

Provisional

For participants only

2 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3417th meeting

Held at the Palais des Nations, Geneva, on Monday, 2 July 2018, at 3 p.m.

Contents

Protection of the atmosphere (*continued*)

Report of the Drafting Committee

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

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

GE.18-11087 (E) 120718 020818



* 1 8 1 1 0 8 7 *

Please recycle 



Present:

Chair: Mr. Valencia-Ospina
Members: Mr. Al-Marri
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Mr. Laraba
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. Šturma
Mr. Tladi
Mr. Vázquez-Bermúdez
Mr. Wako
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Protection of the atmosphere (agenda item 8) (*continued*) (A/CN.4/711)

Report of the Drafting Committee (A/CN.4/L.909)

The Chair invited the Chair of the Drafting Committee to present the report of the Drafting Committee on the topic “Protection of the atmosphere”, as contained in document [A/CN.4/L.909](#).

Mr. Jalloh (Chair of the Drafting Committee), noting the progress the Commission had made during the first part of its seventieth session, which had been held in New York, said that the report of the Drafting Committee contained the preamble and 12 draft guidelines that had been completed on first reading, including 3 draft guidelines that had been considered and adopted at the current session.

He wished to pay tribute to the Special Rapporteur, Mr. Murase, whose mastery of the subject, constructive spirit and cooperation had greatly facilitated the work of the Drafting Committee. Thanks were also due to the members of the Drafting Committee for their valuable contributions to a successful outcome and to the Secretariat for its invaluable assistance. He hoped that the members of the Drafting Committee who had participated in the discussions while continuing to express reservations with respect to the topic and who had later joined the consensus, would not seek to reopen or block the adoption by the plenary of consensus text that had already been provisionally adopted by the Drafting Committee without any formal objections. Of course, that was without prejudice to any reserving member’s right to state his or her position in the plenary record in the usual way.

The Drafting Committee had devoted five meetings — on 29, 30 and 31 May 2018 — to its consideration of the draft preamble and the draft guidelines referred to it by the Commission. It had examined the three draft guidelines initially proposed by the Special Rapporteur in his fifth report (A/CN.4/711), together with a number of reformulations that the Special Rapporteur had proposed in the light of suggestions and concerns that had arisen during the debates in the plenary and in the Drafting Committee. The Commission had previously provisionally adopted draft guidelines 1 to 9 and a draft preamble on the topic, while the Drafting Committee had provisionally adopted, at the current session, three new draft guidelines, namely draft guidelines 10, 11 and 12. The Drafting Committee had subsequently undertaken a *toilettage* of the draft preamble and the draft guidelines in their entirety, during which it had made a substantive change to guideline 2 and a cosmetic change to guideline 9. He recommended that, in line with the Commission’s previous practice, the plenary should take action only on the new or amended draft guidelines.

The draft preamble remained as provisionally adopted by the Commission, except for the removal of the ellipsis and the text in brackets indicating that further preambular paragraphs might be added, given that the work on the topic had now been completed. Such text had been periodically included, since language from some guideline proposals had been moved to the draft preamble as work on the topic progressed. At the current session, a number of preamble-related proposals, including textual ones and others relating to the ordering of the paragraphs had been made, but they had been only briefly discussed by the Drafting Committee. The collective sense of the Committee had been that the preambular language as a whole should be carefully considered, and amended where appropriate, during the second reading stage, as was the Commission’s usual practice. In his summing up of the plenary debate that had taken place during the current session, the Special Rapporteur had indicated that he would make proposals regarding the preamble during the second reading.

Draft guideline 1, on the use of terms, remained as previously adopted. It contained definitions of the key terms vital to the understanding of the topic, namely “atmosphere”, “atmospheric pollution” and “atmospheric degradation”.

Regarding draft guideline 2, on the scope of the guidelines, it would be recalled that paragraph 1 had been adopted by the Commission with alternative formulations in brackets, namely “[contain guiding principles relating to]” and “[deal with]”, which had been left subject to further consideration. Upon review of the entire set of draft guidelines, the

Drafting Committee had considered the words “address”, “relate to” and “concern”, and had concluded that “concern”, which had been used in defining the scope of the topic “Identification of customary international law”, was the most appropriate option. Thus, paragraph 1 had been adopted using the term “concern”, which had been preferred over the phrases “contain guiding principles relating to” and “deal with”. Paragraph 1 therefore now read: “The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.” No changes had been made to paragraphs 2 to 4 of the draft guideline. The Drafting Committee had discussed whether to revisit the use of the words “deal with” in paragraphs 2 and 3. While some members had felt that the formulation could be improved, others had observed that it had been carefully negotiated as part of the understanding concerning the topic. It had therefore been left as it was in order to avoid reopening potentially sensitive issues.

Draft guidelines 3 to 8, which addressed, respectively, the obligation to protect the atmosphere, environmental impact assessment, sustainable utilization of the atmosphere, equitable and reasonable use of the atmosphere, intentional large-scale modification of the atmosphere and international cooperation, remained as previously adopted. The discussions and logic underpinning those draft guidelines could be found in the statements of the Chair of the Drafting Committee, which were available in the relevant section of the Commission’s website.

