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International Law Commission
Seventy-third session (second part)

Provisional summary record of the 3596th meeting
Held at the Palais des Nations, Geneva, on Monday, 25 July 2022, at 10 a.m.

Contents

Present:

Chair:	Sir Michael Wood (First Vice-Chair)
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	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. Rajput
	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 10 a.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 chapter IV of its draft report, as contained in document A/CN.4/L.960/Add.1, beginning with paragraph (1) of the commentary to draft conclusion 3 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).

*Commentary to draft conclusion 3 (Definition of a peremptory norm of general international law (*jus cogens*))*

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

*Commentary to draft conclusion 4 (Criteria for the identification of a peremptory norm of general international law (*jus cogens*))*

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

Mr. Murphy, referring to the fourth sentence, said it was his understanding that the word "draft" was not required in the reference to the "commentaries to the draft articles on the responsibility of States for internationally wrongful acts".

The Chair said that it was standard practice for the word "draft" to be removed once a set of articles or conclusions had been adopted by the General Assembly, as was the case with the articles in question. He would therefore support the deletion of the word "draft" in paragraph (6).

Mr. Tladi (Special Rapporteur) said that he had no objection to removing the word "draft" in the context of paragraph (6). However, the matter might need to be revisited in other contexts.

Mr. Park said that whatever was decided, it was important for the references in the body of paragraph (6) and in footnote 53 to be consistent.

Mr. Jalloh said that the question of when the word "draft" needed to be used could perhaps be addressed further as part of the discussion on methods of work.

Mr. Forteau said that the General Assembly had not in fact adopted the draft articles on responsibility of States for internationally wrongful acts but had merely taken note of them. He would therefore be in favour of retaining the word "draft" in paragraph (6).

Mr. Vázquez-Bermúdez said that, in its resolution 56/83, the General Assembly had taken note of the "articles" – not the "draft articles" – and the articles had been annexed to the resolution without the qualifier "draft". The Commission was therefore justified in deleting the word "draft" from paragraph (6).

The Chair said it was clear that when the General Assembly annexed a set of articles to a resolution, it deliberately dropped the word "draft" throughout the text and from that point on they were referred to simply as "articles". He agreed, however, that it was an important point that would warrant further discussion. It would be preferable to delete the word "draft" in paragraph (6) and in all other references to the articles on responsibility of States for internationally wrongful acts.

Paragraph (6), as amended, was adopted.

*Commentary to draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*))*

Paragraphs (1) and (2)

Paragraphs (1) and (2) were 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 drafting change.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Forteau said that, in the last sentence, the word "some" should be added before "support" in the phrase "There is, moreover, support in writings", as not all writings supported the idea that general principles of law were a source of peremptory norms of general international law.

Mr. Tladi (Special Rapporteur) proposed that the last sentence of footnote 76, which referred to a statement by the Islamic Republic of Iran, should be deleted, as it was not the Commission's usual practice to refer to comments by States in respect of a particular project in the project itself.

Mr. Murphy said that, as draft conclusion 5 (2) stated that "treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)", it might be preferable to reverse the order of paragraph (8), which dealt with general principles of law, and paragraph (9), which dealt with treaties, so as to follow the order of those elements in the draft conclusion itself. That change might also necessitate changes to the footnotes.

The Chair, speaking as a member of the Commission, said that, in the last sentence of paragraph (8), the word "source" should be replaced with "basis" for consistency with the wording of the draft conclusion itself. A decision as to whether to reverse the order of paragraphs (8) and (9) would be taken once paragraph (9) had been discussed.

Paragraph (8), as amended, was adopted on that understanding.

Paragraph (9)

Mr. Zagaynov said that, in the seventh sentence, it was stated that "[t]he role of treaties as an exceptional basis for peremptory norms of general international law (*jus cogens*) may be understood as a consequence of the relationship between treaty rules and customary international law as described by the International Court of Justice in *North Sea Continental Shelf [Cases]*". In that judgment, the Court had stated: "There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed." There was thus a clear inconsistency between the use of the word "exceptional" in the commentary to the draft conclusion and the language of the Court. He therefore proposed that the word "exceptional" should be deleted from the seventh sentence of paragraph (9).

