

Provisional

For participants only

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International Law Commission
Seventy-third session (second part)

Provisional summary record of the 3595th meeting

Held at the Palais des Nations, Geneva, on Friday, 22 July 2022, at 3 p.m.

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Present:

Chair: Sir Michael Wood (First Vice-Chair)

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

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

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

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

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

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

2. *Text of the draft conclusions and commentaries thereto*

Paragraph 1

Paragraph 1 was adopted.

Mr. Huang said that the topic “Peremptory norms of general international law (*jus cogens*)” was one of the most important topics on the Commission’s agenda. He was unsure whether the commentary which had been submitted was ripe for adoption on second reading in a plenary meeting, because it seemed unlikely that the Commission would achieve consensus on some important and controversial issues. That situation might lead to lengthy debates. He therefore suggested that the Commission should postpone its deliberation of the commentary, that the Special Rapporteur should hold informal consultations in order to arrive at a compromise text and that, if necessary, the adoption of the commentary on second reading should be postponed until the seventy-fourth session. Consensus on the content of the report was more important than speed.

Commentary to draft conclusion 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Tladi (Special Rapporteur) said that, in response to a proposal from Mr. Forteau, he wished to suggest inserting the word “necessarily” before “imply” in the final sentence.

Mr. Jalloh said that he supported that proposal.

Mr. Zagaynov said that he wished to know why it was necessary to amend commentary that reflected agreement reached at the Commission’s seventy-first session.

Mr. Murphy said that the word “imply” already captured the idea expressed in the last sentence of the paragraph. It would be better to retain the first-reading text.

Mr. Tladi (Special Rapporteur) said that he could agree to keep the text as adopted on first reading.

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

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Tladi (Special Rapporteur) said that the last sentence should be deleted because the word “determine” was not used in that context in the draft conclusions themselves.

Mr. Forteau said that the other language versions of paragraph (5) should be adapted to reflect the terms actually used in the draft conclusions in a particular language, not the terms used in the English text.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

The Chair, speaking as a member of the Commission, said that, in the second sentence, the word “phrase” should be altered to “term” in both places where it appeared, as a phrase was usually a part of a sentence that included a verb.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Mr. Valencia-Ospina said that, for the sake of consistency, the word “phrase” should be changed to “term”.

Paragraph (8), as amended, was adopted.

Paragraph (9)

The Chair, speaking as a member of the Commission, said that he found the first sentence extraordinary. Surely the word “norm” was used because it was drawn from the Vienna Convention on the Law of Treaties?

Mr. Tladi (Special Rapporteur) said he recalled that, after an earlier discussion of the same point within the Commission, it had been agreed to give the reason stated in that sentence for employing that word.

Paragraph (9) was adopted.

Paragraph (10)

Mr. Park said that the reference in the third and fifth sentences to “entities other than States, in particular international organizations” was puzzling. He wished to know what precisely was meant by “entities other than States”. Was it intended to encompass non-governmental organizations, private individuals and non-State armed groups? The term “non-State actors” appeared three times in the text of the commentary, but in each case, it was made clear that it referred solely to international organizations. He therefore proposed that the third sentence should be changed to read “Nonetheless, there are instances in which the draft conclusions apply also to international organizations”, and the fifth sentence should read “When a particular draft conclusion applies to international organizations, the commentaries will make this clear”. The commentary should be drafted with sufficient precision to prevent any possibility of misinterpretation.

Mr. Ouazzani Chahdi said that the phrase “as the primary subjects of international law” should be clarified to reflect the fact that only two subjects of international law were at issue, namely, States and international organizations.

Mr. Murphy said that he supported Mr. Park’s proposal. The references to entities other than States and international organizations could create confusion and give the impression that the scope of the draft conclusions was broader than it actually was. The fourth sentence, “However ... the draft conclusions refer mainly to States”, should be deleted because it was inconsistent with the overall drift of the paragraph, which began by stating that the draft conclusions applied principally to States and therefore referred in the main to “States”, then noted that there were cases where they also applied to international organizations, and concluded by saying that the commentaries would make such cases clear.

