Provisional

For participants only

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International Law Commission

Seventy-third session (first part)

Provisional summary record of the 3564th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 19 April 2022, at 3 p.m.

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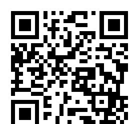

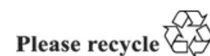

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Present:

Temporary Chair:	Mr. Hmoud
Chair:	Mr. Tladi
later:	Sir Michael Wood (First Vice-Chair)
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	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. Valencia-Ospina
	Mr. Vázquez-Bermúdez

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Opening of the session

The Temporary Chair declared open the seventy-third session of the International Law Commission.

Election of officers

Mr. Tladi was elected Chair by acclamation.

Mr. Tladi took the Chair.

The Chair thanked the members for the trust they had placed in him and said that it was a privilege to chair such an important body. He would make every effort to ensure that the current session was successful and productive.

Sir Michael Wood was elected First Vice-Chair by acclamation.

Mr. Vázquez-Bermúdez was elected Second Vice-Chair by acclamation.

Mr. Park was elected Chair of the Drafting Committee by acclamation.

Mr. Šturma was elected Rapporteur by acclamation.

Introductory remarks by the Chair

The Chair said that he wished to welcome all participants to the session, whether they were physically present in Geneva or participating remotely. He was certain that, thanks to its collegial spirit, the Commission would make the hybrid working model a success and would progress with its work efficiently.

Adoption of the agenda (A/CN.4/745)

The provisional agenda was adopted.

Programme, procedures and working methods of the Commission and its documentation (agenda item 8)

The Chair said that the Commission would follow its customary working methods as closely as possible. However, the hybrid working model, under which some members were participating remotely, made certain adjustments necessary to ensure that all members, spread as they were across numerous time zones, could take part in decision-making on an equal basis. Plenary meetings would take place from 11 a.m. to 1 p.m. Central European Summer Time (CEST) and, when needed, from 3 p.m. CEST for a short time for the purpose of making decisions. Given the shortened length of the meetings, members were encouraged to limit their statements to 20 minutes. The limit would not apply to the Special Rapporteurs or the Chair of the Drafting Committee. Mini-debates would be allowed only exceptionally, during afternoon plenaries.

Members unable to participate "live" in a plenary debate would be permitted to upload a pre-recorded video or audio statement, which would be played during the meeting. In exceptional circumstances, such as in the event of technical difficulties, members could submit a written statement along with a request that it should be either read out by the secretariat or circulated to all members in writing without being read out. In the latter case, the statement would not be translated or reflected in the summary records.

The Drafting Committee would meet from 3 p.m. to 5 p.m. CEST. Whenever the Commission held a plenary meeting at 3 p.m., the Committee would meet immediately after its adjournment. Only members physically present in Geneva and those participating remotely could take part in Drafting Committee meetings. Written statements could not be submitted in lieu of "live" participation.

The meetings of the Study Group on sea-level rise in relation to international law, the Planning Group, the Working Group on methods of work and the Working Group on the

long-term programme of work would follow the same working methods as plenary meetings and would take place in the mornings during the first part of the session.

He took it that the Commission agreed to the proposed working methods.

It was so decided.

Organization of the work of the session (agenda item 1)

The Chair drew attention to the proposed programme of work for the first part of the Commission's current session, which would begin with the second reading of the draft conclusions on peremptory norms of general international law (*jus cogens*) and of the draft principles on protection of the environment in relation to armed conflicts. The Commission would then take up the topics "Immunity of State officials from foreign criminal jurisdiction" and "Succession of States in respect of State responsibility", with the aim of completing its first reading of the respective sets of draft articles on those topics by the end of the current session.

On the topic of immunity of State officials from foreign criminal jurisdiction, the Drafting Committee would meet to conclude the work left over from the seventy-second session, following which it would consider the draft principles on protection of the environment in relation to armed conflicts. It would then return to the draft articles on immunity of State officials and, thereafter, the draft articles on succession of States in respect of State responsibility. The Commission would use any remaining time following its morning plenary meetings for informal consultations.

The Planning Group, the Working Group on methods of work and the Working Group on the long-term programme of work would meet during the seventh week of the session. In line with the practice of the Commission, the proposed programme of work would be applied with the necessary flexibility.

He took it that the Commission agreed to the proposed programme of work for the first part of the session.

It was so decided.

Mr. Park (Chair of the Drafting Committee) said that, for the topic "Immunity of State officials from foreign criminal jurisdiction", the Drafting Committee was composed of Mr. Aurescu, Mr. Forteau, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murphy, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Ms. Escobar Hernández (Special Rapporteur) and Mr. Šturma (Rapporteur), *ex officio*.

Peremptory norms of general international law (*jus cogens*) (agenda item 4) (A/CN.4/747 and A/CN.4/748)

Sir Michael Wood (First Vice-Chair) took the Chair.

