

Provisional

**For participants only**

30 September 2019

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**International Law Commission**  
**Seventy-first session (second part)**

**Provisional summary record of the 3497th meeting**

Held at the Palais des Nations, Geneva, on Friday, 2 August 2019, at 10 a.m.

**Contents**

Draft report of the Commission on the work of its seventy-first session (*continued*)

*Chapter IV. Crimes against humanity (continued)*


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***Present:***

*Chair:* Mr. Šturma

*Members:* Mr. Argüello Gómez  
Mr. Cissé  
Ms. Escobar Hernández  
Ms. Galvão Teles  
Mr. Gómez-Robledo  
Mr. Grossman Guiloff  
Mr. Hassouna  
Mr. Hmoud  
Mr. Huang  
Mr. Jalloh  
Mr. Laraba  
Ms. Lehto  
Mr. Murase  
Mr. Murphy  
Mr. Nguyen  
Mr. Nolte  
Ms. Oral  
Mr. Ouazzani Chahdi  
Mr. Park  
Mr. Petrič  
Mr. Rajput  
Mr. Reinisch  
Mr. Ruda Santolaria  
Mr. Tladi  
Mr. Valencia-Ospina  
Mr. Vázquez-Bermúdez  
Sir Michael Wood  
Mr. Zagaynov

***Secretariat:***

Mr. Llewellyn Secretary to the Commission

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

**Draft report of the Commission on the work of its seventy-first session** (continued)

*Chapter IV. Crimes against humanity (continued)* (A/CN.4/L.928 and A/CN.4/L.928/Add.1)

**The Chair** invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.928/Add.1, beginning with paragraph (8) of the commentary to draft article 2, which had been left in abeyance at the previous meeting.

*Commentary to draft article 2 (Definition of crimes against humanity) (continued)*

*Paragraph (8) (continued)*

**Mr. Murphy** (Special Rapporteur) said that, as proposed by Mr. Jalloh, the words “accepted by the more than 120 States parties” in the first sentence should be replaced with “accepted as of mid-2019 by 122 States parties”.

To address the concerns raised by Mr. Grossman Guiloff, he proposed that a footnote should be inserted at the end of the same sentence to read:

For information submitted by Governments to the Commission on their national laws in this regard, see [http://legal.un.org/ilc/guide/7\\_7.shtml](http://legal.un.org/ilc/guide/7_7.shtml). For a table compiling national laws, see Coalition for the International Criminal Court, *Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)* (2012), at [http://iccnow.org/documents/Global\\_Ratificationimplementation\\_chart\\_May2012.pdf](http://iccnow.org/documents/Global_Ratificationimplementation_chart_May2012.pdf). At present, however, not all national laws addressing crimes against humanity contain the same definition that appears in article 7 of the Rome Statute.

*Paragraph (8), as amended, was adopted.*

*Paragraphs (32) to (37)*

*Paragraphs (32) to (37) were adopted.*

*Paragraph (38)*

**Mr. Nolte** proposed that, in the fourth sentence, the words “a type of jurisdiction unique to” should be replaced with “the specific jurisdiction of” and the word “ambit” with “scope”.

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

*Paragraphs (39) and (40)*

*Paragraphs (39) and (40) were adopted.*

*Paragraph (41)*

**Mr. Jalloh** said that, in the light of the amendments made at the second reading with respect to the term “gender”, it seemed a little excessive to describe the understanding of that term as “changed”. In addition, it might be helpful to indicate that the Commission’s decision not to include in draft article 2 the definition of “gender” found in article 7 (3) of the Rome Statute of the International Criminal Court was a response to comments received from States. For those reasons, he proposed, first, that the word “changed” in the third sentence should be replaced with “different” and, second, that the words “in response to the requests of a large number of States and others” should be inserted at the end of the second sentence.

**Mr. Nolte**, supported by **Mr. Ruda Santolaria**, said that, with regard to Mr. Jalloh’s first proposal, the word “evolved” might be a safer choice than “different”. The word “evolved” also had a legal undertone that “different” and “changed” lacked.

