International Law Commission
Sixty-eighth session (second part)

Provisional summary record of the 3341st meeting
Held at the Palais des Nations, Geneva, on Tuesday, 9 August 2016, at 10 a.m.

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Present:

Chairman: Mr. Comissário Afonso

Members: Mr. Caflisch
         Mr. Candioti
         Mr. El-Murtadi
         Ms. Escobar Hernández
         Mr. Hassouna
         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

Secretariat:

Mr. Llewellyn Secretary to the Commission
The meeting was called to order at 10 a.m.

Draft report of the Commission on the work of its sixty-eighth session (continued)

Chapter VI. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued) (A/CN.4/L.884 and Add.2)

The Chairman 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

Paragraphs 9 to 11

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

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

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

Paragraph (29) (continued)

Mr. Nolte (Special Rapporteur) said that, and following consultations with interested Commission members, he proposed that the text of the paragraph should 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. The Commission has considered the following alternatives.”

Paragraph (29), as amended, was adopted.

Paragraphs (30) to (33)

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, followed by footnote marker 71; the second sentence would be deleted; the third sentence would be retained, followed by footnote marker 72; and the final sentence would be transposed to footnote 72. The reformulated paragraph would continue with the final sentence of paragraph (31), followed by footnote marker 75. 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. 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)

Mr. Nolte (Special Rapporteur) suggested that the text of paragraph (34) should be transposed to footnote 79, the marker for which would appear at the end of paragraph (35).

Paragraphs (34) and (35) were adopted on that understanding.
Paragraph (36)

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.

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).

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.

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).

Mr. Nolte (Special Rapporteur) proposed simply deleting paragraph (36).

It was so decided.

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

The commentaries to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as a whole, as amended, were adopted.

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

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

The Chairman 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.

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.
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

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.

The Chairman invited the Commission to consider the portion of chapter VII contained in document A/CN.4/L.885/Add.1.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session

Commentary to draft article 5 (Criminalization under national law)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

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”.

The Chairman said that the secretariat would ensure that the requisite changes were made to the text.

Paragraph (2) was adopted on that understanding.

Paragraph (3)

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)

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

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.
Paragraph (11)

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)

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

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

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

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

With those amendments, paragraph (15) was adopted.

Paragraph (16)

Paragraph (16) was adopted.

Paragraph (17)

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

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)

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)

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.

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)

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)

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

Paragraph (35), as amended, was adopted.

The Chairman invited the Commission to consider the portion of chapter VII contained in document A/CN.4/L.885/Add.2.

Paragraphs (36) to (44)

Paragraphs (36) to (44) were adopted.

Paragraph (45)

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 “subject 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.

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.

Mr. Vázquez-Bermúdez said that, although he was not entirely convinced, he would not object to the adoption of the paragraph.

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 or not 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.

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

Ms. Escobar Hernández said that she agreed with Mr. Vázquez-Bermúdez and Mr. Kamto. 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.

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.

Mr. Saboia said that Sir Michael Wood’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.

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.

Mr. Nolte said that he did not have the impression that Sir Michael Wood’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.
Mr. McRae said that the extent to which the words “where appropriate” entitled States to decide whether or not 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 Wood.

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.

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.

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 should suspend its discussion and that the Special Rapporteur should 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.

Sir Michael Wood proposed that, in order to reconcile the diverging views, paragraphs (45) and (46) should 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.

Commentary to draft article 6 (Establishment of national jurisdiction)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

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)

Mr. Nolte proposed that, in the final sentence, the words “impose an obligation”, which he found to be rather strong, should be replaced with the words “provide for an obligation”.

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.

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.

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”.

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)

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.

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.

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.

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

Ms. Escobar Hernández said that she, too, preferred the second option, as it would better address Mr. Kamto’s concern.
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.

Mr. Murphy (Special Rapporteur) agreed with Sir Michael Wood’s proposal. Paragraphs (10) and (11) were adopted on the understanding that paragraph (10) would be transposed to precede paragraph (5).

Commentary to draft article 7 (Investigation)
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)
Mr. Nolte suggested that the words “calls upon” in the first sentence should 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)
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 a whole, as amended, was adopted.

Commentary to draft article 9 (Aut dedere aut judicare)

Paragraph (1)
Mr. Kamto suggested that the third sentence should state that the principle of aut dedere aut judicare was not a rule of customary international law.

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 (Belgium v. Senegal) 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.

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)

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)

Mr. Nolte suggested that the words “in recent years, especially”, in the second sentence, should 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 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.”

Mr. Saboia expressed support for Mr. Nolte’s comments.

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.”

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

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.”

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.

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.

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.
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.

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?

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” should be inserted to make that clear, or that the sentence should be deleted altogether.

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

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

The Chairman 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 a whole, as amended, was adopted.

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

Paragraph (1)

Sir Michael Wood suggested that the words “and full protection of his or her rights” should be added at the end of the first sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

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

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Nolte suggested that, in the first sentence of the paragraph, the words “Such protections” should 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 second sentence, the words “replicate with some specificity” should 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.

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.

**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)**

**Mr. Nolte** suggested that the second sentence should 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)**

**Mr. Nolte** suggested that the words “elaborated” should be changed to “spelled out” and “replicate” to “go into”.

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

**Paragraph (9)**

*Paragraph (9) was adopted.*

**Paragraph (10)**

**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 a whole, as amended, was adopted.*

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

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

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

Paragraph 3

Mr. Murphy, referring to footnotes 5 to 10, 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.

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

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.

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.

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.

Mr. Nolte said that a precedent could be found in footnote 14 to chapter V of the report on the previous session (A/70/10). 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.

The Chairman 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

Mr. Murphy pointed out that the Commission had not yet approved footnotes 12 to 24, which indicated where the commentaries to the preamble and the individual draft
A/CN.4/SR.3341

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.

Mr. Šturma concurred with Mr. Murphy.

The Chairman suggested that the Commission should 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.

The Chairman invited the members of the Commission to consider the portion of

2. Text of the draft guidelines with commentaries thereto provisionally adopted by the
Commission at its sixty-eighth session

Commentary to the preamble

Paragraph (1)

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) should be moved to the commentary to draft guideline 6.

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.

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 that sentence was not meant to be a definitive
statement.

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 footnote 4, 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”.

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).

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 International Labour Organization, 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 ….”.
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.

Mr. Murphy said that if the second sentence was deleted, then footnotes 1 and 2 should also be deleted, as paragraph (1) would no longer refer to intra-generational and intergenerational equity.

Mr. Murase (Special Rapporteur) agreed to the deletion of the second sentence and therefore of footnotes 1 and 2.

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.

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.

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

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 and intergenerational equity and referred to the Washington Conference of the International Labour Organization, 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.

Mr. Murase (Special Rapporteur) said that he had explained the relevance of the Washington Conference 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 Washington Conference of the International Labour Organization in 1919, at which delegations from Asia and Africa 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)

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 to insert 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”. It could be followed by the first sentence of paragraph (4).
Sir Michael Wood, referring to the third sentence, said that the quotation of Principle 6 of the Rio Declaration should be corrected: it highlighted “the special situation and needs of developing countries”, not the “special needs of developing countries”.

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

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.

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

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

The Chairman 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.