Mr. Tladi (Special Rapporteur), introducing his fifth report on peremptory norms of general international law (*jus cogens*) (A/CN.4/747), said that the report was divided into six chapters. After the introduction in chapter I, chapter II set forth the purpose and approach of the report, while chapter III contained summaries of and responses to the comments and observations received from Governments, which were set out more fully in document A/CN.4/748. Chapter IV provided a marked-up version of the draft conclusions adopted on first reading, showing his proposed modifications, while chapter V contained a clean version that incorporated those modifications. Chapter VI contained recommendations on the final outcome of the Commission's work.

The Commission was currently at the second-reading stage, the purpose of which was to give careful consideration to the views of all States and assess whether those views, as a whole, necessitated or justified modifications to the Commission's draft conclusions as adopted on first reading. Several factors should be taken into account in determining whether to make any such modifications: first and foremost, the reasoning put forward by States when suggesting a particular modification; the number of States suggesting a particular

modification relative to the total number of comments; and the number of States expressing support for the text and their rationale for doing so. All those factors should be viewed against the background of the first reading; in other words, since the Commission had already carefully considered many, though not all, of the issues, it should err on the side of not modifying the text unless there was a compelling case for doing so.

Accordingly, the approach taken in his report was not to propose modifications, even in cases in which his own preferences and value propositions had been supported by States, save where the views and comments of States had been compelling, generally because they had put forward a new consideration or perspective. He had therefore refrained from proposing amendments to capture Security Council resolutions in draft conclusion 16 or to delete the word "serious" from draft conclusion 19, although both proposals were consistent with his own views and were strongly supported in the comments made by States. He hoped that other members of the Commission would adopt a similar approach when it came to their own policy and/or legal preferences.

A total of 57 States had made comments on the first-reading text of the Commission's draft conclusions, whether in the form of written observations, oral statements made in the Sixth Committee in 2019 during its consideration of the Commission's report on the work of its seventy-first session, or both. Of those 57 States, only 11 had taken the view that, in general, the draft conclusions were not based on practice. In addition, of those 11 States, 6 had not actually criticized the Commission for failure to consider practice but had accepted that there was, in general, no available practice, and had noted that the Commission should therefore be cautious in its approach. Thus, in effect, only 5 of the 57 States that had expressed their views on the Commission's work had criticized it for failure to adhere to practice.

More importantly, the Commission's draft conclusions were in fact supported by a significant amount of practice and by decisions of international courts and tribunals. Some of the draft conclusions were less reliant than others on practice because the rules they contained were uncontested. A case in point was draft conclusion 10, which reflected the generally accepted rule that a treaty that conflicted with a peremptory norm of general international law (*jus cogens*) was void. In the fifth report, he took issue with the suggestion made by two States that the Commission's work was unsubstantiated because it relied mainly on the decisions of the International Court of Justice. It should be recalled that the Court's decisions had served as a basis for the Commission's work on many topics. Not only was that desirable; in fact, it would be a matter of concern if the Commission did not accord great weight to the work of the Court. Nonetheless, upon further reflection, he believed that one or two draft conclusions could perhaps be better supported. In any case, he intended to continue working on the commentaries, taking into account the views of members of the Commission as well as States.

The question of international organizations, which had been raised by several States, could be addressed in the commentaries to the relevant draft conclusions. Additionally, he would propose a carefully drafted catch-all paragraph in the commentary to draft conclusion 1 to address the place of international organizations in the draft conclusions as a whole, taking care to reflect the varied positions that had been expressed on the question in the plenary debate and in the Drafting Committee in the context of draft conclusion 17.

Turning to the draft conclusions themselves, he said that draft conclusion 1, on the scope of the draft conclusions, had garnered very few comments from States; he had therefore not proposed any modifications to its text. Draft conclusion 2, containing the definition of a peremptory norm of general international law (*jus cogens*), was based on the 1969 Vienna Convention on the Law of Treaties and was the provision on which much of the entire text depended. It had not attracted a large number of comments, and many States had, unsurprisingly, been supportive of it.

Draft conclusion 3, on the other hand, had been the subject of much comment by States, although a majority of States supported the proposition in the draft conclusion. The arguments put forward by States on either side of the debate largely reflected those made in the Commission. The main criticisms focused on two contentions: that draft conclusion 3 and

the elements it contained were not supported by practice and that those elements risked creating an additional criterion for *jus cogens*.

As he had already stated in his summing-up of the Commission's debates on the first and second reports, he considered the first criticism to be without merit. Paragraphs (3) to (7) of the commentary to draft conclusion 3, as contained in the Commission's report on the work of its seventy-first session (A/74/10), referred to domestic jurisprudence – and not just *Siderman de Blake v. Republic of Argentina*, as the United States of America had seemed to suggest –, decisions of international courts and tribunals and scholarly writings. While those references were sufficient, he would, if the members considered it necessary, propose additional ones, bearing in mind the need to avoid creating an imbalance in the text.