No substantive changes had been made to draft guideline 9, on the interrelationship among relevant rules, although an issue of punctuation had been addressed. It would be recalled that the previously adopted draft guideline 9 contained three paragraphs regarding the relationship between rules of international law concerning the atmosphere and other relevant rules of international law. The only amendment had been to paragraph 1: commas had been inserted before and after the words “*inter alia*” for the purposes of *toiletage*. The import of the guideline remained the same, since the change was not a substantive one. As had been explained by the Chair of the Drafting Committee in 2017, the reference to “including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law” in draft guideline 9 (1), reflected “the concern within the Drafting Committee to capture, on the one hand, the practical importance of those three areas to the atmosphere, and, on the other, the risk of overlooking other fields of law, which might be equally relevant”. The addition of the commas had the effect of underscoring that “without prejudice” categorization and hopefully would help settle any future questions by establishing that the list of relevant fields of law was not exhaustive or intended to be so.

Draft guideline 10, the first of the three new draft guidelines provisionally adopted by the Drafting Committee at the current session, concerned implementation. It consisted of two paragraphs, which addressed, on the one hand, existing obligations under international law, and, on the other hand, recommendations contained in the draft guidelines. Paragraph 1 read:

“National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present draft guidelines, may take the form of legislative, administrative, judicial and other actions.”

The text of paragraph 1 initially proposed by the Special Rapporteur in his fifth report had been modified to reflect the idea that States might implement their obligations at the national level, without stipulating the form of such implementation. The Special Rapporteur’s proposed language — “States are required to implement in their national law the obligations” — had therefore been replaced with “national implementation of obligations under international law”. The Drafting Committee had agreed that the term “national implementation” would be clarified in the commentary to take into account the various ways in which obligations under international law might be implemented, including situations in which obligations of regional organizations, such as the European Union, might be implicated.

Regarding the use of the term “obligations”, the Special Rapporteur had explained that the provision did not impose or create new obligations on States; rather, it referred to

States' existing obligations under international law. The phrase "obligations affirmed by the present draft guidelines" had therefore been replaced with "including those referred to in the present draft guidelines", the use of the expression "referred to", as opposed to "affirmed by", having been seen as a means of clarifying that the draft guidelines did not create new obligations and were not comprehensive of the issues related to the topic. It had been observed that many of the earlier draft guidelines, for instance draft guidelines 5, 6 and 7, had used the word "should", making them more recommendatory in nature, while other draft guidelines, such as draft guidelines 3, 4 and 8, referred to States as having "the obligation".

With regard to the forms of national implementation, the word "may" had been used in place of the words "required to", as originally proposed by the Special Rapporteur, in order to reflect the elective nature of the provision. It had been agreed that the commentary would explain that if national implementation was indeed required, it might take different forms. The reference to "administrative" action, as proposed in the fifth report, had been retained. As suggested in the plenary, the Drafting Committee had discussed whether it would be more appropriate to use the word "executive"; however, "administrative" had been deemed the more encompassing word since it covered "executive" actions by lower levels of government administration. At the end of the sentence, the words "other actions" covered all other forms of national implementation.

With regard to paragraph 2 on the subject of the responsibility of States, as originally proposed by the Special Rapporteur in his fifth report and revised by him to take into account the views of members expressed during the plenary debate, the members of the Drafting Committee had agreed that the paragraph was unnecessary for the purposes of the draft guidelines under consideration. In the main, it had been considered that the Commission had already addressed the secondary rules of responsibility, having adopted in 2001 the draft articles on responsibility of States for internationally wrongful acts. Those rules would therefore apply, *mutatis mutandis*, in relation to environmental matters, including the protection of the atmosphere from atmospheric pollution and atmospheric degradation. On the other hand, the Special Rapporteur had stressed that some States had indicated that the issue of responsibility should be addressed directly rather than in the form of a "without prejudice" clause. He had further suggested that the element of "damage", which would be relevant to the topic, had in any event not been incorporated into the secondary rules of State responsibility under the 2001 draft articles and had been left to be determined by the primary rules. Nonetheless, the Drafting Committee had concluded that a paragraph on the subject, even if it were framed as a "without prejudice" clause, would unbalance the text of the draft guidelines and would not do justice to a subject that the Commission had taken many years to complete. The paragraph had therefore been deleted, and the Special Rapporteur had indicated that the issue would be dealt with, as appropriate, in the commentary.

Paragraph 2, as adopted by the Drafting Committee, read: "States should endeavour to give effect to the recommendations contained in the present draft guidelines." The members of the Drafting Committee had agreed that the reference to "the recommendations contained in the present draft guidelines" was intended to distinguish it from "obligations", as used in paragraph 1 of draft guideline 10. They had concluded that the use of "recommendations" was appropriate, on the understanding that the meaning of the word would be clarified in the commentary and that it would be consistent with the draft guidelines, which used the word "should". The reference to "recommendations" was not intended to dilute any normative content of any of the draft guidelines.

The Drafting Committee had also discussed whether the term "good faith", as proposed by the Special Rapporteur, should be retained, how it should be used and whether it was to be understood within the meaning of the Vienna Convention on the Law of Treaties. While the Special Rapporteur had explained that the concept of "good faith" was intended to capture both legal and ethical dimensions, the members of the Drafting Committee had agreed that, under environmental law, the term had a specific meaning and entailed specific legal obligations, which were not necessarily covered in the draft guidelines, and had therefore deleted it.

