

Provisional

For participants only

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International Law Commission
Seventy-third session (second part)

Provisional summary record of the 3601st meeting

Held at the Palais des Nations, Geneva, on Wednesday, 27 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. 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, beginning with paragraph (6) of the commentary to draft conclusion 19.

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

Paragraph (6)

Mr. Tladi (Special Rapporteur) said that, in the first sentence, the words “duty to cooperate to bring to an end serious breaches” should be replaced with “duty to cooperate in order to bring to an end any serious breach”.

Mr. Murphy said that the first sentence, however formulated, was incorrect. The International Court of Justice had not confirmed a duty to cooperate to bring to an end a breach of *jus cogens* norms in either of the advisory opinions referred to in paragraph (6). Indeed, the first sentence of paragraph (8) stated that the Court had not made an explicit reference to *jus cogens* in those advisory opinions. He therefore proposed that the first sentence should be deleted.

Mr. Forteau said that he supported Mr. Murphy’s proposal.

Mr. Hmoud said he believed that it was implicit in the Court’s decisions that the international community should come together to end the types of violation referred to in the first sentence. However, as Mr. Murphy had indicated, the duty of cooperation as such had not been explicitly mentioned in the advisory opinions.

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

Paragraph (7)

Mr. Murphy said that the text of paragraph (7) should be placed before the text of paragraph (6). The text of paragraphs (6) and (8), both of which dealt with the International Court of Justice advisory opinions, would then appear next to each other.

Paragraph (7) was adopted on that understanding.

Paragraph (8)

Mr. Tladi (Special Rapporteur) said that the sentence reading “Instead of referring to peremptory norms of general international law (*jus cogens*), the Court referred to *erga omnes* obligations” should be deleted. As the entire paragraph served to make that point, it was unnecessary to have a sentence stating it. In addition, in the last sentence, the words “given that *erga omnes* obligations produce” should be replaced with “given that in judicial decisions *erga omnes* obligations have been said to produce”.

Mr. Cissé said that the last sentence should be reformulated to create a logical transition from the reference to the House of Lords judgment in the preceding sentence: “It follows, therefore, that all peremptory norms of general international law (*jus cogens*) produce the duty to cooperate to bring to an end all serious breaches of such norms” [*Il en résulte donc que toutes les normes impératives du droit international général (jus cogens) produisent l’obligation de coopérer pour mettre fin à toutes les violations graves de telles normes*].

Mr. Tladi (Special Rapporteur) said that he was unable to support Mr. Cissé’s proposal simply because the last sentence of paragraph (8) related to additional decisions beyond the House of Lords judgment.

Mr. Forteau, supported by **Mr. Murphy**, said the last sentence of paragraph (8) suggested that courts had found that *erga omnes* obligations had produced a duty to cooperate simply because of their *erga omnes* nature. However, in paragraph 159 of its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice had indicated that an additional element was required in order for such a duty to be created. On the basis of that paragraph, he proposed that the clause “given the character and importance of the rights and obligations involved” should be inserted between the words “produce” and “the duty to cooperate”.

In paragraph (3) of the commentary to draft conclusion 17, the Commission had indicated that certain rules could produce *erga omnes* obligations independently of whether they had peremptory status, and had referred to examples of such obligations in the context of the law of the sea. However, it was clear that those obligations did not give rise to an obligation to cooperate in the event of a serious breach.

Mr. Vázquez-Bermúdez said that he supported the proposal made by Mr. Forteau, which provided helpful clarification.

The Chair, speaking as a member of the Commission, suggested that, to avoid repeating the word “given”, the words “given that”, which appeared towards the beginning of the sentence, should be replaced with “since”, and the language proposed by Mr. Forteau should be placed between commas after the word “breaches”, so as not to break up the phrase “have been said to produce the duty to cooperate to bring to an end all serious breaches”.

Mr. Jalloh said that, given that the sentence referred to judicial decisions in the plural, he was uncomfortable including content in the sentence that was drawn from only one decision. Although it would undermine the general nature of the statement being made in the sentence, he suggested that the following footnote should be inserted after the clause “given the character and importance of the rights and obligations involved”: “See for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 124 above), para. 159.”

Mr. Tladi (Special Rapporteur) said that, while the language proposed by Mr. Forteau was not necessary, it was also not harmful. The International Court of Justice had in the past used different formulations to express the same concept.

Mr. Murphy said that it could be helpful to include the footnote suggested by Mr. Jalloh, as it would direct readers to an opinion that used the same formulation as the Commission would be using in the sentence.