The second criticism – that the elements in draft conclusion 3 might create new criteria – was based on the argument that those elements were not contained in the 1969 Vienna Convention. However, the purpose of the Commission's project had never been to reproduce that Convention. In any case, it could not be denied, as noted by Kolb, that virtually every statement on *jus cogens* by States and commentators was based on an assumption that those elements applied. In addition, it was important to consider the draft conclusions as a whole. Draft conclusion 4 – the only draft conclusion that specified the criteria for *jus cogens* – did not include the elements set forth in draft conclusion 3. Moreover, it was clear from the commentary to draft conclusion 3 that those elements were descriptive and provided context for the identification of peremptory norms but were not criteria in and of themselves. Nonetheless, that point could perhaps be made even clearer in the commentary to draft conclusion 3 and perhaps also in the commentary to draft conclusion 4.

The Russian Federation and the United States had suggested that if draft conclusion 3 was retained, the "fundamental values" referred to should, for the sake of consistency with draft conclusions 2, 4 and 7, be those of "the international community of States as a whole" and not just "the international community". As he understood it, the reference to "fundamental values" in draft conclusions 2, 4 and 7 was connected to the identification of *jus cogens* norms, which, as the draft conclusions made clear, was to be done with reference to the acceptance and recognition of such norms by States. However, peremptory norms of general international law reflected and protected the fundamental values of the international community more broadly, and that was the import of draft conclusion 3 and perhaps also draft conclusion 18. Importing the wording "international community of States as a whole" into draft conclusion 3 would risk creating the very conflation of the elements in draft conclusion 3 with the criteria in draft conclusion 4 that some members and States feared. He therefore did not support that proposed modification to draft conclusion 3.

Draft conclusion 4, which set forth the criteria for the identification of a peremptory norm of general international law (*jus cogens*), had received near-universal support, with two exceptions. Armenia had expressed the view that it should be reformulated so as to be based on natural law and not positivism. However, as the Commission had maintained throughout its work on the topic that it would not concern itself with theoretical debates, it should not be drawn into the question of whether the draft conclusion reflected a positivist or a natural law approach. The Netherlands had suggested that universal application should be incorporated as an additional criterion in draft conclusion 4. In his view, universal applicability was a consequence rather than a criterion. Certainly, States' belief that a particular norm was universally applicable might be relevant to the assessment of acceptance and recognition of non-derogability, but the criterion remained acceptance and recognition of non-derogability. No proposals for modifications to draft conclusion 4 were thus made in the report.

Draft conclusion 5 concerned the first criterion for the identification of *jus cogens*, namely that it must be a norm of general international law. Some States had suggested that the draft conclusion was redundant, but that seemed to be based on a misunderstanding of the general structure of that part of the draft conclusions. Draft conclusion 5 did not, as had been suggested by the United States, address the same issue as draft conclusions 6 and 7, which concerned the second criterion. Neither was the content of draft conclusion 5 addressed by the first criterion in draft conclusion 4, since draft conclusion 5 was intended to explain what was meant by that first criterion. He therefore did not support the suggestion that draft conclusion 5 should be deleted.

Many States had expressed doubts about the Commission’s choice of the words “basis” and “bases” rather than “source” and “sources”. The Drafting Committee had considered those terms very carefully and opted for “bases”, since “sources” might cause confusion with the elements contained in Article 38 of the Statute of the International Court of Justice. However, as there was nothing objectionable about using the word “source”, he had proposed in the report that the word “basis” should be replaced with “source”. While different views had been expressed about the priority to be accorded to treaty rules *vis-à-vis* general principles, those views had already been taken into account in paragraph 2 of draft conclusion 5, and it would not be useful to reopen that discussion.

Draft conclusion 6 sought to distinguish the criterion of acceptance and recognition for identifying a peremptory norm of general international law (*jus cogens*) from acceptance and recognition as a norm of general international law. The suggestion by the United States that draft conclusion 6 (1) should be replaced with the final sentence of paragraph (2) of the commentary would affect the overall balance of the draft conclusion and would elide the explicit distinction being made between *opinio juris* and recognition and acceptance under draft conclusion 4 (*opinio juris cogentis*). The United Kingdom had proposed the insertion of the phrase “by the international community of States as a whole” in paragraph 2 of the draft conclusion. He did not consider that proposal necessary or helpful, as draft conclusion 6 explained what was meant by acceptance and recognition as a criterion under draft conclusion 4, which already contained the words “accepted and recognized by the international community of States as a whole”. Nonetheless, with caution and reluctance, he proposed in the report that the phrase should be inserted in draft conclusion 6 (2). He did not accept the suggestion that reference should be made to “unequivocal and affirmative support”, as he had not found any basis for such a standard.

