

Document:-  
**A/CN.4/3341**

**Summary record of the 3341st meeting**

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

Extract from the Yearbook of the International Law Commission:-  
**2016, vol. I**

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(<http://legal.un.org/ilc/>)*

Paragraph (26) (*concluded*)\*\*\*

97. Sir Michael WOOD said that the second sentence, which suggested, as a result of the penultimate footnote to the paragraph, that the House of Lords considered in general that the pronouncements of treaty bodies had no value, did not seem necessary and should be deleted.

98. Mr. SABOIA said that he endorsed Sir Michael's proposal.

*Paragraph (26), as amended, was adopted and inserted into paragraph (23).*

Paragraphs (24) and (25) (*concluded*)\*\*\*

99. Mr. NOLTE (Special Rapporteur) proposed shortening and merging paragraphs (24) and (25) so as to respond to the concern expressed by Mr. Forteau, for whom the quotations from the Guide to Practice on Reservations to Treaties<sup>505</sup> concerned the validity of reservations. He thus proposed inserting the words "commentary to the" before "Guide" in the first sentence of paragraph (24), replacing the full stop in the first sentence with a comma and deleting all the text from the second sentence of paragraph (24) up to "which is what is evoked by the expression 'shall give consideration' in the first part of the guideline" in the first sentence of paragraph (25). Paragraphs (24) and (25), as amended, would constitute a new paragraph (24), which would come after the new paragraph (23), as adopted.

100. Mr. MURPHY said that, if Commission members wished to retain the quotations in paragraphs (24) and (25), it would perhaps be wiser to rework those paragraphs, keeping only the first sentence of paragraph (24) and moving the rest, namely the quotation from guideline 3.2.3 and the commentary thereto, to a footnote. That first sentence could be added at the end of the new paragraph (23), which would then mention regional human rights courts, domestic courts and the Guide to Practice on Reservations to Treaties.

101. Mr. NOLTE (Special Rapporteur) said that he endorsed Mr. Murphy's proposal, which seemed to him a good compromise. He proposed not reproducing in the footnote that would be at the end of the new paragraph the entirety of the guideline and the commentary thereto, but only the passage beginning "Of course".

*Paragraphs (24) and (25), as amended and merged into a single paragraph, were adopted.*

Paragraphs (27) and (28) (*concluded*)\*\*\*

*Paragraphs (27) and (28) were deleted.*

Paragraphs (29) to (35) (*continued*)\*\*\*

102. Mr. NOLTE (Special Rapporteur) said that paragraphs (29) to (35), which were closely linked, were essential, since they explained how the Commission had come to draft a "without prejudice" clause. He proposed adopting them as they stood, since they had already been cut,

<sup>505</sup> The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1-2, pp. 23 *et seq.* See also General Assembly resolution 68/111 of 16 December 2013, annex.

but said that he was prepared, if Commission members so wished, to delete the second sentence of paragraph (30), which began with the phrase "As a form of practice", as well as the first sentence of paragraph (31), and to merge those two paragraphs into one. There would then be a first paragraph setting out the position of Commission members who thought that the pronouncements of expert treaty bodies were part of the topic, a second paragraph putting forward the opposite position and three further paragraphs setting out the Commission's conclusions on that point.

103. Sir Michael WOOD, noting that international and domestic courts were criticized rather unfairly in paragraph (29), said that he would prefer it if the Commission limited itself to noting that there were divergent views on the question.

104. Mr. MURPHY said that he agreed with Sir Michael's point of view. The paragraphs under consideration gave the impression that the Commission was seeking to set out the various points of view of its members and that the question, left open, would be resolved only on second reading, once the reactions of States were known. Yet the "without prejudice" clause was not intended to leave open the question for a subsequent decision, but to indicate that the pronouncements of expert treaty bodies were relevant in some contexts, even if they did not constitute subsequent agreements and practice under article 31, paragraph 3, of the 1969 Vienna Convention.

105. Mr. SABOIA said that he, too, agreed with Sir Michael's point of view. He proposed replacing the expression "have not clearly explained the relevance of pronouncements" in paragraph (29) with "have not determined in a definitive manner the relevance of pronouncements". He also proposed moving the last sentence of paragraph (29), which concerned the Commission, to the beginning of paragraph (30).

106. Mr. NOLTE (Special Rapporteur) said that, on first reading, it was appropriate to describe the various points of view and to leave States to react to them as they saw fit. He invited Commission members to adopt the rest of the text with that in mind.

107. Mr. HMOUD said that he would like the paragraphs under consideration to be formulated so as to reflect the fact that the practice that was accepted was practice under article 32 of the 1969 Vienna Convention.

*The meeting rose at 6.10 p.m.*

### 3341st MEETING

*Tuesday, 9 August 2016, at 10 a.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hasouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, 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-eighth session (*continued*)

CHAPTER VI. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties (concluded)* (A/CN.4/L.884 and Add.1–2)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VI contained in document A/CN.4/L.884.

