

Provisional

For participants only

30 September 2019

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International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3499th meeting

Held at the Palais des Nations, Geneva, on Monday, 5 August 2019, at 10 a.m.

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Present:

Chair: Mr. Šturma

Members: Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
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. Rajput
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

The meeting was called to order at 10.05 a.m.

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

Chapter IV. Crimes against humanity (continued) ([A/CN.4/L.928](#) and [A/CN.4/L.928/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.928/Add.1](#), beginning with paragraph (16) of the commentary to draft article 6, which had been left in abeyance at a previous meeting.

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

Paragraph (16) (continued)

Mr. Murphy (Special Rapporteur) said that several members of the Commission had considered that the phrase “the superior has engaged in a dereliction of duty” in the last sentence was not appropriate. He therefore proposed replacing it with “the superior had failed to act”.

Paragraph (16), as amended, was adopted.

Commentary to draft article 4 (Obligation of prevention) (continued)

Mr. Jalloh said that, following the Commission’s discussion of paragraphs (5) and (9) of the commentary to draft article 4, he had circulated a proposal for an additional sentence to be inserted at the end of paragraph (9), along the lines he had suggested during the discussion.

Draft article 4 established that each State had an obligation to prevent crimes against humanity. In its discussion of the commentary thereto, the Commission had emphasized the importance of ensuring that any preventive measures taken by States to address crimes against humanity were in conformity with international law, as stipulated in the draft article. His proposal, while rooted soundly in that context, aimed to reflect the suggestions of one State in its observations on the draft articles adopted by the Commission on first reading, relating in particular to the responsibility to protect and action that might be taken in that respect at the subregional, regional or international level.

It was his understanding that the obligation to take measures to prevent crimes against humanity might in future entail additional measures by States that went further than those discussed in the commentary as it stood, with the important caveat that any such measures must be in full conformity with international law, including the Charter of the United Nations and, in the case of States belonging to the African Union, the Constitutive Act of the African Union.

In view of the time constraints on the Commission’s work, he had decided to withdraw his proposal, on the understanding that the scope of the obligation of prevention, as adopted by the Commission on second reading, and the commentary thereto were without prejudice to existing regional rules on the responsibility to protect or to the emergence of future global norms in that area.

The Chair said he took it that, in view of the explanation provided by Mr. Jalloh, paragraph (9) of the commentary to draft article 4, as adopted by the Commission at its 3497th meeting, would remain unchanged.

It was so decided.

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.928](#).

C. *Recommendation of the Commission*

Paragraph 9

Mr. Murphy (Special Rapporteur) said that the proposed wording for paragraph 9, which had been circulated in the meeting room, consisted of a text on which informal consultations had been held on 15 July 2019, together with some small amendments resulting from those consultations and advice received from the Secretariat. He read the proposed wording of paragraph 9:

At its 3499th meeting, on 5 August 2019, the Commission decided, in conformity with article 23 of its statute, to recommend the draft articles on prevention and punishment of crimes against humanity to the General Assembly. In particular, the Commission recommended the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

The Chair said he took it that the Commission wished to adopt paragraph 9.

Paragraph 9 was adopted.

D. *Tribute to the Special Rapporteur*

Paragraph 10

The Chair read the proposed wording of paragraph 10:

At its 3499th meeting, on 5 August 2019, the Commission, after adopting the draft articles on crimes against humanity, adopted the following resolution by acclamation:

The International Law Commission,

Having adopted the draft articles on prevention and punishment of crimes against humanity,

Expresses to the Special Rapporteur, Mr. Sean D. Murphy, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on prevention and punishment of crimes against humanity.

The Chair said he took it that the Commission wished to adopt paragraph 10.

Paragraph 10 was adopted by acclamation.

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

Mr. Murphy (Special Rapporteur) said that it had been a great honour to serve as Special Rapporteur for the topic for the previous five years. He wished to thank all the members of the Commission who had helped to strengthen and improve the text of the draft articles and commentaries, and particularly the Chairs of the Commission and of the Drafting Committee, past and present. He also wished to acknowledge the huge contribution of the Secretariat and conference staff, as well as the work of his assistants, during the current and previous years. While the project had come to an end for the Commission, it was hoped that it would become a treaty instrument; the work would thus continue later in the year and he would be available to provide any assistance that Member States might need in understanding the topic.

