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**Summary record of the 3282nd meeting**

Topic:  
**Draft report of the International Law Commission on the work of its sixty-seventh session**

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at the current session, on the understanding that the procedure, in particular the question of whether it should be made systematic, would be discussed further at a later session under the agenda item entitled “Programme, procedures and working methods of the Commission and its documentation”.

*It was so decided.*

*The meeting rose at 11.40 a.m.*

## 3282nd MEETING

*Monday, 3 August 2015, at 10 a.m.*

*Chairperson: Mr. Narinder SINGH*

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

### Draft report of the International Law Commission on the work of its sixty-seventh session

#### CHAPTER VII. *Crimes against humanity* (A/CN.4/L.860 and Add.1)

1. The CHAIRPERSON invited the Commission to consider chapter VII of its draft report, beginning with the portion of the chapter contained in document A/CN.4/L.860.

#### A. Introduction

Paragraph 1

*Paragraph 1 was adopted.*

Paragraph 2

2. Mr. TLADI said that a sentence should be added to read: “The General Assembly, in paragraph 7 of its resolution 69/118 of 10 December 2014, took note of the inclusion of the topic in the Commission’s programme of work.”

*Paragraph 2, as amended, was adopted.*

*Section A, as amended, was adopted.*

#### B. Consideration of the topic at the present session

Paragraphs 3 and 4

3. Mr. PARK said that section B did not appear to be in line with the practice followed in the equivalent sections of some previous reports to the General Assembly, since it contained no summary of the debate on the topic within

the Commission. He asked what principles the Secretariat applied in preparing such sections of the report.

4. Mr. LLEWELLYN (Secretary to the Commission) said that the Secretariat followed the practice of previous years, which was to give a much briefer account of the debate when draft articles or draft conclusions had been adopted than when no texts had been finalized.

5. Mr. MURPHY (Special Rapporteur) said that the reproduction in the footnote to paragraph 4 of the draft articles as they had originally been proposed by the Special Rapporteur was unnecessary and potentially confusing for readers. He therefore proposed the deletion of the footnote.

6. Sir Michael WOOD said that, while he agreed that there was no need to reproduce the draft articles as originally proposed in their entirety, it would nonetheless be helpful to retain a footnote referring readers to that text in the relevant section of the Special Rapporteur’s first report (A/CN.4/680).

7. Mr. CANDIOTTI, supported by Mr. SABOIA, said that, in order to give interested readers such as delegates in the Sixth Committee an idea of the tenor of the debate, the report should, at the very least, contain a reference to the relevant summary records.

8. Mr. NOLTE said that it might indeed be confusing for readers if the report reproduced in full two different versions of the draft articles. He therefore supported the proposed deletion of the text in the footnote to paragraph 4 and the inclusion therein of references to the relevant section of the Special Rapporteur’s report and to the summary records covering the Commission’s conclusions on the matter. That manner of proceeding should be considered to be the Commission’s practice for summarizing debates when draft articles or draft conclusions and the commentaries thereto had been adopted.

9. Ms. ESCOBAR HERNÁNDEZ said that, while she was not opposed to the deletion of the text set out in the footnote to paragraph 4, she did not consider that its inclusion was likely to confuse delegations in the Sixth Committee: in fact, it facilitated understanding of the commentaries. The two sets of draft articles were clearly differentiated in the report, inasmuch as one set was contained in a footnote while the other was set out in the body of the text. However, if the Commission were to delete the original text of the draft articles, the footnote to paragraph 4 should include a reference to the corresponding paragraphs of the Special Rapporteur’s report. In addition, a footnote should be inserted in paragraph 3 indicating the summary records of the meetings at which the Commission had considered the topic. The Commission should then follow that practice when drafting future reports.

10. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph 3, with a footnote referring readers to the relevant summary records, and paragraph 4, with a footnote indicating the paragraphs of the Special Rapporteur’s first report containing the texts of the proposed draft articles.

*Paragraphs 3 and 4 were adopted with those amendments.*

Paragraphs 5 and 6

*Paragraphs 5 and 6 were adopted.*

Paragraph 7

11. Mr. MURPHY (Special Rapporteur), supported by Mr. PARK, proposed the addition of a second sentence, to read: "The Commission also requested the Secretariat to prepare a memorandum providing information on existing treaty-based monitoring mechanisms which may be of relevance to its future work on the present topic."

