

Provisional

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Provisional summary record of the 3314th meeting

Held at the Palais des Nations, Geneva, on Monday, 4 July 2016, at 3 p.m.

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Protection of the atmosphere


Report of the Drafting Committee

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Present:

Chairman: Mr. Comissário Afonso
Members: Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Gómez-Robledo
Mr. Hassouna
Ms. Jacobsson
Mr. Kamto
Mr. Kittichaisaree
Mr. Kolodkin
Mr. Laraba
Mr. McRae
Mr. Murase
Mr. Niehaus
Mr. Nolte
Mr. Park
Mr. Peter
M. Petrič
Mr. Saboia
Mr. Singh
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 3 p.m.

Jus cogens (agenda item 10) (A/CN.4/693)

The Chairman invited Mr. Tladi, the Special Rapporteur on the topic “*Jus cogens*”, to present his first report (A/CN.4/693).

Mr. Tladi (Special Rapporteur) thanked the members of the Commission for the trust they had shown him in appointing him Special Rapporteur for such an important and sensitive topic as *jus cogens* and said that he would undertake his task with the greatest of care, seriousness and devotion. In accordance with the spirit of collegiality that characterized the Commission’s work, the outcome of the work on the topic could not, and should not, reflect the views of one person but, rather, should be the collective effort of the Commission as a whole. He therefore looked forward to hearing the views, comments, criticisms and proposals of the members with a view to achieving an outcome of which all members could be proud and which would receive the acceptance of States. As with other topics on the Commission’s programme of work, *jus cogens* garnered much attention. In the course of preparing his report, he had spoken on the topic at several engagements, and delegates of the Sixth Committee had asked him to give a briefing, which he hoped to be able to organize in the near future.

He wished to thank all those who had contributed to the report, whose names were mentioned in the note on the first page of the report. In that regard, it would be necessary to correct the errors that had inadvertently been introduced by the editing service to the affiliations of some of the persons mentioned. He was pleased with the geographical and linguistic diversity of the various contributors and wished to extend his appreciation in particular to members of the Codification Division for their assistance and to everyone who had commented on an earlier draft of the report, including several members of the Commission, in particular Mr. Nolte, who had hosted him in Berlin while he was writing the report, from October 2015 to January 2016. He also wished to express his gratitude to those States that had provided information in response to the Commission’s request in the report on the work of its sixty-seventh session. Although that information had not been used in the current report because it had been received too late, it would be relevant for aspects of the topic to be covered in the second and third reports.

The first report was to be read in conjunction with the informal note distributed on 13 July 2015, in which certain methodological issues had been raised, although because of a lack of time, it had not been discussed in an informal consultation as planned. As an advance copy had been circulated on 8 March 2016, he hoped that the members of the Commission had had sufficient time to study the report, which addressed mainly conceptual issues related to *jus cogens*, including its nature and definition. The report also traced the historical evolution of the concept and the acceptance in international law of its central elements. It also raised a number of methodological issues on which he would be grateful to receive comments from the members. The three draft conclusions proposed in section VII of the report were rather basic and, he hoped, uncontroversial. Rather than repeating the contents of the report, he would sketch out the general framework and explain some of the language choices made in the draft conclusions.

Section II of the report addressed the debate on the topic in the Sixth Committee in 2014 and 2015. By and large, States had expressed support for the topic, with only three States expressing reservations. One of the issues raised by the Member States, which he would return to, concerned methodology, in particular the materials on which the Commission would base its work and conclusions. Another issue raised by several delegations was whether the Commission should address the third element in the syllabus, namely the drafting of an illustrative list of norms that had already acquired the status of *jus cogens*. It should be recalled that the syllabus contained four elements: the nature of *jus cogens*, the requirements for the elevation of a norm to the status of *jus cogens*, the establishment of an illustrative list of norms of *jus cogens* and the consequences of *jus cogens*.

Some States, such as Slovakia and Austria, had been in favour of the Commission drawing up an illustrative list, while others had raised serious questions about that

possibility. Finland, for example, speaking on behalf of the Nordic States, had cautioned that an illustrative list would, by definition, not be exhaustive, and expressed concern that rules of international law that had the status of *jus cogens* but were not included in the list might be deemed to have inferior status to those listed. Similarly, Spain had suggested that such a list, even if it were stressed that it was illustrative, would come to be considered as a *numerus clausus*. South Africa had pointed to the risk that the list, even if accurate at the time of its adoption, would eventually become outdated or incomplete. New Zealand, meanwhile, had adopted a “wait and see” approach, stating that the requirements for a norm to achieve the status of *jus cogens* should determine whether it would be useful to draw up an illustrative list.

Those views were reflective of the internal discussions in the Working Group on the long-term programme of work. While he continued to be of the view that the Commission should not refrain from drawing up a list that was clearly described as illustrative simply because it might be misinterpreted as a *numerus clausus*, he did wonder whether the compilation of such a list might substantially change the nature of the topic. The topic was concerned with methodological rules concerning the determination of the status of *jus cogens*, not with the substantive or normative rules in different areas of international law, such as *jus ad bellum*, international criminal law, international human rights law or international environmental law. For example, if the Commission decided to include the prohibition of genocide in the illustrative list of *jus cogens* norms, would it be required to undertake an in-depth study of the rules of international law relating to genocide? If such a study were considered necessary for a norm such as the prohibition of genocide, which clearly had *jus cogens* status, it would be all the more so for other norms whose *jus cogens* status was not as clear. The compilation of an illustrative list might also blur the nature of the topic, which was fundamentally oriented on methodology and process, by shifting the focus towards the legal status of particular primary rules of international law. He would be grateful to hear the views of the Commission members on that matter. His own view had evolved and he now believed that the Commission should consider dispensing with an illustrative list, on the understanding that it could consider other ways to provide guidance to States and practitioners on norms which, at the current time, met the requirements for *jus cogens* status.

The question of the materials on which the Commission would base its work had been vigorously debated in the Sixth Committee. The United States of America, for example, had suggested that the focus should be on actual practice and not, as appeared in the syllabus, on jurisprudence. That question was an important one for any topic, but perhaps more so for a topic like *jus cogens*, on which there were so many divergent materials. In his view, the Commission should undertake a thorough analysis of the rich variety of practice — both State practice and judicial practice. While literature could not, and should not, be dispositive, it could assist in placing the materials at the Commission’s disposal in their particular context. It would be key when assessing all the materials to accord proper weight to each one.

Section IV of the report contained a detailed analysis of what could be referred to as the historical antecedents of *jus cogens*, of which he would simply highlight the most important points. While the term *jus cogens* in international law had not appeared in the doctrine or practice before the twentieth century, the peremptory character of natural law, considered immutable and superior to positive law, had been stressed by writers of the seventeenth and eighteenth centuries, such as Groot, de Vattel and Wolff. That school of thought had then declined in influence with the rise of positivism in the nineteenth and twentieth centuries. Even then, however, the idea that there were some rules from which States could not derogate, even by agreement, could be found in the literature. That was the theoretical basis of “non-derogation”, which was often the subject of controversy.

Prior to the Commission’s work, there had been much literature supporting the idea of norms from which no derogation was permitted, but little practice to support that proposition. There were agreements, of course, containing non-derogation provisions, such as article 20 of the Covenant of the League of Nations, but that provision, being a treaty rule applicable to parties, did not fulfil the criteria for *jus cogens*.

There was also some judicial practice recognizing rules from which States were not free to contract out of. Examples included the arbitral award in the *Pablo Nájera* case by the French-Mexican Claims Commission and the separate opinion of Judge Schücking of the Permanent Court of International Justice in the *Oscar Chinn* case, although both conclusions had been based on a treaty obligation. In summary, at the time of the Second World War, the literature, going back to the seventeenth century, had recognized the existence of norms from which States could not derogate, and that proposition had not been seriously questioned, even though there might have been disagreement on the basis of the proposition. Practice supporting the proposition, however, had been rather thin, and the little practice that could be found concerned peremptory treaty rules that applied to the parties to the treaties and not rules of general international law.

