that the victims of a crime against humanity had the right to obtain reparation for material and moral damages, but the criminal laws of some States did not provide for reparation for moral damages. States should be left to determine their own rules in such cases.

108. **Ms. Sayej** (Palestine) said that her delegation strongly supported a victim-oriented approach in the draft articles, since the role of victims and witnesses was indispensable, and their right to reparation must be central to any efforts to prevent and punish crimes against humanity. The draft articles as a whole should reflect applicable standards and best practices with regard to the rights of victims, including the need to ensure that all victims had access to the relevant mechanisms for submitting complaints and claiming reparations.

109. Her delegation welcomed the explicit statement in draft article 12, paragraph 1 (b), that complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in proceedings, must be protected against ill-treatment and intimidation. It looked forward to further discussions on that paragraph, with a view to ensuring wider protection for victims and those cooperating with them.

110. Her delegation noted that the commentary to draft article 12 reflected a clear goal to achieve a more comprehensive concept of reparation, for both material and moral damages. The reference in draft article 12 to obtaining reparation on a collective basis was welcome, given that entire peoples could be victims of crimes against humanity.

*Briefing on the recommendation adopted by the International Law Commission on the occasion of the adoption of the draft articles on prevention and punishment of crimes against humanity*

111. **Mr. Pronto** (Codification Division, Office of Legal Affairs) said that the International Law Commission had been granted the authority in its Statute to make recommendations to the General Assembly. In adopting the Statute, in 1947, the General Assembly had established the Commission as a subsidiary body to assist it in fulfilling its mandate under Article 13, paragraph (1) (a), of the Charter of the United Nations to encourage the progressive development of international law and its codification.

112. The function of the Commission in the progressive development and codification of international law was described in articles 16 to 22 of its Statute. In the context of both progressive development and codification, articles 16 (j) and 22 of the Statute envisaged the Commission concluding its work on each topic with the preparation of a final draft text that would be transmitted to the General Assembly together with a recommendation. The submission of a finalized text to the Assembly was accompanied by a recommendation for action. That system was not unique to the Commission; it was standard practice for subsidiary bodies to make recommendations to their respective parent bodies, and in that regard it could be said that the authority to make recommendations was common to all subsidiary bodies. What was perhaps unique, or at least less common, was that such authority was expressly granted to the Commission by its Statute, which also regulated the scope and types of recommendations that the Commission might make. Moreover, the Commission's work on a particular text was technically not complete until it had made a recommendation for action. While other subsidiary bodies typically had the right to make recommendations, they were not usually required to do so and might opt not to do so.

113. Article 23, paragraph 1, of the Statute of the Commission established four types of recommendations that the Commission could make to the General Assembly: (a) to take no action, the report having already been published; (b) to take note of or adopt the report by resolution; (c) to recommend the draft to

Members with a view to the conclusion of a convention; and (d) to convoke a conference to conclude a convention. In practice, particularly in recent years, the Commission had adopted a variety of recommendations, sometimes with multiple components, but always within the broad contours of article 23. The practice had evolved over time, and the Commission had adopted recommendations tailored to particular outcomes and in accordance with its perceptions of how particular texts would be received by the General Assembly.

114. The adoption of a recommendation by the Commission and the subsequent transmission of the text to the General Assembly signalled a shift in the phase of work. While the Commission was developing a text, the nature of the work was substantive, not only for the Commission but also for States. The Commission's work was typically subject to annual comment and review by States. Opportunities for substantive input were provided at multiple stages. At the conclusion of the first reading, Governments were typically given an entire year to digest and comment on the text.

115. The formal submission of the text, with accompanying commentaries and recommendation, to the General Assembly marked the end of the Commission's work and the beginning a new phase of work for the Committee. The Sixth Committee now had the more procedural task of deciding whether or not to accept the recommendation of the Commission. It was the practice of the Committee to propose the inclusion of a new item in the agenda of the General Assembly, at the following session, to consider the Commission's recommendation. While discussion on the substance of the text was not required per se at that stage, the Committee had, on occasion, undertaken a consideration of matters of substance as part of the process of deciding how to respond to a recommendation made by the Commission. That was precisely the function of the two resumed sessions of the General Assembly that had been scheduled for the consideration of the current agenda item.

