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Peremptory norms of general international law (*jus cogens*)

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Present:

Chair: Mr. Valencia-Ospina

Members: Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Huang
Mr. Jalloh
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturna
Mr. Tladi
Mr. Vázquez-Bermúdez
Sir Michael Wood
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) ([A/CN.4/714](#) and [A/CN.4/714/Corr.1](#))

The Chair invited the Special Rapporteur for the topic “Peremptory norms of general international law (*jus cogens*)” to introduce his third report ([A/CN.4/714](#) and [A/CN.4/714/Corr.1](#)).

Mr. Tladi (Special Rapporteur) said that he wished at the outset to apologize for the length of his report. Although he himself had in the past complained about long reports, he had thought it prudent to be more comprehensive than normal given the sensitivity of the current report. He recognized that even though his report was relatively short, compared to other reports, it could probably have been shorter. He also wished to apologize for some mistakes that had crept into the text. In particular, paragraph 2 of draft conclusion 11 contains the phrase “becomes become”; it should read “becomes”. Another error, seemingly introduced during the editing process, concerned the title to part III, section B, where the phrase “for treaty law” seemed to have been deleted mistakenly. He would be asking the Secretariat to issue a corrigendum in due course and, indeed, he believed the corrigendum was already in process.

His third report consisted of six parts. Part I (Introduction) detailed the history of the consideration of the topic in the Commission. Part II described the debate on the second report in both the Commission and the Sixth Committee of the General Assembly. Part III, the main part of the report, was devoted to the consequences of peremptory norms (*jus cogens*). Part IV concerned proposals for draft conclusions, and, as it was derived from the analysis in part III, those two parts would be considered together. In part V, he described his future work.

Turning to Part I and the debate of the Sixth Committee on the report of the work of the Commission, with regard to the topic of peremptory norms of general international law (*jus cogens*), he said that most States had supported the consideration of the topic, while some States had expressed reservations about the topic. For some States, article 53 of the 1969 Vienna Convention on the Law of Treaties should be the starting point for the consideration of the topic. While most States had agreed with the criteria for the identification of *jus cogens* norms that had been suggested by the Drafting Committee, the Russian Federation had recommended the inclusion of a third element, namely, “non-derogation” as such. Greece, on the other hand,

had proposed that the requirement that a norm should be reflective of the fundamental values of the international community should be added as a separate element. Some States, such as Slovakia, had suggested that the concept of “acceptance and recognition” should be clarified further, and in the view of the United Kingdom, “acceptance and recognition” were insufficient and the element of “practice” should be added. Differing viewpoints had been expressed regarding the sources of law for peremptory norms, but there had been near-universal agreement that customary international law was undeniably a source, which suggested, to him at least, that the balance struck by the Drafting Committee had probably been the correct one.

Many States had agreed with the Drafting Committee that the peremptory character of a norm should be recognized by a “very large majority” of States, but a few States had suggested that the qualifier should be made even more stringent. Importantly, Poland had observed that that majority, whether it was large, very large or overwhelmingly large, should not be viewed in terms of the numbers only, but also in terms of the representative character of those States. As in the past, much of the discussion had centred on the characteristics of *jus cogens* norms, namely that they reflected or protected fundamental values of the international community of States, were hierarchically superior and were universally applicable. He had found many of the comments useful and would take them into account when preparing the commentaries.

Some States, notably Austria, had raised an important procedural point concerning the working method in the consideration of the topic and the fact that the plenary did not adopt commentaries. That frustration had been echoed earlier by Mr. Nolte after the Chair of the Drafting Committee had provided his report on the consideration of the draft conclusion that had been left over from the previous year. That concern should be taken up in the Working Group on Methods of work. He agreed that although it might be confusing for States to have a report that did not contain the text adopted by the Drafting Committee, the approach should not be abandoned. Rather, the Working Group on Methods of work might consider producing, perhaps as an annex, the text adopted by the Drafting Committee, and if that idea seemed too radical for the purists among the members of the Commission, the Working Group could perhaps find another way to make it even clearer that the Drafting Committee had adopted the text and to indicate where that text could be found.