#### B. Consideration of the topic at the present session (*concluded*)\*

Paragraphs 9 to 11 (*concluded*)\*

*Paragraphs 9 to 11 were adopted on the understanding that missing details would be filled in by the Secretariat.*

*Section B, as amended, was adopted.*

2. The CHAIRPERSON invited the Commission to resume its discussion of the portion of chapter VI contained in document A/CN.4/L.884/Add.2.

#### C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading (*concluded*)

2. TEXT OF THE DRAFT CONCLUSIONS AND COMMENTARIES THERETO (*concluded*)

*Commentary to draft conclusion 13 [12]* (Pronouncements of expert treaty bodies) (*continued*)

Paragraph (29) (*concluded*)

3. Mr. NOLTE (Special Rapporteur) said that, following consultations with interested Commission members, he proposed that the text of the paragraph be reformulated to read: “Court decisions have not always fully explained the relevance of pronouncements by expert treaty bodies for the purpose of the interpretation of a treaty, be it in terms of the rules of interpretation under the 1969 Vienna Convention or otherwise.<sup>[footnote]</sup> The Commission has considered the following alternatives.”

*Paragraph (29), as amended, was adopted.*

Paragraphs (30) to (33)

4. Mr. NOLTE (Special Rapporteur) suggested merging elements of paragraphs (30), (31) and (33) into a reformulated paragraph (30). Accordingly, the first sentence of paragraph (30) would be retained, along with its footnote; the second sentence would be deleted; the third sentence would be retained, as would its footnote; and the final sentence would be transposed to the footnote to the previous sentence. The reformulated paragraph would continue with the final sentence of paragraph (31), along with its footnote. It would then continue with the text of paragraph (33), amended to read: “These members consider that draft conclusion 12 [11], paragraph 3, could help to resolve the question.<sup>[footnote]</sup> The practice of both an international organization in the application of its own instrument and a pronouncement of an expert treaty body have

in common that, while they are both not practice of a party to the treaty, they are nevertheless conduct mandated by the treaty the purpose of which is to contribute to the treaty’s proper application.”

*Paragraphs (30) to (33) were adopted with those amendments.*

Paragraphs (34) and (35) (*concluded*)

5. Mr. NOLTE (Special Rapporteur) suggested that the text of paragraph (34) be transposed to a footnote, the marker for which would appear at the end of paragraph (35).

*Paragraphs (34) and (35) were adopted on that understanding.*

Paragraph (36) (*concluded*)\*\*

6. Mr. NOLTE (Special Rapporteur) pointed out that in paragraph (36), the Commission supported the conclusion of the International Court of Justice with regard to the interpretative value of a series of pronouncements by an expert treaty body irrespective of whether those pronouncements constituted a form of practice within the scope of the topic.

7. Mr. MURPHY recalled that reference had already been made to the Court’s conclusion in paragraph (22) of the commentary. Given the indication in paragraph (35) that the Commission would take up the matter again on second reading, it seemed unwise to discuss the merits of the issue in paragraph (36).

8. Mr. SABOIA said that paragraph (36) was useful because it made a general affirmation on the basis of the judgments of the International Court of Justice; its deletion might convey the impression that the Commission took a more restrictive view of the relevance of those pronouncements than did the Court.

9. Sir Michael WOOD said that he was in favour of deleting paragraph (36), since paragraph (35) contained the main point that the Commission wished to make at the end of the commentary to draft conclusion 13 [12]. The appropriate place to refer to the findings of the International Court of Justice was in paragraph (22). He therefore proposed the inclusion of some elements of paragraph (36) in paragraph (22).

10. Mr. NOLTE (Special Rapporteur) proposed simply deleting paragraph (36).

*It was so decided.*

*Paragraph (36) was deleted.*

*The commentary to draft conclusion 13 [12], as a whole, as amended, was adopted.*

*Section C of chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.*

*Chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.*

\* Resumed from the 3335th meeting.

\*\* Resumed from the 3337th meeting.

**CHAPTER VII. Crimes against humanity (A/CN.4/885 and Add.1–2)**

11. The CHAIRPERSON invited the Commission to consider chapter VII of its draft report, beginning with the text contained in document A/CN.4/L.885.

**A. Introduction**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

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

Paragraphs 3 to 6

*Paragraphs 3 to 6 were adopted.*

Paragraph 7

*Paragraph 7 was adopted, subject to its completion by the Secretariat.*

*Section B was adopted.*

**C. Text of the draft articles on crimes against humanity provisionally adopted so far by the Commission**

## 1. TEXT OF THE DRAFT ARTICLES

Paragraph 8

12. Mr. MURPHY (Special Rapporteur) said that in the text of draft articles 1 to 10, draft article 5, paragraph 7, had inadvertently been omitted.

*On the understanding that the omission would be rectified, paragraph 8 was adopted.*

13. The CHAIRPERSON invited the Commission to consider the portion of chapter VII contained in documents A/CN.4/L.885/Add.1–2.

