Provisional

For participants only

31 October 2019

Original: English

International Law Commission

Seventy-first session (second part)

Provisional summary record of the 3503rd meeting
Held at the Palais des Nations, Geneva, on Wednesday, 7 August 2019, at 10 a.m.

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GE.19-13317 (E) 160919 311019

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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. 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.

General principles of law (agenda item 7) (*continued*) (A/CN.4/732)

Interim oral report of the Drafting Committee

The Chair invited the Chair of the Drafting Committee to present the interim oral report of the Drafting Committee on the topic "General principles of law".

Mr. Grossman Guiloff (Chair of the Drafting Committee) said that he wished first of all to pay tribute to the Special Rapporteur, Mr. Vázquez-Bermúdez, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. Thanks were also due to the other members of the Drafting Committee for their active participation and significant contributions.

The Drafting Committee had devoted one meeting to the topic on 30 July 2019, to consider the three draft conclusions proposed by the Special Rapporteur in his first report (A/CN.4/732). The Drafting Committee had provisionally adopted one draft conclusion. Due to a lack of time, it had been unable to consider the two other draft conclusions referred to it and would thus resume their consideration at the next session.

Draft conclusion 1, entitled "Scope", read: "The present draft conclusions concern general principles of law as a source of international law." The text proposed by the Special Rapporteur in the first report had been provisionally adopted without any changes. The draft conclusion reflected the Commission's aim to complete its work on the sources of international law listed in Article 38 (1) of the Statute of the International Court of Justice, further to its contributions on the other two main sources of international law, namely treaties and customary international law. Although a view had been expressed that the term "source" was unclear and should be avoided, members of the Drafting Committee had generally considered that it was appropriate to refer explicitly to that term given that the purpose of the topic was precisely to clarify various aspects of the third source of international law listed in Article 38 (1), including its relationship with the other sources. It had been acknowledged, nonetheless, that there were differing views regarding the term "source" and that they could be addressed in the commentary.

The members of the Drafting Committee had also agreed that the term "general principles of law" was to be understood in the sense of Article 38 (1) (*c*) of the Statute of the International Court of Justice, taking into account the practice of States as well as the jurisprudence of international courts and tribunals. In that context, it had also been understood that, in its consideration of the topic, the Commission should not restrict itself to the study of that source as used by the International Court of Justice. Further, the members of the Drafting Committee had agreed with the Special Rapporteur that the Commission should provide examples of general principles of law in the commentaries to the draft conclusions for illustrative purposes only and that it should not delve into the substance of such principles.

An extensive debate had taken place in the Drafting Committee as to whether draft conclusion 1 should be more detailed. It had been suggested that the text of the draft conclusion should refer, for example, to the nature, scope, functions and identification of general principles of law. However, it had been concluded that a general provision, as proposed by the Special Rapporteur, would be more appropriate for several reasons. First, it would have the benefit of indicating in a simple and concise manner the scope and purpose of the topic. Second, members had been concerned that including a more detailed provision could unnecessarily limit the scope of the Commission's work on the topic.

The Special Rapporteur had indicated that the various proposals made in the Drafting Committee reflected the broad consensus that had emerged during the plenary debate regarding the issues to be considered by the Commission in future reports. In that sense, it had been agreed in the Drafting Committee that it would be useful to refer to those issues in the commentary, including the legal nature, origins, functions and identification of general principles of law and the relationship between general principles of law and other sources of international law.

There had been a debate concerning the terminology to be used in the Spanish and French versions to refer to "general principles of law". Some members had indicated that it would be more appropriate to follow the exact language of Article 38 (1) (*c*) of the Statute of the International Court of Justice, which referred to "*principios generales de derecho*" in Spanish and "*principes généraux de droit*" in French, since Article 38 was the starting point for the topic. It had been mentioned that the terminology was not merely a technical issue. It had been noted, however, that the expressions "*del derecho*" and "*du droit*" had been used in international practice, in recent instruments such as the Rome Statute of the International Criminal Court, by the Commission itself in recent work, including in the topic on the identification of customary international law, and in the literature. It had also been stressed that the current title of the topic in Spanish and French had not been the subject of observations by States in the Sixth Committee and that it was contained in the relevant resolutions. It had been agreed by the members of the Drafting Committee that the term used in the French and Spanish versions of the Special Rapporteur's report should not be interpreted as changing the meaning of Article 38 of the Statute. The Drafting Committee had concluded that it would be cautious to provisionally adopt the text of draft conclusion 1 in English only and to continue the debate on that aspect at a later stage.

