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International Law Commission
Seventy-third session (second part)

Provisional summary record of the 3597th meeting
Held at the Palais des Nations, Geneva, on Monday, 25 July 2022, at 3 p.m.

Contents

Present:

Chair:	Sir Michael Wood (First Vice-Chair)
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

Sir Michael Wood, First Vice-Chair, took the Chair.

The meeting was called to order at 3 p.m.

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

Chapter IV. Peremptory norms of general international law (jus cogens) (*continued*) (A/CN.4/L.960 and A/CN.4/L.960/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.960/Add.1.

*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. Murphy suggested that the fifth sentence of the paragraph ("The whole treaty is void *ab initio*") should be deleted and the words "*ab initio*" should be inserted in the sixth sentence, after the words "the whole treaty is void".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Murphy suggested that, in the second sentence of the paragraph, the word "usually" should be inserted before "terminates in whole" and that the third sentence should be altered to read: "The word 'unless', at the end of the *chapeau*, however, signifies that in certain limited instances, which are covered by subparagraphs (a) to (c), separation may take place."

Mr. Tladi (Special Rapporteur), while not objecting to the thrust of those suggestions, pointed out that the *chapeau* of paragraph 2 of draft conclusion 11 did not include the word "usually"; he would therefore not favour its insertion in the corresponding section of the commentary.

Mr. Jalloh, expressing support for that position, said that the use of "certain" and "limited" together in the third sentence might be superfluous.

The Chair, speaking as a member of the Commission, emphasized the need for the cumulative nature of the requirements outlined in subparagraphs (a) to (c) of draft conclusion 11, paragraph 2, to be stated unequivocally; the words "limited instances" might give a different impression. Using the noun in the singular might be preferable.

Mr. Murphy, acknowledging that point, said that he would have no objection to using the singular; he would also have no objection to omitting the word "certain". With regard to inserting "usually" in the second sentence, his intention had been to reflect the fact that the treaty termination provided for in the *chapeau* of paragraph 2 of draft conclusion 11 was qualified by the subparagraphs that followed. That notion was already covered in the first sentence of paragraph (4) by the words "as a general rule", which could perhaps be repeated in the second sentence.

Mr. Tladi (Special Rapporteur) said that he would prefer the words "limited instances" to be retained in the plural; the rest of the paragraph made clear that the elements listed in subparagraphs (a) to (c) of draft conclusion 11, paragraph 2, must be applied cumulatively. He would also prefer not to repeat the words "as a general rule" in the second sentence. Paragraph (4) was structured so as to refer initially to draft conclusion 11, paragraph 2, as a whole, then to the termination provided for in the first part of the *chapeau*, and then

to the exceptions to that termination covered by the word “unless” and the subparagraphs that followed. The phrase “as a general rule” was therefore only appropriate in the context of the first sentence of the paragraph, which referred to the overall effect of paragraph 2.

Mr. Vázquez-Bermúdez echoed the Special Rapporteur’s points regarding the words “as a general rule”; however, Mr. Murphy’s suggested insertion of the word “however” helped to clarify that the word “unless” introduced an exception to an otherwise universal rule.

Mr. Murphy said that he was persuaded by those arguments and would therefore withdraw his suggestions to insert the words “usually” or “as a general rule” in the second sentence and to insert the word “certain” in the third sentence.

The Chair said he took it that the Commission agreed to leave the second sentence of paragraph (4) unamended and to adopt Mr. Murphy’s suggested reformulation of the third sentence, omitting the word “certain”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

Mr. Murphy suggested that the first sentence of the paragraph should be shortened by deleting the words “for severance of a provision that conflicts with a peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of a treaty”. In the second sentence, the word “only” should be deleted. The fourth sentence could be separated out as a new paragraph (8), with the addition of the word “three” before “conditions”.

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

*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 (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Zagaynov suggested that, in the first sentence, the phrase “any provision of the treaty in conflict with a peremptory norm of general international law (*jus cogens*)” should be altered to clarify that the conflict in question was between an individual treaty provision and a peremptory norm, rather than between the peremptory norm and the treaty as a whole, for instance by changing “any provision of the treaty” to “any of its provisions”.