12. Mr. CANDIOTI suggested that a footnote be inserted to explain the reason for the request.

13. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph 7, with the addition of a second sentence, as proposed by Mr. Murphy, and an explanatory footnote, as proposed by Mr. Candiotti.

*Paragraph 7 was adopted with those amendments.*

*Section B, as amended, was adopted.*

**C. Text of the draft articles on crimes against humanity provisionally adopted by the Commission at its sixty-seventh session**

**1. TEXT OF THE DRAFT ARTICLES**

Paragraph 8

*Paragraph 8 was adopted.*

14. The CHAIRPERSON invited the Commission to consider the portion of chapter VII contained in document A/CN.4/L.860/Add.1.

**2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO, AS PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SEVENTH SESSION**

Paragraph 9

*Paragraph 9 was adopted.*

*Commentary to draft article 1 (Scope)*

Paragraph (1)

15. Mr. FORTEAU proposed the deletion of the phrase "*ab initio*", since it was unnecessary and potentially confusing. He further proposed the addition of a phrase at the end of the paragraph, to read: "or when they are occurring" [*ou lorsqu'ils sont en train d'être commis*].

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

16. Mr. KAMTO proposed that a reference to the crime of aggression be added at the end of the second sentence, supplementing the references to genocide and war crimes.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

17. Ms. ESCOBAR HERNÁNDEZ proposed that the first sentence should be recast to read: "Further, the present draft articles take into account the intention to

avoid any conflicts with relevant existing treaties" [*Asimismo, el presente proyecto de artículos toma en consideración la intención de evitar cualquier conflicto con los tratados en vigor pertinentes*].

18. Mr. KAMTO agreed that the first sentence should be reformulated, since it currently attributed an intention to the draft articles that they could not have. The sentence should be reworded to indicate that in developing the draft articles, the Commission had sought to avoid any conflicts with relevant existing treaties.

19. Mr. MURPHY (Special Rapporteur) proposed that the first sentence read: "Further, the Commission will avoid any conflicts with relevant existing treaties."

20. Mr. PETRIČ proposed the following wording: "Further, the present draft articles are drafted so as to avoid any conflicts with relevant existing treaties."

21. Mr. TLADI said that, while he could live with the Special Rapporteur's proposal, he would prefer to retain a reference to the draft articles themselves. He therefore suggested that the first sentence begin with the words: "The Commission, by these draft articles, will seek to avoid ...".

22. Mr. SABOIA endorsed the point made by Mr. Tladi about the retention of a reference to the draft articles themselves.

23. The CHAIRPERSON, speaking as a member of the Commission, said that he saw no difficulty in keeping the text as it stood.

24. Mr. NOLTE said that he supported Mr. Petrič's proposal, since the current wording attributed an intention to the draft articles themselves.

25. Mr. McRAE, referring to Mr. Tladi's proposal, suggested that it be amended by deleting the words "will seek to", so that the sentence would begin "Further, the present draft articles avoid". That would also align the formulation with the one in the second sentence.

26. Ms. ESCOBAR HERNÁNDEZ said that she supported Mr. McRae's amendment to Mr. Tladi's proposal and that in the Spanish text, the words *se persigue evitar* should be replaced with *evita*.

27. Sir Michael WOOD said that he endorsed Mr. McRae's amendment to Mr. Tladi's proposal, but that the word "will" should be retained, thus deleting only the words "seek to".

*Paragraph (3), as amended by Mr. Tladi and further amended by Mr. McRae and Sir Michael Wood, was adopted.*

Paragraph (4)

28. Ms. ESCOBAR HERNÁNDEZ proposed that, in the first sentence, the words "seek to" be deleted, in line with the amendment just adopted in relation to paragraph (3).

*That amendment was adopted.*

29. Mr. KAMTO proposed the deletion of the third sentence, as it was unclear and unnecessary, given the content of the fourth sentence.

30. Mr. TLADI, supported by Mr. NOLTE and Ms. ESCOBAR HERNÁNDEZ, proposed the addition of the words “under the Rome Statute of the International Criminal Court” at the end of the fifth sentence.

