

Provisional

For participants only

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International Law Commission

Sixty-eighth session (second part)

Provisional summary record of the 3315th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 5 July 2016, at 10 a.m.

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Present:

Chairman: Mr. Comissário Afonso
Later: Mr. Nolte (Vice-Chairman)
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. Park
Mr. Peter
Mr. 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 10 a.m.

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

The Chairman invited the Commission to pursue its consideration of the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693).

Mr. Hassouna said that he wished to thank the Special Rapporteur for his clear, well-structured report, which sought to identify the scope of the topic and the general nature of *jus cogens* norms. While many States had expressed support in the Sixth Committee for the inclusion of the topic “*Jus cogens*” on the agenda of the Commission, others continued to voice reservations. Even among those States supporting its inclusion, there remained differences regarding how to approach the topic and the bases on which to rely. The Special Rapporteur should therefore take that divergence of views into consideration and address the topic with great caution. The Special Rapporteur’s ultimate goal would be to clarify the concept of *jus cogens* from an international law perspective, by submitting concrete formulations acceptable to both members of the Commission and members of the Sixth Committee.

With regard to determining *jus cogens* norms, he agreed with the Special Rapporteur that there was no need to depart from the Commission’s normal method of work, which consisted in considering a variety of materials and sources in an integrated fashion. During the Sixth Committee debate on the topic, some States had held that the consideration of the topic should be based on judicial practice, particularly that of the International Court of Justice, whereas others had suggested that it should also be based on relevant State practice. The two sources were not mutually exclusive. The Commission should consider State practice, jurisprudence, literature and other relevant sources; the proper weight to be attached to those sources would then be determined according to the respective materials under consideration.

He supported the fluid and flexible approach to the topic proposed by the Special Rapporteur, which would allow the draft conclusions to be reconsidered in the light of the Commission’s determinations on subsequent elements. That did not mean, however, adopting the draft conclusions on a temporary or provisional basis. Reviews should be undertaken only in the interests of coordination and adaptation.

Concerning the proposal to provide an illustrative list of norms that currently qualified as *jus cogens*, he would favour doing so indirectly by giving examples of such norms in the commentaries in order to substantiate the draft conclusions. He would prefer postponing a decision on whether to compile those examples in an annex to the conclusions until after the Commission had defined the norms of *jus cogens*. The important thing was to clearly underline that any list of examples, whether in the commentaries or in an annex, would be by no means exhaustive in character.

The Special Rapporteur should be commended for his clear description of the historical evolution of the concept of *jus cogens* and for his efforts to outline as concisely as possible the ongoing debates concerning the legal nature of the concept. As the Commission had itself emphasized, *jus cogens* had been the subject of a sizeable volume of attention in the international legal literature, which made the Special Rapporteur’s work all the more impressive.

With regard to the three draft conclusions proposed by the Special Rapporteur, he noted that, when referring to *jus cogens*, the term “norms” had been used in certain formulations and the term “rules” in others. There should be some consistency in the use of terms; otherwise, an explanation would be needed. Although in his introduction to the report the Special Rapporteur had proposed replacing “rules” with “norms” in draft conclusion 1, both terms continued to be used in draft conclusion 2 (2).

Consideration should be given to reversing the order of draft conclusions 2 and 3, so as to begin by describing the general nature of *jus cogens* norms before dealing with the modification, derogation and abrogation of rules of international law. Draft conclusion 2 (1) appeared to go beyond the scope of the topic, since the latter's focus was on *jus cogens* norms, not what rules could be modified, derogated from or abrogated or by what means. The Special Rapporteur should therefore consider deleting the paragraph from the draft conclusions and inserting it in the commentaries, if deemed necessary. Draft conclusion 2 could then be redrafted to read: "Peremptory norms of general international law may only be modified, derogated from or abrogated by rules having the same character."

A definition of *jus cogens* should be added to draft conclusion 3. He supported the suggestion that such a definition should be based on the one contained in article 53 of the Vienna Convention on the Law of Treaties, which included all the core elements of *jus cogens*. In that connection, he would further suggest that the Special Rapporteur should consider renaming the topic "*Jus cogens* in international law", which would better reflect the purpose of the Commission's work.