Mr. Tladi (Special Rapporteur) said that he would prefer to retain the phrase “as the primary subjects of international law” as drafted because it was important to capture the fact that there were other subjects of international law. The references to entities other than States had been included in the paragraph to reflect the range of comments made by States; while some had focused primarily on international organizations, others had referred to other entities. He did not, however, object to Mr. Park’s proposal to delete the references to other entities. The Commission should decide whether or not the references to other entities in the

commentary to other draft conclusions should be limited to international organizations, as was already the case in the commentary to draft conclusion 17. He had no objection to Mr. Murphy's proposal to delete the fourth sentence of the paragraph.

Mr. Jalloh said that he supported Mr. Murphy's proposal to delete the fourth sentence. He also supported the proposal to keep the focus of the commentary on international organizations, although the Commission should generally try to be responsive to comments made by States.

The Chair said he took it that the Commission agreed to the amendments proposed by Mr. Park and Mr. Murphy.

Paragraph (10), as amended, was adopted.

Commentary to draft conclusion 2 (Nature of peremptory norms of general international law (jus cogens))

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nguyen, supported by **Mr. Petrič**, said that, in the fifth sentence, beginning "The word 'protect' is meant to convey", the words "a specific peremptory norm" should be followed by the phrase "of general international law".

Mr. Murphy, supported by **Mr. Petrič**, said that, in the same sentence, the phrase "the effect of the peremptory norm on the value(s)" should be deleted, as the meaning of the sentence was conveyed more clearly without it. In addition, the words "that the norms seek to protect" should be added after the phrase "particular values shared by the international community as a whole" at the end of the following sentence.

Mr. Tladi (Special Rapporteur) said that he did not object to Mr. Nguyen's proposal to refer to a "specific peremptory norm of general international law", which was consistent with the formulation used elsewhere in the draft conclusions and commentaries. Nor did he object to either of Mr. Murphy's proposals. The phrase "the effect of the peremptory norm on the value(s)" had been included to reflect the emphasis placed on that effect in the Drafting Committee, but its deletion would not change the meaning of the sentence.

The Chair said he took it that the Commission agreed to the amendments proposed by Mr. Nguyen and Mr. Murphy.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Jalloh said that the judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* – a case discussed in paragraph (4) – was expected that afternoon. It might be helpful to include a reference to that judgment in the existing footnote.

Mr. Murphy said that such references should be subject to review by the Commission, as members could have differing views on whether a particular judgment supported a particular proposition.

Mr. Tladi (Special Rapporteur) said he agreed with Mr. Murphy; the addition of such a reference was a substantive point. Once prepared, the reference should be reviewed by the Commission.

The Chair said he took it that the Commission wished to suspend consideration of paragraph (4) pending preparation of the reference to the judgment in question.

It was so decided.

Paragraph (5)

Mr. Tladi (Special Rapporteur) said that, in the sentence beginning “Similarly, in the *Arancibia Clavel* case”, the word “and” should be inserted between the words “values” and “interests”.

Mr. Murphy said that ellipsis points should be included at the end of the quotation taken from the decision of the United States Court of Appeals for the Ninth Circuit in *Siderman de Blake v. Argentina* to indicate that language had been omitted. The quotation – in which the Court itself quoted from an academic article – was an important one because later references in the commentaries to other decisions of United States courts built on it.

The Chair, speaking as a member of the Commission, said that unless there was a special reason to draw attention to the fact that language had been omitted from the quotation, it was reasonable to leave the paragraph as it was.

Mr. Tladi (Special Rapporteur) said that the issue had already been addressed by including in the footnote a reference to the article from which the Court had quoted.

The Chair said he took it that the Commission agreed to the amendment proposed by Mr. Tladi regarding the insertion of the word “and”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Jalloh said that the following language should be added to the end of the first sentence, to explain why the paragraph addressed scholarly writings: “which can serve as a subsidiary means for the determination of rules of international law.” In addition, a footnote citing Article 38 (1) (d) of the Statute of the International Court of Justice and referring to the Commission’s topic “Subsidiary means for the determination of rules of international law” could be included.

Mr. Park said that he did not support Mr. Jalloh’s proposal. The sentence should not include a reference to subsidiary means.

The Chair, speaking as a member of the Commission, said that he agreed with Mr. Park. While scholarly writings could constitute subsidiary means, he was not certain that they functioned as such in the context at hand.

Mr. Tladi (Special Rapporteur) said that he did not agree with the Chair’s reasoning. In the context at hand, the writings at issue did qualify as subsidiary means.