Mr. Tladi (Special Rapporteur) said he had no objection to the deletion of the word "exceptional", although he strongly disagreed with the explanation provided in support of that deletion, as it appeared to be based on a misunderstanding of the sentence in question

and of the case. He also agreed with the proposal to reverse the order of paragraphs (8) and (9).

Mr. Murphy said that, if the order of the two paragraphs was reversed, the word "also" in the second sentence of paragraph (9) should be deleted.

The Chair said he took it that the Commission wished to reverse the order of paragraphs (8) and (9) on the understanding that the secretariat would make any consequential changes that were required.

Paragraph (9), as amended, was adopted on that understanding.

Paragraph (10)

Mr. Zagaynov said that there was an inconsistency between the references to an "absence" of practice in the last sentence of paragraph (10) and to "little practice" in paragraph (7). He therefore proposed that the formulation in the last sentence of paragraph (10) should be amended to read "notwithstanding the scarcity of practice to that effect".

Paragraph (10), as amended, was adopted.

Commentary to draft conclusion 6 (Acceptance and recognition)

Paragraph (1)

Mr. Forteau said that, in the first sentence, the words "accepted and" should be added before "recognized by the international community of States".

Paragraph (1), as amended, was adopted with a minor drafting change.

Paragraph (2)

Mr. Forteau said that, at the end of the sixth sentence, the word "general" should be added before "international law". That change might also be necessary elsewhere in the text.

Paragraph (2), as amended, was adopted with a minor drafting change.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Park said that, as both paragraph (4) and paragraph (6) dealt with acceptance and recognition, whereas paragraphs (5) and (7) had to do with evidence, it would improve the flow of the text to add the content of paragraph (6) to the end of paragraph (4).

Mr. Murphy said that, in his view, the third sentence of paragraph (4) was unnecessary and repetitive and could be deleted.

Mr. Tladi (Special Rapporteur) said that, while he had no objection to the substance of Mr. Park's proposal, if paragraph (6) was moved to paragraph (4), it would essentially be repeating what was said in the first sentence of that paragraph and would thus be redundant.

Mr. Murphy said that if paragraph (6) was deleted, footnote 92 could perhaps be moved to the end of the first sentence of paragraph (4).

Mr. Jalloh said that, in his view, paragraph (6) said something slightly different from paragraph (4) in that it emphasized that the framework of acceptance and recognition was based on the "generally accepted interpretation" of article 53 of the 1969 Vienna Convention on the Law of Treaties. If paragraph (6) was deleted, perhaps some of that language could be moved, together with the footnote, to the first sentence of paragraph (4).

The Chair, speaking as a member of the Commission, said that perhaps the best solution would be to move paragraph (6) and its footnote to become the first sentence of paragraph (4).

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Forteau proposed that the words “by means of providing evidence” at the end of the second sentence of paragraph (5) should be deleted for the sake of consistency with paragraph (19) of the commentary to draft conclusion 2, as amended.

Mr. Murphy said that it would be preferable to delete only the words “means of providing”.

The Chair, speaking as a member of the Commission, suggested that the sentence should be redrafted to read “It is necessary to substantiate such a claim with evidence.”

Mr. Murphy proposed that the content of paragraph (5) should be placed after the second sentence of paragraph (7). The remainder of paragraph (7) would remain unchanged.

Paragraph (5), as amended by the Chair, was adopted on that understanding.

Paragraph (6)

The Chair recalled that paragraph (6) had been moved to the beginning of paragraph (4).

Paragraph (7)

The Chair recalled that paragraph (5), as amended, had been incorporated into paragraph (7), which would be renumbered as paragraph (5).

Paragraph (7), as amended, was adopted on that understanding.

Commentary to draft conclusion 7 (International community of States as a whole)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Tladi (Special Rapporteur) said that the end of the last sentence of paragraph (4) should be amended to read “even then the material advanced to illustrate the peremptory character remains acts and practice generated by States, including within international organizations”.

Mr. Murphy said that, while he agreed with the bulk of the Special Rapporteur’s proposed amendment, the words “of norms of general international law (*jus cogens*)” should be retained, so that the end of the sentence would read “even then the material advanced to illustrate the peremptory character of norms of general international law (*jus cogens*) remains acts and practice generated by States, including within international organizations”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Nguyen said that, in the second sentence of paragraph (5), the words “Other actors” should be replaced with the words “International organizations and other non-State actors” in order to reflect the content of paragraph (10) of the commentary to draft conclusion 1.