Mr. Murphy said he agreed with that suggestion and suggested that the words “expressed in subparagraph (a)” should be inserted in the same sentence after “void treaty”, so as to provide an explicit link with the wording of the draft conclusion. In the seventh sentence, the words “and is expressed in subparagraph (b)” should be inserted after “which flows from the first”. Lastly, in the eighth sentence, the words “to the treaty” should be deleted, as by that stage in the process being described the treaty would no longer be valid.

The Chair, speaking as a member of the Commission, said that removing the words “to the treaty” when the sentence still referred to “parties” seemed illogical; he would be inclined not to delete them. In his capacity as Chair, he took it that the Commission agreed to all the other changes suggested.

Paragraph (4), as amended, was adopted with minor editorial changes.

Paragraph (5)

Mr. Murphy suggested that, in the first sentence, the words "and terminates in whole" should be added after "becomes void" and that, in the third sentence, the words "becomes invalid" should be replaced with "terminates", as termination of the treaty was the key effect of the provision.

Mr. Park said that he would prefer not to amend the first sentence as suggested by Mr. Murphy. While the emergence of a new peremptory norm of general international law would result in the termination of a treaty that was incompatible with it, paragraph 2 of draft conclusion 11 allowed for some effects of the treaty to continue in practice, provided that they were not themselves in conflict with the new peremptory norm.

Mr. Jalloh echoed Mr. Park's doubts about inserting the phrase "and terminates in whole" in the first sentence, as it might have consequences for the wording of the rest of the paragraph and for the second change proposed by Mr. Murphy.

Mr. Tladi (Special Rapporteur) said that, while he did not object to Mr. Murphy's proposals in principle, he would nevertheless prefer not to incorporate them into the text of the paragraph, which, as drafted, was closely aligned with the wording of the Vienna Convention on the Law of Treaties, in particular article 64 thereof.

Mr. Murphy said that he had understood the paragraph to be dealing with the specific case of a treaty terminating in whole with no separation of its provisions; however, he would not insist on his proposals, which had been intended to reflect the notion of separability, if others, including the Special Rapporteur, felt the paragraph to be more general.

Mr. Forteau said that the various elements of paragraph 2 of draft conclusion 11 were in some respects inherently contradictory in nature; however, to avoid contradictions in the commentary, he suggested that the fifth sentence of paragraph (5) should be either deleted altogether or altered by inserting the word "general" between "no" and "obligation". In the seventh sentence, the words "in principle" should be added to qualify the phrase "will not be affected".

Mr. Tladi (Special Rapporteur), agreeing with those changes in essence, suggested that the beginning of the fifth sentence would be better altered to read: "There can therefore, in general, be no obligation …"

Mr. Grossman Guiloff, referring to the Spanish version of the text, emphasized the importance of reproducing the terminology used in existing instruments, especially the Vienna Convention on the Law of Treaties, where appropriate.

The Chair said he took it that the Commission agreed to adopt the amendments suggested to the fifth sentence of the paragraph by Mr. Forteau and the Special Rapporteur and the seventh sentence by Mr. Forteau, and to leave the first and third sentences unchanged.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Murphy, referring to the last sentence of the paragraph, suggested that the words "rights and obligations of third States or persons" should be changed to "any right, obligation or legal situation of a third State or person"; that the words "will also be maintained" should be changed to "is not affected"; and that "their maintenance" should be altered to "its maintenance".

Paragraph (6), as amended, was adopted.

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

Paragraph (1)

Mr. Murphy said that the last sentence of the paragraph would be clearer if it read: "The draft conclusion instead addresses the legal consequences of peremptory norms of general international law (*jus cogens*) for reservations once they are made as provided for in

the Convention.” While the Vienna Convention on the Law of Treaties regulated the making of reservations, draft conclusion 13 addressed the legal consequences after such reservations had been made.

Ms. Galvão Teles said that she, too, found the last sentence difficult to understand, but the wording suggested by Mr. Murphy was confusing. One solution might be to reproduce language from the title of the draft conclusion, such that the sentence would read: “The draft conclusion instead addresses the absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*).”

Mr. Forteau said that the sentence was clearer in the French translation, in which “proceeds from” had been rendered as “*se fonde sur*” [“is based on”].

The Chair, speaking as a member of the Commission, said that, drawing inspiration from the wording used in the French translation, the original sentence could be amended to read: “The draft conclusion is based on the effects of reservations as provided for in the Convention.”

Mr. Vázquez-Bermúdez, supported by **Mr. Hmoud**, proposed that the sentence should be deleted, as its meaning remained unclear even in the light of the suggested amendments.

