

Provisional

For participants only

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International Law Commission
Sixty-ninth session (second part)

Provisional summary record of the 3374th meeting

Held at the Palais des Nations, Geneva, on Thursday, 13 July 2017, at 10 a.m.

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Present:

Chairman: Mr. Valencia-Ospina
Members: Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
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. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10 a.m.

Jus cogens (agenda item 7) (continued) (A.CN.4/706)

Mr. Tladi (Special Rapporteur), summing up the debate on his second report, said that he was grateful for the valuable comments and drafting suggestions made by the members of the Commission, as well as for their highlighting of additional materials. The draft conclusions would remain in the Drafting Committee until the full set was adopted, thus ensuring that the Drafting Committee and the Commission had a full overview of how everything fit together before particular provisions were adopted.

Most, if not all, of the members had expressed agreement with his proposal to change the name of the topic, although some had done so with caveats, for example that the Commission should revisit the title when it discussed the question of regional *jus cogens*. He had already expressed his doubts about regional *jus cogens*, but had promised to discuss the possibility in future reports. In any case, if the relevant materials were to establish the existence of regional *jus cogens*, it would not require a change of title because it would be an exception to the general rule. One member had proposed dealing with domestic *jus cogens*, but he did not support that idea, as it would require the Commission to study all legal systems to see how *jus cogens* worked in them, and it was not clear what the purpose of such an undertaking would be. Perhaps domestic *jus cogens* could be considered by the Working Group on the Long-term Programme of Work, but it was automatically excluded under the current topic, given that article 53 of the Vienna Convention on the Law of Treaties was being used as the basis of the work. However, he agreed that the Commission should certainly consider practice from a broader regional spread and diversify the sources of evidence. Another member had accepted the revised title on the understanding that the topic went beyond treaty law. Most of the authority on which the criteria and characteristics proposed in the second report were based had nothing to do with treaty law.

It was clear from the debate at the current session that a very large majority of members accepted the content of draft conclusion 3 (2), although not all supported its retention. Many of the members had agreed that *jus cogens* norms were somehow linked to the fundamental values of the international community. One member had expressed doubt as to whether a reference in the draft conclusions was warranted since the concept did not appear in article 53 of the Vienna Convention, but that reasoning was misplaced, as the criterion for inclusion in the draft conclusions was not that it appeared in article 53 but that it was reflected in practice. Only two members had suggested that there was no practice, arguing that the report referred only to dissenting and separate opinions and scholarly writings. He drew attention to paragraphs 20 to 22 of the report, which referred to judgments and advisory opinions of national and international courts and tribunals. He did not support the view expressed by one member that the near universal reliance by domestic courts on fundamental values should be discarded because courts in different jurisdictions might attach different meanings to the same words; that would suggest that it was necessary not only to establish practice but the intention behind the practice, which was a standard that would never be met under any topic.

Other members had also expressed doubts about the notion of fundamental values. One, for example, had sought to reject it because domestic law could be grounded on particular basic values chosen by a nation, but international law was grounded on a multiplicity of value systems. If that distinction were correct, he did not see why the international community and its multiplicity of value systems could not produce fundamental values. Another member had expressed doubts about whether *jus cogens* could be said to “reflect” or “protect” fundamental values. They were different concepts, and it was not implied in the report that they were not; they were not mutually exclusive, however, and he tended to agree with the proposal to use the two verbs — separated by “and/or” rather than “and”. He agreed with the members who had suggested that it would be helpful to clarify what was meant by fundamental values: by definition, such values were not static, as they largely related to the problems of the day, and such fluidity would best be captured in the commentary.

As at the previous session, the link between universal applicability and regional *jus cogens* had been made. Several members had expressed concern about envisaging the

inclusion of regional *jus cogens*, but he agreed with the member who had maintained that such a notion would not be inconsistent with universal application. After all, if regional *jus cogens* did exist, it would be universally applicable within that region. His suspicion that regional *jus cogens* was not possible in legal terms derived not from some sort of tension with the notion of universal application but from other considerations that would be addressed in a future report, such as the applicability of the persistent objector doctrine. More importantly, practice incontrovertibly showed that *jus cogens* norms were universally applicable. The question raised of whether universal application meant “all States” or “all subjects of international organizations” was an important one, which he would prefer to address in the commentary. One member had seemed to misconstrue universal application as meaning that a norm must be universally accepted before it could be accepted as *jus cogens*.

With respect to hierarchical superiority, one member had suggested that, in some cases, international courts seemed to have actually stripped *jus cogens* of its hierarchical superiority, but that was simply not true. The cases cited would be addressed in the context of consequences, but they had little, if anything, to do with superiority. In *Jurisdictional Immunities of the State, Armed Activities on the Territory of the Congo* and *Al-Adsani v. United Kingdom*, the courts had sought to specifically exclude the question of hierarchy by stating that the rules in question were not in a relationship of conflict, so that the issue of hierarchy did not arise at all. He did not agree with the members who had suggested that hierarchical superiority was more of a consequence than a characteristic. There were consequences that flowed from that characteristic, such as invalidity, but hierarchical superiority was not simply a consequence. He did agree, however, that the effects of hierarchy on other sources of international law, such as general principles and customary international law, should be addressed in future reports.

In general, members had found that the characteristics set out in draft conclusion 3 (2) were supported by relevant practice; however, several members had questioned their practical utility. The suggestion seemed to be that the Commission should not include the characteristics unless they had a direct effect on the criteria and identification of *jus cogens*. He did not agree with those who had suggested that the characteristics should be included in the commentary. Draft conclusions were, by nature, a mixture of normative and descriptive conclusions on the state of the law. He did not see how the Commission could justify not including in the text elements that were the most common and on which reliance was the most consistent in practice.

