

Provisional

For participants only

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International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3500th meeting

Held at the Palais des Nations, Geneva, on Monday, 5 August 2019, at 3 p.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. 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

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.

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

Paragraph (1) (continued)

Mr. Tladi (Special Rapporteur) said that, following consultations, he would suggest that the words “essential” and “general orientation” should be retained. He further suggested that the additional sentence proposed by Mr. Murphy at the Commission’s 3499th meeting should be inserted at the end of the paragraph, the only change being that the words “*jus cogens* norm” in that sentence would be changed to “peremptory norm of general international law (*jus cogens*)”.

Noting that those members who were not in favour of retaining the word “essential” obviously fell within the minority whose view was reflected in Mr. Murphy’s proposed text, he said that, although he could not speak for the Commission as a whole, as Special Rapporteur, he would commit to considering, during the second reading of the commentary to the draft conclusions, the deletion or replacement of the word “essential”. In his view, it would be unfair at the present time both to remove the word “essential” and to include the minority view.

Sir Michael Wood said it was regrettable that the word “essential” would remain for the time being, although he noted the commitment expressed by the Special Rapporteur to reconsider deleting it on second reading. In his opinion, draft conclusion 3 was merely a source of confusion, not least because it could be read as creating additional requirements. More specifically, the reference to “values” did not appear in article 53 of the Vienna Convention on the Law of Treaties or in any other relevant text and therefore made little sense. At most, the draft conclusion might lead to an argument that a norm did not have peremptory status even if it met the test in article 53 because, in the view of the State making the argument, it did not reflect a fundamental value. The draft conclusion was therefore misconceived; he supported Mr. Murphy’s proposed amendment to paragraph (1) of the commentary thereto.

Mr. Grossman Guiloff said that, in view of the clarifications given at the previous meeting regarding the practice of the Commission and the Special Rapporteur’s preference, he supported the insertion of Mr. Murphy’s proposed amendment in paragraph (1), rather than elsewhere in the commentary.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Tladi (Special Rapporteur) said that, for stylistic purposes, at the beginning of the fourth sentence, “The word ‘reflect’” should be replaced with “It”.

Sir Michael Wood said that the fourth sentence was confusing: the norm in question had peremptory status not merely because it gave effect to particular values, but because it had been recognized as having such status. He therefore proposed adding language to the effect that the norm in question had been accepted and recognized as having peremptory status and gave effect to particular values.

Mr. Murphy said that he supported the amendment proposed by Sir Michael Wood. As for the Special Rapporteur’s proposed revision, he said that “It” might be understood to refer back to “the rationale” in the third sentence; to avoid confusion, he proposed that,

instead, the beginning of the fourth sentence should be amended to read “The word ‘reflect’ further seeks to”.

Mr. Tladi (Special Rapporteur) said that he could accept the amendment proposed by Mr. Murphy; as for that proposed by Sir Michael Wood, he could agree to the addition of language on the acceptance and recognition of the peremptory status of the norm, but wished to retain the emphasis on the rationale, rather than creating an additional requirement of giving effect to particular values.

Sir Michael Wood said that the fourth sentence might be understood as stating that if a norm gave effect to particular values, it would automatically be accepted. That was not correct, in his view; hence his proposal to remove the word “because” before the phrase “it gives effect to particular values”.

Ms. Lehto said that, while she shared Sir Michael Wood’s concern about the fourth sentence, she did not believe the addition of language on the acceptance and recognition of the norm’s peremptory status provided much additional value. Moreover, such language went against the clear wording of the draft conclusion, which simply referred to general characteristics of peremptory norms. She therefore suggested that the paragraph should be adopted as originally drafted.

Sir Michael Wood, supported by **Mr. Zagaynov**, said that perhaps the fourth sentence might be shortened to read: “The word ‘reflect’ seeks to establish the idea that the norm in question gives effect to particular values.” In that way, no specific link would be made to the norm’s peremptory status.

The Chair, speaking as a member of the Commission, said that, in his view, the original version of the sentence was satisfactory.

Mr. Nolte said that he shared the concerns expressed by Sir Michael Wood, since if the phrase “has peremptory status because” was included, then the sentence was about norm creation, which was not the subject of the draft conclusion. The Commission simply wanted to make clear that norms of *jus cogens* reflected particular values, not that norms could be directly created by such values.

The Chair, speaking as a member of the Commission, said it seemed that the Commission was confusing the formal procedure for norm-making, as reflected in article 53 of the Vienna Convention on the Law of Treaties, with material sources, which had to do with elevating a norm to *jus cogens* status. The idea behind draft conclusion 3 was that the other characteristics of a peremptory norm of general international law further reflected the material sources of *jus cogens*, rather than the formal procedure for recognizing and adopting a norm.