Mr. Tladi (Special Rapporteur), supported by **Mr. Forteau**, said that paragraph (10) of the commentary to draft conclusion 1 related to the applicability of the draft conclusions, while paragraph (5) of the commentary to draft conclusion 7 described the role other actors might play in providing context. For that reason, the second sentence of paragraph (5) should remain unchanged.

Mr. Park said that paragraph (4) of the commentary to draft conclusion 7 made reference to “States, including within international organizations”. The “other actors” referred to in paragraph 3 of draft conclusion 7, which concerned the international community

of States as a whole, thus appeared to refer only to international organizations, not to other non-State actors.

Paragraph (5) was adopted.

Paragraph (6)

Mr. Tladi (Special Rapporteur) said that the fourth sentence of paragraph (6), "This position has been affirmed by the Federal Tribunal of Switzerland", and the text of footnote 106 should be subsumed within the text of footnote 105.

Mr. Forteau said that the reference to the jurisprudence of the Federal Tribunal of Switzerland should be inserted in footnote 105 immediately after the reference to the remarks of Mr. Yasseen. In footnote 106, the English translation of the French words "*une très large majorité*" should be amended to read "a very large majority".

Mr. Murphy said that he supported Mr. Forteau's proposals. It might be preferable simply to place the reference to the Federal Tribunal and the associated quotation directly after the words "See, further," in the third sentence of footnote 105, since the phrase "This position has been affirmed by the Federal Tribunal of Switzerland" was perhaps inaccurate.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Murphy said that the first sentence of paragraph (8) should be amended to read: "The idea that what is required is a qualitative assessment is also captured by the word 'representative' to qualify 'majority of States'."

Paragraph (8), as amended, was adopted.

Commentary to draft conclusion 8 (Evidence of acceptance and recognition)

Paragraph (1)

Mr. Murphy said that, at the beginning of the last sentence of paragraph (1), the words "Other subsidiary materials" should be replaced with the words "Subsidiary means", in order to avoid implying that subsidiary means were simply another form of evidence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Jalloh said that, in the second sentence of paragraph (2), the reference to "a wide range of forms" was unclear. It might be helpful to insert after that sentence a quotation from paragraph 99 of the judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, which would read: "That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora."

Mr. Forteau said that, in the quotation cited by Mr. Jalloh, the Court had not made clear whether it was establishing that the prohibition of torture was a norm of customary international law or a peremptory norm. In that particular passage, the Court appeared to be establishing the customary character of the prohibition more than its peremptory character.

He was therefore not in favour of including the quotation in the commentary. The end of the third sentence of paragraph (2) should be redrafted to read "as evidence of the prohibition of torture, which the Court characterized as a peremptory norm of general international law (*jus cogens*)".

The Chair, speaking as a member of the Commission, said that in his view Mr. Forteau's proposal would accurately reflect what the Court had done.

Mr. Jalloh said that paragraph 99 of the Court's judgment stated very clearly which materials it had relied on in reaching its conclusion. The Universal Declaration of Human Rights and the Geneva Conventions were considered to be customary international law.

The Chair, speaking as a member of the Commission, said that the question was whether the Court had referred to those materials as evidence of the peremptory character of the prohibition of torture.

Mr. Tladi (Special Rapporteur) said that the Commission had debated the same point in 2017. On that occasion, while some members had interpreted paragraph 99 of the judgment in one particular way, the view that had inspired the current text, namely that the Court had used the materials it had cited to substantiate its claim that the prohibition of torture was a norm of customary international law that had become a *jus cogens* norm, had received overwhelming support. He had chosen not to include the quotation proposed by Mr. Jalloh purely because of its length, but he would be in favour of adding it.

The Chair, speaking as a member of the Commission and supported by **Mr. Grossman Guiloff**, said that the third sentence of paragraph (2), which included a footnote referring to paragraph 99 of the Court's judgment, should be left unchanged.

