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Summary record of the 3370th meeting

Topic:
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to two things: acceptance or recognition of a norm from which no derogation was permitted, and acceptance or recognition of it as a norm which could be modified only by a subsequent norm of general international law having the same character. Unlike the Special Rapporteur, he did not think that the third criterion came into play only after the norm was identified; rather, it was one of the means of identifying the norm, and that was why it appeared in the definition of *jus cogens* contained in article 53. The third criterion qualified the nature of the second criterion: the norm must be one that could not be derogated from but could be changed through modification by another *jus cogens* norm. The third criterion should thus be included in draft conclusion 4, either as a subparagraph (c) or as part of subparagraph (b). If that was done, it might be worth considering whether draft conclusion 4 was really necessary, as it seemed to duplicate draft conclusion 3, paragraph 1. While he thus agreed with Mr. Rajput that there was an overlap between draft conclusions 3 and 4, he would prefer to retain draft conclusion 3 and delete draft conclusion 4.

73. Draft conclusion 5 addressed the issue of where norms of general international law could be found. The discussion in paragraphs 42 and 43 of the report, concerning the definition of “general international law”, was somewhat obscure. That term had been used in various ways by States, courts and scholars, with the result that a single meaning was difficult to define. In his view, the most plausible interpretation was that “general international law” referred to law that was binding on all States. That might be the intended meaning of the words “general scope of application” in draft conclusion 5, paragraph 1, but it would be clearer to state directly that the relevant norms were norms that were binding on all States. He wondered why the Special Rapporteur had included a reference to universal applicability in draft conclusion 3 but not in draft conclusion 5, where it seemed to be more relevant.

74. While he agreed that customary international law was the most common basis for the formation of *jus cogens*, as stated in draft conclusion 5, paragraph 2, he was less convinced by the claim made in paragraph 43 of the report that customary international law was a manifestation of general international law, unless it referred solely to customary international law that was not regional or special in nature. Draft conclusion 5, paragraph 3, identified “[g]eneral principles of law” as another source of *jus cogens* norms, but, as noted by the Special Rapporteur in paragraph 48 of the report, there was significantly less authority for that proposition. A central problem was that most such principles were drawn by analogy from municipal law and were viewed essentially as gap fillers for the main sources of international law; they were not of a peremptory nature. The Commission must therefore be very cautious about identifying general principles of law as a basis for *jus cogens*. If it decided to do so, it should point out, both in the draft conclusion and in the associated commentary, that this proposition was much less grounded in practice.

75. He had doubts about draft conclusion 5, paragraph 4. He agreed that treaty rules, like other factors such as resolutions of international organizations or

decisions of intergovernmental conferences, could influence the development of customary international law. It was unclear, however, why the indirect influence of treaties with respect to *jus cogens* should be singled out from among those factors. A more plausible proposition was that multilateral treaties that had garnered universal or near-universal adherence, such as the Charter of the United Nations or the Geneva Conventions for the Protection of War Victims, played a unique role in helping to establish general international law. The expression “[a] treaty rule” seemed far too open-ended.

76. He had no particular concerns about draft conclusion 6, which addressed the issue of acceptance and recognition. It did, however, include considerable repetition, especially in relation to draft conclusions 3, 4 and 8. Repetition was not necessarily problematic, but it could be confusing if different terms were used in very similar provisions. At a minimum, draft conclusions 6 and 8 could be combined into a single draft conclusion addressing all aspects of acceptance and recognition.

77. In view of time constraints, he would deliver the rest of his statement at the Commission’s next plenary meeting.

The meeting rose at 1.05 p.m.

3370th MEETING

Wednesday, 5 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. MURPHY, continuing the statement he had begun at the previous meeting, expressed general support for draft conclusion 7 but said that he was not convinced that the concept of “States as a whole” referred to collective recognition of non-derogability, as opposed to individual recognition by sufficient States to constitute

recognition by “States as a whole”. States always acted individually, even in deciding on collective action. In that regard, the discussion in paragraph 77 of the Special Rapporteur’s second report was unclear and unhelpful. Moreover, it was inadequate to assert in draft conclusion 7, paragraph 3, that “a large majority of States” was sufficient for the identification of a norm as a norm of *jus cogens*, since the threshold should be much higher. It would be more appropriate to refer to “a very large majority”, “substantially all States” or “virtually all States”.

3. With regard to draft conclusion 9, he queried the lack of reference to decisions of national courts, which were extensively referenced elsewhere in the report, and expressed the view that paragraph 3, as drafted, was incorrect: decisions of international courts and tribunals were not evidence of *jus cogens* in themselves but might serve as a subsidiary means for identifying a norm as one of *jus cogens*. He suggested that the text be amended accordingly, and that consideration also be given to altering the beginning of paragraph 2 to read: “The following materials may provide evidence of the opinion of the international community of States as a whole with regard to the acceptance and recognition ...”. He expressed support for submitting all the draft conclusions contained in the Special Rapporteur’s second report to the Drafting Committee, on the understanding that consolidation would be welcome where possible to avoid potentially confusing repetition.

4. Mr. HMOUD said that the topic of *jus cogens* presented intrinsic difficulties in relation both to the identification of rules and to the effects thereof, as had been recognized in legal writings and by the Commission. While States had come to recognize the existence of the doctrine of *jus cogens*, especially since the adoption of article 53 of the 1969 Vienna Convention, the content of peremptory norms, the criteria for identifying them, and their effects remained inconclusive. The analytical study on the fragmentation of international law, finalized by the Chairperson of the Study Group on that topic, Mr. Martti Koskeniemi, had stated:

Instead of trying to determine the content of *jus cogens* through abstract definitions, it is better to follow the path chosen by the [Commission] in 1966 as it ‘considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals’.²⁸¹ That seems still the right way to proceed.²⁸¹

5. As the Commission had decided to pursue the topic and examine the identification and effects of *jus cogens*, it seemed appropriate to consider developments in State and international practice.