Mr. Tladi (Special Rapporteur) said he agreed that the last sentence was confusing, as was the wording suggested by Mr. Murphy. As for the possibility of drawing inspiration from the wording used in the French translation, the draft conclusion was not in fact “based on” what was provided for in the Convention. He agreed that deleting the sentence was the best solution.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Park said that the last sentence, which did not appear in the commentaries adopted on first reading, seemed redundant, since it merely repeated the idea expressed in the fifth sentence. He proposed that it should be deleted.

Mr. Forteau, referring to the fourth sentence, said that it was confusing to begin speaking of “validity” there. He proposed that the words “retains its validity” should be replaced with “continues to exist”. Such wording would be consistent with the language used by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

Mr. Jalloh said that, if the Commission supported Mr. Park’s proposal that the last sentence should be deleted, it would need to decide what to do with the footnote marker at the end of that sentence and the corresponding footnote.

Mr. Murphy said that he agreed with Mr. Forteau’s proposal. With regard to the fifth sentence, it would be prudent to avoid giving the impression that a reservation affected the treaty rule itself. He therefore proposed deleting the words “the treaty rule and” and inserting the words “to the reserving State” after “application of the treaty rule”. He agreed with Mr. Park’s proposal. The footnote marker at the end of the last sentence could be moved to the end of the fifth sentence.

Mr. Forteau, responding to Mr. Murphy’s proposal, said that a reservation affected not only the reserving State but also any States that accepted that reservation. He therefore proposed that the Commission should follow the definition of the term “reservation” in article 2 (d) of the Vienna Convention on the Law of Treaties: the words “the treaty rule and the application of the treaty rule” should be replaced with “the legal effect of the treaty provision”.

The Chair, speaking as a member of the Commission, said that the words “in respect of the reserving State” should be inserted at the end of the phrase proposed for insertion by Mr. Forteau. In his capacity as Chair, he took it that the Commission agreed to amend the fifth sentence so that it would read: “This means that, while the reservation may well affect the legal effect of the treaty provision in respect of the reserving State, the norm, as a

peremptory norm of general international law (*jus cogens*), will not be affected and will continue to apply.” In addition, the footnote marker at the end of the last sentence would be moved to the end of the fifth, and the last sentence would be deleted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Forteau said that, in the context of treaty relations, a State could exclude the effect of a treaty provision reflecting a peremptory norm of general international law by formulating a reservation to that provision. To reflect that point, he proposed inserting the words “as such” after “escape” in the last sentence.

The Chair, speaking as a member of the Commission, said that, in the English text, it might be possible to convey the same idea by inserting the word “itself” after “general international law (*jus cogens*)”. Even then, however, the sentence would read somewhat oddly. It might not be necessary to amend the English text at all.

Mr. Murphy said that, while the English text did not need to be amended in the manner proposed, he would have no objection to the insertion of the words “as such” after “general international law (*jus cogens*)”.

Mr. Jalloh said that an amendment of the kind proposed by Mr. Forteau might be called for in the French text, but the English text was acceptable as currently drafted. In addition, the phrase “as such” sometimes gave rise to divergent interpretations.

Paragraph (3) was adopted with that change to the French text.

Paragraph (4)

Mr. Grossman Guiloff, referring to the last sentence, said that it was somewhat inelegant to use the word “generally” in close proximity to “general”.

The Chair, speaking as a member of the Commission, said that one solution would be to delete the words “generally recognized”, which were in any case superfluous.

Paragraph (4), as amended, was adopted.

*Commentary to draft conclusion 14 (Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*))*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Forteau proposed that the words “are present” in the second sentence should be replaced with “were to be present”, since the sentence described a hypothetical scenario.

Mr. Jalloh said that he wondered whether, in the same sentence, the word “State” needed to be inserted before “practice”.

The Chair, speaking as a member of the Commission, said that, as the word “practice” was clear enough, no such amendment was necessary.

Paragraph (2), as amended, was adopted with a minor drafting change.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Mr. Forteau said that he would appreciate clarification regarding the last sentence, which included a direct quotation from a ruling of the High Court of Kenya in which reference was made to “pre-emptory rules”. He assumed that, as the paragraph under

consideration addressed conflicts between rules of customary international law and peremptory norms of general international law (*jus cogens*), the phrase "pre-emptory rules" should be interpreted as a reference to the former.