Mr. Jalloh said that he did not agree with the Chair’s reasoning either, but would not insist on his proposal.

Paragraph (6) was adopted.

Paragraph (7)

Mr. Park said that paragraph (7) contained text that had not appeared in the commentaries adopted on first reading. He would be in favour of deleting the paragraph in its entirety. The statement made in the second sentence, namely that the fundamental values referred to in draft conclusion 2 were “not static” and would “change with time”, was rather subjective. In addition, it was controversial to claim that the values often associated with *jus cogens* were “generally humanitarian in nature”. Some such norms – for example the protection of State sovereignty or the equality of sovereign rights – were not directly related to humanitarian values.

Mr. Jalloh said that he was in favour of retaining the new paragraph. The second sentence merely stated a fact: it was incontestable that the fundamental values referred to in draft conclusion 2 were not static and would change with time. The fundamental values of the 1960s were not the same as those of 2022, which, in turn, would no doubt differ from

those of years to come. The third sentence, as it stood, did not preclude the possibility that some of the values underlying peremptory norms might not be humanitarian in nature.

Mr. Murphy said that he tended to agree with Mr. Park. The assertion made in the second sentence was somewhat risky. He certainly hoped that such norms as the prohibition of aggression and the prohibition of genocide, which were included in the non-exhaustive list annexed to the draft conclusions, reflected and protected values that were static and would not change over time. In the 1960s, few norms had been recognized as having a peremptory status, since the concept itself had yet to flourish. Once a peremptory norm emerged, however, it tended to be viewed as fundamental in nature. That said, he could accept that new values might be added. Moreover, a peremptory norm could be modified by a subsequent norm of general international law having the same character.

Ms. Oral said that she was in favour of retaining the paragraph. While not all fundamental values would change with time, some would. To make that point more clearly, the second sentence could be amended to read: "These values evolve and may change with time." With regard to the third sentence, the statement that the values often associated with *jus cogens* were "generally humanitarian in nature" was factually accurate.

Ms. Lehto said that the paragraph should be retained. While the annex to the draft conclusions contained a non-exhaustive list of norms that the Commission had previously referred to as having a peremptory status, paragraph (7) concerned the fundamental values that those norms reflected and protected. Concerning the second sentence, it was important to mention that the fundamental values in question were not static. However, the words "will change" could be replaced with "may evolve".

Mr. Hmoud said that the word "evolve" was apposite, as it captured a gradual process of change.

Mr. Cissé said that, in his view, the paragraph could be adopted without amendment, since it was easy to understand and clearly belonged in the commentary under consideration. The second and third sentences were merely statements of fact.

Mr. Jalloh said that, when the Commission had been debating which norms to include in the non-exhaustive list annexed to the draft conclusions, he had argued that the norms proposed for inclusion reflected the values of the 1960s and had wondered about the status of the prohibition of gender discrimination. In the future, gender equality might become a fundamental value of the kind referred to in draft conclusion 2. The key point was that changes in the status of peremptory norms were driven by changes in the values that they reflected and protected. In his view, Ms. Oral's proposal could work well. Change was in the very nature of values.

Mr. Ruda Santolaria said that he was in favour of retaining the paragraph. He proposed that, in the Spanish text, the words "will change with time" [*cambiarán con el tiempo*] in the second sentence should be replaced with "may change or evolve" [*pueden cambiar o evolucionar*]. That amendment would make the sentence clearer without affecting its substance. He agreed with the wording of the third sentence.

Mr. Vázquez-Bermúdez said that he too was in favour of retaining the paragraph. It was clear that the fundamental values in question were not absolutely immutable. At the same time, as Mr. Murphy had noted, they had an enduring quality. Indeed, a peremptory norm could be modified only by a subsequent norm of general international law having the same character, that is, by a subsequent norm that also protected and reflected the fundamental values of the time. He proposed that the second sentence should be amended to read: "These values are not necessarily static and may evolve over time." The third sentence was also important: the values often associated with *jus cogens* were generally – although not always – humanitarian in nature, but that situation, too, could evolve.