6. While he supported the proposition that the Commission should not deviate from the rule set down in article 53 of the 1969 Vienna Convention, he agreed with the Special Rapporteur that article 53 was the starting point, not an end in itself. Such a stance was necessary in the light of

the scope of the topic, which covered the effects of *jus cogens* not only on treaty law, but also on other sources of international law. While a restrictive approach might have been prudent in 1966, subsequent recognition of the doctrine of *jus cogens* made a more expansive approach necessary. Article 53 included an element of circularity that did not serve as useful guidance in the identification and definition of *jus cogens* and limited the practical effect of that provision, which was used to describe the consequences of *jus cogens* rules in decisions of courts and tribunals but never, for instance, to determine which rules of general international law had been elevated to the status of *jus cogens* or by what process. A rule of *jus cogens* was usually recognized as such through decisions, pronouncements and writings, rather than by the application of the elements contained in article 53.

7. In view of the inconclusiveness of article 53, the extensive examples and evidence provided in the report to underpin the existence of the characteristics of *jus cogens* were welcome, as such a description was critical to understanding *jus cogens* and its effects. Given that international courts and tribunals had taken the fundamental values of the international community that *jus cogens* norms sought to protect as the *raison d’être* for the existence of such norms, more emphasis should be placed on describing those values, even if a single definition was not envisaged. Whether such a description should be placed in the draft conclusions or the commentary thereto was a matter to be decided by the Commission, which had already referred draft conclusion 3 to the Drafting Committee.²⁸² The challenge was to ensure that there was no inconsistency between such a description of *jus cogens* in terms of protected values and the formal criteria for recognizing *jus cogens*.

8. While hierarchical superiority and universal recognition were characteristics of *jus cogens*, they were a consequence, rather than constituent elements, thereof. It was well established that *jus cogens* rules were superior to other norms, and article 53 of the 1969 Vienna Convention had defined the attendant effect in relation to treaties, but the consequences for other sources of law were still unclear. No judicial decisions had yet declared a rule of customary international law void or terminated as a result of a conflict with a norm of *jus cogens*. Such a possibility, along with other potential effects of the hierarchical superiority of *jus cogens*, should be explored in future reports. Universal application, as a characteristic of *jus cogens*, should be examined in terms of its effect on such concepts as regional *jus cogens* and the persistent objector doctrine. He agreed with the proposition that *jus cogens* rules were binding on all States, but were they binding on all subjects of international law? Should an international organization be bound by *jus cogens* in adopting resolutions, for example?

9. The reliance in the report on State practice and the decisions of international courts and tribunals to give content and meaning to article 53 of the 1969 Vienna Convention was the correct approach, given that there had been significant developments since its adoption and

²⁸¹ *Yearbook ... 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, p. 78, para. 376. [The text of the footnote omitted from the quote reads as follows: “Draft articles on the law of treaties, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, part II, p. 248, para. (3) of the commentary to article 50.”]

²⁸² For draft conclusion 3 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/693, para. 74.

the Commission was not confining itself to a definition of *jus cogens* that dealt only with treaty law. There was widespread recognition of the normative value of the definition contained in article 53 and its applicability beyond the law of treaties. He disagreed with the Special Rapporteur's contention that the third element of that definition—that a *jus cogens* norm could be modified only by a subsequent norm of general international law having the same character—was not a criterion for the identification of *jus cogens*. As Mr. Murphy had said at the previous meeting, both the text of the 1969 Vienna Convention and the *travaux préparatoires* seemed to indicate the contrary. The issue was important, first, because if such modification was indeed part of the criterion of acceptance and recognition, the process by which the international community of States modified a *jus cogens* norm must be determined. Second, the lack of practice or jurisprudence explaining how a subsequent norm of *jus cogens* could modify an existing norm seemed to indicate that a norm of *jus cogens*, once established, could never be reversed or modified, making the entire *jus cogens* doctrine the most rigid expression of international law. Future reports by the Special Rapporteur should tackle that issue and related matters, such as what would occur in the event of a conflict between two existing *jus cogens* norms.

10. The term “general international law”, contained in the first criterion for identifying *jus cogens* under article 53, had gained acceptance in legal jurisprudence and writings but had not been authoritatively defined. It comprised rules that applied in a general manner to situations falling under the auspices of international law, with certain recognized limitations such as treaty relations, *lex specialis* and self-contained regimes. Given that the topic was not concerned with the nature of general international law but only with its relevance to the concept of *jus cogens*, the definition proposed in draft conclusion 5, paragraph 1, was appropriate. The term was often used synonymously with “customary international law”, but, as recognized by both the Commission and the International Court of Justice, it also included general principles of international law, in line with Article 38, paragraph 1, of the Statute of the International Court of Justice. The relevant issue was which rules of international law were capable of becoming *jus cogens*. State practice and pronouncements by international tribunals suggested that customary international law was the sole recognized basis for the formation of *jus cogens*, which would exclude the possibility of general principles of law serving as a source for *jus cogens* rules. The report cited no evidence to the contrary. In his introductory statement, the Special Rapporteur had confirmed that the draft conclusions had been guided by practice. Introducing general principles of law as a source of *jus cogens*, while hypothetically possible, would not be based on practice but would instead constitute *lex ferenda*, which would undermine the concept and expose it to unintended vulnerabilities and uncertainties. In addition to the difficulties outlined by Mr. Murase at the previous meeting, in order for a general principle existing in municipal law to become peremptory, it must go through a series of processes that were neither defined nor identified in any material on *jus cogens*, including the Special Rapporteur's second report. No example had been provided of a general principle of law that had become *jus cogens* on its own merit without already constituting customary

international law. Neither did the report explain how the international community of States as a whole could recognize and accept a general principle of law as a peremptory norm. The “double acceptance” process outlined in paragraph 77 of the report was in fact the triple process by which a general principle of law could first be recognized as a norm by civilized nations, then accepted as a norm of customary international law, and then recognized as non-derogable. If anything, the sources cited in the second footnote to paragraph 77 of the report confirmed that proposition.