Chapter V. Peremptory norms of general international law (jus cogens)
([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 consider chapter V of its draft report.

Mr. Hmoud said that he had coordinated with the other Arabic-speaking members of the Commission and provided comments on the Arabic translation of the draft conclusions on the topic to the Secretariat; he hoped that it would be possible to suspend adoption of the Arabic version until those comments had been taken into account.

The Chair said that, pending the provision of a corrected Arabic version of the documents concerned, the Commission would continue to work on the basis of the English version. He invited the Commission to consider the text contained in document [A/CN.4/L.929](#).

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

Mr. Murphy said that the mention of the draft annex after “the entire set of 23 draft conclusions” was superfluous, both in paragraph 7 and in paragraph 9, as the annex formed an integral part of the draft conclusions. The reference should therefore be deleted in both paragraphs.

Mr. Park said that it was important to maintain consistency in the Commission’s work by using similar wording in the reports on the different topics.

Mr. Llewellyn (Secretary to the Commission) said that the annex formed an integral part of the draft conclusions and the reference should therefore be deleted. The same approach should be followed in respect of the other topics under consideration.

Paragraph 7, as amended, was adopted.

Paragraphs 8, 9 and 10

The Chair said that paragraphs 8, 9 and 10 would be held in abeyance until the Commission had adopted the commentaries.

- C. *Text of the draft conclusions on peremptory norms of general international law (jus cogens)*

Paragraph 11

Paragraph 11 was adopted.

The Chair invited the Commission to consider the portion of chapter V of the draft report contained in document [A/CN.4/L.929/Add.1](#).

2. *Text of the draft conclusions on peremptory norms of general international law (jus cogens) and commentaries thereto*

Mr. Tladi (Special Rapporteur) said that, as the discussion on the text proceeded, he would make some proposals on the basis of discussions he had had with other Commission members since the documents had been submitted to the Secretariat and would take the opportunity to rectify some errors that had occurred during the editing and translation processes. He wished to ask members to focus their comments on substantive amendments rather than editorial issues, as the latter, together with any inconsistencies in the text, would be addressed by the Secretariat.

Paragraph 1

Paragraph 1 was adopted.

Commentary to draft conclusion 1 (Scope)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy said that the term “domestic courts” should be replaced with “national courts”, in line with usage elsewhere in the commentary. He also proposed, based on the

distinction that the Commission drew between the two terms, that “identification” in the last sentence should be replaced with “determination”, as the latter implied a systematic process.

Mr. Park said that the meaning of “generally accepted methodology” at the end of the paragraph should be clarified. He proposed adding, immediately after those words, “mainly the inductive approach analysing States’ practice, jurisprudence and doctrines”.

Mr. Nolte said that the words “which are increasingly being invoked” in the first sentence seemed to be predicting the future, which the Commission should not do. He proposed replacing them with “which have increasingly been invoked”. He did not agree with Mr. Park’s proposal, because “inductive approach” was not a generally accepted term; he would prefer to retain the current wording.

Mr. Vázquez-Bermúdez said, in respect of Mr. Park’s proposal, that he agreed with Mr. Nolte that the current wording should be retained. As for the use of “identification” or “determination”, draft conclusion (1) itself mentioned identification, and so that word should be retained.

Sir Michael Wood said that he agreed with Mr. Nolte’s proposal to avoid “which are increasingly being”, but as an alternative suggested that “invoked” could be replaced with “referred to”, so that the phrase would read “which have increasingly been referred to”. In the same sentence, “government officials” should be replaced with “States”, and “other actors” with “others”. He agreed with Mr. Vázquez-Bermúdez that “identification” should be retained. As to Mr. Park’s proposal, he suggested that the inclusion of the indefinite article, so that the phrase would read “a generally accepted methodology”, could solve the problem.

