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International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3502nd meeting

Held at the Palais des Nations, Geneva, on Tuesday, 6 August 2019, at 3 p.m.

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Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission
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The meeting was called to order at 3.05 p.m.

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

Chapter V. Peremptory norms of general international law (jus cogens) (continued)
([A/CN.4/L.929](#), [A/CN.4/L.929/Add.1](#) and [A/CN.4/L.929/Add.2](#))

The Chair invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document [A/CN.4/L.929/Add.1](#), beginning with paragraph (2) of the commentary to draft conclusion 10.

Commentary to draft conclusion 10 (Treaties conflicting with a peremptory norm of general international law (jus cogens))

Paragraph (2)

Mr. Zagaynov said that he had concerns with regard to the second sentence of the paragraph and footnote 122. The term “unilateral declarations of States” was infelicitous, since it could be confused with unilateral declarations within the meaning of the Commission’s Guide to Practice on Reservations to Treaties ([A/66/10/Add.1](#)). The examples given in the footnote were not unilateral declarations but statements, the legal effects of which were unclear. Moreover, it was a moot point whether they were of a political or a legal nature. The last example cited in the footnote was a poor one, because the language of the memorandum of the legal adviser of the State Department to the Acting Secretary of State concerning the treaty between the Union of Soviet Socialist Republics and Afghanistan of 1978 confirmed that the text of the treaty agreement could not be deemed inconsistent with something which might be considered “*jus cogens*”. In 1979, the Soviet Union had relied not only on the treaty but also on Article 51 of the Charter of the United Nations. It would be very strange to posit that Article 51 was invalid on those grounds. He therefore proposed that the second sentence of paragraph (2) and footnote 122 should be deleted. He appreciated the language proposed the previous day by the Special Rapporteur to the effect that any example quoted in the commentary did not mean endorsement of its factual content by the Commission. All the same, it would be advisable to find some good examples for the commentary. If his proposal was not acceptable to the Special Rapporteur and the other members, he would be ready to propose alternative language for the second sentence that he had discussed with the Special Rapporteur on a preliminary basis.

Mr. Tladi (Special Rapporteur) said that he could not agree to the deletion of the sentence, although he appreciated that some of the examples quoted in the footnotes were sensitive. He trusted that Mr. Zagaynov would understand that the Commission could not and should not remove particular examples, however sensitive they might be. The same considerations applied to the third sentence. The General Assembly resolutions which were pertinent to *jus cogens* included resolution 36/51 of 24 November 1981, in paragraph 12 of which the General Assembly requested all States “to refrain from making any investments to the benefit of, or extending loans to, the minority racist regime of South Africa and to refrain from any agreements or measures to promote trade or other economic relations with it”. In other words, the resolution was saying that States should refrain from entering into agreements inconsistent with the inalienable rights of the peoples of dependent territories to self-determination. That resolution was conditioning agreements on their consistency with the above-mentioned inalienable rights. Paragraph 4 of General Assembly resolution 33/28 of 7 December 1978 declared that “the validity of agreements purporting to solve the problems of Palestine requires that they be within the framework of the United Nations and its Charter and its resolutions on the basis of the full attainment and exercise of the inalienable rights of the Palestinian people”. It again conditioned the validity of agreements on their consistency with the inalienable rights of the people of Palestine. General Assembly resolution 34/65 B of 29 November 1979 was more strongly worded in that, in paragraph 4, it declared that the Camp David Accords and other agreements had no validity insofar as they purported to determine the future of the Palestinian people and of the Palestinian territories occupied by Israel since 1967. Those resolutions made the methodological point that the validity of agreements was conditional on their consistency

with certain fundamental rules. For that reason, he could not agree to exclude those examples from the text of the commentary.

In order to solve the problem raised by Mr. Grossman Guilloff at the previous meeting, he could propose, as a compromise, language to make it clear that the Commission itself was not taking a position on the content of agreements. His first suggestion would be: "The General Assembly itself, while not explicitly referring to peremptory norms of general international law, has adopted resolutions which could be interpreted as conditioning the validity or legality of the agreements on principles deemed to be fundamental". His second, even softer, suggestion would be: "The General Assembly has itself adopted resolutions which could be interpreted as suggesting that the validity of certain agreements are to be determined by reference to their consistency with certain fundamental principles". That language made the methodological point that if agreements were inconsistent with fundamental rules, they would be invalid.

