International Law Commission
Sixty-ninth session (second part)

Provisional summary record of the 3384th meeting
Held at the Palais des Nations, Geneva, on Monday, 31 July 2017, at 3 p.m.

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Present:

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

Secretariat:

Mr. Llewellyn Secretary to the Commission
The meeting was called to order at 3 p.m.

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

Chapter IV. Crimes against humanity (continued) (A/CN.4/L.900/Add.2 and Add.3)

The Chairman invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.900.

Commentary to draft article 15 (Settlement of disputes) (continued)

The Chairman said that Ms. Escobar Hernández had drafted a proposal for an additional paragraph (6) to be inserted in the commentary, which read:

“(6) A view was expressed according to which the draft articles should not include a provision on settlement of disputes, since it constituted a final clause, a category of provisions that the Commission decided not to include in the present draft articles. In addition, the view was expressed that draft article 15 on settlement of disputes should establish the compulsory jurisdiction of the International Court of Justice as in article IX of the Genocide Convention.”

[(6) Se expresó la opinión de que el Proyecto de artículos no debería incluir un artículo dedicado al arreglo de controversias, ya que forma parte de la categoría “disposiciones finales” que la Comisión ha decidido no incluir en el Proyecto. Además, se expresó la opinión de que el sistema de arreglo de controversias previsto en el artículo 15 debería establecer la jurisdicción obligatoria de la Corte Internacional de Justicia, tal como lo hace el artículo IX de la Convención sobre el Genocidio.]

Ms. Escobar Hernández said that Mr. Jalloh had proposed a few editorial changes to the English version of the text, all of which she found acceptable, and said that it would be advisable for him to explain them to the Commission.

Mr. Jalloh said that he had discussed the minor changes in question with Ms. Escobar Hernández and the Special Rapporteur, Mr. Murphy, and that they had both found the changes acceptable. The first sentence should begin with the words “A view” instead of “The view”, and at the beginning of the second sentence, the words “In addition” should be replaced with “On the other hand”.

The Chairman said he took it that the Commission agreed to the proposal to insert additional paragraph (6), as amended, in the commentary to draft article 15.

It was so decided.

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

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Designation of a central authority

Paragraph (3)

Paragraph (3) was adopted.

Procedures for making a request

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.
Response to the request by the requested State

Paragraphs (8) to (15)

Paragraphs (8) to (15) were adopted.

Use of information by the requesting State

Paragraphs (16) to (18)

Paragraphs (16) to (18) were adopted.

Testimony of person from the requested State

Paragraphs (19) to (21)

Paragraphs (19) to (21) were adopted.

Transfer of testimony of person detained in the requested State

Paragraphs (22) to (25)

Paragraphs (22) to (25) were adopted.

Costs

Paragraphs (26) to (30)

Paragraphs (26) to (30) were adopted.

The commentary to the annex to the draft articles, as a whole, was adopted.

The Chairman invited the Commission to consider the portion of chapter IV of the draft report contained in document A/CN.4/L.900/Add.3.

Commentary to draft article 6 (4 bis) (Criminalization under national law) (continued)

Subheading and paragraphs (1) and (2)

Mr. Murphy (Special Rapporteur) said it had been agreed that paragraph 4 bis of draft article 6 would be renumbered 5. The references to paragraph 4 bis in the commentary would be amended accordingly. Since the rest of the commentary to draft article 6 contained small subheadings, he proposed adding a subheading, “Official position”, before paragraph (1).

Mr. Jalloh said that, in his view, paragraph (1) could have given more comprehensive coverage to the prior positions of the Commission on the issue of irrelevance of official capacity. Specifically, the Commission’s commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, as well as other instruments adopted before then, had addressed in great detail the notion that the official position or capacity of a person had no bearing on his or her criminal responsibility, nor could a person’s official status be invoked as a way to seek mitigation during sentencing. In that regard, the commentary to the provision under consideration, which aimed to accomplish the same thing in relation to the draft articles on crimes against humanity, could have included additional references to materials and shown the pedigree of that notion going as far back as the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and Control Council Law No. 10. Further on in the commentary, the Special Rapporteur had indeed included references to article 27 (1) of the Rome Statute of the International Criminal Court, which had been the basis of the paragraph in question, but he had not mentioned the equivalent provisions of statutes for ad hoc tribunals such as article 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia, article 6 of the Statute of the International Criminal Tribunal for Rwanda and article 6 of the Statute of the Special Court for Sierra Leone. He asked whether it would be possible to insert that additional information on second reading.
His second comment was more substantive. As currently written, the commentary as a whole seemed directed at the question of a reduction of sentence. In the past, the Commission’s commentary distinguished between the question of mitigation or reduction of sentence and the use or invocation of official position as a substantive defence to criminal responsibility. During the Nürnberg trials, the convicted individuals had been denied the possibility of invoking their official positions as a mitigating factor during sentencing, as well as the possibility of claiming that their official position as State officials exonerated them from any criminal responsibility. In his view, the text under consideration conflated the two ideas. He asked whether the Special Rapporteur could address that issue by adding some of the text from paragraph (4) of the Commission’s commentary to the 1996 draft Code, which dealt more precisely with the question. In the interest of consistency, it would also be advisable to add to the text the words “for the authorities”, in line with the Commission’s previous positions, as reflected in prior commentaries.