The Chair said that the word "pre-emptory" might be a simple typographical error for "peremptory".

After a discussion in which **Mr. Forteau**, **Mr. Jalloh**, **Mr. Murphy**, **Mr. Šturma** and **Mr. Vázquez-Bermúdez** took part, **Mr. Tladi** (Special Rapporteur) said that, in the ruling in question, *jus cogens* was defined as "a pre-emptory norm of general international law". Later in the ruling, the word "pre-emptory" was used with that same meaning. He proposed that the strings of words "rendered void" and "which come into conflict with them" should each be enclosed in quotation marks and that the words "pre-emptory rules" should be replaced with "rules of international law", such that the sentence as a whole would read: "Thus, the High Court of Kenya, in *The Kenya Section of the International Commission of Jurists v. the Attorney-General and Others*, stated that peremptory norms of general international law (*jus cogens*) 'rendered void' any other rules of international law 'which come into conflict with them'."

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Murphy said that, in the sentence beginning "This is based on the recognition that", the phrase "likely to occur" should be replaced with the word "possible" and the phrase "a rule of customary international law" should be replaced with "an existing rule of customary international law".

The Chair, speaking as a member of the Commission, said that it would be preferable to replace "likely to occur" with "most likely to occur". While the type of modification referred to in the sentence was not likely to occur, it was most likely to occur in the context of custom.

Mr. Jalloh said that he could support the Chair's proposal, although the Commission might like to consider the formulation "more likely to occur". The word "possible" was too limited, given that draft conclusion 5, which the sentence referred to, stated that customary international law was the most common basis for peremptory norms of general international law (*jus cogens*).

Ms. Oral said that she supported the Chair's proposal, which was more consistent with the statement that customary law was the most common basis for peremptory norms.

The Chair said he took it that the Commission wished to replace "likely to occur" with "most likely to occur" and "a rule of customary international law" with "an existing rule of customary international law".

Paragraph (6), as amended, was adopted.

The meeting was suspended at 4.35 p.m. and resumed at 4.45 p.m.

Paragraph (7)

Mr. Nguyen said that the first clause of the first sentence, reading "While the current draft conclusions do not address the modification of peremptory norms of general international law (*jus cogens*)", should be deleted because the modification of such norms had already been addressed in the preceding paragraph, paragraph (6).

Mr. Hmoud said that he did not support Mr. Nguyen's proposal because the draft conclusions did not in fact address the modification or termination of rules of *jus cogens*. For the record, his view was that, in practice, it was impossible for a rule of customary international law that acquired a peremptory character to modify a pre-existing *jus cogens* norm, as suggested in paragraph (7). An emerging rule that conflicted with an existing *jus cogens* norm would disappear by virtue of that conflict and would never actually crystallize.

Mr. Tladi (Special Rapporteur) said that he did not support Mr. Nguyen's proposal for the initial reason given by Mr. Hmoud. Although the issue of modification was addressed elsewhere in the commentary, it was not addressed in the draft conclusions.

Mr. Nguyen suggested that the second part of the first sentence could perhaps be amended to clarify that, while a modification of peremptory norms of general international law was possible, it was rare.

The Chair said that the inclusion of the words "in principle" in the sentence as drafted appeared to address Mr. Nguyen's concerns. He took it that the Commission wished to adopt the paragraph without amendment.

Paragraph (7) was adopted.

Paragraph (8)

Mr. Murphy said that, in the first sentence, "cases in which" should be replaced with "situations where"; "existing peremptory norms" should be replaced with "an existing peremptory norm"; and "conflicts with a peremptory norm of general international law (*jus cogens*)" should be replaced with "later conflicts with such a norm".

Mr. Jalloh said that the inclusion of the word "later" seemed unnecessary given the use of the word "subsequent" later in the sentence and the explanations provided in the following sentences.

The Chair said he took it that the Commission wished to accept the amendment proposed by Mr. Murphy but without the word "later".

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9), as amended, was adopted with minor drafting changes.

Paragraph (10)

Mr. Murphy said that, in the first sentence, the formulation "The rule that persistent objection does not apply" should be replaced with "That the persistent objector rule does not apply" and the reference to draft conclusion 3 should be changed to draft conclusion 2.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

Mr. Murphy said that, in the first sentence, the word "however" should be inserted before the word "may" to highlight the distinction being made with paragraph (11). In addition, at the end of the second sentence, the phrase "a very large majority" should be replaced with "a very large and representative majority".

