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International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3498th meeting

Held at the Palais des Nations, Geneva, on Friday, 2 August 2019, at 3 p.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:

<i>Chair:</i>	Mr. Šturma
<i>Members:</i>	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Ruda Santolaria
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission
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The meeting was called to order at 3.05 p.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](#).

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

Paragraph (35)

Mr. Murphy (Special Rapporteur) said that, in the second sentence, a reference to the date “1968” should be inserted before the word “Convention”.

Paragraph (35), as amended, was adopted.

Paragraphs (36) to (38)

Paragraphs (36) to (38) were adopted.

Paragraph (39)

Mr. Murphy (Special Rapporteur) said that footnote 376 was not relevant and should be deleted.

Sir Michael Wood said that the text to which the footnote related should also be deleted from the body of the paragraph.

Paragraph (39), as amended, was adopted.

Paragraph (40)

Mr. Murphy (Special Rapporteur) said that, in footnote 379, the reference to the report of the Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages should be deleted.

With that amendment to footnote 379, paragraph (40) was adopted.

Paragraphs (41) to (44)

Paragraphs (41) to (44) were adopted.

Paragraph (45)

Mr. Jalloh said that, in the first sentence, the words “with the exception of States” should be inserted after “legal persons” in order to bring the language into line with article 46C of the protocol amending the Protocol on the Statute of the African Court of Justice and Human Rights.

Paragraph (45), as amended, was adopted.

Paragraphs (46) to (51)

Paragraphs (46) to (51) were adopted.

Commentary to draft article 7 (Establishment of national jurisdiction)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Sir Michael Wood said that, in the second sentence, the word “joint” should be inserted before “separate opinion”, and, in the quotation, the editorial correction in square brackets should be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Murphy (Special Rapporteur) said that, in the second sentence, the word “was” should be replaced with “is”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

Sir Michael Wood said that, in the last citation in footnote 412, the words “in the government” should be removed, as the “high-level official” referred to in the Note on the Investigation and Prosecution of Crimes of Universal Jurisdiction was the attorney general acting as a prosecutor, not as a member of the Government.

With that amendment to footnote 412, paragraph (9) was adopted.

Paragraph (10)

Mr. Jalloh asked whether it would not be appropriate to add a reference to “universal jurisdiction”, given that a number of States, including the Nordic countries, had raised the question of universality in their submissions on draft article 7.

Mr. Murphy (Special Rapporteur) said that no reference was made to the principle of universal jurisdiction in draft article 7 or the commentary thereto in order to avoid favouring a particular interpretation of the principle. If the exercise of universal jurisdiction by a State was considered to be contingent on the alleged offender being present in the territory of that State, any mention of the principle should have been made in draft article 7 (2) and paragraph (9) of the commentary. If, however, such presence was deemed not to be required, universal jurisdiction would fall under the umbrella of “any other jurisdiction”, which was covered by draft article 7 (3) and paragraph (10) of the commentary.

Paragraph (10) was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

Mr. Nolte said that, for the sake of clarity, the words “in any territory under the State’s jurisdiction” should be added after “present” in the first sentence. The words “in a State” could then be removed from the second sentence.

Mr. Park said that he was concerned that the adoption of paragraph (12) might have an impact on the Commission’s ongoing work on the draft articles on immunity of State officials from foreign criminal jurisdiction, in particular draft article 9, on determination of immunity. If that was the case, he would prefer to delete the paragraph.

Ms. Escobar Hernández said that the paragraph did not appear to be of direct relevance to the question of the establishment of national jurisdiction, which was subject to conditions different to those that applied to the exercise of jurisdiction. She agreed with Mr. Park that the adoption of the paragraph might influence the Commission’s work on immunity of State officials from foreign criminal jurisdiction and that the paragraph should therefore be deleted.

Mr. Murphy (Special Rapporteur) said that no attempt was being made in the paragraph to address the issue of immunity. Rather, the aim was to tie together the obligations stemming from draft articles 7, 9, 10 and, where appropriate, 13, and thereby clarify the sequence of events leading to the exercise of jurisdiction.

