

Provisional

For participants only

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International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3504th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 7 August 2019, at 3 p.m.

Contents

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)

Chapter VI. Protection of the environment in relation to armed conflicts

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Present:

Chair: Mr. Šturma
Members: 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. Saboia
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.2.

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

Paragraph (2)

Mr. Tladi (Special Rapporteur) said that, following some discussion, a consensus had been reached about the paragraph. In the second sentence, the words “an obligation on States to” should be replaced with “that States shall”. In the fourth sentence, the words “of the adoption of its articles on the law of treaties” should be inserted after “Although at the time”, and the word “encapsulated” should be replaced with “expressed”. In the sixth sentence, the words “albeit just” should be added after “obligation”. In the seventh sentence, the words “norms that are widely cited as peremptory, namely the” should be deleted, and the words “norms that are widely cited as peremptory” should be inserted at the end of the sentence, after the footnote 56 call-out. Lastly, in the ninth sentence, the footnote 58 call-out should be placed after the word “self-determination”.

Sir Michael Wood said that, as he had explained at the previous meeting (A/CN.4/SR.3503), he disagreed with the third sentence.

Mr. Vázquez-Bermúdez said that one solution might be to replace, in the third sentence, the words “flows from” with “builds upon”.

Mr. Jalloh said that, while he was happy with the sentence as it stood, he would be willing to accept Mr. Vázquez-Bermúdez’s proposal in the spirit of compromise.

Sir Michael Wood said that the proposal was a good compromise. In the light of the proposed changes to the seventh sentence, it would be appropriate for the ninth sentence to end with the word “self-determination”.

Paragraph (2), as amended, 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 (2)

Mr. Tladi (Special Rapporteur) said that that the reference to the International Court of Justice should be removed.

Paragraph (2) was adopted on that understanding.

Paragraph (4)

Mr. Tladi (Special Rapporteur) said that, in the last sentence, the words “the rule in” should be deleted. A new footnote should be inserted at the very end of the paragraph, which would essentially reproduce the content of the current footnotes to paragraph (5), except for the references to the literature, and include references to the differing views of States. In that latter connection, the text of the footnote would be finalized by the Secretariat with input from Mr. Zagaynov.

Paragraph (4), as amended, was adopted on that understanding.

Paragraph (5)

Paragraph (5) was deleted.

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

Paragraph (8)

Mr. Zagaynov proposed that the first sentence should be redrafted to read: “While the obligation of non-recognition is settled, this duty is not to be implemented to the detriment of the affected population and deprive it of any advantages derived from international cooperation.” The aim of the proposal was to reflect more closely the language used by the International Court of Justice in the advisory opinion cited in the paragraph, namely the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

Mr. Nolte said that, if the language of the proposal was taken from that advisory opinion, quotation marks should be used.

Mr. Zagaynov said that the words “of any advantages derived from international cooperation” were taken from paragraph 125 of the advisory opinion and could, if deemed appropriate, be placed in quotation marks.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Nolte, supported by **Mr. Murphy**, **Mr. Park** and **Mr. Huang**, said that what followed the footnote 77 call-out, which dealt with a proposal by the Special Rapporteur that had not been accepted by the Commission, was not an essential part of the paragraph and should be deleted.

Ms. Lehto said that she wished to recall that, in his statement ([A/CN.4/SR.3472](#)), the Chair of the Drafting Committee had stated that “the Committee had agreed to retain [the word ‘serious’] on the understanding that the contrary view would be highlighted in the commentaries”.

Mr. Tladi (Special Rapporteur) said that, in view of the tenor of the discussions that had taken place in the Drafting Committee, he strongly disagreed with the proposal to delete what followed the footnote 77 call-out.

Mr. Nolte proposed suspending consideration of the paragraph to give members time to agree on a reformulation of the sentences in question.

Paragraph (9) was left in abeyance.

Paragraph (10)

Mr. Nolte proposed that, in the second sentence, the word “serious” should be inserted before “breach”, and that, in the third sentence, the words “for example” should be deleted.