While the proposed draft conclusions provided a useful starting point for the Commission's discussions on the topic, there were several issues that appeared in need of further clarification. The first was the notion of derogation. Draft conclusion 2 (2) provided that "peremptory norms of international law may only be modified, derogated from or abrogated by rules having the same character". However, the peremptory character of a norm precisely implied that it could not be derogated from by another norm created by some States; if the international community of States as a whole adopted a new peremptory norm, that norm would then modify the existing peremptory norm, but not derogate from it. In that respect, it should also be noted that draft conclusion 3 (1), which stated that peremptory norms were norms from which no modification was permitted, contradicted draft conclusion 2 (2) and, more crucially, article 64 of the Vienna Convention. The Special Rapporteur should further develop the analysis buttressing the current formulation of draft conclusions 2 and 3.

A second issue that needed clarifying was the invalidating effect of *jus cogens*. While the Special Rapporteur specified, in draft conclusion 3 (2), that peremptory norms were hierarchically superior to other norms of international law, the invalidating effect of *jus cogens*, which was set forth in article 53 of the Vienna Convention and was integrally related to the idea of hierarchy, was not mentioned in the draft conclusions. Although the issue might be dealt with in future reports, reference to it in the present context would be desirable. In any case, the Special Rapporteur should address important questions raised by the nullity of norms which conflicted with *jus cogens*, such as who determined whether a conflicting norm was void and whether norms other than treaty norms could also be found void.

A third issue was that of regional *jus cogens*. The Special Rapporteur seemed to assume, in paragraph 68 of the report, that, since *jus cogens* norms were universally applicable, they did not apply on a regional basis. However, contrary to that assumption, which was also reflected in draft conclusion 3 (2), the existence of regional *jus cogens* had been recognized in practice. In 1987, the Inter-American Commission on Human Rights had found that in the member States of the Organization of American States there was recognized a norm of *jus cogens* which prohibited the State execution of children. It followed that the existence of regional *jus cogens* and its application in relation to the universal application of *jus cogens* norms deserved further study, which the Special Rapporteur could undertake in his future reports.

In the light of those observations, he agreed with the referral of the three draft conclusions to the Drafting Committee.

As to the form of the Commission's product, he supported the Special Rapporteur's view that draft conclusions would be the appropriate format, since they would aim to clarify the state of the law on the basis of current practice regarding *jus cogens*. He also agreed with the Special Rapporteur's proposed road map for dealing with the topic, on the understanding that, in addition to the issues that he intended to address in his future reports, consideration should also be given to the issues raised and suggestions made during both the Commission's and the Sixth Committee's debates.

Mr. Kittichaisaree said that he would like to thank the Special Rapporteur for his excellent, well-researched first report, in which he analysed the natural law and positivist approaches to explain the sources of *jus cogens* norms, while conceding that State practice in that field was scarce. He himself was not a proponent of either the natural law or the positivist schools of thought. As a pragmatist or realist international lawyer, he would venture to give the following explanations for the emergence of the recognition of *jus cogens* in the Vienna Convention on the Law of Treaties.

The Commission's work in the lead-up to the Vienna Convention had come not long after the Second World War, when atrocities committed by the Nazi regime had still been fresh in the memories of humankind. The invocation of piracy and slave trading as crimes contrary to public order and morals had not only reaffirmed that certain crimes were subject to universal jurisdiction but had also proved that certain acts were universally proscribed. That had provided a basis for recognizing peremptory norms and the *erga omnes* nature of such norms.

Crimes against humanity, war crimes, crimes against peace and what was to become known as genocide had been prosecuted at the Nuremberg trials, at which the International Military Tribunal had pronounced that crimes against international law were committed by men, not by abstract entities, thereby legitimizing, for the first time, the principle of individual criminal responsibility after several previous efforts had resulted in it being rejected for fear of violating another principle, namely that of legality, or *nullum crimen sine lege*. United Nations General Assembly resolution 95 (I), on the Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, which had been adopted unanimously on 11 December 1946, was evidence of State practice in recognizing that the crimes prosecuted at Nuremberg were universally condemned. In some of the first cases considered by the International Tribunal for the Former Yugoslavia, the Tribunal had cited the resolution as the main basis for holding that, when the crimes under its Statute had been committed, they had already been recognized as crimes under customary international law; hence, there had been no violation of the principle of legality.