As noted in the syllabus, the Commission had contributed to the development, acceptance and mainstreaming of *jus cogens* in international law. Indeed, as could be gleaned from the report, much of the practice, both judicial and State practice, had been inspired by the work of the Commission. Paragraphs 29 to 32 of the report illustrated that the concept of *jus cogens*, already broadly accepted by pre-war scholars, had been accepted without much difficulty by the members of the Commission, which, when it had examined the proposition of invalidity on the grounds of *jus cogens*, had debated the drafting and theoretical basis of the proposition, but had never questioned the proposition itself nor its status in international law. It was, however, the reaction of States to the work of the Commission that had highlighted an element that had not been taken into account up to that point: the acceptance of the proposition by States. Almost all States had expressed support for the idea put forward by the Commission, although some had expressed reservations and called for caution, particularly in relation to the drafting of the provision. Only Luxembourg had objected to the provision, arguing that it was designed to “introduce as a cause of nullity criteria of morality and ‘public policy’ such as are used in internal law”, a clear indication that it considered that the provision constituted progressive development. It had been against that background of support, both within the Commission and beyond, particularly among States, that draft article 50 had been included in the draft articles on the law of treaties.

The support by States for the idea that treaties in conflict with *jus cogens* were invalid had been confirmed at the Vienna Conference, although certain States, while expressing support for the provision, had raised important concerns about the drafting. France, the United States of America and the United Kingdom, in particular, had worried that, without clearer guidelines as to what norms constituted *jus cogens*, the text was likely to be abused in order to call into question validly concluded treaties. The response to that concern, which would be considered in a future report, was found in article 66 of the 1969 Vienna Convention on the Law of Treaties, which established an important role for the International Court of Justice in relation to the invocation of *jus cogens* to invalidate a treaty. It was important to stress, however, that those States had not questioned the idea of *jus cogens* or its status as part of international law, contrary to popular belief. Other States, notably Turkey and Australia, had questioned that status, but at the time of the adoption of the Vienna Convention, there had been widespread support, both in the literature and the statements by States, for recognition of *jus cogens* as part of the international law of the time. Moreover, the work of the Commission seemed to have inspired some judicial practice, even prior to the adoption of the Convention; *jus cogens* had been mentioned by the International Court of Justice in the *North Sea Continental Shelf* cases, for example, and by Judges Fernandes and Tanaka in their dissenting opinions in the cases concerning *Right of Passage over Indian Territory* and the *South West Africa* cases (*second phase*), respectively.

Since the adoption of the Vienna Convention, States had consistently invoked *jus cogens*, particularly in their diplomatic correspondence. National, regional and international courts had also done the same, in particular the International Court of Justice, which, although it had earlier adopted a very prudent position on the matter, had recently explicitly recognized *jus cogens* as an element of international law.

While the place of *jus cogens* in international law could now no longer be seriously questioned, its theoretical basis had continued to be debated since the seventeenth century,

as was described in paragraphs 50 to 60 of section V of the report. Although the report did not seek to resolve the debate concerning *jus cogens*, it was necessary to examine the theoretical debate in order to attempt to list the criteria for establishing *jus cogens* norms. There was support for each of the two main schools of thought — the natural and positive law approaches — but, as illustrated by the analysis in the report, neither had yet adequately explained the uniqueness of *jus cogens* in international law.

Subsection C of section V of the report attempted to distil, on the basis of State practice and judicial decisions and the writings of scholars, the core elements of *jus cogens*, which were reflected in the draft conclusions proposed in section VII. Rather than summarizing that section, he would present the proposed draft conclusions.

Draft conclusion 1, which was not, strictly speaking, a “draft conclusion”, defined the scope of the draft conclusions. The Commission had included a similar provision in the draft conclusions on the identification of customary international law provisionally adopted by the Drafting Committee and in draft guideline 2 on the protection of the atmosphere adopted at the previous session. The Commission might, however, wish to address the scope of the draft conclusions in an introductory section, as it had done in the draft principles on the protection of the environment in relation to armed conflict. Draft conclusion 1 set out the main elements to be considered under the topic, namely the way in which *jus cogens* norms were to be identified and the consequences flowing from them. He proposed that the word “rules” should be replaced with “norms” for the sake of consistency with the language used in relation to the topic, notably in the Vienna Convention. He had not referred to the illustrative list in draft conclusion 1 because he believed that the Commission should consider dispensing with such a list, a view which appeared to be shared by most members. Even if it were to include one, the scope of the project was formulated in sufficiently broad terms to cover that possibility.

Draft conclusion 2 was intended to draw a distinction between norms of *jus cogens* and other rules of international law which could be modified, abrogated or derogated from by the agreement of States (*jus dispositivum*). That distinction, which went without saying in many ways, had appeared in the 1969 judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, as well as several dissenting and separate opinions, examples of which were provided in the report. More importantly, the distinction had also been recognized by States, both in the context of the work of the Commission on the law of treaties and in the context of the Vienna Conference, as illustrated in footnotes 220 and 221 of the report. The second sentence of the first paragraph of draft conclusion 2, which set out the modes through which rules of *jus dispositivum* could be modified, abrogated or derogated from, should be similarly uncontroversial.

The principle set out in the second paragraph of draft conclusion 2, according to which *jus cogens* was an exception to the general *jus dispositivum* character of international law, was supported by classical writings as well as judicial and State practice. The provision that *jus cogens* norms could be modified only by other *jus cogens* norms was based on article 53 of the Vienna Convention. The words “abrogated”, “derogated from” and “modified” had been chosen carefully to reflect the various effects that agreement could have on *jus dispositivum* rules, and represented the different ways that rules of international law could be “contracted out of”. The word “modify” referred to the adjustments or amendments made to specific rules. Thus, two States might agree that an existing rule of *jus dispositivum* would be applied as between them in a different manner than was generally understood. While abrogation and derogation were similar, there was an important difference. To derogate from a rule was to depart from applying it, in whole or in part, without affecting its validity. Thus, States could, by agreement, decide not to apply a particular rule of *jus dispositivum* in a specific instance, while continuing to apply it thereafter. Abrogation, however, meant that a rule was no longer valid, either in general or as between the abrogating States.

Draft conclusion 3 described the general character of norms of *jus cogens*. The first paragraph was also based on the definition of norms of *jus cogens* in the Vienna Convention, with the addition of a reference to the fact that such norms could not be modified or abrogated. On reflection, however, he wondered whether that addition was necessary, since it referred not to the application of the rules but to their modification,

which was addressed in draft conclusion 2, and it might be better to return to the language of the Vienna Convention.

The second paragraph of draft conclusion 3 provided that norms of *jus cogens* protected the fundamental values of the international community, were hierarchically superior and were universally applicable. Each of those elements was reflected in practice and was widely accepted in the literature. The idea that *jus cogens* protected the values of the international community proceeded from article 53 of the Vienna Convention, which provided that for a norm to qualify as *jus cogens* it must be “recognized by the international community of States as a whole”. The values in question were, to quote the International Court of Justice in its advisory opinion on *Reservations to the Convention on Genocide*, those that “confirm and endorse the most elementary principles of morality”.

In their comments on draft article 50 of the Commission’s draft articles on the law of treaties, States had also emphasized that *jus cogens* protected the interests of the international community; reference had been made, in particular, to the statements by Nigeria and Lebanon, cited in footnotes 110 and 112 of the report. The fundamental link between the nature of the values being protected by a norm and the recognition of that norm as *jus cogens* had also been confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Inter-American Court of Human Rights, for example in relation to the prohibition of torture and enforced disappearances.