Mr. Murphy said that he understood the issues raised by Mr. Zagaynov and was prepared to look at his alternative proposal for the second sentence. The problem with the language suggested by the Special Rapporteur was that the paragraph was supposed to concern instances of invalidity of treaties on account of conflict with *jus cogens*, but none of the four resolutions cited in footnote 123 actually mentioned *jus cogens* or asserted that there was a conflict of an agreement with *jus cogens*. They did not therefore go as far as the Special Rapporteur apparently suggested. Paragraph 12 of General Assembly resolution 36/51 of 24 November 1981 did not declare any existing agreement to be invalid, nor did it claim that there was an invalidity issue in play. However, the Special Rapporteur was linking the wording of paragraph 12 of that resolution to a condition that a trade agreement must not be concluded if it somehow ran afoul of the inalienable rights of persons. The paragraph did not say that; rather, it requested States to refrain from agreements on trade with the minority racist regime of South Africa. In General Assembly resolution 34/65 B of 29 November 1979, the General Assembly was not saying that the Camp David Accords were invalid. He was unsure what the Special Rapporteur was claiming in respect of that resolution. He appeared to be saying that the General Assembly was declaring that the validity of agreements turned on something akin to a peremptory norm of general international law. Was he asking the Commission to acknowledge that the right of return or the right to independence were peremptory norms of general international law? It was a rather big claim to say that *jus cogens* supported the rights of entities to be independent States; it was one which the Commission should not make. Those resolutions did not therefore have any particular connection with the subject matter of the paragraph.

His preference would be to delete the paragraph. Failing that, he would suggest a sentence which would read: "The General Assembly, without making explicit reference to peremptory norms or to the invalidity of a treaty, has called upon States to refrain from any agreements that promote trade or other economic relations with a State that is practising racism and apartheid, the prohibitions of which are widely accepted as constituting peremptory norms of general international law (*jus cogens*)". A footnote could then be added which would cite General Assembly resolution 39/42 of 5 December 1984, paragraph 11, and General Assembly resolution 36/51 of 24 November 1981, paragraph 12.

Mr. Grossman Guilloff said that the paragraph had wide-ranging implications and raised complex issues which required further in-depth examination for the sake of absolute clarity.

Sir Michael Wood, referring to Mr. Murphy's comments with regard to the first sentence of the paragraph, said that he wondered whether it might be easier to reach agreement if the end of that sentence was amended. His suggestion would be to replace "this does not mean that there has been no practice at all in this respect" with "this does not mean that there has been no practice at all that may be relevant to this question". That would leave it open for each member to have his or her own view on how relevant what followed was to the question. He would be interested to hear Mr. Zagaynov's formulation of the second sentence. The Special Rapporteur's suggestions with regard to the third sentence were very helpful. As for the footnotes, in footnote 122 it was strange and possibly unwise to refer to the counter-memorial of the Government of Australia in the case concerning *East Timor (Portugal v. Australia)*, since everyone agreed that the Timor Gap

Treaty was completely invalid. The second example, that of an internal memorandum of the Legal Adviser of the State Department to the Acting Secretary of State, did not seem to say very much because it was couched in very tentative terms. He would therefore be in favour of limiting that footnote to the general statements. It would be helpful if footnote 123 simply listed the General Assembly resolutions without their content, in other words without the quotations, because the content of the resolutions was more complex than the quotations and explanations suggested. It seemed rather presumptuous to begin the seventh sentence with the words “by necessary implication”. It would therefore be better to use the softer wording “it seems to follow that”.

Mr. Tladi (Special Rapporteur) said that, although the text which he had suggested was better, he had indicated to Mr. Murphy that he was willing to accept the sentence proposed by him, provided that all the resolutions listed in footnote 123 were mentioned.

The Chair suggested that, as several amendments had been proposed, paragraph (2) should be left in abeyance to allow time to arrive at a consolidated text.

It was so decided.

Paragraph (3)

Mr. Nolte said that, in the penultimate sentence, the two occurrences of the word “scenario” should be replaced in each case with “alternative”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Commentary to draft conclusion 11 (Separability of treaty provisions conflicting with a peremptory norm of general international law (jus cogens))

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nolte said that, after consultation with the Special Rapporteur, he wished to propose the addition of a sentence at the end of the paragraph to read: “The view was expressed that there may be cases in which it would nevertheless be justified to separate different provisions of a treaty”. That was a view which he himself and a number of colleagues had expressed. He would not insist on using the expression “some members” in that context. However, he wished to note in that connection that he had checked the Commission’s practice in using that expression and had found that it had been used on several occasions in commentaries, including with respect to the question of immunity *ratione personae*. Accordingly, it should be used when it was appropriate to do so.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Sir Michael Wood, supported by **Mr. Nolte**, said that, in the final sentence, the phrase “adoption of the treaty” should be replaced with “conclusion of a treaty” because adoption and conclusion might not be synonymous with respect to a treaty, and “conclusion” was the term used in the 1969 Vienna Convention on the Law of Treaties.

Mr. Tladi (Special Rapporteur) said that the change should be made throughout the text.