Paragraph (12), as amended, was adopted.

Paragraphs (13) and (14)

Paragraphs (13) and (14) were adopted.

*Commentary to draft conclusion 15 (Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*))*

Paragraph (1)

Mr. Murphy said that, in the last sentence, the words "of conclusion 10 and the first paragraph of conclusion 14" should be replaced with "of paragraph 1 of conclusions 10 and 14".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murphy said that, in the sentence beginning “Although the guiding principles”, the word “unilateral” should be inserted before the word “declaration”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Murphy said that, in the third sentence, the word “conflicted” should be replaced with “comes into conflict”; in the fourth sentence, “of draft conclusion 10 and the second paragraph of draft conclusion 14” should be replaced with “of draft conclusions 10 and 14”; and in the fifth sentence, “obligations do come into existence and only cease to exist” should be replaced with “an obligation does come into existence and only ceases to exist”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Murphy said that the reference to draft conclusion 22 in the penultimate sentence should be deleted. Although he could understand how a unilateral act could be subject to draft conclusions 17, 18 and 19 – the other draft conclusions mentioned in that sentence – he had trouble understanding how such an act could be subject to draft conclusion 22, a “without prejudice” clause.

Mr. Jalloh said that, as the Commission had already adopted paragraph (5) on first reading, changes should not be made to it without a compelling reason. He would prefer to retain the reference to draft conclusion 22 because he believed that it had been included to indicate that draft conclusion 15 was without prejudice to consequences that specific peremptory norms of general international law might otherwise entail under international law.

Mr. Murphy said that he did not understand why the Commission should refer to draft conclusion 22 in connection with draft conclusion 15 and not in connection with all the draft conclusions, since all the draft conclusions would be without prejudice to the consequences referred to by Mr. Jalloh.

Mr. Tladi (Special Rapporteur), agreeing with the points made by Mr. Jalloh, said that it was because draft conclusion 15 did not concern all unilateral acts, but only those that created obligations, that a reference to draft conclusion 22 had been included.

The Chair said he took it that the Commission wished to adopt the paragraph without amendment.

Paragraph (5) was adopted.

Paragraph (6)

Mr. Grossman Guiloff said that, for the sake of clarity, the words “of this commentary” should be added to the end of the last sentence.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

*Commentary to draft conclusion 16 (Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*))*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Tladi (Special Rapporteur) said that the text relating to Security Council resolutions was a finely negotiated compromise that incorporated proposals from various members of the Commission. However, it should be seen as a package, and the Commission should be wary of changing it too much.

Mr. Huang, supported by **Mr. Zagaynov**, said that draft conclusion 16 and the commentary thereto was one of the most controversial sections of the second-reading text. He noted that no big changes had been made to that text. As it was undesirable to touch on Security Council resolutions at all in the text, the best solution would be to delete all references to them. At the Commission's 3595th meeting, he had already made it clear that the Special Rapporteur had taken a step too far on certain major controversial issues, and so it would be impossible to achieve consensus. Paragraph (2) of the commentary to draft conclusion 16 was a case in point. In light of the concerns expressed by some members in plenary meetings and in meetings of the Drafting Committee, he strongly suggested that the sentence concerning Security Council resolutions, and also the references to Security Council resolutions in paragraphs (4) and (5), should be deleted.

The very purpose of studying peremptory norms of general international law was to safeguard the international system centred on the United Nations, the international order that rested on international law, and the fundamental norms of international relations based on the purposes and principles of the Charter of the United Nations. The Security Council of the United Nations lay at the heart of the collective security system established by the Charter and was a major component of the global governance system. It had been given primary responsibility for international peace and security, and the authority of its resolutions had a direct bearing on world peace and the future of the collective security system. It must not therefore be undermined or weakened in any way.

Security Council resolutions derived their validity from the purposes and principles of the United Nations Charter, from the Council's mandate under Chapter VII of the Charter and from Article 103 of the Charter, according to which the obligations of Member States under the Charter must prevail over their obligations under any other international agreement. For that reason, the hypothesis of a conflict between a Security Council resolution and a *jus cogens* norm concerned, in substance and essence, a conflict between the Charter and *jus cogens.* Such a hypothesis was entirely a figment of the imagination and implausible in international practice. It was hard to imagine that the validity of a decision or resolution adopted by the Security Council under Chapter VII of the Charter could be modified. If that happened, what would become of the world? Furthermore, many Member States' municipal law explicitly stated that the Constitution was the highest law of the land. Was it conceivable that the Constitution of those States could be deemed invalid because it conflicted with *jus cogens*?