With respect to the hierarchical superiority of norms of *jus cogens*, the Commission had already recognized, in the conclusions of the Work of the Study Group on the Fragmentation of International Law adopted in 2006, that those norms were superior to other rules of international law “on account of the importance of its content as well as the universal acceptance of its superiority”. Finally, the universally applicable character of *jus cogens* rules had been recognized by the International Court of Justice, for example in its advisory opinion on *Reservations to the Convention on Genocide*, and by ICTY and domestic courts in numerous decisions. The commentary to draft article 50 of the draft articles on the law of treaties also suggested that the Commission viewed *jus cogens* norms as universally applicable, since, in response to the denial by some jurists of the existence of *jus cogens* rules in international law, it had pointed out that the law of the Charter of the United Nations concerning the prohibition of the use of force constituted an example of a norm of *jus cogens*.

With regard to the form the Commission’s work should take, he was strongly of the view that draft conclusions were the most appropriate form for a topic such as *jus cogens*. Finally, on the future work programme, he proposed, without prejudice to the decisions to be taken by the Commission in its new composition, that the second report in 2017 should focus on the criteria for determining norms of *jus cogens*, the third report in 2018 on the consequences of *jus cogens*, and the fourth report in 2019 on miscellaneous issues arising from the debates in the Commission and the Sixth Committee.

Mr. Murase thanked the Special Rapporteur for his excellent first report on *jus cogens* and his oral introduction and commended him on his impressive research and his treatment of a difficult topic by digesting the most qualified academic writings on the subject. However, he said that he was puzzled as to why the report limited the scope of the topic to the context of the law of treaties and did not deal with the function of *jus cogens* in the context of the law of State responsibility, which was an equally important aspect of the topic. In 2013, during a meeting of the Working Group on the Long-Term Programme of Work, he had stressed that the Commission could not ignore the concept of *jus cogens* in the context of the law of State responsibility, where it played a distinct role.

His comments would focus on the scope of the topic and were offered in the spirit of constructive criticism. If the Special Rapporteur considered that the concept of *jus cogens* was the same under both the law of treaties and the law of State responsibility, he should have explained why in his report, which he had not done. He was not convinced, however, that the legal nature, content and function of *jus cogens* were the same in the law of treaties and the law of State responsibility. If that was the case, a broad definition of *jus cogens* would have to be elaborated, applicable to both branches of international law. It would also

have to be stated in the draft conclusion on the scope of the topic that it would not be limited to the law of treaties.

It was unfortunate that the report did not contain any analysis of *jus cogens* in the context of the law of State responsibility. The absence of a reference to State responsibility, with the exception of a brief mention in footnote 134, was striking. Section IV (Historical evolution of the concept of *jus cogens*) and subsection C of section V (Core elements of *jus cogens*) did not reflect the importance of State responsibility, which had been one of the major topics dealt with by the Commission. It was also regrettable that the Special Rapporteur did not intend to include it in his future workplan.

Paragraphs 43 and 48 of the report referred to the role of *jus cogens* “beyond the Vienna Convention” and “beyond treaty law”, without giving any further details; he hoped that the Special Rapporteur would provide further explanation in that connection. It appeared, however, on reading the first report, that the consequences and effects of *jus cogens* would be addressed in future reports only from the perspective of the law of treaties. However, the effects of a breach of *jus cogens* rules under the law of treaties were already clearly indicated in articles 53 and 64 of the Vienna Convention, which stated that a treaty concluded in breach of a *jus cogens* norm was “void”, but did not provide for the consequences of a breach of a *jus cogens* norm itself. Furthermore, article 71 of the Vienna Convention, according to which the parties had an obligation to “eliminate ... the consequences” of the invalidity of a treaty which conflicted with a peremptory norm of general international law, did not refer to State responsibility. The consequences of the breach of *jus cogens* norms were, however, very different in that context. In order to properly define the scope of the topic, it was necessary to clarify at the outset the content, role and effects of *jus cogens* in both branches.

He recalled that draft article 19 of the draft articles on State responsibility provisionally adopted by the Commission on first reading in 1980 had referred to international crimes, which were considered violations of *jus cogens* norms. Article 26 of the draft articles on State responsibility adopted by the Commission on second reading in 2001 provided that “nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.” Articles 40 and 41 covered serious breaches of obligations arising from a peremptory norm of general international law. Article 48 concerning the invocation of responsibility by a State other than an injured State set out obligations *erga omnes* and *erga omnes partes*. Obligations *erga omnes* were based on a “horizontal” expansion of State obligations, while *jus cogens* obligations denoted a “vertical” relationship of norms. Of course, not all *erga omnes* obligations were *jus cogens* obligations, but some might overlap. Article 50 (1) (c) referred to the *jus cogens* obligations as exceptions to countermeasures. Article 54 was generally interpreted as recognizing the possibility of lawful countermeasures in case of serious breaches of *jus cogens* norms.

It was well known that the Commission’s draft articles on State responsibility provided for the application of secondary rules in respect of illicit acts and that they were not concerned with the primary rules of obligations of States under international law. However, those provisions were based on the existence of *jus cogens* obligations, the breach of which entailed State responsibility. The Commission should therefore bear in mind the differences between the notion of *jus cogens* in the law of treaties and in the law of State responsibility. In the former, the concepts of hierarchy of norms and non-derogation from the higher law were essential elements of *jus cogens*, and the notion of “hierarchy of norms” was used to mean that a higher law invalidated a lower law. In contrast, under the law of State responsibility, the notion of *jus cogens* involved simply a group of norms that were fundamentally important and, in that context, it was not the concept of “hierarchy of norms” but rather the “primacy of norms” that was an essential component of *jus cogens*.

In the 1980 draft articles on State responsibility, draft article 19 (3) contained an illustrative list of international crimes to serve as examples of *jus cogens*. However, the crimes had been selected not because they constituted higher laws of international law but because they were critically important for the international community as a whole. Thus, while there was obviously no higher law that prohibited, for instance, massive pollution of

the atmosphere, that prohibition was nonetheless considered a *jus cogens* norm in the context of State responsibility, simply because it was a very important norm in international law. A number of decisions of international courts and tribunals of relevance to *jus cogens* were cited in the report, for example in footnotes 146 to 153, 187 and 188. However, *jus cogens* had been invoked, in part, in support of the alleged invalidity of treaties under the law of treaties in only two cases. The other cases cited were all concerned with State responsibility in one way or another, as the States in question were accused of genocide, torture, illegal use of force and other serious violations of *jus cogens* norms.

As to whether an illustrative list of norms with *jus cogens* status should be drawn up, it was crucial to take into account the Commission's work on State responsibility. Articles 53 and 64 of the Vienna Convention did not include specific examples of *jus cogens* and the illustrative list contained in the aforementioned draft article 19 had not been kept by the Commission on second reading, which was very telling. The issue of the scope and title of the topic — which he considered inappropriate — should be examined further by the Special Rapporteur. In accordance with the Special Rapporteur's current approach, that title should be "*Jus cogens* in the law of treaties". However, the commentaries to articles 53 and 64 of the Vienna Convention were already very dense and if the Commission were to follow that approach, it would simply be writing a commentary on the commentaries. The project would only be meaningful if State responsibility were included, and the title would then be "*Jus cogens* in international law". The Commission might wish to set up a working group to consider the scope of the topic. The draft conclusions would be considered on the basis of the Special Rapporteur's future reports, which he hoped would address the issue of State responsibility. In addition to a draft conclusion on the scope of the topic, it would also be necessary to draft a conclusion defining the concept of *jus cogens* so that it was clear what was being dealt with in the draft conclusions. The definition could be included in a new draft conclusion 3, a proposal he would discuss later.

With regard to draft conclusion 1, it should be noted that, in defining the scope, what the Commission should be concerned with was not "the way in which *jus cogens* rules are to be identified" but the existence and content of the *jus cogens* rules. As he had repeatedly mentioned in connection with the topic on customary international law, the words "identify" and "identification" could give rise to confusion. Was "identification" not simply an intellectual exercise of recognition or did it include a normative exercise of determination of the existence and content of a norm and its interpretation and application? If the Commission decided to study *jus cogens* in the context of State responsibility, draft conclusion 1, which was modelled on article 53 of the Vienna Convention, would have to be entirely reformulated.