He had decided to make recommendations to the Commission and to the Drafting Committee on the basis of two unrelated but mutually reinforcing facts. First,

some members of the Commission had suggested that the issues to be considered on the topic during the first debate were interrelated and that the conclusions should not be drafted until it was known how all the pieces would fit together. Although those members had only applied such reasoning to the text on the characteristics of *jus cogens*, he believed that it applied, in fact, to all the draft conclusions. Secondly, and really that was the main reason, he had observed that the Commission had dealt with the topic of identification of customary international law in the same manner. It was true that, for that topic, the procedure had been largely “accidental”, because the topic was often considered late in the session, thus preventing the Special Rapporteur for the topic from preparing draft commentaries in enough time to permit adoption of the text. His own view, however, was that that “accidental” procedure worked better than the regular procedure. For example, there had been fewer amendments than usual during the first reading on the identification of customary international law, and the even second reading had proceeded more smoothly than for any other topic he could recall having worked on in the Commission. Nonetheless, he thought it would be beneficial for the Working Group on Methods of work to discuss the matter thoroughly.

He reminded the Commission that in the syllabus on the basis of which the Commission had decided to include the topic on the agenda, he had stated that the issue of consequences was likely to be the challenging aspect of the topic. His third report had thus focused on that challenging, controversial and sensitive question. He was well aware that reality was often more or less colourful than people would like. In drafting the report, he had been mindful that for some, including some in the Commission, *jus cogens* was super brilliant and could perform magic beyond the dreamer’s wildest dreams, while for others, its consequences were no different from those of other rules of international law that were binding on subjects of international law. Practice, however, had revealed that, like reality, the consequences of *jus cogens* were less colourful than the dreamer’s dream and yet more colourful than others might wish to suggest.

The analysis in the report was organized according to two main consequences that had been recognized in the previous work of the Commission and practice, namely, consequences of peremptory norms for treaty law, in part III, section B, and consequences of peremptory norms for the responsibility of States for internationally wrongful acts, in part III, section C. Other consequences of *jus cogens* were considered in part III, section D. Part IV of the report contained

thirteen draft conclusions based on the analyses in sections B, C and D. He would be focusing on part IV and would only refer to part III as and when necessary. He would be grateful for any proposals, particularly from the Drafting Committee, that would improve the language of the draft conclusions, which might be somewhat heavy, as legal texts tended to be, but without detracting from their content. Such a balance had mostly been achieved during the previous session, and further improvements could likely be made to the current text.

Draft conclusion 10 (Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)) should be the most straightforward of the draft conclusions, as it was based on the Vienna Convention and, to borrow the words that had been used before to describe the work on the topic so far, it was “pure water without wine”. Indeed, many, though not all, provisions relating to treaties were drawn from the Convention.

Paragraph 1 of the draft conclusion provided that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). Such a treaty does not create any rights or obligations”. Paragraph 2 provided: “An existing treaty becomes void and terminates if it conflicts with a new peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty. Parties to such a treaty are released from any further obligation to perform in terms of the treaty.” The two paragraphs were taken almost verbatim from the Vienna Convention. The first sentence of paragraph 1 reproduced, without any change, the first sentence of article 53 of the Vienna Convention. The second sentence described the implications of the first sentence and, in hindsight, might be redundant — an issue that the Drafting Committee might wish to consider. The first sentence of paragraph 2 was based on article 64 of the Convention. The second sentence was based on article 71 and was placed at its current position in the draft conclusions because it described the direct implications of the phrase “becomes void” in the first sentence.