Mr. Grossman Guiloff suggested that the language of the fourth sentence should be amended to read: “The word ‘reflect’ seeks to establish the idea that the norm in question reflects and protects fundamental values developed or recognized by the international community.”

Mr. Tladi (Special Rapporteur) said that the sentence, as originally drafted, was intended to convey that the reason that States accepted and recognized certain norms as having peremptory status was that States recognized that those norms protected and reflected fundamental values. All the proposed amendments to the sentence conveyed that same meaning, but he continued to prefer the original version as the clearest. For the sake of compromise, however, he would be willing to accept the amendment proposed by Sir Michael Wood and supported by Mr. Zagaynov.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted with minor drafting changes.

Paragraph (4)

Mr. Zagaynov said that he had doubts regarding the interpretation, in the penultimate sentence of the paragraph, of the judgment of the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. It was not entirely clear, in his view, whether the Court had identified a connection between obligations and peremptory norms, as claimed in the text, or simply enumerated different kinds of obligations. To err on the side of caution, he proposed rewording the latter half of the sentence, beginning with the words “the Court identified”, to read “the Court referred to peremptory norms along with ‘obligations which protect essential humanitarian values’, thus indicating a relationship between them”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Murphy proposed that, in the first sentence, the words “in the practice of States, particularly” should be deleted. In footnote 14, he proposed that the words “several other United States cases”, in the second sentence, should be replaced with “lower courts in the Ninth Circuit” and, in the third sentence, the text should refer not to “the opinion of Judge McKeown” but to the opinion of the United States Court of Appeals for the Ninth Circuit. That sentence should be split immediately before the word “although”. The following sentence would then begin “Although that decision was eventually overturned”; later in that sentence, the word “questioned” should be changed to “addressed”. Lastly, he proposed that the latter half of the footnote, from the sentence that started “Rather, the Court determined”, should be deleted, as it was unnecessary.

Mr. Grossman Guiloff, noting that all three court rulings cited in the paragraph emanated from the western hemisphere, suggested that, in order to strengthen the argument made in the paragraph, the Special Rapporteur should draw on more diverse sources.

Mr. Vázquez-Bermúdez said that, while he agreed that the latter part of footnote 14 was not particularly relevant to the commentary paragraph, it should nevertheless be maintained, as it clarified the preceding sentence, which stated that the Supreme Court had not questioned the idea that peremptory norms reflected values of the international community.

Mr. Jalloh said that he supported Mr. Murphy’s proposed amendments to footnote 14. As for the proposed deletion of the words “in the practice of States, particularly”, in the first sentence of the paragraph, he wished to recall that the Commission, in its conclusions on identification of customary international law, referred to the decisions of national courts both in conclusion 6 (2), on forms of practice, and, perhaps more pertinently to the issue at hand, in conclusion 10 (2), on forms of evidence of acceptance as law (*opinio juris*). Therefore, in his opinion, the first sentence as originally drafted was consistent with the Commission’s views on accepted forms of evidence.

Mr. Gómez-Robledo said that he would like to see, at least for the second reading, a citation of the opinion of the Inter-American Juridical Committee that had been requested in relation to the *Alvarez-Machain* case and that had been well received by the Latin-American community.

Sir Michael Wood said that he supported Mr. Murphy’s proposed amendments to the footnote, including the deletion of the latter part of it. He also supported the proposed deletion of the words “in the practice of States, particularly” in paragraph (5), because, in his view, the paragraph as a whole focused on the decisions of national courts, in the sense of Article 38 (1) (d) of the Statute of the International Court of Justice, “as subsidiary means for the determination of rules of law”, rather than as the practice of States.

Mr. Tladi (Special Rapporteur) said that he was ready to accept the changes to footnote 14 proposed by Mr. Murphy. As for the last two sentences of the footnote, they had been included simply to explain why the Supreme Court had overturned the decision of the lower courts; he could agree to their deletion.

As for the proposed deletion of the words “in the practice of States, particularly”, he did not view the court decisions in question as pertaining to Article 38 (1) (d) of the Statute of the International Court of Justice, but rather as State practice. Furthermore, in its conclusions on identification of customary international law, the Commission had not stated that a court decision that could be classified as falling under Article 38 (1) (d) necessarily meant that it did not constitute practice. Nor had it qualified what would make it practice for the purposes of Article 38 (1) (b) or (d). Therefore, he would prefer to retain the words “in the practice of States, particularly”.

Responding to the comment made about the lack of diversity of sources, he pointed out that reference was made, in an earlier footnote, to, *inter alia*, the International Tribunal for the Former Yugoslavia. Moreover, much of the material included in the commentary had been discussed in the Commission’s plenary meetings; nevertheless, he would welcome the submission of additional sources.