Mr. Ouazzani Chahdi said that, in the French text, the term “*conclusion*” was used.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Nolte said that, in the final sentence, the phrase “for example” should be deleted because no example was given.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Tladi (Special Rapporteur) said that, in the final sentence, the words “with a provision” should be corrected to read “without a provision”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Park said that, in order to clarify what was meant by “unjust”, he proposed the inclusion of an additional sentence between the second and third sentences to read: “Furthermore, to decide whether continued performance of the treaty would be ‘unjust’, consideration needs to be given not only to the impact on the parties to the treaty, but also impacts beyond the parties, if relevant and necessary.” He was making that suggestion because, when the word “unjust” had been inserted in article 44 (3) (c) of the Vienna Convention on the Law of Treaties in response to a proposal of the United States of America at the United Nations Conference on the Law of Treaties, the delegate of the United States of America had explained that “unjust” meant “unjust to the other parties”. In order to determine the separability of treaty provisions conflicting with *jus cogens*, the term “unjust” would therefore have to be considered in light of the impact of the continued performance of the treaty not only on the parties to the treaty but also on other parties, in other words on third parties.

Mr. Tladi (Special Rapporteur) said that he agreed with Mr. Park’s proposal. In the first sentence, the words “of general international law (*jus cogens*)” should be inserted after “peremptory norm”.

Paragraph (7), as amended, was adopted with a minor editorial amendment.

Commentary to draft conclusion 12 (Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (jus cogens))

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Commentary to draft conclusion 13 (Absence of effect of reservations to treaties on peremptory norms of general international law (jus cogens))

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy said that, strictly speaking, the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, which was cited in footnote 132, involved not a treaty reservation but a reservation to a declaration accepting the compulsory jurisdiction of the International Court of Justice. The footnote should be amended to make that clear, or deleted altogether.

Mr. Tladi (Special Rapporteur) said that he was in favour of amending the footnote and invited Mr. Murphy to submit proposed language to that effect.

Paragraph (2) was adopted on that understanding.

Paragraph (3)

Sir Michael Wood said that the third sentence was inconsistent with the view that the Commission had taken when adopting its Guide to Practice on Reservations to Treaties, in which it had found that a State might, for example, object to the application of a dispute settlement clause to a treaty provision embodying a peremptory norm without necessarily calling into question that norm. His proposal would be to delete the sentence.

Mr. Tladi (Special Rapporteur) said that, while he was not opposed to the deletion of the sentence, he did not think that the sentence was inconsistent with the Guide to Practice on Reservations to Treaties, as it left open the possibility that a reservation might be in conflict with a *jus cogens* norm.

Mr. Jalloh said that footnote 133 appeared to support the statement made in the third sentence, and asked whether, if the sentence was deleted, the footnote would be retained.

Mr. Murphy said that he was not opposed to deleting the sentence, either. His own proposal was to modify it and footnote 133 to reflect the fact that the Human Rights Committee's general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, had elicited a strong reaction from a number of States.

Mr. Grossman Guilloff said that the reaction of certain States did not undermine the validity of the general comment. He would therefore prefer to keep the sentence and the footnote, and to modify them as proposed by Mr. Murphy.

Sir Michael Wood said that the assertion in parentheses at the end of footnote 133 contradicted the third sentence.

Mr. Murphy proposed that the third sentence should be redrafted to read:

A reservation to a treaty provision embodying a peremptory norm of general international law (*jus cogens*) for the purpose of excluding a treaty's compulsory dispute settlement procedure with respect to that norm, for example, may well meet the requirements of article 19 of the 1969 Vienna Convention, in particular the rule that a reservation may not defeat the object and purpose of the treaty.

He further proposed that the word "indeed" should be inserted at the start of the fourth sentence, and that, in footnote 133, the Commission should cite the observations of the Governments of the United Kingdom, the United States of America and France on general comment No. 24.

Mr. Tladi (Special Rapporteur) said that Mr. Murphy's proposal would completely change the idea conveyed by the third sentence. It would be simpler, in his view, simply to delete the third sentence and footnote 133.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Murphy said that he would like the Special Rapporteur to confirm his own understanding that the last sentence was not calling into question affirmative action programmes aimed at promoting the education of racial minorities.

Mr. Tladi (Special Rapporteur) said that Mr. Murphy's understanding was correct, which was why the words "may well" were used.

Paragraph (4) was adopted.

*Commentary to draft conclusion 21 (Procedural requirements)**Paragraph (1)*

Mr. Murphy proposed that the last sentence should be redrafted to read: "In the context of the present draft conclusions, invocation of the rules set forth in draft

conclusions 10, 11 and 12 without some type of mechanism to avoid misuse raises similar concerns as those raised at the United Nations Conference on the Law of Treaties.”