31. Ms. ESCOBAR HERNÁNDEZ said that, in the Spanish text of the third sentence, the expression *al margen de* did not appropriately convey the point that cooperation under the Rome Statute of the International Criminal Court was not incompatible with cooperation that resulted from bilateral relations between States. Although the Statute did not provide expressly for inter-State cooperation, it did take into account the existence of cooperation mechanisms between States. In order to mark the compatibility of the two regimes, she proposed replacing *al margen* [outside] with *sin perjuicio* [without prejudice to].

32. With regard to the fifth sentence, she proposed replacing the words “will seek to support” [*intentará respaldar*] with “contributes to strengthening” [*contribuye a reforzar*]. As to the sixth sentence, it wrongly implied that the principle of complementarity entailed the recognition of national jurisdictions as the principal and most appropriate place for the prosecution of crimes against humanity—in fact, it established a system for the distribution of jurisdiction. Accordingly, she proposed the deletion of the phrase preceding “for prosecution of crimes against humanity” and its replacement with: “In keeping with that principle, States must, in the first instance, exercise their national jurisdiction” [*En virtud de dicho principio, los Estados deberán ejercer en primer lugar su jurisdicción nacional*]. That formulation was more in line with the preamble to the Rome Statute of the International Criminal Court and with its articles 1, 17 and 18, which related to the principle of complementarity.

33. Mr. NOLTE, referring to the sixth sentence, proposed an addition at the end, to read: “and that the International Criminal Court will exercise jurisdiction only in the second instance when those conditions are not present”.

34. Mr. KAMTO said that the wording of the third sentence gave the erroneous impression that there was a system of obligations with regard to cooperation that had been instituted by the Rome Statute of the International Criminal Court and that was binding, even on States that were not parties to the Statute.

35. Mr. MURPHY (Special Rapporteur) said that the rationale behind the third sentence was to indicate that the Rome Statute of the International Criminal Court assumed that inter-State cooperation was occurring and that Part IX of the Statute referred to situations in which the surrender obligation took precedence when there was a conflict between inter-State cooperation and the surrender of a person to the Court. In response to the remarks just made by Ms. Escobar Hernández, he suggested that the words “will continue to operate outside” be replaced with “exists without prejudice to”. In the fifth sentence, he proposed replacing “seek to support” with “contribute to

enhancing”. In the sixth sentence, he endorsed the addition proposed by Mr. Nolte.

36. Mr. KITTICHAISAREE said that one could not enhance a principle, only its implementation; therefore, the formulation “contribute to enhancing” should be replaced with “contribute to the implementation of”. In the last sentence, he proposed replacing the words “before they happen” with “before their commission or while they are being committed”.

37. Mr. TLADI said that he supported Mr. Kittichaisaree’s point that the fifth sentence should not refer to “enhancing” the principle of complementarity. He was happy to go along with all the other proposals made by Mr. Murphy, except for the addition of the phrase “as provided in the Rome Statute of the International Criminal Court”, maintaining that his prior proposal, “under the Rome Statute of the International Criminal Court”, was more appropriate.

38. Ms. ESCOBAR HERNÁNDEZ said that, in the fifth sentence, she supported the insertion of the words “implementation of” between “contribute to enhancing” and “the principle of complementarity”, as proposed by Mr. Kittichaisaree. She also supported Mr. Tladi’s suggestion to add the phrase “under the Rome Statute of the International Criminal Court” at the end of that sentence.

39. Mr. Nolte’s addition to the end of the sixth sentence left intact the implication in the first part of that sentence, that the Commission was making a pronouncement as to the appropriate place for the prosecution of crimes against humanity, something to which she had expressed her objection earlier. Her amendment to the first part of that sentence made no evaluation of the appropriate place for prosecution and simply described how the principle of complementarity worked.

40. Mr. KOLODKIN, supported by Mr. HMOUD, proposed the deletion of the sixth sentence, because it amounted to an interpretation of the principle of complementarity under the Rome Statute of the International Criminal Court for the purposes of the commentary to the draft articles.

*The sixth sentence was deleted.*

41. The CHAIRPERSON, recapitulating the remaining proposals for amendments to paragraph (4), said that they were the following: in the third sentence, the phrase “will continue to operate outside” should be replaced with “exist without prejudice to”; the start of the fifth sentence should be reformulated to read: “In doing so, the present draft articles will contribute to the implementation of the principle of complementarity under the Rome Statute of the International Criminal Court”; and in the seventh sentence, the words “before they happen” should be replaced with “before their commission or while they are being committed”.