**Mr. Park**, supported by **the Chair**, in his capacity as a member of the Commission, **Mr. Hmoud**, **Mr. Ruda Santolaria**, **Mr. Valencia-Ospina**, **Sir Michael Wood** and **Mr. Zagaynov**, said that, with regard to Mr. Jalloh's second proposal, it was not the Commission's usual practice to state expressly in texts adopted on second reading that it had acted in a particular way in response to a request from States.

**Sir Michael Wood**, supported by **Ms. Lehto**, said that another possibility would be to replace the words "suggesting a changed understanding" with "reflecting the current understanding".

**Mr. Zagaynov** said that his preference was for the word "different".

**Mr. Jalloh** said that, with regard to his first proposal, the word "evolved" was certainly another possibility. Indeed, the following paragraph of the commentary talked of the "evolving understanding" of the meaning of "gender". That said, he found Sir Michael Wood's proposal to use the words "current understanding" rather attractive, as it allowed the Commission to leave to one side the question of how the term "gender" had been understood in the past and would be understood in the future.

As for his second proposal, he understood that it had at one point been the Commission's practice to indicate in its commentaries that a particular course of action on its part had been a response to a proposal by States. In the paragraph under consideration, the Commission had good reason to make explicit that it was reacting to a proposal by States, as the term "gender" raised sensitive issues. It was true that the Commission's decision not to include the definition of gender found in article 7 (3) of the Rome Statute was explained in the following paragraph of the commentary, but it might be helpful if that explanation was provided at the very beginning of the discussion.

**Mr. Hmoud** said that he found the suggestion to use the word "evolved" particularly attractive. It reflected the fact that the International Criminal Court had shifted its understanding of the term "gender" since the adoption of the Rome Statute.

**Mr. Murphy** (Special Rapporteur) said that Sir Michael Wood's proposal might be the most neutral way of conveying the intended message, as the use of the words "changed", "different" or "evolved" would risk giving the impression that the International Criminal Court was deviating from the text of the Rome Statute. The words "suggesting a changed understanding" could thus be replaced with "reflecting a current understanding".

With regard to Mr. Jalloh's second proposal, it was not the Commission's usual practice to indicate expressly whenever it was acting in response to a proposal by States. The Commission had not included indications of that kind elsewhere in the commentaries. In fact, the inclusion of an indication of that kind in the paragraph under consideration might give the impression that the Commission did not agree with the proposal in question.

He proposed that the full text of the definition of gender found in article 7 (3) of the Rome Statute should be quoted at the end of the first sentence of the paragraph, which would require the insertion of the second sentence of that definition: "The term 'gender' does not indicate any meaning different from the above."

**Sir Michael Wood** said that to talk of "a" current understanding would imply that there were other current understandings of the term "gender": he would prefer to use the definite article, as he had suggested.

**Mr. Nolte** said that, although he had wondered whether it would not be safer to use the indefinite article, he would have no objection to Sir Michael Wood's suggested wording.

**Mr. Jalloh** said that, while he was prepared to go along with Sir Michael Wood's suggestion, it might be safer to use the indefinite article, particularly as the paragraph included references to such authoritative sources as a policy paper by the Office of the Prosecutor of the International Criminal Court.

**Mr. Murphy** (Special Rapporteur) said it was true that the use of the indefinite article would leave open the possibility that other understandings of the term "gender" were current.

**Sir Michael Wood** said that he had a strong preference for the use of the definite article to describe the way in which the term “gender” was currently understood.

**Mr. Valencia-Ospina** said that, if the Commission spoke about “a current understanding” of gender, it would be presupposing that other understandings of that term existed and implying that a choice could be made among them. To speak about “the current understanding” did not exclude the possibility of a future evolution of that understanding.

**Ms. Lehto** said that she agreed with Mr. Valencia-Ospina’s and Sir Michael Wood’s explanations.

**The Chair** said he took it that the Commission wished to adopt the paragraph as proposed by the Special Rapporteur, with the insertion of the second sentence of article 7 (3) of the Rome Statute at the end of the first sentence of the paragraph and the replacement of the words “suggesting a changed understanding” in the third sentence with “reflecting the current understanding”.