Mr. Nolte, noting that in draft conclusion 9, there was a reference to international courts and expert bodies, but not to national courts, said that the Special Rapporteur appeared to thus conclude that the decisions of national courts constituted State practice but the works of expert bodies did not. There might well be an inconsistency with the Commission’s conclusions on identification of customary international law, in which the decisions of national courts were considered both as falling under Article 38 (1) (d) and as State practice. Rather than engaging in a debate on the classification of decisions of national courts, he would propose that the Commission should adopt the language of paragraph (5) as originally drafted, on the understanding that it did not exclude the possibility that decisions of national courts might also, in some circumstances, help to determine rules of law, as under Article 38 (1) (d).

Mr. Grossman Guiloff said that he would do his best to find some decisions of national courts in parts of the world other than the western hemisphere, in order to provide a firmer basis for the proposition contained in paragraph (5).

Mr. Murphy said that, in its conclusions on identification of customary international law, the Commission had viewed national courts’ decisions as relevant either as a form of State practice or as a subsidiary source of international law. If a national court was to say that it was not going to detain a person arbitrarily because to do so would violate customary international law, that would constitute State practice reflecting the court’s *opinio juris* of its obligation under international law. However, if a court was to say that it was interested in knowing whether there was a rule of customary international law and made a survey of State practice in order to identify that rule, the determination predicated on that analysis would be more akin to a subsidiary source of international law. In the *Alvarez-Machain* case, the Ninth Circuit court had tried to ascertain whether there was a law of nations prohibiting arbitrary arrest. He had proposed the deletion of the words “in the practice of States, particularly” in order to avoid any suggestion that the Commission might be classifying court decisions in one or other of the two above-mentioned categories. In some places, the commentary referred to national courts’ decisions without equating them with State practice, while in others it dealt with the practice of States on the one hand and of courts on the other.

Mr. Jalloh said that paragraph (6) of the commentary to conclusion 6 on identification of customary international law referred to the role of decisions of national courts and drew the distinction made by Mr. Murphy. However, in footnote 706, the commentary indicated that national courts’ decisions could also serve as a form of evidence of practice, as stated in conclusion 10 (2). He was therefore in favour of retaining the words “in the practice of States, particularly” because, in the conclusions on customary international law, members had been quite comfortable with that position. On the other hand, he could accept the amendments to the footnote.

Mr. Tladi (Special Rapporteur) said that in view of the rationale for the proposed amendment, namely that courts’ decisions fell solely under Article 38 (1) (d) of the Statute of the International Court, he was in favour of retaining the words in question. In its conclusions on identification of customary international law, the Commission had indeed regarded the decisions of national courts as State practice and as a subsidiary means of

determining the rules of law and as *opinio juris*. Hence judicial decisions could be viewed as practice of States, whether the court was examining the content of rules or whether it was giving effect to them; in other words, they were covered by both Article 38 (1) (b) and (d).

Sir Michael Wood said that the whole point of the proposed change was that, as the paragraph stood, it covered only court decisions as State practice and not as *opinio juris* or a subsidiary means of determining rules of law. If the Commission wanted to allow for all three possibilities, the words in question would have to be deleted. He also noted that the paragraph referred solely to the practice of States without any mention of other forms of evidence of practice of States. He therefore thought that the commentary would be better if the sentence simply said, as proposed by Mr. Murphy, “has been recognized in the decisions of national courts”.

Mr. Tladi (Special Rapporteur) said that, following some informal discussions, an agreement had been reached to accept Mr. Murphy’s proposal to delete the words “in the practice of States, particularly” in the first sentence and to accept his amendments to footnote 14.

Sir Michael Wood said that the reference to the decisions of national courts in paragraph (5) could now cover the potential roles of those decisions as a form of State practice, as evidence of *opinio juris* and as a subsidiary means for the determination of rules of customary international law.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Sir Michael Wood suggested that either the entire paragraph should be deleted, or it should be turned into a footnote. In the first sentence, the phrase “is also widely accepted in scholarly writings” was erroneous, since it concerned only four European writers. It would be more accurate to state “is accepted in certain scholarly writings”. Moreover, to rely on scholarly writings to such a high degree did not strengthen the Commission’s case.

The Chair, speaking as a member of the Commission, said that as he could provide some examples of scholarly writings of authors from Central and Eastern Europe in support of the paragraph, he was against its deletion.

Mr. Nolte said that, by way of a compromise, the adverb “widely” could be deleted. The second sentence was not just a statement of Kolb’s personal opinion; Kolb was quite rightly alluding to the views of other writers. To use the phrase “is accepted in scholarly writings” said nothing about the degree of acceptance of those views. The paragraph quoted four universally recognized authors. The fact that they all came from Europe was not prejudicial.