With regard to proposed paragraph 4, which addressed extraterritorial application of national law by a State to the extent permissible under international law, the Drafting Committee had decided that the paragraph was not necessary for the purposes of the draft guidelines. The reason for that was that the matter of extraterritorial application of national law, by a State, raised a host of complex legal and other questions with far-reaching implications for other States and for their relations with each other. In such circumstances, under which further consideration of the practice of States on the issue would be required considering the global commons nature of the atmosphere, it had been widely agreed that the issue of extraterritoriality could not be addressed satisfactorily in a single paragraph. Accordingly, the paragraph had consequently been deleted, and the question of extraterritoriality would be addressed, as appropriate, in the commentary.

Draft guideline 10 was entitled “Implementation”, as originally proposed by the Special Rapporteur.

Draft guideline 11, entitled “Compliance”, had been restructured with a view to streamlining the original proposal by the Special Rapporteur. The draft guideline, which complemented draft guideline 10 on implementation, reinforced the principle *pacta sunt servanda*, even though its main focus was on the existing compliance mechanisms that might be used. It comprised two paragraphs. Paragraph 1 read:

“States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.”

The text of paragraph 1 had been modified to better align it with the principle of *pacta sunt servanda*, while, at the same time, focusing on the existing compliance mechanisms. The words “States are required to effectively comply” had been replaced with “States are required to abide with”. In addition, the Drafting Committee had replaced the words “international law norms” with “obligations under international law”, while further specifying linkage to those obligations concerning “protection of the atmosphere from atmospheric pollution and atmospheric degradation”. The latter formulation served to harmonize the language of paragraph 1 with the language used throughout the draft guidelines. The Drafting Committee had felt that the broad nature of such “obligations under international law” better reflected the reality that treaty rules constituting obligations might, in some cases, be binding only on the parties to the relevant agreements, while other rules might reflect or later crystallize into customary international law with consequent legal effects for non-parties.

The phrase “multilateral environmental agreements”, as proposed by the Special Rapporteur, had been replaced with “relevant agreements to which they [the States] are parties”, to avoid narrowing the scope of the provision. The “relevant agreements” referred to would include multilateral, regional or other trade treaties that might also contemplate environmental protection provisions, including exceptions such as those under article XX of the 1947 General Agreement on Tariffs and Trade or even so-called environmental side agreements such as the North American Agreement on Environmental Cooperation. The Drafting Committee had considered that paragraph 1 should serve as an introduction to paragraph 2.

Paragraph 2 dealt with the facilitative or enforcement procedures that might be used by compliance mechanisms and covered the ideas encapsulated in paragraphs 2, 3 and 4 as originally proposed by the Special Rapporteur.

The chapeau of paragraph 2 read: “To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements:” The opening phrase “For non-compliance”, as proposed by the Special Rapporteur, had been replaced with “To achieve compliance” in order for the paragraph to begin with a purposive positive approach and for its wording to be aligned with that of existing agreements. Similarly, the word “approaches” had been replaced with “procedures” to reflect the use of the latter term in such agreements, while the words “may be used, as appropriate,” emphasized the differing circumstances and contexts in which facilitative or enforcement procedures could be deployed to nudge compliance. The

expression “and/or” in the original version of paragraph 2 had been replaced with “or” to present such procedures as alternatives to be considered by the competent organ established under the agreement concerned. At the end of the chapeau, the words “in accordance with the relevant agreements” had been used, since the members of the Drafting Committee had agreed that the commentary would emphasize that facilitative or enforcement procedures were those provided for under existing agreements to which States were parties and that such procedures would operate in accordance with such agreements.

Besides the chapeau, paragraph 2 comprised two subparagraphs (a) and (b), which had been based on paragraphs 3 and 4 originally proposed in the fifth report. The structure and punctuation of the subparagraphs indicated that existing regimes were not affected by facilitative or enforcement procedures. The subparagraphs read:

“(a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;

(b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.”

In both subparagraphs, the word “may” had been added before “include” in order to provide States with flexibility in the use of the existing facilitative or enforcement procedures. In addition, at the beginning of both subparagraphs, the words “facilitative measures” and “enforcement approaches” had been replaced with the words “facilitative procedures” and “enforcement procedures” respectively, to align the subparagraphs with the chapeau of paragraph 2.

In subparagraph (a), the word “non-complying” before “States”, initially proposed by the Special Rapporteur, had been deleted, since some members had felt that it had negative and punitive connotations, when compliance procedures were in fact intended to induce compliance. Based on the Montreal Protocol on Substances that Deplete the Ozone Layer, article 8 of which contained the phrase “Parties found to be in non-compliance”, the Drafting Committee had considered it more appropriate to use the words “in cases of non-compliance” and refer to “the States concerned”. In the last part of the sentence, the words “taking into account their capabilities and special conditions” had been considered necessary, in recognition of the specific challenges often faced by developing and least developed countries in the discharge of obligations relating to environmental protection. Those challenges tended to arise from a general lack of capacity, which could sometimes be mitigated by the receipt of external support to build capacity to facilitate compliance with their obligations under international law.

In subparagraph (b), the words “multilateral environmental agreements” had been replaced with “relevant agreements”, for the reasons already explained. Following lengthy debate, the members of the Drafting Committee had agreed to replace the term “sanctions”, originally proposed in the fifth report at the end of paragraph 4, with “enforcement measures” which had been deemed more appropriate for the purposes of the draft guidelines in order to avoid confusion with references to unilateral sanctions or the sometimes negative connotation of the term “sanctions”.