*Paragraph (41), as amended, was adopted.*

*Paragraphs (42) and (43)*

*Paragraphs (42) and (43) were adopted.*

*Paragraph (44)*

**Mr. Jalloh** proposed that, in the last sentence, the words “or retain” should be inserted after “to adopt”, as some States had already adopted broader definitions of crimes against humanity.

*Paragraph (44), as amended, was adopted.*

*Paragraph (45)*

**Mr. Grossman Guiloff** said that a new second sentence should be inserted to the effect that, while regional and universal treaties such as the American Convention on Human Rights, the African Charter on Human and Peoples’ Rights, the European Convention on Human Rights and the International Covenant on Civil and Political Rights did not include a definition of “disappearance”, they did refer to elements of such a definition, including the right to be recognized as a person before the law and a non-derogable prohibition of deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty. That new sentence could then be followed by an explanation of the Commission’s decision to follow the definition contained in article 7 of the Rome Statute.

**The Chair** said he took it that the Commission wished to leave paragraph (45) in abeyance pending the submission of an informal written text of Mr. Grossman Guiloff’s proposal.

*It was so decided.*

*Paragraph (46)*

**Mr. Grossman Guiloff**, noting that the paragraph concerned disappearances, said that the final sentence did not apply only to disappearances and so should be moved. Nor was it appropriate to refer to the harmonization of national laws. As the commentary applied only to draft article 2, there was nothing to prevent States from availing themselves of mechanisms established under, for instance, the Inter-American Convention on Forced Disappearance of Persons, if they so wished. The current wording of the draft commentary might seem to indicate that the Commission wished to harmonize national laws on disappearances to include the elements of intentionality and a lengthy period of time, which was not the case in all countries. If harmonization was to be mentioned, it should be in a general context, not in the specific context of disappearances.

**The Chair** said that, as he understood it, the paragraph referred to the “without prejudice” clause in draft article 2 (3), which was general in nature.

**Mr. Grossman Guiloff**, supported by **Mr. Ruda Santolaria**, said that, although the elements of draft article 2 (3) were general, the present reference to them was in a paragraph, paragraph (46), which specifically addressed disappearances.

**The Chair** suggested leaving the paragraph in abeyance to allow Mr. Grossman Guiloff to submit in writing the wording of his proposed amendment.

*It was so decided.*

*Commentary to draft article 3 (General obligations)*

*Paragraph (1)*

**Mr. Murphy** (Special Rapporteur) said that changes proposed by Sir Michael Wood to paragraph (6) of the commentary to draft article 3 would have an effect on paragraph (1), so he suggested leaving paragraph (1) in abeyance until paragraph (6) had been discussed.

**The Chair** said he took it that the Commission agreed to that suggestion.

*It was so decided.*

*Paragraph (2)*

**Sir Michael Wood** proposed that the first part of the third sentence should be amended to read: "A formula that calls for States not to engage in 'acts that constitute' crimes against humanity is appropriate since States themselves do not commit crimes."

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

*Paragraph (3)*

**Mr. Murphy** (Special Rapporteur) said that the wording of the third sentence should be amended to reflect more accurately the excerpt quoted immediately afterwards from the International Court of Justice judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The relevant part of the third sentence would thus read "the International Court of Justice found that the identification of genocide as a crime, as well as the obligation of a State to prevent genocide, necessarily implies an obligation of the State not to commit genocide".

*Paragraph (3), as amended, was adopted.*

*Paragraphs (4) and (5)*

*Paragraphs (4) and (5) were adopted.*

*Paragraphs (1), (6) and (7)*

**Mr. Murphy** (Special Rapporteur) proposed, on the basis of a written suggestion from Sir Michael Wood, that, for reasons of logic, the third and fourth sentences of paragraph (1) and the last three sentences of paragraph (6) should be moved to paragraph (7). The resulting paragraph (7) would then be split, leaving the new paragraph (7) to focus on the obligation to prevent crimes against humanity. The amended paragraph (7) would then read:

(7) Paragraph 2 of draft article 3 sets forth a second general obligation: "Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict." In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice found (again when considering article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide) that States have an obligation "to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing" acts of genocide. In that instance, the State party is expected to use its best efforts (a due diligence standard) when it

has a “capacity to influence effectively the action of persons likely to commit, or already committing” the acts, which in turn depends on the State party’s geographic, political and other links to the persons or groups at issue. At the same time, the Court found that “a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed”. Further content of this second general obligation is addressed through the various more specific obligations set forth in the draft articles that follow, beginning with draft article 4. Those specific obligations address steps that States are to take within their national legal systems, as well as their cooperation with other States, with relevant intergovernmental organizations and with, as appropriate, other organizations.

The new paragraph (7) *bis* would begin “The Court also analysed the meaning of ‘undertake’ ...” and the text thereafter would remain unchanged from the second part of the former paragraph (7).

**Mr. Jalloh** proposed adding, in the penultimate sentence of the new wording of paragraph (7), after “Further content of this second general obligation is addressed”, the words “in various ways, including”, to take account of other possible actions by States.

**Mr. Murphy** (Special Rapporteur) suggested that adding the words “in various ways, through” and deleting “various” later in the sentence, so that it read “Further content of this second general obligation is addressed in various ways, through the more specific obligations ...”, would capture the broad sense of preventive measures without giving the impression there could be other possibilities.

**The Chair** said he took it that the Commission agreed to the Special Rapporteur’s restructuring of the paragraphs and his amended version of Mr. Jalloh’s proposal, on the understanding that the footnotes would be renumbered as necessary.

*On that understanding, paragraphs (1), (6) and (7), as amended, and the proposed new paragraph (7) bis were adopted.*

*Paragraphs (8) and (9)*

*Paragraphs (8) and (9) were adopted.*

*Paragraph (10)*

*Paragraph (10) was adopted, subject to the requisite editorial adjustments.*

*Paragraphs (11) to (14)*

*Paragraphs (11) to (14) were adopted.*

*Paragraph (15)*

**Mr. Murphy** (Special Rapporteur) said that Sir Michael Wood had proposed that the last part of the fourth sentence, starting with the words “the Security Council had already determined”, should be deleted, as the determination by the Security Council that the situation was a threat to international peace and security was not directly germane to the point being made. The reference in footnote 190 to *International Legal Materials* should also be deleted, as it was superfluous.

**Mr. Jalloh** said that the first proposed deletion would remove the reference to the first occasion on which the Security Council had exercised its powers of enforcement under Chapter VII of the Charter of the United Nations, which had been a controversial decision at the time. Those powers had been used again in connection with the International Criminal Tribunal for Rwanda in 1994. He considered that the explicit link between the existence of an armed conflict and the Security Council decision was useful, and would prefer to retain at least the reference to Chapter VII of the Charter of the United Nations, for the sake of clarity.

**Sir Michael Wood** said that the proposition was that the Statute of the International Tribunal for the Former Yugoslavia had been constituted with the understanding that armed conflict in fact existed in the former Yugoslavia; if that was followed by an explanation that

the Security Council had determined that there was a threat to international peace and security, it might be implied that, whenever the Security Council determined that there was a threat to international peace and security, or exercised its enforcement powers, it was making a statement on the existence of an armed conflict. That would be misleading.

*Paragraph (15), as amended by the Special Rapporteur, was adopted.*

*Paragraphs (16) to (20)*

*Paragraphs (16) to (20) were adopted.*

*Paragraph (21)*

**Sir Michael Wood** proposed that, in the first sentence, the words “this formulation” should be replaced with “the formulation in draft article 3”, for greater clarity.

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

*Commentary to draft article 4 (Obligation of prevention)*

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

**Sir Michael Wood** proposed amending the final phrase of the paragraph to echo the wording of article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide, to which it referred.

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

*Paragraph (3)*

**Sir Michael Wood** said that the reference in the first sentence to “an obligation of prevention” was not completely accurate and should be amended to read “an obligation to take action”.