Sir Michael Wood said that, in the same sentence, the words “draft conclusions 10, 11 and 12” should be replaced with “the draft conclusions in Part Three”. The second sentence, as currently drafted, gave the false impression that States had not expressed concerns about articles 53 and 64. It should therefore be recast to read:

It is important to recall that during the United Nations Conference on the Law of Treaties, States generally supported the provisions relating to peremptory norms of general international law (*jus cogens*), and concerns about articles 53 and 64 arose from the concern that the right to invoke the invalidity of treaties could be abused by States unilaterally invoking articles 53 and 64 and thus threatening the stability of treaty relations.

Mr. Nolte said that, while he supported Mr. Murphy’s proposal, the word “misuse” should be replaced with “unilateral measures”, which more accurately reflected what the Commission was trying to say.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Grossman Guilloff said that, to avoid a non sequitur, the words “not without its difficulties” in the first sentence should be replaced with “a complex endeavour”.

Mr. Murphy said that he also struggled to make the connection between the first sentence and what followed. To resolve the issue, his proposal would be to leave the first sentence as it stood, but insert a new second sentence that would read: “The principal difficulty is that detailed dispute resolution provisions are embedded in treaties and do not operate as a matter of customary international law.” The existing second sentence could then be redrafted to read: “Thus, with respect to peremptory norms of general international law (*jus cogens*), the 1969 Vienna Convention contains an elaborate dispute settlement framework.”

Mr. Zagaynov said that, in the existing third and fifth sentences, the words “State” and “States” should be replaced with “party” and “parties”, respectively, in line with the language of the Vienna Convention on the Law of Treaties. The list of peaceful means under Article 33 (1) of the Charter of the United Nations in the existing sixth sentence should be exhaustive, rather than selective. He would be happy to submit a language proposal in that regard.

Sir Michael Wood said that he supported Mr. Zagaynov’s proposal to include an exhaustive list. Doing so would mean that the word “non-judicial” would have to be removed from the final sentence. The existing fourth sentence would be clearer if the word “notifications” was replaced with “notification”.

Mr. Nolte, responding to Mr. Zagaynov’s proposal concerning the existing third and fifth sentences, said that it would be better to refer to “State party” and “States parties”, rather than simply “party” and “parties”.

Paragraph (2), as amended, was adopted on the understanding that Mr. Zagaynov would submit a language proposal for the existing sixth sentence.

Paragraph (3)

Sir Michael Wood, supported by **Mr. Nolte**, said that, in the first sentence, the Commission should quote the International Court of Justice in order to capture more accurately its findings in the *Gabčíkovo-Nagymaros Project* case. The sentence should thus be reworded to read: “In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice stated that ‘both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary international law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith’.”

Mr. Nolte said that, in the third sentence, the word “mean” should be replaced with “determine”, as the Commission could not authoritatively interpret the conclusions of the International Court of Justice.

Mr. Murphy said that footnote 141 should be amended to reflect the proposed changes to the first sentence of the paragraph. In the second sentence, the word “statement” should be replaced with “observation”.

Mr. Park proposed that, in the last sentence, the word “entered” should be replaced with “formulated”, in line with article 19 of the Vienna Convention on the Law of Treaties.

Sir Michael Wood said that, in the fourth sentence, reference should be made to “articles 65 to 67”, rather than “articles 65 to 66”, and the words “are treaty provisions and can therefore not be regarded as customary international law” should be replaced with “cannot be said to reflect customary international law”. In the fifth sentence, the word “consequently” should be replaced with “as treaty provisions”, while in the last sentence, the words “many States” should be replaced with “a number”.

Footnote 142 was quite inaccurate in many respects. The Special Rapporteur and the Secretariat should review it carefully to ensure its accuracy. The United Kingdom, for example, had done some very different things to what was suggested in the footnote.

Mr. Tladi (Special Rapporteur) said that he was open to including additional references to the views of the United Kingdom with regard to the reservations mentioned. Sir Michael Wood had sent him the text that he wished to see inserted; it would be reflected in the footnote.

Paragraph (3), as amended, was adopted subject to the requisite adjustments to the footnotes.

Paragraph (4)

Mr. Murphy said that, in the first sentence, the words “purport to” should be inserted before “impose”.

Mr. Tladi (Special Rapporteur) said that he wished to propose to add the following text at the end of the paragraph: “The procedures set forth in draft conclusion 21 do not constitute customary international law and are not binding on States. They serve to facilitate the resolution of disputes and to prevent unilateralism in the resolution of such disputes.”

Mr. Nolte said that he was not in favour of the Special Rapporteur’s proposal. It flatly contradicted the beginning of the quotation from the judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case referenced in the previous paragraphs, which suggested the possibility that at least part of the procedural provisions reflected customary international law.