Mr. Forteau said that he wished to know whether the first reference in the sentence to *erga omnes* obligations was intended to refer to all *erga omnes* obligations, in which case it should be preceded by a definite article in the French translation of the sentence, or whether it was intended to refer to only some *erga omnes* obligations, in which case it should be preceded by an indefinite article in the French translation.

The Chair said that, in English, the phrase “*erga omnes* obligations” did not necessarily encompass all *erga omnes* obligations. He took it that the Commission agreed to delete the sentence beginning “Instead of referring”, insert the footnote proposed by Mr. Jalloh and replace the portion of the last sentence that preceded the words “and that all peremptory norms” with the following: “At any rate, since in judicial decisions *erga omnes* obligations have been said to produce the duty to cooperate to bring to an end all serious breaches, given the character and importance of the rights and the obligations involved”.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

Ms. Lehto said she noted that, in the second version of the informal document circulated by the Special Rapporteur, all references to the European Union had been deleted from paragraphs (10) and (11). Unfortunately, that meant that the Commission was ignoring

the European Union's fairly extensive practice with regard to measures intended to address serious breaches of peremptory norms. In those circumstances, the last sentence of the original version of paragraph (10) should at least be included in a footnote, while the regulations on which those measures were predicated should also be specified in a footnote, in place of the reference to statements of the High Representative of the European Union for Foreign Affairs and Security Policy.

Mr. Tladi (Special Rapporteur) said that he agreed with Ms. Lehto's suggestion. He drew the Commission's attention to the new formulation of the fourth sentence in the second informal document which he had circulated, which now read: "Other international organizations may also adopt measures to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) if their mandates permit them to do so". He proposed the insertion, after the first sentence of paragraph (10), of a footnote that would quote the text of article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide and of article VIII of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.

Ms. Escobar Hernández said that she supported Ms. Lehto's proposal. She, too, had been surprised to see that all references to the European Union had disappeared. The general competences of the European Union were provided for in the Treaty on European Union. They encompassed not only measures to address breaches of peremptory norms, but also cooperative action to ensure freedom, security and justice. Two further regulations which were of particular relevance and could be added to the relevant footnote, in that they referred to the establishment and competences of the European Union Agency for Criminal Justice Cooperation and to cooperation mechanisms within the European Union and with third-party States, were Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022 amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences.

Mr. Saboia, referring to the Special Rapporteur's new formulation of the fourth sentence, said that, although other international organizations could indeed take action to bring to an end serious breaches of peremptory norms of general international law, it was essential not only for them to have a mandate to do so, but also for them to be acting in accordance with the Charter of the United Nations, especially if such action was usually the exclusive preserve of United Nations organs. The sentence should be amended to that effect.

Mr. Murphy, echoing Mr. Saboia's call for caution when referring to interventions by other international organizations, said that article 4 (h) of the Constitutive Act of the African Union specifically mentioned the right of the Union to intervene "in a Member State". He suggested that the relevant wording of that provision should be included as a quotation in a footnote placed at the end of the sentence, and that a similar approach should be taken when citing legislation of the European Union.

Mr. Jalloh expressed support for the proposals made by Ms. Lehto and Ms. Escobar Hernández. With regard to the valid concerns of Mr. Saboia and Mr. Murphy, he suggested that article 4 (h) should be quoted in its entirety in the footnote in question, even though the proposed footnote already contained most of the text.

Mr. Tladi (Special Rapporteur), acknowledging the concerns expressed, suggested that the words "consistent with international law" could be added to the fourth sentence, after the word "may". The footnote at the end of the last sentence, rather than explaining the content of article 4 (h), would simply quote the entire provision. If he had correctly understood the proposals made by Ms. Lehto and Ms. Escobar Hernández, the last sentence of paragraph (10) as originally drafted would then be moved to the same footnote to introduce the references to the various relevant European Union instruments, with wording to be finalized in due course.

Mr. Vázquez-Bermúdez expressed support for Mr. Saboia's comments and the Special Rapporteur's proposed addition to the sentence, which was intended to take account

of them, but suggested that it should instead be placed after the words “may also adopt measures”.

Mr. Forteau said that he was uneasy with the direction the discussion was taking. Paragraph (10) of the commentary to draft conclusion 19 concerned the obligation to cooperate to bring to an end serious breaches of peremptory norms, which was covered in article 41 of the 2001 articles on responsibility of States for internationally wrongful acts, not measures that might be taken to that end, which were the subject of article 54 of the same articles. The issue had been debated in the context of the 2011 articles on the responsibility of international organizations, in particular article 49, paragraph 3, thereof; the commentary to that provision was considerably more nuanced than the text currently before the Commission and made reference to the practice of the European Union. He suggested that the words “may also adopt measures” should be altered to “may also serve as framework for cooperation”.