Mr. Murphy said that perhaps the Commission could reconcile the different views expressed by deleting the words "as evidence of the peremptory character of the prohibition of torture" and replacing them with the phrase "when stating that, '[i]n [its] opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'".

Mr. Jalloh proposed that the entirety of paragraph 99 of the judgment should be quoted in footnote 108.

Mr. Forteau said he was surprised that some members wished to impose a particular interpretation of the Court's judgment at all costs. Paragraph 99 of the judgment referred only to the evidence in support of the two constituent elements of international custom, as shown by the sentence immediately preceding the list of forms of evidence; it said nothing about evidence substantiating the peremptory character of the prohibition of torture and was thus ambiguous. Mr. Murphy's proposal was therefore a good compromise solution.

Mr. Tladi (Special Rapporteur) suggested that, in order to move forward, the Commission should adopt Mr. Murphy's proposal in part, incorporating the first sentence of paragraph 99 into the text of the commentary but citing the rest of paragraph 99 in the footnote. Considerations of length had been behind his decision not to include the full text suggested by Mr. Jalloh. However, it was not the length of paragraph 99 but rather differences of opinion as to its meaning that had fuelled the current discussion. In the light of the views expressed, and to be faithful to the Court's decision, he had concluded that paragraph 99 should be cited in its entirety to ensure that all members' positions were taken into account.

Mr. Jalloh said that, while it was still not clear to him why the entire text could not be incorporated into the commentary itself, in deference to his colleagues he would accept the compromise proposed by the Special Rapporteur.

Mr. Grossman Guiloff said he agreed that paragraph 99 of the Court's judgment should be cited verbatim in the footnote.

Mr. Saboia said that he supported Mr. Jalloh's proposal, as modified by Mr. Murphy and the Special Rapporteur.

Mr. Forteau said that the reference to "a variety of materials" in the second sentence of paragraph (2) was indispensable and should not be deleted.

Mr. Zagaynov pointed out that part of the quotation proposed for incorporation in the second sentence already featured in footnote 110.

The Chair, speaking as a member of the Commission, said that the Commission could agree to remove that duplication, if appropriate, when it considered paragraph (5), which contained the footnote in question. He agreed with Mr. Forteau that the words "relied on a variety of materials" should be retained, and, on that basis, proposed that the third sentence of paragraph (2) should be amended to read: "In its judgment in *Questions relating to the Obligation to Prosecute or Extradite*, the International Court of Justice relied on a variety of materials when stating that, in its opinion, 'the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'." The remainder of paragraph 99 would be cited in footnote 108, as amended.

Paragraph (2) was adopted with those changes.

The meeting was suspended at 11.35 and resumed at 11.50.

Paragraph (3)

Mr. Tladi (Special Rapporteur) drew attention to an error in the quotation included in the last sentence: the word "any" did not appear in the text cited and should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted with a minor drafting change.

Paragraph (6)

Mr. Tladi (Special Rapporteur) said that, in the last sentence, the phrase "abstentions, reservations and, in relation to treaties" should be amended to read "abstentions, reservations, context and, in relation to treaties".

Paragraph (6), as amended, was adopted with a minor drafting change.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Commentary to draft conclusion 9 (Subsidiary means for the determination of the peremptory character of norms of general international law)

Paragraph (1)

Mr. Murphy proposed that the beginning of the third sentence, "Other materials, not necessarily reflecting the views of States, may also be relevant as subsidiary means", should be replaced with the words "Subsidiary means may also be used". That would avoid giving the erroneous impression that subsidiary means were an alternative form of evidence. In the fourth sentence, the word "some" should be deleted from the phrase "some such subsidiary means".

Mr. Forteau said that, in the final sentence of the paragraph, the words "evidence of" should be inserted before "such acceptance and recognition". The rationale for his suggestion was that, as noted earlier in the paragraph, draft conclusion 8 concerned "forms of evidence" of acceptance and recognition. Moreover, the purpose of the sentence in question was to emphasize that "subsidiary means" were something other than, or additional to, such forms of evidence.