Paragraph 3, which provided that a treaty should be interpreted in a manner consistent with peremptory norms of general international law (*jus cogens*), was not based on a particular provision of the Vienna Convention, but was a necessary consequence of article 31 (3) (c), which provided that in the interpretation of treaties, “any relevant rules of international law applicable in the relations between the parties” should be taken into account. Peremptory norms of general international law qualified as “relevant rules of international law” and were “applicable in the

relations between parties” to a treaty. There was therefore an obligation to interpret treaties in a manner consistent with norms of *jus cogens*. The implications of that requirement were also reflected in the practice of States and in the decisions of international courts. Both Cyprus and the United Kingdom had made statements in Security Council debates on the intervention of Turkey in Cyprus which, although coming to different conclusions, had suggested that the Treaty of Guarantee should be interpreted in a manner consistent with *jus cogens* in order to avoid nullity. Both principal organs of the United Nations had adopted a similar approach.

Also relevant were two decisions of the Grand Chamber of the European Court of Justice concerning agreements entered into between the European Union and Morocco: one was the Reciprocal Liberalization Measures Agreement between the European Community and the Kingdom of Morocco, while the other was the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco. The judgment in the latter case was, in all material respects, similar to the judgment concerning the former. In the report, however, he had erroneously referred to the Fisheries Partnership Agreement when he should have referred to the Reciprocal Liberalization Measures Agreement, an error that would also be rectified in the corrigendum. While the General Court of the European Court of Justice had annulled the agreements because they were inconsistent with self-determination (a norm of *jus cogens* which the Grand Chamber described as “one of the essential principles of international law having an *obligatio erga omnes* character”), the Grand Chamber had decided to interpret the agreements as excluding the territory and waters of Western Sahara, with the result that the validity of the agreements had been unaffected.

The judgment of the International Court of Justice in *Oil Platforms (Islamic Republic of Iran v. United States of America)* was more explicit. The Court, in connection with article XX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, had stated that article 53 of the Vienna Convention had generated “a stringent principle of interpretation, so that any provision of a treaty is to be interpreted, if at all possible, so as not to conflict with” norms of *jus cogens*. Consequently, the Court had concluded that article XX (1) (d) of the Treaty of Amity must be interpreted in a manner consistent with the prohibition on the use of force. In a separate opinion in that case, Judge Simma had stated that in the light of article 31 (3) (c) of the Vienna Convention, *jus cogens* norms became “a legally insurmountable limit to

permissible treaty interpretation”. Judge Al-Khasawneh had expressed the same view in his dissenting opinion.

Finally, the Commission, in its work on responsibility of the States for internationally wrongful acts, had stated that norms of *jus cogens* “generate strong interpretative principles which will resolve all or most apparent conflicts”. All three paragraphs of draft conclusion 10 were based on the Vienna Convention and should therefore be agreeable to all members of the Commission.

Articles 53 and 64 of the Vienna Convention provided that treaties that conflicted with norms of *jus cogens* were void. Furthermore, those two articles did not provide for severability of such treaties. However, under normal circumstances, severability was an important element of any discussion of the invalidity of instruments. That issue was dealt with in draft conclusion 11 (Severability of treaty provisions in conflict with peremptory norm of general international law (*jus cogens*)), which was based on article 44 of the Convention, in which the word “invalid” was used. The Drafting Committee might wish to consider whether to retain the word “invalid” in the draft conclusion or to replace it with the word “void”, which was the word used in articles 53 and 64. Paragraph 1 of the draft conclusion provided that a treaty that, at the time of its conclusion, was in conflict with norms of *jus cogens* was invalid as a whole, and that no part of the treaty could be severed, wording that was based on article 53, when read in conjunction with article 44 (5) of the Vienna Convention.

Paragraph 2 concerned the severability of terms of a treaty that had become void because a new norm of *jus cogens* had emerged subsequent to the conclusion of the treaty. In keeping with the provisions of article 64 of the Vienna Convention, which did not provide for severability, paragraph 2 provided that a treaty that had become void as a result of a newly emergent peremptory norm was not severable. That paragraph, however, provided for an exception in three cases: First, when it was possible to separate or sever the provisions in conflict from the rest of the treaty; secondly, when the provisions that conflicted with the peremptory norm did not constitute an essential basis for the consent of States to enter into the treaty; and thirdly, when the continued performance of the treaty without the impugned provisions would not be unjust. The wording of the draft conclusion was based on article 44 of the Vienna Convention.