The Chair said he took it that the Commission wished to take note of the interim oral report of the Drafting Committee.

It was so decided.

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 21 (Procedural requirements) (continued)

Paragraph (4)

Mr. Tladi (Special Rapporteur) said that, following consultations, it had been agreed that a new sentence should be added to the end of the paragraph, to read: "Not every aspect of the detailed procedure set forth in draft conclusion 21 constitutes customary international law."

With that addition, paragraph (4) was adopted.

Paragraph (9)

Mr. Tladi (Special Rapporteur) said that, following consultations, a finely balanced agreement had been reached on the insertion of two new sentences to replace the existing first sentence. They would read: "Draft conclusion 21 is a procedural provision, without implication for the lawfulness of any measures that may be carried out. If after the expiration of the 12-month period no offer to submit the matter to the International Court of Justice is made by the other States concerned, the invoking State is no longer precluded by the procedural provisions of draft conclusion 21 from taking the measure."

Mr. Murphy said that he supported the Special Rapporteur's proposal. At the end of the original third sentence, the words "to the International Court of Justice" should be added after "submit the matter".

Paragraph (9), as amended, was adopted.

The Chair invited the Commission to consider section C of chapter V, contained in document A/CN.4/L.929/Add.2.

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

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy said that he wished to propose the deletion of the second sentence, which referred to the *Committee of United States Citizens Living in Nicaragua v. Reagan* case, and footnote 2, as they were not entirely accurate. The word "similarly" at the beginning of the third sentence and the phrase "having referred to the dictum in *Committee of United States Citizens Living in Nicaragua v. Reagan* that treaties conflicting with peremptory norms of general international law (*jus cogens*) are void" should be deleted. The beginning of the third sentence would then read: "In *Siderman de Blake v. the Republic of Argentina*, the United States Court of Appeals for the Ninth Circuit considered that …". In order to clarify the source of the internal quotes in the third sentence, a parenthetical reference could be added to footnote 3, which would read: "citing to the *Restatement (Third) of the Foreign Relations Law of the United States* (1987), section 102, comment K". He would provide the Special Rapporteur with the citation in writing.

Mr. Jalloh said that, while he did not object to Mr. Murphy's proposal, he would be interested to know if he was disputing the content of the case in question.

Mr. Murphy said that the quoted language in that sentence was an argument by the appellant and not by the court itself. If the sentence was to be retained, it would have to read "in *Siderman de Blake v. the Republic of Argentina*, the appellants before the United States Court of Appeals for the Ninth Circuit considered that …", which was not a particularly helpful statement.

Sir Michael Wood said that he was happy with Mr. Murphy's proposed changes. In the second sentence, the words "take priority over" should be replaced with "prevail over".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Sir Michael Wood proposed that, in the first sentence, the phrase "override conflicting customary international law" should be replaced with "prevail over conflicting rules of customary international law".

Mr. Nolte said that the quotation in the second sentence was incomplete. In fact, in the *Jurisdictional Immunities of the State* case, the International Court of Justice had stated: "since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs". The phrase "so the argument runs" indicated that the Court was describing an argument put forward by Italy, not that it accepted it. He therefore proposed replacing the phrase "the International Court of Justice accepted the proposition of Italy" with "the International Court of Justice referred to the proposition of Italy".

Mr. Jalloh said that, since the expression "prevail over" was already used in the citation from the International Court of Justice in the second sentence, perhaps the original wording "override" should be retained in the first sentence to avoid repetition.

Mr. Tladi (Special Rapporteur) said that his preference would be to retain the word "override" in the first sentence but he would not object to its being replaced with "prevail over". He did not support Mr. Nolte's proposal to replace "accepted the proposition of Italy" with "referred to the proposition of Italy". It had been his understanding that a compromise solution had been agreed, namely the wording "seemed to accept the proposition of Italy". The fact that the Court had not rejected that proposition by Italy, as it had other arguments, meant that it had been implicitly accepted. He proposed adding a footnote directly after "the *Jurisdictional Immunities of the State* case" with a reference to the book *Understanding* Jus Cogens *in International Law and International Legal Discourse* by Ulf Linderfalk and a

quote in parentheses: “examples include the priority-rule implicitly confirmed by the International Court of Justice in the *Jurisdictional Immunities of the State* case: in the event of a conflict between a *jus cogens* norm and a rule of customary international law, States must act upon the former.”