Some members of the Commission had called for some or all of the characteristics to be included as part of the identification criteria, arguing, *inter alia*, that they were critical to addressing the inconclusiveness of the elements contained in article 53, that they were intrinsically linked with whether a norm became *jus cogens*, that the fact that *jus cogens* norms protected fundamental values should be mentioned, that certain fundamental public policy values were necessary to prove the existence of *jus cogens* and that it would be difficult to leave fundamental values as simply descriptive. One member had asked whether there were any known norms of *jus cogens* that did not reflect those characteristics, and another had observed that fundamental values represented the substantive or material requirement for *jus cogens*, the implication being that article 53 represented the formal requirements. There was something to be said for the views expressed. In that context, he referred to paragraph 18 of the second report, which stated that “such characteristics may ... be relevant in assessing the criteria for *jus cogens* norms of international law” and to paragraph 89, where it was stated that “the belief by States that particular norms reflect these characteristics” might be advanced in support of *opinio juris cogentis*. His intention had been to include such language in the commentary, but he would have no objection if the Drafting Committee decided to reflect the idea in the text itself.

One member had suggested that the distinction drawn between the characteristics and the criteria and the report’s attempt at justifying the characteristics were unconvincing, and that the inclusion of the provision on characteristics would be superfluous and potentially harmful. However, the characteristics could be either superfluous or harmful, but hardly both — the two were mutually exclusive.

Concerning the natural law issue that had been raised by several members, although he found it surprising to be described as a positivist, the fact that his reports had created that impression perhaps demonstrated that he did not allow his own policy preferences to determine their content, but instead stuck to the objective evidence. With the exception of two members, all had accepted that article 53 should serve as the basis for consideration of the topic. One member believed that the Commission should be visionary and should not restrict itself to what States might have agreed to; his criticism of the two reports seemed to centre on what he termed the consent-based approach. However, the approach was not based on consent; the role of States was, of course, central, but not in the sense of consent.

Most members had agreed, in principle, with the two-step approach to the identification of *jus cogens*. However, one member had suggested that that approach, in particular the idea of *opinio juris cogentis*, was unnecessary, and that a simpler process would be preferable, and two others had considered that the approach might suggest a temporal element that did not always exist. That had not been his intention. The criteria for identification were without prejudice to the process by which the norms of *jus cogens* were formed, although of course there was a close correlation. One member had suggested that the two-step approach was interesting but artificial and amounted to double counting, but had not offered an alternative. The proposed approach could only be seen as double counting if the fact that the two steps were qualitatively different was ignored. In the first step, one was searching for the existence of law, most often customary international law, while in the second, what was at issue was the peremptory character of the rule or norm. It would be double counting only if, in that second stage, it were sufficient to show that a norm was accepted and recognized as having the quality of law.

One member had argued that the words “accepted and recognized” did not constitute a single criterion, and had seemed to take issue with the reasons cited for their inclusion in article 53 of the Vienna Convention. Did that mean that clear and incontrovertible evidence of recognition of peremptoriness was not sufficient, and that acceptance also needed to be shown? There was simply no evidence of anyone, whether in State practice or the decisions of international courts and tribunals, engaging in that interesting, but ultimately highly academic, distinction. He could not agree with the member who had suggested that the term “acceptance” applied to customary international law and “recognition” to general principles of international law: the basis for that distinction was not clear. As was noted in the report, the two words had been included in article 53 to reflect the language of Article 38 of the Statute of the International Court of Justice, but no distinction had been made as to their applicability. At any rate, those views could be reflected in the commentary.

One member had made a proposal for a structural reformulation of the draft conclusions based on two substantive criteria and one procedural criterion: the norm in question should be one of general international law, it should be a peremptory norm, and it should be accepted and recognized by the international community of States. Another member had made a similar proposal, based on four criteria: norms of general international law, acceptance and recognition by the international community, non-derogability, and modification only by a subsequent norm — though the last two could be merged into a single criterion. Although he was sympathetic to both proposals, he had difficulties in accepting them. First, they would require a major rewriting of article 53 of the Vienna Convention. It was clear from the text of article 53 and from the negotiating history that acceptance and recognition were meant to qualify the non-derogability requirement. Secondly, the approach would require the Commission to go against the grain of practice, which generally also conceived of article 53 as a two-step approach. Finally, it was not clear, under the proposed structure, what acceptance and recognition by the international community of States would refer to.

Noting that one member had raised the question of the difference between the criteria for *jus cogens* and the general nature of *jus cogens*, he recalled that draft conclusion 3 (1) had been redrafted essentially as a definition. Even though criteria were almost always derived from definitions, that did not obviate the need for criteria.

Most members had argued that acceptance and recognition by the international community of States as a whole applied to both non-derogability and modification. One member had agreed with the general idea that, structurally, proper interpretation of article

53 would include modification, but would rather it not be included in the draft conclusions, arguing that when States expressed their opinions, convictions or attitudes, they contemplated the status and character of the norm and not its future demise at the hands of a new norm. That likely explained his own reluctance to include modification when drafting the second report. However, the arguments advanced in favour of including modification were insurmountable, and the structure of article 53 was certainly compatible with that view. While courts generally only referred to the non-derogability element, as in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, it was possible that that was simply a kind of shorthand. At any rate, from a substantive perspective, the views expressed by members suggested that a norm conclusively shown to be accepted and recognized as one that was non-derogable was a norm of *jus cogens* unless separate evidence was also adduced concerning the process of its modification. As one member had noted, judicial practice from both domestic and international courts had focused on the evidence of acceptance and recognition of non-derogability. The solution would be to view the derogation and modification elements as composite parts of a single criterion. On that understanding, he accepted the views of the members of the Commission on that issue.

However, he did not agree with the group of members who believed that the inclusion of the modification element would make draft conclusion 4 similar to draft conclusion 2, necessitating the deletion of one or the other. The two provisions had two different objectives: one defined *jus cogens* while the other set out the relevant criteria. Merely having the definition without breaking it down into its constituent elements would not be helpful. Draft conclusion 4 illustrated the relationship between the different elements in draft conclusion 2. He could not therefore comfortably agree to the merger of the two draft conclusions. While he was generally in favour of streamlining and welcomed suggestions from members as to how to do so, it was necessary to take care not to lose essential elements of the text.