Mr. Park said that the new text proposed by the Special Rapporteur was already covered by the second sentence of paragraph (10). It was therefore not necessary to make the same point in paragraph (4).

Mr. Zagaynov said that he supported the Special Rapporteur’s proposal, which he found to be very helpful. During the Commission’s discussion of the topic in the plenary, questions had been raised with regard to the nature of draft conclusion 21. In his summing-up of the discussion, the Special Rapporteur had explicitly stated that draft conclusion 21 represented recommended practice. It was important to reflect that in the commentary.

Mr. Murphy said that he too felt that the Special Rapporteur’s proposal was a useful one. Perhaps the word “detailed” could be inserted before the word “procedures”. The proposed text made clear that the Commission understood that the draft conclusion reflected good practices and was not an attempt to say what customary international law was.

Mr. Nolte said that the proposed text could be amended to indicate that “not all aspects” of the procedures set forth “may reflect customary international law”. In any case,

he would prefer to see the Special Rapporteur's proposal circulated in writing after informal consultations between interested members.

The Chair suggested that paragraph (4) should be held in abeyance pending the presentation of a written proposal by the Special Rapporteur.

It was so decided.

Paragraph (4) was left in abeyance.

Paragraph (5)

Sir Michael Wood said that he wished to propose that the final part of the third sentence, beginning with the words "such as customary international, unilateral declarations and binding decisions of international organizations", should be deleted. It was a rather strange list and was incomplete. Moreover, it was not needed, as all of the elements contained therein were already encapsulated in phrase "other international obligations deriving from other sources of international law".

Mr. Nolte said that unilateral declarations and binding decisions of international organizations were not, properly speaking, sources of international law. Those two examples should therefore be deleted; they should be replaced with a reference to general principles of law, which like customary international law, were a main source of international law.

Mr. Tladi (Special Rapporteur) said that it would be simpler to end the sentence after the words "deriving from other sources of international law", so as to avoid any discussion on whether the other elements on the list were also sources of international law.

Paragraph (5), as amended by Sir Michael Wood, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Zagaynov said that the list provided in the final sentence of paragraph (7) was selective and perhaps unnecessary. He proposed that the entire sentence should be deleted.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

Sir Michael Wood, noting that the first sentence stated that the import of paragraph 4 was that if after the expiration of the twelve-month period no offer to submit the matter to the International Criminal Court was made, the invoking State "may carry out the measure that it has proposed", said that it was important to state that it did not follow from the fact that the invoking State had not brought the matter to the Court that it was free lawfully to carry out the measure. A new sentence could be inserted after the first sentence to read: "This is of course without prejudice to the question whether taking the measures is justified under international law since the dispute concerning the effect of any possible peremptory norm will not have been resolved."

Mr. Tladi (Special Rapporteur) said that he would be willing to agree to add the sentence proposed by Sir Michael Wood if it was amended to read: "This is of course without prejudice to the lawfulness of such measures." The question of lawfulness would be left open. A further sentence could then be added at the end of the paragraph to read: "If the invoking State rejects the offer to submit the matter to the International Court of Justice, it may not carry out the proposed measures and will continue to be bound by the rule or obligations." The whole point of the draft conclusion was to avoid unilateralism. Both of the proposed new sentences contributed to that aim.

Mr. Nolte said that he agreed with the Special Rapporteur's proposal for an additional sentence at the end of the paragraph. However, the second part of the proposed sentence, which read "and will continue to be bound by the rule or obligations", should be deleted. The question of whether or not the State was bound was not a matter that the Commission addressed.

Mr. Zagaynov said that he too had concerns with regard to the first sentence. His understanding of paragraph 4 of the draft conclusion was that if the objecting State did not offer to submit the matter to the International Court of Justice, the situation remained as it was. In other words, the dispute situation continued. He was unsure whether it was right for the Commission to say that the invoking State "may carry out" the measures proposed but that those measures might be unlawful. Moreover, the interpretation of paragraph 4 proposed in paragraph (9) was not compatible with the idea that the provision did not establish the compulsory jurisdiction of the International Court of Justice, since it seemed to suggest that the objecting State had a choice between bringing the matter before the Court or accepting that the invoking State could do what it proposed to do.

Mr. Murphy said that, generally speaking, he agreed with Mr. Zagaynov. It would help to see a redrafted version of the paragraph in writing. Even with the proposals put forward by Sir Michael Wood and Mr. Tladi, the clause in the first sentence that stated that the invoking State "may carry out" the measure remained problematic. If that was simply a factual claim, it was correct. It seemed to him, however, that it was a claim about propriety. To make such a claim and then try to soften it created a disconnect that was problematic. His own view was that paragraph 4 of the draft conclusion stopped short of saying what paragraph (9) was saying. One solution would be to delete the first sentence of paragraph (9).