Mr. Nolte said that the fact that a court did not exclude an argument did not mean that it accepted it. It was quite obvious to him that if a court described an argument as an argument it did not accept it. Given that the International Court of Justice had referred to the proposition of Italy and then dealt with it *ex hypothesi*, the most appropriate wording would be “referred to”. The fact that one author had drawn the conclusion that the Court had implicitly accepted the argument was not a sufficient authority for the Commission to make that assertion. The International Court of Justice had no doubt carefully chosen the formulation used to introduce the proposition in paragraph 92 of its judgment.

Mr. Murphy said that he agreed with Mr. Nolte on that point. The International Court of Justice often described the arguments of both parties before reaching a conclusion. Perhaps it had seen some merit in the proposition put forward by Italy from a theoretical perspective but it had not accepted it in application. The Commission should be cautious in characterizing what the Court had or had not accepted. He supported Mr. Nolte’s proposal to use the formulation “referred to the proposition”, which was well balanced and did not impugn the proposition. If that was not acceptable to the Special Rapporteur, he proposed simply stating that “the International Court of Justice noted the proposition”.

The Chair said that his understanding was that the International Court of Justice had not rejected the argument put forward by Italy but had declined to find that there was a conflict between the rules on State immunities and peremptory norms of general international law. He therefore proposed using the formulation “did not refuse the proposition of Italy”.

Sir Michael Wood said that, in his view, the formulation “noted the proposition” would strike a reasonable balance. In response to Mr. Jalloh, he said that it would be preferable to use consistent language throughout the commentaries; “prevail over” seemed to be the standard wording. That wording had already been introduced in paragraph (3) and he would propose a similar amendment in paragraph (5). The fact that the words “prevail over” appeared in the second sentence of paragraph (4) reinforced the point that it was the appropriate language to use. Using different wording, such as “override” or “take priority over” could give rise to confusion.

The Chair suggested that paragraph (4) should be held in abeyance to allow interested members to reach an agreement.

It was so decided.

Paragraph (5)

Sir Michael Wood said that, in the first sentence, the phrase “is implied by the authority that peremptory norms of general international law (*jus cogens*) have over conflicting rules of customary international law” could be simplified to read: “follows from the fact that peremptory norms of general international law prevail over conflicting rules of customary international law”. At the beginning of the second sentence, the words “to this end” should be replaced with “thus”.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

Paragraph (9)

Mr. Murphy said that in the third sentence, for the sake of accuracy, the words “the plaintiffs before” should be added before “the United States Court of Appeals for the District of Columbia”, as the argument cited had been made by the plaintiffs and not the

Court itself. If his proposal was retained, the word “similarly” should be deleted from the next sentence.

Mr. Tladi (Special Rapporteur) said that he would need to check the reference before accepting the proposal.

Paragraph (9) was held in abeyance.

Paragraph (10)

Mr. Zagaynov said that, in the sixth sentence, the words “as a whole” should be inserted after “community of States” so as to mirror the language of draft conclusion 7. He wondered whether it might be advisable to delete the third sentence, which stated that the persistent objector rule did not prevent the emergence of either a rule of customary international law or a peremptory norm of general international law (*jus cogens*) based on that rule, as the same information was conveyed later in the paragraph. If the Commission was in favour of deleting the third sentence, it would be necessary to the delete the words “At the same time” from the following one.

Sir Michael Wood said that he agreed with Mr. Zagaynov that the words “as a whole” should be added to the sixth sentence. He could go along with Mr. Zagaynov’s second suggestion that the third sentence should be deleted. If that sentence was retained, it should be reformulated, as it was currently rather obscure.

As the paragraph as a whole was long and complicated, it might be better to split it into two, with the second of the resulting new paragraphs beginning with what was currently the fifth sentence. In that sentence, the words “such acceptance and recognition” could be replaced with “acceptance and recognition of a rule of general international law having peremptory character (*jus cogens*)”.

The current seventh sentence would be clearer if the words “if a rule of customary international law was the object of persistent objections from several States” were replaced with “even if a rule of customary international law emerged despite persistent objections from several States”.

Mr. Murphy proposed that, in the first sentence, the words “in scholarly writings” should be inserted after “that arises”, as the scenario addressed in that sentence had yet to emerge in actual practice, and that, in the second sentence, the words “The answer is that” should be deleted, as they did not reflect the usual style of the Commission’s commentaries.