One member had suggested that the topic of *jus cogens* should clarify the ways in which a norm could be modified. That suggestion seemed to relate mainly to the formation of a norm of general international law and to how modification could take place given the inadmissibility of practice contrary to general international law. He was not sure that the question of how to reconcile potentially unlawful conduct with the formation of a new rule should be dealt with under the topic of *jus cogens*. In any case, while the issue of modification in broader terms would certainly be covered in a future report, it was unclear whether the particular contradiction in theory should be.

Another member had suggested that the first sentence of article 53 of the Vienna Convention should be included as a criterion for the identification of a *jus cogens* norm. While the literature commonly supported the notion that article 53 defined *jus cogens* in terms of the consequences of a norm, such assertions were usually based on the second sentence of article 53, particularly with regard to the element of non-derogation, rather than on the first sentence. In any case, even the ordinary interpretation of article 53 would serve to exclude the first sentence. It was only in the second sentence that the word “is” was used to denote that something was being defined. He therefore did not support the suggested amendment.

While most members had expressed agreement with the general approach to the description of *jus cogens* norms as norms of general international law, many had expressed the view that “general international law” had never been authoritatively defined. It had also been suggested that the Commission should examine the meaning of the term “norm”, but the usefulness of such a discussion was questionable. Furthermore, it was incorrect to consider the words “norm” and “rule” as synonymous and he would not be amenable to reflecting such an interpretation in the commentary to the draft conclusions.

In response to the question raised as to whether paragraph 41 of the report implied that international humanitarian law could not form part of *jus cogens*, he said that the point being made in paragraph 41 was, on the contrary, that attempting to define general international law by distinguishing it from treaty law and *lex specialis* might result in the strange and likely unintended consequence of precluding international humanitarian law rules. Hence, paragraph 42 began by stating that the word “general” in the phrase “general

international law” referred to the scope of applicability. Since international humanitarian law was applicable to all States, it was not excluded from the possibility of producing *jus cogens* norms.

One member, while agreeing that the question in respect of general international law was to whom it applied, had suggested that the Commission should strive for even greater clarity by stating that norms of general international law were those that were “binding on all States”. Another member, of the same view, had had no objection to the assertion of universal application in draft conclusion 5 (1), on the understanding that regional *jus cogens* would be addressed subsequently. But the assumption that draft conclusion 5 (1) referred to universal application was in both cases based on a misconception. There was a big difference between the contexts in which universal applicability and general applicability were used in draft conclusion 3 and draft conclusion 5 (1), respectively. Draft conclusion 3 referred to *jus cogens*, which was indeed universally applicable, whereas draft conclusion 5 (1) referred to categories such as customary international law which were not necessarily universally applicable. The persistent objector doctrine and even what the Commission referred to as “particular custom” precluded the possibility of stating, unequivocally, that general international law was applicable to all. It was important in any case to avoid creating the impression that *jus cogens* was synonymous with customary international law.

It had been suggested that, given the lack of a generally accepted definition of general international law, reference should be made to article 31 (3) (c) of the Vienna Convention. In fact, that article referred to “any relevant rules” — thus not necessarily general rules of international law — that were “applicable in the relations between the parties”, the scope of which would clearly extend to bilateral treaties and local customary international law. That could hardly be regarded as synonymous with or equivalent to general international law.

While several members had expressed disagreement with the report’s conclusion that treaties were not part of general international law, others, with whom he agreed, had asserted that treaty rules could reflect norms of general international law but were not themselves general international law. It was worth noting that all those members who had spoken on that issue had referred to the Charter of the United Nations as an example; he assumed that they had been referring to particular provisions in the Charter and not the Charter as a whole. Yet every provision in the Charter to which they had referred was also customary international law; the same was true of the references made to the 1949 Geneva Conventions and some human rights treaties. Such references were therefore of limited use in the topic under consideration. Taking the hypothetical example that an overwhelming majority of States ratified a treaty establishing a norm that the parties declared to be peremptory, not just non-derogable, would that norm suddenly be elevated to *jus cogens* status, making it binding on non-States parties? The Commission should exercise great caution before drawing such conclusions.

Draft conclusion 5 (4) did not state that treaty provisions were not general international law for the purposes of *jus cogens*, but merely that such provisions could reflect norms of general international law, an objectively correct proposition reflected in the Commission’s work on customary international law.

Responding to a suggestion that treaty law should be highlighted as reliable material in identifying *jus cogens* norms, he said that while resolutions and other materials could indeed reflect norms of general international law, draft conclusion 5 did not concern evidence. Rather, it was intended to identify those recognized sources of international law that qualified as general international law and to provide some conclusions about their relationship to *jus cogens*. Since resolutions and other potential materials did not qualify as sources of law, it would be inappropriate to include them in draft conclusion 5. In addition, although he did not object to specifying that treaties of universal or near-universal participation were more likely to reflect general international law, he wondered if making such a statement might imply that bilateral and other treaties could not reflect it.

One member had expressed the view that customary international law, general principles of law and treaty law should all play an equal role in the identification of *jus*

cogens norms and, further, that all three should exist at the same time for a norm to be elevated to one of *jus cogens*. However, such a view was not borne out by practice and doctrine. The case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, cited as supporting that view, did not indicate that general international law meant that all three sources must be present. While the International Court of Justice had used elements from all three sources, it was not with a view to establishing general international law.