**Mr. Murphy** (Special Rapporteur) said that it would be unfortunate to lose the mention of prevention. He suggested that the words “an obligation of prevention” should be replaced with “an obligation to take preventive measures”.

*Paragraph (3), as amended by the Special Rapporteur, was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted.*

*Paragraph (5)*

**Mr. Murphy** (Special Rapporteur) suggested that, in the third sentence, the words “this obligation” should be altered to “its obligation to prevent crimes against humanity” to avoid any ambiguity.

**Mr. Jalloh** said he agreed with that suggestion, and proposed that, in the light of comments made by States urging the Commission not to exclude the possibility of cooperative action being taken by States with the aim of preventing crimes against humanity, an additional sentence should be added at the end of the paragraph, to read: “Although this obligation imposed on States must conform with their international obligations, this draft article is not intended to limit the use of other appropriate diplomatic, humanitarian, peaceful or other means.” Reference might also be made to the 2005 World Summit Outcome contained in General Assembly resolution 60/1.

**Sir Michael Wood**, while expressing support for the thrust of that proposal, suggested that the text would be better placed elsewhere in the commentary to draft article 4 and that certain amendments to the wording might be necessary.



**Mr. Murphy** (Special Rapporteur) suggested that the issue should be considered in the context of paragraph (9) of the commentary to draft article 4 and requested Mr. Jalloh to provide his proposal in writing.

**The Chair** said he took it that the Commission agreed to adopt paragraph (5) with the amendment suggested by the Special Rapporteur.

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

*Paragraph (6)*

**Sir Michael Wood** suggested that, for clarification, the words “provided for in subparagraphs (a) and (b) respectively” should be inserted at the end of the paragraph.

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

*Paragraph (7)*

**Sir Michael Wood** suggested that, in the first sentence, the words “must pursue actively and in advance” should be changed to “take”; the words “such as by taking” should be altered to “through”; and the words “as indicated in subparagraph (a)” should be deleted.

**Mr. Jalloh** said that, while he did not disagree with those suggestions, he considered the sentence appropriate as drafted. In the wider context of the debate on the scope of the obligations covered by draft article 4, the Commission would be missing an opportunity to provide clarification if it made the commentary any less specific.

**Mr. Murphy** (Special Rapporteur) said that he would prefer to keep the words “must pursue actively and in advance”, so as to maintain the sense of action being taken before crimes against humanity were committed. He would have no objection to changing “such as by taking” to “through”, particularly as the wording of draft article 4 had previously been altered in a similar vein to take account of States’ concerns that it had been too open-ended; the words “or other appropriate preventive measures” provided sufficient leeway. He was also content to accept the deletion of the words “as indicated in subparagraph (a)”.

**Mr. Jalloh** said that changing “such as by taking” to “through” would alter the emphasis of the text, even though the words “or other appropriate preventive measures” would still mean that the list was non-exhaustive. In such a heavily debated area as international criminal law, the point was an important one.

**Mr. Murphy** (Special Rapporteur) pointed out that the chapeau of draft article 4 had been amended by the Drafting Committee to remove the word “including” before “through”, with the aim of sharpening the focus on subparagraphs (a) and (b). The suggested change to the text of the commentary was in line with that amendment.

**The Chair** said he took it that the Commission agreed to adopt paragraph (7) with the two changes accepted by the Special Rapporteur.

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

*Paragraph (8)*

**Mr. Park** suggested that, with a view to further clarifying the use of the word “appropriate” in draft article 4 (a), a new sentence should be inserted after the first sentence of paragraph (8), to read: “The term ‘appropriate’ affords some flexibility to each State when implementing this obligation, allowing it to tailor other preventive measures to the circumstances faced by that particular State.”

**Sir Michael Wood** said that the text could also be made clearer by altering the words “in this clause” in the first sentence to “in subparagraph (a)”.

**Mr. Murphy** (Special Rapporteur) said that he agreed with both of those amendments.

*Paragraph (8), as amended, was adopted.*

*Paragraph (9)*

**The Chair** suggested that the additional text proposed by Mr. Jalloh for paragraph (5) might logically be placed at the end of paragraph (9).