Mr. Jalloh said that he understood the paragraph in the same way as the Special Rapporteur, and found it to be useful. He therefore supported its retention, with the amendments proposed by Mr. Nolte.

Paragraph (12), as amended, was adopted with a minor editorial change.

Commentary to draft article 8 (Investigation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor editorial change.

Paragraph (4)

Mr. Murphy (Special Rapporteur) said that, in the first sentence, to avoid changing the standard set in the draft article, the words “suspicion of a crime having been” should be replaced with “a reasonable ground to believe that crimes against humanity have been or are being”.

Sir Michael Wood said that, in the same sentence, the words “immediately or without any delay” should be replaced with “without delay”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Park proposed that, in the first sentence, the words “available to that State” should be inserted after “all reasonable steps”.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Commentary to draft article 9 (Preliminary measures when an alleged offender is present)

Paragraph (1)

Mr. Murphy (Special Rapporteur) said that, in the second sentence, the indicator for footnote 433 should be placed immediately after the words “other legal measures”. At the beginning of the footnote itself, he would insert the word “See”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte, referring to the last sentence, proposed that, for the sake of clarity, the words “withholding of” should be inserted before “reporting”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Sir Michael Wood said that, in the penultimate sentence, the word “objective” should be replaced with “object”.

Paragraph (5), as amended, was adopted with a minor editorial change.

*Commentary to draft article 10 (Aut dedere aut judicare)**Paragraphs (1) to (5)*

Paragraphs (1) to (5) were adopted.

Paragraph (6)

Paragraph (6) was adopted with a minor editorial change.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

Paragraph (11)

Paragraph (11) was adopted with a minor editorial change.

Paragraph (12)

Sir Michael Wood proposed that, in the penultimate sentence, the words “Secretariat of the United Nations” should be replaced with “Secretary-General”.

Mr. Murphy (Special Rapporteur) said he could agree with that proposal if it was not customary to refer to the “position of the Secretariat of the United Nations”. In addition, he would suggest replacing, in the last sentence of the paragraph, the word “prohibited” with “prohibits”.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Mr. Jalloh said that, according to paragraph (13), an amnesty adopted by a State should be assessed for compatibility with that State’s international obligations. Moreover, that State had an *aut dedere aut judicare* obligation, especially in relation to victims. Referring to the example of the Special Court for Sierra Leone, he wished to confirm that, if a scenario was to arise in which a State provided amnesty to an accused person and refused to extradite that person, consistent with its *aut dedere aut judicare* obligation, to a State with concurrent jurisdiction, the former State should nevertheless be accountable for breaches of its obligations under the draft articles.

Mr. Murphy (Special Rapporteur) said that the paragraph, carefully crafted on first reading, had remained unchanged for the second reading. It was best interpreted as stating that there were important aspects of draft article 10 that should be taken into account by any State that sought to adopt an amnesty in the context of crimes against humanity. It would be difficult to find acceptable language that referred to breaches of the draft articles, since the latter had not yet served as the basis for a convention. He would prefer the Commission to adopt the paragraph as drafted, not least because States had seemed generally amenable to it on first reading.

Mr. Jalloh, acknowledging the sensitive nature of the paragraph, said that he merely wished to highlight the need for the permissibility of an amnesty to be assessed in the light of the international obligations of the States concerned.

Paragraph (13) was adopted.

*Commentary to draft article 11 (Fair treatment of the alleged offender)**Paragraph (1)**Paragraph (1) was adopted with a minor editorial change.**Paragraphs (2) to (6)**Paragraphs (2) to (6) were adopted.**Paragraph (7)*

Mr. Murphy (Special Rapporteur) drew attention to a proposal submitted by Mr. Grossman Guiloff for a new sentence to be inserted immediately after footnote indicator 481, to read: “These instruments not only guarantee fair treatment, but also establish the obligation that fair treatment guarantees take place before an independent, impartial and competent tribunal established by law.”

Mr. Jalloh said that while he understood the spirit of the proposal, the language might be redrafted, for instance to indicate that fair trial guarantees were needed not just before a tribunal, but at various stages of proceedings.