Mr. Vázquez-Bermúdez said that the reference to legal theory in the paragraph was very useful and should be retained. He could accept the amendment proposed by Mr. Nolte.

Mr. Jalloh said that the Commission should not have an aversion to scholarly writings. It was on safe grounds quoting Kolb, since he was describing the actual situation. It would, however, be wise to broaden the selection of sources used by the Commission and it would therefore be helpful if members could supply the Special Rapporteur with extra material. The language of the paragraph as it stood was accurate, but in a spirit of compromise he could accept the amendment proposed by Mr. Nolte.

Mr. Petrič said that he wondered why the Commission was reviving a long discussion it had already had in the past. As a maximum concession, he could endorse the amendment proposed by Mr. Nolte if it was acceptable to the Special Rapporteur. He had the feeling that the Commission valued only what was published in certain countries and in certain circles. For example, the commentary ignored an article he had written on *jus cogens* for the *Czech Yearbook of International Law*, which was published by Charles University in Prague, one of the most venerable universities in Europe, and in which he had supported the ideas defended by Kolb and the other authors cited in the paragraph.

Ms. Escobar Hernández said that the paragraph was extremely interesting and should not be deleted. The word “widely” reflected reality. Perhaps other authors could also be cited.

Ms. Oral said that the paragraph was both correct and important, although a wider selection of authors could have been quoted. It should be left to the Special Rapporteur to decide whether to retain the adverb “widely”. Otherwise the paragraph should be kept as it stood.

Mr. Murphy proposed the insertion of the words “western European” before “scholarly writings” in the first sentence. His general objection was that, in the previous paragraph, there appeared to be an effort to characterize three court decisions as State practice and a reluctance to acknowledge that they were just court decisions rather than general practice of States. In the paragraph under consideration, there was an effort to exaggerate the importance of the views of four particular scholars in support of the proposition it advanced. Such an emphasis on a smattering of scholars would reflect poorly on the Commission and would not be received well by some States. It would be better to place the reference to their writings in a footnote, or for the paragraph to be scaled back, with a single footnote listing the scholars.

Mr. Ruda Santolaria said that the paragraph was apposite. In his view, it reflected the opinion not of a few authors but of a majority of authors. It was appropriate to refer to legal theory, but not solely that of western Europe. He left it to the discretion of the Special Rapporteur whether to accept the amendment proposed by Mr. Nolte.

Mr. Nolte said that mentioning four leading scholars was not placing too much emphasis on legal writings in the context of the current topic. In the past, the Commission had quoted scholars without there being any suggestion that their contribution to international law was greater than that of States. They had always played a role in the field of international law. He would be surprised if States considered it unacceptable to refer to the four leading scholars of *jus cogens*. He therefore encouraged members to accept paragraph (6) with the deletion of “widely”, if the Special Rapporteur agreed.

Mr. Ouazzani Chahdi said that he, too, supported the retention of the paragraph. Generally speaking, it was sufficient to quote two leading scholars. If the word “widely” was the stumbling block, the phrase could be recast to read “accepted by several authors”, and they could be enumerated in the footnote.

Mr. Vázquez-Bermúdez suggested that it might be useful, at the end of the first sentence, to add the words “*inter alia*” followed by a list of authors who shared that opinion, in order to demonstrate that it was not held by only four people.

Mr. Tladi (Special Rapporteur) said it appeared that a majority of members supported the retention of the paragraph, subject to the deletion of the adverb “widely”. In a footnote, he would add some references to further scholars from Africa and South America, the many writings of Judge Cançado Trindade on *jus cogens*, and the article by Mr. Petrič.

On that understanding, paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Park said that, in the final sentence, he was unhappy with the reference to “moral foundations”, as it might reopen the debate about positivism versus natural law. Some people might misinterpret those words as an indication that the Commission was following the trend towards natural law.

Mr. Jalloh said that the previous paragraph had quoted an opinion by Alain Pellet which used the words “moral value”. Personally, he did not think that a reference to “moral foundations” would reopen a debate about positivism versus natural law.

Mr. Nolte said that there was a difference between quoting the opinion of a scholar and expressing the Commission’s own position. He therefore had some sympathy for Mr. Park’s proposal. “Normative foundations” could be read as including moral foundations. An explicit reference to moral foundations would indeed reopen the debate about positivism versus natural law.

Mr. Tladi (Special Rapporteur) said that he disagreed with Mr. Nolte, because many laws did have moral foundations. That did not mean that a particular legal system was based on natural law. The prohibition of murder was a positivist rule but it had moral foundations. The text simply said that a rule had certain foundations, including moral foundations. That did not signify that the Commission accepted the natural law approach.

