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Summary record of the 3368th meeting

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SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-NINTH SESSION

Held at Geneva from 3 July to 4 August 2017

3368th MEETING

Monday, 3 July 2017, at 3.05 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation (*concluded*)^{*} (A/CN.4/703, Part II, sect. G)

[Agenda item 9]

1. The CHAIRPERSON, after welcoming the participants in the International Law Seminar, drew attention to the publication, in English, of the ninth edition, volumes I and II, of *The Work of the International Law Commission*.²⁵⁷ At the start of every quinquennium, the Codification Division updated the publication, which was intended to provide a general introduction to the work of the Commission and to bring together the principal relevant instruments. Multilateral conventions and texts finalized by the Commission were reproduced in volume II of the publication.

^{*} Resumed from the 3366th meeting.

²⁵⁷ *The Work of the International Law Commission*, 9th ed., vols. I–II (United Nations, Sales No. E.17.V.2).

*Jus cogens*²⁵⁸ (A/CN.4/703, Part II, sect. C,²⁵⁹ A/CN.4/706²⁶⁰)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

2. The CHAIRPERSON invited the Special Rapporteur on the topic “*Jus cogens*” to introduce his second report (A/CN.4/706).

3. Mr. TLADI (Special Rapporteur) said that he shared the frustration expressed by Mr. Murase during the first half of the session about the treatment he had received from the Secretariat concerning the length of his fourth report on the protection of the atmosphere (A/CN.4/705).²⁶¹ His own report, on *jus cogens*, was 47 pages long—well within the 50-page limit. Yet, like Mr. Murase, he had received an email requesting him to shorten his report and informing him of the costs associated with editing documents, as if his reports were a burden on the Secretariat. He wished to express his profound dissatisfaction and to state that he hoped never again to receive such a communication.

4. His second report on *jus cogens* consisted of three substantive sections: previous consideration of the topic, criteria for *jus cogens* and proposals. In the context of the previous consideration of the topic, three areas were worth highlighting. First, there had been general agreement on the need to change the title of the topic. Second, the Commission had been uncharacteristically united in rejecting draft conclusion 2.²⁶² Although he had agreed

²⁵⁸ At its sixty-seventh session (2015), the Commission decided to include the topic “*Jus cogens*” in its programme of work and to appoint Mr. Dire Tladi as the Special Rapporteur for the topic (*Yearbook ... 2015*, vol. II (Part Two), p. 85, para. 286). At its sixty-eighth session (2016), the Commission considered the first report of the Special Rapporteur (*Yearbook ... 2016*, vol. II (Part Two), p. 191, para. 98, and *ibid.*, vol. II (Part One), document A/CN.4/693 (first report)).

²⁵⁹ Available from the Commission’s website, documents of the sixty-ninth session.

²⁶⁰ Reproduced in *Yearbook ... 2017*, vol. II (Part One).

²⁶¹ See the 3349th meeting above, p. 10, para. 17.

²⁶² For draft conclusion 2 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/693, para. 74.

to withdraw it, he now wondered whether that was the right decision. The text merely stated the basic principle that *jus cogens* norms were an exception to the general rule that rules of international law were *jus dispositivum*. That distinction was ubiquitous in State practice, the decisions of international courts, academic writings and the work of the Commission itself, and it was unclear why it should be controversial. He therefore intended, in a future report, to reintroduce the draft conclusion, perhaps somewhat reformulated.

5. Third, the greatest divergence of views, both in the Commission and in the Sixth Committee, concerned draft conclusion 3,²⁶³ in particular paragraph 2, which set forth three basic characteristics of *jus cogens* norms: they protected the fundamental values of the international community; they were hierarchically superior to other norms; and they were universally applicable. He remained stunned that any member of the Commission would question those basic points—the vast majority had endorsed draft conclusion 3 and agreed to refer it to the Drafting Committee.

6. In an upcoming report, which would deal with miscellaneous issues, he would put forward a proposal on whether an illustrative list of *jus cogens* norms should be elaborated. He would particularly welcome the views of the new members of the Commission on that question.