Mr. Murphy (Special Rapporteur) said that the issues raised by Mr. Jalloh had already been addressed earlier in the current session. When the draft paragraph had been discussed within the Drafting Committee, he had circulated the commentary, more or less as it currently stood, so that all the members of the Drafting Committee could understand the intentions behind the commentary. He had welcomed their views, which had been presented both during the work of the Drafting Committee and afterwards. It was regrettable that Mr. Jalloh should for the first time signal problems with the commentary at the current juncture. The goal of the text was to indicate basic parameters, citing the Nürnberg and Tokyo trials, the 1954 draft Code of Offences against the Peace and Security of Mankind, the 1996 draft Code and the Rome Statute, as well as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid. The goal was not to try to feature, for each of those instruments, the travaux préparatoires and explanatory materials. In his view, there was plenty more information that could have been included, but doing so would render the text heavy, and a balance had to be struck. He would prefer to leave the commentary as it stood. As for the issue of the distinction between mitigation and reduction of sentence, he considered that it would be better addressed under paragraph (5). If the proposal consisted in replacing the word “reduction” with “mitigation”, he was open to it. However, if the proposed change went farther than that, it might raise a series of new problems.

The Chairman said that at the current stage, it would be most helpful if specific proposals were put forward.

Mr. Jalloh said that he had in fact raised his concerns with the Special Rapporteur, who had said that the material in question had to be sent to the Secretariat before being discussed in plenary session. He had understood that it had been impossible to make changes at that earlier stage and that he should raise any issues in the current plenary meeting. He acknowledged that the Special Rapporteur had asked members of the Drafting Committee to provide their comments at an earlier stage, but the timing had unfortunately not been right, and he had shared his concerns with the Special Rapporteur subsequently. The question of mitigation and reduction of sentence could indeed be discussed when the Commission considered paragraph (5). It was important for the Commission to ensure consistency with the language it had used in the past. Bringing the text in line with the language used in paragraph 4 of the 1996 draft Code and in the Commission’s commentary thereto would underscore the point the Commission was trying to make, without departing from the carefully negotiated text. He expressed concern that a lack of coherence between the paragraphs in the commentary might leave readers at a loss to understand the Commission’s reasoning behind a clause as important as the irrelevance of official position in determining or mitigating the criminal responsibility of a person for horrific crimes against humanity.

As to the Special Rapporteur’s proposal, both mitigation and reduction of sentence were important concepts. It was not necessarily best in all cases to simply remove one term and replace it with another. He proposed that the Commission should take a closer look at their usage when considering changes in paragraph (5). He agreed to the adoption of
paragraph (1), on the understanding that such issues could be revisited on second reading of the draft articles on crimes against humanity.

The Chairman expressed concern that the heading proposed by the Special Rapporteur for insertion above paragraph (1), “Official position”, was excessively vague. He suggested instead the subheading “Official position as a ground for excluding criminal responsibility”.

Mr. Murphy (Special Rapporteur) said that while such wording would be accurate, it would not be in line with the formulations used in other subheadings, which were shorter.

Mr. Jalloh proposed, as a compromise, that the subheading should be worded “Irrelevance of official capacity”, which was standard language currently used in legal instruments, or “Official position and responsibility”, which was the heading used in the 1996 draft Code to address the same concept.

The Chairman said that he preferred the words “Official position and responsibility”, as “Irrelevance of official capacity” could include aspects other than those addressed by the text.