Regarding draft conclusion 2, the reference to *jus dispositivum*, in paragraph 1, was rather misleading and should be moved to the commentary. Furthermore, since paragraph 2 of that draft conclusion and paragraph 1 of draft conclusion 3 were almost identical, they should be merged into a single provision. Draft conclusion 3 was circular and would make sense only if it set out a definition of *jus cogens*. The question also arose as to what constituted the "fundamental values" of the international community, to which reference was made in paragraph 2 of the draft conclusion. In the same paragraph, the words "hierarchically superior" were valid to describe *jus cogens* in the context of the law of treaties, but that element of hierarchy was not necessarily present in the law of State responsibility, under which *jus cogens* norms were simply considered "especially important".

Mr. Cafilisch, noting that article 139 (3) of the Swiss federal Constitution on popular initiatives requesting constitutional revision provided that "if the initiative ... infringes mandatory provisions of international law, the Federal Assembly [the Parliament] shall declare it to be invalid in whole or in part," said that that provision clearly showed that the concept of *jus cogens* was recognized under Swiss constitutional law and that his country attached great importance to the identification of *jus cogens* norms. For that reason, he was in favour of drawing up at least an illustrative list of such norms. There were, of course, uncertainties in that field, but the work undertaken by the Commission would be of much less relevance and value if an attempt was not made to at least draw up such a list. Despite the uncertainties, it would be regrettable if the Commission, instead of drawing up

just an “illustrative” and provisional list, limited itself to citing “examples”, on the pretext that “the topic, as proposed in the syllabus, is inherently about process and methodology rather than the content of specific rules and norms”, as indicated in paragraph 16 of the report. In paragraph 73 of his report, the Special Rapporteur proposed that the outcome of the Commission’s work should take the form of “draft conclusions”. He supported that proposal, as well as the three draft conclusions proposed in paragraph 74, which could be referred to the Drafting Committee, although perhaps the order of draft conclusions 2 and 3 should be inverted.

In paragraph 14, the Special Rapporteur mentioned a methodological issue that had arisen during the debate in the Sixth Committee: should the work of the Commission be based on State practice, jurisprudence or writings? The Commission usually based its work on the three elements and there was no reason to depart from that practice for the topic at hand. In that regard, State practice — including texts such as the aforementioned Swiss constitutional provision — and international and national jurisprudence played a key role.

He also agreed with the Special Rapporteur’s reflections on the historical evolution of the concept of *jus cogens*, contained in paragraphs 18 to 41. It was generally considered that the existence of a body of peremptory rules in international law was recent, but it had played a central role in the history of that branch of law, albeit by different means. However, it seemed possible to conclude that *jus cogens* had in a way superseded natural law when it came to “moralizing” international public law. While it was no doubt informative and relevant to point out, in paragraphs 46 and 47 of the report, that the International Court of Justice had referred to *jus cogens* 11 times and that the concept had been mentioned 78 times in the individual opinions of the Court’s members, he was of the view that the existence of peremptory rules of international law was no longer seriously disputed.

With regard to the basis for those rules, the Special Rapporteur had rightly highlighted in paragraph 50 that there was no natural law theory to *jus cogens*, just as there was no positive law theory to it, even though exponents of natural law might be more inclined to allege the existence of such rules where there were none. In principle, however, the problem — and the solution to it — went beyond differences of opinion between schools of thought. *Jus cogens* was certainly not immutable, contrary to what exponents of natural law might have claimed in respect to that branch of law. In fact, it was just the opposite that emerged from article 64 of the Vienna Convention on the Law of Treaties.

Was it true, as the Special Rapporteur had stated in paragraph 53, that *jus cogens* arose from the consent of the community of States? Could one really refer in that context to “consent”, a concept that tended to reduce international law as a whole to a consensual phenomenon? In his view, *jus cogens* rules, which fell under the category of customary rules, were binding, like all rules of that kind, because of a general practice followed by States which accepted them as law. Furthermore, there was a third element in addition to the other two: States considered that the rule in question could not be derogated from, even if it could be replaced by another rule of the same type but with a different content. The reasons for the existence of such a rule did not, strictly speaking, come under the jurist’s remit, but rather that of moralists, theologians, sociologists, philosophers, economists or politicians. A theory of consent in the strict sense of the term was not essential, in that context, to explain the basis and custom of *jus cogens*.

In paragraphs 61 to 72 of his report, the Special Rapporteur sought to identify the “core elements of *jus cogens*”, in other words its characteristics. He had no objection to the elements identified by the Special Rapporteur, who raised two interesting questions in drawing up his list. The first was whether the idea of *jus cogens* could be applied in regional international law. The Special Rapporteur was of the view that it could not, which seemed appropriate for a number of reasons. First, the idea of regional rules of *jus cogens* was contrary to the argument that such rules were universal. Secondly, the existence of such norms would raise the issue of their effects: what would happen to a treaty concluded between a State that belonged to a given “region” and a State situated outside that region? Thirdly, it had already been observed that the spatial scope of a regional rule was defined by the territory of the States that had adhered to it: what would be the effect of a norm of *jus cogens vis-à-vis* a State in the region that had not accepted it? Fourthly, what would be

the relationship between the universal norms of *jus cogens* and any contrary regional peremptory rules?

With regard to the issue of the persistent objector, which unfortunately reappeared in the first report on *jus cogens*, he recalled that he had been opposed to the inclusion of a rule on the matter in the draft articles on the identification of customary international law. He hoped that the Commission would firmly reject the idea that there were peremptory rules of international law that were binding on everyone but persistent objectors. Finally, in his first report, the Special Rapporteur had not addressed the question of possible conflicts between binding peremptory rules or how to resolve them.

Mr. Kamto said that, unless it was considered that the rules of customary international law and rules of *jus cogens* were identical, he did not consider it possible to argue that, because the persistent objector principle had been accepted in respect of the former, it must necessarily be valid for the latter.

Sir Michael Wood said that he was grateful to the Special Rapporteur for his first report and his introduction. The report was a most interesting read, with a judicious mix of theory and practice, appropriate for an initial report, and based on an essentially practical approach, which was also appropriate for the topic. The fact that it was an initial report which the Special Rapporteur seemed to be describing as preliminary meant that the Commission should not adopt any texts at that stage, unless it was confident that it had a full picture of all available materials and practice.

While the topic was undoubtedly a challenging one, it was by no means new to the Commission, as it had already addressed it in connection with its work on other topics, such as the law of treaties, State responsibility, reservations to treaties and the fragmentation of international law. Both the Commission and States had already addressed *jus cogens* in some depth, starting in 1953, with Hersch Lauterpacht's first report on the law of treaties. The outcome of that work, in particular articles 53, 64 and 66 (a) of the Vienna Convention on the Law of Treaties, would inevitably be one of the central aspects of the topic. The negotiating history of article 53, which the Special Rapporteur had summarized in paragraphs 28 to 41 of the report, was of great importance. He would slightly nuance what was said in paragraph 41, namely that States had questioned the inclusion of paragraph 53 "out of concern for the lack of clarity about the particular norms that had achieved the status of *jus cogens*". The concerns expressed by States in that regard had been more fundamental and had also extended to the uncertainty over how to identify such norms in practice. For some States, the meaning of the phrase "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" was not self-evident. Explaining how norms of *jus cogens* were to be identified would be one of the key aspects of the Commission's work on the topic.

In section II of the report, the Special Rapporteur helpfully described the debates in the Sixth Committee in 2014 and 2015. States seemed to have been generally in favour of studying the topic, although they had stated that the Commission should approach it with caution. In paragraph 11 of the report, the Special Rapporteur agreed with those words of caution and said that he would take great care in ensuring that his reports reflected contemporary practice and did not stray into untested theories.