## 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-EIGHTH SESSION

Document A/CN.4/L.885/Add.1

*Commentary to draft article 5 (Criminalization under national law)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

14. Mr. TLADI, referring to the first sentence and the footnote thereto, pointed out that throughout the document, there were inconsistencies in the spelling of the place name “Nürnberg”.

15. The CHAIRPERSON said that the Secretariat would ensure that the requisite changes were made to the text.

*Paragraph (2) was adopted on that understanding.*

Paragraph (3)

16. Mr. NOLTE proposed the insertion of “, including” after the word “conduct” in the final sentence.

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

Paragraphs (4) and (5)

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

Paragraph (6)

17. Mr. NOLTE suggested that, in the second sentence, the word “unique” be replaced with the word “specific”.

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

Paragraphs (7) to (10)

*Paragraphs (7) to (10) were adopted.*

Paragraph (11)

18. Mr. MURPHY (Special Rapporteur) suggested inserting the word “Third” at the beginning of the first sentence.

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

19. Mr. NOLTE proposed that, in the first sentence, the word “allied” before “concepts” be replaced with the word “related”.

*Paragraph (13), as amended, was adopted.*

Paragraph (14)

*Paragraph (14) was adopted.*

Paragraph (15)

20. Mr. NOLTE proposed the replacement of the word “shape” with the words “spell out” in the second sentence.

21. Sir Michael WOOD suggested that in the same sentence, the word “contours” be replaced with the word “details”.

*With those amendments, paragraph (15) was adopted.*

Paragraph (16)

*Paragraph (16) was adopted.*

Paragraph (17)

22. Mr. TLADI suggested the insertion of a footnote to the second sentence that would indicate the specific judgments to which reference was being made.

23. Mr. MURPHY (Special Rapporteur) said that he would find appropriate examples of relevant judgments or an authoritative treatise for inclusion in a new footnote.

*Paragraph (17) was adopted on that understanding.*

Paragraph (18)

*Paragraph (18) was adopted.*

Paragraph (19)

24. Mr. NOLTE proposed the deletion of the word “theory” in the third sentence.

*Paragraph (19), as amended, was adopted.*

Paragraphs (20) to (23)

*Paragraphs (20) to (23) were adopted.*

Paragraph (24)

25. Mr. PARK said he was not convinced of the need to retain paragraph (24), which did not discuss the subject of superior orders, despite its placement under that subheading in the commentary.

26. Mr. MURPHY (Special Rapporteur) said that, although paragraph (24) was, in fact, not essential, it reflected the Commission’s acknowledgement that all jurisdictions had different grounds for excluding responsibility for crimes against humanity. It stood in contrast to the idea that most jurisdictions that addressed crimes against humanity provided that perpetrators of such crimes could not invoke as a defence the fact that they were ordered by a superior to commit an offence.

*Paragraph (24) was adopted.*

Paragraph (25)

*Paragraph (25) was adopted.*

Paragraph (26)

27. Mr. NOLTE suggested the replacement of the word “exception” with the word “defence” in the first sentence.

*Paragraph (26), as amended, was adopted.*

Paragraphs (27) to (34)

*Paragraphs (27) to (34) were adopted.*

Paragraph (35)

28. Mr. NOLTE suggested that, in the fifth sentence, the words “International Law” be deleted.

*Paragraph (35), as amended, was adopted.*

Document A/CN.4/L.885/Add.2

Paragraphs (36) to (44)

*Paragraphs (36) to (44) were adopted.*

Paragraph (45)

29. Mr. VÁZQUEZ-BERMÚDEZ said that paragraph (45) was intended to explain the expression “where appropriate” in the first sentence of draft article 5, paragraph 7, which provided that “[s]ubject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article”. The first sentence of paragraph (45) appeared to give a very restrictive

interpretation of the expression “where appropriate” with its use of the phrase “obligated only to take measures”. In his view the word “only”, and perhaps the paragraph in its entirety, should be deleted.

30. Mr. MURPHY (Special Rapporteur) said that he understood Mr. Vázquez-Bermúdez’s concern that the paragraph perhaps gave too much latitude to States. The example in the second sentence covered a situation in which a State might have included the concept of attempted crime in its national law, but the imposition of liability for attempted crime on a legal person was not possible. That was a problem that had actually arisen in the context of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, under which legal persons could not be held liable for attempted crimes. He had thought it a good example of what might be meant by “where appropriate”. While he would not object to deleting the word “only” in the first sentence, he wished to retain the second sentence.

31. Mr. VÁZQUEZ-BERMÚDEZ said that, although he was not entirely convinced, he would not object to the adoption of the paragraph.

32. Mr. KAMTO said that he shared the concerns expressed by Mr. Vázquez-Bermúdez, some of which would be addressed by deleting the word “only”. However, the rest of the paragraph merely diluted what was stated in the draft article and did not really explain the expression “where appropriate”. In fact, the second sentence seemed to be a negation of the very text it was intended to elucidate. If the Commission was going to say that it was for the State to decide whether to impose liability on legal persons, then there seemed little point in even having a provision on the subject. He would have serious reservations about the adoption of paragraph (45) as currently drafted.