Mr. Tladi (Special Rapporteur), supported by **Sir Michael Wood**, said that the second sentence also covered non-serious breaches and should therefore be left as it stood.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Nolte said that, for the sake of clarity, the third sentence should be redrafted to read: “Moreover, according to articles 41 and 42 of the articles on the responsibility of international organizations, the duties in draft conclusion 19 apply to both States and international organizations.”

Mr. Murphy said that his preference would be to recast the first sentence to read: “As with draft conclusions 17 and 18, draft conclusion 19 is without prejudice to the application of the duties in draft conclusion 19 to international organizations.” A footnote

reference to articles 41 and 42 of the articles on the responsibility of international organizations could then be added, and the remainder of the paragraph could be deleted.

Mr. Tladi (Special Rapporteur) said that he could agree to Mr. Murphy's proposal, on the understanding that the paragraph would be revisited at the second-reading stage in order to take into account any views expressed by States.

Paragraph (1), as amended, was adopted on that understanding.

Commentary to draft conclusion 20 (Interpretation and application consistent with peremptory norms of general international law (jus cogens))

Paragraph (1)

Sir Michael Wood said that, in the first sentence, the word "to" should be replaced with "in the case of". The last sentence should be redrafted to read: "The rule in draft conclusion 20 applies as part of the process of interpretation under applicable rules of interpretation."

Paragraph (1), as amended, was adopted.

Paragraph (2)

Sir Michael Wood said that, for the sake of accuracy, in the second sentence, the word "interpreted" should be replaced with "applied".

Mr. Nolte said that, in the last sentence, the word "may" should be used in place of "should".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Nolte said that, in the last sentence, the words "all subjects" were too vague and should be replaced with "primarily States and international organizations".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Murphy said that the last sentence was potentially misleading and should be redrafted to read: "The Court itself did not address such arguments."

Mr. Nolte said that, to make the first sentence more comprehensive, the words "and application" should be inserted after "interpretation". He proposed the addition, at the end of footnote 84, of a reference to conclusion 42 of the report of the Study Group on fragmentation of international law. He would submit a specific language proposal in that regard to the Secretariat.

Sir Michael Wood said that the reference, in footnote 85, to a statement made by the Islamic Republic of Iran during a meeting of the Security Council should be deleted or, failing that, expanded on to give a fuller account of the meeting, in which other States had expressed different views.

Mr. Tladi (Special Rapporteur) said that he was happy to agree to Mr. Nolte's proposal to insert the words "and application" after "interpretation" in the first sentence. However, it seemed that the sentence had been read incorrectly: it was the interpretative rule, not article 31 (3) (c), that also applied to the interpretation of all other rules of international law. Some text was missing from the quotation from paragraph (3) of the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts. The first half of the quote should read: "When there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory

norm of general international law, it is evident that such an obligation must prevail.” He disagreed with Mr. Murphy: the final sentence was sufficiently nuanced and took into account the fact that the Court had not addressed the argument relating to peremptory norms of general international law (*jus cogens*). In the interests of time, however, he would agree to delete that sentence, on the condition that the earlier references to the arguments of Iran were also deleted, since maintaining those arguments alone might suggest that the Court had not said anything at all on the matter. He proposed that the entire second half of the paragraph, from the sentence that began “Similar to this statement by the Commission”, should be deleted.

Ms. Lehto said that it would be a pity to delete the entire second half of the paragraph. Perhaps the concerns of those members who had been critical of the final sentence would be allayed if the final clause, which began “a norm which the Commission has described”, was deleted or moved to a footnote.

Mr. Murphy said that he was not advocating the deletion of the entire second half of the paragraph. The problem with the final sentence was that in its judgment in the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*, the Court was not interpreting the 1955 Treaty of Amity, Economic Relations and Consular Rights in relation to a peremptory rule of international law or even rules on the use of force; it was interpreting a specific provision of the Treaty that called for the possibility of an exception based on essential security interests. It was purely an issue of treaty interpretation, not a scenario involving a conflict between two rules of international law. The sentence could be perceived as a misunderstanding on the part of the Commission of the way in which the Court had interpreted the Treaty. Deleting the final clause would not change that.