Sir Michael Wood said that he preferred to use the term “Official position” and that including the word “responsibility” in the subheading would be excessive and would risk repeating the meaning of the article. Obviously, official position was not a ground for excluding criminal responsibility. The same could be said for superior orders, but those words were used in a subheading too.

Mr. Tladi said that he could accept the wording “Official position”, or, if more clarity was desired, “Official position and responsibility”. He would not be very comfortable using “Irrelevance of official capacity”. While that wording was common in recent instruments, the Commission had used different formulations.

Mr. Grossman Guiloff noted that “official position” was the term of art and had been used in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and the Charter of the International Military Tribunal for the Far East. He supported its use in the current text as well.

The Chairman said he took it that the Commission would prefer to use the term “Official position” in the subheading preceding paragraph (1).

It was so decided.

The subheading and paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Grossman Guiloff proposed adding the words “For example” at the beginning of the second sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Park said that in the third sentence, the words “any procedural immunity” should be replaced with the phrase “any procedural issues in the context of immunity”.

Mr. Jalloh said that in relation to the Al-Bashir case and the decision of the International Criminal Court, footnote 9 should make reference to the opinion of Judge Perrin de Brichambaut. The decision of the Court had been unanimous, but the judges had arrived at their opinions for different reasons. The footnote should put forward the reasoning used not only by the majority.

Ms. Escobar Hernández said that in the third sentence the words “or international” should be deleted. There was no reason to include a reference to immunity before international courts. The reference had perhaps been included owing to the wording of article 27 (2) of the Rome Statute, which read “under national or international law”, and its relationship with article 98 (1) of the same Statute. In her view, article 98 referred not to immunity, but to the cooperation of States parties with the International Criminal Court.
That article did not bar the Court’s jurisdiction; it merely prevented its application at a given moment. In the context of the paragraph under consideration, the reference to international jurisdiction was not entirely appropriate in the light of current international criminal law. The deletion of the words “or international” would thus in no way diminish the meaning of the paragraph.

If the proposal put forward by Mr. Park was adopted, then the meaning of the sentence would change, as procedural issues in the context of immunity clearly would include questions related to cooperation. In any case, she preferred to leave the paragraph as it stood, and simply delete the words “or international”. The Commission would thus avoid taking a position on the very sensitive subject of the relationship between article 27 (2) and article 98 (1) of the Rome Statute.

Mr. Tladi said that he endorsed the position taken by Ms. Escobar Hernández, but did not support Mr. Park’s proposal for the addition of the words “issues in the context of” before the word “immunity”, as that would lead to a slight change in meaning. He said he understood the need for balance, but the purpose of the commentary was to explain the meaning of the draft articles, and he expressed concern that the inclusion of the text proposed by Mr. Jalloh might suggest that the Commission’s position was wrong. In any case, the judge’s opinion mentioned by Mr. Jalloh was a minority opinion.

Mr. Murphy (Special Rapporteur) said he was concerned that the amendment proposed by Mr. Park might make the text less clear, as a number of issues could arise in the context of procedural immunity. The focus of the text was the procedural immunities themselves. He supported the deletion of the words “or international”. In fact, the original version of the text had not included those words, which had been added on the suggestion of a member of the Drafting Committee. While Mr. Jalloh was correct that a minority view had been expressed in the case cited in the footnote, that had also been true in many other cases cited in the text. The aim of the Commission was not to offer a comprehensive report on the minority or majority opinions, but to direct the reader’s attention to the positions taken by the bodies in question. While he did not strongly object to Mr. Jalloh’s proposal, he said he tended to agree with Mr. Tladi that it would be best not to include a reference to the minority opinion.

Mr. Jalloh said that Judge Perrin de Brichambaut’s opinion had in fact been issued not in dissent; it concurred with the majority opinion. The judge’s opinion differed from that of the majority on a point of law that was significant. The footnote’s reference only to the majority glossed over the fact that it was important to the judge that his opinion should be noted. The judge had given a different interpretation of a point of law, an interpretation on an issue that was in fact heavily debated between him and the majority, as well as outside the court, including in the academic literature. He agreed with the Special Rapporteur that the Commission should advance its own view, but that did not mean it should exclude the plausible views of others. He supported the proposal to delete “or international”, by Ms. Escobar Hernández.

Mr. Park asked whether the word “procedural” could be deleted before the word “immunity”. Academic scholars agreed that immunity was by nature procedural. If the text used the word “procedural”, then more clarification was required.

The Chairman said that one reason for the use of the word “procedural” was to establish a contrast with the term “substantive defence” mentioned in the preceding sentence. In that context, footnote 9 provided an explanation when it cited the Arrest Warrant case.