Mr. Murphy (Special Rapporteur) said that the additional sentence was not really necessary, since the main point of the paragraph was to refer to human rights instruments, with an array of guarantees, without having to reproduce them in the draft articles or in the commentary.

*Paragraph (7) was adopted.**Paragraphs (8) to (11)**Paragraphs (8) to (11) were adopted.**Commentary to draft article 12 (Victims, witnesses and others)**Paragraphs (1) and (2)**Paragraphs (1) and (2) were adopted.**Paragraph (3)*

Mr. Murphy (Special Rapporteur), drew attention to a proposal submitted by Mr. Grossman Guiloff, to insert the phrase “provided that it is consistent with their obligations under international law” at the end of the first sentence. While he agreed with the general idea that national laws, when defining the term “victim”, should be consistent with international law, the proposed amendment did not quite reflect the treaties concerned by the paragraph, which generally did not provide for States to adopt their own definition of the term “victim” provided that it was consistent with their international obligations. Generally speaking, international law did not attempt to regulate such matters.

Mr. Jalloh, supported by **Mr. Ruda Santolaria**, said that he was in favour of the proposed amendment, which made it clear that, while the Commission left the definition of the term “victim” to States’ discretion, such definition must be consistent with their obligations under the treaties referred to in the paragraph.

*Paragraph (3), as amended, was adopted.**Paragraphs (4) to (15)**Paragraphs (4) to (15) were adopted.**Paragraph (16)*

Sir Michael Wood proposed that, in the last sentence of the paragraph, the phrase “where the crimes against humanity were committed ‘through acts attributable to the State

under international law”” should be replaced with “to which the acts constituting crimes against humanity are attributable”.

Paragraph (16), as amended, was adopted.

Paragraphs (17) and (18)

Paragraphs (17) and (18) were adopted.

Paragraph (19)

Paragraph (19) was adopted with a minor editorial change.

Paragraph (20)

Paragraph (20) was adopted.

Paragraph (21)

Mr. Park, supported by **Mr. Jalloh**, proposed that, in the penultimate sentence, the words “meaningful reparation” should be replaced with “meaningful and effective forms of reparation”, to reflect the language in the statement of the Chair of the Drafting Committee on the topic at the Commission’s current session.

Mr. Nolte said that he would like to know whether the adjective “effective” had been used previously in relation to reparations and, if so, in what context. The Commission should be cautious in introducing a potentially new term; the fact that the language had been used in a statement by the Chair of the Drafting Committee did not make it established terminology. In fact, another phrase – “full reparation” – had been used in the Commission’s articles on responsibility of States for internationally wrongful acts.

Mr. Murphy (Special Rapporteur) said that Mr. Nolte was right to raise the question and that he agreed that the statement of the Chair of the Drafting Committee was not in any way binding. As it happened, draft article 12 (3), which referred to a number of forms of reparation, did not actually employ the word “meaningful” either, although the latter did effectively capture the thrust of the paragraph.

Mr. Park said that paragraph (21), which stated that reparations “must be tailored to the specific context”, did not discuss “full reparation”, but rather provided for certain circumstances in which States might consider meaningful and effective forms of reparation.

The Chair, speaking as a member of the Commission, suggested that the word “meaningful” should be replaced with “appropriate”.

Mr. Nolte said that the word “effective” might be understood as more expansive than the word “full”, and that the point of the paragraph was that reparation was not always “full”. He could accept the Chair’s proposed amendment.

Mr. Hmoud, noting that the adjective “effective” was used in relation to “reparations” in 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, as adopted by the General Assembly in resolution 60/147, said that he nonetheless would support the amendment proposed by the Chair.

Mr. Murphy (Special Rapporteur) said that the penultimate sentence of paragraph (21) was simply meant to caution States against abusing the flexibility of their obligation to provide reparation. He agreed that the word “appropriate”, which was explained in the first sentence of the paragraph, would also serve well in the last sentence.

Paragraph (21), as amended, was adopted.

Paragraphs (22) and (23)

Paragraphs (22) and (23) were adopted.