Mr. Park said that the content of the last clause of the final sentence was covered in paragraph (8) of the commentary to draft conclusion 5. The whole final sentence should be deleted.

Sir Michael Wood said that he appreciated the Special Rapporteur’s willingness to delete the entire second half of the paragraph. Doing so would resolve his problem with footnote 85.

The Chair said he took it that the Commission agreed to delete the second half of the paragraph, from the sentence beginning “Similar to this statement by the Commission” onward, as proposed by the Special Rapporteur.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Vázquez-Bermúdez said that the words “a general principle of law” should be inserted after “customary international law” in the list enumerated at the end of the first sentence.

Paragraph (7), as amended, was adopted.

Part Four (General provisions)

Commentary to draft conclusion 22 (Without prejudice to consequences that specific peremptory norms of general international law (jus cogens) may otherwise entail)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Mr. Murase said that he wished to propose the insertion of a new paragraph (2 *bis*) to read: “The present draft conclusions do not deal with the issue regarding the consequences arising from a possible conflict or collision between peremptory norms (e.g. the principle of non-use of force and the right of self-determination).” The issue of the

collision of *jus cogens* norms had become a point of interest in academic circles; a footnote could be included referencing the work of João Christófolo in that connection.

Mr. Tladi (Special Rapporteur) said that he welcomed Mr. Murase's proposal. However, he would amend the paragraph to read: "The present draft conclusions do not deal with issues arising from a conflict between peremptory norms of general international law (*jus cogens*).” He did not think it was necessary to include the examples provided in parentheses.

Mr. Petrič said that Mr. Murase's proposal, as amended by the Special Rapporteur, was a valuable addition, which he strongly supported.

Mr. Nolte said that he also supported including a shortened version of Mr. Murase's proposal, without the footnote, along the lines of the amended text proposed by the Special Rapporteur. The paragraph should read: "The present draft conclusions do not deal with the consequences arising from a conflict between peremptory norms.”

Mr. Murase said that another possible formulation was: "... the consequences arising from a possible conflict between peremptory norms”. He would strongly prefer to see the footnote included.

Mr. Park said that he was unsure whether it was appropriate to adopt the newly proposed paragraph. The Commission had decided not to include the principle of the non-use of force in the non-exhaustive list of norms contained in the annex to the draft conclusions. That was because no exceptions were permitted under *jus cogens* norms, but an exception could be made to the principle of the non-use of force in the event of the exercise of the right of self-determination. There was therefore not necessarily a conflict between the examples provided by Mr. Murase in parentheses.

The Chair said that the Special Rapporteur had proposed to delete the examples provided in parentheses.

Ms. Galvão Teles said that she supported the amendments made to Mr. Murase's proposal by the Special Rapporteur. The issue touched upon in the proposed paragraph was an important one and attention should be drawn to it. However, given that it had not been discussed thoroughly by the Commission, it should be mentioned only succinctly and in a neutral fashion. For that reason, it would not be appropriate to include a footnote.

Mr. Jalloh said that he agreed with Ms. Galvão Teles. He supported the proposal as amended by the Special Rapporteur.

Mr. Tladi (Special Rapporteur) said that the paragraph should be inserted with his proposed amendments. It would appear without the examples in parentheses and without the footnote.

The Chair said he took it that the Commission agreed to adopt the new paragraph (2 *bis*), as proposed by Mr. Murase and as amended by the Special Rapporteur.

It was so decided.

Paragraph (2 bis) was adopted.

Paragraph (3)

Mr. Nolte said that, at the end of the first sentence, "immunity and jurisdiction over national courts" should be amended to read "immunity and jurisdiction of national courts”.

Mr. Huang said that paragraph (3) addressed the issue of immunity, which was the main theme of another topic currently being considered by the Commission. It was his understanding that there had been a general feeling within the Drafting Committee that the Commission's consideration of the topic of peremptory norms of general international law (*jus cogens*) should not overlap with its consideration of the issue of immunity. He therefore proposed that paragraph (3) should be deleted.