Section III of the report raised a number of methodological questions. In particular with respect to the sequence in which the various elements identified in the syllabus might be addressed, the Special Rapporteur had indicated that, given their interconnectedness, he would propose a fluid and flexible approach. By that, he appeared to mean that some draft conclusions, even those already adopted by the Commission, might need to be reconsidered even prior to the first reading in the light of more in-depth study. To the extent that such an approach had already been followed in the past, for example under the guidance of Mr. Gaja on the topic of the responsibility of international organizations, it had been in response to the comments of States on drafts adopted by the Commission after careful consideration, rather than the Commission having second thoughts about its decisions in the light of more in-depth study. Generally speaking, it did not seem very sensible to adopt draft conclusions lightly, in the knowledge that their formulation could always be reviewed before first reading. That should be the exception, not the rule, since otherwise the Commission's

regular procedures might be subverted and it would be even more difficult for States, and others, to see at what stage the Commission was on a particular topic. He did not see, for example, why “questions of definition ... will need to be revisited as the project proceeds and as more practice is evaluated”. Of course, everything might need to be revisited on second reading, and that would in fact be the case, but that was true of every topic and did not mean that in the current instance the Commission should proceed to adopt texts on anything less than a full assessment of relevant practice. To the extent that the various elements identified in the syllabus and refined in the report were so interconnected that it was impossible to reach a conclusion on one aspect without considering others, that should not prompt the Commission to adopt a text provisionally with the intention of coming back to it, but rather to adopt a group of texts at the same time. That was in effect what had happened with the customary international law topic: the Commission had not adopted any draft conclusions until the current session, at which a full set of draft conclusion had been drawn up by the Drafting Committee in light of the plenary debates on the Special Rapporteur’s four reports, the two studies by the secretariat and successive debates in the Sixth Committee.

The Special Rapporteur had asked for members’ views on whether or not to draw up an indicative list of *jus cogens* norms. He shared the doubts expressed in the Sixth Committee on that point and agreed that there might be reasons to reconsider the idea. However, the Special Rapporteur had indicated in paragraph 17 of the report that, even if the Commission did not draw up an indicative list, it would have to provide examples of *jus cogens* norms when discussing how to identify those norms, and the examples could perhaps be collected together and presented in an annex. However, the Special Rapporteur had also pointed to the difficulties that would arise in doing that. Which examples would be included in the list — since, when considering norms, the Commission would not necessarily be taking a position on their status as *jus cogens*? What would the status of such a list be and why should norms be included simply because they had been mentioned in the commentaries by way of examples? In short, he was sceptical about the idea of adding an “indirect” list as an annex, including for reasons similar to those given in the report.

With regard to the fact that there had been different views in the Sixth Committee on the materials that should be examined for the topic, he agreed with the Special Rapporteur that the Commission should, as usual, examine all the materials it could find; the weight to be given to them was a different matter.

Section IV was in two parts. Subsection A was an interesting summary of some of the historical antecedents of the notion of *jus cogens*, from which the Commission could not, and should not, draw any specific conclusions. Subsection B provided important background information, recalling how the Commission, States and the Vienna Conference had come to develop the *jus cogens* provisions of the Vienna Convention. While the report naturally focused, at that preliminary stage of the project, on what had become article 53, the Commission should not lose sight of the fact that, at the Vienna Conference, States had paid great attention to the procedural requirements for the invocation of *jus cogens*. That had resulted in article 66 (a) of the Convention, which provided that where a party invoked *jus cogens* as a ground for impeaching the validity of a treaty, and if following objection thereto no solution was reached within a year, “any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration”. It would be important for the Commission to bear those procedural aspects in mind as it proceeded with work on the topic; he had been pleased to hear that the Special Rapporteur intended to address that point in a future report.

In subsection A of section V of the report, the Special Rapporteur convincingly demonstrated, on the basis of State practice and case law, that *jus cogens* was now part of contemporary international law, which was the cornerstone of the Commission’s work on the topic. He had read with interest subsection B on the theoretical basis for the peremptory character of *jus cogens*. While the Special Rapporteur rightly stated that it was not necessary to enter deeply into those theoretical questions, he seemed to unnecessarily enter into detail on some of them. At that initial stage, what needed to be said, and what could be

said, could be found in the definition of *jus cogens* in the second sentence of article 53 of the Vienna Convention on the Law of Treaties, which read "... a peremptory norm of general international law 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." Although the sentence opened with the words "For the purposes of the present Convention," there was no suggestion that "for the purposes of the present topic" the Commission needed to come up with a different definition. The Commission had not done so in the case of other topics dealing with *jus cogens*. As the definition in the Vienna Convention was widely accepted by States and by international lawyers generally, there would have to be a very good reason for the Commission to depart from it. He therefore believed that the precise language of the Vienna Convention should be retained and included very early in the draft conclusions.

In subsection C of section V, entitled "Core elements of *jus cogens*", the Special Rapporteur attempted, not very convincingly, to elaborate on what was written in article 53 of the Vienna Convention by introducing the notion of "core elements". In paragraph 63 of the report, he suggested that in addition to the elements explicitly referred to in article 53 of the Vienna Convention, there were three other "core elements" that characterized *jus cogens* norms: they were universally applicable, superior to other norms and served to protect fundamental values of the international community. In his view, those elements were not helpful, and by adding them the Special Rapporteur seemed to depart from his initial commitment to ensure that his reports reflected contemporary practice. In fact, there was virtually no reference to practice to support the inclusion of those elements. In any event, as a matter of substance, it was difficult to see that the elements added anything to the terms of article 53 — and, if they did add something, that would raise difficult issues. The Commission needed to be very careful about seeming to create new requirements for the recognition of a *jus cogens* norm, but it was not clear from the formulation of draft conclusion 3 whether the Special Rapporteur was saying that those additional elements must be proven to show that a *jus cogens* norm existed. That was presumably not the case, but then what was their effect?

On reading the Special Rapporteur's explanation, the notion of universal applicability seemed to add nothing to non-derogability. In paragraph 68 of the report, the Special Rapporteur set out the two implications of that additional element, with the caveat that they were provisional considerations to which he would return in future reports: first, the persistent objector rule would not be applicable to *jus cogens* norms and, second, *jus cogens* norms could not apply on a regional or bilateral basis. He himself would call for caution with respect to those statements, as it was difficult to see to what extent they were accurate without having first studied in depth article 53 of the Vienna Convention and State practice. How could the Commission state that the persistent objector rule was not applicable to *jus cogens* — which he believed was the case — without having reached an agreement on the meaning of the expression "accepted and recognized by the international community of States as a whole"? And were members being asked to exclude the possibility of regional *jus cogens*, when that precise issue was to be examined in a later report? Mr. Caflisch had made very interesting comments on those two points, which would no doubt be taken into consideration later.

The notion of "superiority" was unclear and potentially misleading. Consequently, speaking of a "hierarchy" within international law, or saying that certain rules were "superior" to others, without explaining in what way, did not mean a great deal. The Commission might know what effect, if any, *jus cogens* had in relation to treaties and in the fields of international responsibility and State immunity, but the whole question of the effects and consequences of *jus cogens* was to be dealt with in a later report and should not be pre-empted by invoking some vague notion of "superiority". The question of the relationship between *jus cogens* norms themselves would presumably be dealt with in a later report. Since any given *jus cogens* norm was not superior to another *jus cogens* norm, it might be problematic to say that *jus cogens* norms were "superior to other norms of international law".

The reference to the “values of the international community” was similarly unhelpful. The existence of a *jus cogens* norm depended on its acceptance and recognition as such by the international community of States as a whole, not on a subjective assessment of “values”.

With regard to section VI of the report, he agreed that draft conclusions would be the most appropriate form for the outcome of the Commission’s work on the topic, and he welcomed the Special Rapporteur’s intention that the draft conclusions would “reflect the current law and practice on *jus cogens* and will avoid entering into ... theoretical debates”.