Mr. Nolte said that the Commission should not, in the commentary, backtrack on the adopted draft conclusion. It could be explained that the draft conclusion did not equate to an obligation to submit the matter to the International Court of Justice. The Special Rapporteur's proposals explained the issue well. Perhaps the adoption of the paragraph should be suspended to allow for further refinement.

Mr. Jalloh said that he agreed with Mr. Nolte. While he understood the concerns raised by Mr. Murphy and Mr. Zagaynov, it was important to remember that the paragraphs of the draft conclusion applied in sequence. If one considered paragraph 4 in isolation, it could be misconstrued as giving rise to compulsory jurisdiction. However, such a conclusion could not be reached if the paragraph was read in conjunction with the preceding paragraphs. He supported the Special Rapporteur's proposed addition at the end of the paragraph, as amended by Mr. Nolte.

Sir Michael Wood said that the first sentence could perhaps be modified to take account of the concerns raised by Mr. Murphy and Mr. Zagaynov. The word "import" could be changed to "implication", and the words "may carry out" could be amended to "would no longer be precluded from carrying out". That could then be followed by the Special Rapporteur's first proposed addition, namely "This is of course without prejudice to the lawfulness of such measures."

Mr. Tladi (Special Rapporteur) said that the text was very delicately balanced. It was true that it was possible to arrive at a literal, ordinary-meaning interpretation of paragraph 4 that flatly contradicted the first sentence of paragraph (9). However, a good faith reading of the paragraph led to the opposite conclusion. The objective of the draft conclusion had always been to avoid unilateralism. An interpretation of the text which allowed the objecting State to unilaterally prevent the resolution of the dispute would be contrary that objective.

Mr. Murphy said that the draft conclusion itself did not support the first sentence of paragraph (9). The draft conclusion established a sequence, as Mr. Jalloh had rightly pointed out, and paragraph 2 of that sequence established that there was a circumstance where the invoking State "may carry out the measure" it had proposed. The language of paragraph 4 was in fact explained in paragraph (8) of the commentary. What was problematic was the claim that the implication of paragraph 4 was that the invoking State "may carry out" the measure or "would no longer be precluded from carrying out" the

measure, but that doing so might be unlawful. A possible solution would be to avoid the words “import” and “implication”, and instead start the paragraph with: “If after the expiration of the twelve-month period, no offer to submit the matter to the International Court of Justice is made by the other States concerned and if the invoking State carries out the measure, that measure may or may not be lawful.”

The Chair suggested that paragraph (9) should be left in abeyance to give members more time to formulate appropriate language.

It was so decided.

Paragraph (9) was left in abeyance.

Paragraph (10)

Paragraph (10) was adopted.

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

Part Three (Legal consequences of peremptory norms of general international law (jus cogens) (continued)

Commentary to draft conclusion 10 (Treaties conflicting with a peremptory norm of general international law (jus cogens) (continued)

Paragraph (2) (continued)

Mr. Tladi (Special Rapporteur) said that he wished to propose that the first part of paragraph (2) up to the sentence which began “There have also been judicial decisions ...”, should be redrafted to read:

While instances of invalidity of treaties on account of conflict with peremptory norms of general international law (*jus cogens*) have been rare, this does not mean that there has been no practice at all that may be relevant to this question. There have been examples of individual States assessing whether a particular treaty was consistent or not with a peremptory norm of general international law (*jus cogens*) and, accordingly, whether it could be considered as valid or not.¹²² The General Assembly itself has adopted resolutions which could be interpreted as suggesting that the validity of certain agreements is to be determined by reference to their consistency with certain fundamental principles.¹²³

He also wished to propose that footnote 123 should be redrafted to read: “General Assembly resolution 34/65 B of 29 November 1979, para. 2. See also General Assembly resolutions 36/51 of 24 November 1981 and 39/42 of 5 December; and General Assembly resolution 33/28 A of 7 December 1978.”

Mr. Grossman Guilloff said that the treaty concluded between the Saramaka community and the Netherlands, which was mentioned in paragraph (2) in reference to the *Aloeboetoe et al. v. Suriname* case, established that the authorities of the Netherlands were required to respect the territorial integrity and customs of the Saramaka. Some provisions of the treaty provided that the Saramakas, in exchange, would return escaped slaves to Suriname. Therefore, that part of the penultimate sentence which stated that “under the treaty” the Saramaka had undertaken to capture any escaped slaves should be amended to read “under some provisions in that treaty” or “that treaty prescribed among other things”.