Draft conclusion 7 was intended to explain what was meant by the phrase “international community of States as a whole”. While States generally supported the content of the draft conclusion, some had suggested that the required numerical threshold, “a very large majority”, should be replaced with “virtually all”, “virtually universal” or “overwhelming majority”. At least two States had suggested that that would be in line with the 1969 Vienna Convention, although in fact the Convention did not contain any quantitative requirements. It had also been suggested that the higher threshold was based on the *North Sea Continental Shelf* cases. It was true that in those cases the Court had referred to “virtually uniform” State practice as a standard for customary international law, but the phrase referred not to the number of States that participated in the practice, but rather to the idea that the practice of those States that did participate must be virtually uniform. In fact, the Court had used the qualifier “extensive” in reference to the number of States. The possible use of that qualifier could be discussed in the Drafting Committee if necessary. As many States had noted, determining acceptance and recognition by the international community of States as a whole must also involve a qualitative assessment. He agreed with the point made by several States about the importance of representativeness and thus recommended that the words “a very large majority” in draft conclusion 7 (2) should be replaced with “a very large and representative majority”.

The content of draft conclusion 8, concerning evidence of acceptance and recognition, had been relatively well received. The main suggestion made by several States was that the phrase “resolutions adopted by an international organization or at an intergovernmental conference” should be preceded by the words “conduct of States in connection with”. The Drafting Committee had already considered that possibility and had rejected it, correctly in his opinion, for two reasons. First, while it was true that the conclusions on identification of customary international law referred to “conduct in connection with resolutions” as a form of practice, conclusion 12 of those conclusions provided that resolutions, and not only conduct in connection with resolutions, provided evidence for determining the existence of customary international law. Second, in paragraph 99 of its judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice had not referred to conduct in relation to General Assembly resolution 3452 (XXX), but rather to the resolution itself. He was also unconvinced by the suggestion to specify that inaction or failure to react could not serve as evidence of acceptance and recognition, as there was no support for such an assertion.

The few comments made in respect of draft conclusion 9 had mainly centred on the outputs of expert bodies. Spain had suggested that expert bodies should be highlighted in the text itself rather than in the commentary, while other States, such as Germany and the Russian Federation, had called for greater caution in referring to expert bodies in the commentary. His view was that it would be difficult to justify a specific reference to expert bodies in the text. The call for greater caution in the commentary could be addressed in the discussions on the commentaries.

States had generally agreed with draft conclusion 10, which provided for the nullity of treaties that conflicted with *jus cogens* and was based on articles 53 and 64 of the 1969 Vienna Convention. While he was sympathetic to the suggestion by France that the draft conclusion should simply reproduce articles 53 and 64, he worried that such an amendment might require reconsideration of the structure of draft conclusions 10 to 12. For that reason, he preferred to maintain the current wording.

Draft conclusion 11, which concerned the non-separability of treaty provisions that conflicted with *jus cogens*, had also enjoyed broad support. Nonetheless, several States, including Austria, Belarus, Belgium and South Africa, had suggested that the rule whereby treaties which, at the time of conclusion, were in conflict with *jus cogens* were not separable should be reconsidered. He continued to support that position, which he had put forward in his third report (A/CN.4/714 and A/CN.4/714/Corr.1). However, given the lengthy debate on the subject in the Commission and the fact that only a small number of States had made the suggestion, he had not considered it appropriate to propose that modification himself.

Very few States had commented on draft conclusion 12, on the consequences of the invalidity of treaties that conflicted with a *jus cogens* norm, which was based on article 71 of the 1969 Vienna Convention. Colombia had suggested that the duty of the parties to bring their relations into conformity with *jus cogens* must be restricted to their treaty relations. That proposal, however, was inconsistent with the 1969 Vienna Convention; if the Commission was going to depart from the Convention, it should have very compelling reasons for doing so. Secondly, the performance of the treaty could potentially result in a situation where the parties' mutual relations outside the treaty context were contrary to *jus cogens*. Any suggestion that such relations would be unaffected by that rule would be inconsistent with the general thrust and purport of the Commission's work.

Draft conclusion 13 concerned the effects of *jus cogens* on reservations. Several States, including Poland, Romania and South Africa, had questioned paragraph 1, which, rather than providing for the invalidity of a reservation that was contrary to *jus cogens*, stated that such a reservation did not affect the binding nature of the peremptory norm. The Commission had debated that issue extensively both in the plenary and in the Drafting Committee. Paragraph 1 of draft conclusion 13 did not undermine *jus cogens*. It was based on the understanding that, although a norm of *jus cogens* might be contained in a treaty, its basis in general international law remained unaffected by any reservation to it. He agreed with the suggestion put forward by the Netherlands that the matter should be clarified in the commentary. The Commission might also consider specifying that a reservation to a *jus cogens* norm in a treaty was likely to be contrary to the object and purpose of the treaty. That determination, however, would be based not on the *jus cogens* norm as such but rather on an appreciation and interpretation of the treaty. He would thus not recommend any modification to draft conclusion 13.