116. Recommendations and actions of subsidiary bodies were not binding on their parent bodies. Nonetheless, recommendations adopted by the Commission were very important, as they formed an integral part of the machinery established to implement Article 13, paragraph 1 (a), of the Charter. The issuance of a recommendation was thus a key procedural step in the progressive development and codification of international law. The Assembly's action under that subparagraph had generally been taken on the basis of a recommendation of the Commission. Such a recommendation was therefore dispositive in the sense that it was an authoritative proposal made by the

subsidiary body established by the Assembly to assist it in fulfilling its mandate under Article 13; it was thus worthy of the Assembly's consideration. The recommendations of the Commission over the decades had played a seminal role in the development of the contemporary body of international law.

117. The Commission's recommendatory function was arguably one of its most important responsibilities. The Commission took each of its recommendations very seriously and debated each one extensively, typically on the basis of a discussion and proposal contained in the final report of the relevant Special Rapporteur. As part of its deliberations, it assessed the suitability and viability of the text being developed to serve as a basis for the conclusion of an international convention. In doing so, it routinely took into account the comments made by States as to the final form of the text. Furthermore, the Commission typically adopted recommendations by consensus, meaning that they reflected the collective view of all 34 members. Nonetheless, the question of whether or not to accept a recommendation of the Commission remained entirely in the hands of Member States.

118. Turning to the matter of the Commission's recommendation concerning the draft articles on prevention and punishment of crimes against humanity, he said that from the very beginning of the Commission's work on the topic of crimes against humanity, the stated intention had been the preparation of a set of draft articles to serve as the basis for an international convention. That objective had been clear in the syllabus on the topic adopted in 2013, in the four reports of the Special Rapporteur and throughout the debates in the Commission. Furthermore, in paragraph (2) of the general commentary to the draft articles adopted on first reading in 2017, the Commission had clearly confirmed once again that a global convention on prevention and punishment of crimes against humanity might serve as an important additional piece in the current framework of international law, and in particular, international humanitarian law, international criminal law and international human rights law. The Commission, including its Drafting Committee, had thus worked on that basis and with that goal in mind. It was clear from the discussions held by the Committee each year that Member States had also been well aware throughout the process that the intended outcome of the Commission's work would be a text meant to serve as a basis for an international convention.

119. Accordingly, upon adopting the draft articles at its seventy-first session in 2019, the Commission had decided, in conformity with article 23 of its Statute, to

recommend the draft articles to the General Assembly. In particular, the Commission had recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

120. The procedural question now before the Committee was whether or not to accept the Commission's recommendation and, if so, whether the convention should be elaborated by the General Assembly or by an international conference of plenipotentiaries. The Commission had also recommended that the future convention be negotiated on the basis of the draft articles. While there had been exceptions, the traditional practice had been for the text developed by the Commission to serve as the base text for subsequent treaty negotiation.

121. It was important to consider the Commission's recommendation in the light of its general practice regarding recommendations, as well as the past practice of the General Assembly, in particular the Sixth Committee, in connection with recommendations made by the Commission. Since its establishment, the Commission had brought to a conclusion, through the adoption of a final report or text, its consideration of 47 items, including phases of items. That number did not include topics that had been discontinued or merged into other topics. In a few cases, the Commission had made no recommendation for action per se, choosing instead, for example, simply to bring the contents of its annual report to the attention of the General Assembly.

122. In total, the Commission had adopted approximately 44 recommendations. On some occasions it had adopted multiple recommendations, or even composite recommendations involving several possible steps or alternative actions. In almost all cases, the recommendation had been for distinct action or actions to be taken by the General Assembly. Some of the Commission's recommendations had not concerned the adoption of a text, usually because the product had been a report or a soft law instrument such as draft guidelines, draft conclusions or draft principles, and as such had not been intended for adoption by the Assembly. The Commission had recommended the conclusion of an international convention, either immediately or as a possible future outcome, on 27 occasions. Of those, 14 recommendations had been followed and had resulted in the adoption of 17 treaties (including protocols), either directly or indirectly on the basis of the Commission's proposal. There were more treaties than recommendations because one recommendation on the law of the sea had resulted in four separate conventions.