Sir Michael Wood said that he hoped that the Secretariat would provide precise references for the statements made by States in the Sixth Committee that were cited in footnote 122. He recalled that he had proposed the deletion of the second half of that footnote, which referred to two specific statements, neither of which supported the point being made in the paragraph.

Mr. Zagaynov said that he supported Sir Michael Wood’s proposal. He wondered whether, in the Special Rapporteur’s proposed new text, the word “itself” after “General Assembly” was necessary.

Mr. Murphy said that he appreciated the Special Rapporteur's efforts to try to find common ground. The word "itself" after "General Assembly" should be deleted. The footnote indicator for footnote 123 should be moved from the end of the third sentence and placed after the word "resolutions" in the same sentence. In the text of footnote 123, the General Assembly resolutions that were cited should be placed in chronological order, without the words "see also". The words "could be interpreted" in the third sentence of the paragraph incorrectly suggested that it was the view of the Commission that the resolutions could be interpreted in the way described. They should be replaced with "some have interpreted".

Mr. Jalloh said he agreed that the word "itself" after "General Assembly" should be deleted. Deleting the second half of footnote 122, however, could mean losing an important part of the explanation provided therein. With regard to Mr. Murphy's proposal concerning footnote 123, he wondered whether placing the resolutions in chronological order might undermine the logic behind their original placement.

Mr. Hassouna said that he supported the proposal put forward by Mr. Zagaynov. With regard to General Assembly resolution 32/28 A of 7 December 1978 on the question of Palestine, he was satisfied with the formulation presented by the Special Rapporteur, since he did not agree that the resolution could be interpreted as implying that the Camp David Accords were invalid. He did not believe that that was the General Assembly's intention. He was also satisfied with the Special Rapporteur's proposition that the issue was one of methodology and agreed with the Special Rapporteur's proposals suggesting that, as a general principle, the validity of certain agreements was to be determined by reference to their consistency with certain fundamental principles.

Ms. Oral said that she wondered whether the first sentence could be simplified by deleting the part which read "this does not mean that there has been no practice at all that may be relevant to this question", which seemed unnecessary given that practice was already described as "rare" in the first part of the sentence. With regard to footnote 122, the example that related to the Soviet Union and Afghanistan was not particularly clear and was perhaps unnecessary.

Mr. Grossman Guiloff said that he wished to propose that the words "for the purposes of reparation" should be inserted between the phrase "an agreement concluded between the Netherlands and the Saramaka community" and the indicator for footnote 126. There should then follow a paraphrase of paragraph 57 of the judgment of the Inter-American Court of Human Rights in the *Aloeboetoe et al.* case, stating that while the Court did not deem it necessary to investigate whether or not the agreement was an international treaty, it had decided that even if the agreement in question were a treaty, it would be null and void because it contradicted the norms of *jus cogens superveniens* on account of the fact that under one of its provisions the Saramakas undertook to return escaped slaves to Suriname.

Ms. Galvão Teles said that the newly proposed text aptly addressed the various concerns that had been expressed by members. She disagreed that the first sentence was redundant; it was necessary to emphasize that there had indeed been instances of invalidity of treaties on account of conflict with peremptory norms. She likewise disagreed with the proposed deletion of the second half of footnote 122: the two cases covered were useful, especially since there were not many examples of written assessments by States relating to the invalidity of treaties in conflict with peremptory norms. Lastly, in the reference to the counter-memorial of the Government of Australia of 1 June 1992, in the case concerning *East Timor (Portugal v. Australia)*, it might be useful to include a direct quote from the counter-memorial, as was done in the citation that immediately followed.

Mr. Park said that although the rewording of the second sentence of the paragraph, as a compromise text, might be more neutral, it downplayed the value of State practice; he would prefer language that referred to "some statements by individual States" rather than "examples of individual States".

Mr. Nolte said that, in the newly drafted third sentence, the combination of the proposed replacement of the words "could be interpreted" with "some have interpreted" and the verb "suggesting" overly weakened the sentence. If the words "some have

interpreted” were adopted, then the verb “suggesting” should be changed to “recognizing”. Another option for neutral phrasing might be simply to state “resolutions, which have been interpreted”.

Mr. Tladi (Special Rapporteur) said that he agreed with the proposed insertion, in the penultimate sentence of the revised paragraph, of the phrase “some provisions of” between the words “under” and “the treaty”. As for the fact that the Inter-American Court of Human Rights had not assessed whether or not the agreement was an international treaty because it had ultimately decided that it did not have to do so, the phrase “if the agreement in question were a treaty” should, in his view, address Mr. Grossman Guiloff’s concern.