Mr. Petrič said that, while he agreed that changes in the fundamental values reflected and protected by peremptory norms occurred gradually, the passage of time alone was insufficient to bring about such changes. Changes in fundamental values formed part of a broader process of social development. For example, the doctrine of human rights had emerged from the tragedy of the Second World War. Similarly, the prohibition of racial discrimination had acquired peremptory status through a process of social change that had

culminated in decolonization. The second sentence could be amended to make that point explicit.

The meeting was suspended at 4.30 p.m. and resumed at 5.15 p.m.

Mr. Park said that, having listened to the views expressed by other members, he was not opposed to maintaining the paragraph. He agreed with the reformulation of the second sentence proposed by Mr. Vázquez-Bermúdez. However, the third sentence remained problematic. He suggested deleting the word “generally”, since the sentence already included the word “often”. He further suggested placing footnote marker 22 immediately after the words “humanitarian in nature”, since the corresponding footnote contained references of relevance to humanitarian values.

Mr. Zagaynov said that the Commission should avoid giving the impression that peremptory norms could change rapidly in view of changes in the fundamental values that they reflected and protected. With regard to the second sentence, he supported Ms. Lehto’s and Mr. Vázquez-Bermúdez’s proposals. He shared Mr. Park’s doubts regarding the third sentence and wondered whether it could be deleted entirely. In any case, the footnotes should be maintained and, if necessary, the corresponding footnote markers moved.

Mr. Grossman Guiloff said that, with regard to the second sentence, he supported Mr. Vázquez-Bermúdez’s proposal. As the Commission could not see into the future, the word “may” was preferable to “will”. In that connection, it was important to bear in mind not only that existing fundamental values could change but also that new fundamental values could be added. As for the third sentence, he had no objection to Mr. Park’s proposal that the word “generally” should be deleted. It was true that “generally” and “often” had different connotations.

Ms. Escobar Hernández said that she, too, was in favour of amending the second sentence along the lines proposed by Mr. Vázquez-Bermúdez. In view of Mr. Petrič’s comments, the words “in the light of social changes” [*a la luz de los cambios sociales*] could be inserted at the end of that sentence. She supported the third sentence as currently drafted.

Mr. Argüello Gómez said that the Commission was wading into complex philosophical and sociological matters. Many philosophers and sociologists would argue that fundamental values were not amenable to change; what changed were the norms that reflected and protected those values. The Commission should therefore focus on changes in the application of the norms in question.

Mr. Cissé, referring to the second sentence, said that it was somewhat redundant to state both that the fundamental values reflected and protected by peremptory norms were not static and that they could evolve. For greater simplicity, the sentence could be amended to read: “These values could evolve with time” [*Ces valeurs pourraient évoluer avec le temps*]. The use of the conditional might help to address some of the concerns expressed during the debate.

Mr. Tladi (Special Rapporteur) said that the amendment proposed by Ms. Lehto captured the essence of the debate and seemed to enjoy broad support; he hoped the paragraph could be adopted with no other substantive changes. He welcomed Mr. Park’s flexibility on retaining the paragraph but felt his concern regarding the third sentence to be misplaced: if read as a whole, it contained nothing to suggest that the values underlying *jus cogens* norms must always be humanitarian in nature. The two works referred to in footnote 22 made the point more fully. Viñuales, in particular, asserted that norms such as the prohibition on the use of force and the right to self-determination were based more on inter-State considerations than humanitarian values. Other members had noted that the terms “generally” and “often” were not interchangeable, with which he would agree. The former implied a more qualitative judgment than the latter. While he agreed with the substance of the comments made by Mr. Petrič and Ms. Escobar Hernández, he would prefer not to make any further changes to the text. In particular, he did not favour the inclusion of the word “necessarily” in the second sentence. It should be made clear, however, that the evolution of values occurred with the passage of time, rather than as a result of it. Various factors, such as social change, economic progress or technological advances, could bring about such developments.

Mr. Nguyen suggested that the second sentence could be amended to read: “These values are generally permanent but may evolve over time.” That, he felt, would reflect the nature of *jus cogens* more appropriately than the phrase “not necessarily static”.

Mr. Murphy said he understood that phrase to imply that, while individual values might remain the same, the set of values accepted as peremptory norms could change over time; however, he accepted that it might be read differently.

Mr. Jalloh expressed support for the Special Rapporteur’s stated preference.