The Chair, speaking as a member of the Commission, suggested that it might be clearer to state that subsidiary means did not "in themselves", rather than simply "themselves", constitute evidence of such acceptance and recognition, since the materials in

question might indeed include evidence. Summing up the proposed amendments, he said that the third sentence, as amended, would read: "Subsidiary means may also be used for the determination of the peremptory character of a norm." The fourth sentence, as amended, would read: "Draft conclusion 9 concerns such subsidiary means." The end of the last sentence, as amended, would read "but do not, in themselves, constitute evidence of such acceptance and recognition".

Mr. Tladi (Special Rapporteur), responding to doubts expressed by **Mr. Jalloh**, said that the change proposed by Mr. Forteau was primarily a linguistic adjustment, intended to clarify that the materials in question did not themselves constitute acceptance or recognition but that they could provide "evidence" of such acceptance or recognition.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Murphy said that, for the sake of clarity and readability, it might be useful to insert the words "when identifying a peremptory norm of general international law (*jus cogens*)" at the end of the first sentence. It would then be possible to refer simply to "such a norm" in the second sentence.

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

Paragraph (4)

Mr. Murphy said that, once again, a few small adjustments, while not essential, would improve readability. Specifically, in the second sentence, the phrase "the express mention" should be replaced with "this express mention" and the end of the sentence, "of the International Court of Justice", should be deleted. In the fifth sentence, which began with the word "Moreover", he suggested that the full term "peremptory norms of general international law (*jus cogens*)" should be used in preference to the shortened form "peremptory norms" after the words "the general concept of". The final part of the sentence, beginning with the words "even in cases where", could then refer simply to "such norms". The shortened reference, "such norms", could also replace the words "peremptory norms" at the end of the third to last sentence. In the penultimate sentence, on the other hand, he felt that the words "of general international law (*jus cogens*)" should be added after "has pronounced itself expressly on peremptory norms".

The Chair, speaking as a member of the Commission, suggested that it would be better to use the full term, "peremptory norms of general international law (*jus cogens*)", near the start of the fifth sentence, so that it would read: "Moreover, while the Court has been reluctant to pronounce on peremptory norms of general international law (*jus cogens*), its jurisprudence has left a mark on the development both of the general concept of peremptory norms and of particular peremptory norms, even in cases where such norms were not explicitly invoked."

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Tladi (Special Rapporteur) drew attention to some drafting adjustments in the penultimate sentence. The latter part of the sentence now read "to indicate that, although decisions of national courts may serve as subsidiary means for the determination of peremptory norms of general international law (*jus cogens*), they should be resorted to with caution".

Mr. Murphy proposed that the adverb "Consequently" should be inserted at the start of the third sentence in order to emphasize its link to the second.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Park said that the last sentence, which had been added to the second-reading text, should be deleted. He understood that the Special Rapporteur's intention had been to differentiate between draft conclusion 8 and draft conclusion 9 in terms of the value of decisions of national courts, but he was not convinced that the phrase "less dependent on the reasoning" was entirely correct. Deleting the entire sentence would prevent any possible confusion.

Mr. Murphy said he agreed that the idea being conveyed could be expressed more clearly. He suggested that the sentence should be reformulated to read: "In that context, the relevance of the decision of the court concerns whether it evidences that State's position and not the quality of its broader assessment of the recognition and acceptance of the norm in question by the community of States".

Mr. Jalloh said that he shared Mr. Park's concern with regard to the final sentence of paragraph (6). He supported Mr. Murphy's proposal, which went some way towards clarifying the distinction between the role of national court decisions as evidence of a State's position and their role with regard to acceptance and recognition.

Mr. Forteau said that he had no objection to Mr. Murphy's proposal. However, the words "as a whole" should be inserted after the phrase "community of States", to bring the sentence into line with the language used in the draft conclusions. He wished to point out, nonetheless, that much vaguer wording was used in the second sentence of paragraph (7), which dealt with the same subject. Mr. Murphy's proposal risked being overly restrictive.

Mr. Zagaynov said that, in addition to the insertion of the words "as a whole" at the end of the proposed new sentence, as suggested by Mr. Forteau, the word "international" should be inserted before the phrase "community of States".

Mr. Tladi (Special Rapporteur) said that he was willing to agree to Mr. Murphy's proposal, as amended by Mr. Forteau and Mr. Zagaynov.

Mr. Forteau said that the words "as a norm that is peremptory in nature" should also be inserted at the end of the proposed new final sentence, so as to leave no room for ambiguity.