There had been overwhelming support for the substance of draft conclusion 14, concerning the consequences of *jus cogens* for customary international law. Nonetheless, one question that had been posed by many States was how a peremptory norm inconsistent with an existing rule of customary international law could arise, since it would require a general practice accepted as law first. That point could perhaps be clarified in the commentary.

Several States had expressed concern at the wording of paragraph 1 of draft conclusion 14, considering that it referred to a nonsensical situation involving a rule of customary international law which did not come into existence. The Drafting Committee had already spent a considerable amount of time attempting to address that same problem. While the suggestion by the United States that the phrase "does not come into existence" should be replaced with "is void" might seem to address the problem, that solution would raise other

difficulties that the Drafting Committee had sought to avoid, since it would still imply the existence of a rule of customary international law. Such a rule existed only if it was valid, and the idea of a void or invalid rule of customary international law did not make sense. As noted by Kawasaki, that was mainly because the rules of customary international law, unlike treaties, were created not by legal acts, but rather "through the factual process of accumulation of State practice accompanied by the collective consciousness of obligation". The solution proposed in the report was the insertion of the word "would" to indicate that the putative rule in question had not actually come into existence. The United Kingdom and Israel had proposed the deletion of paragraph 3 of draft conclusion 14, but most other States supported the rule contained therein.

Draft conclusion 15, concerning obligations created by unilateral acts of States, had also met with general acceptance. He therefore did not propose any modifications to that draft conclusion.

Unsurprisingly, draft conclusion 16 had garnered several comments. Only the United States had opposed the draft conclusion as such. However, China, France, Germany, Israel, the Russian Federation, the United Kingdom and the United States had raised serious concerns about the fact that the draft conclusion covered decisions of the Security Council. On the other hand, several States, including Brazil, the Islamic Republic of Iran, South Africa and Togo, had expressed the view that Security Council resolutions should be mentioned not only in the commentary but also in the draft conclusion itself, which was the position to which he also adhered. Other States, in particular Italy, South Africa and Spain, had proposed an additional paragraph, either in the draft conclusion or in the commentary, to emphasize that draft conclusion 16 did not permit a State to unilaterally determine that a Security Council resolution was in conflict with *jus cogens*. However, as that caveat applied equally to other sources of obligations, he would be hesitant to include such language, since it could suggest that the principle did not apply to other sources. On the strength of the comments expressed in the Sixth Committee, he would caution against any modification of either the text of draft conclusion 16 or the commentary thereto, at least insofar as it related to the Security Council. The compromise that had been reached on first reading should be retained.

Draft conclusion 17 had been generally well received. France and Spain had suggested a clarification of the phrase "have a legal interest" in paragraph 1. As had been agreed in the Drafting Committee, he believed that the issue could be addressed in the commentary. A suggestion had also been made to include, in the commentary, references to the International Court of Justice order of 23 January 2020 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, which had been delivered after the adoption of the draft conclusions on first reading.

There had been virtually no opposition to draft conclusion 18, concerning circumstances precluding wrongfulness. However, it had been suggested that the commentary ought to address some of the complex issues arising from the application of the rule set forth therein, particularly in relation to consent and self-defence and the use of force. As noted in the report, the complexity of those issues related not so much to the general consequences of *jus cogens* as such, but rather to the scope of particular norms of *jus cogens* and the exceptions thereto. Indeed, that point was made several times in the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts. It would thus be beyond the scope of the topic to address those interesting yet vexed questions. However, the commentary might benefit from additional references indicating the acceptance of the rule in practice.

Draft conclusion 19, concerning particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*), had garnered a significant number of comments. Germany, Israel, the United Kingdom and the United States had expressed the view that, contrary to what was stated in the commentary, the draft conclusion did not reflect customary international law. Other States, however, including Cuba, Cyprus, Nicaragua and Spain, had expressed strong support for the draft conclusion. A few States, including Australia, the Netherlands and Poland, had suggested that the commentary should include examples of recent practice. Such recent practice might include the response of States to the Russian invasion of Crimea in 2014, to the decision by the United States to move its embassy in Israel from Tel Aviv to Jerusalem, and to the most recent armed intervention by

Russia in Ukraine. He agreed that the commentaries could and should be strengthened significantly.

Israel, Japan and the United States had noted that the jurisprudence of the International Court of Justice relied upon in the commentary did not support the draft conclusion. At the Commission's seventy-first session, in 2019, Mr. Murphy had made a similar point. In preparing the next version of the commentary, he would take up the suggestion made by Italy to make the link between the Court's advisory opinions and *jus cogens* explicit. No States had called for modifications to the draft conclusion itself, and he did not wish to propose any either.