Draft guideline 11 was entitled “Compliance”, as originally proposed by the Special Rapporteur.

Turning to draft guideline 12, on dispute settlement, he said that a discussion had taken place within the Drafting Committee about whether it would be appropriate for the Commission to adopt such a draft guideline. Although some members had remained unconvinced, the majority had agreed on the need to include one. It had been felt that, if disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation arose between States, they should be settled in accordance with international law, using established mechanisms. The purpose of the draft guideline as provisionally adopted was solely to describe the principle of the peaceful settlement of disputes between States, without delimiting specific forms, and to address the use of

technical and scientific experts in such disputes. The Drafting Committee had settled on a simpler formulation than that initially proposed by the Special Rapporteur. Draft guideline 12 comprised two paragraphs.

Paragraph 1 read: “Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.” The paragraph described the general obligation of States to settle their disputes by peaceful means. The expression “between States” had been added to clarify that the disputes referred to in the paragraph were inter-State in nature. The Drafting Committee had considered that the reference to Article 33 (1) of the Charter of the United Nations, as originally proposed, should be deleted, as a wide variety of amicable means of dispute settlement could be found in the practice of States. The intent, in omitting the specific reference to Article 33, had not been to downplay the significance of the various pacific means mentioned in that provision, such as negotiation, enquiry, use of good offices, mediation, conciliation, arbitration, judicial settlement or resort to other peaceful means that might be preferred by the States concerned. There had been agreement among the members of the Drafting Committee that he should highlight, in his statement before the plenary Commission, that the provision was not to be construed in any way that might interfere with or displace existing dispute settlement provisions in treaty regimes, which would continue to operate on their own terms. It had further been agreed that, given its importance, that point should be explained in the commentary. The Drafting Committee had ultimately concluded that the commentary should emphasize that the main purpose of the paragraph was to reaffirm the principle of peaceful settlement of disputes and to serve as a primer for paragraph 2.

Paragraph 2 read: “Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.” The first part of the sentence implicitly recognized that disputes in the area of protection of the atmosphere would be “fact-intensive” and “science-dependent”. Those elements, evident from the experience of inter-State environmental disputes, would typically require specialized expertise to contextualize or grasp fully the issues in dispute. For that reason, it would be necessary for “due consideration” to be given to the use of technical and scientific experts.

The Drafting Committee had decided not to retain the original proposal from the Special Rapporteur’s fifth report concerning proper assessment of scientific evidence and party appointment and cross-examination of experts, in order to focus on the essential aspect, which was the use of technical and scientific experts in the settlement of inter-State disputes whether by judicial or other means. The reference to “the rules and procedures concerning, inter alia, the use of experts in order to ensure proper assessment of scientific evidence, if such disputes are to be settled by arbitration or judicial procedures” had been replaced with “the use of technical and scientific experts”. The Drafting Committee had considered that the reference and the last two sentences of the original proposal, concerning the appointment of experts and their use by the parties or those mandated to settle the dispute or determine the relative weight to be accorded to scientific evidence, were descriptive in nature and would be better addressed in the commentary. As a result, they had been deleted.

There had been wide agreement among the members of the Drafting Committee that the originally proposed paragraph 3, which dealt with the principles of *jura novit curia* and *non ultra petita* in the context of the judicial settlement of disputes that might arise in relation to the protection of the atmosphere, was not necessary for the purposes of the draft guidelines and that the issues raised therein would be more appropriately dealt with in the commentaries. Consequently, the paragraph had been deleted.

Draft guideline 12 was entitled “Dispute settlement”, as proposed by the Special Rapporteur in his fifth report.

After completing its work on the draft guidelines, the Drafting Committee had adopted the title of the entire text of draft guidelines on first reading, namely “Guidelines on Protection of the Atmosphere”.

Mr. Huang said that the Drafting Committee had deleted almost half of the text of draft guidelines 10 to 12 as proposed by the Special Rapporteur in his fifth report and had changed what remained beyond recognition, with a result that looked good on paper but risked proving useless in practice. For example, draft guideline 10 (2) and (4), and draft guideline 12 (3) had been removed entirely, while draft guideline 10 (1) had been stripped of its most important provision through the deletion of the reference to States being “required to implement in their national law the obligations affirmed by the present draft guidelines”.

In view of the deletion of provisions to which the Special Rapporteur had previously attached considerable importance, he wondered whether what was left of draft guidelines 10 to 12 could provide meaningful, practical guidance to Member States. During the intersessional period, he had sounded out government officials and legal experts in charge of environmental protection, whose response had largely been to question whether the Commission was achieving anything. Indeed, it was shocking to note how the draft guidelines, in their current form, were devoid of substance and characterized by either ambiguous and barely comprehensible legal jargon or truisms and redundancies. For instance, the provision in draft guideline 12 (1) that “disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means” was a self-evident, universal norm and a basic principle of the Charter of the United Nations. The outcome of the work of the Drafting Committee appeared to vindicate the view, expressed by some Commission members in plenary, that the draft guidelines ought not to have been referred to the Committee at all.

In recent years, there had been some undesirable developments and tendencies within the Commission. During the consideration of certain topics, good traditions and sound methods of work had been compromised, and there had been a failure to respect fully the views of all members. Worse still, efforts to reach consensus on important matters had been abandoned, an extremely serious issue that should receive the Commission’s full attention.