Mr. Park said that paragraph 10 offered a complicated theoretical discussion of the kind more often found in scholarly writings than in a set of commentaries proposed for States. For greater clarity and neutrality, he proposed that the first five sentences of the paragraph should be deleted.

Mr. Grossman Guiloff proposed that, in the last sentence, the words “does not arise” should be replaced with “might not arise”.

Mr. Tladi (Special Rapporteur) said that he accepted Mr. Zagaynov’s suggestion that the words “as a whole” should be inserted after “community of States” in the sixth sentence, Mr. Murphy’s proposals regarding the first and second sentences, Sir Michael Wood’s suggestion that the paragraph should be divided into two, and Mr. Grossman Guiloff’s proposal that the words “does not arise” in the last sentence should be replaced with “might not arise”. If the paragraph was split into two, and the current fifth sentence became the first sentence of a new paragraph, the words “of a rule of general international law” would have to be inserted in that sentence after the words “acceptance and recognition”. He was, however, in favour of retaining the third sentence, which seemed to him to be accurate.

Sir Michael Wood said that the third sentence would be clearer if it read: “For that reason, the persistent objector rule does not prevent the emergence of a peremptory norm of general international law (*jus cogens*) based on a rule of customary international law to which one or more States have persistently objected.”

Mr. Nolte proposed that the words “namely non-opposability” in the fourth sentence should be deleted, as the effects of persistent objection were already explained in the text.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Sir Michael Wood, referring to footnote 18, said that the reference to the Commission’s work on the identification of customary international law was not entirely accurate. He would be happy to submit his proposed new wording to the Secretariat.

Paragraph (11) was adopted, subject to that amendment to footnote 18.

Paragraph (12)

Paragraph (12) was 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)

Sir Michael Wood proposed that, in the second sentence, the words “establish obligations on” should be replaced with “establish obligations for”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murphy, referring to footnote 19, said that the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* involved a reservation to a treaty, which was a situation addressed in a different draft conclusion. He proposed that the reference to the *Armed Activities* case should be replaced with a citation to article 53 of the 1969 Vienna Convention on the Law of Treaties. If that proposal was not accepted, the context of a reservation to a treaty should be made explicit.

Mr. Huang said that there seemed to be a mismatch between footnote 19 and the first sentence of the body of the text. In addition, the first sentence of that footnote reflected an overly broad interpretation of the judgment of the International Court of Justice in the *Armed Activities* case. For those reasons, footnote 19 should be deleted.

Mr. Tladi (Special Rapporteur) said that, in his view, the *Armed Activities* case was relevant by analogy, but he would not insist on retaining a reference thereto. Indeed, he was sympathetic to Mr. Huang’s point. It was not necessary to insert a footnote reference to article 53 of the 1969 Vienna Convention, as that instrument was already mentioned in the body of the text. He would prefer to retain the reference to the Guide to Practice on Reservations to Treaties.

The Chair said that, if the first sentence of footnote 19 was deleted, it would be necessary to delete the word “also” from the following sentence.

Paragraph (2) was adopted with those amendments to footnote 19.

Paragraph (3)

Mr. Tladi (Special Rapporteur) proposed that the word “only” should be inserted between the words “but” and “cease” in the penultimate sentence.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

Mr. Nolte said that it should be made clear that the term "unilateral act" had a broader scope in draft conclusion 15 than it did in the Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. In draft conclusion 15, unilateral acts were not subject to conditions such as a requirement that they should be publicly announced. For that reason, he proposed that a sentence should be added after the current first sentence, to read: "The scope of this draft conclusion is thus broader than the scope of the 2006 International Law Commission Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which 'relate only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law'." A footnote containing a reference to the fifth preambular paragraph of the Guiding Principles should be associated with that sentence.

Mr. Murphy said that, although he did not object to the additional sentence proposed by Mr. Nolte, he wondered whether it really belonged after the first sentence of the paragraph, which was focused on the manifestation of the intention to be bound by an obligation under international law rather than on the scope of unilateral acts.

In order to clarify the point being made later in the paragraph, he proposed that a footnote containing a reference to the two judgments of the International Court of Justice currently cited in footnote 22 should be added to the second sentence of the body of the text and that the third and all subsequent sentences, and associated footnotes, should be deleted.

Mr. Nolte said that another option would be to incorporate his proposed sentence into a footnote to be associated with the first sentence of paragraph (1). On a separate point, he proposed that the words "a search" in the third sentence should be replaced with "an ascertainment".