Divergent views had been expressed regarding the role of general principles as an underlying legal source for a *jus cogens* norm. One member had emphasized, correctly in his view, that not all general principles were *jus cogens* norms. Another had noted that while it was possible in theory for general principles to form the basis of a *jus cogens* norm, there was no practice to support it. There could be many reasons for the dearth of practice, however. Moreover, if the Commission's work on the topic proceeded from article 53 of the Vienna Convention, then in addition to practice, the interpretation of article 53 should also be taken into account. Both ordinary meaning and drafting history supported the inclusion of general principles of law as general international law capable of rising to the level of *jus cogens*. Lastly, he agreed that the words "basis for" in draft conclusion 5 should be replaced with the words "source of".

Referring to one member's suggestion that general principles of law had been excluded by the Commission itself during its debate in 1963 on what would ultimately become article 53, he said that the summary records of that debate (A/CN.4/SR.683 to 680, *inter alia*) revealed that the issue had not been whether general principles formed part of general international law for the purposes of *jus cogens*, but rather, whether general principles should be considered a basis for the voiding of treaties, in other words, whether they themselves could be considered *jus cogens*.

The main reason advanced by those opposed to the inclusion of general principles of law was the fact that they were, by definition, domestic law principles. While it was true that most general principles were derived from domestic legal systems, once those domestic law principles were recognized as general principles within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice, they ceased to be merely domestic law principles. To become *jus cogens*, domestic principles would be subject to a series of processes that were not defined in any material on *jus cogens*. However, that was no different from customary international law: for practice to become customary international law, and thus part of general international law, it must undergo some processes, including consistency and the acquisition of the requisite *opinio*. For the purposes of *jus cogens* it was sufficient to note that general principles could be a source of *jus cogens*. Draft conclusion 5 simply suggested that possibility and intimated that practice in that regard was minimal. The commentary, should the text be adopted, would also make that clear.

The notion that general principles of law on their own were *jus cogens* represented a natural law approach; however, he did not agree that his approach in draft conclusion 5 (3) — namely, that general principles of law were capable of constituting general international law for the purposes of *jus cogens* — represented one of natural law. He supported the proposal to redraft draft conclusion 5 in such a way as to designate both general principles of law and treaty rules as being capable of giving rise to or reflecting a norm of general international law that could in turn be elevated to a *jus cogens* norm. Such an amendment would in many ways resolve the differences between members on treaty law and general principles. He noted that on the whole members had expressed agreement with the content of draft conclusion 5, if not with the manner in which it had been drafted.

Draft conclusion 6 had not received any outright criticism, although some members had questioned its added value and had suggested that it might be incorporated into other provisions as part of a streamlining exercise. He found draft conclusion 6 useful, structurally; however, if the Drafting Committee preferred to delete it, he would find appropriate language, to be included in the commentary, to provide orientation on the structure of the draft conclusions concerned with the identification of *jus cogens*.

The main issues raised regarding draft conclusion 7 concerned the meaning of the phrase "as a whole". While a couple of members had expressed doubt about the language in

the report to the effect that “as a whole” denoted collective attitude or views of States, he tended to support the view expressed by other members that the phrase sought to inspire a sense of the collective. It was a recognition of the evolution of international law, at the time of the drafting of the Vienna Convention, from bilateralism to community interests. Nonetheless, perhaps the difference of views on that point was not crucial, since the assessment of the collective *opinio* would not preclude the consideration of the attitudes of individual States in their interaction with one another and when acting collectively.

He did not agree that the word “attitude” was inappropriate. The draft conclusions were a mixture of normative and descriptive characteristics of certain aspects of international law for which the criterion of normativity, which might well be relevant for draft guidelines, principles and articles, was less important. In any case, the proposal to replace the word “attitude” with “assessment” was not logical: presumably materials were assessed with a particular aim in mind, and in the report it was suggested that the assessment provided for in draft conclusion 9 was conducted with a view to determining the collective attitude of States. The suggestion to replace the word “attitude” with a phrase that would refer to practice coupled with *opinio juris* was likewise unacceptable, since that would be indicative of custom. He strongly supported the suggestion to substitute the word “conviction” for the word “attitude”.

Observing that many members had expressed concern that the word “very” had been deleted in draft conclusion 7 (3), he said that the phrase “a large majority” had not been intended to signify a less-than-substantial majority. He would therefore be amenable to the proposal to revert to the phrase initially proposed by the Chairman of the Drafting Committee at the Vienna Conference.

With regard to draft conclusion 8 (2), he agreed that the phrase “accepted by States as one which cannot be derogated from” should be replaced with “accepted and recognized by the international community of States as a whole as one from which no derogation is permitted” in order to better reflect article 53 of the Vienna Convention. If the Drafting Committee amended draft conclusion 4 to include a criterion regarding the modification of a norm, draft conclusion 8 would need to be amended accordingly.

One member had suggested that draft conclusion 8 (2) did not shed much light on the subject at hand, but simply repeated the content of draft conclusions 3, 4 and 6. That was not correct: none of the other draft conclusions emphasized that evidence must be provided or for what evidence must be provided. The question of whether *opinio juris cogentis* differed from *opinio juris sive necessitatis* not only by reason of content of the “opinion” but also by form was answered in the body of the report and in draft conclusion 8. Draft conclusion 9 (1) made it plain that it was the content that distinguished the two.

Overall, draft conclusion 9 had raised fewer concerns than drafting suggestions. He agreed that national constitutions should be included as evidence; the Drafting Committee might consider inserting a reference to national legislation in paragraph 2. He had no objection to inserting language in paragraph 2 to make it clear that the list contained therein was non-exhaustive. National courts could indeed serve as a subsidiary means for identifying a norm as one of *jus cogens*, hence the reference to such courts in paragraph 2, if not in paragraph 3. He was flexible regarding the suggestion to add, in paragraph 3, the qualifiers found in Article 38 (1) (d) of the Statute of the International Court of Justice, though he noted that the Commission had had a lengthy debate on that matter in the context of customary international law.

One member had observed, correctly, that the language of draft conclusion 9 had departed from the language adopted in the Commission’s work on the topic of identification of customary international law. That had been done because of the particular relationship between *jus cogens* and the Commission’s work. Draft conclusions 4 to 9 concerned the identification of *jus cogens* norms. No other body had been more influential in that respect than the Commission; the same could not be said for its work on the identification of customary international law.