11. As to whether treaty law could serve as a source of *jus cogens*, he agreed that it was not a suitable basis for general international law for the reasons given in the report and because treaty rules, by their nature, applied not to all subjects of international law but to the parties to a particular treaty. Some treaties, such as the Charter of the United Nations and the Geneva Conventions for the Protection of War Victims, had become general in nature and applicability, and there was no reason not to consider them capable of becoming *jus cogens*. The prohibition on the use of force contained in the Charter of the United Nations was considered a *jus cogens* rule. Such exceptions, however, were limited. To avoid any conceptual difficulties, the proposition that a treaty could only reflect—not be a basis for—rules of general international law that could reach the status of *jus cogens* was acceptable. The limited examples of general rules of general application warranted such a conclusion, although further debate on the matter was needed.

12. While it was logical, in seeking to identify a norm as one of *jus cogens*, to consider, first, whether it was a norm of general international law and, second, whether it was accepted and recognized as non-derogable, there was no need for that sequence to be adhered to strictly. The essential point was to ensure that both criteria were satisfied separately, as acknowledged in paragraph 62 of the report and reflected in draft conclusion 4. He agreed with the Special Rapporteur that it was necessary to prove, not the non-derogability of a norm *per se*, but acceptance and recognition of such non-derogability by the international community of States as a whole. The wording of article 53 of the 1969 Vienna Convention shifted the second criterion from objectivity to subjectivity. Nonetheless, non-derogability was essentially related to the nature of the values that *jus cogens* rules sought to uphold. Interpreters would find it imperative to examine whether such values were so fundamental that they were non-derogable. Pronouncements of various international courts and tribunals, including the International Court of Justice, had dwelt on whether and to what extent particular *jus cogens* norms protected such basic values. The question remained whether, in order to establish the acceptance and recognition of the non-derogable character of a norm by the international community of States as a whole, it was necessary to determine whether each and every State had accepted and recognized that non-derogability. In his view, it was not necessary: in the context of *jus cogens*, acceptance differed from the acceptance as law required for the purpose of proving a rule of customary international law. Collective acceptance by the international community of States was what must be determined. In essence, it must

be proven that, among themselves, States had accepted and recognized the peremptory character of the norm, not whether a majority or minority of States had done so. Nor was the issue whether a single State or group of States had a power of veto. Rather, the test should be whether States had established single acceptance and recognition among themselves of the non-derogability of the norm. Draft conclusion 7, paragraph 3, should be amended to that effect.

13. In draft conclusion 7, paragraph 1, the word “attitudes” should be removed as it was neither normative nor indicative with regard to acceptance and recognition by States and was irrelevant in the context. What needed to be assessed was material proving a belief in the non-derogable character of the norm, which could be found in State evidence, treaties, resolutions of international organizations and decisions of international tribunals. Examples of such forms of evidence were given in draft conclusion 9. The hierarchy and relative weight of the various forms of evidence departed from the Commission’s work on the identification of customary international law. The greater value accorded to the judgments of international courts and tribunals was welcome, but the descriptions of the value of evidence should be further considered by the Drafting Committee. Using various terms that had the same meaning could lead to confusion. The relevant material should be examined overall to determine whether acceptance and recognition by the international community as a whole could be established. While material from actors other than States might be useful in assessing acceptance and recognition by States, acceptance and recognition by non-State actors was not the issue at stake.

14. The draft conclusions contained some repetition and would need to be streamlined by the Drafting Committee. With regard to the future work programme, the Commission should provide a non-exhaustive, illustrative list of *jus cogens* norms based on its draft conclusions on the topic. Such a list would be useful to States, international courts and practitioners and would increase certainty regarding the peremptory value of certain norms. While he had no objection to discussing the legal effects of *jus cogens* on State responsibility, he urged the Special Rapporteur to ensure consistency with the articles on that subject.²⁸³ He recommended that draft conclusions 4 to 9 be referred to the Drafting Committee.

15. The CHAIRPERSON, speaking as a member of the Commission, said that he agreed with many of the points contained in the Special Rapporteur’s second report, in particular the proposition that norms of *jus cogens* could arise not only from rules of customary international law, but also from general principles of international law; that *jus cogens* could be reflected in treaties; and that a peremptory norm of general international law could only arise from a norm of general international law. He likewise agreed that one of the characteristic elements of *jus cogens* was its specific form of acceptance and recognition, which the Special Rapporteur had felicitously referred to as *opinio juris cogentis*. Nevertheless, he shared

the concerns of others regarding the criteria that the Special Rapporteur had identified for determining whether a norm was one of *jus cogens*.

16. The scope of the first criterion—that *jus cogens* were norms of general international law—needed clarification. Saying that a peremptory norm of general international law could only arise from a norm of general international law was not the same as saying that a norm of peremptory international law could only be of general application. In his view, particular norms of peremptory international law, especially regional *jus cogens*, might exist. The European Court of Human Rights had sometimes referred to “fundamental European values”; other regional human rights courts might also consider certain values and principles to be fundamental to their respective systems and recognize specific peremptory norms accordingly. Rather than taking a stance on the matter, the Commission should simply leave the door open to the possibility. It would be sufficient to say that a peremptory norm of general international law could only arise from a norm of general international law. It would be inappropriate to exclude the existence of particular norms of peremptory international law without fully investigating the practice of regional systems.

17. His main concern related to the second criterion identified as a condition for *jus cogens*: acceptance and recognition of a rule of general international law as a rule of *jus cogens*, or *opinio juris cogentis*. While he agreed that such a criterion existed and that acceptance and recognition by the international community of States as a whole was decisive, the way in which the Special Rapporteur had proposed that criterion seemed to suggest that the formation of *jus cogens* from a simple rule of customary international law was easier than the formation of a simple rule of customary international law. According to draft conclusion 7, paragraph 3, “[a]cceptance and recognition by a large majority of States is sufficient for the identification of a norm of *jus cogens*”. Thus, if only a “large majority of States” considered that a given rule of customary international law should become a norm of *jus cogens*, they could produce that effect simply by saying so.