7. His second report focused on the criteria for the identification of *jus cogens* and took article 53 of the 1969 Vienna Convention as the basis for finding such criteria. In defining *jus cogens*, article 53 stipulated that the definition was for the purposes of the Convention itself. However, it was not accurate to suggest, as had been done in the past, that it implied that the scope of the Commission's topic was limited to treaty law. Article 53 contained two cumulative criteria: the norm in question must be a norm of general international law and it must also be accepted and recognized as one from which no derogation was permitted. That two-criteria approach was captured in draft conclusion 4.

8. Having identified the two criteria to be used in the identification of *jus cogens* norms, the Special Rapporteur, in his report, proceeded to assess the content of the first criterion, which was addressed in draft conclusion 5. The concept of “general international law” as set out in article 53 referred to rules of international law that were applicable to all. Customary international law constituted the most typical example of norms of general international law, and most authorities made an explicit link between customary international law and *jus cogens*. Draft conclusion 5, paragraph 2, thus stated that customary international law was the most common basis for the formation of *jus cogens*. That meant, not that the process of such formation was the same as that for the formation of customary international law, but that customary international law could be elevated to the status of *jus cogens*. Calls had been made for the consideration of the relationship between *jus cogens* and customary international law, but in his view, draft conclusion 5, paragraph 2, served to do just that.

9. Some authors had suggested that customary international law might be the exclusive way through which a norm became peremptory. However, general principles of law, within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, clearly constituted a part of general international law. While there was a dearth of actual practice, it would be strange to construe the phrase “general international law” as excluding general principles of law. The latter therefore needed to be mentioned in the draft conclusions, but in less absolute terms than in the reference to customary international law. Accordingly, draft conclusion 5, paragraph 3, provided that general principles of law “can also serve as the basis” for *jus cogens* norms.

10. Treaties were not usually generally applicable. While treaty law was normally not accepted as the basis for *jus cogens* norms, it could be relevant for the identification of *jus cogens* norms. Moreover, it was generally acknowledged that a treaty rule could embody a rule of general international law. Draft conclusion 5, paragraph 4, therefore stated that a treaty rule “may reflect a norm of general international law capable of rising to the level of ... *jus cogens*”.

11. Draft conclusions 6 to 9 concerned the second criterion, namely that the norm in question “must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”. Draft conclusion 6 set out the general context, with paragraph 1 serving as a reminder that not all norms of general international law were *jus cogens*: they became *jus cogens* when they met the criterion of acceptance and recognition. Paragraph 2 emphasized that what was relevant for that purpose was the opinion of the community of States as a whole—the collective attitude of States, not the attitudes of States individually.

12. With the general context having been set out in draft conclusion 6, draft conclusion 7 concerned the question of whose acceptance and recognition was involved. It was clear from the records of meetings of the United Nations Conference on the Law of Treaties that the drafters of article 53 of the 1969 Vienna Convention had intended States to have a decisive role in the identification of a norm as one of *jus cogens*. The decisions of international courts and tribunals, moreover, had continued to link the identification of *jus cogens* norms to States. Thus it was the views of States, when taken together, that were relevant to the identification of such norms, and that was the idea reflected in draft conclusion 7, paragraph 3. Paragraph 2 of the draft conclusion emphasized the central role of the international community of States, while not denying the influence that other entities might have in the identification of rules of law.

13. For a norm to qualify as *jus cogens*, it had to be accepted and recognized as having a particular quality, namely, that no derogation from it was permissible. However, the most important aspect was not the mere fact that derogation from the norm was impermissible, but rather that the impermissibility of such derogation was accepted and recognized. That aspect had been referred to in the literature as *opinio juris cogentis*. The particular nature of acceptance and recognition for the purposes of *jus cogens*

²⁶³ For draft conclusion 3 proposed by the Special Rapporteur in his first report, see *ibid.*

was expressed in draft conclusion 8, paragraph 1. However, evidence of such acceptance and recognition had also to be provided, a fact that was the subject of paragraph 2.