33. The CHAIRPERSON, speaking as a member of the Commission, said that he also had doubts about the second sentence.

34. Ms. ESCOBAR HERNÁNDEZ said that she agreed with Mr. Kamto and Mr. Vázquez-Bermúdez. In her view, the second sentence should be deleted, as it referred to attempted crimes, which were not covered in the draft article itself. She agreed that the word “only” should be deleted.

35. Sir Michael WOOD said that he understood the concerns being expressed by other members and wondered whether they might be allayed if the second sentence were deleted and the first sentence were divided into two, to read: “Second, each State is obliged to take measures to establish the liability of legal persons ‘where appropriate’. Even if the State, under its national law, is in general able to impose liability upon legal persons for criminal offences, the State may conclude that such a measure is inappropriate in the context of crimes against humanity.” The purpose of the proposed changes was to simplify the sentence and shift the emphasis to make it clear that there was an obligation upon States.

36. Mr. SABOIA said that Sir Michael's proposal seemed to be the opposite of what had actually been discussed in relation to legal persons. Several members had argued that it was precisely in the context of the commission of crimes against humanity that the possibility of imposing criminal liability on legal persons needed to be envisaged, because some legal persons, in certain regions, had in the past been involved in the commission of grave crimes against humanity. It was simply because some States did not impose liability on legal persons under their legal systems that the words "where appropriate" were used in draft article 5, paragraph 7. As paragraph (45) was now worded, it might give the impression that the liability of legal persons could be considered inappropriate *per se* in the context of crimes against humanity. If it was possible to correct that wrong impression, he would not oppose the adoption of paragraph (45) but, as it stood, he would rather delete it.

37. Mr. PARK said that he also had reservations concerning the appropriateness of paragraph (45). Nevertheless, he thought that paragraph (45) could be understood as applying to transitional justice.

38. Mr. NOLTE said that he did not have the impression that Sir Michael's proposal misrepresented the discussion of "where appropriate". While the rest of the commentary dealt with the positive obligation to establish some form of liability, the words "where appropriate" were intended to explain that States were entitled to deem the imposition of liability inappropriate in certain situations.

39. Mr. McRAE said that the extent to which the words "where appropriate" entitled States to decide whether to fulfil an obligation was not clear at all. The second sentence reinforced the idea that States could reach their own decisions about fulfilling obligations. Paragraph (45) should either be deleted or amended as proposed by Sir Michael.

40. Mr. KAMTO said that if the Commission wanted States to comply with an obligation, it must specify under what conditions they must do so and clarify when it was "appropriate". The Commission had adopted the draft article following a long discussion, and it should not now undermine it with inappropriate commentary. The simplest solution would be to delete the paragraph and review the issue on second reading, based on comments from States. If it was considered necessary to adopt the paragraph, the first part of the first sentence, up to "where appropriate", could be retained.

41. Mr. PETRIČ said that the issue had already been discussed at length in the plenary and in the Drafting Committee, and there had been a fairly even split between members who wanted the criminal responsibility of legal persons to be addressed and those who did not. It would be quite unacceptable to ignore the issue, which had been resolved by introducing the words "as appropriate" in draft article 5, paragraph 7. He could accept paragraph (45) with the deletion of the second sentence and of the word "only" in the first.

42. Mr. KITTICHAISAREE recalled that he had been opposed to the inclusion of the words "where appropriate",

but now that they had been included, their meaning had to be explained in the commentary. He recommended that the Commission suspend its discussion and that the Special Rapporteur take a look at various conventions against international terrorism, which provided that it was appropriate to prosecute legal persons for terrorist crimes in States whose legal systems allowed the criminal prosecution of legal persons for other serious offences.

43. Sir Michael WOOD proposed that, in order to reconcile the diverging views, paragraphs (45) and (46) be combined by moving his version of the first sentence of paragraph (45) – "Second, each State is obliged to take measures to establish the liability of legal persons, 'where appropriate'" – to the beginning of paragraph (46).

*Paragraph (45), as amended by Sir Michael Wood, was adopted.*

Paragraph (46)

*Paragraph (46) was adopted.*

*The commentary to draft article 5, as a whole, as amended, was adopted.*

Document A/CN.4/L.885/Add.1

*Commentary to draft article 6 (Establishment of national jurisdiction)*

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.*

Paragraph (7)

44. Mr. NOLTE suggested, in the second sentence, the deletion of the word "also", as it was not immediately clear to which idea that word referred.

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

Paragraph (8)

45. Mr. NOLTE proposed that, in the final sentence, the words "impose an obligation", which he found to be rather strong, be replaced with the words "provide for an obligation".

46. Mr. PARK said that the final sentence might give the impression that the Commission was attempting to prevent States from providing for the establishment of jurisdiction over an offence when the alleged offender was not present in their territory. He therefore proposed its deletion.