*Paragraph (4), as thus amended, was adopted.*

*The commentary to draft article 1 as a whole, as amended, was adopted.*

Commentary to draft article 2 (General obligation)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

42. Mr. MURASE, referring to the text of the last footnote to the paragraph, said that the second part of the second sentence, which read “rather, the convictions concerned war crimes that occurred outside Japan and against persons other than Japanese nationals”, was inaccurate. In fact, the criminals convicted outside Japan had been tried in accordance with the traditional law of war under ordinary military tribunals, which did not have jurisdiction over crimes against humanity. He therefore proposed the deletion of that clause.

43. Mr. MURPHY (Special Rapporteur) endorsed Mr. Murase’s proposal.

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) and (4)

44. Mr. KAMTO said that in the French text of the first sentence in paragraph (3), the words *consignés et* were superfluous and should be deleted.

*That amendment was adopted.*

45. Sir Michael WOOD proposed that, in the third sentence of paragraph (3), the word “identified” be replaced with “stated that”, and the words “to be”, with “were”.

*That amendment was adopted.*

46. Mr. MURPHY (Special Rapporteur), responding to comments made by Sir Michael WOOD and Mr. KAMTO about the fourth sentence in paragraph (3), said it was entirely true that the phrase “the offence of crimes against humanity” was not the terminology used in the 1954 draft code of offences against the peace and security of mankind,<sup>321</sup> which spoke, instead, of “inhuman acts”. He therefore proposed that the words “included the offence of”, before the phrase “crimes against humanity”, be replaced with “included as an offence a series of inhuman acts that are today understood to be”.

47. Mr. KITTICHAISAREE endorsed that proposal but suggested that the words “in article 2, paragraph 11” be inserted before the word “included”.

*The proposal by Mr. Murphy (Special Rapporteur), as amended by Mr. Kittichaisaree, was adopted.*

48. Ms. ESCOBAR HERNÁNDEZ said that the final sentence in paragraph (4), concerning the 1996 draft code of crimes against the peace and security of mankind,<sup>322</sup> should be inserted in paragraph (3), after the reference to the 1954 draft code of offences on the same subject. In that way, paragraph (3) would include references to all the

texts that had defined crimes against humanity as crimes under international law.

49. Mr. MURPHY (Special Rapporteur) said that paragraphs (2) to (4) of the commentary described the criminalization, at the international level, of crimes against humanity, and did so in chronological order, starting with the Charter of the International Military Tribunal established at Nürnberg (“Nürnberg Charter”).<sup>323</sup> The historical overview culminated, in paragraph (4), with the Commission’s completion of the draft code of crimes against the peace and security of mankind, in 1996. He would therefore be reluctant to make the transposition proposed by Ms. Escobar Hernández.

50. Ms. ESCOBAR HERNÁNDEZ said that, in that case, the final sentence in paragraph (3) should be transposed to the end of paragraph (4), so that it covered all of the Commission’s projects dealing with crimes against humanity.

51. Mr. MURPHY (Special Rapporteur) said that Ms. Escobar Hernández was correct: the sentence, which referred to the gravity of crimes against humanity and their consequent prohibition under international law, should be placed at the end of paragraph (4).

*That amendment was adopted.*

*Paragraphs (3) and (4), as amended during the discussion, were adopted.*

Paragraph (5)

52. Ms. ESCOBAR HERNÁNDEZ said that in the third sentence, the words “intruding into” [*injerirse en*] should be replaced with the more neutral phrase “dealing with” [*ocuparse de*].

53. Sir Michael WOOD said that the first sentence should be ended after the phrase “in time of armed conflict” and the next sentence should begin with “The reference to armed conflict”.

*Those amendments were adopted.*

54. Ms. ESCOBAR HERNÁNDEZ, referring to the last footnote to the paragraph, said that it should be amended to make it clear that it had been the International Tribunal for the Former Yugoslavia, in the *Prosecutor v. Kupreškić, et al.* judgment, which had “noted the tenuous link between the crimes against humanity committed by Baldur von Schirach and the other crimes” (para. 576 of the judgment) within the jurisdiction of the International Military Tribunal. The current wording of that footnote might cause confusion.