Mr. Tladi (Special Rapporteur) said that, although paragraph (1) had already been adopted, he could accept the addition of a footnote to be associated with its first sentence.

With regard to Mr. Murphy's proposal, paragraph (6) provided an explanation of the wording of the draft conclusion, which the Drafting Committee had based on wording used in the two cases cited in footnote 22. In a sense, the paragraph was a reflection of the discussion that had taken place in the Drafting Committee. He would be in favour of retaining the text of the paragraph as originally proposed, with the replacement of the words "a search" in the third sentence with "an ascertainment".

The Chair said he took it that the Commission wished to adopt paragraph (6), with the replacement of the words "a search" in the third sentence with "an ascertainment", and to incorporate the sentence proposed by Mr. Nolte into a footnote to be associated with the first sentence of paragraph (1), which had already been adopted.

It was so decided.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Nolte said that, according to the second sentence of the paragraph, unilateral acts of international organizations that created or were intended to create obligations for themselves were addressed in draft conclusion 16. However, draft conclusion 16 covered only certain acts of international organizations. To offer an example, it did not cover the commitment made by the Secretary-General of the United Nations to respect certain standards of humanitarian law in the conduct of peacekeeping operations. He seemed to recall that the Drafting Committee had wished to make clear that other acts that could produce legal obligations or effects should be covered by the draft conclusions *mutatis mutandis*. He thus proposed that the word "Certain" should be added to the beginning of the second sentence and that a new sentence should be inserted after that sentence to read: "In addition, draft conclusion 15 may apply, *mutatis mutandis*, to other unilateral acts of international organizations that are intended to create obligations for themselves."

Mr. Park said that, as far as he recalled, the Drafting Committee had not discussed in depth the issue of the *mutatis mutandis* application of the draft provision to other unilateral acts of international organizations.

Mr. Murphy said that he agreed with Mr. Park. The Drafting Committee had not extended the scope of application of draft conclusion 15 to include international organizations. It was made clear in the title of the provision and in both of its constituent paragraphs that it applied to unilateral acts by States. He thus opposed the amendments proposed by Mr. Nolte. Other acts of international organizations were dealt with in draft conclusion 16.

Mr. Nolte said that his proposal was not part of an effort to extend the competences of international organizations; to the contrary, it was a way of safeguarding the general approach of the project, by providing that *jus cogens* rules also had an effect on unilateral acts of international organizations. Although the Drafting Committee had not discussed that issue specifically with regard to draft conclusion 15, there had been a general discussion in the Drafting Committee to the effect that the role of international organizations should be recognized more broadly than in draft conclusion 16 alone. His proposal, which was formulated using careful wording such as "may apply" and "*mutatis mutandis*", indicated that draft conclusion 15 did not apply directly to international organizations. The proposal did not in any way affect the role of States, but ensured that the rules postulated for States should also apply to international organizations.

Mr. Petrič said that the proposal would merit inclusion if it could be supported by a real case. Although Mr. Nolte had mentioned a possible position of the Secretary-General, there did not seem to have been any act of an international organization that did not fall under the resolutions or conclusions covered in draft conclusion 16.

Mr. Park said that Mr. Nolte's proposal was problematic in that it would undermine draft conclusion 16, which considered only binding effects. If the proposal was accepted, draft conclusion 15 would also cover non-binding effects of acts by international organizations.

Mr. Jalloh said that he supported Mr. Nolte's position. In his statement, the Chair of the Drafting Committee had made clear that the phrase "of a State" was included in paragraphs 1 and 2 of draft conclusion 15 on the understanding that the draft conclusion "mainly concerned unilateral acts by States". The use of the word "mainly" in the statement indicated that such acts by international organizations were not excluded and, as Mr. Petrič had indicated, there was no wish to preclude that possibility. He therefore supported Mr. Nolte's proposal for the inclusion of a new sentence.

Mr. Grossman Guiloff said that the appropriate location for the proposed amendment should also be considered: while it would still be possible to amend the title of draft conclusion 15 to allow the mention of international organizations to be included there, draft conclusion 16 specifically addressed acts of international organizations, so it might be worth considering whether the content of the proposed amendment could be included there. He therefore proposed postponing the discussion until draft conclusion 16 was considered.

The Chair suggested that the debate should be suspended to allow the various interested parties to engage in informal discussions on Mr. Nolte's proposal and other unresolved issues.

The meeting was suspended at 11.30 a.m. and resumed at 11.50 a.m.