Therefore, although those crimes were dealt with under separate international conventions, the purpose of those conventions was to ensure their widest possible prosecution in domestic legal systems and to secure international cooperation to deny safe havens to their perpetrators. However, at the international conferences leading up to the adoption of the conventions concerned, universal jurisdiction had not generally been accepted, except in relation to grave breaches of the four Geneva Conventions of 1949.

Against that background, the task of finding criteria to identify *jus cogens* norms would be an arduous one. However, the Special Rapporteur might, for instance, analyse how the prohibition of torture had become a norm of *jus cogens*, using both the inductive and deductive approaches to establish appropriate criteria for identifying new *jus cogens* norms and for evaluating State practice in support of the existence of such norms. The Special Rapporteur might also look at the possible role played in that respect by general principles of law recognized by civilized nations. For example, child pornography and sexual exploitation of children were crimes under most legal systems. Were they *jus cogens* norms? If not, why not?

Although the report should focus on the process of the identification of *jus cogens* in general and its consequences, he agreed with the idea of having an illustrative list of *jus cogens* norms both in the commentaries and in an annex to the report. Provided that it was clearly stated that the list was not exhaustive, he did not believe that it could be interpreted as closed.

With respect to draft conclusions 1 and 2, he agreed with the view expressed by Sir Michael Wood at the previous meeting. As to draft conclusion 3 (2), while the core elements chosen by the Special Rapporteur to define *jus cogens* norms seemed appropriate, there was a need to explain extensively in the commentary the meaning of the expression “fundamental values of the international community”. The phrase “hierarchically superior to other norms” should be either modified to deliver the idea of superiority without referring to hierarchy, or explained in the commentary. In particular, the Special Rapporteur should specify how the hierarchical superiority of *jus cogens* in international law differed from hierarchical superiority in national systems and how superiority could be determined when two or more norms were in conflict. Rather than being a requirement for identification, hierarchical superiority was one of the consequences of *jus cogens*. Therefore, although the idea of superiority should be mentioned, he was concerned that addressing it in draft conclusion 3 (2) might blur the difference between the identification of *jus cogens* and its consequences and thereby risk making its definition circular. While article 20 of the Covenant of the League of Nations and article 103 of the Charter of the United Nations, which had been cited in paragraph 28 of the report, were interesting examples in the current context, it was not clear how the idea of hierarchy might help shed light on the criteria for identifying *jus cogens*.

Lastly, the phrase “universally applicable” should be retained and explained in the commentary with reference to the International Court of Justice’s advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, according to which principles that might qualify as *jus cogens* had to be recognized as binding on States, even without any conventional obligation, and universal in character. If universality was to be considered a characteristic of *jus cogens* — which he believed to be the case — then the notion of regional *jus cogens* could not be accepted.

The Special Rapporteur should also distinguish between the universal recognition that *jus cogens* norms could not be derogated from, on the one hand, and the fact that States might not accept universal jurisdiction over crimes committed on their respective territories or by or against their nationals, on the other.

Mr. McRae said that he wished to congratulate the Special Rapporteur on his first report, which evidenced high-quality research and highlighted many of the preliminary issues faced by the Commission. The description of the historical evolution of the concept of *jus cogens* was very illuminating and had brought to the fore some of the fundamental contradictions and challenges of the topic.

The Special Rapporteur had brought a balanced approach to the topic and, in response to views expressed by Member States in the Sixth Committee, had said that he would be cautious in his treatment of it. However, Special Rapporteurs and the Commission as a whole were by their very nature and composition cautious, so he was not sure that the Special Rapporteur’s affirmation of caution added anything, methodologically, to the Commission’s treatment of the topic. More important was the Special Rapporteur’s affirmation that he would base his report on the material on which the Commission normally relied, namely State practice, jurisprudence and literature, and that he would not introduce new priorities among them for the purposes of the present topic.

As the Special Rapporteur indicated in his discussion of the historical evolution of the idea of *jus cogens*, the concept was rooted in a mixture of natural law and positivism.

While the origin of *jus cogens* lay in natural law, the methodology for ascertaining whether a rule of *jus cogens* existed was essentially positivist. Although the Special Rapporteur had eschewed a decision on theoretical issues, there was always a theoretical construct behind any choice that was made. In the case of *jus cogens*, a natural law idea was being made to fit into a positivist framework.