55. Mr. MURPHY (Special Rapporteur) said that he could not accept that amendment, because the final sentence of paragraph (5) made that point clearly.

56. After a discussion in which Mr. ŠTURMA, Mr. MURPHY (Special Rapporteur) and Ms. ESCOBAR HERNÁNDEZ participated, Mr. KITTICHAISAREE,

<sup>321</sup> *Yearbook ... 1954*, vol. II, document A/2693, pp. 151–152, para. 54.

<sup>322</sup> *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

<sup>323</sup> The Charter of the International Military Tribunal is annexed to the 1945 Agreement for the prosecution and punishment of the major war criminals of the European Axis.

supported by Mr. PETRIČ, proposed that the footnote be left unchanged.

*Paragraph (5), as amended earlier, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

57. Mr. MURPHY (Special Rapporteur) said that he had been asked by Mr. Tladi to propose that the footnote to the penultimate sentence be transposed to the end of the sixth sentence and that a new footnote, to read “*Ibid.*”, be added at the end of the last sentence.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

58. Mr. FORTEAU proposed that in the first sentence, the phrase beginning “most likely”, which was solely conjecture, be deleted.

*Paragraph (9), as amended, was adopted.*

*The commentary to draft article 2 as a whole, as amended, was adopted.*

*Commentary to draft article 3 (Definition of crimes against humanity)*

Paragraph (1)

*Paragraph (1) was adopted.*

59. Mr. KITTICHAISAREE said that, to be more precise, the subheading “Prior definitions” should read “Definitions in other instruments”.

*That amendment was adopted.*

Paragraphs (2) to (4)

*Paragraphs (2) to (4) were adopted.*

Paragraph (5)

60. Mr. FORTEAU said that in the second sentence, the words “of the United Nations” should be inserted after “Secretary-General”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

61. Ms. ESCOBAR HERNÁNDEZ queried the reference to a “discriminatory” motive in the second sentence and suggested that reference instead be to a “selective” motive.

62. Mr. MURPHY (Special Rapporteur) said that what was unusual about the Statute of the International Tribunal for Rwanda<sup>324</sup> was that it stipulated that the crimes

over which the Tribunal had jurisdiction had to target a particular group. The term “discriminatory motive” was used in the literature.

63. In response to a remark by Mr. KAMTO, he said that the final sentence of the paragraph could be deleted, although it did make the important point that the jurisdiction of hybrid tribunals was explicitly described as covering crimes against humanity.

64. Mr. KITTICHAISAREE said that in the case law of the International Tribunal for Rwanda, reference was made to crimes against humanity committed with discriminatory “intent”.

65. Ms. ESCOBAR HERNÁNDEZ said that, in view of the foregoing, the words *motivos discriminatorios* (discriminatory motives) should be replaced with *intención discriminatoria* (discriminatory intent) throughout the Spanish version of that paragraph.

66. The CHAIRPERSON noted that “motive” would have to be replaced with “intent” throughout the English text of the paragraph.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

67. Mr. MURPHY (Special Rapporteur) said that, in the last sentence, “motive” would have to be changed to “intent”.

68. Ms. ESCOBAR HERNÁNDEZ said that she would supply the Secretariat with some editorial adjustments to the Spanish text.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

69. Mr. NOLTE, referring to the first sentence, proposed the deletion of the words “of those”, because it was not necessarily only the States parties to the Rome Statute of the International Criminal Court which used the definition provided in article 7 thereof when they amended their national laws. The final sentence in the paragraph referred to an event which might occur long after the Commission had completed its work on the topic; he therefore proposed the deletion of the words “by the Commission” and the replacement of the word “language” with “paragraph”.

70. Ms. ESCOBAR HERNÁNDEZ, referring to the first part of the second sentence, said that it misrepresented the primary consideration that had prompted the Commission to base its definitions of crimes against humanity on those in article 7 of the Rome Statute of the International Criminal Court, namely a disinclination to introduce amendments into those definitions, on which there was now broad consensus in the international community. It would therefore be advisable to delete the first part of the sentence and to say simply, “The Commission considered that article 7 constituted the basis for defining such crimes in paragraphs 1 to 3 of draft article 3” [*La Comisión estimó que el artículo 7 del Estatuto de Roma constituía la base para definir esos delitos en los párrafos 1 a 3 del proyecto de artículo 3*].