In paragraph (5) of the commentary to draft conclusion 16, the Special Rapporteur did make it clear that draft conclusion 16 should not be read as providing cover for a unilateral renunciation of obligations under binding resolutions of the United Nations. The wording was, however, rather weak and in practice would not prevent abuses, because artificially positing a conflict between a Security Council resolution and *jus cogens* would undermine the authority of the Security Council and the validity of its resolutions, thereby opening the door to the non-implementation of its resolutions by certain States on the grounds that they were not compatible with *jus cogens*. That would have very harmful consequences. He did not believe that that was what the Special Rapporteur intended.

The Special Rapporteur might argue that the text contained clauses on dispute settlement in accordance with the procedures recommended in draft conclusion 21. When

States believed that there was a conflict between a Security Council resolution and *jus cogens,* they could submit the matter to the International Court of Justice, or another procedure that could take binding decisions. Frankly, that would not produce a solution and would merely compound the Commission's problems. As many members had pointed out, over the past seven decades the Court had been very cautious in its relations with the Security Council. If another body were to decide the matter, that would inevitably give that body's findings precedence over obligations under the United Nations Charter, in violation of Article 2 thereof. The current formulation of the second-reading commentary might well give rise to bewilderment and confusion and was not fit for purpose. It would be highly regrettable if the Special Rapporteur maintained his position and refused to compromise.

The commentary and footnotes to draft conclusion 16 already contained sufficient material for its purposes without the inclusion of a highly controversial reference to Security Council resolutions, which was a "Pandora's box". He therefore once again urged the deletion of the references to Security Council resolutions from paragraph (2) of the commentary.

Mr. Murphy said that, although he understood many of the points made by Mr. Huang and Mr. Zagaynov and agreed not only that there was a relative lack of State practice that would allow the Commission to develop the commentary in question, but also that there was uncertainty with regard to the interaction of aspects of the Charter with *jus cogens*, the objective of the paragraph was patently to find a balance that would allow the Commission to move forward. He wondered whether some of the concerns which had been raised could be addressed by moving footnote 180 to paragraph (2), inserting the marker after the words "Charter of the United Nations" in the sentence beginning "Examples of a resolution", and moving the marker for footnote 177 to immediately after the words "Security Council" in the same sentence.

Mr. Jalloh said that he supported the Special Rapporteur's position: the text was a finely negotiated compromise and should be retained. As for Mr. Murphy's suggestions, he feared that the process of adopting the report would be delayed if the Commission started to debate whether or not to move footnotes.

The Chair, speaking as a member of the Commission, said that he wished to make two suggestions for the language of paragraph (2): the word "draft" should be deleted twice before the word "conclusion[s]" in the second sentence; and the text should refer to a "decision of the General Assembly admitting a State to membership of the Organization", to reflect the language of Article 4 of the United Nations Charter.

Mr. Huang said that the commentary to draft conclusion 16 was something on which the Commission could hardly reach agreement. Opinion was evenly divided between those in favour of it and those opposed to it. The different views involved some issues of principle. As the Commission was commencing the adoption of its draft report on the work of its seventy-third session, there was no need for any further debate in plenary or for another round of general discussions on a few controversial issues. He therefore proposed two solutions. The first was to delete the whole sentence beginning with the words "Examples of a resolution" together with footnote 177. It was unnecessary to use Security Council resolutions as an example. The second was to ask the Special Rapporteur to hold private consultations with other members in order to seek a compromise solution to be presented to the Commission the following day.

Mr. Tladi (Special Rapporteur) said that he was not amenable to holding consultations on the text of paragraph (2), since the latter was already the result of multiple compromises. The majority of members had wished to have a reference to Security Council resolutions in the text of draft conclusion 16, but instead it had been placed in the commentary. The original commentary discussed at the seventy-first session had been a very lengthy text which had been the result of informal consultations with various Commission members. In fact, it had not included some information which he personally considered to be relevant. The text currently under consideration was a further compromise based on further consultations. The Commission was therefore in a position to take a decision on the suggestions made by Mr. Murphy and the Chair. He was not prepared to delete all references

to Security Council resolutions or hold consultations on paragraph (2) or the following paragraphs of the commentary.