18. He himself did not believe that *opinio juris cogentis* was the only requirement in order for a simple rule of customary international law to be elevated to a rule of *jus cogens*. If that were the case, then a rule of customary international law might become *jus cogens* simply because the General Assembly adopted a resolution to that effect by a two-thirds majority. Giving a hypothetical example involving the Calvo doctrine, he said that it should not be possible for a rule of customary international law to be elevated to the status of *jus cogens* simply based on the common economic or political interests of a “large majority” of States. The criteria needed to be stricter, in respect both of substance and procedure.

19. In terms of substance, any rule of general international law that was elevated to the status of *jus cogens* should have to reflect the existing fundamental values of the international community of States. He agreed with the Special Rapporteur that the Commission should not revert to theories of natural law for the identification of such fundamental values. It must point to a more generally

²⁸³ The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

accepted way in which existing fundamental values could be identified. One approach might be to show that a rule was rooted in a representative number of national legal systems. If there was such a basis for a certain rule, then it would be acceptable to elevate it, by specific *opinio juris cogentis*, to the status of a rule of *jus cogens*.

20. Regarding procedure, he said that, given the extraordinarily strong legal effect of *jus cogens*, he was surprised that the Special Rapporteur considered a “large majority” sufficient to establish the requisite *opinio juris cogentis*. That was all the more surprising because, in paragraph 67 of the report, the Special Rapporteur explained that the reference to the international community of States “as a whole” had been used in article 53 of the 1969 Vienna Convention as the equivalent of “a very large majority” of States. The objective had been to ensure that the opposition of one, or a very few States, would not prevent the emergence of a rule of *jus cogens*; at the time, the framers of the Convention must have had in mind the case of South Africa as a persistent objector to the prohibition of apartheid. Thus, the existence of *opinio juris cogentis*, as proposed by the Special Rapporteur, was certainly necessary, but not sufficient, for a rule to become *jus cogens*. Moreover, by stating in paragraph 31 of his report that the formal, procedural criteria for *jus cogens* should be present before a rule or principle could be called *jus cogens*, the Special Rapporteur excluded the substantive legal nature of *jus cogens*, namely, the fact that it protected a fundamental value of the international community of States as a whole.

21. The Special Rapporteur had referred at the beginning of his report to the previous year’s discussion, when the Commission had been hesitant about adopting draft conclusion 3, with its reference to the protection of fundamental values by *jus cogens* norms. The Commission’s hesitation should be seen, not as expressing any doubt that norms of *jus cogens* protected fundamental values, but rather some reluctance to refer to fundamental values in the abstract without clarifying the relationship of that element with the procedural elements of *jus cogens*, in particular the core element of acceptance and recognition as *jus cogens*. In his view, the Commission should clarify that relationship now, and the characteristic of *jus cogens* as protecting fundamental values of the international community should be given a place among the criteria for identifying *jus cogens*.

22. Lastly, he agreed with the Special Rapporteur’s proposal that the name of the topic be changed to “Peremptory norms of general international law (*jus cogens*)”. That would also clarify the fact that the topic concerned only norms of general international law, while leaving open the possibility that there could be peremptory norms of particular international law. He did not think the question of who determined whether the criteria for *jus cogens* had been met fell beyond the scope of the topic, as suggested in paragraph 31 of the report. Regarding the proposed draft conclusions themselves, in his opinion the Drafting Committee could shorten them without sacrificing essential content.

23. Mr. HASSOUNA said that, as had been evidenced by the debate so far, the concept of *jus cogens* was a

source of substantial controversy. It had been deemed an obscure term for an obscure notion as early as 1969, during the adoption of the Vienna Convention on the Law of Treaties, and that sentiment seemed to remain largely unchanged today. The reservations expressed by States in the Sixth Committee, which mainly revolved around the scope of the topic and a potential lack of practice regarding *jus cogens* norms, should be taken into account by the Special Rapporteur. That would both contribute to his aim of clarifying the concept of *jus cogens* from an international law perspective and advance the idea of international law as a law of cooperation rather than a law of coexistence, as suggested by the well-known scholar Georges Abi-Saab.

24. In paragraph 18 of his report, the Special Rapporteur stated that the criteria for the determination of whether a norm had reached the status of *jus cogens* remained those in article 53 of the 1969 Vienna Convention. Although some States considered that the characteristics typically used to describe *jus cogens*, such as “fundamental”, “hierarchically superior” and “universally applicable”, were additional elements not outlined in article 53 of the Convention, in his own view, the Special Rapporteur gave sufficient examples of State and judicial practice to show that those characteristics of *jus cogens* were generally accepted by States. However, the Special Rapporteur should provide more evidence of why they were merely descriptive in nature, and make clear in the commentary the distinction between those descriptive elements and the constitutive elements identified in his report.

25. The descriptive elements were intrinsically linked to whether a norm became a norm of general international law from which no derogation was permitted. Non-derogation clauses in human rights treaties could provide evidence of non-derogable norms. One non-derogable right commonly cited in treaties was the right not to be held in slavery or servitude. Even though many of the treaties containing that right had been ratified by only a few States or were regional conventions, and, in addition, many of them prohibited the suspension of similar non-derogable rights under certain circumstances, thereby qualifying their non-derogable nature, such rights were still considered by the international community to be non-derogable, precisely because certain descriptive elements—such as “fundamental”, “hierarchically superior” and “universal in application”—were attached to them.