14. The nature of the materials that could be offered as evidence was covered in draft conclusion 9. In his report, the Special Rapporteur concluded that a norm is acceptance and recognition as one from which there could be no derogation, which could be discerned from a wide variety of materials. Those materials were similar to those that could be used as evidence of acceptance as law. The idea that the relevant materials could take a variety of forms was reflected in draft conclusion 9, paragraph 1, and a list of materials, inspired by materials that could serve as evidence of acceptance as law, was contained in paragraph 2.

15. Judgments and decisions of international courts could serve as secondary evidence of acceptance and recognition of a norm as not being susceptible to derogation, and that was reflected in draft conclusion 9, paragraph 3. The work of the Commission itself—which contained the most authoritative list of norms that constituted *jus cogens*—as well as scholarly writings and the work of expert bodies could provide context for assessing the weight of primary materials. The role of the secondary materials was reflected in draft conclusion 9, paragraph 4.

16. In paragraph 90 of the report, it was proposed that the name of the topic be changed to “Peremptory norms of international law”, a proposal on which there had virtually been consensus at the previous session. One of the important reasons advanced had been the need for consistency with article 53 of the 1969 Vienna Convention, but for that purpose, the word “general” should be included. The title would thus be “Peremptory norms of general international law (*jus cogens*)”.

17. Although it had been suggested at the previous session that the draft conclusions went too far—or, alternatively, not far enough—the truth was that they reflected practice, the decisions of international courts and tribunals and the weight of doctrine. He hoped that members of the Commission would allow themselves to be led forward in that direction.

The meeting rose at 3.45 p.m.

3369th MEETING

Tuesday, 4 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Jus cogens (continued) (A/CN.4/703, Part II, sect. C, A/CN.4/706)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on *jus cogens* (A/CN.4/706).

2. Mr. MURASE said that he wished to thank the Special Rapporteur for his well-researched report on a difficult, theoretical topic. Some of the assumptions made and conclusions drawn in the report were, however, problematic. The Special Rapporteur highlighted three descriptive and characteristic elements of *jus cogens* norms that were seemingly excluded from the normative criteria for identifying such norms, namely, that they protected “fundamental values”, were “hierarchically superior” and were of “universal application”. The three characteristics were not properly defined and were used almost interchangeably, which rendered the Special Rapporteur’s arguments circular. Moreover, the Special Rapporteur did not give any concrete examples related to the formation and identification of *jus cogens*, and it was difficult to understand the arguments that he put forward on an extremely abstract level.

3. Although no one had openly objected to *jus cogens*, there appeared to be widespread scepticism towards it. In the report, the Special Rapporteur essentially stated that *jus cogens* norms: (a) reflected and protected fundamental values for the international community as a whole; (b) were hierarchically superior norms of general international law from which no derogation was permitted; and (c) were accepted and recognized as *jus cogens* norms by the international community of States as a whole. The Special Rapporteur stressed that the International Court of Justice and other courts and tribunals, including domestic courts, referred to those three concepts. Unfortunately, however, such courts and tribunals, in referring to *jus cogens* norms, did not elaborate on the meaning of “general international law”, “hierarchical superiority”, “fundamental values”, “acceptance and recognition” or “international community (of States) as a whole”. The courts did not have to explain their judgments, and the implicit message in the report was that the judgments should be accepted unquestioningly. However, until the substantive contents of relevant notions were laid bare, the Commission would be unable to free itself from the circular arguments advanced in the report.

4. He had doubts about introducing the concept of “fundamental values” in international law, given that it was extralegal and fell outside the Commission’s mandate to codify and progressively develop international law. The domestic law of a nation was grounded in a particular basic value that it had chosen and that constituted the essence of its basic constitutional norm. International law, by contrast, was based on a multitude of value systems. Each State had its own system, and, in principle, there were no uniform values in the international community of sovereign States.