

INTERNATIONAL LAW COMMISSION
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Jus cogens

Statement of the Chairman of the Drafting Committee

9 August 2016

It is my pleasure, today, to introduce the eighth report of the Drafting Committee for the sixty-eighth session of the International Law Commission, dealing with the topic “*jus cogens*”.

Following the referral to the Drafting Committee of draft conclusions 1 and 3, on 19 July 2016, three meetings were held on the topic, on 19, 22 and 26 July 2016, respectively. It should be recalled that, upon summing up this year’s debate on the topic in the Plenary, the Special Rapporteur recommended that the draft conclusions remain in the Drafting Committee pending the submission of further proposals for draft conclusions. My statement today is, accordingly, presented in the form of an interim report, intended to provide the Commission with information on the progress made in the Drafting Committee so far.

As I will describe shortly, the Drafting Committee proceeded on the basis of the proposals made by the Special Rapporteur, in his first report, and provisionally adopted a text for draft conclusion 1. It then turned to the Special Rapporteur’s proposal for draft conclusion 3, which was renumbered as draft conclusion 2, and provisionally adopted a text for the first paragraph of the draft conclusion. The Committee, however, was unable to conclude its consideration of the second paragraph of the Special Rapporteur’s proposal, owing to a lack of time.

The Drafting Committee also considered suggestions for changing the title of the topic as a whole, and various options were considered. The concern expressed, among others, in the Drafting Committee was that it should follow the Commission’s past practice regarding the use

of Latin. However, the Drafting Committee was aware of the fact that this was a matter for the Plenary to decide, and it is to be recalled that the Special Rapporteur indicated his intention to consider the question of the title of the topic in his next report, and possibly make a recommendation.

Draft conclusion 1

Mr. Chairman,

Draft conclusion 1 deals with the scope of the draft conclusions being developed by the Commission, and reads as follows “[t]he present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*)”. The Drafting Committee worked on the basis of the proposal of the Special Rapporteur, as contained in his first report. The opening phrase “the present draft conclusions concern” follows the standard structure of the Commission’s formulation for scope provisions.

The Drafting Committee settled for the clause “the identification of” which tracks the formulation of the title adopted for the “Identification of customary international law” topic. There was a proposal to replace the word “identification” with “determination”, but the Drafting Committee decided against such change since the reference to “determination” suggested the existence of an authoritative determination of the norm in question. In its view, “identification” was more appropriate also because it suggested an element of deduction.

The words “and legal effects” were initially rendered as “legal consequences”, but the Drafting Committee was of the view that the concept of “legal effects” was more all-encompassing and conveyed the idea of the norms in question producing specific legal effects. Other proposals included referring to the “nature” of *jus cogens*, as well as to its “existence and content”. However, there was insufficient support in the Drafting Committee for those proposals. The sense of the Drafting Committee was that the process of identification was broad and would, necessarily, involve an assessment of the nature of *jus cogens*, and its content. It was understood thereby that the draft conclusions will cover both the identification of *jus cogens*, which is based in the law of treaties, and its legal effects, which is ascertained outside of the law of treaties,

including in the law on the responsibility of States for internationally wrongful acts. The Drafting Committee further simplified the original reference to “flowing from” in the Special Rapporteur’s proposal to “of”.

The Drafting Committee also considered a proposal to simply present the provision as “the present draft conclusions concern peremptory norms of general international law (*jus cogens*)”, which would leave the scope of the draft conclusions open. It, however, preferred language that sought to specify what the draft conclusions set out to do. At the same time, as already mentioned, it was understood that the formulation of the draft conclusion meant that the scope of the project was broad.

The Drafting Committee also considered the reference to “*jus cogens*” itself. Separate from the question of the title of the topic as a whole, which I alluded to earlier, the matter was also raised in connection with draft conclusion 1. The Drafting Committee settled on the formulation found in the Vienna Convention, namely “peremptory norms of general international law (*jus cogens*)”. Another suggestion made was to have the reference to “(*jus cogens*)” located after “peremptory norms”, and not at the end of the phrase “norms of general international law”, but the Drafting Committee felt that such deviation from the Vienna Convention, and from the Commission’s own past usage (most recently in its work on the reservations to treaties), would be difficult to justify.