Mr. Jalloh said that, on reflection, he found it problematic that Mr. Murphy's proposal contained no reference to the element of reasoning. The proposed wording could be construed to mean that, in the context of draft conclusion 8, the decisions of national courts were relevant only to the extent that they indicated the State's position. However, in an assessment of the element of acceptance and recognition, a particular national court decision might be used not only because it constituted evidence of State practice, but also because it was well reasoned.

The Chair, speaking as a member of the Commission, said that the original final sentence was concise and clear. The proposed new text was becoming increasingly complicated. The real problem was that the matter under discussion should be dealt with in the commentary to draft conclusion 8. All that it was necessary to say in paragraph (6) of the commentary to draft conclusion 9 was that, in addition to serving as subsidiary means, national court decisions could also be relevant under draft conclusion 8.

Mr. Tladi (Special Rapporteur) said that while it was true that the matter addressed in the final sentence of paragraph (6) could be addressed in the commentary to draft conclusion 8, the inclusion of the sentence in the commentary to draft conclusion 9 was nonetheless appropriate, since it drew a clear distinction between the role of national court decisions in the context of draft conclusion 8, where reasoning was irrelevant, and their role in the context of draft conclusion 9, where reasoning was relevant. A decision of the type described by Mr. Jalloh, which both served as evidence of a State's position and was well reasoned, could be relevant under both draft conclusions. In his view, the final sentence as originally proposed but with the deletion of the words "to be applied" was clear enough. Given the trouble that Commission members seemed to be having with the proposed new text, he wondered whether Mr. Park and Mr. Murphy would agree to revert to that original wording.

Mr. Murphy said that he did not support the original language because a national court's reasoning was relevant both in the context of draft conclusion 8, as evidence of the State's position on whether a norm was peremptory in nature, and in the context of draft conclusion 9, as an assessment of the acceptance and recognition of that norm by the international community of States as peremptory in nature. His proposal was an attempt to make that clear to the reader. He proposed that, to address Mr. Forteau's concern, the words "as peremptory in nature" should be inserted at the end of his original proposal.

Mr. Vázquez-Bermúdez said that Mr. Murphy's proposal, as amended by Mr. Forteau and others, was useful. In his view, it was the reference to the "quality" of the court's broader assessment that was problematic. The beginning of the proposed text should therefore be amended to read "In that context, the relevance of the decision of the court concerns whether it evidences that State's position and not its broader assessment".

Mr. Park said that he supported Mr. Murphy's proposal, as amended by Mr. Vázquez-Bermúdez.

Mr. Jalloh said that while he still had reservations about the proposed text, he was open to the compromise suggested by Mr. Vázquez-Bermúdez, whose amendment partially addressed his concerns.

Mr. Forteau said that he agreed with Mr. Jalloh that a reference to reasoning should be maintained in the paragraph. The original final sentence, as proposed by the Special Rapporteur, should be retained as the penultimate sentence of the paragraph but amended to read: "In such a situation, the relevance of the decision of the court may be less dependent on the reasoning to be applied."

Mr. Tladi (Special Rapporteur) said that the two proposed final sentences were alternatives and could not both be included in the paragraph. In response to Mr. Murphy's comments on the question of reasoning, he wished to point out that, in the context of draft conclusion 8, a national court's decision was relevant insofar as the court clearly stated its position that the norm in question was a peremptory norm of international law (*jus cogens*). Such a statement could not be considered "reasoning". In such a case, the reasoning that had led to the court's conclusion did not matter. Nonetheless, the original final sentence did not state that the relevance of the decision was not dependent on reasoning at all. In any case, Mr. Murphy's proposal was becoming increasingly cumbersome as more and more amendments were made to it. He therefore suggested that the proposal should be discarded and that the original final sentence should be retained.

Mr. Murphy said that he was not convinced by the Special Rapporteur's explanation with regard to the role of reasoning. He could not support the sentence as originally proposed and therefore suggested that it should be deleted.

Mr. Jalloh said that, if the final sentence as proposed by the Special Rapporteur was deleted, a reference to reasoning would be missing from the paragraph.