Most States had not commented on draft conclusion 20. France had argued that the use of the phrase "as far as possible" was problematic, on the grounds that, in the event of a conflict between *jus cogens* and another rule of international law, there ought to be an absolute consequence of non-application of the latter. As he explained in the report, since the rule in draft conclusion 20 was one of interpretation rather than application, it applied prior to the establishment of a conflict. Therefore, the phrase "as far as possible" was not only relevant but also necessary. He did not wish to propose any modification to draft conclusion 20.

Draft conclusion 21, on procedural requirements, had received a significant number of comments from States, most of them critical. Broadly speaking, some States felt that the draft conclusion undermined the dispute settlement framework under the 1969 Vienna Convention, while others believed that it had the effect of imposing the Convention's rules on States that were not bound by them. In other words, the two criticisms pulled in opposite directions. While all the concerns expressed had merit, he did not think that it would be appropriate for the Commission to adopt the draft conclusions without a provision addressing the problem of auto-interpretation. On the basis of the comments by States, he proposed that the draft conclusion should be renamed "Recommended procedure" to indicate that it did not purport to establish or reflect any rule of general application. Moreover, he recommended that it should be placed under Part Four, on general provisions, rather than Part Three, on the legal consequences of *jus cogens*, and that a saving clause should be inserted to make clear that the Vienna Convention framework remained, for those bound by it, unaffected by the draft conclusion. In the report, he suggested that, in paragraph 1, the words "States concerned" could be replaced with "States concerned and other entities, as may be appropriate". In retrospect, however, he believed the modification could cause a problem, at least in respect of paragraph 4 of the draft conclusion. He would therefore withdraw the proposal in the Drafting Committee.

Draft conclusion 22, which specified that the draft conclusions were without prejudice to consequences of specific *jus cogens* norms, had not attracted many comments. The Islamic Republic of Iran had suggested its deletion, though it was not clear precisely why. The draft conclusion was an extremely important provision because it covered a number of issues that could have been, but were not, addressed elsewhere in the draft conclusions. Without it, the Commission might send the message that it had taken a position on those issues. He had taken note of the suggestion by France and Italy that the consequences of *jus cogens* for specific norms contemplated in the commentary to draft conclusion 22 ought to have been addressed. In his view, the commentary explained convincingly why those issues were not addressed. He had proposed, in his fourth report (A/CN.4/727), that some of the issues should be addressed, but the Commission had decided that it would not be appropriate to do so, a position that he had subsequently come to accept. He believed that draft conclusion 22 should be retained in its current state.

Unsurprisingly, draft conclusion 23 and the draft annex had been the subject of many comments. While several States had expressed their views on which norms ought to have been included or excluded and how particular norms ought to have been formulated, the Commission had decided, on first reading, to list norms that it had previously identified as

jus cogens. As a result of that approach, the only real choice before the Commission at its current session was whether or not to include a list at all. Slightly more States had expressed support for retaining it, with the arguments on either side of the debate being largely the same as those put forward in the Commission. The main argument against the list was that the Commission had not based it on the methodology outlined in the draft conclusions, in particular draft conclusion 4. However, that criticism was essentially addressed by the Commission's approach, in that all it was doing was listing, in an annex, norms that it had previously identified as *jus cogens*. It was important to recall that the purpose of the draft conclusions was to offer guidance to those who might be called upon to identify *jus cogens* norms, including non-experts in international law. While for an expert, the list might seem unnecessary and even unhelpful, for others, it could prove extremely useful. He therefore recommended the retention of draft conclusion 23 and its annex as they stood. Lastly, he proposed that the final outcome of the Commission's work on the topic should continue to be referred to as "conclusions".

Mr. Forteau said that he wished to thank the Special Rapporteur for his fifth report, which faithfully reflected the comments and observations received from States, as compiled in document A/CN.4/748. It was regrettable, however, that the latter document did not contain all the observations submitted to the secretariat in French by France, and that those observations had not been translated in full into English. Respect for the principle of equality among the official languages was all the more important in the context of the draft conclusions and draft annex adopted on first reading, the French translation of which had left much to be desired. He welcomed the Special Rapporteur's efforts to work in both English and French, and hoped that the Drafting Committee would work in at least two official languages and that the linguistic changes proposed by States would be duly taken into account during the second reading.

Before turning to the draft conclusions, he wished to express a number of regrets. The first was that, following an approach that appeared to have become generalized, the Commission intended to complete the second reading in only one session. That did not seem to be a good practice, especially as certain provisions were the subject of lively debate, and a further exchange with the Sixth Committee might prove necessary. To make matters worse, the Commission had not completed the first reading in accordance with its usual procedure and risked neglecting substantive discussions on a topic of primary importance for the international legal order. Since the topic did not require urgent attention, more time could have been set aside for its consideration, even though the upcoming end of the quinquennium did present certain challenges.