26. With regard to the first criterion for *jus cogens*, namely that it should be a norm of general international law, he said that the report did not make clear what constituted general international law. Indeed, as pointed out in paragraph 41 of the second report of the Special Rapporteur, the Study Group on fragmentation of international law had observed that there was no accepted definition.²⁸⁴ The Special Rapporteur considered that the term “general” simply referred to the scope of applicability of the norms, and that customary international law, general principles of law and even treaty law could serve as the basis for, or could reflect, norms of general international law. His own understanding of the term was that it referred

²⁸⁴ See the conclusions of the Study Group on fragmentation of international law, *Yearbook ... 2006*, vol. II (Part Two), p. 179, footnote 976.

to all sources of law generally. Reference could also be made to the specific source of law in which the norm was established. Judge *ad hoc* Dugard, a former member of the Commission, had stated in his separate opinion in the International Court of Justice case concerning *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* that the term could include general international conventions that codified principles of international law, widely accepted judicial decisions and customary international law and general principles of law within the meaning of Article 38, paragraph 1 (c) and (d), of the Statute of the International Court of Justice (para. 16 of the separate opinion). Draft conclusion 5 could be made simpler and clearer by stating that general international law encompassed all the sources of international law outlined in Article 38, paragraph 1, of the Statute of the International Court of Justice, with no hierarchy among the sources.

27. While it might be viewed as controversial to include general principles of international law as a source of general international law norms, bearing in mind that the Special Rapporteur stated in paragraph 51 of the report that there was a dearth of practice in which general principles of law rose to the level of *jus cogens*, that lack of practice could in fact be attributed to many factors. For example, as Judge *ad hoc* Dugard stated in his opinion in the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* case, general principles of law tended to refer to rules of evidence or procedure, or were used as a legal defence. The International Court of Justice had not always found the conditions for the application of such principles to be fulfilled, because they were not always viewed as separate causes of action. A lack of practice was therefore not indicative of whether general international law could reflect general principles of law. On the other hand, if a norm of general international law was a norm applicable to all international legal subjects, it followed that a general principle of law could be a source of general international law.

28. As to the use of customary international law as a source of general international law, in his view, the work on the subject would benefit from a study on whether the term “general international law” was truly differentiated from “customary international law” in international jurisprudence and State practice, or if the two terms were treated as indistinguishable by courts and States. As the report indicated, customary international law could be used to identify norms of general international law, but that might simply be because courts used the two terms interchangeably. Commentators had suggested that the International Court of Justice simply referred to a norm as general international law so as not to go through the arduous process of identifying whether such a norm existed in customary international law by looking at *opinio juris* and State practice worldwide. A norm might thus become binding upon States without the identification of practice and *opinio juris*. That possibility raised some concern; the question of whether the term “general international law” was used to circumvent such analysis of customary international law should be analysed.

29. With regard to the second criterion for *jus cogens*, namely acceptance and recognition, he generally agreed

with the Special Rapporteur that there was sufficient State and judicial practice to show that a general international norm accepted and recognized by the international community of States as non-derogable must be considered a *jus cogens* norm. He also agreed that the opinions and practice of international organizations and similar international actors could help provide context with regard to non-derogable norms of general international law. However, the existence of regional *jus cogens* had been recognized in international jurisprudence, and the Special Rapporteur should therefore further study how regional *jus cogens* norms related to the universal application of *jus cogens* norms. For example, in 1987, the Inter-American Commission on Human Rights had found that among member States of the Organization of American States (OAS) there was a recognized norm of *jus cogens* that prohibited the execution of children by the State. It might also be useful to analyse whether the “international community of States” by which *jus cogens* norms must be accepted and recognized included States that were not members of the United Nations.

30. The second report did not provide sufficient analysis and State practice to conclude that there was no need for States also to accept and recognize that a norm of *jus cogens* was one that could be modified by a subsequent norm having the same character. The plain language of article 53 of the 1969 Vienna Convention could reasonably be interpreted as requiring such acceptance and recognition. The Special Rapporteur relied only on a statement by Ireland, a case from Ontario and some legal articles to conclude that the modification element did not form part of the *jus cogens* identification criteria. Some scholars such as Sévrine Knuchel had indicated that this third element should be included among the criteria, because it acknowledged the fact that new and future peremptory norms could change existing *jus cogens* norms. The Special Rapporteur should accordingly provide additional practice and analysis to support his decision not to include the third element among the criteria for the identification of *jus cogens*.

31. With regard to changing the name of the topic, he said that although he had advocated using a different title than the one now proposed by the Special Rapporteur, he generally supported the current proposal, especially the inclusion of the word “general”. The proposed new title reflected the nature and scope of *jus cogens* norms, as well as the criteria needed to identify them. As to the draft conclusions themselves, he believed that they were well thought out and well structured, though some would benefit from being condensed and made more explicit, so that they did not address issues outside their scope. Some members had proposed merging certain draft conclusions: for instance, all the content relating to acceptance and recognition of a general international norm might be covered by one draft conclusion instead of four separate ones.

32. Draft conclusion 4 was generally acceptable, although the Special Rapporteur should provide additional practice and analysis to support his decision not to include the third possible criterion relating to modification. In draft conclusion 5, paragraph 1, it was unclear what was meant by “general scope of application”. In the report, the Special Rapporteur referred to *jus cogens* norms as norms

that were universally applicable and thus applicable to all States. If draft conclusion 5, paragraph 1, was meant to encapsulate that idea, then it should do so more clearly. The clarity of draft conclusion 6 could also be improved. Paragraph 1 should include a reference to the modification of a *jus cogens* norm as a criterion for identification. In paragraph 2, it would be beneficial either to change or to further define the term “as a whole” in order to expressly indicate that a vast majority of States had to accept and recognize a norm. Draft conclusion 7 could also be made more clear and concise. In particular, paragraph 1 merely stated that it was acceptance and recognition by the community of States as a whole that was “relevant”. However, such acceptance and recognition was a necessary precondition for the formation of a *jus cogens* norm. Paragraphs 1 and 2 should be reformulated to indicate that it was acceptance and recognition by States alone that created *jus cogens* norms, and that the attitudes of non-State actors could not provide a basis for a *jus cogens* norm but could be relevant in providing context for the statements and beliefs of States. In draft conclusion 9, paragraph 2, it would be important to include a list of materials that could be consulted in order to find evidence of acceptance and recognition of a norm of general international law. It should also be made clear that the list was non-exhaustive, perhaps by using the phrase “including, but not limited to”.

