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International Law Commission

Seventy-third session (second part)

Provisional summary record of the 3600th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 27 July 2022, at 10 a.m.

Contents

Present:

Chair:	Sir Michael Wood (First Vice-Chair)
Members:	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 draft conclusion 20 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).

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

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Commentary to draft conclusion 21 (Recommended procedure)

Paragraph (1)

Mr. Murphy, suggesting a few minor changes in the interests of clarity, said that, in the second sentence, a comma should be inserted after the words "(*jus cogens*)", the "and" that followed should be replaced with "but", and the words "about articles 53 and 64" and "from the concern that" should be deleted. The second part of the sentence, following the comma, would thus read "but concerns arose that the right to invoke the invalidity of treaties could be abused by States unilaterally invoking articles 53 and 64 and thus threatening the stability of treaty relations". In the third sentence, the word "concern" should be pluralized.

Paragraph (1) was adopted with those changes.

Paragraph (2)

Mr. Murphy said that, for clarity, the words "binding upon States parties" should be added at the end of the fourth sentence.

The Chair, speaking as a member of the Commission, said that the addition should perhaps read "binding upon States parties to the Convention".

Mr. Tladi (Special Rapporteur) said that he was not in favour of the proposed addition, since it was unnecessary. It was evident that, whenever the Commission referred to the provisions of a convention, those provisions were binding only upon States that were parties to that convention. Accordingly, the Commission did not usually include such specifications unless there was a particular reason for doing so; in the commentary under consideration, such reasons were addressed in other paragraphs of the draft conclusions and thus elsewhere in the commentary. Furthermore, if the proposed text was added for purposes of precision, it would be necessary to clarify also that some States parties had entered reservations to the dispute settlement framework of the convention in question.

Paragraph (2) was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Murphy said that, at the end of the second sentence, the words "in the present draft conclusions" should be added after "any provision".

Mr. Grossman Guiloff said that, for clarity, the words "about this matter" should also be added at the end of the second sentence, after "any provision".

Mr. Tladi (Special Rapporteur) said that he did not consider the proposed additions necessary but was not opposed to them. However, he wondered precisely which "matter" was being referred to in the additional text proposed.

Mr. Grossman Guiloff said that the "matter" in question was the subject matter of paragraph (4), namely dispute settlement. If that specification was not made, the sentence might be interpreted too broadly.

Mr. Tladi (Special Rapporteur) said that he thought it was important to specify the "matter" but hesitated to refer to dispute settlement expressly.

Mr. Murphy pointed out that paragraph (4) began with a reference to "a provision for dispute settlement" and that, accordingly, it would be clearer to also refer to dispute settlement in the second sentence. On that basis, he proposed that the second sentence should end with the words "any provision on dispute settlement in the present draft conclusions".

The Chair, speaking as a member of the Commission, suggested that, since the reference to "any provision" was actually a reference to the dispute settlement provision embodied in the draft conclusion, the language proposed by Mr. Murphy was unnecessarily lengthy and the intended meaning could be captured through a simple reference to "the present provision".

Paragraph 4 was adopted with the change proposed by the Chair.

Paragraph (5)

Mr. Ouazzani Chahdi said that the last sentence of the paragraph would benefit from a reformulation. Currently, the sentence appeared to indicate that the term "States concerned" included international organizations "in particular", which was not the case. Noting that similar language was used in paragraph (10) of the commentary to draft conclusion 1, he suggested that the text of that paragraph, as previously adopted by the plenary Commission, should be used as a model, as the wording was clearer than the text currently under consideration.

The Chair, speaking as a member of the Commission, said that in the English version of paragraph (5), the word "than" had been erroneously omitted. When that omission was rectified, it was clear that international organizations were being referred to as an example of "entities other than States".

Mr. Forteau said that the sentence would be clearer if the word "broadly" was replaced with "*mutatis mutandis*".

Mr. Park said he agreed that it would be best to replicate the language previously adopted for paragraph (10) of the commentary to draft conclusion 1.

Mr. Ouazzani Chahdi said that replacing the words "in particular" with "including" would also help to clarify the meaning.

The Chair said that the last sentence of paragraph (10) of the commentary to draft conclusion 1, as adopted by the plenary Commission, read: "Where a particular draft conclusion applies to international organizations, the commentaries will make this clear."

Mr. Tladi (Special Rapporteur) said that the penultimate sentence of paragraph (10) was more relevant to the current discussion; it read: "Nonetheless, there are instances in which the draft conclusions also apply to international organizations."