Mr. Jalloh said that paragraph (3) was the result of a delicate compromise. He would propose that, in view of time constraints, the compromise should be left as it stood.

Mr. Tladi (Special Rapporteur) said that he wished to recall the genesis of paragraph (3). He had proposed two draft conclusions that had threatened to divide the Commission. At the outcome of the debate regarding those draft conclusions, he had committed to removing the texts proposed and to inserting a “without prejudice” clause, on the understanding that the issues would be raised in a non-prejudicial manner in the commentaries. Paragraph (3) did that. It described the issues in an impartial manner. It was only fair to adopt the paragraph and, in that way, leave the door open to the various views held in that regard both within the Commission and in the wider world.

Mr. Grossman Guiloff said that he wondered whether Mr. Huang’s concern could be addressed by moving the final sentence of paragraph (3) to the beginning of the text. For example, it could be inserted after the first sentence and amended to read: “This commentary will not address, however, the topics above.”

Sir Michael Wood said that he had some sympathy with Mr. Huang’s position. At the same time, he acknowledged that the Special Rapporteur had promised to draft such a paragraph. However, the Special Rapporteur had said that the paragraph would be drafted in a “non-prejudicial” manner. With that in mind, he wondered whether the Special Rapporteur would be willing to omit the second sentence, which was slightly prejudicial insofar as it dealt with very specific points that had given rise to different views. The first sentence, which simply indicated what the issues might be, and the third and fourth sentences could be retained. He hoped that Mr. Huang might be prepared to accept such a compromise.

Mr. Jalloh said that he supported Mr. Nolte’s proposed amendment but had doubts about the proposals put forward by Mr. Grossman Guiloff and Sir Michael Wood. In his view, the paragraph was non-prejudicial as it stood.

Mr. Murphy said that paragraph (3) reflected the Commission’s discussions in the plenary and in the Drafting Committee. It presented a neutral position. He agreed with Mr. Jalloh that the paragraph, as amended by Mr. Nolte, was acceptable.

Mr. Huang said that the Commission should never compromise the quality of its work in any circumstances, especially not because of time constraints. He fully agreed that it was appropriate to try to establish a balance. However, the sentence in question was completely new to everyone. It was therefore in line with the Commission’s normal working methods to discuss the content of the paragraph. He proposed that paragraph (3) should be held in abeyance pending informal consultations.

Mr. Tladi (Special Rapporteur) said that he did not think that the Commission should suspend consideration of the paragraph. A decision should be made.

Ms. Galvão Teles said that she too felt that it was important that the Commission should move forward with its work. She recognized that the Special Rapporteur had, in paragraph (3), addressed a very delicate matter. Sir Michael Wood’s proposal was the basis for a compromise.

Mr. Ruda Santolaria said that his preference was to maintain the text as presented, with the amendment proposed by Mr. Nolte.

Mr. Park said that he seconded Mr. Huang’s request for paragraph (3) to be held in abeyance.

The Chair said the Special Rapporteur clearly opposed suspending consideration of the paragraph. In normal circumstances, he would have granted the request for suspension, but time was running short. The proposal made by Sir Michael Wood and seconded by Ms. Galvão Teles seemed to him to be a possible compromise.

Mr. Huang said that everyone was aware that time was limited. However, his proposal was clear and reasonable. He had simply asked for a short suspension. If the Commission could not agree to that simple proposal, he would have to propose postponing consideration of the entire chapter. The Commission had spent almost three days considering the chapter, which suggested that it was simply not ready for consideration by the plenary.

The Chair said that he agreed to suspend consideration of the paragraph. However, if upon resuming consideration of the text no consensus had been reached, he would use his power to call a vote.

Paragraph (3) was left in abeyance.

Draft conclusion 23 (Non-exhaustive list)

Paragraph (1)

Paragraph (1) was adopted with minor drafting changes.