Mr. Hmoud said that the binding nature of Security Council resolutions was a substantive issue that could not be resolved in the commentary. The majority of Commission members held that the legality of Security Council decisions and resolutions was unquestionable, although in fact Security Council resolution 1192 (1998) concerning the *Lockerbie* case had been much criticized. He suggested that the statement in paragraph (5) that it was highly unlikely that a Security Council resolution would be in conflict with a peremptory norm of general international law (*jus cogens*) should be moved to paragraph (2).

Mr. Grossman Guiloff said that he supported Mr. Hmoud's proposal and suggested that the statement should be inserted immediately at the end of the sentence beginning "Examples of a resolution".

Mr. Jalloh said that he agreed with the Special Rapporteur that paragraph (2) was the result of several compromises. The Commission was a place for building consensus, but if too many concessions were made, that would undermine the willingness of future members to engage in bargaining. He therefore supported only the minimal changes to the text of paragraph (2) proposed by the Chair.

Mr. Tladi (Special Rapporteur) said that many States had supported the commentary, although some of them were unhappy that draft conclusion 16 did not itself refer to Security Council resolutions. His modifications to the first-reading text of the commentary had been prompted by a desire to accommodate the States that were unhappy with the commentary. His first modification had been to include the statement to which Mr. Hmoud had referred, namely the statement in paragraph (5) that it was highly unlikely that a Security Council resolution would be in conflict with a peremptory norm of general international law (*jus cogens*). The other modification had been to note that draft conclusion 16 and the commentary thereto were subject to draft conclusions 20 and 21. The proposal by Mr. Grossman Guiloff was impractical, as all the caveats were contained in one paragraph, paragraph (5), the whole of which would have to be moved to paragraph (2). The text of paragraph (2) had been very carefully considered and allowed no room for further modification. He therefore asked the Commission to take a decision on the text before it.

Mr. Saboia said that, although he understood the position of Mr. Huang and Mr. Zagaynov, the Special Rapporteur was correct in saying that the compromise reached had been to make no mention of Security Council resolutions in the text of draft conclusion 16, but to refer to them in the commentary. The Commission should accept that compromise. He supported the text of the commentary in general, without prejudice to any small changes that might be made in the course of the discussion. He trusted that the Commission members who did not agree with the text would not stand in the way of its adoption, but would be content with having their views reflected in the summary record.

Ms. Oral said that Mr. Huang had made some very compelling points. However, it was true that draft conclusion 16 had been very carefully crafted and was in fact a compromise that took those points into account. Moreover, paragraph (5) did state that conflict between a Security Council resolution and a *jus cogens* norm was highly unlikely, notwithstanding the controversial decision in the *Lockerbie* case. She therefore hoped that Mr. Huang and Mr. Zagaynov would give due weight to the caveats in paragraph (5) in order to enable the Commission to reach consensus on the commentary to draft conclusion 16 as a whole.

Mr. Huang said he was very sorry to hear the Special Rapporteur say that he was not prepared to entertain the idea of any further compromises; he was, in other words, blocking consensus and the adoption of the report. He felt that the Special Rapporteur's position was unreasonable.

He himself had already accepted the compromise that the relationship between Security Council resolutions and *jus cogens* would be mentioned not in draft conclusion 16, but in the commentary thereto. Everyone in the Commission knew that the Security Council was the cornerstone of the United Nations system. Did the Commission wish to undermine that foundation, destroy the current security system, or have a third world war? His own

proposed compromise, to hold informal consultations, was quite reasonable. Mr. Murphy's proposals could then be taken into consideration. Emphasis could be placed on the Charter's provisions and on the fact that Security Council resolutions under Chapter VII were binding on all Member States. Other sensible suggestions could be taken into account and put together in a new package. However, if the Special Rapporteur refused further consultations, it would not be possible to adopt the report.

The Chair, after reminding members that the Commission could adopt individual paragraphs of its report by vote, asked if the Commission was willing to adopt paragraph (2) with the drafting changes suggested.

Mr. Huang said that, unless paragraph (2) was amended along the lines he had suggested, he would not join the consensus on adopting that or any of the following paragraphs.

The meeting rose at 6.10 p.m.