Sir Michael Wood said that he too had understood the use of the word “procedural” to be linked with the preceding reference to “substantive defence”. He supported keeping the paragraph as it stood, but with the deletion of the words “or international”. He agreed with Mr. Tladi that there was no need to cite a minority opinion. It would be odd to refer to a concurring opinion that took a radically different legal view in contradiction with the view of the Commission itself.

The Chairman said that the text of footnote 9 already contained an implicit reference to the concurring minority opinion, as it referred to the existence of a majority on
Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Jalloh, referring to his earlier comments about the need for a clear distinction between the concepts of mitigation and reduction of sentence, proposed simply inserting the words “mitigation or” immediately before the words “reduction of sentence” in both the first and last sentences of the paragraph.

Mr. Tladi said that while he agreed with the substance of the proposed amendment, it would be more logical if the word order were “reduction of sentence or mitigation” so that the word “mitigation” did not qualify the word “sentence”.

The Chairman said that mitigating factors were normally considered prior to reduction and so mitigation should be mentioned before reduction of sentence.

Mr. Jalloh, endorsing the Chairman’s comment, said that, once an individual was convicted, a judge considered aggravating or mitigating factors and then handed down a sentence; reduction of a sentence could be considered at a later point. However, he understood Mr. Tladi’s point and, in the interest of time, would support his proposed amendment.

Mr. Murphy (Special Rapporteur) said that he too, in the interest of time, would support Mr. Tladi’s amendment.

Mr. Grossman Guiloff said that the qualifier “alleged” before the word “offender” was incorrect, given that the offender in the scenario presented was being sentenced and therefore had already been convicted; the word should be deleted where it appeared in the paragraph.

Mr. Jalloh said that he did not agree with the deletion of the word “alleged” since the individual in the given scenario could also be at the predicate stage of the consideration of mitigating factors. Removal of the term would, in such a context, be inappropriate.

The Chairman said that that there might well be some States where criminal law provided for a different procedure whereby mitigation and reduction of sentence could be considered simultaneously.

Mr. Grossman Guiloff said that he had never come across any such criminal law; in his view, the word “alleged” was a technical error and should be deleted.

Mr. Murphy (Special Rapporteur) proposed that, in the first sentence, the words “alleged offender’s position” should be replaced with “official position.” In the last sentence, the words “an alleged offender” should be deleted and the rest of the sentence reformulated accordingly.

Paragraph (5), as amended, was adopted.

The commentary to draft article 6 (4 bis) as a whole, as amended, was adopted.

The Chairman invited the Commission to resume its consideration of the portion of chapter IV contained in document A/CN.4/L.900.

B. Consideration of the topic at the present session

Paragraphs 8 to 10

Mr. Murphy (Special Rapporteur) proposed replacing, in paragraph 9, the deadline of 1 January 2019 with that of 1 December 2018. Although bringing forward the deadline by a month represented a change in the Commission’s practice and would give Governments less time to submit comments and observations, such a change would make
the Commission’s work more efficient, not least because it would allow more time for the
translation of such submissions.

The Chairman said he was not opposed to the change, but wondered whether it
might have implications for other special rapporteurs for other topics.

Sir Michael Wood said that he would not be in favour of retrospectively changing
the deadlines set with regard to other topics.

Mr. Jalloh said that while he appreciated the advantages that changing the deadline
would represent for the Commission, especially the Special Rapporteur, whose work in that
regard was important, he would prefer to retain the original date, in line with the
Commission’s practice. Many States, especially developing States, might find it
challenging to submit their comments one month earlier. Nevertheless, he would not
oppose the proposed change if the majority of members supported it.

Mr. Murase said that he supported changing the deadline to 1 December 2018.

Paragraphs 8 to 10, as amended, were adopted, subject to their completion by the
Secretariat and to an editorial amendment to the French text.

The commentaries to the draft articles on crimes against humanity, as a whole, as
amended, were adopted.

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

Chapter V. Provisional application of treaties (A/CN.4/L.901 and Add.1)

The Chairman invited the Commission to consider chapter V of its draft report,
beginning with the portion contained in document A/CN.4/L.901.

Mr. Gómez-Robledo (Special Rapporteur), introducing chapter V, on provisional
application of treaties, said that a number of changes, mostly stylistic, had been made to the
commentaries to the draft guidelines on the basis of members’ contributions within the
working group, in plenary meetings and through written submissions.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted, subject to their completion by the Secretariat.