Paragraph (2)

Mr. Nolte said that, in the third-to-last sentence, the word “will” should be changed to “may”, as the Commission should avoid speculating about future peremptory norms of general international law (*jus cogens*).

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor drafting change.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

Paragraph (6) was adopted with a minor correction.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Sir Michael Wood said that, in the last sentence, the words “in contrast” should be replaced with the softer language “on the other hand”.

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (11)

Paragraphs (9) to (11) were adopted.

Paragraph (12)

Mr. Murphy proposed that the words “obligation to respect” should be inserted immediately before “right of self-determination” and that the phrase “referred to the right to self-determination” should be replaced with “referred just to the ‘principle of self-determination’ or ‘right to self-determination’”. All three formulations had been used by the Commission, as was explained in the footnote.

Mr. Nolte said that he supported the latter amendment proposed by Mr. Murphy; however, he would prefer to retain the formulation “right of self-determination” in the first instance. In addition, he proposed that the first sentence of footnote 116 should be moved to the end of the footnote, since the right of self-determination was not described as having a peremptory character in the source quoted in that first sentence.

Mr. Grossman Guiloff, supported by **Mr. Petrič**, said that he agreed with Mr. Nolte that the formulation “right of self-determination” should be the first to appear in the paragraph.

Sir Michael Wood said that if the first part of the paragraph was to remain as drafted, he would propose replacing the phrase “although it has at times referred to the right to self-determination” with “although it has at times used other wording”.

Mr. Jalloh said that the amendments proposed by Mr. Murphy were covered in footnote 116; therefore, he did not see the need to repeat the language in the body of paragraph (12). However, if the majority of members were in favour of doing so, he would support Mr. Murphy’s proposed changes, as amended by Mr. Nolte. He would not, however, be in favour of the insertion of the word “just”, as suggested by Mr. Murphy, which would seem to downplay an extremely important paragraph.

Mr. Grossman Guiloff proposed that the phrase “resorted to different formulations” should be inserted after the words “the Commission has” and that the rest of the sentence should be deleted. As pointed out by other members, the relevant terminology was provided in footnote 116.

Mr. Nolte said that he would not be opposed to the amendment proposed by Mr. Grossman Guiloff; however, if the paragraph was adopted with that amendment, he would reiterate his proposed amendment to footnote 116, namely, to move the first sentence to the end of the footnote, because the peremptory character of the right of self-determination was not described in the reference cited in that sentence.

Mr. Tladi (Special Rapporteur) said that all the formulations suggested, including the original version of the paragraph, were acceptable. As for footnote 116, paragraph (5) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts – the source cited in the first paragraph of footnote 116 – listed a number of peremptory norms. To his understanding, the obligation to respect the right of self-determination was described in the context as being one of those norms. He would prefer to retain the paragraph and the footnote as originally drafted.

Mr. Murphy said that perhaps footnote 116 began with the reference to paragraph (5) of the commentary to article 40 of the articles on State responsibility simply because that was the one that included the phrase that the Commission had opted for in draft conclusion 23: “right of self-determination”.

Paragraph (12) was adopted with a minor editorial amendment.

Paragraph (13)

Sir Michael Wood proposed the deletion of the last two sentences of the paragraph, as it would be very inappropriate for the Commission to say that the provision referred to therein was worth noting, when it had been very deliberately rejected on second reading

Mr. Zagaynov said that he agreed with the proposed deletion of the last two sentences. Furthermore, in order to adequately reflect the view expressed by a number of members during the plenary discussion of the draft conclusion, he proposed that the two deleted sentences should be replaced with a new sentence that would read: “In particular, the Commission had also referred to the important role of the Charter of the United Nations, especially those provisions of the Charter which set out the purposes and principles of the United Nations for the development of peremptory norms of general international law (*jus cogens*).”

Mr. Huang said that paragraph (13) was a crucial part of the commentary; it needed to be strengthened. He furthermore shared the concerns raised by Mr. Zagaynov. More generally, paragraph (13) and the document as a whole were too lengthy, especially when compared to other, well-received outcomes of the Commission’s work, such as the articles on diplomatic protection.