Mr. Tladi (Special Rapporteur) said that the discussion in the Drafting Committee had resulted in a clear decision in favour of the use of “identification”; in the view of Drafting Committee members, “determination” referred more to the content of the rule. With regard to Mr. Park’s comment, he was prepared to accept the inclusion of the indefinite article before “generally accepted methodology”, although he did not consider it necessary. He was also prepared to accept the other proposals made by Mr. Nolte and Sir Michael Wood, with the exception of the proposal that “others” should replace “other actors”, as the latter was a standard term.

Mr. Murphy, noting that the word “determine” was used in the second sentence, said that a clear distinction, spelled out in paragraph (4), was being drawn between the two terms. Moreover, the final sentence of the current paragraph noted that it was essential, when determining the content of the norm, to follow an accepted methodology. In that case, “determine” was the correct term to use. If the Commission did not wish to use the word “determine”, it should be replaced in the second sentence with “identify”.

Mr. Nolte suggested, by way of a compromise, that the words “to identify and to determine” could be used. Paragraph (4) would then provide a more specific explanation.

Sir Michael Wood said that the use of both terms together, as proposed by Mr. Nolte, should be avoided, as that would suggest that there was a clear distinction between them. In the Commission’s conclusions on identification of customary international law, they had been used fairly interchangeably, the title including the word “identification” and the text speaking of determining “the existence and content of a rule”. Furthermore, Article 38 (1) (d) of the Statute of the International Court of Justice spoke of “the determination of rules of law”. He thought it preferable to use the two terms interchangeably, as was done in the current wording of paragraph (2).

Mr. Murphy said he could agree to Sir Michael Wood’s suggestion if paragraph (4) was amended or deleted in consequence.

The Chair said that he took it that the Commission wished to adopt paragraph (2) with the following amendments: “which are increasingly being invoked” should be replaced with “which have increasingly been referred to”; “domestic courts” should be replaced with “national courts” and “government officials” with “States”; and there would be no change to “identification” in the final sentence.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Tladi (Special Rapporteur) suggested that the last two sentences of paragraph (3) should be replaced with the following text: “The materials referred to as examples of practice, including views of States, serve to illustrate the methodology for the identification and consequences of peremptory norms of general international law (*jus cogens*). They do not imply the agreement with or endorsement of the views expressed therein by the Commission.”

Mr. Nolte, after expressing support for that proposal, suggested that the second sentence of paragraph (3) should be deleted, as it was almost identical to the second sentence of paragraph (2).

Mr. Murphy expressed support for both suggestions but added that the Special Rapporteur’s proposed change would not obviate the need to discuss certain examples used in the commentary in due course.

Mr. Tladi (Special Rapporteur) said that his aim was not to preclude such discussions but to facilitate them.

Sir Michael Wood welcomed the Special Rapporteur’s proposal.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Tladi (Special Rapporteur) said that, in the first sentence, the words “a general norm of international law” should read “a norm of general international law”. In order to take account of suggestions made by Mr. Nolte and Sir Michael Wood and to reflect Mr. Murphy’s concerns regarding paragraph (2), he suggested that the portion of the paragraph from “the added quality of non-derogability”, in the first sentence, to “the Statute of the International Court of Justice”, in the fourth, should be replaced with the following text: “... the added quality of having a peremptory character (that is, being accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law (*jus cogens*) having the same character).”

Sir Michael Wood, welcoming the Special Rapporteur’s proposal, suggested that the opening phrase of the paragraph could also be deleted, so that the text would begin: “The draft conclusions are concerned primarily...”.

Mr. Nolte said that the Special Rapporteur’s proposal, with the additional amendment suggested by Sir Michael Wood, seemed constructive.

Mr. Tladi (Special Rapporteur) said he agreed with Sir Michael Wood’s suggestion.

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

Paragraph (5)

Mr. Nolte said that the second sentence would be clearer if the words “other consequences” were altered to “non-legal consequences”. In the last sentence, the words “the particular legal consequences” should be changed to “any possible legal consequences” to avoid any presupposition that such consequences existed.