Since compliance with treaty obligations sometimes produced its own consequences, the question that arose was whether those consequences remained

valid in a case where that treaty had become void due to a conflict with *jus cogens* norms. That question was addressed in draft conclusion 12 (Elimination of consequences of acts performed in reliance of invalid treaty), which was based on article 71 of the Vienna Convention. Paragraph 1 of the draft conclusion concerned treaties that were void because they conflicted with norms of *jus cogens* at the time of their conclusion. The word “invalid” was used in the text of the draft conclusion, and therefore the Drafting Committee might wish to consider whether to replace it with “void” for the sake of consistency.

Paragraph 1 tracked the wording of article 71 (1) (a), stating that the parties to a treaty had the duty to eliminate the consequences of any act performed in reliance of a provision of the treaty that was in conflict with a peremptory norm of general international law (*jus cogens*). According to article 71 (1) (a), the duty to eliminate consequences applied only to the provision or provisions that conflicted with *jus cogens*, and not to all provisions. The text of draft conclusion 12, paragraph 1, should therefore read: “Parties to a treaty which is invalid as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty’s conclusion have a legal obligation to eliminate the consequences of any act performed in reliance of a provision of the treaty in conflict with a peremptory norm of general international law (*jus cogens*)”.

Paragraph 2 concerned treaties that became void on account of a new peremptory norm of general international law that emerged subsequent to the conclusion of the treaty. The paragraph was based on article 71 (2) of the Vienna Convention, and comprised two separate elements: First, that any rights or obligations created through the application or execution of the treaty prior to its termination by virtue of article 64 would not be affected by the termination, and, secondly, that such right or obligation would terminate if it were itself in conflict with a peremptory norm.

The provisions of draft conclusions 10, 11 and 12 were fairly straightforward and, with the exception of paragraph 3 of draft conclusion 10, were entirely based on the wording of the Vienna Convention. Some might say that the Vienna Convention had simply been cut and pasted into the draft conclusions, but he felt that that was appropriate, as the Commission was not tasked with creating new law.

Draft conclusion 13 (Effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties), however, was not based on the Vienna Convention, as the latter did not directly regulate the

effects of *jus cogens* on reservations to treaties. Still, he had felt that, unless there were specific reasons for deviating, the Commission should be consistent with its previous work on reservations. Thus, the two paragraphs of draft conclusion 13 were based on guideline 4.4.3 of the Guide to Practice on Reservations to Treaties. Paragraph 1, in recognition that a treaty provision might coexist with a peremptory norm, provided that a reservation to a treaty provision which reflected a peremptory norm of general international law did not affect the binding effect of that norm, which would continue to apply. As indicated in paragraph 71 of the report, in most instances, reservations to treaty provisions that reflected peremptory norms would likely be in conflict with the object and purpose of the treaty and thus would be impermissible. However, that consequence flowed not from the *jus cogens* status of the norm but rather from the rules on reservations to treaties. It was for that reason that the Commission had chosen the formulation found in the Guide to Practice rather than a more far-reaching formulation that would invalidate the reservation as such.

Paragraph 2 provided, however, that a reservation could not exclude or modify the legal effects of a treaty in a manner contrary to peremptory norms of general international law. That provision related to any treaty norm, not only norms reflecting *jus cogens*. For example, a treaty that provided that schools should provide three meals a day would probably not reflect a norm of *jus cogens*, but a reservation wherein a State declared that it would apply that provision only with respect to schools serving a particular racial group would be modifying that neutral provision in a manner inconsistent with a potential norm of *jus cogens*, namely, the prohibition of racial discrimination. Paragraph 2 indicated that such a reservation would have no effect.