Paragraph (24)

Mr. Murphy (Special Rapporteur) suggested that, in the fifth sentence, the words “such a right” should be deleted and that a comma should be inserted after the title “Convention for the Protection of Human Rights and Fundamental Freedoms”. As the sentence currently stood, it was unclear to which instrument the words “such a right” were referring.

Paragraph (24), as amended, was adopted.

*Commentary to draft article 13 (Extradition)**Paragraphs (1) to (3)*

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Sir Michael Wood proposed that the third sentence of the paragraph should be deleted and that the phrase “*unless* the person is extradited or surrendered to another State (or competent court or tribunal)” should be inserted at the end of the second sentence, to mirror the language used in paragraph (7) of the commentary to draft article 13.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

Sir Michael Wood proposed that, in the second sentence, the words “identified in” should be replaced with “covered by”, for consistency with language that the Commission had used elsewhere in the draft articles.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Sir Michael Wood proposed that the phrase “as a ground for not proceeding with an extradition process” should be replaced with “for refusing an extradition request”.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (14)

Paragraphs (10) to (14) were adopted.

Paragraph (15)

Mr. Jalloh, recalling the comments and observations received from Governments, international organizations and others, wondered whether the commentary should include a recommended time limit by which States should inform the Secretary-General that they intended to use the draft articles as the legal basis for extradition in relation to crimes against humanity.

Sir Michael Wood proposed that, for the sake of logic and to avoid repetition, the second sentence should be deleted, because its subject matter was dealt with in paragraph (16), and the last sentence of paragraph (15) should be moved to the beginning of the paragraph, which would then begin “Paragraph 5 is modelled on ...”.

Mr. Murphy (Special Rapporteur) said that he agreed with the amendment proposed by Sir Michael Wood. In response to Mr. Jalloh’s question, he explained that one or two States had asked whether draft article 13 should not include a deadline, because some conventions did so. In his fourth report, he had stated that a time limit would be

desirable, but that was something which would have to be decided by States during any potential negotiation of a convention.

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (25)

Paragraphs (16) to (25) were adopted.

Paragraph (26)

Sir Michael Wood suggested the deletion of the word “out” in the first sentence.

Paragraph (26), as amended, was adopted.

Paragraph (27)

Sir Michael Wood said that the subheading above paragraph (27) was rather bald. Perhaps it should read “No obligation to extradite in certain circumstances”.

Mr. Murphy (Special Rapporteur) said that the subheading suggested by Sir Michael Wood would be incorrect, because the draft articles did not set out any circumstances in which there was an obligation to extradite.

Sir Michael Wood said that the following paragraphs made it plain that, while there was nothing in the draft articles that required a State to extradite in certain circumstances, under other legal instruments States might well have an obligation to extradite. The subheading as it stood was therefore confusing.

The Chair, speaking as a member of the Commission, suggested “Exceptions to obligations to extradite” for the subheading.

Mr. Murphy (Special Rapporteur) said that draft article 13 (11) made it clear that nothing in the draft articles should be regarded as obliging a State to extradite in the circumstances enumerated therein. What was curious was that there was nothing in the draft articles which obligated a State to extradite at all. If the title read “No obligation to extradite in certain circumstances”, it might imply that there were circumstances where such an obligation did exist.

Sir Michael Wood suggested the wording “Cases where there are substantial grounds for believing that the request is made for improper purposes”.

The Chair, speaking as a member of the Commission, suggested “Circumstances precluding extradition”.

Mr. Murphy (Special Rapporteur) suggested referring to requests for extradition made on improper grounds.

Mr. Jalloh said that he found the Chair’s proposal quite attractive. Essentially, the Commission did not wish to use wording as strong as “no obligation to extradite”, while, at the same time, it wanted to capture the idea that the draft articles did permit extradition, but only within certain parameters.

Mr. Hmoud suggested speaking of “impermissible grounds under international law” rather than “improper grounds”.

Mr. Murphy (Special Rapporteur) suggested “Requests for extradition based on impermissible grounds”.

The heading, as amended by the Special Rapporteur, was adopted.