The Chair, while expressing his personal view that certain values underpinning *jus cogens* norms would and should be eternal, said he took it that the Commission wished to adopt the paragraph with the second sentence amended to read: “These values are not static and may evolve over time.”

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

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

Mr. Jalloh suggested adding the words “a wide range of” before “other actors beyond States” in the last sentence of the paragraph.

Mr. Park said that his thoughts tended in the opposite direction: the last sentence of the paragraph, as drafted, seemed to represent a departure from the Commission’s previous position, as well as repeating, to some extent, material that appeared earlier in the same paragraph. Overall, the paragraph was a useful addition to the commentaries adopted on first reading, as it clarified the use of the expression “international community” in draft conclusion 2; however, the inclusion of a reference to “other actors” in the last sentence – especially given that, unlike in previous paragraphs, there was no specific mention of international organizations – left the door open to different interpretations of the text. He suggested combining the last and penultimate sentences of the paragraph to read: “However, in respect of the values underlying peremptory norms, a more inclusive sense of the ‘international community’ is relevant and may play an important role in the emergence of fundamental values.”

Mr. Nguyen said that international organizations constituted one subset of subjects of international law; there were other actors beyond States. He suggested that the words “but it includes other actors beyond States” should be altered to “but it includes international organizations and other non-State actors”.

The Chair, observing that the various proposals made appeared to cancel one another out, suggested that the text as drafted represented a reasonable and carefully crafted balance. He said that, if he heard no objections, he would take it that the Commission wished to adopt paragraph (9) as it stood.

Paragraph (9) was adopted with a minor editorial change to the English text.

Paragraphs (10) to (13)

Paragraphs (10) to (13) were adopted.

Paragraph (14)

Mr. Murphy suggested that the words “not having the same character” should be added at the end of the third sentence and the words “of a conflicting treaty rule” at the end of the fourth sentence.

Ms. Lehto expressed support for the essence of those suggestions but said that it might be better to omit the word “treaty” from the second of the two, so that it would also cover customary international law.

Mr. Tladi (Special Rapporteur), also expressing support for the two amendments proposed by Mr. Murphy, pointed out that the fourth sentence was clearly couched as an example, rather than a general statement; that being the case, referring specifically to “a conflicting treaty rule” should not prove problematic.

The Chair said he took it that the Commission agreed to the two amendments proposed by Mr. Murphy.

Paragraph (14), as amended, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

Paragraph (16)

Paragraph (16) was adopted with a minor editorial change.

Paragraph (17)

Mr. Murphy asked whether the reference in footnote 44 to “the conclusions of the work of the Study Group on the fragmentation of international law” should in fact be to the report of that Study Group.

Mr. Tladi (Special Rapporteur) said that it was his understanding that “the conclusions of the work of the Study Group” and “the report of the Study Group” referred to two separate documents.

Mr. Llewellyn (Secretary to the Commission) confirmed that understanding to be correct.

Paragraph (17) was adopted.

Paragraph (18)

Mr. Murphy suggested that, in the last sentence of the paragraph, the words “the identification of” should be added between “the criteria for” and “peremptory norms of general international law” and that the words “found in Part Two” should be added at the end.

Paragraph (18), as amended, was adopted with a minor editorial change.

Paragraph (19)

Mr. Park suggested that the words “of States as a whole” should be deleted from the second sentence of the paragraph, in line with the wording of the draft conclusion itself.

Mr. Jalloh, supported by **Mr. Cissé**, proposed the addition of the words “for identifying peremptory norms of general international law (*jus cogens*)” at the end of the third sentence for greater clarity.

Mr. Murphy, agreeing with those suggestions, expressed the view that the phrase “should always be presented”, at the end of the paragraph, should be changed to “must always be present”, which would provide a clear and immediate link to the vital content of draft conclusion 3.

Mr. Forteau, speaking via video link, said that the change suggested by Mr. Murphy would serve to emphasize that States themselves were under no procedural obligation to demonstrate that a norm of general international law had the status of *jus cogens* in order for its existence as such to be accepted, as reflected in the text of draft conclusion 6.

The Chair said he took it that the Commission agreed to the deletion of the words “of States as a whole”; the addition of the words “for identifying peremptory norms of general international law (*jus cogens*)”; and the alteration of the words “should always be presented” to “must always be present”.

Paragraph (19), as amended, was adopted.

The meeting rose at 6 p.m.