**Mr. Murphy** (Special Rapporteur) said that he would prefer to return to the issue once a written proposal had been circulated and suggested that paragraph (9) should be adopted on the understanding that an additional sentence might subsequently be added.

*On that understanding, paragraph (9) was adopted.*

*Paragraph (10)*

**Mr. Murphy** (Special Rapporteur) said that, at the end of the first sentence, the word “operational” should be deleted so as to accurately reflect the content of the case cited in footnote 228.

*Paragraph (10), as amended, was adopted.*

*Paragraph (11)*

*Paragraph (11) was adopted.*

*Paragraph (12)*

**Mr. Murphy** (Special Rapporteur) said that, in the second sentence, the words “activities carried out in” should be deleted to ensure that the focus was on territory, rather than activities.

*Paragraph (12), as amended, was adopted.*

*Paragraph (13)*

**Mr. Grossman Guiloff** said that, in the first sentence, the phrase “with organizations, such as the United Nations” had the effect of minimizing the importance of the United Nations and suggested that it should be altered to “with the United Nations and other international organizations”.

**Mr. Park** suggested that Mr. Grossman Guiloff’s concern might be better addressed by inserting the word “intergovernmental” before “organizations”, in line with draft article 4 (b).

**Mr. Murphy** (Special Rapporteur) said that the simplest approach might be to replicate the wording of draft article 4 (b), so that the first sentence would read: “Second, pursuant to subparagraph (b) of draft article 4, States have an obligation to cooperate with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.”

*Paragraph (13), as amended by the Special Rapporteur, was adopted.*

*Paragraph (14)*

*Paragraph (14) was adopted.*

*Commentary to draft article 5 (Non-refoulement)**Paragraph (1)*

**Mr. Park** suggested that the words “territory under the jurisdiction of” should be deleted from the first sentence.

**Mr. Nolte** said that the wording in question had been included deliberately to cover cases in which a person was sent to a location under the jurisdiction of a particular State, rather than to the territory of the State itself.

**Mr. Park** pointed out that, following extensive discussion within the Drafting Committee and the Commission, it had been agreed that draft article 5 would refer only to extraditing a person “to another State”.

**Sir Michael Wood** said that, according to his understanding, the words “to another State” had been used to ensure that the provision would apply more broadly, encompassing situations in which the handover of a person actually took place on the territory of a third State – for example, when the United Kingdom had handed over individuals in Iraq.

**The Chair** said he took it that the Commission agreed to the amendment proposed by Mr. Park.

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

*Paragraph (2)*

**Mr. Park** suggested that other examples should be given within the parentheses in the second sentence; the text in brackets might be altered to “such as surrender of a person within the same territory or over the high seas”.

**Mr. Murphy** (Special Rapporteur) said that he would prefer to leave the text in brackets as drafted, given that the situation of surrender within the same territory was dealt with earlier in the paragraph. At the same time, he proposed that the phrase “so as to encompass situations” in the same sentence should be altered to “so as to also encompass situations”, thereby covering the possibility of transfer within a State.

**The Chair** said he took it that the Commission agreed to the amendment proposed by the Special Rapporteur.

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

*Paragraph (3)*

**Mr. Murphy** (Special Rapporteur) said that, in the last sentence, “paragraph 9” should be corrected to “paragraph 11”.

*Paragraph (3), as amended, was adopted.*

*Paragraphs (4) to (7)*

*Paragraphs (4) to (7) were adopted.*

*Paragraph (8)*

*Paragraph (8) was adopted, subject to the requisite editorial adjustments to footnote 253.*

*Paragraph (9)*

*Paragraph (9) was adopted.*

*Paragraph (10)*

**Mr. Murphy** (Special Rapporteur) said that, in footnote 266, the reference to *Koktysh v. Ukraine* should be replaced with a reference to *Soldatenko v. Ukraine*, which better illustrated the point being made. For ease of reading, he also suggested that the factors listed in that footnote should be separated by semicolons and that the words “whether local authorities can be expected to abide by such assurances” should be added before the phrase “if the assurances were issued by the central Government of a State”, so as to more accurately capture the nature of that factor.