With that amendment to the subheading, paragraph (27) was adopted.

Paragraphs (28) to (35)

Paragraphs (28) to (35) were adopted.

Paragraph (36)

Mr. Murphy (Special Rapporteur) said that the last clause in the second sentence, “which may be identified in the State’s national law”, should be deleted.

Paragraph (36), as amended, was adopted.

Paragraphs (37) to (39)

Paragraphs (37) to (39) were adopted.

*Commentary to draft article 14 (Mutual legal assistance)**Paragraphs (1) to (3)*

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Sir Michael Wood said that, in the first sentence, it might be better to replace the adjective “contemporary” with “recent”, because the word “contemporary” suggested that there were some old-fashioned conventions that could be disregarded.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Murphy (Special Rapporteur) said that, footnote 611 should be amended to refer to the second edition of *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*.

Sir Michael Wood said that, in the fourth sentence, it would be more natural to say “No State party has made a reservation to ...” rather than “No State party has filed a reservation objecting to ...”.

With that amendment to footnote 611, paragraph (5), as amended, was adopted.

Paragraph (6)

Sir Michael Wood said that, in the parenthesis in the second sentence, it would be clearer to say “even if there is” rather than “even then”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

Mr. Murphy (Special Rapporteur) pointed out that the 1990 Model Treaty on Assistance in Criminal Matters, cited in footnote 616, had been amended by the General Assembly in 1998, in its resolution 53/112. That reference, therefore, and others to the same model treaty, needed to be corrected. He would clarify with the Secretariat where adjustments were required.

Sir Michael Wood said that, at the end of the second sentence, “extradition treaties” should be replaced with “mutual assistance treaties”.

Paragraph 10, as amended, was adopted, subject to the requisite editorial changes.

Paragraph (11)

Mr. Murphy (Special Rapporteur) said that the last sentence of footnote 620 should be deleted.

With that amendment to footnote 620, paragraph (11) was adopted.

Paragraphs (12) to (21)

Paragraphs (12) to (21) were adopted.

Paragraphs (22) and (23)

Mr. Zagaynov said that he had some doubts about the advisability of including in paragraphs (22) and (23) the particular examples of mechanisms which had been set up to collect evidence of crimes against humanity. The General Assembly and Human Rights Council resolutions establishing them had given rise to some sharp disagreement in both bodies, and a number of delegations had voted against them. Mentioning them in the draft commentary would add little in the way of substance and might hamper agreement in the Sixth Committee. Moreover, in unofficial consultations about the wording of the draft article, a number of Commission members had expressed a preference for a cautious approach that would not target the situation in particular countries. He therefore considered that it would be wise to delete paragraphs (22) and (23).

Mr. Murphy (Special Rapporteur) said that he understood Mr. Zagaynov's concerns. Although there was no need to retain all three examples of mechanisms referred to in paragraphs (22) and (23), there would be some value in keeping one example, to indicate what was meant by "international mechanisms" in paragraph 9 of the draft article. Perhaps Mr. Zagaynov would agree to keep the reference to the Investigative Team set up to ensure accountability for crimes against humanity perpetrated in Iraq.

Mr. Huang said that he shared Mr. Zagaynov's concerns. The two paragraphs in question touched on some highly controversial cases, to which that of Afghanistan could be added. Not all the permanent members of the Security Council had been in favour of setting up the international mechanisms. It would be better for the Commission not to become involved in such political controversy. He therefore supported the deletion of both paragraphs.

Mr. Ouazzani Chahdi said that he perfectly understood the concerns of both Mr. Zagaynov and the Special Rapporteur. However, if the paragraph concerning Iraq was retained, the paragraph concerning the Syrian Arab Republic would also have to be kept.

Mr. Jalloh, recalling the discussions in the Drafting Committee, said that a number of members had drawn attention to the existence of commissions or mechanisms of inquiry established by regional bodies, in particular the African Union Commission of Inquiry on South Sudan. It had been understood that that kind of scenario would be captured in the commentary. He therefore wondered whether a reference to that Commission of Inquiry should be added to a footnote.