47. Mr. MURPHY (Special Rapporteur) said that, although the sentence was not essential, it was intended to emphasize that draft article 6, paragraph 2, did not address the case of offenders who were not present in the territory of the State. His preference would be to retain it.

48. Sir Michael WOOD said that he found the final sentence to be useful and was in favour of retaining it, but he suggested that its wording should be softened by replacing the words "impose an obligation on the State" with the words "require the State".

49. Mr. KITTICHAISAREE said he would prefer to delete the final sentence, because it was unnecessary and if it was retained, that might arrest the progressive development of international law.

*Paragraph (8) was adopted, with the deletion of the final sentence.*

Paragraph (9)

*Paragraph (9) was adopted.*

Paragraphs (10) and (11)

50. Mr. KAMTO questioned the relevance of the quotation that appeared in paragraph (10), because it related to multilateral treaties addressing crimes, whereas draft article 6, paragraph 3, referred specifically to the exercise of criminal jurisdiction established by States in accordance with their national law. He therefore proposed the deletion of the quotation.

51. Mr. SABOIA said that, on the contrary, he found the quotation to be a good addition to the text and was of the view that it should be retained.

52. Mr. MURPHY (Special Rapporteur) said that it would be regrettable to delete the quotation contained in paragraph (10), as it was an important joint separate opinion that had been given some attention within the international community. Its second sentence, in particular, made a useful point. Perhaps Mr. Kamto's concern was that the quotation did not seem to be in the proper place in the commentary. Although paragraph (9) referred to draft article 6, paragraph 3, his intention had been for paragraphs (10) and (11) to refer to draft article 6 as a whole. There were two options for rectifying that problem. One would be to insert a clause to show that paragraph (10) did not refer exclusively to draft article 6, paragraph 3; the other would be to transpose the text of paragraphs (10) and (11) to precede paragraph (5) so as to place them in the part of the commentary that addressed draft article 6 generally.

53. Mr. KAMTO said that the Special Rapporteur's second idea, that of transposing the paragraphs, made sense and he could go along with it.

54. Ms. ESCOBAR HERNÁNDEZ said that she, too, preferred the second option, as it would better address Mr. Kamto's concern.

55. Sir Michael WOOD said that he was in favour of transposing paragraph (10) to precede paragraph (5). Paragraph (11), on the other hand, should stay where it was, because it followed a description of the three types of jurisdiction and fit well at the end of the commentary to draft article 6.

56. Mr. MURPHY (Special Rapporteur) agreed with Sir Michael's proposal.

*Paragraphs (10) and (11) were adopted on the understanding that paragraph (10) would be transposed to precede paragraph (5).*

*The commentary to draft article 6, as a whole, as amended, was adopted.*

*Commentary to draft article 7 (Investigation)*

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

*The commentary to draft article 7 was adopted.*

*Commentary to draft article 8 (Preliminary measures when an alleged offender is present)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

57. Mr. NOLTE suggested that the words "calls upon" in the first sentence be altered to read "requires" in order to reflect the binding language of the provision under discussion.

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

Paragraphs (3) and (4)

*Paragraphs (3) and (4) were adopted.*

Paragraph (5)

58. Mr. NOLTE proposed an editorial amendment to the English version of the text.

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

*The commentary to draft article 8, as amended, was adopted.*

*Commentary to draft article 9 (Aut dedere aut judicare)*

Paragraph (1)

59. Mr. KAMTO suggested that the third sentence state that the principle of *aut dedere aut judicare* was not a rule of customary international law.

60. Mr. KITTICHAISAREE emphasized the sensitive nature of such a suggestion, given that some States maintained precisely the opposite view, and that the judges of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite* had been divided on the issue. The Working Group on crimes against humanity had deliberately avoided making a clear statement either way so as not to block the future development of international law in that area, and he expressed the strong view that the Commission should follow suit in the present commentary.

61. Mr. KAMTO observed that saying that something was not a rule of customary international law at present would not preclude it from becoming one in future, but said that he would not press the point.

*Paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

62. Mr. NOLTE said that, in the third sentence, the word “imposed” was superfluous and should be deleted.

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

Paragraphs (4) and (5)

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

Paragraph (6)

63. Mr. NOLTE suggested that the words “in recent years, especially”, in the second sentence, be deleted. Draft article 9 required States to prosecute alleged offenders unless they were extradited or surrendered to another State or competent international criminal tribunal, but the wording of the last sentence of paragraph (6) framed domestic prosecution as a choice. That did not hold true for those States that already recognized the principle of *aut dedere aut judicare* as a rule of customary international law. He suggested that the last sentence be amended to read: “A State that is not bound under international law to send a person to an international criminal tribunal must submit the matter to prosecution by its own authorities.”