33. As to the future programme of work, he supported the Special Rapporteur’s plan to consider the effects or consequences of *jus cogens*. The Special Rapporteur might also wish to look into the interaction of *jus cogens* with regional *jus cogens* norms and whether there was an obligation to exercise universal jurisdiction in the event of *jus cogens* violations. It would be useful to analyse the invalidating effect of *jus cogens* on the 1969 Vienna Convention and other treaties; whether there was an exception to the immunity of States and their officials in the event of *jus cogens* violations; and whether there were invalid amnesties and invalid statutes of limitations for *jus cogens* crimes.

34. He was in favour of an illustrative list of *jus cogens* norms being included in the commentary. It would help to substantiate the draft conclusions and serve as context for identifying potential *jus cogens* norms. Wherever it was included—in an annex, the commentary or elsewhere—the most important aspect was to clearly note that such a list was not exhaustive.

35. In conclusion, he agreed to the referral of the draft conclusions to the Drafting Committee.

36. Mr. SABOIA said that the Special Rapporteur’s second report revealed a deep analysis of the relevant background material. He welcomed the solid evidence of State practice presented in support of draft conclusion 3 and reiterated his support for the draft conclusion, including paragraph 2, which embodied the notion that *jus cogens* norms protected and reflected fundamental values of the international community.

37. He also welcomed chapter II of the report, on the criteria for *jus cogens*, particularly the comments with regard to the definitional nature of article 53 of the 1969

Vienna Convention. The Special Rapporteur had rightly pointed out that taking article 53 as a basis for the criteria for *jus cogens* should not be understood to mean that the Commission could not move beyond that article even if practice so determined. Chapter II usefully shed light on the meaning of the concepts of general international law and general principles of law, as well as on the meaning of the expression “the community of States as a whole”. He shared the Special Rapporteur’s view that this expression reflected a collective idea rather than implying that States should unanimously uphold the elevation of a given rule of customary international law to a rule of *jus cogens*. Therefore, while supporting the thrust of draft conclusion 7, he agreed that the expression “a large majority of States”, contained in paragraph 3 of the draft conclusion, might establish too low a threshold and might have to be further refined.

38. Referring to paragraph 41 of the report, in which the Special Rapporteur stated that the distinction between general international law, on the one hand, and treaty law and *lex specialis*, on the other, might preclude some rules, such as those of international humanitarian law, from acquiring the status of *jus cogens*, he said that he would be interested to know the Special Rapporteur’s specific views on the matter. As for the proposals contained in chapter III of the report, he was in favour of changing the name of the topic and supported referring draft conclusions 4 to 9 to the Drafting Committee. Regarding the future work programme on the topic of *jus cogens*, a number of useful suggestions had been made in the course of the Sixth Committee’s consideration of the Commission’s report on its sixty-eighth session, including on the relationship between *jus cogens* and *erga omnes* rules. The possible application of the persistent objector rule to norms of *jus cogens* might also be considered. He welcomed the information that an illustrative list of *jus cogens* norms might be proposed.

39. Mr. GROSSMAN GUILOFF said that he welcomed the Special Rapporteur’s second report, which provided solid support for the draft conclusions proposed for adoption. The concern that *jus cogens* might be extended to areas not foreseen at the time of its inclusion in the 1969 Vienna Convention was not new. Even at the time of the Convention’s adoption, concerns had been expressed that the principle of *jus cogens* might restrict States’ freedom of contract. Moreover, in the wake of the Second World War, the need to recognize the existence of an international public order had become the prevailing concern. The existence of such an order, however, presupposed that some acts simply were not to be tolerated. It was necessary, therefore, that the concept of *jus cogens* also refer to fundamental values shared by the international community.

40. The concept of an international public order itself was not necessarily clear-cut, as evidenced by the debate held in the Sixth Committee at the General Assembly’s seventy-first session. Potential risks involved the misuse of the concept of *jus cogens*, based on political or ideological considerations, and certain parties’ seeking to impose values that were not shared by the international community as a whole. Such risks were not inherent to the concept of *jus cogens* but rather related to its use in practice. The Commission must therefore proceed with

caution in order to avoid any arbitrary extension of the concept of peremptory norms. Such caution had clearly been exercised during the adoption of the 1969 Vienna Convention, articles 65 and 66 of which provided that a party which invoked *jus cogens* as a ground for impeaching the validity of a treaty should submit its dispute to the International Court of Justice. Thus, the Convention did not seek to impede the development of the concept of *jus cogens* with regard to an international public order, but established procedural guarantees aimed at preventing abuse of such peremptory norms. International practice supported that notion. For instance, when the Inter-American Court of Human Rights had established that slavery violated rules of *jus cogens*, it had done so not on the basis of its rejection of any specific treaty but rather with the aim of affirming the international responsibility of States for failing to comply with their obligation to prevent that practice, in accordance with established law. Long before that, in its judgment in the case concerning *Barcelona Traction*, the International Court of Justice, without mentioning *jus cogens*, had referred to the obligations of a State towards the international community as a whole as obligations *erga omnes*, thereby also linking that notion to *jus cogens*.

41. By insisting that the legal nature of a rule was crucial in determining whether it could be considered a rule of *jus cogens*, the International Court of Justice had anchored the concept of *jus cogens* in positive law. Various national courts had also confirmed the legal foundation of *jus cogens*, for example, in the case of *Filártiga v. Peña-Irala*, in which a United States federal court had established that all States had an interest in the prohibition of torture. The Special Rapporteur might wish to provide additional examples of case law in his future work. The Commission itself, in its work on the articles on the responsibility of States for internationally wrongful acts, had referred to “serious breaches of obligations under peremptory norms of general international law” in defining the term “international crime”.²⁸⁵ The Special Rapporteur’s efforts were laudable given the difficulties in attempting to define peremptory norms both now and during the adoption of the 1969 Vienna Convention. It was important to strike a careful balance that took into consideration all the points of view expressed.