The Chair suggested that, in order to take the members' proposals into account, the last sentence of paragraph (5) should be amended to read: "In line with paragraph (10) of the commentary to draft conclusion 1, the words 'State' and 'States concerned' in this draft conclusion should be understood to include *mutatis mutandis* international organizations that may be affected by any measures that may be adopted."

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

Mr. Murphy said that the words "as well as the invoking State" should be removed from the final sentence, since the invoking State was one of the "States concerned".

Mr. Forteau said that he was against the proposed deletion; since the paragraph was about dispute settlement and disputes necessarily involved two parties, the sense of the sentence would be lost if the reference to one of the parties was removed.

The Chair pointed out that paragraph 3 of draft conclusion 21 indicated simply that "the States concerned" should seek a solution.

Mr. Jalloh said he also took the view that the proposed deletion was not an improvement. The sentence was drawing a distinction between the two categories of States in a dispute: the State invoking a violation of *jus cogens*, on the one hand, and the other States that might be implicated or might need to react, on the other. The proposed deletion might thus introduce a degree of ambiguity into the text.

Mr. Forteau suggested that replacing the words "as well as" with "and" might clarify the text and thus allay Mr. Murphy's concern.

Mr. Tladi (Special Rapporteur) said that his original intention had been to create a distinction between the two categories of States, in line with the first-reading text. However, since the text of paragraph 3 of draft conclusion 21 adopted on second reading referred simply to "the States concerned", without distinction, Mr. Murphy's observation was correct.

Mr. Vázquez-Bermúdez said that another possible solution would be to refer to "the States concerned, including the invoking State". That formulation made it clear that the invoking State was one of the States concerned.

Mr. Forteau said that, as that formulation would change the sense of the sentence, he would prefer to delete the reference to "the invoking State".

Mr. Jalloh said that he was in favour of Mr. Vázquez-Bermúdez's proposal. Paragraph 3 of draft conclusion 21 made it clear that the "States concerned" included two categories of States: the objecting State and the invoking State. He would, however, defer to the Special Rapporteur.

Mr. Murphy said that he also liked Mr. Vázquez-Bermúdez's proposal. It was wrong to state that there were two separate categories of States; looking through the draft conclusions and the commentary, he could identify many instances where the term "States concerned" was used in a manner clearly meant to include the invoking State. Such examples could be found in paragraphs (5), (9) and (10) of the commentary to draft conclusion 21, *inter alia*. It was simply not the case that a distinction between objecting and invoking States was maintained throughout the text.

Mr. Tladi (Special Rapporteur) said that, while he tended to agree with Mr. Forteau that Mr. Murphy's initial proposal was the best solution, he would also accept Mr. Vázquez-Bermúdez's proposal. It was a question of drafting, not substance, and either way the intended meaning would be clear.

Mr. Valencia-Ospina, pointing out that the penultimate sentence was focused exclusively on the invoking State, said that, for that reason, he would suggest a reversal of the order in which the categories of States were mentioned in the final sentence so that it began "In such a case, the invoking State and other States concerned". That formulation should satisfy all concerns.

Mr. Nguyen noted that paragraph (11) referred to "the States concerned (including the invoking State)".

The Chair, speaking as a member of the Commission, said that, if appropriate, paragraph (11) could also be adjusted in line with Mr. Vázquez-Bermúdez's proposal, which elegantly clarified that "the States concerned" should be understood to include the invoking State without obscuring the point that there were in effect two sides to the dispute.

Paragraph (8), as amended by Mr. Vázquez-Bermúdez, was adopted.

Paragraph (9)

Mr. Murphy said that the words “until the dispute is resolved” should be inserted at the end of the second sentence, which would read “the invoking State should not carry out the measure it had proposed until the dispute is resolved”. That change would bring the text into line with paragraph 3 of draft conclusion 21.

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

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

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Commentary to draft conclusion 23 (Non-exhaustive list)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Tladi (Special Rapporteur) proposed that, in the first sentence, the word “first”, between the words “determine” and “which”, and the second half of the sentence, which read “and, second, which of the norms that meet the criteria ought to be included in a non-exhaustive list”, should be deleted.

Mr. Cissé said that the phrase “To elaborate a list of peremptory norms of general international law (*jus cogens*), including a non-exhaustive list” did not make sense.

The Chair, speaking as a member of the Commission and supported by **Mr. Cissé** and **Mr. Jalloh**, proposed that the word “including” in that phrase should be replaced with the word “even”.