**Mr. Grossman Guiloff** said that, in footnote 263, it would be helpful to add the year of publication of the Committee against Torture’s general comment No. 4 in order to highlight how recent it was. Reference should also be made in that footnote to other cases that reflected the general trend, in both doctrine and treaty body practice, to take a more

negative view of diplomatic assurances. He would provide the Special Rapporteur with a revised text for consideration.

**The Chair** said that he took it that the Commission wished to leave paragraph (10) in abeyance.

*It was so decided.*

*Paragraph (11)*

*Paragraph (11) was adopted.*

*Commentary to draft article 6 (Criminalization under national law)*

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were adopted.*

*Paragraph (3)*

**Mr. Murphy** (Special Rapporteur) said that the marker for footnote 271 should be moved to the end of the paragraph. In the footnote itself, he proposed deleting the words “of disturbing the peace, organizing armed gangs and undermining state security”, as the publicly available 2015 judgment of the Appeals Chamber of the International Criminal Court in the *Gbagbo* case contained redactions that concealed the specific crimes involved.

*With that amendment to footnote 271, paragraph (3) was adopted.*

*Paragraphs (4) and (5)*

*Paragraphs (4) and (5) were adopted.*

*Paragraph (6)*

**Mr. Murphy** (Special Rapporteur) proposed replacing “(and in subsequent draft articles)” with “and in other draft articles”, without brackets. In the second part of the last sentence, the words “for the purpose of the draft articles” should be deleted so that that part of the sentence would read: “in customary international law or in national law, for the purposes of these draft articles the definition of crimes against humanity is limited to draft article 2, paragraphs 1 and 2”.

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

*Paragraphs (7) and (8)*

*Paragraphs (7) and (8) were adopted.*

*Paragraph (9)*

**Mr. Park** said that he was not convinced that the word “invariably” in the eighth sentence, in reference to treaties addressing other types of crimes, was appropriate. He therefore proposed deleting it.

**Mr. Murphy** (Special Rapporteur) said that, while he believed “invariably” was the correct word in that context, he agreed that it could cause confusion and could be deleted without the sentence losing any substance.

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

*Paragraphs (10) to (13)*

*Paragraphs (10) to (13) were adopted.*

*Paragraph (14)*

**Mr. Murphy** (Special Rapporteur) said that Sir Michael Wood had made a proposal to insert the words “within their power” in the final sentence, after the words “necessary and reasonable measures”.

**Mr. Jalloh** said that, in his view, the original wording was more appropriate and in line with the jurisprudence in that area.

**Sir Michael Wood** said that the phrase “necessary and reasonable measures in their power” appeared in paragraph 3 of draft article 6, so his proposal was merely to include that phrase in full in the commentary.

**Mr. Murphy** (Special Rapporteur) said that he had no objection to adding the words “in their power” to mirror the language of the draft article itself.

*Paragraph (14), as amended, was adopted.*

*Paragraph (15)*

*Paragraph (15) was adopted.*

*Paragraph (16)*

**Sir Michael Wood** said that, in his view, the technical term “dereliction of duty”, in the second sentence, should be replaced, so that the end of the sentence would read “in circumstances where the superior has failed to act with respect to the subordinates’ conduct”.

**Mr. Jalloh** said that, although he was not opposed to the proposal, he wondered whether it might not have further substantive implications.

**Mr. Grossman Guiloff** said that he would support retaining the original formulation, which in the Spanish version had been rendered as “*negligencia*”. To his mind, the proposed amendment would not be as clear and did not adequately cover the superior’s duty of prevention.

**Mr. Ruda Santolaria** said that he agreed with Mr. Grossman Guiloff that, in the Spanish version at least, the meaning would change if the word “*negligencia*” was replaced.

**The Chair** suggested that, as the proposal seemed to have not only linguistic but also conceptual implications, paragraph (16) should be left in abeyance to allow time for consultations and to find suitable wording.