He wished to stress that, as a former special representative of his country’s Ministry of Foreign Affairs for climate change negotiations, he was not opposed to the protection of the atmosphere, nor did he intend to block the adoption of the draft guidelines on first reading. However, he continued not to support the Commission’s consideration of the topic “Protection of the atmosphere” and had doubts over the usefulness of the 12 draft guidelines adopted by the Drafting Committee.

The Chair said that he appreciated the spirit of cooperation displayed by Mr. Huang in not standing in the way of the adoption of the draft guidelines by the plenary Commission on first reading.

Mr. Park said that when the Drafting Committee had discussed paragraph 2 of draft guideline 10, he and other members had expressed concern that, given the Committee’s decision to delete the paragraph, dealing with the issue of State responsibility in the commentary might confuse readers. That concern should have been reflected in the statement of the Chair of the Drafting Committee, especially as the text of the statement would be made publicly available.

Mr. Jalloh (Chair of the Drafting Committee) said that he had endeavoured to reflect faithfully the discussion held by the Drafting Committee and would be willing to find language that captured the point made by Mr. Park.

Mr. Petrič said that the statement reflected most of the issues raised by Commission members in plenary and that the draft preamble and draft guidelines should be adopted as they stood in order to enable Member States to have their say.

Mr. Murase (Special Rapporteur) said that he wished to express his heartfelt appreciation to the Chair of the Drafting Committee for his superb work, which had culminated in the adoption of the draft guidelines by the Committee, despite some challenges. The Committee had tried its utmost to retain the basic structure of the draft guidelines that he had proposed in his fifth report. He agreed fully with the changes that had

been made and was satisfied with the outcome. The issue of State responsibility should be addressed when the Commission convened in plenary to discuss the commentaries.

The Chair invited the Commission to adopt draft guideline 2, as revised, and draft guidelines 10, 11 and 12.

Draft guideline 2

Draft guideline 2 was adopted.

Draft guidelines 10 to 12

Draft guidelines 10 to 12 were adopted.

The Chair said that he took it that the Commission wished to adopt, on first reading, the texts and titles of the draft guidelines and preamble on the protection of the atmosphere, as contained in document [A/CN.4/L.909](#).

It was so decided.

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

Mr. Nolte said that he wished to thank the Special Rapporteur for his rich third report on *jus cogens*, which covered many important questions in a crucial area of international law. The Commission needed to deal with such questions in a particularly careful way. Any premature conclusions could have serious effects on the state and the working of the international legal system.

The procedural rules set out in articles 42 and 65 of the 1969 Vienna Convention on the Law of Treaties were of great importance for ensuring the stability of treaty relations and for preventing incorrect or abusive invocations of *jus cogens*. It was therefore crucial that those articles should be taken as the point of departure when considering the relationship between the rules regarding the consequences of *jus cogens* and the procedure by which the existence of a *jus cogens* norm was determined. Such rules needed to be reaffirmed.

That being said, national and regional courts had occasionally raised the issue of whether a particular treaty, or treaty-based decision, violated a norm of *jus cogens*, without making the consequences of such a violation dependent on following the procedure under the Vienna Convention. It would indeed be difficult for national or regional courts to suspend the effects of their judgments, if they concluded that a treaty violated a norm of *jus cogens*, until the States concerned had followed the procedure under the Vienna Convention. That did not mean, however, that the obligation of States under the Vienna Convention to follow the procedure did not also apply in such cases; it did indeed apply. Therefore, a State whose court had declared a treaty to be invalid because it would conflict with a *jus cogens* norm must notify other States; and a State that considered that the court of another State had wrongly declared a treaty to be invalid for the same reason could choose to follow the procedures under articles 65 and 66 of the Vienna Convention.

An even more important question was whether States that were not bound by articles 65 and 66 of the Vienna Convention — either because they had not ratified the Convention or because they had entered reservations with respect to article 66 — could simply invoke the invalidity of a treaty as a result of a violation of a norm of *jus cogens*, or whether such States must or should follow at least certain basic elements of the procedure laid down in the Vienna Convention before being able to draw any consequences from their view that a treaty violated a norm of *jus cogens*. There was no easy answer to that question. So far, relevant practice seemed sparse. It was clear, however, that the recognition of *jus cogens* and its effects, by the Vienna Convention, was premised on the requirement that a State could not unilaterally draw consequences when it considered that a treaty was void because the treaty violated a norm of *jus cogens*. Draft conclusion 14, by recommending States to submit the matter to the jurisdiction of the International Court of Justice, seemed incorrectly to imply that they were free to do so. While it was true that States that were not bound by the Vienna Convention were obviously not bound by article 66, which established

the jurisdiction of the International Court of Justice, the rules contained in article 65 were more than mere treaty obligations. Rather, article 65 expressed certain generally recognized rules that should be recognized in the draft conclusions. After all, in paragraph 109 of its judgment in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice had noted the following regarding articles 65 to 67: "... if not codifying customary international law, [they] at least generally reflect customary international law and contain certain procedural principles which are based on the obligation to act in good faith." He therefore proposed inserting a new paragraph above the current paragraph 1 of draft conclusion 14, to read:

"A State party which invokes the invalidity of a treaty as resulting from a conflict with a peremptory rule of general international law (*jus cogens*) shall notify the other parties of its claim. If another party raises an objection, the States parties concerned shall negotiate in good faith with a view to agreeing on a solution or an appropriate procedure to resolve the dispute. The invoking party may give effect to its claim in relation to any objecting party after the invalidity of the treaty has been determined as agreed by them."