Mr. Forteau said that the phrase “including a non-exhaustive list” could be deleted altogether, since it related to the second half of the sentence, which the Special Rapporteur had proposed to delete.

Mr. Murphy said that he was not in favour of deleting the phrase “including a non-exhaustive list” altogether. The purpose of the paragraph was to make clear that even the non-exhaustive list that the Commission had produced was not the outcome of a detailed and rigorous study. He had no objection to the Chair’s proposal to replace the word “including” with the word “even”.

The Chair said he took it that the Commission agreed to amend the first sentence of the paragraph to read: “To elaborate a list of peremptory norms of general international law (*jus cogens*), even a non-exhaustive list, would require a detailed and rigorous study of many potential norms to determine which of those potential norms meet the criteria set out in Part Two of the present draft conclusions.”

Paragraph (2) was adopted with those amendments.

Paragraphs (3) to (8)

Paragraphs (3) to (8) were adopted.

Paragraph (9)

Paragraph (9) was adopted with a minor drafting change to footnote 299.

Paragraphs (10) to (14)

Paragraphs (10) to (14) were adopted.

Paragraph (15)

Mr. Forteau said that the draft articles on State responsibility, as a whole, had been provisionally adopted on first reading in 1996, not in 1976 as claimed in the last sentence of paragraph (15). Draft article 19 had been adopted on first reading in 1976, as correctly indicated in footnote 317. The words "in 1976" should be deleted.

Mr. Jalloh said that there was value in retaining the wording proposed by the Special Rapporteur, provided that the date indicated was correct. The last sentence referred to findings by the Commission with regard to other possible *jus cogens* norms. Keeping the date in the body of the text emphasized that the Commission had been selective in its choice of the possible norms listed in the annex.

Mr. Forteau proposed that the first half of the last sentence should be amended to read "In draft article 19 adopted in 1976 during the first reading of the topic 'State responsibility'."

Paragraph (15), as amended, was adopted.

Paragraph (16)

Paragraph (16) was adopted.

The Chair invited the Commission to resume its consideration of paragraphs (2) to (20) of the commentary to draft conclusion 19, which had been left in abeyance.

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

Paragraphs (3) and (4) (*continued*)

Mr. Tladi (Special Rapporteur) said that, in the light of the views expressed by Commission members with regard to the commentary to draft conclusion 19, he wished to propose the insertion of a new paragraph, which would replace the current paragraphs (3) and (4). The purpose of the new paragraph, which would be inserted before the current paragraph (11), was to indicate, in general terms, that organs of international organizations, in particular of the United Nations, had adopted a number of measures that illustrated the duty to cooperate. It would read:

> There are numerous examples of decisions of organs of international organizations, in particular the United Nations, that illustrate the duty to cooperate to bring to an end serious breaches of obligations that are widely recognized as arising from peremptory norms of general international law (*jus cogens*). These include decisions condemning breaches of such obligations, decisions calling for the cessation of breaches of such obligations, and decisions establishing accountability mechanisms to address such breaches.

The new paragraph would include three detailed footnotes that gave examples, with relevant wording, of each type of decision referred to in the second sentence.

Ms. Oral said that while she was grateful to the Special Rapporteur for having taken the time to draft an alternative text, she regrettably could not support the proposed new paragraph, not least because of the reasons for which the new text had had to be proposed. At the Commission's 3599th meeting, she had made clear that she would not agree to the deletion of paragraphs (3) and (4); the replacement of those paragraphs with the proposed new text would amount to their deletion *de facto*. The reference to the resolutions that concerned the Russian Federation and Ukraine had been buried deep in one of the lengthy new footnotes. She would have agreed to shorten paragraph (3) to a single sentence, provided that the reference to the resolutions related to the intervention of the Russian Federation in Ukraine, including those that demanded the cessation of the relevant breaches, was maintained in the text. Paragraph (4) could then have been merged into paragraph (3), in

order to provide additional relevant examples, and further examples could have been provided in footnotes.

Mr. Hmoud said that, having only rapidly read the amended text, he could tentatively go along with the changes proposed by the Special Rapporteur.

Mr. Ruda Santolaria said that the text of the proposed new paragraph to replace paragraphs (3) and (4) and the examples listed in the footnotes presented by the Special Rapporteur reflected the debate in the Commission and was an acceptable compromise that struck the necessary balance.

Mr. Forteau said that, although it was difficult to express a definitive position on the proposed new paragraph to replace paragraphs (3) and (4) without having read the commentary as a whole to see how the changes would affect the overall text, he considered it acceptable. However, he did not agree with the choice of the word "decision", which appeared four times in the paragraph, to refer to the resolutions of organs of international organizations cited in the footnotes. The word "decision" could perhaps be replaced with the word "act".