123. On four occasions, the General Assembly had chosen not to pursue the recommendation of the Commission that a convention be adopted or possibly adopted. Those recommendations had concerned the draft on arbitral procedure of 1953, which had later been transformed into the Model Rules on Arbitral Procedure; the draft articles on most-favoured-nation clauses of 1978; the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier of 1989; and the draft articles on the effects of armed conflicts on treaties of 2011. On one occasion, the Commission had recommended two distinct conventions, but only one had been adopted: the Convention on the Reduction of Statelessness of 1961. On another occasion, in relation to the draft Code of Crimes against the Peace and Security of Mankind of 1996, the Commission had left the outcome entirely to the General Assembly. However, an international convention had been one of the options mentioned. The Committee was currently considering recommendations by the Commission for the adoption, or possible future adoption, of a further eight international conventions, in relation to the articles on responsibility of States for internationally wrongful acts of 2001, the articles on prevention of transboundary harm from hazardous activities of 2001, the articles on diplomatic protection of 2006, the draft articles on the law of transboundary aquifers of 2008, the articles on the responsibility of international organizations of 2011, the draft articles on the expulsion of aliens of 2014, the draft articles on the protection of persons in the event of disasters of 2016 and the draft articles on prevention and punishment of crimes against humanity of 2019.

124. One recent practice of the Commission was the adoption of composite recommendations, such as the recommendation adopted in 2001 in connection with the draft articles on responsibility of States for internationally wrongful acts. Unlike in its earlier recommendations, the Commission had not proposed the immediate elaboration of a convention. Instead, it had made a two-step recommendation, whereby it had first recommended that the General Assembly take note of the draft articles and annex them to a resolution, and then had further recommended that the Assembly consider, at a later stage and in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles. Thus, while the Commission had considered that the draft articles could serve as the basis for a convention, it had preferred to leave the decision on the viability of such an outcome for Member States to take at a later stage, in the light of subsequent developments.

125. Since then, the Commission had adopted the same, or similar, recommendations in relation to the draft articles on the law of transboundary aquifers, the draft articles on the effects of armed conflicts on treaties, the draft articles on the responsibility of international organizations and the draft articles on the expulsion of aliens. That was not a change in the practice of the Commission but rather the emergence of a variation in its practice. The Commission had continued to make more traditional recommendations in connection with other texts, such as the draft articles on diplomatic protection of 2006, the draft articles on the protection of persons in the event of disasters of 2016 and the draft articles on prevention and punishment of crimes against humanity of 2019. The Commission had had the option of taking the two-step approach in respect of those texts but, after deliberation, had felt sufficiently confident as to the suitability of the traditional, more affirmative, type of recommendation recommending prompt action in the direction of the conclusion of a treaty.

126. It would be premature at present for the Codification Division to comment on specific matters that might arise if the General Assembly decided to accept the Commission's recommendation regarding the draft articles. It had not been requested to do so, and it understood that some delegations would be uncomfortable having such a discussion at the present time. He did wish to highlight that any decision to accept the Commission's recommendation should be expressly and clearly reflected in a General Assembly resolution. Such a decision would ideally be preceded by a reflection on the various procedural options and the consequences, both practical and financial, of pursuing the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries. Lastly, he recalled that, pursuant to General Assembly resolution 77/97, a report of the Secretary-General would be prepared on all procedural options regarding possible action on the basis of the articles on responsibility of States for internationally wrongful acts, based on precedents regarding action taken on other products of the Commission. That report would cover some of the specific matters that might arise if the Assembly were to elaborate a convention on the basis of the articles on State responsibility, which would likely apply in the event of the elaboration of a convention on prevention and punishment of crimes against humanity as well.