Mr. Murphy said that deleting the last part of the last sentence, “and not the particular legal consequences arising from individual peremptory norms of general international law”, would remove some repetition, though he could also support Mr. Nolte’s suggested amendment to that sentence.

Mr. Tladi (Special Rapporteur) said that he could accept Mr. Murphy’s proposal. If Mr. Nolte’s was adopted, he would prefer to omit the word “possible”. On a general point, wherever the words “peremptory norms of general international law” appeared in the text, they should be followed by the term “*jus cogens*” in parentheses.

Mr. Park said that Mr. Nolte's proposal introduced some confusion to the text if read in conjunction with draft conclusion 22, as discussed by the Commission at its seventieth session, which dealt with potential legal consequences in specific areas of law and had been referred to the Drafting Committee on the understanding that it would be redrafted as a "without prejudice" clause.

Mr. Nolte said that the context of draft conclusion 22 was the distinction between general and specific legal consequences, while the second sentence of paragraph (5) referred to the distinction between legal and non-legal consequences. As such, no confusion should arise.

Mr. Tladi (Special Rapporteur) said that deleting the last part of the last sentence, as suggested by Mr. Murphy, would resolve that issue.

Mr. Jalloh said that such an approach entailed a significant change of meaning but he could accept it if it was agreeable to the Special Rapporteur.

The Chair said he took it that the Commission agreed to amend the second sentence of the paragraph as suggested by Mr. Nolte and the last as suggested by Mr. Murphy.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Tladi (Special Rapporteur) said that, in the first sentence, "words" should be changed to "terms".

Mr. Murphy suggested that, in the same sentence, State practice should be referred to first, to emphasize its importance; the list should continue with international jurisprudence and then scholarly writings, which could perhaps be changed to "teachings" or simply "writings".

Sir Michael Wood said that, in line with the Special Rapporteur's proposal, the word "phrase" in the last sentence should also be changed to "term".

Ms. Oral said that such suggestions, while not problematic in themselves, did not necessarily contribute much when the Commission had such limited time available. The sentence as drafted appeared sound; in particular, she would prefer to retain the term "scholarly writings", although she agreed that "words" could be changed to "terms".

Mr. Tladi (Special Rapporteur) said that he would also prefer to keep the term "scholarly writings". The word "writings" on its own might be interpreted to cover materials such as newspaper articles.

Mr. Murphy said that emphasizing the importance of State practice would have a useful effect on how the outcome of the Commission's work was received by States. If the word "writings" was considered too general, given that it was applied to numerous sources – including the work of the Commission – "teachings" might convey the desired meaning.

Sir Michael Wood expressed support for that suggestion, which would have the advantage of mirroring the use of terms under the topic of identification of customary international law.

Mr. Nolte, noting that the reports on which the Commission based its work could rightly be regarded as scholarly writings, said that the term seemed appropriate. When used in the context of *jus cogens*, in particular, it had a specific meaning.

Mr. Jalloh, expressing support for the Special Rapporteur's proposal and Mr. Nolte's remarks, said that the Commission should employ caution in seeking to align its use of terminology among topics: such consistency was not always conducive to reflecting the nature of individual subjects.

Mr. Grossman Guiloff said that he agreed with Mr. Murphy's suggestion to change the order of elements in the first sentence, but that the term "scholarly writings" should be retained.

Mr. Murase suggested that, instead of “scholarly writings”, the words “expert writings” or “doctrine” could be used.

Mr. Tladi (Special Rapporteur) said that changing the order of elements in the first sentence but retaining the term “scholarly writings” would be an acceptable compromise.

The Chair said he took it that the Commission agreed to amend the paragraph to that effect and to alter “words” to “terms” in the first sentence but to leave the second sentence as drafted.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Park said that, in his view, the fourth sentence did not adequately reflect the debate in the Commission. According to the statement by the Chair of the Drafting Committee at the time, the Commission had decided not to include the concept of regional *jus cogens* without prejudice to the possibility of the existence of such rules. He therefore proposed amending the sentence to read: “The Commission considered and did not entirely exclude the possibility of the existence of regional *jus cogens*; however, it decided not to include such a concept in the present draft conclusions.”