Mr. Murphy said that he was willing to go along with the new compromise text proposed by the Special Rapporteur, which was clear, transparent and balanced. He agreed with Mr. Forteau that the word "decision" should be replaced, but perhaps with the word "resolution". The footnotes cited very significant resolutions covering a range of events from different time periods, such as the apartheid regime in South Africa and the intervention of the United States of America in Panama, which supported the proposition in the draft conclusion to varying degrees. The order in which the examples were presented in the footnotes should be reviewed, as it was not clear whether they were meant to be in chronological order or organized in some other way.

Ms. Escobar Hernández said that, while the specific drafting of the new paragraph would have to be reviewed in due course, she supported the aim and spirit of the revised text, which was a fair compromise. She agreed that the resolutions cited in the footnotes should be presented chronologically.

Ms. Galvão Teles said that, although she had not objected to paragraphs (3) and (4) as originally formulated, she supported the compromise text proposed by the Special Rapporteur, which would allow the Commission to move forward. She did not believe it was necessary to make any changes to the examples included in the footnotes, although it might be helpful to add more to provide an even more representative sample of the relevant practice.

Mr. Huang said that he was grateful to the Special Rapporteur for his efforts to accommodate the diverging views of the Commission members and help them reach a consensus. He supported the well-balanced new text, to which some minor modifications might be needed.

Mr. Jalloh said that, although he had fully supported the original wording of paragraphs (3) and (4) and personally shared Ms. Oral's position, he would reluctantly go along with the revised text proposed by the Special Rapporteur. Now that a compromise seemed to have been reached, it would be preferable to keep any further changes to the text to a minimum. For example, he did not believe that it was incorrect to refer to the resolutions cited in the footnotes as "decisions", as the Special Rapporteur had proposed. In terms of the organization of the examples cited in the footnotes, it would make sense for each of the three categories of decisions to follow its own chronology. When it came to decisions establishing accountability mechanisms to address breaches of obligations arising from peremptory norms of general international law (*jus cogens*), those concerning the situations in Myanmar, the Syrian Arab Republic and the Tigray region of Ethiopia were all very good examples of resolutions on recent events that could be included in reverse chronological order. It was not necessary to open a debate on the examples themselves, although he would be in favour of including additional examples to strengthen the commentary.

Mr. Park said that he supported the Special Rapporteur's well-balanced new text. In his view, however, the new paragraph would be better placed after paragraph (12), which dealt with the actions of international organizations.

Mr. Vázquez-Bermúdez said that he would support the compromise text proposed by the Special Rapporteur. He agreed that it would be preferable to refer in the new paragraph to the "resolutions" of organs of international organizations rather than "decisions"; the word "acts" might be too broad in that context.

Mr. Grossman Guiloff said he was glad to see that the Special Rapporteur had been able to draft a compromise solution, which followed a legal approach, on which the Commission could reach a consensus without sacrificing important values. Of course, alternative formulations might have been possible, but the most important thing was to reach a consensus. He therefore supported the adoption of the proposed new paragraph.

Mr. Zagaynov said that, without entering into the substance of the many changes proposed by the Special Rapporteur, the members would need to take the time to properly review the drafting.

Mr. Petrič said that it was very positive for the work of the Commission that a compromise seemed to have been reached, even though members might, to varying degrees, find it difficult to accept. At the same time, he believed that the Commission could have made reference to the situations addressed in the new text without assigning blame to any particular State, which was in any case unproductive. In his view, the Commission should not deal with the topic by enumerating examples of wrongdoing by individual States. Instead, it should highlight acts that must be prohibited because they violated obligations arising from peremptory norms of general international law (*jus cogens*) and should emphasize the obligation of States to cooperate to bring an end to such violations. It seemed that aggression had become the focus of attention even though it was not the main aspect of the topic.

In any case, he would go along with the compromise solution, although he might have some drafting proposals once he had reviewed the consolidated draft. He agreed that the Security Council had the primary responsibility for the issues referred to in the paragraph under discussion and had adopted some relevant resolutions, but in many instances it had failed to take a decision, for example on the situation in the Syrian Arab Republic, because of the veto power of the permanent members.