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

Paragraph (4)

Mr. Tladi (Special Rapporteur) said that, following consultations, he wished to propose amending the second sentence to read: "In the *Jurisdictional Immunities of the State* case, the Court noted the proposition of Italy that '*jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law'." A footnote would then be inserted referencing the

Jurisdictional Immunities of the State case. The amended second sentence would be followed by a sentence that read: "The Court did not reject that proposition, but declined to find that there was a conflict between the rule on State immunities in civil proceedings and peremptory norms of general international law (*jus cogens*)." Another footnote would be added, referencing the writings of Ulf Linderfalk.

Paragraph (4), as amended, was adopted.

Paragraph (9)

Mr. Tladi (Special Rapporteur) said that, in line with the suggestions made by Mr. Murphy, he wished to propose the deletion of the fourth sentence and its footnote. The word "similarly" in the following sentence would also be deleted.

Paragraph (9), as amended, was adopted.

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

Paragraph (7)

Mr. Nolte said that, in light of the suggestion made by Mr. Grossman Guiloff, he wished to withdraw his proposal concerning paragraph (7).

Paragraph (7) was adopted.

Paragraph (8)

Paragraph (8) was 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. Nolte said that, in the second sentence, the words "the description of 'resolution'" should be replaced with "the term 'resolution'". In the penultimate sentence, the words "this draft conclusion" should be replaced with "a peremptory norm of general international law (*jus cogens*)", as it was not the draft conclusion but the peremptory norm of general international law that would have binding effect.

Mr. Huang said that he had a major concern regarding the reference in the fifth sentence to a decision in a resolution of the Security Council as an example of a resolution, decision or act of an international organization that would otherwise have binding effect. It had been agreed in the Drafting Committee that Security Council decisions would not be referred to in the draft conclusions; that should be valid for the commentaries too. When adopting decisions, the Security Council had to respect the Charter of the United Nations and the fundamental principles of international law and *jus cogens* norms. Therefore, when a decision or resolution of the Security Council had been adopted, it was not subject to review and its binding nature should not be challenged, even if it was argued that it conflicted with a *jus cogens* norm. The same was true for decisions of the International Court of Justice. He therefore proposed the deletion of the whole of the fifth sentence, or at least the references to the Security Council and the Court.

Mr. Tladi (Special Rapporteur) said that the paragraph under consideration was only describing what such resolutions might include; the relationship between Security Council resolutions and *jus cogens* was addressed in a later paragraph. He therefore proposed that the Commission should adopt the present paragraph and discuss the issue

raised by Mr. Huang at that later point. He also proposed the deletion of the reference to the International Court of Justice, which was not necessarily appropriate in that context.

Mr. Murphy said that, since Security Council resolutions were also mentioned in paragraphs (4) and (5), it would be preferable to consider those paragraphs together with paragraph (2).

The Chair suggested suspending the consideration of paragraph (2) until paragraphs (4) and (5) were considered.

Mr. Jalloh said that, while he agreed to the Special Rapporteur's proposal to discuss the issue raised by Mr. Huang at a later point, he wished to note that a compromise had been reached in the Drafting Committee on the issue, it having been agreed that the matter should not be mentioned in the draft conclusions, but would be referred to in the commentaries. He hoped that the compromise, which had allowed progress to be made in the Drafting Committee discussions, would not be broken in the plenary.

Mr. Petrič said that the issue raised was a crucial one. It had to be asked whether the Security Council, on which only 15 countries were represented, of whom 5 were permanent members, was required to respect *jus cogens* in its decisions, or whether there was a special kind of law for some countries that exempted them from the limits of *jus cogens*.

Mr. Tladi (Special Rapporteur) proposed that the paragraphs should be held in abeyance to allow him to work with the other members to achieve a solution.

It was so decided.

Paragraph (3)

Paragraph (3) was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were left in abeyance.

Paragraph (6)

Paragraph (6) was adopted.

*Commentary to draft conclusion 17 (Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations* erga omnes*))*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Zagaynov said that, in the second sentence, the words "the most widely cited list of peremptory norms of general international law (*jus cogens*)" should be replaced with "the non-exhaustive list of norms previously referred to by the Commission as having peremptory status".

Mr. Nolte said that, if Mr. Zagaynov's proposal was accepted, the reference, in the second sentence, to "the list of norms previously recognized by the Commission as having peremptory status" should be replaced with a reference to the list of norms that appeared in the annex, for reasons of clarity.