The Chair, speaking as a member of the Commission, said that a reference to the Commission of Inquiry on South Sudan might be helpful in that it would show other regional organizations that they also had a role to play in establishing such mechanisms.

Sir Michael Wood said that the content of paragraphs (21) and (24) was sufficient commentary to paragraph 9 of the draft article, which spoke of States entering into agreements with international mechanisms to collect evidence with respect to crimes against humanity. Paragraphs (22) and (23) did not deal with cases in which States had entered into such agreements; they merely gave examples of mechanisms. As such, they were unnecessary, and there was therefore nothing to be lost by accepting Mr. Zagaynov's proposal.

Ms. Galvão Teles said that she agreed with Sir Michael Wood. It would be strange to refer to one particular example of a mechanism, but not to others. The Special Rapporteur's original description of the mechanisms in question was quite neutral. Perhaps a more succinct reference to them could be placed in a footnote. However, in view of the politically sensitive nature of some mechanisms, she would prefer not to mention any of them.

Mr. Hassouna said that it would be inadvisable for the Commission to give examples that were politically controversial. If it referred to one case, it might as well list all such mechanisms which had been established by international or regional organizations.

He agreed with Ms. Galvão Teles that the wisest course of action would be not to refer to any of them, and therefore supported the proposal to delete paragraphs (22) and (23).

Mr. Tladi said that the Commission should take a cautious approach. As a point of principle, it should avoid referring to certain events if doing so made some States uncomfortable.

Mr. Murphy (Special Rapporteur) said that the best solution seemed to be to delete paragraphs (22) and (23), as Mr. Zagaynov had proposed. It would mean doing away with the examples, but those examples were well known. In any case, as Sir Michael Wood had indicated, paragraph 9 addressed a form of cooperation that was not best demonstrated by the examples cited.

The Chair said he took it that the Commission agreed to delete paragraphs (22) and (23).

It was so decided.

Paragraphs (24) and (25)

Paragraphs (24) and (25) were adopted.

Commentary to draft article 15 (Settlement of disputes)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy (Special Rapporteur) said that the *travaux préparatoires* mentioned in the third sentence of paragraph (2) related only to the United Nations Convention against Transnational Organized Crime, not to the protocol supplementing it. The words “and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime”, should therefore be deleted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Murphy (Special Rapporteur) said that, in the final sentence of the paragraph, the words “42 States parties have filed a reservation declaring” should be amended to read “more than 40 States parties have communicated”. There was some controversy as to whether some States parties had actually filed a reservation, and some of the communications that had been submitted by States parties had not been styled as “reservations” but as “declarations”, so it was perhaps wiser not to indicate a precise number.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The Chair invited the Commission to consider the commentary to the annex to the draft articles.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy (Special Rapporteur) said that, to reflect the contents of the second edition of *State of Implementation of the United Nations Convention against Corruption*, the final sentence of paragraph (3) should be amended to read: “As of 2017, all but eight States parties to that convention had designated a central authority.”

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

Paragraph (10)

Paragraph (10) was adopted with a minor editorial change.

Paragraphs (11) to (20)

Paragraphs (11) to (20) were adopted.

Paragraph (21)

Mr. Murphy (Special Rapporteur) said that paragraph (21) should be amended to reflect the publication in 2017 of the second edition of *State of Implementation of the United Nations Convention against Corruption*: in the final sentence, “2015 implementation report” should be amended to read “2017 implementation report”. The quotation from the report was almost identical, with only slight changes. He would clarify with the Secretariat where those changes should be made.

On that understanding, paragraph (21), as amended, was adopted.

Paragraphs (22) to (29)

Paragraphs (22) to (29) were adopted.

Paragraph (30)

Paragraph (30) was adopted with a minor editorial correction.

The Chair invited the Commission to resume its consideration of a number of paragraphs that had been left in abeyance.