Mr. Jalloh said that the addition of the words “consistent with international law” should allay the concerns expressed by Mr. Forteau. Organizations such as the African Union and the European Union constituted regional arrangements under Article 53 of the Charter of the United Nations; they were inherently mechanisms for cooperation, so there was no need to explicitly describe them as such. Their status under the Charter did not detract from the provisions of their own constituent instruments.

Paragraphs (3) and (4) (continued)

The Chair invited the Special Rapporteur to introduce his revised proposal relating to paragraphs (3) and (4), which had been left in abeyance.

Mr. Tladi (Special Rapporteur) drew attention to another informal document, circulated to members, containing a proposed new paragraph for insertion before existing paragraph (11). In substance, it was intended to replace paragraphs (3) and (4), and it would imply the deletion of the last two sentences of paragraph (10), with appropriate amendments to other parts of that paragraph; the deletion of the last two sentences of paragraph (11); and the modification of a sentence in paragraph (15). The text of the new paragraph would read:

There are numerous examples of resolutions 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 resolutions condemning breaches of such obligations, resolutions calling for the cessation of breaches of such obligations, and resolutions establishing accountability mechanisms to address such breaches.

It would contain three footnotes providing extensive references to examples of the three categories of resolution; the footnotes would be based on a previous informal document circulated to members, with editorial changes to ensure consistency.

The Chair suggested that the meeting should be suspended to allow time for members to consider the revised proposal, especially the proposed footnotes.

The meeting was suspended at 4.15 p.m. and resumed at 4.45 p.m.

Paragraph (10) (continued)

Ms. Lehto proposed that the following text should be included in the footnote to the sentence beginning “Other international organizations may also adopt measures”:

See Treaty on European Union (Consolidated Version), *Official Journal* 26 October 2012, arts. 21 (2) and 29. See also Treaty on the Functioning of the European Union (Consolidated Version), *Official Journal* 26 October 2012, art. 215. See further Regulation (EU) 2018/1727 of the European Parliament and of the Council, *Official Journal* 21 November 2018, and Regulation (EU) 2022/838 of the European Parliament and of the Council, *Official Journal* 31 May 2022.

The Chair asked whether the Commission was ready to adopt paragraph (10) as amended.

Mr. Zagaynov requested additional time to consider the European Union texts referred to in the proposed footnote.

Mr. Murphy sought clarification regarding the exact wording thereof.

Ms. Lehto explained that it would be based on the text of the original footnote 247, amended to quote article 4 (h) of the Constitutive Act of the African Union directly, followed by the last sentence of paragraph (10) and the citations she had provided for the four pieces of European Union legislation.

Mr. Murphy, while observing that there seemed to be general agreement on the content of the footnote, said it had been his understanding that it would consist only of citations.

Mr. Tladi (Special Rapporteur) said that the last sentence of paragraph (10) need not be reproduced in the footnote because the text of the paragraph, even with the proposed deletions and amendments, still made clear that international organizations could take measures to bring to an end serious breaches of peremptory norms. He proposed that the footnote in its entirety should read:

See, for example, article 4 (h) of the Constitutive Act of the African Union (2000) (“the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”). See also Treaty on European Union (Consolidated Version), *Official Journal* 26 October 2012, arts. 21 (2) and 29. See further Treaty on the Functioning of the European Union (Consolidated Version), *Official Journal* 26 October 2012, art. 215. See further Regulation (EU) 2018/1727 of the European Parliament and of the Council, *Official Journal* 21 November 2018, and Regulation (EU) 2022/838 of the European Parliament and of the Council, *Official Journal* 31 May 2022.

Mr. Grossman suggested that reference should also be made in the footnote to article 29 of the Charter of the Organization of American States.

Mr. Zagaynov expressed serious concern that the Commission appeared to be about to adopt new text containing references to substantive documents without giving members sufficient time to examine them.

The Chair said he took it that the Commission agreed to adopt paragraph (10) as amended during its discussions, including the footnote read out by the Special Rapporteur.

Paragraph (10), as amended, was adopted.

Paragraphs (3) and (4) (continued)

The Chair asked whether the Commission was prepared to accept the Special Rapporteur’s proposals regarding paragraphs (3) and (4), namely that those two paragraphs should be deleted and that the new paragraph he had read out, with its associated footnotes, should be inserted before current paragraph (11).