42. He supported changing the name of the topic from “*Jus cogens*” to “Peremptory norms of international law (*jus cogens*)”. He would welcome the Special Rapporteur’s comments on the need to establish a clear definition of “general international law”. Establishing such a definition would not be an easy task, but it might be useful to identify some constituent elements at the very least.

43. Draft conclusions 4 and 5 set out the essential characteristics of rules of *jus cogens*. Since the Special Rapporteur did not intend to enter into the natural law versus positive law debate—although he clearly adopted a positive law approach—the Special Rapporteur was, in his view, right to establish the criteria for *jus cogens* on the basis of article 53 of the 1969 Vienna Convention, an

article which necessarily must be accompanied by State practice and international case law.

44. Specifically regarding draft conclusion 5, paragraph 4, while a treaty might “reflect” a norm of general international law capable of rising to the level of a *jus cogens* norm, the same treaty might also “establish” such a norm, if so decided by the States concerned. If such a norm were thus established by States, either explicitly in the treaty or on the basis of its interpretation under international law, international treaties should be considered an important source of law in that regard and should not be excluded. What was more, nothing in Article 38 of the Statute of the International Court of Justice ruled out treaties as a source of *jus cogens*. The Special Rapporteur’s position that general principles of law could constitute a basis for *jus cogens* norms, but that treaties could not, seemed inconsistent.

45. Draft conclusion 6, together with the three draft conclusions that followed, demonstrated the complexities of the topic at hand. The Drafting Committee should further refine the Special Rapporteur’s conclusions on acceptance and recognition by dealing with each separately.

46. The use of the word “attitude” in draft conclusion 7 was too vague; he urged the Special Rapporteur and the Drafting Committee to find a better solution, perhaps by stating that it was the “conduct” of States that was relevant, followed by the phrase “*opinio juris*”. Paragraphs 1 and 3 of the draft conclusion should be redrafted so as to remove any redundancy. In addition, since the phrase “community of States” in paragraphs 1 and 2 appeared to correspond to the “large majority of States” referred to in paragraph 3, it would be useful to elaborate on the meaning of the latter, especially in the light of the aforementioned risks of misuse of *jus cogens*. It was not always a question simply of the number of States that accepted and recognized a norm as one that could not be derogated from; it was also important to consider the issue from a qualitative point of view. In that connection, various legal traditions and shared values should be represented. He supported the comments made by Mr. Nolte based on the example of the Calvo doctrine, although the world had changed significantly since the origin of that doctrine.

47. Draft conclusion 8 sought to distinguish ordinary *opinio juris*, based on acceptance in the case of customary law and on recognition in the case of general principles, from *opinio juris cogentis*, which exclusively related to the peremptory norms that were accepted by States as ones which could not be derogated from. The draft conclusion should be simplified so as to facilitate its understanding.

48. In draft conclusion 9, the Special Rapporteur stated that evidence of acceptance and recognition of rules of *jus cogens* could be reflected in a variety of materials and could take various “forms”, both of which seemed to refer primarily to sources of international law and its manifestation in practice. Such “materials” and “forms” should be weighted differently, according to their nature. Dealing with evidence in such a way was especially important when there was a lack of extensive and consistent evidence of States’ acceptance of a rule of *jus cogens*.

²⁸⁵ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chapter III of Part Two of the draft articles on the responsibility of States for internationally wrongful acts, pp. 26 *et seq.*, at p. 29.

49. He was in favour of referring the draft conclusions to the Drafting Committee.

50. Mr. ŠTURMA said he agreed with others that the idea that *jus cogens* was a part of positive international law or *lex lata* was no longer in question, but that the characteristics of *jus cogens* and the criteria for its identification and content were still the subject of disagreement. The debate thus far on the characteristics of *jus cogens* set out in draft conclusion 3, paragraph 2, namely fundamental values, hierarchical superiority and universal application, which went beyond the text of article 53 of the 1969 Vienna Convention, showed how important those characteristics were. They helped to distinguish *jus cogens* norms from other similar concepts.

51. It could hardly be denied that peremptory norms, within the meaning of article 53, protected the fundamental values of the international community. However, those underlying values alone were not sufficient to establish that a *jus cogens* norm existed. Modern positivism, unlike natural law, held that there was no direct and immediate connection between those values and peremptory norms; it was necessary to give them legal form through State practice and *opinio juris*. In other words, *jus cogens* was also a legal technique aimed at preventing the fragmentation of certain international norms, though, in his view, it was more than just that. It might help to distinguish peremptory norms such as the prohibition of genocide, torture and the use of force from other legal techniques that provided for the binding character of other rules or simply for their priority application, such as article 41 of the 1969 Vienna Convention.

52. The issue of hierarchy was equally important, but there was a need to specify the distinctive features of the hierarchy enjoyed by *jus cogens*, which was based on the nullity of treaties that ran counter to a peremptory norm and was thus different from other types of hierarchies in international law, such as that established by Article 103 of the Charter of the United Nations. The Special Rapporteur should take that point into account when addressing non-derogation as a consequence of *jus cogens*.

53. He also supported the view that peremptory norms were universally applicable. However, he believed it necessary to explore the question of regional *jus cogens* norms, of which one of the best-known examples was the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), presented by the European Court of Human Rights as an instrument of European *ordre public* (public policy). The issue could best be studied from the perspective of the relationship between *jus cogens* and the non-derogation clauses in human rights treaties. He was convinced that *jus cogens* norms must be part of general international law and universally applicable. The concept of *ordre public* was a clear example of a municipal law analogy. Although the use of such analogies by Sir Hersch Lauterpacht and others was understandable and had had certain merits at a time when the concept of *jus cogens* in international law had not yet been generally accepted, it seemed unnecessary and misleading today. Other examples of *ordre public* rules included the Covenant of the League of Nations and the United Nations Convention on

the Law of the Sea. However, they were not peremptory rules of international law within the meaning of article 53.

54. He supported changing the name of the topic, as proposed by the Special Rapporteur in paragraph 90 of his report. The name should make it clear that the topic covered only peremptory norms of international law and not *jus cogens* in internal law, various kinds of *ordre public* and the like.