64. Mr. SABOIA expressed support for Mr. Nolte’s comments.

65. Mr. MURPHY (Special Rapporteur), accepting Mr. Nolte’s first suggestion, said that the last sentence of paragraph (6) was intended to clarify the final clause of the penultimate sentence. He suggested the following alternative wording to address Mr. Nolte’s concern: “A State that is not bound under international law to send a person to an international criminal tribunal can choose not to do so, but then must submit the matter to prosecution by its own authorities.”

66. Sir Michael WOOD said that, even as amended, the sentence still presented only two options. There was a third: extradition.

67. Mr. MURPHY (Special Rapporteur) acknowledged that point and suggested the following wording instead: “A State that is not bound under international law to send a person to an international criminal tribunal can choose not to do so, but then must either extradite the person or submit the matter to prosecution by its own authorities.”

68. Mr. KAMTO said that the wording “must either extradite” was problematic, as it implied that an obligation to extradite was being established in the commentary, something that certainly could not be the case. Extradition was usually covered by specific treaties between States, and a request for extradition must be made by a State.

69. Mr. SABOIA said that the situation was clear: if a State had accepted the jurisdiction of an international criminal tribunal, then it was bound by international law; otherwise, it could either extradite to a country with which it had an extradition regime or submit the matter to its own authorities. The three options were set out in the last wording suggested by the Special Rapporteur.

70. Mr. KITTICHAISAREE said that examples such as that of the Extraordinary African Chambers within the Senegalese judicial system, which was not an international criminal tribunal as such, but a special tribunal within the legal system of Senegal, should be covered in the commentary.

71. Sir Michael WOOD said that it had been an instance of prosecution within a State and it did not need to be mentioned. The last version of the sentence suggested by the Special Rapporteur reflected draft article 9 perfectly.

72. Mr. KAMTO said it was true that the sentence as amended by the Special Rapporteur reflected the provisions of draft article 9; nevertheless, it should be clarified by separating out the various options. What would happen if no State requested the extradition of an alleged offender? If a State was not a party to the statute of an international criminal tribunal, did the obligation to extradite or prosecute still apply?

73. Mr. MURPHY (Special Rapporteur) said that the essential point was that draft article 9 applied even if a State was not bound by the statute of any international criminal tribunal. He suggested either that the words “under draft article 9” be inserted to make that clear, or that the sentence be deleted altogether.

74. Mr. KAMTO reiterated his suggestion that the sentence be amended to specify that extradition had to be requested specifically by a State.

75. Mr. MURPHY (Special Rapporteur) said that it seemed simplest to delete the sentence in question.

76. The CHAIRPERSON said he took it that the Commission agreed to amend the second sentence of the paragraph as suggested by Mr. Nolte and to delete the last sentence entirely.

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

Paragraph (7)

*Paragraph (7) was adopted.*

*The commentary to draft article 9, as amended, was adopted.*

*Commentary to draft article 10 (Fair treatment of the alleged offender)*

Paragraph (1)

77. Sir Michael WOOD suggested that the words “and full protection of his or her rights” be added to the end of the first sentence.

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

Paragraph (2)

78. Mr. Nolte suggested that the words “contain within their national law” in the first sentence be changed to “provide within their national law for”.

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

Paragraph (3)

79. Mr. NOLTE suggested that, in the first sentence of the paragraph, the words “Such protections” be altered to “The most important of such protections”, to reflect the fact that some more mundane protections in national law were not dealt with in international law. He also suggested that, in the third sentence, the words “replicate with some specificity” be changed to “specify” so as to avoid any suggestion that the standards in question were reproduced automatically in instruments establishing standards for an international court or tribunal.

80. Mr. MURPHY (Special Rapporteur), accepting Mr. Nolte’s second amendment, said that he agreed with the purpose of the first but that it might be clearer to alter the beginning of the paragraph to read: “Important protections are also now well recognized ...”. He hoped that would allow the Commission to avoid going into what the most important protections at national level might be.

81. Mr. SABOIA supported the amendments suggested by Mr. Nolte, as reworded by Mr. Murphy.

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

Paragraphs (4) and (5)

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

Paragraph (6)

82. Mr. NOLTE suggested that the second sentence be broken into two, with the first one ending with “the national legal systems of States”. The second could then begin: “At the international level, they are set out in global human rights treaties ...”.

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

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

83. Mr. NOLTE suggested that, in the first sentence, the words “elaborated” be changed to “spelled out” and, in the second sentence, the word “replicate” be replaced with “go into”.

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

Paragraph (9)

*Paragraph (9) was adopted.*

Paragraph (10)

84. Mr. TLADI proposed an editorial amendment to the English version of the text.

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

*The commentary to draft article 10, as amended, was adopted.*

*Section C, as amended, was adopted.*

*Chapter VII of the draft report of the Commission, as a whole, as amended, was adopted.*

#### CHAPTER VIII. *Protection of the atmosphere* (A/CN.4/L.886 and Add.1)

85. The CHAIRPERSON invited the Commission to consider the portion of chapter VIII of the draft report contained in document A/CN.4/L.886.