*Commentary to draft article 2 (Definition of crimes against humanity) (continued)**Paragraph (45) (continued)*

Mr. Murphy (Special Rapporteur) said that Mr. Grossman Guiloff had submitted the text of a sentence that he wished to insert in paragraph (45). The sentence, which would be placed after footnote indicator 156, read: “Additionally, while all regional human rights conventions and the International Covenant on Civil and Political Rights do not contain definitions on disappearance, they refer expressly to elements concerning disappearances that are relevant to this topic, including the non-derogable prohibition of detention without acknowledging its occurrence and the right to be recognized as a person before the law.”

He was not in favour of the proposed addition. Paragraph (45) referred to the definition of “enforced disappearance of persons”, and tried to make clear that the Commission’s definition of crimes against humanity was not intended to prejudice other existing definitions, citing the definitions contained in three other instruments. The sentence proposed by Mr. Grossman Guiloff, however, noted that there were other instruments that did not contain definitions. That might well be true, but he did not see it as germane to the paragraph. He proposed that the sentence should remain as it stood.

Paragraph (45) was adopted.

Paragraph (46) (continued)

Mr. Murphy (Special Rapporteur) said that Mr. Grossman Guiloff had proposed two amendments to paragraph (46). The first proposed amendment was that the second sentence should be deleted in its entirety. The second was to insert the words “unless States so agree” at the end of the final sentence. It was unclear to him why one might delete the second sentence, since it simply stated a fact: it was true that the Commission was hoping to harmonize national laws to promote inter-State cooperation. His preference was therefore to retain that sentence. He was not, however, opposed to the addition of “unless States so agree”, which was presumably intended to indicate that, in any given situation, two States could agree to cooperate within the scope of the draft articles, even if they were operating on the basis of broader definitions of crimes against humanity.

Mr. Ruda Santolaria said that, while he understood the explanation given by the Special Rapporteur, he remained concerned by the use of the term “harmonization” in the second sentence. The first sentence referred to the “without prejudice” clause in draft article 2 (3), recognizing that some laws might contain broader definitions of crimes against humanity than the draft articles. However, the focus in the second sentence on the harmonization of national laws seemed to suggest that the definition of crimes against humanity contained in such laws should be brought into line with that set out in the draft articles, which could in some cases be more restrictive. He would prefer to see the second sentence deleted, and the word “however” inserted at the beginning of the third sentence. He agreed with Mr. Grossman Guiloff’s proposed insertion of “unless States so agree” at the end of the last sentence.

Mr. Jalloh said that the second sentence struck him as odd. One of the underlying objectives of the draft articles was the promotion of mutual legal assistance and extradition between States. New Zealand had submitted an interesting comment regarding draft article 14, in which it expressed a preference for a broader approach. The comment underlined that in New Zealand, mutual legal assistance was largely governed by the Mutual Assistance in Criminal Matters Act 1992, both in terms of requests made by New Zealand to other States and in terms of requests made of New Zealand by other States, and that the legal system of New Zealand did not require the existence of a mutual legal assistance treaty or convention in order for such assistance to be requested or provided. New Zealand had ended its submission by stating that it would prefer a formulation in which the draft annex applied to requests pursuant to draft article 14 if the States in question were not bound by such a treaty, or which did not otherwise have a legal basis to provide such assistance. Such a formulation would address the concern raised by Mr. Grossman Guiloff and Mr. Ruda Santolaria, namely, that some space should be left for States to reach agreements in circumstances that were not envisaged in the draft articles. He therefore supported the proposal to delete the second sentence and the proposal to insert “unless States so agree” at the end of the paragraph, in order to make it clear that the draft articles would not stand in the way of States doing a better job of offering mutual legal assistance or dealing with extradition matters if they chose to do so.

Sir Michael Wood said that the idea in the second sentence was quite an important one but was perhaps in the wrong place. It could be moved to the final sentence of paragraph (44), after the word “thus”. On a more general point, he saw no inherent conflict between the wish to harmonize laws and the right of States to go beyond the scope of the draft articles.

Mr. Park said that he was in favour of maintaining the second sentence. Paragraph (2) of the general commentary, which had already been adopted, also referred to harmonizing national laws. Sir Michael Wood’s proposal was perhaps a compromise solution.