Mr. Jalloh said that he also disagreed with Mr. Nolte. The Commission was not expressing a view but simply explaining the legal basis for the topic, which included scholarly writings. The last sentence was a benign statement which made sense in the context of the topic.

Mr. Vázquez-Bermúdez said that he understood the Special Rapporteur's reasoning. He had presumably taken into consideration the advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of Genocide*, which used the phrase "contrary to moral law". The reference to "moral foundations" was therefore valid.

Ms. Oral said that she fully agreed with the previous speaker. If there was one topic where it was completely appropriate to include moral aspects it was the topic of *jus cogens*.

Mr. Murphy said that he would suggest ending the third sentence after the words "mutually exclusive". The paragraph explained that different terms or phrases were used by the authorities to signify the relevance of values; however, the foundations of a norm did not seem to have anything to do with those different terms. Accordingly, in the first sentence, the term "the authorities" should be replaced with "courts and scholarly writers".

Mr. Ruda Santolaria said that he was happy to keep the phrase "normative and moral foundations", because the affirmation of fundamental values should include those of both a normative and moral nature.

Mr. Grossman Guiloff said he agreed with the Special Rapporteur that the use of the terms was not mutually exclusive. He would, however, add the words "*inter alia*" after "they indicate" because moral values did have a role to play as a foundation of *jus cogens* and he did not see any disconnect between normative and moral foundations.

Mr. Park said that, while he would not oppose the adoption of paragraph (7), he was not comfortable with the reference to moral foundations, because the first mentions of *jus cogens* were to be found in the State practice of the Soviet Union of the 1920s. That meant that the link between the natural law trend in international relations and the moral foundations of the norm was very weak. He was well aware that the International Court of Justice had referred to moral law in the aforementioned advisory opinion and in its judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*. However, his interpretation of the Court's rulings was that it wanted to neutralize that reference to moral law by also speaking of the "principles of morality" and of "moral and humanitarian principles".

Ms. Escobar Hernández said that it would be very difficult to talk about fundamental values and the interests of States without accepting that they had an underlying moral element alongside a normative element. She would therefore prefer to keep the words "normative and moral".

Sir Michael Wood said that he had some sympathy with Mr. Park's view. The combination of the words "normative" and "moral" was problematical, because it raised doubts about the meaning of the terms. As the paragraph merely explained why different terms were being used, he wondered whether that idea could be captured in the phrase "and they indicate the important foundations of the norm in question". That would make the same point and might overcome any hesitations about the words "normative" and "moral".

Mr. Tladi (Special Rapporteur) said that many of the concerns regarding the use of the word "moral" were overstated. He was in favour of retaining "normative and moral". In reply to Mr. Murphy, he said that the final sentence should continue after "mutually exclusive", because the use of different words by various authorities was partly due to the normative and moral foundations of *jus cogens* norms. The final sentence was important

and, as there was support among Commission members for his text, he suggested that it should be retained as it stood. He would prefer to keep the notion of “authorities” in the first sentence, but he could accept “courts and scholarly writers”.

Mr. Nolte said that one way to address concerns over the last sentence might be to replace the word “foundations” with “background”.

Ms. Oral said that paragraph (7) was linked to the paragraph that preceded it, in which reference was made to “fundamental values”. Since there was a moral component to such values, she did not see any problem with the use of the word “moral” in paragraph (7).

Mr. Tladi (Special Rapporteur) said that he was ready to accept Mr. Murphy’s proposal to replace the words “the authorities” with “courts and scholarly writers” and Mr. Nolte’s proposal to replace the word “foundations” with “background”.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Mr. Murphy, noting that the word “effect” was used in the second sentence, while the word “consequence” was used in the third, said that it would be better to use the same word in both. One option would be to amend the third sentence by replacing the words “a consequence” with “an effect”, and the words “has the effect” with “means”.

Mr. Nolte said that the word “effect” was not as sharp and legally well defined as “consequence”. He would therefore prefer to amend the second sentence by replacing the words “an effect” with “a consequence”.

Sir Michael Wood said that he agreed with Mr. Nolte. In order to avoid using language that did not appear in draft conclusion 3, the second sentence could be rephrased more simply to state that hierarchical superiority was “both a characteristic and a consequence of peremptory norms of general international law (*jus cogens*)”.

The Chair said he took it that the Commission agreed with Sir Michael Wood’s proposal.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Murphy proposed moving the seventh sentence of paragraph (10) to the beginning of paragraph (9) and modifying it slightly to read: “States have, in their statements, referred to the hierarchical superiority of peremptory norms of general international law (*jus cogens*).” He also proposed inserting the word “also” before “often referred” in the existing first sentence of paragraph (9), and removing the word “also” from the existing third sentence.