Ms. Lehto said that, in paragraph (13), the Special Rapporteur very consistently referred only to norms that had been considered or mentioned by the Commission previously. Regarding the proposed deletion of the last two sentences, she recalled that several members had stated in plenary meetings that the Commission should not exclude the possible emergence of environmentally-related peremptory norms in the future; she

would like that view to be reflected, perhaps in a way that ensured that the paragraph did not draw too much attention to draft article 19 of the draft articles on State responsibility.

Mr. Murphy proposed that, in the third sentence, the phrase “the Commission referred to, *inter alia*, the prohibition of piracy and the sovereign equality of States” should be amended to read “the Commission referred, *inter alia*, to the prohibition of piracy and to the principle of the sovereign equality of States”. He agreed with the proposed deletion of the last two sentences of the paragraph. If, however, the sentences were to be retained, he would suggest adding in the penultimate sentence, for the sake of clarity, the words “in 1976,” after the phrase “on first reading” and deleting the final clause beginning with the word “although”. He would also suggest that the last sentence should be replaced with the following sentences: “When read in conjunction with the commentary, that provision linked obligations ‘of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas’ with peremptory norms of general international law. That language, however, was deleted on second reading in 2001.”

Ms. Oral, supported by **Mr. Grossman Guiloff** and **Mr. Jalloh**, said that she supported the statement made by Ms. Lehto. She felt strongly that the last two sentences should not be deleted in their entirety and that there should be a reference to protection of the environment, which had been raised a number of times during the Commission’s discussions.

Paragraph (13) was left in abeyance.

The meeting was suspended at 4.50 p.m. and resumed at 5.15 p.m.

Draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (jus cogens)) (continued)

Paragraph (9) (continued)

Mr. Tladi (Special Rapporteur) said that, following consultations, he suggested that the third, fourth and fifth sentences should be deleted and replaced with a new sentence, to read “A view was expressed that the word ‘serious’ should be omitted from the text of draft conclusion 19, *inter alia*, since the duties of recognition and non-assistance were not onerous.”

Paragraph (9), as amended, was adopted.

Part Four (General provisions) (continued)

Commentary to draft conclusion 22 (Without prejudice to consequences that specific peremptory norms of general international law (jus cogens) may otherwise entail) (continued)

Paragraph (3) (continued)

Mr. Tladi (Special Rapporteur) suggested that, in the first sentence, the phrase “immunity and jurisdiction over national courts” should be amended to read “immunity and jurisdiction of national courts”. Following consultations, he said he further suggested that the second sentence should be deleted.

Mr. Murphy, supported by **Mr. Jalloh**, proposed that, in the third sentence, the word “questions” should be deleted.

Mr. Nolte said that, rather than delete the word “questions”, the latter might be changed to “consequences”.

Paragraph (3), as amended, was adopted.

*Draft conclusion 23 (Non-exhaustive list) (continued)**Paragraph (13) (continued)*

Mr. Tladi (Special Rapporteur) said that, the third sentence should be amended to read: “For example, in the commentary to draft article 50 of the draft articles on the law of treaties, the Commission referred, *inter alia*, to the prohibition of piracy and to the principle of the ‘sovereign equality of States’ – a fundamental principle under the Charter of the United Nations.” The sentence proposed earlier by Mr. Zagaynov would be inserted after the call-out for footnote 117. It would be followed by a reformulated version of Mr. Murase’s proposal, which would read: “The Commission had also referred to obligations of ‘essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or the seas’ as peremptory norms of general international law.” A sentence, based on Mr. Murphy’s proposal, would then be added. It would read: “This language, however, was not adopted on second reading in 2001.”

Mr. Nolte said that he wished to know whether the sentence proposed by Mr. Murphy concerned draft article 19, which had been dropped, or the reference to pollution and the protection of the environment.

Mr. Tladi (Special Rapporteur) said that, with respect to the language in the footnote, Mr. Murphy’s proposal had been to the effect that language already contained in footnote 119 should be moved to footnote 118.