Mr. Nolte said that it would be sufficient simply to state that the Commission had not addressed regional *jus cogens* because it did not fall within the scope of the topic. It was not necessary to give any other reasons or to make gratuitous additional remarks. He proposed amending and merging the fifth and sixth sentences to read: “This was done because the current topic is focused on peremptory norms of general international law and excludes from its scope norms that are not of general international law.” The final two sentences could then be deleted. Such a solution would not prejudice any future developments in that area.

Mr. Tladi (Special Rapporteur) said that he had also intended to make a proposal, based on the debate during the first part of the session, to modify the paragraph slightly, although not to the extent proposed by Mr. Park or Mr. Nolte. By way of compromise, and to more accurately reflect the majority view in the Commission, he proposed deleting the fifth sentence and inverting the order of the sixth and seventh sentences, so that it would first be acknowledged that there was insufficient State practice to support the existence of regional *jus cogens* and then that the topic excluded from its scope norms that were not of general international law. The final sentence, indicating that the notion of regional peremptory norms appeared to be incompatible with the application of peremptory norms of general international law, could be deleted, as that view excluded the possibility that there might be other developments in that area in the future.

Ms. Oral said that she was one of several members to take the view that the notion of regional peremptory norms appeared to be incompatible with the application of peremptory norms of general international law. She did not believe that the issue had been discussed in depth in the Drafting Committee. She disagreed with Mr. Park’s proposal, but could support the Special Rapporteur’s compromise.

Mr. Grossman Guiloff said that paragraph (7) was overly long and repetitive. Given that it was indicated in the first sentence that the topic was concerned only with norms of general international law, it was not necessary to repeat in the sixth sentence that the topic was focused on peremptory norms of general international law and excluded from its scope norms that were not of general international law. He therefore proposed retaining the first three sentences as originally formulated and amending the fourth sentence to indicate simply that the Commission had decided not to include the concept because it did not fall within the scope of the topic. From a political perspective, it would also be wiser not to make any reference to “insufficient State practice”, as that might give States cause to argue the contrary.

Ms. Galvão Teles said she agreed that it was an important issue that had not been discussed fully and on which no definitive position had been taken. She would support the compromise solution put forward by the Special Rapporteur.

Mr. Jalloh said that paragraph (7), as originally drafted, was too strongly worded. Although he was in the camp that believed that the notion of regional *jus cogens* appeared to be incompatible with the universal application of peremptory norms of general international law, he would also support the Special Rapporteur's more balanced proposal.

Mr. Nolte said that the Special Rapporteur's proposal did not represent a compromise and was based on flawed logic. It did not make sense to begin by stating that there was insufficient State practice to support the existence of regional *jus cogens* and then to say that, in any case, it did not fall within the scope of the topic. If the Commission wished to adopt a more neutral stance, it should simply use the one argument on which all of the Commission members were agreed: regional *jus cogens* norms were not part of general international law. He therefore reiterated his original proposal.

Mr. Tladi (Special Rapporteur) said that perhaps the meeting should be suspended to allow interested members to reach a solution.

The meeting was suspended at 11.40 a.m. and resumed at 12.05 p.m.

Mr. Tladi (Special Rapporteur) said that a compromise had been reached. The proposal was to insert the words "or regional" after "norms of a purely bilateral" in the third sentence and to delete from the fourth sentence to the end of the paragraph.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Sir Michael Wood said that the first two sentences were unnecessary and should be deleted. If they were retained, however, they would have to be amended, as he did not believe it was correct to say that the word "norm" was used because it was generally understood to have "a broader meaning than other related words". Rather, it was used by the Commission because it was the word that appeared in article 53 of the Vienna Convention on the Law of Treaties. He proposed amending the first two sentences, if they were to be kept, to read: "The word 'norm' is sometimes understood to have a broader meaning than other related words such as 'rules' and 'principles'. It is, however, to be noted that in some cases, the words 'rules', 'principles' and 'norms' can be used interchangeably."