Mr. Tladi (Special Rapporteur) said that paragraph (9) dealt exclusively with international courts and tribunals, whereas paragraph (10) concerned State practice. He would prefer to keep the two paragraphs separate.

Mr. Murphy asked whether, in that case, the Special Rapporteur would be open to reversing the order of paragraphs (9) and (10), so that attention would be given first to the practice of States and then to international courts and tribunals. He also said, in that connection, that the last three sentences of paragraph (10) did not concern State practice and would thus be better placed elsewhere.

Mr. Tladi (Special Rapporteur) said that he would rather not change the order of the paragraphs, but would not object if there was a consensus to do so. The fact that one paragraph preceded another did not necessarily mean that it was more important.

Mr. Jalloh said that, while he had initially been attracted to Mr. Murphy’s proposal, which appeared to give paragraphs (9) and (10) a logical flow, he was concerned that the changes would have an impact on subsequent paragraphs.

Mr. Nolte said that the order of the two paragraphs should be retained. The Commission should not give the impression that the decisions of domestic courts were of greater value than those of international courts.

The Chair said he took it that the only change in paragraph (9) would be to remove the word “also” from the third sentence.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Mr. Tladi (Special Rapporteur) said that the fourth sentence should be redrafted to read: “In *Siderman de Blake v. Republic of Argentina*, the Court of Appeals for the Ninth Circuit stated that peremptory norms of general international law (*jus cogens*) were those norms ‘deserving of the highest status in international law’.”

Mr. Murphy said it was unfortunate that the Commission was systematically downplaying the importance of statements made by Governments. The seventh sentence of the paragraph, which addressed such statements, came after the discussion of decisions of international courts and tribunals and those of national courts.

Mr. Park said that he shared Mr. Murphy’s concern about the order of the sentences. He wished to propose moving the second- and third-last sentences to a separate paragraph devoted to scholarly writings, immediately after paragraph (10), and to place the last sentence in a footnote.

Mr. Grossman Guiloff said that he did not see why the last sentence should be relegated to a footnote. Christian Tomuschat was a former member of the Commission and a person of considerable authority; besides, other scholars were cited in earlier paragraphs. While he agreed with Mr. Murphy that the Commission should not disregard the opinions of States, he took exception to the claim that it was systematically downplaying their importance.

Mr. Jalloh said that, as noted by Mr. Grossman Guiloff, scholars were cited in earlier paragraphs, notably paragraph (6). With that in mind, his preference would be to keep the last sentence in the body of the paragraph. He also agreed that the Commission was not systematically downplaying the importance of the views of States. The nature of the topic under consideration was such that the Commission had to draw more heavily than usual on scholarly writings.

Mr. Tladi (Special Rapporteur) said that, while he did not object to Mr. Park’s proposals, he hoped that the Commission would not make it a general policy to relegate scholarly writings to the footnotes. If the third-last sentence was to be moved to the start of a new paragraph, it should be redrafted to read: “The hierarchical superiority of peremptory norms of general international law (*jus cogens*) was recognized in the conclusions of the work of the Commission’s Study Group on the fragmentation of international law.”

With that drafting change, paragraph (10), as amended by Mr. Park, was adopted.

Paragraph (11)

Mr. Nolte said that, since not all peremptory norms of general international law were binding on all subjects of international law, the words “that they address” should be inserted at the end of the second sentence. For the sake of consistency, in the last sentence, the word “effect” should be replaced with “a consequence”. The third sentence was problematic in that it conflated two separate issues: that of consent, which was a condition for the formation of norms; and that of applicability, which clearly did not depend on the existence of consent. Given that the sentence could give rise to misunderstandings, he would delete it.

Sir Michael Wood said that he supported Mr. Nolte’s proposals, but that, if the third sentence was deleted, an effort should be made to preserve footnote 36, which was important. The second sentence was somewhat unclear, and could be simplified to read: “The universal applicability of peremptory norms of general international law (*jus cogens*) means that they are binding on all subjects of international law that they address.”

Mr. Huang said that he completely agreed with Mr. Nolte's proposal to delete the third sentence, which was unnecessary and controversial, and had no basis in the work of either the Commission or the Drafting Committee.

Mr. Zagaynov said that he shared the concerns expressed by Mr. Nolte and Mr. Huang with regard to the third sentence. The language lent itself to misinterpretation. The best option would be to delete it. The footnote to the third sentence – footnote 36 – referred to the advisory opinion of the International Court of Justice in the proceedings concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. However, having checked the passage of the opinion cited, he did not think that it could be used to substantiate the second sentence. The quotation from the second source cited in footnote 36, the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Siderman de Blake v. Republic of Argentina*, primarily concerned the persistent objector rule, which the Commission addressed in a subsequent draft conclusion.