Member States in the Sixth Committee had encouraged the Special Rapporteur to look for a grounding of *jus cogens* in State practice, thereby evidencing a positivist perspective. What State practice showed was that no State denied the existence of an international law principle of *jus cogens*. When it came to determining whether a norm had the status of *jus cogens*, however, the question remained whether the Commission should apply the same method as it did for identifying customary international law. If it did, it would find either that there was plenty of *opinio juris* and no real evidence of a constant and uniform usage, or that the evidence of what constituted practice was essentially the same material as that which constituted *opinio juris*. That raised the question whether, in accordance with the standards set in the Commission's work on customary international law, it might be easier to identify a *jus cogens* norm than a customary rule of international law. However, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the International Court of Justice had found a customary rule of international law relating to the use of force on the basis of what States had said and had ignored the fact that what many States did in practice was contrary to their statements that they regarded the use of force as illegal. The rule identified by the Court had perhaps been a *jus cogens* norm, a point that the Special Rapporteur might elaborate upon in future reports. In any event, the case highlighted the conceptual difficulties that the Special Rapporteur would face in producing draft conclusions on the way in which *jus cogens* rules were to be identified.

The grounding of the identification of *jus cogens* norms in the method for identifying customary international law raised further problems, including the relevance of the notion of the persistent objector. While he was sympathetic to the ideas expressed by some members that the persistent objector rule should not apply in the identification of *jus cogens* norms, he was not sure of the justification for doing so. If the methodology for the identification of customary international law was to be applied to the identification of *jus cogens* norms, the question arose as to how the different elements of that methodology should be selected. It was thus up to the Special Rapporteur to find a rationale for excluding the persistent objector rule.

Other matters also required clarification. The Special Rapporteur asserted in his draft conclusions that a *jus cogens* norm could be changed through customary international law, but one might well wonder how that could happen. The first instance of State practice deviating from a *jus cogens* norm would automatically be invalid, as would any subsequent practice of the same nature. Moreover, since universal identity of action by States creating instantaneous customary international law was inconceivable, the Special Rapporteur would have to consider whether the only way in which a *jus cogens* norm could be replaced would be through a multilateral treaty with universal adherence. The problem was not peculiar to the present topic but also inherent in article 53 of the Vienna Convention. The Special Rapporteur would have to consider such matters in his subsequent reports.

Regarding the Special Rapporteur's proposal for a "fluid and flexible approach" that would at times require the reconsideration of certain issues and draft conclusions, he shared the view that it had not been the Commission's practice to proceed in such a manner and that it would not be an efficient use of its time to do so. As the Special Rapporteur was dealing with an evolutionary topic, perhaps he should rethink his plan of work as his research developed and deal later with topics on which more research was needed.

He agreed that draft conclusions were the appropriate format for the outcome of the Commission's work. As to whether there should be an illustrative list, there was no doubt that during its treatment of the topic the Commission would indicate what it considered to be *jus cogens* norms. Whether those norms were then collected in an annex, an illustrative list or an indicative list seemed to him to be a matter of form that could be decided on later in the project when the Commission had a sense of what those norms were.

The question of whether the Commission should embark on a further inquiry into other *jus cogens* norms was a more difficult matter. Although such a list would undoubtedly be of great value, the question arose as to whether it would change the nature of the project. As it might involve considerable additional work and a detailed analysis of substantive areas of law, it was perhaps premature to reach any decision at the current juncture. The Commission could return to the matter when its work on the topic had progressed further and there was a better understanding of the range of *jus cogens* norms emerging from its work and what the production of an annex or illustrative list of additional norms would entail.

With regard to the three draft conclusions, the question of whether the scope of the project should be dealt with in draft conclusion 1 or form part of an introduction could be left to the Drafting Committee when it considered the overall structure of the outcome of the Commission's work. As to the substance of draft conclusion 1, he looked forward to the Special Rapporteur's response to Mr. Murase's questions about whether, in practice, the Commission's work on the topic was being narrowed down to *jus cogens* in the context of the law of treaties. Focusing on the nature of *jus cogens* norms as hierarchical and superior to other norms while reflecting how they functioned in relation to treaties might not be an appropriate way of handling the role that *jus cogens* norms played elsewhere.