Mr. Zagaynov said that it was his understanding that, for the Commission, the term "norms" was not only broader than "rules" and "principles" but encompassed both. He therefore proposed adding the words "and to encompass both" at the end of the first sentence.

Mr. Tladi (Special Rapporteur) said that he would not support deleting the first two sentences of the paragraph but would have no objection to the amendments proposed.

Paragraph (8), as amended, was adopted.

Commentary to draft conclusion 2 (Definition of a peremptory norm of general international law (jus cogens))

Paragraph (1)

Mr. Ouazzani Chahdi said that, in the second sentence, it was incorrect to say that draft conclusion 2 had been taken "*verbatim*" from article 53 of the 1969 Vienna Conventions: that word should be replaced with "almost entirely" [*presque intégralement*] given that the definition had, in fact, been modified rather than included in full.

Mr. Murphy said he agreed that to say the draft conclusion had been taken *verbatim* was not accurate, as entire sentences from article 53 had been omitted. He proposed replacing "is taken *verbatim* from" with "is based upon" and deleting the word "minor" before "modifications".

Mr. Tladi (Special Rapporteur) said that the proposal put forward by Mr. Murphy would address the concerns raised by Mr. Ouazzani Chahdi.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Tladi (Special Rapporteur) said that Mr. Valencia Ospina had brought to his attention a reference in footnote 4 to “Czechia”, which should perhaps be replaced with “the Czech Republic”.

The Chair, speaking as a member of the Commission, said that, although the short form of the country’s name was often used in United Nations documents, in that instance his preference would be to refer to the “Czech Republic”, which was the full official name.

Mr. Park said that, as the judgment in the *Jaime Córdoba Triviño* case had been handed down by a national court, that reference should be moved from footnote 6, which dealt with the decisions of international courts, to footnote 5.

Mr. Murphy said that, as the text of article 53 of the Vienna Convention was not strictly speaking a definition, he would propose replacing the phrase “The definition in the 1969 Convention” in the first sentence with “This formulation”. He proposed rewording the fifth and sixth sentences to read: “Similarly, international courts and tribunals have used article 53 of the 1969 Vienna Convention as a basis when addressing peremptory norms of general international law, as have scholarly writings.” In the seventh and eighth sentences, the words “the definition in” could be deleted to simply leave the reference to “article 53 of the 1969 Vienna Convention”.

Sir Michael Wood said that he did not object to Mr. Murphy’s proposed changes, although he did not feel they were all necessary. He agreed that, in the first sentence, “The definition in the 1969 Convention” should be replaced with “This formulation”. In the same sentence, it should be indicated that the formulation was “the most widely accepted definition”. In the seventh sentence, the words “the definition in” could not simply be deleted, but should be replaced with “the formulation in”.

Mr. Grossman Guiloff said that he did not support Mr. Murphy’s proposal to combine the sentence dealing with the decisions of international courts and tribunals and the sentence dealing with scholarly writings. Nor was he in favour of omitting the words “in their decisions” in the fifth sentence, as Mr. Murphy had done in his proposed reformulation; doing so would seem to downplay the importance of the decisions of the courts. He would prefer to retain the original formulation.

Mr. Jalloh said that he agreed with Mr. Grossman Guiloff that the original formulation was preferable.

Mr. Vázquez-Bermúdez said that, other than the proposal by Sir Michael Wood to replace “the definition in” with “the formulation in” in the seventh sentence, he would support maintaining the original text.

Mr. Ruda Santolaria said that he, too, supported the Special Rapporteur’s original text and agreed with Mr. Grossman Guiloff that the emphasis on the decisions of international courts and tribunals in the fifth sentence should not be lost.

Mr. Tladi (Special Rapporteur) said that he did not have strong views on the matter, although his preference was, of course, for the original text.