During his time as a Commission member, he had sought to have the Commission make a neutral pronouncement on the right to self-determination, which it had recognized as possessing peremptory character, but others had not wished to take up the issue, judging it to be too politically sensitive. Yet, while colonialism was a thing of the past, other forms of foreign domination persisted in the modern world. Thus, if a situation related to self-determination were to arise, there would be a lack of clarity on the matter and only *ad hoc* responses that reflected the political balance of power. Such a situation might well prompt the Commission to deal with the issue in the future.

Mr. Hassouna said that he supported the proposed new paragraph, which represented a compromise and took a balanced legal approach by setting out a range of examples without focusing on a single controversial one. Importantly, the text would enable the Commission to adopt a decision by consensus, something that was not always achieved in the political bodies of the United Nations. As an independent legal body, the Commission took positions based on the rule of law, in a very objective and impartial way.

Mr. Hmoud said that, in the third footnote to the proposed new paragraph, the reference to Security Council resolution 2334 (2016) should include a quotation from the text of the resolution.

Mr. Tladi (Special Rapporteur) said that, although his intention had been to follow a strict chronology in the text, a number of minor editorial issues remained to be corrected, and some additional dates should be inserted.

The Chair suggested that an updated version of the proposed text should be prepared and presented to the Commission for consideration at a later date.

It was so decided.

Paragraph (2) (*continued*)

The Chair recalled that it had been proposed that, at the end of the last sentence of paragraph (2), the formulation "can now be said to be recognized under international law" should be amended to read "is now recognized under international law".

Mr. Murphy said that the proposed change brought the paragraph back into line with the text that had been adopted on first reading, with the exception of footnote 227, which had not featured in that text. The footnote should be deleted to avoid making any claim relating to States' responsibility not to exercise veto power, which was the subject of the journal article cited in the footnote.

In addition, the second sentence of paragraph (5) should be moved to the end of paragraph (2), since that sentence provided excellent support for the proposition being advanced, namely that States had an obligation to cooperate in the context of a breach of a peremptory norm. The text of paragraph (7), which gave an example from a regional court that directly supported that proposition, should also be added to the end of paragraph (2).

Mr. Tladi (Special Rapporteur) said that, while he had no strong objection to the proposed deletion of footnote 227, he did not support the proposal to move the second sentence of paragraph (5) and the text of paragraph (7) to paragraph (2).

Mr. Grossman Guiloff said that Mr. Murphy's concerns could perhaps be addressed through the use of cross references.

Mr. Murphy said that if the second sentence of paragraph (5) and the text of paragraph (7) were not moved to paragraph (2), it would not be necessary to amend the last sentence of paragraph (2) as outlined by the Chair.

Mr. Jalloh said that the Commission would not be doing anything unusual by reverting to the text that had been adopted on first reading. Restoring the formulation "is now recognized under international law" in the last sentence of paragraph (2) was in no way a dangerous proposition. Rather than deleting footnote 227 in its entirety, it might be preferable to delete only the first of the two references it contained, while retaining the second.

Mr. Murphy said that if the aim was to go beyond the text that the Commission had adopted on first reading, it would be preferable to redraft it from scratch. The Commission should not cite an article about the responsibility not to exercise the right to veto.

Mr. Tladi (Special Rapporteur) said that the journal article in question had been cited in view of other propositions it contained, not on the basis of its position on the exercise of the right to veto. He himself took the view that the responsibility not to exercise that right was not justified in law. It was important for Commission members to accept that their colleagues acted in good faith.

Mr. Huang said that, in the Sixth Committee, some Member States had expressed strong doubts about draft conclusion 19. The United States had taken the position that it should be deleted in its entirety. Accordingly, it would not be accurate to assert either that the obligation to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*) "can now be said to be recognized" or that it "is now recognized" under international law. The word "is", in the latter formulation, should be replaced with the words "tends to be".

The Chair recalled that the proposed wording "is now recognized" was the language that had been adopted on first reading. He said he took it that the Commission wished to adopt paragraph (2) with that amendment and with the deletion of footnote 227.

Paragraph (2), as amended, was adopted.

Paragraph (5)

The Chair, speaking as a member of the Commission, said that in paragraph (5), which would be placed directly after paragraph (2), the first sentence should be redrafted to read: "This obligation has been recognized in judicial decisions." At the beginning of the second sentence, the words "In an example from national courts" should be deleted.

Mr. Ouazzani Chahdi said that in the last sentence of paragraph (5), the word “not” should be deleted from the phrase “duty not to cooperate”.

Mr. Tladi (Special Rapporteur) said that in the second sentence, the words “for example” should be inserted before the word “referred”.

Paragraph (5), as amended, was adopted.

The meeting rose at 1 p.m.