Turning to the draft conclusions proposed in section VII of the report, he said that draft conclusion 1 seemed to capture well the intended scope of the draft conclusions, and he had no comments other than drafting ones, particularly concerning the curious use of the expression “*jus cogens* rules”, already mentioned by the Special Rapporteur. The text reflected the Special Rapporteur’s description of the object of the Commission’s study of the topic, namely to “provide a set of draft conclusions that reflect the current state of international law relating to *jus cogens*”. Draft conclusion 2 seemed to be largely of an explanatory nature and its provisions would perhaps be more appropriate for the commentaries than the body of a draft conclusion. In any event, much of the draft conclusion was rather questionable. The first paragraph, for example, referred to modification, derogation and abrogation, and he would review carefully the explanations given by the Special Rapporteur on that point when introducing his report, particularly since, for draft conclusion 3, he had decided to revert to the language of the Vienna Convention, which of course did not mention derogations. The phrase “can take place through treaty, customary international law or other agreement” raised several questions concerning the relationship between different sources of international law which were of no relevance to the Commission in its work on the topic. Draft conclusion 2 should therefore not be adopted, at least for the time being. It could be discussed by the Drafting Committee, if the Special Rapporteur so wished, but not with a view to adopting it as a draft conclusion. Certain aspects of it might feature in a later draft conclusion or eventual commentary. While the first paragraph of draft conclusion 2 seemed to be a statement about the modification and abrogation of, and derogation from, rules of international law in general, he wondered why it was necessary to first explain how rules of international law could “normally” be changed or terminated before considering *jus cogens* norms. In fact, it was not easy to describe the “normal” way that rules changed in a single paragraph of a draft conclusion.

Regarding draft conclusion 3, entitled “General nature of *jus cogens* norms”, he was of the view that the Commission should seek not to set out the “general nature” of *jus cogens*, whatever that expression might mean in that context, but to give a definition of *jus cogens*. For that purpose, as he had already said, it would be better to use the exact language of the second sentence of article 53 of the Vienna Convention, as it would be a serious mistake to change it in any way. As he had already mentioned, he did not find the propositions in the second paragraph of draft conclusion 3, concerning values, hierarchical superiority and universality, to be helpful, and if they meant anything, they addressed matters that would need to be considered in depth, and with caution, at a later stage. Even on the understanding, mentioned by the Special Rapporteur, that the Commission could review it before the first reading, it would be premature to adopt paragraph 2, which should therefore be left aside, at least for the time being.

He agreed with the Special Rapporteur’s proposed future work on the topic, set out in section VIII of the report, and hoped that it meant that the topic could be completed in the course of the next quinquennium; that should be the aim.

In conclusion, despite his considerable doubts about aspects of draft conclusion 3, he would not object to referring draft conclusions 1 and 3 to the Drafting Committee, if that was what the Special Rapporteur wished at the end of the debate. That would not necessarily mean that the Drafting Committee should adopt the three draft conclusions at that stage, before the Commission had considered later reports from the Special Rapporteur. Finally, he agreed with the comments made by Mr. Murase in relation to the draft conclusions.

Protection of the atmosphere (agenda item 8) (*continued*) (A/CN.4/692)*Report of the Drafting Committee* (A/CN.4/L.875)

Mr. Šturma (Chairman of the Drafting Committee) said that he was pleased to present the fifth report of the Drafting Committee for the sixty-eighth session of the Commission, addressing the topic of protection of the atmosphere and contained in document A/CN.4/L.875. The report comprised a preambular paragraph and five draft guidelines. At the current session, the Drafting Committee had devoted five meetings, on 7, 8 and 9 June 2016, to the consideration of draft guidelines 3, 4, 5, 6 and 7 and the draft preambular paragraph, which had been referred to it by the Commission at its 3311th meeting, on 7 June 2016. He thanked the Special Rapporteur, whose mastery of the subject, constructive spirit and cooperation had greatly facilitated the work of the Drafting Committee and his task as Chairman, as well as the members of the Committee for their active participation. The Drafting Committee had also had before it a working paper containing the proposed amendments to the draft guidelines and preambular paragraphs, as contained in the Special Rapporteur's third report (A/CN.4/692). The Special Rapporteur had presented the proposals during his summing up of the debate, taking into account the various comments made in the plenary. He recalled that the Drafting Committee was elaborating draft "guidelines" on the topic, in line with the 2013 understanding, and that it had left open the question of whether the "guidelines" would be presented as containing "guiding principles relating to" or "dealing with" the protection of the atmosphere. He further recalled that, at the previous session, on the recommendation of the Drafting Committee, the Commission had adopted three draft guidelines, namely draft guidelines 1, 2 and 5, together with four preambular paragraphs. Following the proposal by the Special Rapporteur in his third report, the Drafting Committee had renumbered draft guideline 5, on international cooperation, as draft guideline 8, which appeared as such in the Drafting Committee's report, on the understanding that the number 5 in square brackets denoted the previous number and that the text remained as adopted at the previous session. In addition to draft guidelines 3, 4, 5, 6 and 7, the Drafting Committee had, on the basis of the Special Rapporteur's proposal in his third report, adopted a preambular paragraph, which would appear as the fourth paragraph of the preambular text adopted thus far.

Turning to the draft guidelines, he said that draft guideline 3, on the obligation to protect the atmosphere, was central to the draft guidelines as a whole. Draft guidelines 4, 5 and 6, which had also been adopted at the current session, flowed from draft guideline 3 and sought, in particular, to establish an analogous link between various principles of international environmental law and the specific situation of the protection of the atmosphere. It should be recalled that, at the previous session, the Special Rapporteur had proposed in his second report a draft guideline whose referral to the Drafting Committee had been deferred following the debate in the plenary pending further analysis by the Special Rapporteur, taking into account the criticism that his characterization of the duty to protect as an obligation *erga omnes* had not been fully substantiated in the second report. In an effort to allay that concern, the Special Rapporteur had made a proposal in his third report to limit the seemingly broad scope of the obligation specifically to atmospheric pollution and atmospheric degradation, and to differentiate the kinds of obligations pertaining to the two dimensions, while refraining from making a determination as to whether a duty to prevent in the context of protection of the atmosphere was an obligation *erga omnes*.

The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur, taking into account comments made in the plenary, in particular the need to better link the chapeau of the draft guideline and the two paragraphs dealing respectively with atmospheric pollution and atmospheric degradation. It had ultimately been decided to merge the elements into a single paragraph. As currently formulated, draft guideline 3 provided that States had an obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation. That formulation had its genesis in principle 21 of the Stockholm Declaration on the Human Environment, channelling the *Trail Smelter* arbitration, and was also related to principle 2 of the Rio Declaration on Environment and Development. The reference to

“States” for the purposes of the draft guidelines covered both the possibility of States acting “individually” or “jointly”, as appropriate.

It should be recalled that draft guideline 1, provisionally adopted at the previous session, already defined atmospheric pollution as the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin, of such a nature as to endanger human life and health and the Earth’s natural environment. That definition already contained a “transboundary” element. Moreover, the definition of atmospheric degradation as “the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth’s natural environment” also had a “global” dimension. Accordingly, the Drafting Committee had decided to delete the words “transboundary” and “global” from the draft guideline proposed by the Special Rapporteur.

As currently formulated, the draft guideline was without prejudice to whether the obligation to protect the atmosphere was an obligation *erga omnes*. That point would be addressed in the commentary. It would also be clarified in the commentary that the duty of due diligence was an obligation of conduct and not of result, which required States to take appropriate measures to control public and private conduct. Due diligence implied a duty of vigilance and prevention. It also required that the context and evolving standards, from a regulatory or technological perspective, should be taken into account.

The Commission had already acknowledged the fluctuating and dynamic nature of the atmosphere that resulted in the transport and dispersion of polluting and degrading substances within it. Moreover, the atmosphere was essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems. It was on that basis that it was stated in one of the preambular paragraphs provisionally adopted by the Commission at the previous session that the “protection of the environment from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole”. Accordingly, the reference to “prevent, reduce or control” denoted a variety of measures that could be taken by States, whether individually or jointly, in accordance with applicable rules as might be relevant to atmospheric pollution on the one hand and atmospheric degradation on the other. That phrase drew upon formulations contained in article 194 of the Convention on the Law of the Sea and article 4 of the United Nations Framework Convention on Climate Change. Moreover, article 2 of the Paris Agreement provided that “this would significantly reduce the risks and impacts of climate change” by “increasing the ability to adapt to adverse impacts of climate change and foster climate resilience and low greenhouse emissions development”.