The impression of rushing through the second reading was heightened by the fact that, in the report, the Special Rapporteur merely examined States' observations, without saying anything about the case law and doctrine published since the first reading. Contrary to what the Special Rapporteur said in paragraph 6 of the report, that did not seem to be the "normal" practice of the Commission. It did not allow the Commission to assess for itself what changes might be necessary, and while the observations of States must be taken into account, the Commission should take care not to become another Sixth Committee or a mere rubber stamp for the wishes expressed by States. The Commission should evaluate those observations in the light of recent developments in case law and doctrine, in particular legal scholars' criticisms of the draft adopted on first reading.

It was also regrettable that, ultimately, the draft had little added value and did not properly guide its target audience. That was particularly true of draft conclusion 19, which simply repeated what the Commission had said in the past and, in paragraph 4, did not deal with relevant contemporary developments. The same was true of the "without prejudice" clause in draft conclusion 22, though it should be recognized that, in that case, it was the Commission that had limited the ambitions of the Special Rapporteur, and not vice versa. Among the many points that should have been addressed and clarified in the draft conclusions

was the crucial question of what was meant by “in conflict with”, “contrary to” or “in conformity with” a *jus cogens* norm, as those expressions were used repeatedly in the draft conclusions and were undoubtedly central to their implementation.

He had misgivings about some of the methodological choices that had been made. States’ silence with regard to certain draft conclusions was afforded inconsistent treatment by the Special Rapporteur: in some cases it was taken as a sign of approval, in line with the idea that silence implied consent, while in others, particularly in paragraph 86 of the report, it was deemed to be inconclusive, on the grounds that some States had limited resources and could not always adopt a position on questions of international law.

The Special Rapporteur had a tendency, evident in paragraphs 53, 72, 79, 138, 147 and 198 of the report, among others, to propose amendments only to the commentaries, when it was the wording of the draft conclusions themselves that was problematic. That approach could ultimately lead to a kind of codification by abdication, as illustrated in particular by what the Special Rapporteur advocated in paragraph 224 concerning the list of *jus cogens* norms.

He wished to comment on some of the draft conclusions, on the understanding that his silence on the points that he did not have time to mention did not necessarily mean that he agreed or disagreed with the Special Rapporteur. He would begin with three cross-cutting remarks. First, he agreed with the suggestion in paragraph 32 of the report to reword the title of the draft conclusions. Second, on the role of practice, he agreed with the Special Rapporteur’s remark in paragraph 19 of the report that the commentaries did contain references to practice. Nevertheless, it would be beneficial to increase the frequency of such references. Third, according to the Special Rapporteur, the draft conclusions were “restatements” of the law, which was why the final product should take the form of “conclusions”. While he agreed with that view, some of the draft conclusions went beyond existing law. For example, draft conclusion 21 presented significant difficulties: its customary basis was more than questionable, and it introduced two parallel legal regimes, both of which could be binding on the same State *vis-à-vis* different States depending on whether they were parties to the 1969 Vienna Convention. That situation was highly problematic in the case of norms “of general international law” that should apply to all in the same way. It was not enough to say, as the Special Rapporteur did, that draft conclusion 21 contained a “without prejudice” clause, as that left unresolved the problem of the coexistence of two distinct regimes in respect of an issue that should be addressed in a uniform manner. Moreover, the very wording of the draft conclusion posed a number of problems, as pointed out by several States, whose observations the Commission must take into account. The Special Rapporteur’s proposals in that regard were a step in the right direction, but certainly did not appear to be sufficient. He took note, however, of the new proposals made by the Special Rapporteur in introducing the report, on which he would reserve judgment.

He had a few specific comments about some of the draft conclusions. While he was not opposed to placing draft conclusion 3 directly after draft conclusion 1, he did not think that doing so would solve the main problem in draft conclusion 3, which was that the substance and concrete legal scope of the reference to “values” were in need of clarification. Moreover, as several States had pointed out, the commentary seemed to treat values as a source of *jus cogens*, which was not compatible with the criteria set out in draft conclusion 4. Paragraph (16) of the commentary to draft conclusion 3 was confusing in that respect, as was paragraph 52 of the report, in which the Special Rapporteur suggested that the Commission could add to the criteria established in the 1969 Vienna Convention. Also confusing was paragraph 60 of the report, in which the Special Rapporteur referred to an observation by Greece that values could provide a criterion for identifying *jus cogens* norms. The reference to values would be better placed in a preamble. Furthermore, as he had stated in the past, the notion of values was polysemous and must therefore be defined precisely if it was to be used in a legal text. For example, the Court of Justice of the European Union had

recently identified the "values" upheld by the European Union, not all of which fell under *jus cogens*. The French Court of Cassation, meanwhile, had found that the immunity of State officials from foreign criminal jurisdiction was a "value" recognized by the international community that must be weighed against other values recognized by that community. He doubted that the Special Rapporteur understood the term "value" in the same way. Accordingly, if reference was to be made to the term, it should, at the very least, be defined in the draft conclusions.