As to the question of whether the Commission should provide an illustrative list of *jus cogens* norms as part of its consideration of the topic, a greater number of members now seemed to be in favour of providing such a list compared to during the previous

quinquennium. He would take the Committee's views into account when formulating a recommendation in respect of such a list.

While he welcomed the feedback that he had received on both the reasoning behind and the content of the draft conclusions, one statement had seemed more *ad hominem* than the others. A Commission member had questioned his selection of article 53 of the Vienna Convention as the point of departure for his second report and had suggested that the reasons he had advanced defeated the purpose of considering the topic in the first place. The member was not alone in holding that view, which in itself was not a problem. Rather, the problem lay with the fact that the member in question had offered no alternative point of departure or guidance on the approach to be taken. The topic of *jus cogens* was not being considered by the Special Rapporteur alone, but by the Commission as a whole; all the members would be responsible for its success or its failure. On the question of whether the Special Rapporteur should make known his position on the positive versus natural law debate, it was sufficient to say that philosophical inclinations were irrelevant, since the Commission was a collegiate body and its outcome on the topic should reflect all the members' views, not just the Special Rapporteur's.

In conclusion, he thanked the Commission for the enriching debate on his report and requested it to change the name of the topic, "*Jus cogens*", to "Peremptory norms of general international law (*jus cogens*)" and to refer draft conclusions 4 to 9 to the Drafting Committee.

The Chairman said that he took it that the Commission wished to accede to the Special Rapporteur's requests to change the name of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)" and to refer draft conclusions 4 to 9 to the Drafting Committee.

It was so decided.

Mr. Rajput (Chairman of the Drafting Committee) said that the Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)" was composed of Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez-Robledo, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Ouazzani Chahdi, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Vázquez-Bermúdez and Mr. Wood, together with Mr. Tladi (Special Rapporteur) and Mr. Aurescu (Rapporteur), *ex officio*.

Succession of States in respect of State responsibility (agenda item 7 *bis*) (A/CN.4/708)

The Chairman invited Mr. Šturma, Special Rapporteur on the topic "Succession of States in respect of State responsibility", to introduce his first report (A/CN.4/708).

Mr. Šturma (Special Rapporteur), introducing his first report on succession of States in respect of State responsibility, said that the topic, while new to the Commission's work, was linked to several it had previously dealt with, including succession of States in respect of treaties, succession of States in respect of matters other than treaties, and nationality in relation to the succession of States, completed in 1974, 1981 and 1999, respectively. Its work on the responsibility of States for internationally wrongful acts had been completed in 2001. The new topic would fill a gap in both the law of succession of States and the law of State responsibility. It was also susceptible to codification and progressive development: as the International Court of Justice had observed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the rules on succession that might come into play fell into the same category as those on treaty interpretation and responsibility of States. In other words, the rules in question were systemic rules of general international law. In his first report, he had referred explicitly to the codification and progressive development of international law, both of which fell within the statutory mandate of the Commission. The dearth of examples of State succession made it difficult to identify customary rules on succession of States in respect of State responsibility. Nevertheless, it seemed sensible to examine State practice and propose certain rules, especially subsidiary rules, that might govern State relations and the legal consequences arising from responsibility in the event of succession of States.

During discussion of the Commission's long-term programme of work in the Sixth Committee in 2016, summarized in the introduction to the report, seven delegations had supported the inclusion of the topic, two had questioned its relevance, and one had taken an intermediate stance. Support had chiefly been expressed by the delegations of States that had recently experienced problems of succession, such as Slovakia, Slovenia, Czechia and Sudan. The report briefly outlined the Commission's work on State responsibility for internationally wrongful acts and the exclusion of succession from the resultant draft articles. It also described the work that had led to the 1978 Vienna Convention on Succession of States in Respect of Treaties, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, and the 1999 articles on nationality of natural persons in relation to the succession of States. Issues of succession had also arisen in the context of the 2006 draft articles on diplomatic protection. The report also took account of work done outside the Commission, in particular by the Institute of International Law, which had adopted a resolution on State succession in matters of State responsibility at its Tallinn session in 2015. Despite the high quality of that work, the Commission should be free to take a different approach, as appropriate.

Chapter I of the report aimed to explain the scope of the topic and shed more light on the question of whether there were rules of international law governing both the transfer of obligations and the transfer of rights arising from the international responsibility of States. The topic should be limited to the transfer of rights and obligations arising from internationally wrongful acts, remaining within the scope and definitions contained in the articles on responsibility of States for internationally wrongful acts. The scope of the topic would not extend to international liability for injurious consequences arising out of acts not prohibited by international law, principally because international liability provided for various kinds of primary, treaty-based obligations. Any possible question of transferring such obligations should be resolved on the basis of the rules applicable to the succession of States in respect of treaties. Work on the topic should also follow the main principles of succession of States concerning the differentiation of transfer of part of a territory, secession, dissolution, unification and creation of a new independent State. An appropriate outcome for the topic would seem to be draft articles with commentaries, a choice supported by the precedents of the articles on State responsibility and the texts that had become the 1978 and 1983 Vienna Conventions, as well as the articles on nationality of natural persons in relation to the succession of States. The chapter concluded with draft article 1 (Scope).