Mr. Murphy said he agreed that the third sentence could be deleted. However, like Mr. Zagaynov, he did not think that footnote 36 could be moved to the second sentence, since the sources cited therein did not speak to that sentence's proposition. Consequently, the footnote would probably have to be deleted too. He also wondered whether, in the fourth sentence, "flows from non-derogability" could be amended to read "flows from their non-derogability". He supported Mr. Nolte's proposal to insert the words "that they address" at the end of the second sentence.

Mr. Tladi (Special Rapporteur) said that he was happy to acquiesce to the will of the Commission, which seemed to be in favour of deleting the third sentence. However, footnote 36 should be retained. While he conceded that the relevance of the advisory opinion in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* could be questioned, he felt that the other sources cited were all relevant, including the judgment in the *Siderman de Blake* case. It was true that the judgment addressed the issue of the persistent objector rule; however, it also addressed the question of whether *jus cogens* norms were binding on all States, for example, in the passage which stated that norms of *jus cogens* were "derived from values taken to be fundamental by the international community of States" and as such "transcended" consent. The reference to the International Criminal Court's advisory opinion should therefore be deleted and the footnote marker moved to the end of the second sentence.

Mr. Murphy said that, if he understood the Special Rapporteur correctly, he was proposing that the quotation from the judgment in the *Siderman de Blake* case should be maintained because of its assertion that *jus cogens* norms "transcended" consent, which was the kind of statement that the Commission was seeking to avoid by deleting the third sentence. The reference to Raphaële Rivier's book *Droit international public* addressed the need for the consent of States, which was associated with the third sentence. It was therefore unclear to him how the footnote could justifiably be retained.

Mr. Tladi (Special Rapporteur) said that an alternative proposal would be to retain the third sentence, including footnote 36, and to insert the word "all" before the word "States", so that the sentence would read: "The applicability of peremptory norms does not depend on the consent of all States to be bound."

The Chair said he took it that the Commission agreed with Sir Michael Wood's reformulation of the second sentence and Mr. Nolte's proposal to delete the third sentence. He also took it that the Commission agreed to replace "flows from non-derogability" in the fourth sentence with "flows from their non-derogability", and the word "effect" in the final sentence with "a consequence". It seemed to him that more time was required to allow members to reflect on the content of footnote 36 and the placement of its indicator. He proposed therefore that the text of paragraph (11) should be adopted with the aforementioned amendments, on the understanding that footnote 36 would be revisited at a later stage.

On that understanding, paragraph (11), as amended, was adopted.

Paragraph (12)

Mr. Murphy said that, in the second sentence, the words “has also been affirmed” should be replaced with “was affirmed”, and the phrase “in various contexts” should be deleted. He had noticed that, throughout the draft commentaries, there were inconsistencies in the tense of the verbs used: he trusted that the Secretariat would address those inconsistencies.

Mr. Park, noting that the term “universal character” had been replaced with “universal applicability” in the second sentence of paragraph (11), suggested that it might be appropriate to amend all instances of “universal character” to “universal applicability”.

Sir Michael Wood said that the amendment in paragraph (11) had been introduced simply for the purpose of simplifying the sentence structure. It was not necessary to introduce the same amendment throughout the commentary.

Paragraph (12), as amended by Mr. Murphy, was adopted.

Paragraph (13)

Paragraph (13) was adopted with a minor editorial correction.

Paragraph (14)

Mr. Nolte said that the second sentence of paragraph (14) used the term “doctrine of the persistent objector”. However, draft conclusion 14 (3) used the term “persistent objector rule”. He therefore wished to propose that, in paragraph (14), “doctrine of the persistent objector” should be replaced with “persistent objector rule”.

Mr. Vázquez-Bermúdez said that his preference was for retaining “doctrine”, but he would not object should the Commission decide otherwise.

Mr. Tladi (Special Rapporteur), supported by **Mr. Park**, said that the Commission’s decision to use the term “persistent objector rule” in draft conclusion 14 was explained in paragraph (11) of the commentary to that draft conclusion. Both terms were used in the commentaries, so it was not terribly important which of the two was used in paragraph (14).

Mr. Jalloh, supported by **Sir Michael Wood**, said that, in the interests of saving time and given the relative unimportance of the issue, the term “doctrine” should be retained in paragraph (14), unless Mr. Nolte insisted otherwise.

Ms. Oral said that she, too, supported Mr. Nolte’s proposal. The term “persistent objector rule” had been widely used in the Commission’s work on customary international law.

Mr. Tladi (Special Rapporteur) said that he was happy to use “persistent objector rule or doctrine” in paragraph (14), given that the Commission’s choice to use the word “rule” was later explained in the commentary to draft conclusion 14.