C. Text of the draft guidelines on provisional application of treaties provisionally
adopted so far by the Commission

1. Text of the draft guidelines

Paragraph 9

Mr. Park said it appeared that the text of the draft guidelines contained in paragraph
9 had not been updated to reflect the most recent changes adopted in plenary session.

Following a discussion in which Mr. Murphy, Mr. Gómez-Robledo (Special
Rapporteur) and Mr. Saboia participated, the Chairman said he took it that the
Commission wished to adopt paragraph 9 on the understanding that the Secretariat would
replace the text of the draft guidelines with the most up-to-date version thereof.

It was so decided.

Paragraph 9 was adopted, subject to the requisite changes by the Secretariat.
The portion of chapter V contained in document A/CN.4/L.901, as a whole, as amended, was adopted.

The Chairman invited the Commission to consider the portion of chapter V contained in document A/CN.4/L.901/Add.1.

C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission

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

Paragraph 1

Paragraph 1 was adopted.

Provisional application of treaties

General commentary

Paragraph (1)

Mr. Gómez-Robledo (Special Rapporteur) proposed that the word “expand” should be changed to “clarify”.

The Chairman observed that it was not the Commission’s usual practice to explain the weight to be given to commentaries on draft guidelines. He suggested that paragraph (1) should either be redrafted to reflect the wording used in previous commentaries or be deleted altogether.

Mr. Park echoed the concern expressed by the Chairman and his suggestion that paragraph (1) should be deleted.

Mr. Gómez-Robledo (Special Rapporteur) said that he was not convinced of the need to delete the paragraph, which gave additional guidance to the reader and did not undermine the value of the commentaries, but that he would go along with the majority view.

Mr. Vázquez-Bermúdez suggested altering the paragraph to the effect that the commentaries should be read in conjunction with the draft guidelines, in line with previous commentaries produced by the Commission.

The Chairman acknowledged the importance of the issue of how the Commission characterized its commentaries and the need for consistency in terms of approach and wording. He suggested that discussion of paragraph (1) should be suspended to allow for informal consultations.

It was so decided.

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) proposed that the words at the beginning of the paragraph “Owing to a lack of clarity of the applicable legal regime, they” should be deleted and that the first two sentences should be combined and amended to read: “The purpose of the draft guidelines is to provide assistance to practitioners concerning the law and practice on the provisional application of treaties, who may encounter difficulties ….”. It was not the applicable regime per se that lacked clarity but the manner in which it had been applied. He also proposed that, in the last sentence, the words “for the progressive development of such rules” should be changed to “for contemporary practice”, as the aim of the draft guidelines was to reflect the practice of States and international organizations, rather than to engage in progressive development of the applicable rules.

Mr. Park proposed that, as contemporary practice did not seem relevant to international organizations in all cases, the sentence should instead end at the word “solutions”.

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Mr. Šturma said that he would welcome clarification as to whether the words “its commencement and termination, and its legal effects”, in the second sentence, were intended to refer to the provisional application of a treaty or to the treaty itself.

Sir Michael Wood proposed that, in the first sentence, the word “practitioners” should be altered to “States, international organizations and others concerned”, with a view to making the paragraph more comprehensive and allowing for the inclusion of academics. He echoed Mr. Šturma’s request for clarification of the second sentence.

Mr. Gómez-Robledo (Special Rapporteur), welcoming Sir Michael’s suggestion, explained that the second sentence referred to the commencement, termination and legal effects of provisional application of a treaty. Any drafting suggestions to avoid ambiguity would be welcome. He disagreed with Mr. Park regarding the last sentence of the paragraph, but suggested that the alternative wording “solutions that seem most appropriate to reflect contemporary practice” might be clearer than his original proposal.

Mr. Grossman Guiloff said that, if Sir Michael’s proposal were accepted, the last sentence of the paragraph should be similarly amended to refer to others concerned, as well as States and international organizations.

Mr. Murphy expressed support for Sir Michael’s proposal and Mr. Grossman Guiloff’s related amendment. In order to clarify the second sentence, the words “its commencement and termination, and its legal effects” could be changed to “the commencement and termination of such an agreement, and its legal effects”. With regard to the last sentence, he had intended to make a similar proposal to that made by Mr. Park; however, he could go along with the Special Rapporteur’s suggestion, in which case the words “for contemporary practice” seemed most suitable.