Mr. Ruda Santolaria said that he supported Sir Michael Wood’s proposed solution, which made clear that the aim of harmonizing national laws was to facilitate cooperation and that such harmonization did not preclude States from having more advanced legislation in that regard. He had simply been concerned about the way in which the second sentence was formulated in the context of paragraph (46).

Mr. Murphy (Special Rapporteur) said that, if he understood correctly, the suggestion was to amend the final sentence of paragraph (44) to read: “Thus, notwithstanding that an important objective of the draft articles is the harmonization of national laws, so that they may serve as a basis for robust inter-State cooperation, if a State wishes to adopt or retain a broader definition in its national law, the present draft articles do not preclude it from doing so.”

The Chair said he took it that the Commission agreed that the second sentence of paragraph (46) should be moved to paragraph (44), in the manner just described by the Special Rapporteur.

It was so decided.

Mr. Murphy (Special Rapporteur), turning back to paragraph (46), said that, in sum, the members’ proposals were that the first sentence should remain unchanged; the second sentence should be deleted, having been incorporated into paragraph (44); and the third sentence should begin with the word “however”. Building on Mr. Grossman Guiloff’s initial suggestion, he proposed that the words “unless the States concerned so agree” should be inserted at the end of the final sentence.

Mr. Jalloh said that, although the draft articles focused more on accountability than on harmonization, he was happy to agree to the amendments to the paragraph as summed up by the Special Rapporteur.

Paragraph (46), as amended, was adopted.

Draft article 5 (Non-refoulement) (continued)

Paragraph (10) (continued)

Mr. Murphy (Special Rapporteur) said that Mr. Grossman Guiloff had proposed that the fifth sentence should be moved to the end of paragraph (7) and replaced with a sentence that referred to paragraph 20 of general comment No. 4 of the Committee against Torture. He did not think that it was a good idea to move the fifth sentence of paragraph (10) to the end of paragraph (7), since paragraph (10) dealt with the considerations that should be brought to bear during a *non-refoulement* analysis and, from footnote indicator 263 onward, addressed the appropriateness of relying on assurances made by other States. Noting that the sixth sentence focused on what the European Court of Human Rights had said on that matter and that Mr. Grossman Guiloff’s proposal was to cite the findings of the Committee against Torture in that regard, he wished to propose that the sixth sentence should be amended to read:

When considering whether it is appropriate for States to rely on assurances made by other States, the Committee against Torture has considered that “diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of *non-refoulement* as set out in article 3 of the Convention, where there are substantial grounds for believing that the person would be in danger of being subjected to torture in that State”.

A footnote would then be inserted, which would read: “Committee against Torture, general comment No. 4, para. 20.” The part of the sentence that referred to the European Court of Human Rights would become an independent sentence.

Another possibility would be to include the quotation in a footnote, but he was willing to see it incorporated into the text of the paragraph if the Commission members so wished.

Sir Michael Wood said that his preference was not to include the quotation, which was not particularly helpful. To say that something should not be used as a loophole to get around *non-refoulement* was to state the obvious, whereas the statements from the European Court of Human Rights were helpful. Including the quotation would also make the passage about assurances excessively long. The purpose of the paragraph was not to present a study on the topic of assurances.

Mr. Jalloh, supported by **Mr. Ruda Santolaria**, said that the question of the status of diplomatic assurances had arisen in a number of human rights cases. It was a substantive element that was relevant to the draft article on *non-refoulement*. He was therefore in favour of inserting the quotation in the body of the text, as proposed by Mr. Grossman Guiloff.

The Chair, speaking as a member of the Commission, suggested that the quotation could perhaps be added to footnote 264.

Mr. Murphy (Special Rapporteur) said that he agreed that a footnote referring to paragraph 20 of general comment No. 4 of the Committee against Torture, and reproducing the text thereof, could be inserted. He proposed that it should take the form of a stand-alone footnote, with the indicator inserted after the clause “When considering whether it is appropriate for States to rely on assurances made by other States”.

The Chair said he took it that the Commission agreed to insert the new footnote as proposed by the Special Rapporteur.

Paragraph 10, as supplemented with a footnote, was adopted.

The meeting rose at 6 p.m.