While he was grateful for members’ spirit of compromise, he would prefer to maintain the first sentence of the revised text as drafted. He agreed that, in the second sentence, the phrase “examples of individual States” could be replaced with “statements made by individual States”. As for footnote 122, he would prefer to keep the entire text. Regarding the concerns raised by Sir Michael Wood, the language “whether it could be considered as valid or not”, in the second sentence of the revised text, made it clear that the statements by States were not definitive; therefore, both examples were relevant to the revised text. He agreed that it would be useful, in the footnote, to insert a quote from the counter-memorial of the Government of Australia of 1 June 1992, in the *East Timor* case. He could accept, in the third sentence, the deletion of the word “itself” and the replacement of the words “could be” and “suggesting” with “some have” and “recognizing”, respectively.

The Chair said he took it that, in addition to those amendments, the Commission wished to adopt the proposals to insert the words “for the purposes of reparation” at the end of the eighth sentence; to move the indicator for footnote 123 from the end of the third sentence to immediately after the word “resolutions” in the same sentence; and, in the text of footnote 123, to place the General Assembly resolutions cited in chronological order, without the words “see also”.

Paragraph (2), as amended, was adopted, subject to its completion by the Secretariat.

Draft conclusion 9 (Subsidiary means for the determination of the peremptory character of norms of general international law) (continued)

Paragraph (7) (continued)

Mr. Tladi (Special Rapporteur) proposed that the first sentence should be redrafted to read: “Although the forms of materials relevant to the determination of acceptance and recognition emanate from the views of States, other materials may be used to provide context.”

Mr. Murphy said that he understood paragraph (7) of the commentary to cover draft conclusion 9 (2), which related to the works of expert bodies and the teachings of publicists, and that the point of paragraph (7) was to indicate that courts also relied on such other materials. Therefore, he wondered whether the paragraph belonged in an earlier part of the commentary.

The Chair, speaking as a member of the Commission, suggested that the paragraph should be placed immediately before the current paragraph (5).

Mr. Tladi (Special Rapporteur) said that the revised language was intended to indicate that, while acceptance and recognition were found in the views of States, there were other materials that did not reflect the views of States but that could be useful and had in fact been relied on in the examples provided in the sentences of the paragraph that followed. Therefore, it was preferable to keep the paragraph where it was.

Mr. Murphy said that, while he appreciated the explanation provided by the Special Rapporteur, the entire draft conclusion 9 was about sources other than those emanating from States; the revised language still did not seem appropriate in paragraph (7). He proposed replacing the words “State practice” with “courts”.

Mr. Park said that a solution to Mr. Murphy's concern might be to split paragraph (7) in two: the first part could be placed immediately before paragraph (3) and the second part immediately after paragraph (3).

Mr. Tladi (Special Rapporteur) said that he would support the proposal to replace the words "State practice" with "courts".

Paragraph (7), as amended by Mr. Murphy, was adopted.

Draft conclusion 3 (Categories of general principles of law) (continued)

Paragraph (11) (continued)

Mr. Murphy, recalling the concern that he had raised about the retention of footnote 36 despite the deletion of the third sentence, to which it was attached, said that the footnote did not support the second sentence, to which it had been proposed that it should be attached.

Mr. Tladi (Special Rapporteur) said that since the second sentence dealt with the universal application of peremptory norms of international law, rather than the consent of States to be bound by them – the subject of the third sentence – it indeed made little sense to maintain the footnote if the third sentence was deleted. He therefore agreed that footnote 36 should be deleted.

The Chair, recalling that paragraph (11) had been adopted at a previous meeting (A/CN.4/SR.3500) on the understanding that footnote 36 would be revisited at a later stage, said he took it that the Commission wished to delete that footnote.

It was so decided.

Draft conclusion 7 (International community of States as a whole) (continued)

Paragraph (4) (continued)

Sir Michael Wood proposed that the fourth sentence should be amended to read:

In its conclusions on the identification of customary international law, the Commission stated that it is "primarily ... the practice of States that contributes to the formation, or expression, of rules of customary international law", while noting that "in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law". It went on to note that the conduct of non-State actors, even though not practice for such purposes, "may be relevant when assessing the practice" of States.

Mr. Tladi (Special Rapporteur) said that he supported the proposed amendment.

Paragraph (4), as amended, was adopted.

Draft conclusion 3 (Categories of general principles of law) (continued)

Paragraphs (4) and (5) (continued)

Mr. Tladi (Special Rapporteur) said that he would like to clarify that, in response to requests for more diverse authorities in relation to paragraphs (4) and (5), he had provided the Secretariat with the text for a new footnote to accompany the first sentence in paragraph (5), containing references to additional cases and quotations therefrom, and a new footnote at the beginning of paragraph (6) that would feature a more diverse array of literature.

Mr. Murphy said that he would welcome an opportunity to review the proposed additions in written form.

The meeting rose at 6 p.m.