The proposed additional paragraph reflected the basic elements of article 65 of the Vienna Convention, using language from that provision. While article 65 was generally supported during the elaboration of the Vienna Convention, it was well known that article 66 had attracted several reservations and objections to those reservations. However, the basic elements of article 65, as they were reflected in the proposed additional paragraph, expressed certain core rules that flowed from the generally recognized obligations to act in good faith and to settle disputes peacefully. The rules acquired their specific character in the present context from the importance of the question under which circumstances the fundamental principle of *pacta sunt servanda* might be called into question by States parties when invoking *jus cogens*.

The question of the procedure by which a conflict with a *jus cogens* norm was determined arose with respect not only to treaties but also to other sources of law and of obligations, as covered in draft conclusions 15 to 17. It was his view that the same procedural rules should apply for all sources of law and obligations. He therefore proposed that the additional paragraph that he had put forward in respect of draft conclusion 14 should either be added, *mutatis mutandis*, to draft conclusions 15 to 17, or, preferably, that the Commission should formulate a general draft conclusion on procedure. Such a draft conclusion would read:

"A State which invokes the invalidity of an obligation as resulting from a conflict with a peremptory rule of general international law (*jus cogens*) shall notify other States concerned of its claim. If another State raises an objection, the States concerned shall negotiate in good faith with a view to agreeing on a solution or an appropriate procedure to resolve the dispute. The invoking State may give effect to its claim in relation to any objecting State after the invalidity of the obligation has been determined as agreed by them."

The proposed new paragraph did not address all the questions that might arise in the context, including the issue of whether a treaty was presumptively valid if States parties were unable to agree on a way to determine if a treaty was invalid because it would violate a norm of *jus cogens*. It would clearly be preferable for the Commission to formulate a conclusion in that respect. If it did so, it should take care not to be overly influenced by the distrustful attitudes that many States had displayed towards the International Court of Justice in the 1960s and 1970s, following its 1966 judgment in the *South West Africa* cases.

Turning to the individual draft conclusions, he said that draft conclusion 10 was a good point of departure with regard to the consequences of *jus cogens*, although he had doubts regarding the second sentences of paragraphs 1 and 2. While supporting the thrust of paragraph 3, he did not see why the rule of interpretation contained therein should not also apply to rules of customary international law and other sources of obligations that were addressed in other proposed draft conclusions, especially draft conclusions 15 to 17. Moreover, if there were a general rule of interpretation, it would not be necessary to repeat the rule in draft conclusion 17 (2), specifically for resolutions of international organizations.

He supported paragraph 2 of draft conclusion 11; however, subparagraphs 2 (b) and (c) were superfluous and might even be misleading, principally because they covered matters that were already addressed in subparagraph (a). As for paragraph 1 of draft conclusion 11, it was true that the paragraph reflected the Commission's views in the lead-up to the adoption of the 1966 draft articles on the law of treaties. There was, moreover, a strong argument in favour of draft conclusion 11 (1), according to which the non-severability rule emphasized the importance of *jus cogens* and provided a sanction and a deterrence against violations of *jus cogens*. Those facts notwithstanding, he had pragmatic doubts about the content of paragraph 1. By way of example, he noted that the General Assembly had declared in 1979 in its resolution 34/65 "that the Camp David accords and other agreements have no validity in so far as they purport to determine the future of the Palestinian people and of the Palestinian territories occupied by Israel since 1967." The Assembly thereby seemed to have expressed the view that certain provisions of the Camp David accords would remain valid even if others violated a norm of *jus cogens* which existed prior to the conclusion of the treaty. Given the increase, since the 1960s, of the number of norms that were arguably *jus cogens* and given the complexity of many treaties that had been concluded thereafter, it was likely that specific rules from treaties that were otherwise unobjectionable might be called into question as violating *jus cogens*. He wondered whether it would be necessary or appropriate to request the parties to such a treaty to revise it as a whole in cases in which an interpretation of the treaty concerned in conformity with *jus cogens* norms was not possible. Perhaps, then, the Commission should consider basing the entire draft conclusion on the severability approach contained in paragraph 2 of draft conclusion 11, with a presumption that the whole treaty was void in a case like that set out in article 53 of the Vienna Convention. Draft conclusion 11 could also be extended to cover secondary treaty law, namely acts of international organizations that created obligations for States.

He agreed that draft conclusion 12, which dealt with the duty to eliminate consequences of a treaty that conflicted with *jus cogens*, should be based on article 71 of the Vienna Convention. However, the phrase "as far as possible", which appeared in paragraph 1 (a) of that article, should not be omitted, as it was important in assuring that the legal effect of rules of *jus cogens* remained practicable. He supported in principle draft conclusion 13, although its placement should be discussed.