He remained unconvinced by draft conclusion 5, which appeared to confuse the sources and evidence of *jus cogens*. It was generally accepted that a norm of *jus cogens* was necessarily customary and, to date, no convincing example had been provided to suggest otherwise. Draft conclusion 5 should therefore be rewritten. The Special Rapporteur's argument, in paragraph 69 of the report, that "sources of international law" had two meanings, and his proposal to replace the word "bases" with "sources", unduly complicated matters and obscured the meaning of the draft conclusion. It was nonetheless true that restricting *jus cogens* to norms of customary origin could be problematic in domestic legal systems that did not fully incorporate international custom and would thus be prevented from giving effect to *jus cogens*. Flexibility would therefore be needed in the reformulation of draft conclusion 5 to reflect contemporary domestic judicial practice. On another note, he agreed with the Special Rapporteur that a treaty could reflect a norm of *jus cogens* but could not be the source of it. However, what was true of treaties was also true of all non-customary sources of international law. For that reason too, it would be appropriate to amend not only the commentary but also draft conclusion 5 itself.

Turning to draft conclusion 7, he said he agreed that the text adopted on first reading achieved a satisfactory balance and that the inclusion of the word "representative" could further improve the provision. However, he was opposed to the idea of replacing the words "very large majority" with "overwhelming majority", as doing so seemed overly restrictive and subjective.

It was odd that, in draft conclusion 9, there was no mention of the fact that the International Court of Justice was assigned a special role by the 1969 Vienna Convention in identifying *jus cogens* norms.

With regard to draft conclusion 10, he was not convinced by the explanation given in paragraph 116 of the Special Rapporteur's report. It seemed to him that the United States had rightly pointed out that draft conclusion 10 (2) was not entirely consistent with draft conclusion 11 (2), and that an adjustment was therefore necessary.

He did not understand the exact purpose of draft conclusion 13 (1), which concerned reservations. What was said in that provision would be true of many other situations: the non-signature or non-ratification of a treaty would have the same effect, as would an objection or non-objection to such a reservation. It was not clear, therefore, what purpose was served by the paragraph, or indeed by the whole of draft conclusion 13, which was devoid of nuance, unless it was to say that a reservation contrary to a treaty provision that reflected a norm of *jus cogens* was invalid on that ground alone. However, that seemed unlikely, since there was nothing to prevent a State from limiting the scope of a treaty obligation as long as it remained bound by the corresponding peremptory or other customary rule. It was not clear why, for example, a State could not conclude a treaty on international criminal law and set aside, by means of a reservation, a provision of the treaty that related to the crime of genocide, provided that the reservation was not contrary to the object and purpose of the treaty, which was a different matter. Paragraph 1 should therefore be reviewed. Paragraph 2 could be retained, but with an important correction: a reservation could not modify the effect of "a treaty" in its entirety, only of certain "provisions of a treaty", as indicated in articles 2 and 21 of the 1969 Vienna Convention.

Contrary to what the Special Rapporteur indicated in the report, the wording of draft conclusion 14 still seemed legally inconsistent, for the reasons put forward by several States that had referred to an "impossible scenario". Only a norm that existed could conflict with another. Moreover, draft conclusion 14 raised a major problem by implying that *jus cogens* norms were irreversible: if a customary norm contrary to *jus cogens* could not exist, then a *jus cogens* norm could never be modified. However, that view ran counter to article 64 of the 1969 Vienna Convention. Draft conclusion 14 should therefore be thoroughly revised.

Draft conclusion 16 appeared flawed in two respects. First, it said nothing about resolutions that were recommendatory or had "normative value", to quote from the 1996 advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. Second, it said nothing about decisions that granted authorizations, such as a Security Council resolution authorizing certain States to use force under Chapter VII of the Charter of the United Nations. Subject to those reservations, he agreed with what the Special Rapporteur proposed in paragraph 162 of the report, with one important nuance: it should not be stated in the draft conclusion that the act of an organization "does not create obligations", but that such an act was rendered null and void, or at least without effect. That would make it clearer that *jus cogens* had such an effect only if the act was ultimately found to be contrary to it. To say that no obligation was created might increase the risk of unilateral challenges to the decisions of international organizations.

Regarding draft conclusion 23 and the draft annex, he was in favour of retaining the list of *jus cogens* norms. However, in the light of the comments received from many States, the commentary should be thoroughly revised so as to illustrate how the methodology set forth in the draft conclusions had been used to identify the *jus cogens* norms in the list. As was clear from paragraph 31 of the report, the Special Rapporteur intended to make proposals along those lines, and he himself stood ready to contribute to efforts in that regard.

The meeting rose at 4.55 p.m.