The Chair said he took it that the Commission wished to accept Mr. Murphy’s proposal for the first sentence and the changes proposed by Sir Michael Wood, and to delete the words “in their decisions” in the fifth sentence but not to merge the fifth and sixth sentences.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Commentary to draft conclusion 3 (General nature of peremptory norms of general international law (jus cogens))

Paragraph (1)

Mr. Nolte said that, in the second sentence, the word “essential” should be deleted, as it did not add anything and might even cause confusion. He would also be in favour of deleting the last sentence, which seemed unnecessary.

Mr. Murphy said that some members of the Commission continued to have concerns about draft conclusion 3, which was the outcome of a debate in the Commission that had spanned two sessions. For the purposes of a first-reading text, it would be appropriate to capture the view expressed that three aspects of the draft conclusion were problematic. He thus proposed that, at the end of the paragraph, a new sentence should be added to read: “A view was expressed, however, that such ‘characteristics’ have an insufficient basis in international law, unnecessarily conflate the identification and effects of these norms, and risk being viewed as additional criteria for determining whether a specific *jus cogens* norm exists.”

Sir Michael Wood said that he supported the addition of the sentence proposed by Mr. Murphy. Whether it was added to paragraph (1) or at the end of the commentary to the draft article was perhaps a matter of style. He tended to agree with the points raised by Mr. Nolte, although another solution would be to replace the word “essential” in the first sentence with “main” and the word “orientation” in the last sentence with “introduction”.

Mr. Jalloh said that he could support Sir Michael Wood’s proposal to replace the word “essential” with “main”. He was in favour of retaining the last sentence as it stood. In his view, the expression “general orientation” was fairly clear and could thus be retained.

With regard to Mr. Murphy’s proposal, the Commission’s standard practice was indeed to reflect minority views in first-reading texts. The question of the placement of the proposed sentence was an important one.

Mr. Grossman Guiloff said that, if Mr. Murphy’s proposed sentence was added to paragraph (1), it would considerably weaken the project as a whole. If such a sentence was to be added, it should appear later in the commentary and should be worded so as to make clear that the view in question ran contrary to the overwhelming consensus reached in the Commission.

Ms. Oral said that she fully agreed with Mr. Grossman Guiloff’s comments on Mr. Murphy’s proposal. She was in favour of retaining the word “essential”, as the characteristics in question were the features that distinguished peremptory norms.

Mr. Zagaynov said that he supported Mr. Nolte’s and Mr. Murphy’s proposals. If the Commission wished to retain the last sentence, Sir Michael Wood’s proposal might offer a solution. However, he was not sure that the replacement of the word “essential” with “main” would address Mr. Nolte’s concerns.

Mr. Park said that he would be grateful if Mr. Murphy could clarify the purpose of his proposal. Although some members of the Commission had indeed expressed dissenting views during the debate on draft conclusion 3, it was unclear to which of the distinct elements of that draft provision Mr. Murphy’s proposal related.

Mr. Nolte said that the expression “essential characteristics” was tautological, as the characteristics of *jus cogens* norms were by definition the features that characterized them. In addition, that expression was not used later in the paragraph. He agreed with Sir Michael Wood that the word “introduction” was preferable to “orientation”.

Mr. Murphy’s proposal raised a question of principle. As far as he understood, the Commission’s usual practice was that, if one or more members requested that a particular view should be reflected in the commentaries adopted on first reading, that view should be reflected in the appropriate form. There was no need to preface such a view with a statement to the effect that it ran contrary to the view of the overwhelming majority of members, as it was already implied that it reflected a minority position. It was also important to ensure that minority views were reflected in the appropriate place. In that

regard, he could agree with Sir Michael Wood's suggestion to add Mr. Murphy's proposed sentence to a paragraph at the end of the commentary.

Ms. Lehto said that Mr. Murphy's proposed sentence would seem to belong in paragraph (15) of the commentary to the draft article, which already contained a similar sentence.

Mr. Tladi (Special Rapporteur) said that he would be in favour of retaining the word "essential", although he would not object to its deletion if that had the Commission's support. He would also be in favour of retaining the expression "general orientation", which described the manner in which the provisions should be read and was distinct in sense from "general introduction".