With regard to draft conclusions 15 to 17, he agreed with the Special Rapporteur that it was not necessary to address the consequences of preemptory norms on general principles of law. He could not conceive of a situation in which a general principle of international law could conflict with a norm of *jus cogens*. If such a situation were to be asserted by a State, the general principle of law would surely be interpreted in a way that would render it consistent with *jus cogens*. While he generally supported draft conclusion 15, he wondered why the words "not of a *jus cogens* character" appeared only in paragraph 2 and not in paragraph 1. As it was currently formulated, paragraph 1 seemed to exclude the possibility of replacing one rule of *jus cogens* with another — a possibility that was envisaged in article 64 of the Vienna Convention.

In draft conclusion 16, the expression "unilateral act" could, in the context, give rise to the misunderstanding that purely factual acts could be invalidated by *jus cogens*. When adopting its Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations in 2006, the Commission, acknowledging that the term "unilateral act" could give rise to misunderstandings, had clarified that it referred to "juridical act[s] that] necessarily impl[y] an express manifestation of a will to be bound on the part of the author State". That should be made clear in the context of the topic of *jus cogens*, for example by replacing the term "unilateral act" with "unilateral commitment".

Regarding draft conclusion 17, he agreed with the Special Rapporteur that it was useful to cover, in the context of *jus cogens*, the acts of international organizations that created legal obligations and that such acts, if and insofar as they conflicted with *jus cogens* norms, were invalid. However, he was not convinced that the draft conclusion should be limited to binding resolutions, and even less so that it should single out one specific form of binding resolutions — those of the Security Council of the United Nations. The fact that there had been major debates on the relation of Security Council resolutions with norms of

jus cogens did not justify such a narrow focus in a project that was aimed at formulating general rules. Otherwise, the Commission would risk being misunderstood as taking a generally distrustful position *vis-à-vis* the Security Council and its resolutions.

He broadly agreed with draft conclusions 18 to 21, although he suggested that, in draft conclusion 21, the word “serious” should be inserted before the phrase “breach of a peremptory norm”, consistent with the language of article 41 (2) of the articles on State responsibility for internationally wrongful acts.

He was not convinced by the assertion in the Special Rapporteur’s report that draft conclusions 22 and 23, on criminal responsibility, were “effects of peremptory norms of general international law (*jus cogens*) on individual criminal responsibility in international criminal law”. First, the Commission’s work on the topic of *jus cogens* was based on a distinction between the rules regarding the methodology for determining all rules of *jus cogens* and their effects, on the one hand, and the rules that might be contained in a possible, “illustrative”, list of specific rules of *jus cogens*, on the other. The Special Rapporteur had confirmed that distinction by asking members, when introducing his second report (A/CN.4/706), to convey their views on whether an illustrative list of specific norms of *jus cogens* should be formulated. Given that no proposal had been made by the Special Rapporteur to that effect and that the Commission had not yet taken a decision on the matter, the third report should attempt only to address the effects that were applicable to all rules of *jus cogens*. Draft conclusions 22 and 23, however, concerned only certain, specific rules of *jus cogens*, the prohibitions of international crimes, and a limited number of possible specific effects that might result from those prohibitions. For that reason alone, draft conclusions 22 and 23 were not part of what the Commission had agreed to cover as part of the topic at the current stage.

Secondly, even if the term “effect (or consequence) of *jus cogens*” were to extend, at the current stage, to the possibility of addressing specific consequences of specific rules of *jus cogens* — which was not the case — the Commission would then also have to deal with other such specific consequences. The right of self-determination, for example, was said to produce certain specific consequences, but those were not addressed in the report. It was therefore selective to cover a limited number of possible specific effects of international crimes and not of other specific *jus cogens* norms.

Thirdly, even if it were appropriate, in the current context, to address specifically the effects of international crimes as norms of *jus cogens*, the third report did not do so in accordance with the methodological requirements set out provisionally by the Drafting Committee. A thorough analysis of State practice in all its forms was necessary, according to provisionally adopted draft conclusions 5 and 6, by identifying, first, a norm of general international law — most commonly a rule of customary international law — and, secondly, a specific *opinio juris* of States according to which a particular rule of customary international law had a peremptory character. Those requirements constituted a high threshold that were not addressed in the third report. If in his report the Special Rapporteur was asserting that draft conclusions 22 and 23 were not themselves *jus cogens* but nevertheless effects of *jus cogens*, he wondered what criteria should be used for determining that a simple rule of customary international law was the effect of a *jus cogens* norm.

The Special Rapporteur, in his report, merely attempted to demonstrate that draft conclusions 22 and 23 had some support in practice, and that they flowed from the character of international crimes. The Commission did not usually consider that type of reasoning to be sufficient for identifying a rule of customary international law or a norm of *jus cogens*, as confirmed in its recently adopted conclusions on the identification of customary international law and in the provisionally adopted draft conclusions on the topic of *jus cogens*. It was not sufficient, in order to demonstrate certain further effects, to demonstrate that international crimes were *jus cogens* norms; rather, it was necessary to show that a large majority of States accepted and recognized as *jus cogens* a particular effect of such a norm. The third report did not fulfil such requirements. Instead, the Special Rapporteur had attempted to draw conclusions by way of theoretical reasoning, despite having rejected that approach in his general remarks at the beginning of the third report. It was also not sufficient to invoke certain instances of practice when they were far from

being generally accepted as rules of *jus cogens*. Thus, even if the reasoning behind draft conclusions 22 and 23 established that those draft conclusions reflected customary international law, it would be insufficient to show that they were effects of international crimes.