Members of the Commission and some States had pointed out that the substance of articles 53 and 64 of the Vienna Convention could not be considered without the procedural safeguards contained in article 66 of the Convention on the basis of which articles 53 and 64 had been accepted. Mr. Forteau, a former member of the Commission, had been particularly adamant on that point. He recalled that, in the process of drafting the text that had become article 53, both in the Commission and at the Vienna Conference on the Law of Treaties, many States had feared that articles 53 and 64 would threaten the stability of treaty relations. Although that fear had not come to pass, a dispute settlement provision had been built into article 66 (a), which provided that any party to a dispute concerning the application or interpretation of articles 53 or 64 could refer the matter

to the International Court of Justice, unless the parties agreed to submit the matter to arbitration. In so doing, article 66 (a) was a compromissory clause. It was difficult, however, to incorporate such a rule into the current draft conclusions, because a proper compromissory clause in a non-treaty instrument would have no real binding effect. For that reason, paragraph 1 of draft conclusion 14 (Recommended procedure regarding settlement of disputes involving conflict between a treaty and a peremptory norm of general international law (*jus cogens*)) contained a recommended procedure. Paragraph 2 made clear that the draft conclusion did not constitute a compromissory clause, as it stipulated that the mere fact that a dispute concerned a norm of *jus cogens* was not sufficient to establish the jurisdiction of an international court. Consistent with article 66 (a) of the Vienna Convention and the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, draft conclusion 14 concerned only the application of articles 53 and 64 of the Vienna Convention; in other words, it applied only to the invalidation of a treaty on account of *jus cogens* norms, and not to all issues related to *jus cogens* norms.

For parties to the Vienna Convention, draft conclusion 14 obviously added little, as the Convention's dispute settlement processes applied to any dispute concerning the invalidation of a treaty, as per article 66 (a) of the Convention. However, in cases where the Convention did not apply, draft conclusion 14 would encourage parties to submit disputes regarding the invalidity of treaties due to conflicts with *jus cogens* norms to judicial settlement, including by the International Court of Justice.

Turning to draft conclusions 15, 16 and 17, which addressed the consequences of peremptory norms of general international law for other sources of international law, particularly customary international law, unilateral acts and binding resolutions of the United Nations, he said that draft conclusion 15 concerned the consequences of *jus cogens* norms for customary international law and was based on paragraphs 138 to 145 of the report.

Paragraph 1 of the draft conclusion provided that a rule of customary international law did not arise if it conflicted with a norm of *jus cogens*. In other words, even when the requirements of practice and *opinio juris* were met concerning a potential rule of customary international law that putative rule would not arise if it conflicted with an existing norm of *jus cogens*. In a sense, the draft conclusion was the equivalent of article 53 of the Vienna Convention. It used the wording "does not give rise to" rather than "is void" to reflect that more

so than treaty law, the emergence of a rule of customary international law was a process. The paragraph was based on cases from various jurisdictions, including the United States, the United Kingdom, Kenya and Argentina, although some of the authorities contained in paragraph 140 of the report did not use the same wording as was found in the draft conclusion. While the draft conclusion stated that the customary international law rule in question would not come into effect, the authorities in the report were more cautious, stating that the norms of *jus cogens* would prevail over the customary international law rule in question. In his view, the idea that *jus cogens* norms prevailed over customary international law meant that they could invalidate a rule of customary international law or prevent it from coming into being. Indeed, it would be strange if *jus cogens* norms had the effect of invalidating treaty rules but not customary international law. The draft conclusion therefore shared the sentiment, if not the same choice of words, of the judgment of the High Court of Kenya that *jus cogens* norms "rendered void" other rules, including customary international law.

Paragraph 2 of the draft conclusion concerned the effect of *jus cogens* on a pre-existing rule of customary international law and was equivalent to article 64 of the Vienna Convention. The words "void" and "invalidate" were not used in the paragraph, where the formulation used was "ceases to exist". Paragraph 3 provided that the persistent objector rule did not apply to *jus cogens* norms. Very few things in law were trite, but that one was. First, the application of the persistent objector rule to prevent the application of norms of *jus cogens* to some States would be inconsistent with the idea, accepted by the Drafting Committee and widely supported during the debates in the plenary, that *jus cogens* norms were universally applicable. Moreover, the rejection of the persistent objector rule with respect to the application of *jus cogens* was often taken for granted in the practice of States. National court judgments in Switzerland, the United States and the Inter-American Court of Human Rights had confirmed that norms of *jus cogens* were binding on all States.