Chapter II dealt with general provisions. Having posed the question of whether there was a general principle guiding succession in respect of State responsibility, it briefly explained that the doctrine of State succession had generally denied the possibility of the transfer of responsibility to a successor State, but that modern international law did not support the general thesis of non-succession in respect of State responsibility. Some scholarly works, as well as the 2015 resolution of the Institute of International Law, admitted the transfer of responsibility under certain circumstances. A preliminary survey of State practice related to the topic was presented, including some judicial decisions in both early and new cases. Paragraphs 47 to 64 dealt with cases of succession in the post-decolonization context, mainly in Central and Eastern Europe. Paragraphs 65 to 82 focused on the 1978 and 1983 Vienna Conventions and whether any rules set out therein were applicable to the topic. In particular, the report drew a distinction between succession of States in respect of responsibility and succession of States in respect of State debts. The latter was understood as an interest in assets of a fixed or determinable value existing on the date of the succession of States. If, however, an internationally wrongful act occurred before the date of succession but the legal consequences arising therefrom had not yet been specified, then any possible transfer of obligations or rights should be governed by rules on succession of States in respect of State responsibility. Although there were differences between State succession in respect of responsibility and State succession in respect of other areas, the basic terms should be used in a uniform manner, as reflected in draft article 2 (Use of terms).

The last section of chapter II dealt with the nature of the rules to be codified and the relevance of agreements and unilateral declarations. Analysis seemed to support two preliminary conclusions. First, the traditional thesis of non-succession had been questioned

by modern practice. Secondly, the transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needed to be proved on a case-by-case basis. That led to the view that in the present topic, as with the 1978 and 1983 Vienna Conventions and the articles on nationality in relation to the succession of States, the rules to be codified should be of a subsidiary nature. As such, they might serve two purposes. First, they could present a useful model for the States concerned to use and modify. Secondly, in the event of lack of agreement, they could present a default rule to be applied in case of dispute. In principle, an agreement between the States concerned should have priority over subsidiary general rules on succession, which was why the report focused on an analysis of the relevance of such agreements, having also in mind the *pacta tertiis* rule. In that respect there was a difference between the 1978 Vienna Convention, article 8 of which reflected the relative effect of treaties, and the 1983 Vienna Convention.

The situation was even more complex when it came to the present topic. On the one hand, rules on State responsibility were different from the law of treaties. On the other hand, agreements between States concerning their succession differed in nature. The report distinguished three groups of agreements. The first and largest group included devolution agreements, related mainly to the process of decolonization, which were agreements between a predecessor State and a successor State and were therefore subject to the *pacta tertiis* rule. The second group, claims agreements, were concluded between a successor State and a third State that had been affected by an internationally wrongful act committed by the predecessor State. The *pacta tertiis* rule did not apply. Such agreements were less numerous but very important because they were directly related to the transfer of obligations arising from State responsibility. The third group comprised other agreements that differed from the classic devolution agreements and claims agreements: they were more recent, having been adopted from the 1990s onwards, outside the decolonization context, and usually governing the settlement of various issues arising from the succession of States, including certain claims and liabilities. In addition, they could provide for certain administrative arrangements. That analysis had inspired him to propose draft article 3 (Relevance of the agreements to succession of States in respect of responsibility).

The report next addressed the relevance of unilateral acts. Unlike article 9 (1) of the 1978 Vienna Convention and article 6 (3) of the 2015 resolution of the Institute of International Law, which concluded that the obligations and rights of a predecessor State did not become the obligations or rights of the successor State only by reason of the fact that the successor State had accepted them, the report was not ready to accept that conclusion quickly. Instead, it drew its conclusions from the analysis of three relevant sources and materials: certain examples of unilateral acts of States; relevant rules on State responsibility; and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted by the Commission in 2006. On the basis of those materials, the report presented draft article 4 (Unilateral declaration by a successor State), which made a clear distinction between the transfer of rights and the transfer of obligations.

Chapter III set out the future programme of work on the topic. The second report should address the issues of the transfer of obligations arising from an internationally wrongful act by a predecessor State. The third report should in turn focus on the transfer of rights of an injured predecessor State to the successor State. The fourth report could address procedural and other issues, including the plurality of successor States and the possible application of rules on succession of States in respect of State responsibility to injured international organizations or to injured individuals. Depending on progress in debating the reports, the entire set of draft articles could be adopted on first reading in 2020 or 2021.

Finally, he drew attention to a number of discrepancies among the various language versions of the report and requested the Secretariat to correct them as necessary.

Mr. Murase said that the topic of succession of States had been of significant importance in the process of decolonization after the Second World War, which had led to the creation of many new independent States, and also in various situations during the period following the Cold War, including the collapse of the Soviet Union and the former Yugoslavia. Although the topic could be viewed as having limited contemporary significance, sporadic events of secession and merger of States might still occur. In its work

on the topic, the Commission should refer constantly to the 2015 resolution adopted by the Institute of International Law. It was already apparent that a number of the draft articles proposed by the Special Rapporteur were identical or substantially similar to portions of that resolution. What was the Special Rapporteur's view of the resolution — were there any points that should be changed or supplemented?

Draft article 1, on scope, was crucial to the draft articles as a whole. In his view, it should be expanded somewhat. The phrase “in respect of responsibility of States for internationally wrongful acts” should be further qualified. It was necessary to know whether an internationally wrongful act had occurred before its effect on State succession could be considered, and its effect on the rights and obligations of the States concerned must also be known. The expression “effect of a succession of States in respect of the rights and obligations arising out of an internationally wrongful act” would capture the scope of the draft articles more accurately.

He was not sure whether issues relating to State liability should be entirely excluded from the project, as proposed in paragraph 21 of the report. The term “liability” always caused a problem since there was no corresponding term in French. In English, the term referred to the risk arising out of activities not prohibited by international law; it was understood that responsibility was engaged by a wrongful act, whereas liability might be engaged by lawful acts. It was true that a large part of international liability was treaty-based, and questions could therefore be resolved in accordance with the rules on the succession of States in respect of treaties. However, some of the important rules and principles of liability were now considered as rules of customary international law, and that should be mentioned at least in the commentary.

While he basically agreed that the responsibility of international organizations should not be included under the topic, there were situations where States members could incur responsibility in connection with the conduct of an international organization vis-à-vis third parties. Those situations were catalogued in articles 58 to 63 of the text on the responsibility of international organizations, which should also be mentioned in the commentary.