*It was so decided.*

*Paragraphs (17) and (18)*

*Paragraphs (17) and (18) were adopted.*

*Paragraph (19)*

**Mr. Murphy** (Special Rapporteur) said that he had come to the conclusion that the reference to the Akayesu judgment in footnote 311 was not appropriate in that context and should be deleted. The footnote would then begin: “See, for example, *Prosecutor v. Jean Kambanda* ...”.

*With that amendment to footnote 311, paragraph (19) was adopted.*

*Paragraphs (20) and (21)*

*Paragraphs (20) and (21) were adopted.*

*Paragraph (22)*

**Mr. Park** proposed adding the words “including a State party to the 1998 Rome Statute” in the last sentence after “foreclose a State”. His concern was that, as one of the major changes made during the adoption on second reading of draft article 6 had been to

base paragraph 3 on article 86 (1) of Protocol I additional to the Geneva Conventions of 1949 rather than article 28 of the Rome Statute, the Commission should send a message to the States parties to the Rome Statute that had already adopted national laws in accordance with article 28.

**Mr. Jalloh** said that he, too, was concerned about some of the changes made on second reading to the provisions on individual criminal responsibility by moving away from the text of the Rome Statute. The Commission should ensure that it did not cause difficulties for the States parties to the Rome Statute when it came to incorporating the standard in their national laws. It should be made clear, however, that all States, not just States parties, could align their national laws with the article 28 standard.

**Mr. Murphy** (Special Rapporteur) suggested that a compromise solution would be to refer to “any State”.

*Paragraph (22), as amended by the Special Rapporteur, was adopted.*

*Paragraphs (23) to (25)*

*Paragraphs (23) to (25) were adopted.*

*Paragraph (26)*

**Mr. Murphy** (Special Rapporteur) said that the reference to *Prosecutor v. Dražen Erdemović* in footnote 335 should be deleted, as the case in question did not actually support the proposition in paragraph (26).

*With that amendment to footnote 335, paragraph (26) was adopted.*

*Paragraphs (27) to (30)*

*Paragraphs (27) to (30) were adopted.*

*Paragraph (31)*

**Mr. Jalloh**, referring to footnote 350, said that it might seem somewhat strange for the Commission to make reference to the 2017 decision of the Pre-Trial Chamber of the International Criminal Court on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir and not to mention the subsequent decision by the Appeals Chamber of the Court in the same case. He would therefore propose adding a reference to the more recent jurisprudence of the Appeals Chamber after the original reference to the Pre-Trial Chamber decision.

**Mr. Murphy** (Special Rapporteur) said that the case cited in the footnote was the one that supported the proposition in paragraph (31). If a reference to the Appeals Chamber decision was to be added, it would be necessary to find the section of that decision that also supported that proposition, which he did not believe would be possible. However, another option would simply be to delete the reference to the Pre-Trial Chamber decision if it was not considered a good authority in the light of the subsequent decision by the Appeals Chamber.

**Mr. Jalloh** said that, while he did not agree that the Appeals Chamber decision would not support the proposition in paragraph (31), he would not object to the deletion of the reference to the Pre-Trial Chamber decision.

**Mr. Hmoud** said that he would strongly object to any reference to the controversial Appeals Chamber decision.

**Sir Michael Wood** said that he would also support deletion of the reference to the Pre-Trial Chamber decision.

*With that amendment to footnote 350, paragraph (31) was adopted.*

*Paragraph (32)*

*Paragraph (32) was adopted.*

*Paragraph (33)*

**Sir Michael Wood** said that the last sentence should perhaps be adjusted in light of the change made with regard to the retroactive effect of a convention in paragraph (3) of the commentary to draft article 1.

**Mr. Murphy** (Special Rapporteur) said that, if the last sentence was aligned with paragraph (3) of the commentary to draft article 1, it would read: "Further, as noted in the commentary with respect to draft article 1, if the present draft articles ultimately serve as the basis for a convention, the obligations of a State party under that convention, unless a different intention appears, would only operate with respect to acts or facts that took place, or any situation that existed, after the convention enters into force for that State."

*Paragraph (33), as amended, was adopted.*

*Paragraph (34)*

*Paragraph (34) was adopted.*

*The meeting rose at 1 p.m.*