55. Turning to the draft conclusions proposed in the report, he said that he agreed with the two criteria for *jus cogens* set out in draft conclusion 4. However, he had serious doubts when it came to the explanation of the norms of general international law in draft conclusion 5. He agreed that, as stated in the first two paragraphs, a norm of general international law had a general scope of application and that customary international law was the most common basis for the formation of *jus cogens* norms. However, he had serious problems with the paragraph concerning general principles of law for several reasons. First, he agreed with other members that, within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, general principles of law had their origins in internal law. However, it was precisely the internal law analogy of *jus cogens* that was problematic, as he had noted previously. Second, although he did not believe it had been the Special Rapporteur's intention, general principles of law were burdened by the natural-law approach. Since the Special Rapporteur had rightly stressed the basis of *jus cogens* in positive law, he should not then introduce the concept of natural law by referring to general principles of law. Finally, as noted in paragraph 51 of the report, there was a lack of actual practice in which general principles served as the basis of *jus cogens* norms.

56. He did not propose discarding general principles completely. Nor did he agree with Mr. Rajput that, in order for a norm to be identified as *jus cogens*, it must appear in all three sources of law. Basing *jus cogens* only on general principles of law might open the door to analogies with internal law or natural law. By contrast, making the identification of a peremptory norm conditional on its appearance in all the sources would make the test too restrictive. In fact, it was more likely that a norm would first appear in the form of a general principle or in a universal multilateral treaty, such as the Charter of the United Nations, and then evolve into customary international law. He therefore proposed alternative wording that would align general principles of law and treaty rules, as both could give rise to or reflect a norm of general international law capable of becoming a *jus cogens* norm.

57. He supported the substance of the other draft conclusions but agreed with Mr. Murphy's proposal to merge draft conclusions 6 and 8 into a single draft conclusion. With regard to draft conclusion 7, paragraph 3, he supported the wording "a very large majority of States".

58. As to the future work programme, he supported the road map put forward by the Special Rapporteur. In particular, he welcomed his intention to address the effects of *jus cogens* in treaty law and other areas of international law. In his view, the main potential added value of the topic would be in clarifying the effects of peremptory norms, as

well as the hierarchy of norms. He was in favour of drawing up an indicative list of *jus cogens* norms, or at least including examples in the annex to the draft conclusions. From a methodological and practical point of view, there were a number of reasons for the elaboration of such a list. First, as had already been noted, there were different approaches to the scope of *jus cogens*. If the Commission's work was to lead to the identification of genuine peremptory norms, and the exclusion of other legal techniques aimed at non-derogation or the hierarchy of certain rules, it could hardly be done without giving examples of *jus cogens* norms. Second, the generalized elements or criteria of *jus cogens* should, in turn, be tested against at least some examples of such norms. Third, though such a list must necessarily be non-exhaustive, it might nevertheless give some theoretical and practical indications of what the Commission would identify as peremptory norms of general international law.

59. In conclusion, he recommended that the Commission refer all the draft conclusions to the Drafting Committee.

Organization of the work of the session (*continued*)*

[Agenda item 1]

60. The CHAIRPERSON drew attention to the proposed programme of work for the remainder of the session, which, as usual, was subject to change.

61. Mr. ŠTURMA, responding to a question by Mr. VALENCIA-OSPINA, said that the four proposed draft articles on succession of States in respect of State responsibility that might be referred to the Drafting Committee were contained in paragraphs 29, 81, 111 and 132 of his first report (A/CN.4/708).

62. After a procedural discussion in which Mr. HASSOUNA, Mr. MURPHY, Mr. PARK, Mr. REINISCH, Mr. TLADI and Sir Michael WOOD participated, the CHAIRPERSON said that the Commission would follow its usual practice when it came to the topic of succession of States in respect of State responsibility, as the Special Rapporteur's report was available electronically in all six languages and would serve as the basis for the debate in the plenary, followed by discussion in the Drafting Committee.

63. Mr. OUZZANI CHAHDI said that it was regrettable that the proposed programme of work was not available in French.

64. The CHAIRPERSON said that the Commission attached great importance to the issue of translation but, as the programme had been finalized just before the meeting, there had unfortunately not been time to translate it. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

The meeting rose at 12.55 p.m.

3371st MEETING

Thursday, 6 July 2017, at 10.05 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. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

1. The CHAIRPERSON welcomed Mr. de Serpa Soares, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited him to take the floor.
2. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, as part of the activities of the Office of Legal Affairs during the previous year, the Codification Division had provided substantive secretariat services to the Sixth Committee during the seventy-first session of the General Assembly. The Committee had considered a total of 27 agenda items, convened four different working groups and held numerous informal consultations on draft resolutions. Upon the recommendation of the Sixth Committee, the General Assembly had eventually adopted without a vote 26 resolutions and 4 decisions.
3. In resolution 71/140 of 13 December 2016, entitled "Report of the International Law Commission on the work of its sixty-eighth session", the General Assembly had noted the completion of the first reading of two of the Commission's projects: the draft conclusions on identification of customary international law²⁸⁶ and the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.²⁸⁷ It had also endorsed the Commission's recommendation that the first part of its seventieth session be held in New York and had taken note with appreciation of the Commission's plans to commemorate its seventieth anniversary in 2018 with events in New York and Geneva. In resolution 71/141 of 13 December 2016, entitled "Protection of persons in the event of disasters", the General Assembly had taken note of the draft articles on the protection of persons in the event of disasters,²⁸⁸ presented by the Commission, and had decided to include an item on that topic in the provisional agenda of its seventy-third session.
4. At the seventy-first session of the General Assembly, the Sixth Committee's agenda had included four items

²⁸⁶ See *Yearbook ... 2016*, vol. II (Part Two), pp. 60 *et seq.*, paras. 62–63.

²⁸⁷ See *ibid.*, pp. 84 *et seq.*, paras. 75–76.

²⁸⁸ See *ibid.*, pp. 25 *et seq.*, paras. 48–49.

* Resumed from the 3367th meeting.