Concerning draft article 1 on scope, it was worth noting that the Institute of International Law resolution on succession applied only to the succession of States occurring in conformity with the principles of international law embodied in the Charter of the United Nations. However, many instances of State succession occurred as a result of the unlawful use of force by secessionists and outsiders. That raised the question whether there were any relevant rules of international law by which to judge the lawfulness or unlawfulness of a given succession of States. If there were rules of international law that prohibited such State succession, then perhaps they should be mentioned in draft article 1.

Reference should also perhaps be made to issues relating to the succession of Governments, which in some cases resembled the succession of States. The succession of Governments presupposed the continuity of the State; accordingly, there should be no problem with the automatic transfer of the rights and obligations of previous Governments. However, in some exceptional cases, similar claims might be made to a successor Government for wrongful acts committed by the previous Government vis-à-vis a number of third parties when the new Government had come to power in an unconstitutional manner, established a new regime or simply gave a new name to the State. Article 2 (3) of the International Institute of Law resolution did not govern the situations resulting from political changes within a State, including changes in the regime or name of the State: it failed to encompass the full complexity of the issue. He cited the *Kokaryo (Guanghualiao) Dormitory* case, between Japan and the People's Republic of China, in that connection.

In paragraphs 115 to 117 of the report, the Special Rapporteur shifted from discussing State responsibility to giving examples of legislation relating to the obligations, responsibility and liabilities of Governments. Those examples might well involve the succession of States, yet the Special Rapporteur used the term “organs of the predecessor State”. Furthermore, it was not clear whether the cases described in paragraph 122 concerned the succession of Governments or the succession of States. A clearer distinction

should thus be drawn between the devolution of State responsibility and devolution of Government responsibility.

With regard to draft article 2, on the use of terms, he had no objection to subparagraphs (a) to (d), which were identical to the provision on use of terms in the International Institute of Law resolution. However, he suggested that a definition of the term “internationally wrongful act” should be inserted, based on that contained in article 1 (g) of the International Institute of Law resolution. In addition, subparagraph (e) referred to “the relations” which arose under international law from the internationally wrongful act of a State, but the words “the consequences” or “legal consequences” would seem more appropriate.

He had some problems with draft articles 3 and 4, which were essentially “without prejudice” clauses. It would make more sense for the general rules on the succession of States covering core issues, such as claims of international responsibility and the corresponding obligations for reparation, to precede such clauses. He would therefore prefer to wait for the Special Rapporteur to elaborate those general rules before considering draft articles 3 and 4. Thus he was in favour of referring only draft articles 1 and 2 to the Drafting Committee.

Mr. Reinisch said that Mr. Šturma was to be congratulated for having produced a substantive report in the short time since his appointment as Special Rapporteur. Nonetheless, he wished to voice his concern about the way the topic had been chosen: at the beginning of the new quinquennium, when almost a third of the Commission’s members had been new. The selection of topics merited thorough discussion with a view to clarifying the purpose of the topic: whether it was to codify existing customary international law or to elaborate new rules to be adopted by States in the future.

In paragraph 32 of the report, the Special Rapporteur provided ample evidence from the older legal literature to demonstrate the traditional view that a successor State did not succeed to the responsibility for internationally wrongful acts of a predecessor State. That was still the prevailing view in the literature today. For instance, in *Brownlie’s Principles of Public International Law*, cited in footnote 37, James Crawford concluded that the preponderance of authority was in favour of a rule that responsibility for an international delict was extinguished when the responsible State ceased to exist, as liability was considered “personal” and remained with the responsible State if it continued to exist after the succession. French scholarly writings supported the view that there was no customary rule postulating an automatic transfer of obligations resulting from wrongful acts of a predecessor State to a successor State, and German literature clearly endorsed the traditional rule of non-succession, often stating that there was no succession to the “personal” rights and obligations stemming from State responsibility.

In paragraphs 38 *et seq.*, the Special Rapporteur cited a number of cases that clearly adhered to the non-succession rule. The lesson to be drawn from the award in *F.H. Redward (Great Britain) v. United States (Hawaiian Claims)* was that there was no succession to the “personal” obligation arising from State responsibility, although there might be succession to State debts. To demonstrate the existence of State succession to State responsibility, the Special Rapporteur used the *Lighthouses* arbitration concerning a dispute between a French company and Greece, as the Ottoman Empire’s successor for the territory of Crete. Most of the claims in the arbitration had invoked wrongdoing by Greece itself, not by the Ottoman Empire, although one claim had alleged an internationally wrongful act committed by the Ottoman Empire. The tribunal had decided that the Ottoman Empire had not violated international law, but had clarified that, in any event, Greece would not be responsible for an internationally wrongful act committed by the Ottoman Empire — it would be Turkey, as the continuing State of the Empire. The tribunal’s conclusion had rested primarily on the treaties entered into by the States involved and the notion that a successor State was not liable for preceding acts that it had “absolutely nothing” to do with. In respect of some claims, Greece had been found responsible for acts committed before it had partially succeeded to the Ottoman Empire. However, the tribunal had held Greece liable, not for the commission of the acts of its predecessor State, but for pursuing the wrongful conduct after succession. The tribunal itself had argued for a nuanced approach to the issue of succession in State responsibility, it was clear that a

general and absolute principle of non-succession did not exist, at least with regard to debts of a predecessor State.

Among more recent cases, the Special Rapporteur cited the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case as the most important decision of the International Court of Justice concerning State succession to international responsibility. In paragraph 50 of the report, he argued that notwithstanding the special agreement between Hungary and Slovakia, “the Court seemed to recognize the succession in respect of secondary (responsibility) obligations and secondary rights resulting from wrongful acts.” However, that assertion was based on a quote from paragraph 151 of the Court’s judgment which omitted an important passage. In concluding that Slovakia might be liable to pay damages for the conduct of Czechoslovakia, the Court had pointed to a special agreement between the parties that Slovakia should succeed to both the “rights and obligations relating to the Gabčíkovo-Nagymaros project.”