##### A. Introduction

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

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

Paragraph 3

86. Mr. MURPHY, referring to the footnotes to the paragraph, said that it was unusual for the original proposals made by a Special Rapporteur to be cited in footnotes. Generally, the Commission did not include such references once it had finished its work on the proposals. He feared that it might be confusing for the reader to be presented with both the original proposals and the final drafts. He wondered whether the Special Rapporteur had had a particular reason for including the former. If not, his preference would be to delete them in order to be consistent with the Commission’s usual practice.

87. Mr. MURASE (Special Rapporteur) said that the footnotes followed the same format as that of the report on the previous session.

88. Mr. LLEWELLYN (Secretary to the Commission) said that the original proposals that had appeared in a report by a Special Rapporteur and had been adopted by the Drafting Committee in a different form were not normally included in footnotes to the Commission’s report to the General Assembly.

89. Mr. MURASE (Special Rapporteur) said that the Commission’s practice had not been uniform, and on some occasions the Special Rapporteur’s original proposals had been reproduced. He believed that it would be helpful in the present instance to include the original proposals to show how the Commission had arrived at the draft guidelines.

90. Sir Michael WOOD recalled that the outcome of the discussion at the previous session on what should be included in the footnotes had not been very clear. It was useful to reproduce the Special Rapporteur’s original proposals in footnotes if the content of the debate was also being reproduced in the report, so that the debate could be understood in the light of the proposals, but not if the debate was not being reproduced *in extenso*. He would propose checking the precedents and returning to the issue at a later stage.

91. Mr. NOLTE said that a precedent could be found in footnote 17 to chapter V of the report on the previous session.<sup>506</sup> In line with that precedent, a reference to the fact that the Commission had provisionally adopted draft guidelines and commentary should be added to the footnotes to paragraph 3.

<sup>506</sup> *Yearbook ... 2015*, vol. II (Part Two), p. 17, footnote 17.

92. The CHAIRPERSON said that he took it that the Commission wished to follow the approach proposed by Mr. Nolte.

*It was so decided.*

*Paragraph 3, as amended, was adopted.*

Paragraphs 4 to 8

*Paragraphs 4 to 8 were adopted.*

Paragraph 9

*Paragraph 9 was left in abeyance.*

**C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission**

**1. TEXT OF THE DRAFT GUIDELINES, TOGETHER WITH PREAMBULAR PARAGRAPHS**

93. Mr. MURPHY pointed out that the Commission had not yet approved the footnotes, which indicated where the commentaries to the preamble and the individual draft guidelines could be found. As the inclusion of footnotes of that nature was not the Commission's normal practice, he requested the consideration of each individual footnote.

94. Mr. ŠTURMA concurred with Mr. Murphy.

95. The CHAIRPERSON suggested that the Commission defer further consideration of document A/CN.4/L.886 until the secretariat had had time to check the normal practice regarding footnotes that pointed to the location of commentary to draft texts.

*It was so decided.*

96. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter VIII of the report contained in document A/CN.4/L.886/Add.1.

**2. TEXT OF THE DRAFT GUIDELINES, TOGETHER WITH A PREAMBULAR PARAGRAPH, AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-EIGHTH SESSION**

*Commentary to the preamble*

Paragraph (1)

97. Mr. NOLTE, supported by Mr. MURPHY, said that paragraph (1) was in the wrong place: it referred to equity, which formed the subject of draft guideline 6. Paragraphs (2) and (4) fully explained the thinking behind the preamble. He therefore proposed that paragraph (1) be moved to the commentary to draft guideline 6.

98. Sir Michael WOOD agreed with Mr. Nolte that paragraph (1) should be moved to the commentary to draft guideline 6. In fact, paragraph (4) was all that was needed by way of a commentary to the preamble, and it should become the first paragraph of the commentary.

99. Mr. TLADI said that the second sentence of paragraph (1) was rather ambiguous: it was unclear whether "which often warrants" referred to equality or equity. In

the third sentence, the word "probably" could be deleted, because the phrase "One of the first attempts" was sufficient indication that this sentence was not meant to be a definitive statement.

100. Mr. MURASE (Special Rapporteur) said that the commentary was structured in such a way that it went from the general to the specific. Paragraph (1) should come first, as it introduced the notion of intra-generational equity. In the second sentence, the phrase starting "which often warrants" could be deleted, as could the word "probably" in the third sentence. In the last footnote to the paragraph, a reference to a resolution of the United Nations Conference on Trade and Development (UNCTAD) needed to be included. At the end of the paragraph, he suggested the addition of the phrase "as reflected in article 23 of the Commission's 1978 draft articles on most-favoured-nation clauses".

101. Mr. SABOIA said that paragraph (1) was valuable because it outlined the genesis of the principle of equity, which had also been recognized in the General Agreement on Tariffs and Trade (GATT).