The Chair said that there appeared to be no agreement to delete the final sentence as originally proposed by the Special Rapporteur, or indeed to retain it. The only way forward seemed to be Mr. Murphy's proposal, as amended by Mr. Vázquez-Bermúdez and others.

Mr. Tladi (Special Rapporteur) said that he would be willing to agree to Mr. Murphy's proposal, provided that it was amended along the lines suggested by Mr. Vázquez-Bermúdez. He could not support the deletion of the final sentence altogether.

The Chair said he took it that the Commission wished to adopt paragraph (6) with the amendment proposed by Mr. Murphy, as amended by Mr. Forteau, Mr. Zagaynov and Mr. Vázquez-Bermúdez. The final sentence of the paragraph would thus read: "In that context, the relevance of the decision of the court concerns whether it evidences that State's position and not its broader assessment of the recognition and acceptance of the norm in question by the international community of States as a whole as peremptory in nature."

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Murphy proposed that, in the fourth sentence of the paragraph, the words "may attach" should be replaced with the word "attaches". The first part of the fifth and last sentence, which currently read "The relevance of these other materials as subsidiary means depends on other factors, including on the reasoning of the works or writings", should be amended to read "The relevance of these other subsidiary means depends on various factors, including the reasoning of the works or writings".

Mr. Jalloh said that the word "may" in the fourth sentence served to indicate that the quality of the "works of expert bodies and scholarly writings" in question was a factor in determining how much weight should be attached to a particular work or writing.

The Chair, noting that Mr. Murphy had signalled that he was willing to withdraw his proposal with regard to the words "may attach", said he took it that the Commission agreed to the other amendments proposed by Mr. Murphy.

Paragraph (7) was adopted with those amendments.

Paragraphs (8) to (12)

Paragraphs (8) to (12) were adopted.

*Part Three (Legal consequences of peremptory norms of general international law (*jus cogens*))*

*Commentary to draft conclusion 10 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))*

Paragraph (1)

Mr. Murphy said he wished to propose that the word "their" should be inserted before the word "being" in the first sentence of the paragraph. In the fifth sentence, which began with the words "Article 53 of the 1969 Vienna Convention", the final phrase "it has been questioned whether it remains operative" should be amended to read "it has been questioned whether that article remains relevant".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Jalloh said that the statement, in the fifth sentence of paragraph (2), that there was a provision of the statute of the Special Court for Sierra Leone that "removed immunities of officials" was factually incorrect. The sentence should be amended to read: "In *Prosecutor v. Charles Ghankay Taylor*, the Special Court for Sierra Leone had to determine whether the provision in its own statute which did not recognize the immunities of any officials was invalid."

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Mr. Tladi (Special Rapporteur) proposed that the words "(*jus cogens*)" should be inserted after the term "peremptory norm of general international law" in the first sentence.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted with minor editorial changes.

Paragraph (7)

Paragraph (7) was adopted.

New paragraph (8)

Mr. Tladi (Special Rapporteur) said that he wished to propose the insertion of a new paragraph (8). The new paragraph would read: "Draft conclusion 10 should be read together with draft conclusion 20 on interpretation and application consistent with peremptory norms of general international law (*jus cogens*)."

Mr. Murphy said that he wished to know whether, in every commentary related to the issue of invalidity and other ways in which a rule became inoperative, the wording in the proposed new paragraph (8) would appear. He had no objection to the text but wished to make sure that it was used consistently throughout the commentaries.

Mr. Forteau said that the same statement was made in the commentary to draft conclusion 14 but not in the commentaries to draft conclusions 11 or 12. Including it was pointless, since the whole set of draft conclusions should be read together. That statement should be deleted wherever it appeared in the commentaries.

Mr. Tladi (Special Rapporteur) said that while the exact wording of the proposed new paragraph (8) did not appear in the commentary to each relevant draft conclusion, its content was nonetheless reflected where appropriate. It was explicitly stated in the commentary to draft conclusion 16, which raised particularly sensitive issues and therefore necessitated such an indication. It was therefore important, for the sake of consistency, to make such an explicit statement throughout the commentaries, to avoid any ambiguity.

The Chair said he took it that the Commission agreed to adopt the proposed new paragraph (8).

New paragraph (8) was adopted.

The meeting rose at 1 p.m.