It was clear from the statements of the parties in the case that the responsibility of Slovakia for acts of Czechoslovakia was not based on any general rule of succession to international responsibility. Hungary, for instance, based its arguments on an exception to the general rule of non-succession to responsibility, when “the successor State, by its own conduct, has acted in such a way as to assume the breaches of the law committed by its predecessor.” Although the Court had not addressed that issue in its judgment, it had noted that Slovakia, while still a constituent part of Czechoslovakia, had played a significant role in the events leading to the decision about the fate of the project. The only conclusion to be drawn from the Court’s decision was thus that it was possible for a State to freely decide to assume the consequences of internationally wrongful acts by a predecessor State.

In paragraph 54 of the report, the Special Rapporteur referred to the judgment of the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, as the most recent pronouncement in favour of the argument that the responsibility of a State might be engaged by way of succession. In the case, Croatia had argued that the alleged violations of the Genocide Convention that had occurred before 27 April 1992 — the date of notification by the Federal Republic of Yugoslavia of succession to the Socialist Federal Republic of Yugoslavia — were attributable to Serbia due to its succession to the responsibility of the Socialist Federal Republic of Yugoslavia. The Court had not found a violation of the Genocide Convention, and thus had never decided whether the acts of the Socialist Federal Republic of Yugoslavia were attributable to Serbia through succession to State responsibility. Accordingly, while it was true that the Court had not dismissed the Croatian argument of State succession regarding State responsibility, it had not entertained the substance of the argument, favourably or unfavourably.

Having chaired the arbitration in the context of the United Nations Commission on International Trade Law case of *Mytilineos Holdings SA v. Serbia and Montenegro*, mentioned in paragraph 60 of the report, he agreed that it was an interesting case. However, no argument could be derived from the tribunal’s award in the sense that a State would succeed to State responsibility obligations incurred by a predecessor State.

What could be derived from the decisions discussed by the Special Rapporteur in his report was a default rule of non-succession to State responsibility. The only clearly established exception to that rule appeared to be that succession occurred where a successor State voluntarily assumed secondary obligations arising from internationally wrongful acts committed by the predecessor State or when it endorsed or continued the wrongful conduct. Other exceptions to the default rule might exist, as suggested by the work of the Institute of International Law. However, neither the latter, nor the fact-sensitive approach to establish responsibility of successor States argued for by some scholars, suggested that a rule of succession to State responsibility had evolved.

Domestic courts had also generally relied on a default rule of non-succession to State responsibility. Two notable cases were the 1990 Namibian High Court Mwandighi case concerning atrocities committed by South African forces before Namibian independence and the 2002 Austrian Supreme Court decision affirming the rule of non-succession in respect of compensation claims relating to the Second World War, which was,

however, not relevant because the Russian Federation was recognized as a continuator State of the Soviet Union.

Given the prevailing view that there was no succession to international responsibility and the affirmation of that non-succession rule in international practice, it appeared that the Commission's project should be purely one of progressive development, guided by the position of the Institute of International Law that responsibility had to remain with at least some successor State: otherwise no responsibility could be claimed. The proposition was worth discussion, even though it contradicted the existing law and the prevailing view that responsibility stemming from the commission of an internationally wrongful act was a highly "personal" obligation of the State, which like "political" or "personal" treaty obligations did not automatically transfer to a successor State.

The Special Rapporteur had clearly provided convincing reasons as to why there could not be any State succession to State responsibility, including with the statements in paragraph 32 of his report that "responsibility *ex delicto*" was "not transferable from a wrongdoer to a successor" and concerning the "highly personal nature" of claims and obligations that arose for a State towards another State as a result of a breach of international law. Moreover, the fact that an exception might exist in cases where a State had declared an intention to succeed to the rights and obligations of its predecessor State, as mentioned in paragraph 33, was merely an acknowledgment that successor States might endorse and accept the consequences of State responsibility. It could not serve as an indication that a new rule had emerged whereby successor States had to succeed to obligations arising from the responsibility of their predecessor States. Also noteworthy in that connection was the statement in the commentary to article 11 of the text on State responsibility to the effect that "if the successor State, faced with a continuing wrongful act on its territory, endorsed and continued that situation, the inference might readily be drawn that it had assumed responsibility for it." Such responsibility did not result from State succession but from the successor State's own continuation and endorsement of a wrongful act.

Even Professor Marcelo Kohen, former Rapporteur for the Commission on Succession of States in Matters of International Responsibility of the Institute of International Law, argued that only three situations had already been established as relevant to succession to State responsibility: acts committed by an insurrection movement leading to the creation of a new State; wrongful acts having a continued character both before and after the date of State succession; and acts allowing for diplomatic protection committed against the predecessor State. In regard to other areas, he acknowledged that the International Court of Justice had left the question open and gave no guidance towards the solution.

Consequently, to adopt rules stipulating State succession in State responsibility would erode the existing core principles of State succession law. States might well be willing to adopt such new rules; however, it should be made clear from the outset that that was the Commission's intention. It was highly misleading to label the exercise as a codification task when it was a clear example of progressive development. Given the Commission's disappointing experience with its previous codification and progressive development endeavours in the field of State succession, it was questionable whether the project would be widely accepted. The statement in paragraph 24 of the report that the succession of States in respect of State responsibility was a topic of general international law where customary international law had not been well established in the past still rang true. He was not suggesting that the Commission's task should be limited to codifying international law: the task relating to progressive development was equally important. Nevertheless, before embarking on an exercise to establish rules *de lege ferenda*, it would have been advisable for the Commission to consider what such rules might look like — an exercise more suited to a study group.

Therefore, he could not recommend the referral of the four draft articles in the first report to the Drafting Committee. Further reflection on the actual purpose of the topic was needed.

The meeting rose at 1 p.m.