102. Mr. McRAE said that the problem in paragraph (1) was that it did not clearly demonstrate the link between the idea of equity and the special situation of developing countries. If that link were made clear at the outset, the paragraph would be in the right place. The differential labour standards of the ILO, the Generalized System of Preferences of UNCTAD and the GATT provisions to which Mr. Saboia had referred had been designed to address the special situation and needs of developing countries, but they had not explicitly mentioned equity. The paragraph should therefore start with a sentence along the lines of "Addressing the special situation and needs of developing countries was based on notions of equity that were developed at ...".

103. Mr. KITTICHAISAREE, supported by Mr. SABOIA and Mr. NOLTE, agreed with Mr. McRae and suggested that the second half of the first sentence should read "in relation to the need to take into consideration the special situation and needs of developing countries" and that the whole of the second sentence should be deleted.

104. Mr. MURPHY said that if the second sentence was deleted, then the first two footnotes should also be deleted, as paragraph (1) would no longer refer to intra-generational and intergenerational equity.

105. Mr. MURASE (Special Rapporteur) agreed to the deletion of the second sentence and therefore of the first two footnotes.

106. Mr. VÁZQUEZ-BERMÚDEZ concurred with those members who wanted to insert a reference to the special situation and needs of developing countries. The need for intra-generational equity in order to offset States' different levels of development had been discussed during meetings in plenary session. For that reason, it was important to mention intra-generational equity in that part of the commentary.

107. Mr. MURASE (Special Rapporteur) said that his third report (A/CN.4/692) had discussed both aspects of equity, and the commentary harked back to the debate in plenary meetings and in the Drafting Committee.

108. Sir Michael WOOD suggested the deletion of the words “of equity” in the third sentence.

109. Mr. PETRIČ said that he was firmly in favour of the idea of paying attention to the special situation and needs of developing countries, which formed the subject of the preamble. However, paragraph (1) spoke of intra-generational equity and intergenerational equity and referred to the first annual meeting of the International Labour Organization, held at Washington, D.C. in 1919, at which local industrial conditions, not equity or developing countries, had been discussed. As it stood, paragraph (1) was therefore going too far, although in a spirit of cooperation he would not oppose its adoption.

110. Mr. MURASE (Special Rapporteur) said that he had explained the relevance of the Washington meeting to the notion of equity in his third report. Taking into account all the amendments proposed, he said that a revised version of paragraph (1) might read:

“The fourth preambular paragraph has been inserted in relation to considerations of equity, in particular regarding the special situation and needs of developing countries. One of the first attempts to incorporate such a principle was the first annual meeting of the International Labour Organization in Washington, D.C., in 1919, at which delegations from Africa and Asia succeeded in ensuring the adoption of differential labour standards. Another example is the Generalized System of Preferences elaborated under the United Nations Conference on Trade and Development in the 1970s, as reflected in article 23 of the Commission’s 1978 draft articles on most-favoured-nation clauses.”

*The revised version of paragraph (1) was adopted.*

Paragraph (2)

111. Mr. TLADI suggested that two additional instruments which contained the idea that developing countries deserved special consideration in the context of environmental protection should be included in paragraph (2). He proposed the insertion of a sentence at the end of the paragraph which would read: “The principle is similarly reflected in article 3 of the United Nations Framework Convention on Climate Change and article 2 of the Paris Agreement under the United Nations Framework Convention on Climate Change”. It could be followed by the first sentence of paragraph (4).

112. Sir Michael WOOD, referring to the third sentence, said that the quotation of Principle 6 of the Rio Declaration on Environment and Development<sup>507</sup> should be corrected: it highlighted “[t]he special situation and needs of developing countries”, not the “special needs of developing countries”.

<sup>507</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I: Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

113. Mr. MURPHY said that there seemed to be a disconnect between the third sentence, which referred to Principle 7 of the Rio Declaration on Environment and Development, and paragraph (3). The simplest solution might be to delete the reference to Principle 7.

114. Mr. MURASE (Special Rapporteur) agreed to the correction of the quotation of Principle 6, the deletion of the reference to Principle 7 and the insertion proposed by Mr. Tladi.

115. Sir Michael WOOD said that, like Mr. Tladi, he thought that the first sentence of paragraph (4) should be transposed to paragraph (2).

116. Mr. MURASE (Special Rapporteur) said that he would prefer to keep paragraph (4) as it stood.

117. The CHAIRPERSON suggested that the Commission should pursue its discussion of paragraph (2) at the next meeting.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

## 3342nd MEETING

*Tuesday, 9 August 2016, at 3 p.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kitichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

### *Jus cogens (concluded)*\* (A/CN.4/689, Part II, sect. H, A/CN.4/693)

[Agenda item 10]

#### REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the interim report of the Drafting Committee on the topic “*Jus cogens*”.

2. Mr. ŠTURMA (Chairperson of the Drafting Committee), introducing the eighth report of the Drafting Committee for the sixty-eighth session of the Commission, said that, following the referral to the Drafting Committee of draft conclusions 1 and 3 on 19 July 2016,<sup>508</sup> the Com-

\* Resumed from the 3323rd meeting.

<sup>508</sup> See the 3323rd meeting, above, para. 83.