Mr. Nolte said that, if the statement “this language was not adopted on second reading” related to the protection of the environment, he was unsure whether it was justified.

Mr. Murase said that draft article 19, which had been formulated by Special Rapporteur Ago in 1976, was very important in that it introduced the *jus cogens* concept in the context of State responsibility. The sentence which he had proposed was therefore correct. However, the term “language” might not be completely accurate. Although draft article 19 had not been adopted on second reading, the concept of an international crime was still of great significance because, in 1976, the prohibition of international crimes was considered to be analogous to a *jus cogens* norm and the commentary to draft article 19 actually contained a reference to *jus cogens*. For that reason, the Commission should keep the sentence which he had proposed. However, as everyone knew that the draft article had not been retained on second reading, he wondered if it was necessary to state that fact in a footnote.

Sir Michael Wood, supported by **Mr. Jalloh** and **Ms. Lehto**, suggested that the statement that draft article 19 had not been retained on second reading should be placed in a footnote, which would read “Draft article 19, read in conjunction with the commentary, was not retained on second reading.”, in order to indicate that the Commission was aware of that fact.

Ms. Oral said that she agreed with Mr. Murase. She would not be comfortable with relegating factual text to a footnote.

Mr. Murphy said that he felt strongly that, if the text was to contain a proposition that the Commission had linked the protection of the environment with *jus cogens*, the text must make it clear that that linkage had not been retained at the final stage of the topic.

Mr. Vázquez-Bermúdez said that Mr. Nolte had a very valid point. The solution proposed by Sir Michael Wood was the best one.

Mr. Nolte, supported by **Ms. Oral**, said that the abandonment of draft article 19 and the fact that the Commission had expressed an opinion on the protection of the environment in connection with that draft article were two entirely different things. It should not be inferred that, because draft article 19 had not been retained, the particular formulation under consideration had also been rejected. That was why the reference to environmental protection should be kept in the text and the context should be explained in the footnote.

Mr. Tladi (Special Rapporteur) said that the footnote would read: “Draft article 19 of the draft articles on State responsibility ... read in conjunction with paragraphs (17) and

(18) of the commentary to draft article 19. Draft article 19 was not retained on second reading.” The necessary citation would be inserted after the words “State responsibility”.

Mr. Murphy said that, by including Mr. Murase’s proposed text, the paragraph erroneously suggested that, at the second reading stage of the draft articles on the law of treaties, the Commission had adopted language concerning preservation of the human environment. Moreover, contrary to the Commission’s normal practice, it cited a draft text that had not been included in the outcome of its work, therefore making it necessary to rely on a footnote to explain where it came from.

Mr. Tladi (Special Rapporteur) said that he suggested that the sentence in question should be recast to read: “In the draft articles on State responsibility adopted on first reading the Commission had also referred to obligations of ‘essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or the seas’ as peremptory norms of general international law (*jus cogens*).”

Paragraph (13), as amended, was adopted.

Paragraph (14)

Sir Michael Wood said that the words “of appearance” should be deleted.

Paragraph (14), as amended, was adopted.

The portion of chapter V contained in document [A/CN.4/L.929/Add.2](#), as a whole, as amended, was adopted.

The Chair invited the Commission to resume its consideration of the portion of chapter V of the report contained in document [A/CN.4/L.929](#).

Paragraph 8

Paragraph 8 was adopted, subject to its completion by the Secretariat.

Paragraph 9

The Chair said that the phrase “and draft annex” would be deleted.

Mr. Murphy said that he wished to know if the date at the end of the paragraph would be aligned with that in paragraph 11 of document [A/CN.4/L.930](#). If so, it should be 1 December 2020.

With that amendment of the date and the deletion of the phrase “and draft annex”, paragraph 9 was adopted.

Paragraph 10

Paragraph 10 was adopted.

The portion of chapter V of the report contained in document [A/CN.4/L.929](#), as a whole, as amended, was adopted.