He had several concerns regarding draft conclusion 2. First, paragraph 1 did not relate to *jus cogens* norms but was a broad proposition about the extent to which rules of international law might be modified, derogated from or abrogated. Secondly, the report did not lay the analytical groundwork for making such a proposition; that could be misleading. He queried how the draft conclusion tied in with article 41 of the Vienna Convention, which set out a more nuanced position on modification, at least in relation to treaties. Moreover, the draft conclusion, perhaps unintentionally, seemed to allude to the current debate in the World Trade Organization (WTO) about the extent to which two parties to WTO agreements could enter into a bilateral agreement modifying their relations under the Organization. It did not seem that the implications of draft conclusion 2 (1) had been fully thought through. Thirdly, he questioned the usefulness of focusing on the exceptional nature of *jus cogens* norms in draft conclusion 2 (2), particularly at the outset of the treatment of the topic. It was somewhat confusing to treat *jus cogens* norms as if they were at the top of a hierarchy and then say that they were exceptions to the norms lower in the hierarchy. Moreover, it was not clear in what way draft conclusion 2 helped to explain how to identify *jus cogens* norms or their legal consequences.

In his view, the Special Rapporteur should rethink draft conclusion 2 and decide whether there was a proposition about *jus cogens* norms worth putting forward in that provision. If there was such a proposition, it should not relate to the modification of, derogation from or abrogation of treaties or customary international law. He endorsed the suggestion that the idea the Special Rapporteur was seeking to convey should be dealt with in the commentaries, where it could be made clearer than it was at present.

With regard to draft conclusion 3, he shared the doubts of others as to whether it provided an adequate definition of *jus cogens* norms. By asserting that *jus cogens* norms could not be derogated from, draft conclusion 3 (1) seemed to contradict draft conclusion 2 (2), which explained how *jus cogens* norms could be derogated from. Draft conclusion 3 also departed from the definition of *jus cogens* norms set out in article 53 of the Vienna

Convention by adding to derogation, modification and abrogation and taking an absolute position on modification — all that needed further explanation.

Draft conclusion 3 (2) seemed to add qualifications to the definition of *jus cogens* norms that were not sufficiently substantiated in the report. While the statement that *jus cogens* norms protected fundamental values of the international community might be descriptively correct, its normative significance was not clear. Likewise, it was not clear whether the term “hierarchically superior” said anything useful about the range of *jus cogens* norms. While he agreed that a definition of *jus cogens* norms was essential to the project, he considered that it could be achieved by amending draft conclusion 3 (1) and deleting draft conclusion 3 (2), whose purpose and substance could be explained more fully in the commentaries.

In the light of the foregoing, he considered that draft conclusions 1 and 2 should be referred to the Drafting Committee only if they were revised by the Special Rapporteur to reflect the current debate. He was not in favour of referring draft conclusion 2 to the Drafting Committee, unless the consensus of the Commission was otherwise, in which case, the draft conclusion would require major changes that would depend, in part, on how draft conclusion 3 was reworded.

In conclusion, he said that the Special Rapporteur had provided an excellent overview of the history of the concept of *jus cogens* norms and of the conceptual and practical issues confronting the Commission. His subsequent reports elaborating on those issues would be a most valuable contribution to the Commission’s work.

Mr. Nolte said that the Special Rapporteur’s first report provided a solid introduction to the topic and that he shared many of the views it set forth. For example, he agreed that the basis of the work on the topic should be actual State practice, not “untested theories”. Almost fifty years after the adoption of articles 53 and 64 of the Vienna Convention, there was no longer any doubt about the existence of *jus cogens* norms, as the Special Rapporteur had amply demonstrated. Shortly after the Second World War, it had been necessary to establish that international law contained certain basic peremptory norms, such as the prohibition of genocide, of the use of force, or of torture. Such peremptory norms were now established. Today there was a different issue at stake — the difficulty in determining which of the many claims that a particular rule had the character of *jus cogens* were well founded. Less obvious claims were being made than had previously been the case, such as claims by individuals that their right of access to a court was violated by the national implementation of certain Security Council resolutions that established sanctions.