Draft conclusion 16 provided that a unilateral act that conflicted with a peremptory norm of general international law was invalid. If States were precluded from assuming obligations contrary to peremptory norms, it would follow that they would be precluded from assuming such obligations through unilateral acts, and thus, unilateral acts contrary to norms of *jus cogens* were without legal effect. He had contemplated using the phrase "without legal effect", but had settled on "is invalid" instead, which more closely tracked the wording of Guiding Principle 8 of the Commission's

Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. He suggested that the Drafting Committee might wish to replace the word “invalid” with “void”.

Draft conclusion 17 concerned binding resolutions of international organizations. The report focused on binding resolutions rather than resolutions in general because the latter did not create binding obligations. Besides, the draft conclusion was mostly based on binding resolutions of the Security Council. However, the Drafting Committee might wish to consider redrafting the text, depending on the debate in the plenary, to refer to resolutions in general and to use the formulation “legal effect” or something similar, rather than “binding obligations”. The draft conclusion would thus provide that “resolutions of international organizations, including those of the United Nations Security Council, that are inconsistent with a norm of general international law (*jus cogens*) have no legal effect”.

Paragraph 1 provided that a binding resolution inconsistent with norms of *jus cogens* did not establish binding obligations. In the report, he had noted that it was highly unlikely that the Security Council or any other international organization would adopt a resolution that, on its face, ran contrary to *jus cogens*. Much of the literature on the subject supported that proposition. Indeed, in the report, he had made reference to a new book by Daniel Costelloe, entitled “Legal Consequences of Peremptory Norms in International Law”, which he had found very helpful. He had indicated that the author had suggested that there was “no practice” to support that notion. However, the author had written to inform him that he had in fact suggested in the book that there had been “little practice” to support the notion. The report would be amended in a corrigendum to reflect that nuance.

At any rate, paragraph 153 of the report contained examples of such practice, specifically, public statements by States that Security Council resolutions were subject to peremptory norms of general international law. He had only been able to find one example of a State that held the contrary view — the United States — and even it had not expressed a definitive statement about the state of the law. Rather, it had cautioned that the Commission should not venture into that area. In that connection, he recalled that he had been made clear in the syllabus that the Commission would need to grapple with that issue.

Judgments of national courts, including in the case of *Nada (Youssef) v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs* in

Switzerland and in *R v. Secretary of State for Defence (on the application of Al-Jedda)* in the United Kingdom, had held that Security Council resolutions were subject to respect for peremptory norms of international law, as had the International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor v. Duško Tadić* case. Although the Grand Chamber of the European Court of Justice had set aside the decision of the Court of First Instance in the case of *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, it had not put forward a contrary conclusion. The logical necessity of the conclusion contained in paragraph 1 of the draft conclusion was captured in the separate opinion of Judge Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia and Montenegro)*, which was quoted in paragraph 156 of the report.

Paragraph 2 of draft conclusion 17, which contained a similar interpretative presumption to that of draft conclusion 10, paragraph 3, stated that to the extent possible, resolutions of international organizations must be interpreted in a manner consistent with peremptory norms of general international law (*jus cogens*). That proposition was supported by statements by States in various contexts and by judgments of the European Court of Justice.

Because the titles of draft conclusions 15, 16 and 17 were rather cumbersome, he had considered omitting the words “Consequences of peremptory norms of general international law (*jus cogens*) for ...”. That change, however, would only work if the part was appropriately titled. If the title of the part was changed to “Effects of peremptory norms of general international law (*jus cogens*) on other sources of international law”, that would allow the titles to be shortened.

Draft conclusion 18 was unlikely to be controversial, as its content was almost universally accepted and supported by the judgments of the International Court of Justice and national courts, as well as by statements made by States in various forums. Although a doctrinal debate existed as to whether *erga omnes* obligations could exist independently of *jus cogens* norms, the reverse proposition, namely, that *jus cogens* norms result in *erga omnes* obligations, was hardly questioned.