Mr. Jalloh echoed Mr. Murphy’s comments regarding the last sentence of the paragraph.

Mr. Murase, expressing support for Sir Michael’s point that academics should not be excluded from those to whom assistance was directed, suggested that the word “practitioners” could be altered to “experts”.

The Chairman pointed out that the Commission used the term “experts” very specifically to exclude State officials and advised against introducing such a limitation in the text under consideration.

Sir Michael Wood welcomed Mr. Murphy’s suggestions, with the exception of the one to alter the phrase “its commencement and termination”, which would be clearer if amended to “the commencement and termination of provisional application”, in line with the wording of the draft guidelines.

Mr. Petrič urged members of the Commission to keep in mind the time constraints on their work and to restrict their comments to substantive matters. In the search for consensus, due consideration should be given to the views of the Special Rapporteur, who had explored the subject in the greatest depth.

Mr. Gómez-Robledo (Special Rapporteur) said that he favoured Sir Michael’s proposal regarding the words “its commencement and termination” and had no objection to reverting to his original amendment to the last sentence of the paragraph.

Sir Michael Wood said that it might be clearer not to combine the first two sentences of the paragraph, as suggested by the Special Rapporteur, but instead to replace the words “Owing to a lack of clarity of the applicable legal regime, they” with “They may”.

Mr. Grossman Guiloff said that the assistance provided in the guidelines was not intended solely for those who encountered difficulties. He proposed that the first two sentences should be combined and amended to read: “The purpose of the draft guidelines is to provide assistance to States, international organizations and others concerning the law and practice on the provisional application of treaties, including, inter alia, the form …”.

Mr. Vázquez-Bermúdez suggested that Mr. Grossman Guiloff’s proposal be followed but that the words “including, inter alia” be altered to “when dealing with issues, inter alia”. 
Mr. Gómez-Robledo (Special Rapporteur) said that he would prefer to keep the paragraph as close to the original drafting as possible. He therefore continued to favour Sir Michael’s proposal.

The Chairman encouraged members to discuss possible wording while the meeting was suspended to allow for a meeting of the Bureau.

The meeting was suspended at 4.50 p.m. and resumed at 5.10 p.m.

The Chairman said he understood that agreement on how to word paragraph (2) had nearly been reached and proposed that discussion on the issue should be left in abeyance pending the results of informal consultations.

It was so decided.

Paragraph (3)

Mr. Gómez-Robledo (Special Rapporteur) said that, in the second sentence, the word “expand” should be changed to “explain”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Gómez-Robledo (Special Rapporteur) proposed that the last sentence of paragraph (4) should be amended to read: “Therefore, the draft guidelines allow States and international organizations to set aside, by mutual agreement, the practices addressed in certain draft guidelines, if they deem those provisions unsuitable, in a given treaty or a part of a treaty.”

Mr. Park said that the word “unsuitable” was insufficiently neutral. He suggested that the words “if they deem those provisions unsuitable” should be altered to “if they decide otherwise”.

Mr. Murphy, welcoming the wording proposed by the Special Rapporteur and amended by Mr. Park, suggested deleting the words “in a given treaty or a part of a treaty”, as the reference was unclear. The word “different”, being superfluous, could be deleted from the first sentence of the paragraph.

The Chairman said he took it that the Commission wished to adopt the paragraph as amended by the Special Rapporteur, Mr. Park and Mr. Murphy.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Gómez-Robledo (Special Rapporteur) said that, in the first sentence, the word “correct” should be changed to “consistent”. In the second sentence, the word “extended” should be changed to “extensive”, the words “‘provisional application’,” should be deleted and the words “or ‘definite entry into force’ as if they were equivalent” should be changed to “as opposed to ‘definite entry into force’”. Furthermore, a footnote, reading “See the memorandums by the Secretariat on the origins of article 25 of the 1969 and 1986 Vienna Conventions (A/CN.4/658 and A/CN.4/676)”, should be inserted at the end of the third sentence.

Mr. Murphy suggested that, in the first sentence, the words “avoid the confusion often associated with their misuse” should be altered to “avoid confusion”, thereby skirting the implication that States were prone to misuse terms.

Mr. Gómez-Robledo (Special Rapporteur) endorsed that suggestion.

Paragraph (5), as amended, was adopted.