In *Al-Dulimi and Montana Management Inc. v. Switzerland*, the European Court of Human Rights had recently affirmed that the human right of access to a court was not a *jus cogens* norm. That and other cases suggested that today’s challenge was not to establish and expand *jus cogens* norms, but to strike the right balance between ordinary rules of international law which could be modified by regular procedures, on the one hand, and certain exceptional foundational rules which could not be thus modified, on the other. In order to strike that balance, it was necessary to look closely at State and judicial practice, to use the procedures available, such as that under article 66 of the Vienna Convention, and not merely to postulate morality and justice. It was the right time for the Commission to address the topic with a view to helping States and courts deal with *jus cogens* in practical terms and as a matter of *lex lata*. The Commission should help States and courts find the right balance between not enough and too much *jus cogens*.

His preference was not to draw up an illustrative list of *jus cogens* norms, as he was concerned that it would lead to fruitless debate about why certain norms were included over others. It would be better to give a few examples in the commentaries that illustrated how *jus cogens* norms could be identified and what legal effects they produced. However, the

existence of such norms should not be recognized for their own sake. That approach had the additional advantage of obviating discussion of the difficult question of the theoretical foundations of *jus cogens*. He was not convinced by the Special Rapporteur's proposition, in paragraph 59 of the report, that it was impossible and unnecessary to resolve the opposition between positivist and natural law approaches to *jus cogens*. In his view, articles 53 and 64 of the Vienna Convention offered a satisfactory solution by emphasizing the acceptance and recognition of a norm by the international community of States and the possibility of the emergence of new *jus cogens* norms by such acceptance and recognition. Furthermore, he did not consider the rules of the Vienna Convention, which were positive law, to be, in the Special Rapporteur's words, at odds with the idea of a higher set of norms from which no derogation, even if by consent or will of States, was permissible, or an expression of "*le froid cynicisme positiviste*". Articles 53 and 64 of the Vienna Convention demonstrated that a positivist approach was not necessarily cold or amoral. An enlightened positivist approach could prevent natural or moralistic approaches to the law that invited those who applied it to project their own preferences thereon.

On methodology, he agreed that the topic raised different issues which were interrelated and that the Special Rapporteur should proceed cautiously. However, he was not convinced that that required a "fluid" approach where everything remained provisional. The Special Rapporteur had quite rightly drawn parallels between the present topic and the topics of identification of customary international law and of subsequent agreements and subsequent practice in relation to the interpretation of treaties, all of which raised issues that were difficult to disentangle. Yet the nature of the Commission's work was such that once a draft conclusion was provisionally adopted it was no longer "fluid": any change called for another decision, usually by consensus. He would therefore prefer to defer the adoption of certain aspects of the proposed draft conclusions until their implications were clearer.

Regarding the proposed draft conclusions, he endorsed the substance of draft conclusion 1, but suggested that the Drafting Committee might find a way to express it in simpler terms. One possibility could be: "The present draft conclusions concern the identification of norms of *jus cogens* and their legal consequences."

He had two difficulties with draft conclusion 2. The first concerned the second part of the first sentence which read "unless such modification, derogation or abrogation is prohibited by the rule in question". He did not agree that there was a general rule in international law whereby the parties to a treaty could establish a treaty obligation that contained an immutable prohibition to change that obligation. On the contrary, the parties to a treaty could, in principle, modify any rule that they had established by agreement, including a treaty rule that prohibited modification of the treaty. For example, if the parties to the Charter of the United Nations had added a clause to Article 51, whereby, due to its inherent nature, the right of self-defence could not be modified, the parties could, after abrogating the clause, amend Article 51. There might well be exceptions, but it was certainly not generally recognized that the parties to a treaty could bind themselves forever simply by proclaiming that a particular treaty rule could not be changed by their own agreement. A rule did not acquire the character of *jus cogens* solely by agreement of the parties to a treaty. That being said, his intent was not to deny the special nature of *jus cogens*, merely to indicate that he found the formulation of draft conclusion 2 too broad. His second difficulty with draft conclusion 2 related to the second sentence, which concerned the ways in which a modification, derogation or abrogation could take place. He agreed with the Special Rapporteur that the latter could take place through treaty or custom, but he did not consider that the process of customary international law should be described as one of several possible forms of "agreement". An obligation under customary law could arise even for a State that had not agreed to such a rule.