Mr. Murphy said that footnote marker 39 should be moved from the end of the sentence to immediately after the words "described by the Court". In the following sentence, the phrase in parentheses, "(which concern breaches of peremptory norms)", should be placed after "wrongful acts". Lastly, he did not think that any of the writings referred to in footnote 42 were anything other than "scholarly"; he therefore proposed the deletion of the words "and other writings".

Sir Michael Wood said that the first sentence should be split into two, with the first sentence ending at "obligations *erga omnes*". The word "although" would be deleted from the first sentence and the word "nevertheless" inserted at the beginning of the new second sentence.

Mr. Jalloh said that, given time constraints, it would be preferable to focus the discussions on more substantive changes.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Wood said that it was not accurate to say that it was "generally accepted" that not all obligations *erga omnes* arose from peremptory norms. That phrase should be replaced with "widely considered".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Nolte said that a footnote should be added to the penultimate sentence to reference the International Court of Justice advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and the Court's judgment in the case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*.

Sir Michael Wood said that, for the sake of accuracy, the words "one of" in the penultimate sentence should be deleted, so that the phrase in question would read "describes the main consequences of the *erga omnes* character".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Zagaynov, referring to the fifth sentence, said that while the responsibility of international organizations in the context of draft conclusion 17 had been discussed in the Drafting Committee, he did not recall any discussion in that regard concerning "other entities". Accordingly the words "any other entities" should be deleted.

Mr. Murphy said that, also in the fifth sentence, it was incorrect to say that draft conclusion 17 also applied to international organizations, as its wording mentioned only States. As he understood it, the idea formulated in the Drafting Committee had been that the draft conclusion was without prejudice to a comparable rule applying to international organizations. He therefore proposed replacing the words "should be understood to apply also" with "is without prejudice to". The final sentence should then be deleted as it was unnecessary.

Mr. Tladi (Special Rapporteur) said that he agreed to all the proposals. The word "another" in the sixth sentence should be replaced with "that".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

*Commentary to draft conclusion 18 (Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness)*

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy, supported by **Mr. Zagaynov**, suggested that, for the same reasons discussed in relation to paragraph (5) of the commentary to draft conclusion 17, the first sentence of paragraph (3) should be altered to: "Draft conclusion 18 is without prejudice to the invocation of such circumstances by international organizations."

Paragraph (3), as amended, was adopted.

*Commentary to draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*))*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Sir Michael Wood said that he had doubts about the content of the third sentence of paragraph (2); moreover, the point it made was highly theoretical. He would prefer the sentence to be deleted in its entirety.

Mr. Park suggested that, in the fourth sentence, the words "under international law" should be changed to "by State practice and jurisprudence", to avoid any tautology.

Mr. Murphy suggested that, in the second sentence, the words "an obligation on States to cooperate" should be altered to "that States shall cooperate". In the fourth sentence, the words "of the adoption of its articles on the law of treaties" should be inserted after "at the time", for clarity. The sixth sentence of the paragraph referred to the Commission's draft articles on the protection of persons in the event of disasters; as the Commission had not discussed *jus cogens* in those draft articles, he suggested that the sentence should be redrafted or, which might be simpler, deleted. In the International Court of Justice cases cited, the Court had not directly discussed *jus cogens*. In order to avoid overstating the Court's view, he suggested deleting the words "norms that are widely cited as peremptory, namely the" from the seventh sentence, altering the word "breach" to "breaches of such obligations" in the eighth sentence, and deleting the words "a norm widely accepted as having peremptory character" from the ninth sentence. The cases, which all referred to cooperation among States, would still be mentioned but the context would be clarified by such changes.

Mr. Jalloh said that, in the interests of time, he wished to urge members to submit stylistic changes directly to the Secretariat. He was opposed to Sir Michael Wood's suggestion to delete the third sentence of the paragraph as it helped to explain the nature of the obligation to cooperate covered by draft conclusion 19 (1), which was considered in more detail later in the commentary. Some of the suggestions made by Mr. Murphy would serve to undermine the authority of the text, in particular with regard to the obligation to cooperate. In that regard, he would not, for example, be in favour of the deletion of references to the idea that the right to self-determination was peremptory in character.