Even though the appropriate measures to “prevent, reduce or control” applied to both atmospheric pollution and atmospheric degradation, it was understood that the reference to “applicable rules of international law” was intended to signal a distinction between measures taken, bearing in mind the transboundary nature of atmospheric pollution and the global nature of atmospheric degradation, and the different rules that were applicable thereto. Different “applicable rules of international law” were implicated in each of the two situations, and their contours would be further explored in the commentary.

The title of draft guideline 3, which was now “Obligation to protect the atmosphere” following the deletion by the Drafting Committee of the words “of States” after “obligation”, sought to accentuate the centrality of the obligation to protect.

Draft guideline 4 dealt with environmental impact assessment. It was the first of three draft guidelines that flowed from draft guideline 3. In paragraph 153 of its judgment in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, the International Court of Justice had affirmed that “a State’s obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State”. As currently formulated, draft guideline 4 provided that: “States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities

under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.”

The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur, which sought to take into account views expressed in the plenary. The main points of discussion had revolved around the scope of the draft guideline, which was still considered overly broad. First, the provision had been reformulated in the passive voice: “States have the obligation to ensure that an environmental impact assessment is undertaken ...”, as opposed to “States have an obligation to undertake an appropriate environmental impact assessment”, in order to indicate that it was an obligation of conduct and that, given the diversity of economic actors, the obligation did not necessarily attach to the State itself. What mattered was that it was the State that put in place the necessary legislative, regulatory and other measures for an assessment of the proposed activities to be conducted. Notification and consultations were key to such assessments.

Secondly, concern had been expressed that the proposal had not been limited in space. The phrase “of proposed activities under their jurisdiction or control” was intended to indicate that the obligation of States to ensure that an environmental impact assessment was undertaken related to activities under their jurisdiction or control. Since environmental threats had no respect for borders, that would, in principle, not exclude the possibility of a group of States, as part of global environmental governance, coming together and agreeing that an assessment should be undertaken in respect of an activity under their jurisdiction or control or likely to have an impact on areas under their jurisdiction or control.

The third concern had related to whether a threshold was needed, considering in particular that the definition of the terms “atmospheric pollution” and “atmospheric degradation” in draft guideline 1, provisionally adopted in 2015, already provided for a threshold. The Drafting Committee had considered such a threshold necessary, as exceeding the threshold provided for in the current draft guidelines formed the basis for triggering an environmental impact assessment. The formulation “which are likely to cause significant adverse impact” drew on principle 17 of the Rio Declaration on Environment and Development. Moreover, other instruments, such as the Convention on Environmental Impact Assessment in a Transboundary Context, provided for a similar threshold. The International Court of Justice had also, in several judgments, including those in the cases concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* and the *Construction of a Road in Costa Rica along the San Juan River*, alluded to the importance of an environmental impact assessment. In the *Pulp Mills* case, it had indicated that “it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”. The threshold set by the formulation “likely to cause significant impact” in draft guideline 4 meant that an environmental impact assessment would not be necessary for an activity whose impact was likely to be minor or transitory. The impact of the potential harm must be “significant”, and given that the topic covered both “atmospheric pollution” and “atmospheric degradation”, what constituted “significant” remained a factual determination. To ensure that the threshold of foreseeability was met before an obligation arose, the qualifier of “appropriate” had been omitted from the reference to “an environmental impact assessment”.

While the Drafting Committee had considered that the phrase “in terms of atmospheric pollution or atmospheric degradation” was not, from a drafting perspective, entirely felicitous, it had considered it important to mention the two main issues addressed by the draft guidelines in respect of the protection of the environment, namely transboundary atmospheric pollution and atmospheric degradation. Further explanation would be provided in the commentary as to the extent to which the obligation to ensure that an environmental impact assessment was undertaken applied in transboundary and global contexts.

The Drafting Committee had acknowledged that transparency and public participation were important components aimed at ensuring access to information and representation, but it had considered that procedural aspects of an environmental impact

assessment should be addressed in the commentary and not in the draft guideline, as the Special Rapporteur had proposed.

Principle 10 of the Rio Declaration provided that environmental issues were best handled with the participation of all concerned citizens, at the relevant levels. Such participation included access to information, the opportunity to participate in decision-making processes and effective access to judicial and administrative proceedings. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters addressed those issues. Draft guideline 4 was entitled “Environmental impact assessment”, as originally proposed by the Special Rapporteur.

Draft guideline 5 dealt with sustainable utilization of the atmosphere. The atmosphere was a limited resource with limited assimilation capacity. It was often not conceived of as exploitable in the sense that mineral, oil and gas resources were explored and exploited, but, in fact, it was exploited in its physical and functional components. The polluter exploited the atmosphere by reducing its quality and its capacity to assimilate pollutants. First and foremost, draft guideline 5 drew an analogy with the concept of “shared resource”, while also recognizing that the unity of the global atmosphere required a recognition of the community of interests. Accordingly, the draft guideline was based on the premise that the atmosphere was a limited resource whose ability to sustain life on Earth was affected by anthropogenic activities. In order to ensure the protection of the atmosphere, it was important to see it as an exploitable resource, which subjected it to the principles of conservation and sustainable use. Some members had expressed doubts that the atmosphere could be treated in the same way as aquifers or watercourses.

Draft guideline 5 comprised two paragraphs. In the first paragraph, it was acknowledged that the atmosphere was a “natural resource with a limited assimilation capacity”. The Drafting Committee had preferred that phrase to “the finite nature of the atmosphere,” as proposed by the Special Rapporteur, which it had considered to be imprecise and bound to raise questions, as it was the introduction or release of substances into the atmosphere and alterations to the atmospheric condition which necessarily impacted the atmosphere. The second part of paragraph 1 sought to integrate conservation and development to ensure that modifications to the planet did not compromise the survival and well-being of organisms on Earth by indicating that the utilization of the atmosphere should be undertaken in a sustainable manner. That wording was inspired by articles 4 and 5 of the draft articles on the law of transboundary aquifers adopted by the Commission in 2008 and articles 5 and 6 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

The term “utilization” was used broadly and in general terms, evoking notions beyond actual exploitation, and the commentary would elaborate further on that point. Some members of the Drafting Committee had had difficulties with the notion of “utilization”, given that it was often the activities of humans that, directly or indirectly, had an impact on the atmosphere as an envelope of gases and not the utilization of the atmosphere as such that was the major concern. The Drafting Committee had nonetheless considered that the formulation “its utilization should be undertaken in a sustainable manner” was simple and not overly legalistic. That formulation better reflected the paradigm shift towards viewing the atmosphere as a natural resource that should be utilized in a sustainable manner. It was presented more as a statement of international policy and regulation than an operational code to determine rights and obligations of States.

Paragraph 2 built upon the language of paragraph 140 of the judgment of the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, which referred to “the need to reconcile economic development with protection of the environment”. The formulation proposed by the Special Rapporteur, invoking the need to “ensure proper balance” had been considered unnecessarily conflictual, pitting economic development against environmental protection. Moreover, the use of the expression “protection of the atmosphere” sought to focus the paragraph on the subject matter, which was protection of the atmosphere.

Some members of the Drafting Committee had been of the view that paragraph 2 was unnecessary, as it simply reflected a statement that could be contained in a commentary to explain the guideline, for example.

The title of draft guideline 5 was “Sustainable utilization of the atmosphere”, as originally proposed by the Special Rapporteur. As noted earlier, draft guideline 5 on international cooperation, provisionally adopted in 2015, was now draft guideline 8.

Draft guideline 6 dealt with equitable and reasonable utilization of the atmosphere, an important but autonomous element of sustainability, as reflected in draft guideline 5. The Drafting Committee had discussed it on the basis of a reformulated text by the Special Rapporteur, taking into account comments made in the plenary. As with the preceding draft guideline, some members had questioned its usefulness in relation to the atmosphere, particularly as draft guideline 5 already addressed sustainable utilization.