With regard to Mr. Murphy's proposal, as a member of the Commission who had often held a minority view, he had on occasion argued strongly for the right of members to have such views reflected in the manner in which they saw fit. However, a minority view should not become an alternative commentary. He had no objection to Mr. Murphy's proposed text. He had previously proposed similar texts and had insisted that they should not be negotiated. In his view, the placement of the proposed text was not very important, but it would be more logical to reflect minority views towards the end of the commentary to a particular provision.

The Chair, speaking as a member of the Commission, said that, as a matter of general principle, he very much agreed with the comments of Mr. Nolte and the Special Rapporteur on Mr. Murphy's proposed new sentence. Minority views should be reflected in commentaries adopted on first reading. He agreed with Ms. Lehto's suggestion that the proposed sentence could be added to paragraph (15).

Mr. Grossman Guiloff said that he fully agreed with the right of small groups of members, and indeed individual members, to have their minority views reflected. However, it was unclear how the Commission's practice in that regard differed for the first and the second readings. He, too, thought that Mr. Murphy's proposed sentence would probably be best placed in paragraph (15).

Noting that Mr. Murphy's proposal had been made orally, he would appreciate clarification regarding the procedure for submitting textual proposals in writing.

The Chair said that it was the Commission's practice to reflect minority views in the commentaries adopted on first reading and not in the final product. To his knowledge, the procedure for making textual proposals in writing depended on their length and complexity.

Mr. Murphy said that his understanding was that it was helpful to circulate complex proposals in writing but that more straightforward ones could be made orally.

He appreciated the clarification made by the Chair and Mr. Nolte regarding the Commission's practice of attempting to capture minority views in commentaries adopted on first reading. The addition of his proposed sentence to paragraph (1) would in no way cast doubt on the project as a whole. In fact, his proposed sentence belonged in that paragraph, as it addressed multiple aspects of the draft conclusion and not only the question of whether the characteristics contained in that draft conclusion provided supplementary evidence, which was the question addressed in paragraph (15).

The Commission had faced a similar situation during the adoption of the commentaries to the draft articles on crimes against humanity, for which he was the Special Rapporteur. In paragraph (1) of the general commentary to those draft articles, two sentences had been included to reflect the view of a single member, Mr. Tladi, that the Commission should have addressed genocide and war crimes in addition to crimes against humanity. Those two sentences represented a significant challenge to the scope of the project. That view was then restated in the commentary to draft article 1. Given that precedent, he was prepared to discuss the placement of his proposed sentence, but it would be completely inappropriate to attempt to bury it towards the end of the commentary in the hope that readers would not reach that far.

Ms. Galvão Teles said that the expression “general orientation” in the last sentence had been taken from the 2017 statement of the Chair of the Drafting Committee on the topic. She was therefore in favour of retaining it. Although it was made clear in that statement that the majority view in the Commission had been in support of draft conclusion 3, she would have no objection to Mr. Murphy’s proposed sentence, which might make more sense as a separate paragraph. The Commission could discuss where such a separate paragraph should be placed.

Mr. Ruda Santolaria said that, for the reasons already stated, he was in favour of retaining the expressions “essential characteristics” and “general orientation”. He fully agreed that, in accordance with its usual practice, the Commission should ensure that minority views were reflected. He agreed that Mr. Murphy’s proposed sentence could be incorporated into the commentary as a separate paragraph.

Mr. Vázquez-Bermúdez said that he could support the text of the paragraph as originally proposed by the Special Rapporteur.

Mr. Jalloh said he agreed that minority views should be reflected in the commentaries and that consideration should be given to incorporating Mr. Murphy’s proposed sentence into the commentary as a separate paragraph.

Mr. Tladi (Special Rapporteur) said that he would not oppose the insertion of the proposed sentence in paragraph (1) if that was Mr. Murphy’s wish.

The Chair said he took it that the Commission wished to leave paragraph (1) in abeyance and to request the Secretariat to circulate Mr. Murphy’s proposal informally in writing in order to facilitate the Commission’s work.

It was so decided.

The meeting rose at 1.10 p.m.