<sup>324</sup> Security Council resolution 955 (1994) of 8 November 1994, annex.

71. In the final sentence, the phrase “may exercise jurisdiction over the crime of aggression” was not completely consistent with the Rome Statute of the International Criminal Court. The International Criminal Court could exercise jurisdiction over the crime of aggression when the requirements laid down by the Review Conference of the Rome Statute (Kampala Conference) were met. For that reason, it would be more accurate to say “In due course, the International Criminal Court will be able to exercise its jurisdiction with respect to the crime of aggression, when the requirements laid down by the Kampala Conference are met” [*En un momento dado, la Corte Penal Internacional podrá ejercer su competencia respecto del crimen de agresión cuando se cumplan los requisitos establecidos en la Conferencia de Kampala*].

*Paragraph (8), as amended by Mr. Nolte and Ms. Escobar Hernández, was adopted.*

Paragraph (9)

*Paragraph (9) was adopted.*

72. Ms. ESCOBAR HERNÁNDEZ said that the word “attack” should be added to the subheading “Widespread or systematic” to make its contents clearer to the reader.

*That amendment was adopted.*

Paragraphs (10) to (19)

*Paragraphs (10) to (19) were adopted.*

Paragraph (20)

73. Ms. ESCOBAR HERNÁNDEZ said that she had a number of editorial corrections to make to the Spanish version of that paragraph, but in the interests of speeding up the debate, she would hand them to the Secretariat.

74. Mr. KOLODKIN said that he also had numerous editorial corrections to make throughout the Russian version of the document. He would likewise pass them to the Secretariat in order to save time.

*Paragraph (20) was adopted.*

Paragraph (21)

75. Mr. NOLTE said that, in that paragraph and elsewhere in the text where the phrase “the ICC’s Elements of Crimes” occurred, it would be more correct to refer to “The *Elements of Crimes* under the Rome Statute of the International Criminal Court”.

*Paragraph (21), as amended, was adopted.*

Paragraphs (22) to (36)

*Paragraphs (22) to (36) were adopted.*

Paragraph (37)

76. Ms. ESCOBAR HERNÁNDEZ said that the word “underlying” should be deleted, since the acts in question were manifestations of crimes against humanity.

77. Mr. MURPHY (Special Rapporteur) said that he had no objection to deleting the adjective “underlying”.

*The subheading and paragraph (37), as amended, were adopted.*

Paragraph (38)

78. Ms. ESCOBAR HERNÁNDEZ said that the last part of the penultimate sentence was superfluous and should be deleted.

*Paragraph (38), as amended, was adopted.*

Paragraph (39)

*Paragraph (39) was adopted.*

Paragraph (40)

79. Mr. NOLTE proposed that the instruments referred to in the second sentence be placed in the order of their importance in international law, rather than in chronological order. The International Convention for the Protection of All Persons from Enforced Disappearance, adopted in 2006, had reinforced the contents of, and was more important than, the 1992 Declaration on the Protection of All Persons from Enforced Disappearance.<sup>325</sup>

80. Mr. FORTEAU (Chairperson of the Drafting Committee) said that he opposed the establishment of any hierarchy among the instruments mentioned. The Drafting Committee had construed the term “international instrument” in its broad sense, and the following phrase should be inserted at the end of the first sentence in paragraph (40) to make that clear: “since the term ‘international instrument’ is to be understood in the broad sense and not only in the sense of a binding international agreement” [*étant entendu que le terme “instrument international” doit être entendu au sens large et pas seulement au sens d’un accord internationalement contraignant*].

81. Mr. MURPHY (Special Rapporteur) said that he was in favour of retaining the chronological order. It was also useful to bring out the fact that two of the instruments had been adopted before and one after the Rome Statute of the International Criminal Court. Each had been important in its own way and, for that reason, it would be unwise to create a hierarchy among them. He agreed with the additional wording proposed by Mr. Forteau and suggested the creation of a new second sentence, to read: “‘International instrument’ is to be understood in the broad sense and not only in the sense of a binding international agreement.”

82. The CHAIRPERSON suggested that paragraph (40) be left in abeyance until the next plenary meeting of the Commission.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

<sup>325</sup> General Assembly resolution 47/133 of 18 December 1992.