Draft conclusions 19, 20 and 21 were based on the Commission’s work on State responsibility. Draft conclusion 19 (Effects of peremptory norms of general international law (*jus cogens*) on circumstances precluding wrongfulness), was based on article 26 of the Commission’s 2001 articles on responsibility of States

for internationally wrongful acts, which provided that nothing in chapter V precluded the wrongfulness of any act of a State which was not in conformity with an obligation arising under a peremptory norm of general international law. Paragraph 1 of draft conclusion 19 provided that “[n]o circumstance may be advanced to preclude the wrongfulness of an act which is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*)”. The wording could, however, be changed to state simply that “the circumstances precluding wrongfulness recognized under the rules of State responsibility do not apply to breaches of obligations arising under peremptory norms of general international law (*jus cogens*)”. Paragraph 2 was intended to prevent the possibility of retroactive responsibility for an act that was not inconsistent with a norm of *jus cogens* at the time it was committed.

Draft conclusions 20 and 21 concerned particular consequences of serious breaches of peremptory norms of general international law. Draft conclusion 20 concerned the duty to cooperate. Paragraph 1 provided that States should cooperate to bring to an end through lawful means any serious breach of a peremptory norm of general international law. The qualifier “lawful” was included in the text to emphasize that the draft conclusion could not be used as a justification for breaching other rules of international law. That paragraph was based on article 41 (1) of the articles on State responsibility. Although the Commission had taken the view that article 41 (1) represented progressive development at the time of its adoption, more recently, in its commentaries to the draft articles on the protection of persons in the event of disasters, it had determined that the duty to cooperate was well established as a principle of international law. Furthermore, in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice had taken the view that due to the character of the rights and obligations concerning humanitarian law applicable in armed conflict, which were “so fundamental to the respect of the human person and ‘elementary considerations of humanity’” and which were of an *obligatio erga omnes* character — long form for *jus cogens* — “all States are under an obligation not to recognize” the violations in question. That view had also been upheld by the Inter-American Court of Human Rights in the case of *La Cantuta v. Perú*. In paragraph 3 of the draft conclusion, it was explained that cooperation could take place through recognized institutions, such as the African Union or the United Nations, or through ad hoc measures.

Draft conclusion 21, concerning the duty not to recognize or render assistance, was based on article 41 (2) of the articles on State responsibility. Paragraph 1 of the draft conclusion provided that States had a duty not to recognize as lawful a situation created by a breach of a *jus cogens* norm. Paragraph 2 provided that a State must not give aid or assistance in the maintenance of a situation created by a breach of a norm of *jus cogens*. Notwithstanding the content of the draft conclusion, in 2001 the Commission had determined that the duty not to recognize or render assistance was a rule of customary international law. The draft conclusion addressed two different but mutually reinforcing duties that were supported by the same authorities. Those authorities, specified in paragraphs 96 to 101 of the report, included opinions of the International Court of Justice and resolutions of the Security Council and the General Assembly.

The Commission should note a subtle distinction between draft conclusions 20 and 21. While draft conclusion 20 applied to “serious” breaches of *jus cogens*, draft conclusion 21 did not contain a similar qualifier, even though it was present in article 41 (2) of the articles on State responsibility. There were two reasons for its exclusion. Firstly, unlike the duty in draft conclusion 20, the duty in draft conclusion 21 only required negative, not positive, conduct. The duty was therefore not onerous, and there was little reason to limit its application only to serious breaches. Secondly, and more importantly, none of the authorities listed in paragraphs 96 to 101 required serious breaches but rather based the duty on the peremptory nature of the rule.

Draft conclusions 20 and 21 and paragraph 2 of draft conclusion 23 were the only draft conclusions in which the phrase “States shall” was used. The Drafting Committee might consider whether to replace that phrase with “States have a duty to”.

Draft conclusion 22 (Duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law) was based on draft article 7 of the draft articles on crimes against humanity adopted by the Commission on first reading at its sixty-ninth session. The draft conclusion, however, had been simplified as, in his view, many of the nuances concerning territory under a State’s jurisdiction could be clarified in the commentary. Although he preferred the simplified version, he recognized that the Drafting Committee sometimes preferred complexity.