Mr. Tladi (Special Rapporteur) said that the proposition in the third sentence of the paragraph was true; however, he could accept its deletion in the interests of making progress. Likewise, he would not oppose the deletion of the sixth sentence, despite the fact that retaining it would be preferable. With regard to Mr. Murphy's suggestions concerning the seventh, eighth and ninth sentences, all of which referred to cases before the International Court of Justice, he agreed with Mr. Jalloh. He did not consider that the text misrepresented the views of the Court. In particular, instead of deleting any part of the seventh sentence, he suggested that reference should be made to the non-exhaustive list of peremptory norms of general international law (*jus cogens*) drawn up by the Commission, which was annexed to draft conclusion 23. Such a compromise would be acceptable.

The Chair suggested that the paragraph should be left in abeyance pending informal consultations to find a solution agreeable to all.

It was so decided.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Nolte said that, for the sake of clarity, in the sixth sentence, the words "institutionalized measures" should be changed to "measures under institutionalized cooperation mechanisms" and that similarly, in the seventh sentence, the words "including through a group of States acting together" should be altered to "including through *ad hoc* cooperative arrangements by a group of States acting together".

Mr. Zagaynov suggested that, in the seventh sentence, the words "non-institutionalized mechanisms" should be changed to "non-institutionalized cooperation" and the rest of the sentence deleted, in order to reflect the wording of article 41 (2) of the articles on responsibility of States for internationally wrongful acts.

Mr. Murphy said that the Commission again seemed to be overstating the views of the International Court of Justice in the various cases cited. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court had not addressed the issue as a breach of a *jus cogens* norm, as suggested in paragraph (4), but had instead discussed *erga omnes* obligations. In the case of the African Union, the claim made did not reflect the exact wording of the Union's Constitutive Act and might be misunderstood.

The Chair said that the Commission could take the liberty of using its own words in the text of the commentary; by providing exact references in the footnotes, it gave the reader the opportunity to consult the original sources.

Mr. Tladi (Special Rapporteur) said that he could agree to the amendments suggested by Mr. Nolte and the replacement of the phrase "non-institutionalized mechanisms" with "non-institutionalized cooperation", as proposed by Mr. Zagaynov. However, with regard to the issues raised by Mr. Murphy in regard to the examples concerning the African Union and the International Court of Justice, it should be clear that the Commission was drawing a logical connection; he therefore recommended that the text in question should be left unaltered.

Paragraph (4) was adopted with the amendments accepted by the Special Rapporteur.

Paragraph (5)

Mr. Park said that, in the fourth sentence, the word "principle" should be deleted, as the responsibility to protect was not a principle.

Mr. Nolte said that, in the fourth sentence, the whole phrase "which could be seen as an application of the responsibility to protect principle" should be deleted, as the reference was unnecessary and the proposition in the sentence more general than even a broad interpretation of the responsibility to protect would permit. The third sentence should either be deleted or, preferably, amended to clarify the distinction in legal personality, and consequently in capacity to exercise discretion, of an international organization and its members. He suggested wording to the effect "a duty on the members of that international organization to act with a view to the organization exercising that discretion" could be used, so as to clarify that, in such a case, discretion would be exercised directly by the international organization but on the instruction of its members.

Mr. Grossman Guiloff said that he agreed with Mr. Nolte's suggestion concerning the exercise of discretion. The text should maintain a clear distinction between the actions of States and those of international organizations.

Mr. Murphy suggested that the transition between paragraphs (4) and (5) would be clearer if, in the first sentence, the words "of States" were inserted after "obligation" and the words "cooperation with" after "consequences for".

Mr. Cissé said that the principle of the responsibility to protect had been recognized as such in General Assembly resolutions.

Mr. Tladi (Special Rapporteur) said that it would be simpler to delete the entire reference to the responsibility to protect. With regard to the third sentence, he agreed with the reasoning behind Mr. Nolte's comments and would also prefer to retain the sentence, amended to the effect suggested. He could accept Mr. Murphy's suggested changes to the first sentence of the paragraph.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Huang said that the citation of the *Wall* advisory opinion was problematic: while he had no objection to classing the right to self-determination as a *jus cogens* norm, the Court had reached its conclusion based on the *erga omnes* nature of self-determination. He therefore suggested either changing the words "having peremptory character" to "*erga omnes*" or deleting the entire seventh sentence, including footnote 72.

Mr. Tladi (Special Rapporteur) said that, while he agreed with Mr. Huang's assessment of the Court's reasoning, the sentence in question did not attribute the description of the right to self-determination as a norm of *jus cogens* to the Court. He would prefer to leave the paragraph unaltered.

Paragraph (7) was adopted.

The meeting rose at 1.05 p.m.