127. **Mr. Gómez Robledo Verduzco** (Mexico), suggesting that the text of the briefing just given be distributed to the members of the Committee, said that his delegation fully concurred with the points made by the representative of the Codification Division. His

description of the relationship between the International Law Commission and the General Assembly was entirely accurate and consistent with the Charter of the United Nations and the Commission's Statute and practice. The Assembly did not wait until the Commission had finalized a product before expressing its views; its involvement began when, or even before, a topic was added to the Commission's long-term programme of work. States had various opportunities to express their views on whether or not a proposal should go ahead. In his experience as a former Special Rapporteur, the purpose of the second reading of a text drafted by the Commission was specifically to take into account the comments and observations of the General Assembly. His delegation took the recommendations of the Commission very seriously. The Commission's work on a topic was technically not complete until the Assembly took a decision on the relevant recommendation. In that regard, the Committee's work at the two resumed sessions of the General Assembly should culminate in a definitive decision, one way or the other, on the recommendation regarding the draft articles on prevention and punishment of crimes against humanity.

128. The most important part of the Committee's work during the General Assembly was its consideration of the report of the Commission. It was crucial to continue to improve dialogue between the Committee and the Commission, building on the changes that had already been made to make it more interactive, more informal and, consequently, more substantive.

129. **Mr. Kowalski** (Portugal) said that the briefing had confirmed that the General Assembly was free to decide the future of the draft articles on prevention and punishment of crimes against humanity.

130. It might be worth considering holding resumed sessions of the General Assembly for the Committee to consider other topics in the Commission's programme of work in the future, to enable delegations to focus in greater depth on specific issues and projects. The resumed session had been very useful, as it had enabled delegations to explain their positions in more detail. Furthermore, the Committee's consideration of the annual report of the Commission always fell during International Law Week, which was a very busy time for delegations.

131. **Mr. Abdelaziz** (Egypt) said that his delegation supported the suggestion to hold more resumed sessions in order to engage in meaningful discussions on products of the International Law Commission. Resumed sessions should, however, be consistently and

widely utilized; they should not be held only to discuss products that were important to certain Member States.

132. With regard to the briefing by the Codification Division, he asked how the resolutions had been worded when the General Assembly had decided not to take up a recommendation of the Commission.

133. **Mr. Liu Yang** (China) said that his delegation would welcome written information on what action the General Assembly had ultimately taken following previous recommendations of the International Law Commission for the elaboration of an international convention.

134. His delegation agreed that the Commission's work on a topic was complete only once the General Assembly had taken a decision on the text that the Commission had produced. However, it should be borne in mind that one option available to the Assembly was to include the topic in the provisional agenda of its next session. That was precisely what it had done, in its resolution [74/187](#), in response to the Commission's recommendation regarding the draft articles on prevention and punishment of crimes against humanity. That decision amounted to recognition by States of the product of the Commission and constituted the requisite action by the Assembly.

135. Given that the Commission was a subsidiary body of the General Assembly and that its members served in their individual capacity, not as representatives of their Governments, his delegation agreed with the representative of the Codification Division that it was up to Member States to decide on the way forward with regard to the draft articles.

136. **Ms. Solano** (Colombia) said that the task of the International Law Commission was to examine the topics in its programme of work, and the task of the Committee was to discuss the Commission's work and to make international law. Member States would not always support the texts adopted by the Commission.

137. Various delegations had expressed the view that the relations between the Committee and the Commission could be improved. While steps had been taken in that regard, the Commission still did not always take the concerns of States, in particular small developing countries, into account. Sometimes States did not submit comments and observations within the specified time frame, which could be a factor; however, there were ways to address that issue and to improve the Commission's products. Although, for some States, the draft articles on prevention and punishment of crimes against humanity were acceptable as drafted, the text could be further improved. Her delegation hoped that

the discussions held during the present resumed session, in its novel format, could be a catalyst for broader, deeper and more direct communication between the Committee and the Commission.

*The meeting rose at 1.10 p.m.*