Like draft guideline 5, draft guideline 6 was formulated in a broadly abstracted and general way. Instead of indicating that States “should utilize the atmosphere”, it provided that: “The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.”

The draft guideline was formulated in general terms, seeking to apply the principle of equity to the protection of the atmosphere as a natural resource shared by all. The first part dealt with “equitable and reasonable” utilization. The formulation that the “atmosphere should be utilized in an equitable and reasonable manner” drew, in part, on article 5 of the Convention on the Law of the Non-navigational Uses of International Watercourses and article 4 of the draft articles on the law of transboundary aquifers. The differences between the atmosphere on the one hand and watercourses or aquifers on the other had been stressed by some members of the Drafting Committee. That required a balancing of interests and consideration of all relevant factors that might be unique to atmospheric pollution, on the one hand, and atmospheric degradation, on the other.

The second part of the draft guideline addressed intra- and inter-generational equity. In order to make the link between the two aspects of equity, the Drafting Committee had elected to use the phrase “taking into account the interests of present and future generations” rather than “and for the benefit of present and future generations of humankind”. The words “taking into account the interests” had replaced “for the benefit of” in order to signal the integrated nature of the atmosphere, whose “exploitation” needed to take into account a balancing of interests to ensure sustenance of life for Earth’s living organisms.

The draft guideline was entitled “Equitable and reasonable utilization of the atmosphere”, the words “and reasonable” having been added to the title proposed by the Special Rapporteur.

Before turning to the last draft guideline, he wished to say a few words about the preambular paragraph that the Drafting Committee had considered and adopted, as it had been proposed by the Special Rapporteur in relation to considerations of equity, in particular intra-generational equity.

The Drafting Committee had worked on a revised proposal by the Special Rapporteur, which had sought to reflect the concept of “different national circumstances” in the text. Such a reference had been considered inappropriate in that context, as it reflected a broader notion and was associated with the concept of common but differentiated responsibilities, which was not part of the topic according to the 2013 understanding.

The text originally proposed by the Special Rapporteur in his third report had been drawn from the ninth preambular paragraph of the draft articles on the law of transboundary aquifers, whereas the current text was inspired by the seventh preambular paragraph of the Convention on the Law of the Non-navigational Uses of International Watercourses. As currently formulated, the paragraph read: “Aware of the special situation and needs of developing countries”. Following the proposal of the Special Rapporteur, it would appear as the fourth preambular paragraph. It simply acknowledged the particular factual situation and needs of developing countries.

Draft guideline 7 dealt with activities whose very purpose was to alter atmospheric conditions, the clear and concrete intention being to modify them on a large scale. The Special Rapporteur had originally proposed it as draft guideline 7, but had then presented it as a new paragraph 3 of draft guideline 5 in the revised proposals he had made following the plenary debate; finally, following discussion in the Drafting Committee, it had been considered that the issue deserved a separate guideline. Moreover, on the substance, the Special Rapporteur had proposed in his third report a draft guideline on geoengineering, which had been revised in general terms following the plenary debate. It was on the basis of that revised text that the Drafting Committee had worked.

In the Drafting Committee, even though the formulation in general terms had been considered a step in the right direction, there had been some concerns about the seemingly broad scope of the proposed provision. Indeed, several members had remained unconvinced that there was a need for a draft guideline on matters that essentially remained controversial and were based on scant practice.

As currently formulated, the text of the draft guideline read: “Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.”

The term “activities” was understood broadly, but they were “activities aimed at intentional large-scale modification of the atmosphere”. The Draft Committee had considered different formulations before settling on that language, which was based on the definitions of “geoengineering” and “environmental modification techniques” under the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which referred to “any technique for changing — through the deliberate manipulation of natural processes — the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space”.

As had already been noted, the term “activities” was to be understood in a broad sense. Certain other activities were prohibited under international law, but the Drafting Committee was of the view that they were not covered by the draft guideline in question. The Environmental Modification Convention, for example, was specifically intended to prevent use of the environment as a means of warfare, by prohibiting the deliberate manipulation of natural processes that could produce phenomena such as hurricanes, tidal waves or changes in climate or that had “widespread, long-lasting or severe effects” (art. 1). Furthermore, the 1977 Protocol additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) contained provisions that were complementary to the Environmental Modification Convention in the event of armed conflict: while the Convention prohibited deliberate modifications of the environment as a means of warfare, Additional Protocol I prohibited attacks on the environment as such, regardless of the means used (arts. 35 (3) and 55; see also art. 8 (2) (b) (iv) of the Rome Statute of the International Criminal Court).

In the course of the discussion in the Drafting Committee, a proposal had been presented to specify that the term “activities” referred only to “non-military” activities. Given that it was understood that the draft guideline did not apply to military activities, there had been an exchange of views on whether the draft guidelines as a whole applied only to “non-military” activities. Some members had considered that that limitation applied only to draft guideline 7, as any other interpretation would call into question the scope of the draft guidelines, defined in a guideline provisionally adopted in 2015 without any similar limitations. Other members had been of the view that the withdrawal of the aforementioned proposal so that “activities” were not qualified as “non-military” had been made precisely because they had been given to understand that the draft guidelines as a whole would not apply to military activities.

Some of the activities were subject to regulation and would continue to be governed by the various applicable regimes. For example, afforestation had been incorporated into the Kyoto Protocol regime and in the Paris Agreement (art. 5 (2)). Measures had been adopted to regulate carbon capture and storage under some international legal instruments. The 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter now included an amended provision and annex, as

well as new guidelines for controlling the dumping of wastes and other matter. To the extent that “ocean iron fertilization” and “ocean alkalinity enhancement” related to questions of ocean dumping, that Convention and the Protocol thereto were relevant.

The draft guideline was not intended to stifle innovation and scientific progress. Principles 7 and 9 of the Rio Declaration highlighted the importance of new and innovative technologies and cooperation in those areas. Draft guideline 7 therefore did not seek to prohibit such activities, although States could agree to do so; it simply set out the principle that such activities should be conducted with prudence and caution. The reference to “prudence and caution” was inspired by the language of the rulings of the International Tribunal for the Law of the Sea in the case concerning *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (para. 77), the *MOX Plant case (Ireland v. United Kingdom)* (para. 84) and the case concerning *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)* (para. 99). The draft guideline was cast in hortatory language, aimed at encouraging the development of rules to govern such activities in the context of the regimes applicable in the various fields relevant to atmospheric pollution and atmospheric degradation.

It should also be noted that the draft guideline provided for an important threshold for such activities: they had to involve “intentional” modification and be conducted on a “large scale”.

The draft guideline ended with the words “subject to any applicable rules of international law”. There had been some discussion in the Drafting Committee as to whether it was appropriate to use in a hortatory guideline the formulation “and in accordance with existing international law,” as had originally been proposed by the Special Rapporteur. Some members had proposed deleting the reference. As currently formulated, the first part of the draft guideline ended with a comma, and was to be understood as “subject to any applicable rules of international law”. It was understood that international law would continue to apply in relation to the draft guideline.

The text originally proposed by the Special Rapporteur had mentioned “transparency”, but the Drafting Committee had decided to address that matter in the commentary. Similarly, as environmental impact assessment was addressed in draft guideline 4, it had elected to delete the second sentence of the draft guideline proposed by the Special Rapporteur, according to which environmental impact assessments were required for such activities, and to address that matter in the commentary.

The title of draft guideline 7 was “Intentional large-scale modification of the atmosphere” rather than “Modification of the atmosphere”, as previously proposed in the Drafting Committee. The title was intended to signal that the draft guideline addressed only intentional modification of the atmosphere on a large scale.

In conclusion, he said that he hoped that the Commission would be in a position to provisionally adopt the draft guidelines and the preambular paragraph as presented.

The meeting rose at 6.10 p.m.