Paragraph (6)

The Chairman suggested that, in the first sentence the words “formal requirements” should be changed to “all domestic and international procedural requirements”. He also
suggested that, in the last sentence, the words “for example” should be inserted after “useful purpose” and that the phrase “or the implementation of the treaty or a part of a treaty is of great political significance” should be deleted, as they carried a risk of unintended consequences. Referring to treaties of political significance being applied provisionally before procedural requirements were met might raise concern among States that important and sensitive requirements could be circumvented. In Germany, for instance, any internationally binding agreement of great political significance must be ratified by parliament. Provisional application could prove problematic in that regard.

Sir Michael Wood said that the inclusion of the word “procedural” might prove too limiting; instead, he suggested referring simply to completion of “the requirements”.

The Chairman expressed concern that referring only to “requirements” might not be sufficiently clear. He amended his suggested change to “all domestic and international procedural or other formal requirements”.

Ms. Galvão Teles suggested that changing the words “formal requirements”, in the sentence as originally drafted, to “all domestic and international requirements” would be sufficient to allay the Chairman’s concern.

The Chairman endorsed her suggestion.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Commentary to draft guideline 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Gómez-Robledo (Special Rapporteur) suggested an editorial amendment to the numbering of the draft guidelines in the second sentence.

Paragraph (3), as amended, was adopted.

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

Commentary to draft guideline 2 (Purpose)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) said that during a Drafting Committee meeting it had been suggested that a distinction should be drawn between the level of acceptance of the two Vienna Conventions and that it should be reflected in the commentary. He therefore proposed that the paragraph should read: “The reference to ‘provide guidance’ is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, as well as on the 1986 Convention to the extent that the latter reflects customary international law.”

The Chairman said that although doubts had been expressed about whether the 1986 Vienna Convention reflected customary international law, it was clear that the 1969 Vienna Convention might not reflect customary international law in every respect either. He therefore suggested that the words “the latter reflects” should be replaced with “both treaties reflect”.

Paragraph (2), as amended, was adopted.
Sir Michael Wood said that the Vienna Convention was international law for the parties thereto and therefore he was not sure that the reference to the extent that it reflected customary international law was appropriate. His preference was for the simpler phrase used in the original version of the paragraph “are based on the 1969 and 1986 Vienna Conventions and other rules of international law”.

Mr. Murphy said that the problem with the original version of the paragraph was that it did not reflect the text of draft guideline 2, which seemed to refer to the 1969 Vienna Convention only. He therefore suggested that the revised version should be retained but that the last phrase “as well as on the 1986 Vienna Convention to the extent that the latter reflects customary international law” should be replaced with the new sentence: “Guidance may also be found in the 1986 Vienna Convention to the extent that it reflects customary international law.”

Mr. Saboia, supported by Ms. Escobar Hernández, said that the commentary to a draft guideline was not the appropriate place to give different interpretations to the Vienna Conventions and agreed with Sir Michael Wood that it would be better to revert to the Special Rapporteur’s original version of the paragraph.

Mr. Gómez-Robledo (Special Rapporteur) said that he had no difficulty with reverting to the original text that he had changed only in the light of suggestions made in the Drafting Committee.

The Chairman said he took it that the Commission wished to revert to the original version.

It was so decided.

Mr. Murphy said that the paragraph should begin with the phrase “As was stated in the general commentary”, since it related to the phrase “the reference to provide ‘guidance’” and not the phrase “should not be interpreted as if the guidelines were merely recommendatory”. Furthermore, the Commission needed to decide on the substantive matter of whether draft guideline 2 was supposed to cover both the 1969 and 1986 Vienna Conventions and, if that was not the case, it must seek a suitable formulation that did not cast aspersions on the 1986 Vienna Convention.

The Chairman suggested that the paragraph should be simplified to read: “The reference to ‘provide guidance’ is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention.”

Sir Michael Wood said that he could endorse the Chairman’s suggestion, but that it would make more sense to begin the paragraph “Draft guideline 2 is intended to underline…”.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

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

Commentary to draft guideline 3 (General rule)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Murphy drew attention to a discrepancy concerning footnote 22 and other footnotes.

The Chairman said that the matter would be followed up by the Secretariat.

On that understanding, paragraph (4) was adopted.
Paragraph (5)

Mr. Gómez-Robledo (Special Rapporteur) proposed that the first sentence should read: “The second phrase, namely, ‘pending its entry into force between the States or international organizations concerned’, is based on the chapeau of article 25.” The last sentence of the paragraph should be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Sir Michael Wood proposed that the third sentence should be simplified to read: “Furthermore, the draft guideline envisages the possibility of a third State or international organization ….”