Although the draft conclusion was adopted with the word “general”, this was without prejudice to the possibility of the existence of regional *jus cogens*, an issue to be considered in a future report of the Special Rapporteur. Another suggestion, not adopted, was to retain the word “general” in square brackets. The Drafting Committee also replaced the word “rules” with “norms”, as was suggested by the Special Rapporteur, during his introduction of the first report in the Plenary, and which is used in the Vienna Convention.

The title of the draft conclusion is “scope”, as was proposed by the Special Rapporteur, and which is common to similar provisions adopted by the Commission in its other texts.

Draft Conclusion 2

Mr. Chairman,

The Drafting Committee next considered the Special Rapporteur's proposal for draft conclusion 3 as proposed in his first report, and which it subsequently renumbered as draft conclusion 2.

Paragraph 1

As regards the first paragraph, the Drafting Committee, on the basis of suggestions made in the plenary, decided to reformulate the provision in order to track the language of the second sentence of Article 53 of the Vienna Convention. It was understood that, at this early phase of the work on the topic, it would be difficult to justify adopting a different definition of *jus cogens* than that adopted in the Vienna Convention.

Earlier versions commenced with a reference to “[i]nternational law recognizes that...”, and “[f]or the purposes of the present draft conclusions”, but neither found favour with the Drafting Committee.

The main issue discussed was whether the Drafting Committee might modify the language of the Vienna Convention, in particular by deleting the reference to “of States” in the formula “international community of States as a whole”, which was a suggestion supported by some members. Their view was that including the reference to “of States” did not accord with the approach recently taken by the Commission in other topics, which also took into account the practice of international organizations and other actors. The concern also expressed was that the reference to “of States” was based on a notion of the international community at the time of the Vienna Conference, which no longer reflected the present reality.

The Drafting Committee, however, did not accept the suggestion, out of the concern that reconceiving the idea of the “international community of States” would represent a significant departure from the Vienna Convention, and the Commission's own previous work on *jus cogens*, including prior understandings on language employed in the context of *jus cogens*, and that in connection with *erga omnes* obligations. The prevailing view of the Drafting Committee was that the Commission's approach to the issue had not changed since the 1960s, and that the

understanding of the meaning of the phrase “international community of States as a whole” given at the 1969 Vienna Conference still applied. Furthermore, the topic being considered concerned a source of international law, and, as such, it was still the case that acceptance and recognition by States was central to the concept of *jus cogens*. The Drafting Committee considered this to be inadvisable, especially at such an early stage of the work, and without the benefit of in-depth research and analysis by the Special Rapporteur, followed by clear guidance on the point from the Plenary.

A further possibility considered by the Drafting Committee was to separate out the aspect of modification by a subsequent norm of general international law having the same character, as found in Article 53, into a separate draft conclusion. However, the Drafting Committee remained reluctant to do so as it was a key element of the definition in the Vienna Convention, which, it felt was also accepted under customary international law.

Mr. Chairman,

As indicated at the beginning of my statement, the proposal of the Special Rapporteur contained a second paragraph indicating a number of descriptive elements of *jus cogens*, and its purpose. The Drafting Committee was only able to hold an initial exchange of views on the paragraph, owing to a lack of time. Among the options the Drafting Committee will consider next year is the possibility of moving paragraph 2, or a further version thereof, into a separate draft conclusion or conclusions. Allow me to also indicate, for the record, that paragraph 1 was acceptable to some members on the understanding that the content of paragraph 2 would appear in the draft conclusions, in some form.

As the draft conclusion was not finalized, the Drafting Committee was not able to adopt a title, which has been left for next year’s session.

Mr. Chairman,

Before concluding my report today, I wish to pay tribute to the Special Rapporteur, Mr. Dire Tladi, whose knowledge of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also wish to thank the members of the Drafting Committee for their active participation and valuable contribution to the work undertaken this year. I also thank the Secretariat for its valuable assistance.

Mr. Chairman,

This concludes my introduction of the eighth report of the Drafting Committee for the sixty-eighth session. I wish to confirm that the Commission is not, at this stage, being requested to act on the draft conclusions, as this report has been presented for information purposes only.

Thank you.

Annex

Title and text of draft conclusion 1, and text of draft conclusion 2, paragraph 1, provisionally adopted by the Drafting Committee on 19 July 2016 and on 22 July 2016, respectively

Draft conclusion 1

Scope

The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*).

Draft conclusion 2 [3]

...

1. A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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