Mr. Cissé said that he was in favour of using the term “doctrine of the persistent objector”. “Rule” was stronger than “doctrine” and, for that reason, was not appropriate in the present context.

Mr. Nolte said that the Commission had already adopted the term “persistent objector rule” in the context of draft conclusion 14. It should not undo that decision by using the word “doctrine” in the commentaries. However, in a spirit of compromise, he was willing to agree to the use of “persistent objector rule or doctrine”.

The Chair said he took it that the Commission agreed to replace “the doctrine of the persistent objector” with “the persistent objector rule or doctrine”.

Paragraph (14), as amended, was adopted.

Paragraph (15)

Sir Michael Wood said he wished to propose that the words “the existence of” should be inserted before the word “characteristics” in the third sentence, and that the word “can” in the same sentence should be changed to “may”. He was unsure about the use of the word “evidence” in the fourth sentence, since it suggested that the characteristics mentioned in the previous sentence were evidence that a norm was a peremptory norm. The first part of the sentence could perhaps be amended to read “They may serve to explain why a norm is recognized and accepted”.

Mr. Tladi (Special Rapporteur) said that, later in the same sentence, it was stated that evidence of the characteristics mentioned “may serve to support or confirm the peremptory status of a norm”. It was therefore not implied that the characteristics themselves were evidence of the peremptory nature of a norm, but that it was necessary to provide evidence that such norms were accepted as reflecting and protecting the fundamental values of the international community of States as a whole.

Sir Michael Wood said that it was unclear to him why it was necessary to say “evidence that a norm is recognized and accepted as reflecting and protecting”, rather than “evidence that a norm reflects and protects”.

Mr. Tladi (Special Rapporteur) said that Sir Michael Wood’s suggestion would indeed make the sentence clearer. He proposed that the amended sentence should read: “In other words, evidence that a norm reflects and protects fundamental values of the international community of States as a whole, is hierarchically superior to other norms of international law and is universally applicable, may serve to support or confirm the peremptory status of a norm.” Sir Michael Wood’s suggestions for the third sentence were also acceptable to him.

Paragraph (15), as amended, was adopted.

*Part two (Identification of peremptory norms of general international law (jus cogens))**Commentary to draft conclusion 4 (Criteria for the identification of a peremptory norm of general international law (jus cogens))**Paragraph (1)*

Paragraph (1) was adopted with a minor editorial change.

Paragraph (2)

Sir Michael Wood said that the words “in international law” were not really needed after “the importance or the role of a norm” in the penultimate sentence.

The Chair said he took it that the Commission wished to delete the words “in international law” from the penultimate sentence.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Sir Michael Wood said that the order of the words “recognized and accepted” in the fourth sentence should be changed to “accepted and recognized”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Sir Michael Wood said that paragraph (5) presented an alternative interpretation of the words “accepted and recognized” in paragraph 53 of the Vienna Convention on the Law

of Treaties for which there was very little support and no supporting citations. Removing paragraph (5) altogether would simplify the commentaries.

Mr. Murphy said that paragraph (5) dealt with a very complicated, alternative scenario that distracted from the overall thrust of the commentary. It would be best to delete it for the sake of a tighter, sharper commentary.

Mr. Jalloh said he felt that explaining the possibility of an alternative interpretation brought clarity to the Commission's own interpretation.

Mr. Tladi (Special Rapporteur) said that paragraph (5) was important because the views set out therein had been expressed by members of the Commission in plenary and in his third report on the topic (A/CN.4/714). It was important to make it clear that the Commission had considered various alternative interpretations before arriving at its conclusion.

Mr. Park said that he would be willing to agree to retain paragraph (5) on the condition that at least two footnotes were inserted, to explain who supported the alternative interpretation and who was against it. In the second sentence, after the marker (c), "another peremptory norm" should be replaced with "subsequent peremptory norm".

Mr. Murase said that he had been among those members who had raised concerns about tautology in the criteria proposed under the alternative interpretation. Paragraph (5) was important insofar as it raised that issue in the penultimate sentence.

Ms. Oral said that she was one of those members who had initially held the view that "accepted and recognized" in paragraph 53 of the Vienna Convention could be interpreted as qualifying "general international law", but she was not opposed to deleting the paragraph.

Sir Michael Wood said that if the text of the paragraph was to be retained, the opening words should not be "Alternatively, it is possible to interpret the phrase 'accepted and recognized' as qualifying ...", but rather "Alternatively, it has been suggested that the phrase 'accepted and recognized' qualifies ...". Moreover, the text should be set out in a footnote rather than in an independent paragraph.

The Chair said that the Commission would continue its consideration of paragraph (5) at its next meeting.

The meeting rose at 6.05 p.m.