He had several concerns with regard to draft conclusion 3 (2), the first being that the expression “fundamental values” was too limited. In his report, the Special Rapporteur developed the expression based on a judgment of the International Court of Justice related to the Genocide Convention and on the humanitarian character of certain norms. That dimension of humanitarian rules was certainly one important source for *jus cogens* norms, but *jus cogens* was not limited to norms designed to protect individual human beings. There were also important inter-State rules, such as the prohibition of the use of force, which had the character of *jus cogens*. Such norms were more formal in nature and thus protected humanitarian values more indirectly than fundamental rules of a humanitarian character. He therefore proposed that the expression “the fundamental values” should be replaced with “the most fundamental principles”.

Furthermore, while he agreed that the project should deal only with *jus cogens* rules of a universal character, he did not deem it wise to exclude, at least at the current stage, regional or other forms of *jus cogens*. Since, as the Special Rapporteur had rightly observed, the concept of *jus cogens* originated in domestic law, and *jus cogens* norms were a typical feature of domestic law, there was no reason why such a feature should not be recognized within a limited community of States. In Europe, certain rules were recognized as elements of the European public order, which, together with the principle of the primacy of European Union law, produced effects that were very similar to what was known as *jus cogens* at the universal level. He did not consider that the concept of “norms of *jus cogens*” should be limited to rules which were “universally applicable”; however, he had no objection to the scope of the project being limited to *jus cogens* rules which were universally applicable.

His final concern with regard to draft conclusion 3 (2) related to the expression “hierarchically superior”. The concept was not as clear as it appeared because the legal effects of “hierarchically superior” norms could be different. The meaning of “hierarchically superior” was wrapped up with the issue of the legal consequences of *jus cogens* rules, which the Special Rapporteur intended to address at a later stage. He therefore shared the doubts expressed about the advisability of prejudicing the issue at that juncture by introducing the ambiguous term “hierarchical superiority”.

In conclusion, he said that the report was an excellent point of departure for the Commission’s work on the topic.

Protection of the atmosphere (agenda item 8) (*continued*) (A/CN.4/692)

Report of the Drafting Committee (continued) (A/CN.4/L.875)

The Chairman invited the members of the Commission to adopt the titles and texts of draft guidelines 3, 4, 5, 6 and 7, together with a preambular paragraph, provisionally adopted by the Drafting Committee on 7, 8, and 9 June 2016, as contained in document A/CN.4/L.875.

Preambular paragraph

Mr. Kittichaisaree said that during the meetings of the Drafting Committee he had not objected to the inclusion of the preambular paragraph, the wording of which had been drawn from the seventh preambular paragraph of the Convention on the Law of the Non-navigational Uses of International Watercourses. However, he wished to have it placed on record that, in his view, the Commission was not suggesting or acknowledging that developing countries had a free hand to harm the atmosphere.

The preambular paragraph was adopted.

*Draft guideline 3**Obligation to protect the atmosphere*

Mr. Kittichaisaree said that, while he had no objection to draft guideline 3, he wished to make it clear that it was his understanding that, as far as developing countries were concerned, their national capacity and the technology at their disposal would have to be taken into account as a factor in assessing their obligation to exercise due diligence.

Draft guideline 3 was adopted.

*Draft guideline 4**Environmental impact assessment*

Mr. Park said that, although as a member of the Drafting Committee he had joined the consensus on draft guideline 4 and was not opposed to its adoption as a whole, he had strong doubts as to whether States had a legal obligation to ensure that an environmental impact assessment was undertaken of proposed activities likely to cause significant adverse impact on atmosphere in terms of atmospheric pollution or atmospheric degradation. He considered that at the current stage there was insufficient State practice relating to environmental impact assessments in that connection. For that reason, he regarded the final part of draft guideline 4 as, purely and simply, *lex ferenda*.

Draft guideline 4 was adopted.

*Draft guideline 5**Sustainable utilization of the atmosphere*

Mr. Kittichaisaree said that he wished to place on record his view that no State should use “economic development” as an excuse for not protecting the environment. Developing countries should, however, be allowed reasonable grace periods to make the necessary adjustments in order to ensure that their economic development activities would not adversely affect the atmosphere.

Draft guideline 5 was adopted.

*Draft guideline 6**Equitable and reasonable utilization of the atmosphere*

Draft guideline 6 was adopted.