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

Mr. Tladi (Special Rapporteur) said that he wished to express his sincere gratitude to the Commission for entrusting him with a very sensitive topic. He thanked all the members for their contributions in both the current quinquennium and the preceding quinquennium to what was truly a collective work which reflected their many different views. The draft conclusions were all the stronger for having formed the subject of intense debate. He was particularly grateful to the members of the Drafting Committee, especially the current and previous Chairs, for all their hard work. He thanked the members of the Secretariat, in particular the Codification Division, and all the assistants who had helped him ever since the topic had first been considered for inclusion in the long-term programme of work. He also thanked the wide circle of people who had assisted him on a voluntary basis by sending him material, including foreign language material, for what had become a pretty good text which, he trusted, would be well received.

*Chapter VI. Protection of the environment in relation to armed conflicts
(A/CN.4/L.930 and A/CN.4/L/930/Add.1)*

The Chair invited the Commission to consider chapter VI of the draft report beginning with the portion contained in document [A/CN.4/L.930](#).

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

B. Consideration of the topic at the present session

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

Paragraphs 10 to 12

Paragraphs 10 to 12 were left in abeyance.

C. Text of the draft principles on protection of the environment in relation to armed conflict adopted by the Commission on first reading

1. Text of the draft principles

Paragraph 13

Paragraph 13 was adopted.

The Chair invited the Commission to pursue its consideration of chapter VI and to examine the portion of the report contained in document [A/CN.4/L.930/Add.1](#).

C. Text of the draft principles on protection of the environment in relation to armed conflict adopted by the Commission on first reading

1. Text of the draft principles

Paragraph 1

Paragraph 1 was adopted.

2. Text of the draft principles and commentaries thereto

Paragraph 1

Ms. Lehto (Special Rapporteur) said that she wished to recall that the commentaries to the introduction and to draft principles 1, 2, 4, 13, 14, 15, 16 and 17 had been provisionally adopted in 2016. The commentary to draft principles 3, 5, 6, 7, 23, 24, 25, 27 and 28 had been provisionally adopted in 2018. While members might have comments on those parts of the commentary, no major revision should be required. She had made a few minor editorial adjustments and updated the references to different parts to reflect the new structure.

Paragraph 1 was adopted.

*Protection of the environment in relation to armed conflicts**Part One**Introduction*

Mr. Huang said that the heading “Commentary” should be inserted under the heading “Introduction”, in accordance with the Commission’s usual practice.

The Chair said that the Secretariat would ensure that that heading would be inserted.

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Sir Michael Wood said that he found the reasoning of the paragraph, in particular the last sentence thereof, hard to follow. He wondered whether the intersection of two areas of law was really the reason that the principles were cast normatively at a general level of abstraction.

Mr. Nolte said that he agreed with Sir Michael Wood. The fact that two areas of law intersected did not suggest the need for any particular level of abstraction. While some principles were very specific, others were more general. The Commission should not engage in an explanation of what was meant by “principles”. He therefore proposed the deletion of the paragraph.

Mr. Murphy said that he proposed retaining the first sentence and moving it to the start of paragraph (4).

Ms. Lehto (Special Rapporteur) said that the paragraph formed part of the commentary which had been adopted in 2016 and had also appeared in the statement of the Chair of the Drafting Committee for the topic in 2015 ([A/CN.4/SR.3281](#)). She would not, however, insist on keeping it.

Ms. Escobar Hernández said that, in 2016, the purpose of the paragraph had been to indicate, first, that the provisions were formulated as draft principles and that, when those principles had been adopted, account had been taken of the intersection between international law relating to the environment and the law of armed conflict. It would be wrong to abandon the idea of an intersection since it had been the guiding thread of work on the topic. Perhaps it would be possible to say: “The provisions have been cast as ‘draft principles’ in which account has been taken of the intersection between international law related to the environment and the law of armed conflict.” The rest of the paragraph would of course disappear.

Mr. Grossman Guiloff said that Ms. Escobar Hernández had a point but that Mr. Murphy’s proposal to make the last sentence of paragraph (3) the first sentence of paragraph (4) largely solved the problem.

The meeting rose at 6.05 p.m.