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

The commentary to draft guideline 3, as a whole, as amended, was adopted.

Commentary to draft guideline 4 (Form of agreement)

Paragraph (1)

Mr. Gómez-Robledo (Special Rapporteur) proposed the deletion of the words “inter alia” in the second sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Gómez-Robledo (Special Rapporteur) proposed that the word “expands” should be replaced with “elaborates”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Gómez-Robledo (Special Rapporteur) said that since it had been agreed to replace the word “agreement” with the word “treaty” in the text of the draft guideline, the explanation of the word “agreement” contained in the second sentence was no longer necessary and could be deleted. The paragraph would thus read: “Subparagraph (a) envisages the possibility of provisional application by means of a separate treaty, which should be distinguished from the principal treaty.”

Mr. Park questioned the appropriateness of the term “principal treaty”.

Sir Michael Wood proposed that the words “principal treaty” should be replaced with “the treaty that is provisionally applied”.

Mr. Park said that the words “principal treaty” also appeared in footnote 27, which would need to be amended accordingly.

On that understanding, paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Gómez-Robledo (Special Rapporteur) proposed that, in the first sentence, the words “separate instrument” should be changed to “separate treaty”. Furthermore, the last sentence should be reworded: “By way of providing further guidance, reference is made to two examples of such ‘means or arrangements’, namely provisional application agreed by
Mr. Murphy proposed that the phrase “adopted by an international organization” should be changed to “adopted at an international organization”, to render the idea of States coming together to reach an agreement, rather than a decision being taken by an organization. He further proposed that footnotes 28 and 29 should be merged and that the reference in footnote 30 to the resolution establishing the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty should be deleted, since it was not a good example of provisional application of a treaty.

Mr. Gómez-Robledo (Special Rapporteur) said that he could endorse Mr. Murphy’s first two proposals but not his last one. He had already discussed footnote 30 with Mr. Murphy and the text had been amended to make clear that it concerned a resolution, adopted by a meeting of signatory States, whose purpose was to establish the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO). It was not a resolution relating to provisional application per se, since the Treaty contained no provisional application clause. However, he wished to retain the reference to the resolution as a case sui generis that illustrated how, in fact, and as a result of certain decisions, parts of the Treaty were provisionally applied — a position supported by recent literature. Moreover, the Treaty was likely to continue to be provisionally applied indefinitely, since all the requirements for its entry into force were unlikely to be met.

Sir Michael Wood said that he was not in favour of Mr. Murphy’s proposal that the phrase “adopted by an international organization” should be changed to “adopted at an international organization”. The former was in line with the language used for other topics and covered the substantive point that there must be an agreement among States to provisional application by means of a resolution adopted. However, he was in favour of the proposal to delete the reference in footnote 30 to the resolution relating to CTBTO. It would merely confuse matters to suggest that the work done by the Preparatory Commission constituted provisional application in the sense of article 25 of the 1969 Vienna Convention and the project. Nevertheless, at some juncture, it might be useful to explain that it was an exceptional situation, but that preparatory work for the entry into force of a treaty did not amount to provisional application.

The Chairman said that he too was concerned about Mr. Murphy’s proposal, but suggested that “by or at an international organization” might be a solution. Likewise, he was concerned about referring to the establishment of the Preparatory Commission for CTBTO in footnote 30 as the first example of provisional application, when not all members of the Commission were in agreement. He suggested that it might be sufficient to refer to the article by Mr. Andrew Michie on the provisional application of arms treaties mentioned in the footnote.

Mr. Murphy said that Mr. Michie’s article clearly stated that the Comprehensive Nuclear-Test-Ban Treaty was not an example of the provisional application of treaties and, in that connection, had noted that during the negotiations on the Treaty, the Government of Austria had made a proposal for a provisional application mechanism that had been rejected. Thus, while the source might well support the proposition that bilateral arms treaties had been provisionally applied, it was not relevant in the context under consideration.

Following further comments by Mr. Murphy, the Chairman and Sir Michael Wood, the Chairman suggested that discussion on paragraph (4) and its related footnotes should be left in abeyance to allow for informal consultations.

It was so decided.

Mr. Gómez-Robledo (Special Rapporteur) said that informal consultations on the matter were indeed necessary. Furthermore, he wished to underline that the information furnished by Mr. Murphy was incomplete. References by the same author that supported the opposite view could be found.

The meeting rose at 6.05 p.m.