*Draft guideline 7**Intentional large-scale modification of the atmosphere*

Mr. Park said that, as a member of the Drafting Committee, he had joined the consensus on draft guideline 7 and was not opposed to its adoption. The draft guideline had initially been entitled “Geoengineering” and was closely related to climate change. The debate in the plenary had evidenced a divergence of views regarding the guideline, both pro and con. He continued to consider that the content and applicability of the draft guideline were controversial; the relevant technology was still in its infancy, and there was a lack of relevant State practice and *opinio juris* underpinning the guideline. On the latter point, it seemed that the content of the draft guideline had not been arrived at in a manner that corresponded exactly to the Commission’s traditional method in that regard. Lastly, it was

his understanding that draft guideline 7 and the future set of draft guidelines as a whole should apply to non-military activities. In order to avoid any possible misinterpretation of the draft guidelines, it would be necessary to revisit their scope in the near future.

Mr. Kamto said that in plenary meetings most of the members who had spoken on that draft guideline, which had formerly referred to geoengineering, had been opposed to its referral to the Drafting Committee. He was not satisfied with the version produced by the Drafting Committee. The idea that the Commission could formulate a guideline on activities aimed at intentional, large-scale modification of the atmosphere was very worrying and he had serious reservations about it.

Mr. Forteau said that he had not joined the consensus in the Drafting Committee on the draft guideline, which was not supported by State practice or case law. He was against the draft guideline because, among other things, it seemed to legitimize activities aimed at intentional large-scale modification of the atmosphere. Problems might arise in the future if the draft guideline were interpreted as an endorsement of such activities by the Commission.

Mr. Kittichaisaree said that, during the drafting of the guideline, following a proposal that he had made, the phrase “and in accordance with existing international law” had been replaced with “..., subject to any applicable rules of international law” as a means of indicating that intentional large-scale modification of the atmosphere would be subject to any applicable rules of international law as might already exist or might emerge in the future. Whether military or non-military activities were covered by that draft guideline would depend on the general scope of the draft guidelines as a whole.

Mr. Nolte said that he fully agreed with Mr. Forteau that the Commission should not appear to encourage efforts to modify the atmosphere intentionally on a large scale. If that draft guideline were adopted, that concern should be addressed in the commentary. On the other hand, he was surprised by and did not share the opposite concern that the draft guideline was unduly restrictive, since its scope was strictly limited and in point of fact it did not prohibit intentional large-scale modification of the atmosphere, but only said that it should be conducted with prudence and caution. If the Commission was to address the issue, such wording was necessary.

Ms. Jacobsson said that she fully supported Mr. Nolte’s statement.

Mr. Kamto said that he should perhaps have expressed his objection to, rather than his reservations about, the adoption of draft guideline 7. None of the explanations given by various members and nothing in the report of the Chairman of the Drafting Committee militated in favour of its adoption. It was not enough to say that the draft guideline did not seek to encourage “activities aimed at intentional large-scale modification of the atmosphere”. That phrase clearly indicated that the Commission took note of the fact that such activities could exist and that it was endeavouring to define the conditions under which they could be conducted. The draft guideline was therefore unsatisfactory and was apparently based on some treaty provisions relating to the modification of the atmosphere in the context of armed conflict that had been drafted with a view to regulating activities in that area. In conclusion, he said that he was uncomfortable with the guideline.

Draft guideline 7 was adopted.

Draft guideline 8

International cooperation

Draft guideline 8 was adopted.

The Chairman said that he took it that the Commission wished to adopt the report of the Drafting Committee on protection of the atmosphere, as a whole, as contained in document A/CN.4/L.875, subject to a minor editorial amendment.

It was so decided.

The meeting was suspended at 11.40 a.m. and resumed at 12.45 p.m.

Mr. Nolte (First Vice-Chairman) took the Chair.

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

Mr. Šturma (Chairman of the Drafting Committee) said that the Drafting Committee on the topic of provisional application of treaties was composed of Mr. Forteau, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Petrič, Mr. Vázquez-Bermúdez, Sir Michael Wood, together with Mr. Gómez-Robledo (Special Rapporteur) and Mr. Park (Rapporteur), *ex officio*.

The meeting rose at 12.50 p.m.