Ms. Oral said that, regrettably, she would not be able to join the consensus on the commentary to draft conclusion 19. Paragraphs (3) and (4) were neutral and well balanced. The varied examples provided therein were by no means limited to General Assembly resolutions concerning the Russian intervention in Ukraine. The Special Rapporteur’s proposals represented a radical change. In the text of the proposed new paragraph, which consisted of only two sentences, no examples were provided, and the associated footnotes were long and difficult to follow. By contrast, in the preceding paragraphs of the commentary, various examples were provided in the text. She could see no reason for that imbalance. The Commission had provided specific examples in its commentaries to the articles on responsibility of States for internationally wrongful acts, yet the process of adopting those commentaries did not seem to have been politicized in the same way.

Mr. Jalloh, supported by **Mr. Hmoud**, proposed that the seventh preambular paragraph and paragraph 7 of Human Rights Council resolution 49/28 should be cited at the

end of the second footnote associated with the new paragraph and that the full text of each of those paragraphs should be reproduced in parentheses.

The Chair said he took it that the Commission wished to delete paragraphs (3) and (4) and to insert the new paragraph proposed by the Special Rapporteur, as amended, before current paragraph (11).

It was so decided.

Paragraph (11)

Mr. Tladi (Special Rapporteur) proposed that the last two sentences and associated footnotes should be deleted.

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted with minor editorial changes.

Paragraph (14)

Mr. Tladi (Special Rapporteur) proposed that, in the light of a suggestion made by Mr. Forteau, the words “third States” in the fifth sentence should be replaced with “all States”.

Paragraph (14), as amended, was adopted.

Paragraph (15)

Mr. Tladi (Special Rapporteur) said he was proposing that a new sentence should be inserted after the current first sentence, to read: “Similarly, the General Assembly has made decisions calling for the non-recognition of situations created by the breach of acts widely accepted as constituting breaches of peremptory norms of general international law (*jus cogens*).” He was also proposing that a new footnote containing references to General Assembly resolutions 3411 D (XXX), ES-10/19, 46/47 and 68/262 and Security Council resolution 2334 (2016) and quotations from relevant paragraphs of those resolutions should be associated with the new second sentence and that the current second sentence and associated footnotes should be deleted. He was further proposing that the text of two of the other footnotes associated with the paragraph should be amended in the manner indicated in the informal document circulated in the meeting room: the footnote associated with the first sentence should contain references to Security Council resolutions 276 (1970), 541 (1983) and 662 (1990) and General Assembly resolution 73/295 and quotations from relevant paragraphs of those resolutions; and the second footnote associated with the last sentence should contain references to General Assembly resolutions ES-11/1, 2022 (XX) and 36/27 and quotations from relevant paragraphs of those resolutions.

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (20)

Paragraphs (16) to (20) were adopted with minor editorial changes.

Mr. Zagaynov said that, for the reasons that he had set out earlier in the debate, he wished to distance himself from the consensus on the commentary to draft conclusion 19.

The Chair invited the Commission to resume its consideration of the portion of chapter IV contained in document [A/CN.4/L.960](#), as sections C and D had been left in abeyance.

C. *Recommendation of the Commission (continued)*

Paragraph 10

Mr. Tladi (Special Rapporteur) read the proposed wording of paragraph 10:

At its 3601st meeting, on 27 July 2022, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(a) take note of the draft conclusions of the International Law Commission on identification and legal consequences of peremptory norms of general international law (*jus cogens*), annex the draft conclusions to the resolution, and ensure their widest dissemination;

(b) commend the draft conclusions and annex, together with the commentaries thereto, to the attention of States and to all who may be called upon to identify peremptory norms of general international law (*jus cogens*) and to apply their legal consequences.

The Chair said he took it that the Commission wished to adopt paragraph 10.

Paragraph 10, as amended, was adopted.

D. *Tribute to the Special Rapporteur (continued)*

Paragraph 11

The Chair read the proposed wording of paragraph 11:

At its 3601st meeting, held on 27 July 2022, the Commission, after adopting the draft conclusions and annex on identification and legal consequences of peremptory norms of general international law (*jus cogens*), adopted the following resolution by acclamation:

The International Law Commission,

*Having adopted the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*),*

*Expresses to the Special Rapporteur, Mr. Dire Tladi, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft conclusions through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).*

The Chair said he took it that the Commission wished to adopt paragraph 11.

Paragraph 11 was adopted by acclamation.

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

Mr. Tladi (Special Rapporteur) said that it had been a great honour to serve as Special Rapporteur for such an important topic. He was grateful to all the States that had provided input, whether orally or in writing. He wished to thank all the members of the Commission, in particular the Chairs of the Commission and of the Drafting Committee, past and present, for their hard work and commitment. The Commission had brought greater clarity to a complex topic, and the final outcome of its work represented a collective achievement. He also wished to acknowledge the contribution of the secretariat, conference and library staff, as well as the work of his assistants, during the current and previous years.

The meeting rose at 5.40 p.m.