There was considerable settled treaty and legislative practice of States establishing jurisdiction over crimes prohibited by *jus cogens* norms where either

a nationality or a territoriality element was present. However, the practice of establishing universal jurisdiction was less settled, particularly in contexts where the State was not obligated by an international treaty. Paragraph 3 of draft article 7 of the draft articles on crimes against humanity provided a “without prejudice” clause to address that uncertainty, and paragraph 2 of draft conclusion 22 adopted a similar approach. That approach would be particularly relevant if the Commission were to take up the topic of universal jurisdiction in the future.

Turning to draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*) he said that paragraph 1 provided that a person’s official capacity was not a ground for excluding responsibility. That paragraph was concerned with substantive responsibility, not immunity, and was generally accepted as being part of customary international law. That provision had been reflected in the work of the Commission since the 1950 Nürnberg Principles and the draft Code of Offences against the Peace and Security of Mankind of 1954 and the draft Code of Crimes against the Peace and Security of Mankind of 1996. Paragraph 3 of draft article 6 of the draft articles on crimes against humanity contained a similar provision.

Paragraph 2 of draft conclusion 23 concerned immunity as a procedural bar to prosecution and provided that immunity *ratione materiae* did not apply to crimes prohibited by *jus cogens* norms. The draft conclusion was based principally on draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission in 2017. That draft article had attracted much attention from States and academics, some of whom had raised the criticism that there was no State practice in support of that exception and that the proposition was contradicted by practice, often based on cases involving civil proceedings and proceedings against States. The argument had also been made in the Commission that civil proceedings were relevant for criminal immunities, but there was no basis for that view. Moreover, judgments related to civil proceedings often themselves emphasized that the cases should not serve as precedent for immunities in a criminal context. For example, in paragraphs 87 and 91 of the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case, the International Court of Justice had made clear that the scope of its judgment was limited to civil proceedings against the State itself and that it did not necessarily extend to criminal proceedings against State officials. That circumscription was also reflected in *Al-Adsani v. United Kingdom*. Similarly, in *Yousuf v. Samantar*, the

court, while denying the exception in civil proceedings, had noted that there was a tendency in criminal cases to “deny official-act immunity in the criminal context for alleged *jus cogens* violations”, but that “the *jus cogens* exception appears to be less settled in the civil context”.

In his article entitled “*Immunity Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?”, published in the *American Journal of International Law Unbound*, Mr. Murphy presented a novel and interesting argument for why the case concerning *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* stood for the opposite proposition. During his summing-up, he would respond as appropriate to that argument, which he was convinced Mr. Murphy was going to raise. In paragraph 125 of the report, he provided examples that recognized the exception. In paragraph 126, he addressed some of the arguments raised by members of the Commission during the debate at the sixty-ninth session as to why the authorities listed did not support the proposition in draft conclusion 23. Finally, it was worth pointing out that several judgments that had upheld immunity *ratione personae* had shown that, owing to the nature of the crimes, the relevant persons would not enjoy immunity once they no longer held the office that entitled them to immunity *ratione personae*. That meant, *a contrario*, that immunity *ratione materiae* did not apply to those crimes. He was convinced that draft conclusion 23 would attract many comments, some critical. He hoped, however, that the debate on the issue would take place under less tense circumstances than the debate on draft article 7 of the draft articles on immunity of State officials. He suggested that if the plenary decided to send the draft conclusions to the Drafting Committee, the draft conclusions should be divided into parts. He would make a firm proposal as to that division, but proposed that it should be addressed only after the draft conclusions had been considered in full.

As for future work, he intended to present what might be a final report the following year that would address the question of whether to include an illustrative list of *jus cogens* norms, and, if so, what form it should take. He would also address the issue of regional *jus cogens*, which was not considered in the current report.

The meeting rose at 11.05 a.m. to enable the Drafting Committee on Protection of the atmosphere to meet.