Fourthly, the reasoning provided in respect of draft conclusion 23 (2) was particularly incomplete and therefore unpersuasive. The assertion that the rule that the Commission had provisionally adopted as draft article 7 in the context of the topic “Immunity of State officials from foreign criminal jurisdiction” was an effect of the norm of *jus cogens* that prohibited the commission of core international crimes was surprising. In its debate on that draft article at its previous session, the Commission had also discussed whether it constituted a rule of customary international law, in the sense of a rule of ordinary customary international law; varying views had been expressed by members in that regard. Even among those members who had ultimately voted in favour of draft article 7, a majority had not made the claim that it expressed a rule of customary international law. The Special Rapporteur herself had spoken only of a “trend” to that effect. It was puzzling that a norm that a majority of the Commission did not recognize as a rule of simple customary international law, could be characterized, just one year later, as being the effect of a norm of *jus cogens*.

During the debate in the Sixth Committee on draft article 7 of the topic of immunity of State officials from foreign criminal jurisdiction, the Member States that had made statements had been evenly split on the question of whether or not draft article 7 (1) reflected customary international law. More importantly, only 5 States had more or less clearly expressed the view that draft article 7, paragraph 1, reflected customary international law, whereas 16 States had more or less clearly expressed the view that draft article 7, paragraph 1, did not reflect customary international law. In his view, the third report on the current topic was attempting to reopen the debate in an inappropriate context. Under the circumstances, he failed to see how it could be asserted, at the current stage, that the proposition contained in draft conclusion 23 (2) was a norm of *jus cogens*, or the effect of a rule of *jus cogens*.

The question of how to deal with draft conclusions 22 and 23 on the current topic was not one that should divide the Commission along the same lines as draft article 7 of the topic of the immunity of State officials from foreign criminal jurisdiction. Those colleagues who had voted in favour of that draft article 7 should not simply take draft conclusions 22 and 23 on the current topic as an opportunity to reaffirm their positions on draft article 7. Such an approach would be based on a misunderstanding: although that draft article resembled draft conclusions 22 and 23, there was a crucial difference in whether a rule was an effect of a *jus cogens* norm, or simply a rule of ordinary customary international law — or even a proposal *de lege ferenda*. In addition, draft article 23 (2), if adopted, would not include the procedural safeguards that the Commission would have to discuss in the framework of the topic of immunity of State officials from foreign criminal jurisdiction. For many members, the question of procedural safeguards was inextricably connected with draft article 7 as provisionally adopted. Draft conclusion 23 (2) would close the door to any possibility of arriving at a consensual approach regarding draft article 7 on the topic of immunity of State officials from foreign criminal jurisdiction. He was, moreover, concerned that the Special Rapporteur, in proposing two draft conclusions whose content was more specifically addressed in the context of other topics already on the Commission’s agenda, had not addressed the concern that those draft conclusions could interfere with the Commission’s consideration of those other topics. Failure to do so risked aggravating an already difficult situation.

On the substance, he failed to see how draft conclusion 23 (2) could be an effect of *jus cogens*. The International Court of Justice had stated in general terms that substantive norms of *jus cogens*, such as the prohibitions of international crimes, on the one hand, and rules on immunity — which were procedural in character — on the other, were two sets of rules that addressed different matters. Draft conclusion 23 (2) therefore directly contradicted the Court’s case law since its judgments in the cases concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* and the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Moreover, if the

Commission were to consider adopting draft conclusion 23 (2), it would have to explain why the envisaged effect of the *jus cogens* prohibitions of international crimes would be limited to establishing an exception to immunity *ratione materiae*, and why they should not also extend to immunity *ratione personae*.

For the aforementioned reasons, he was opposed to referring draft conclusions 22 and 23 to the Drafting Committee. That did not mean the Commission could not take up the draft conclusions at a later stage, if the Commission decided that it should elaborate an illustrative list of specific rules of *jus cogens* and once definitive conclusions had been reached in the context of the topics of immunity of State officials from foreign criminal jurisdiction and of crimes against humanity. He was in favour of sending all the other proposed draft conclusions to the Drafting Committee.

Regarding methods of work, he recalled that the proposed draft conclusions contained in the Special Rapporteur's first report on the current topic had been referred to the Drafting Committee, which had provisionally adopted them. However, those draft conclusions had been left pending in the Drafting Committee. The Commission as a whole had been informed of the Drafting Committee's work through an interim report issued by the latter's Chair, a report that had been published, not very prominently, on the Commission's website. That same procedure had been repeated in 2017 with the second report, and he understood that it would be so again with the Special Rapporteur's third report. The Drafting Committee did not refer its work back to the Commission for its consideration in plenary meeting, which in turn meant that no commentaries were produced that the Commission as a whole and States could consider until the first reading of the draft conclusions. That was a serious problem, in that Member States could not properly follow the Commission's work on the topic and could not comment meaningfully in such cases. Member States were able to access a mere summary of the debate and the interim reports of the Drafting Committee Chair, which were not included in the Commission's annual report to the General Assembly and had not been discussed by the Commission in plenary meeting. Proceeding in such a way raised two major problems. First, the authority of the Commission's work rested on its procedure and on its transparent interaction with Member States, as represented in the Sixth Committee. It might under certain circumstances be acceptable to postpone the elaboration of commentaries and the adoption by the Commission as a whole of provisionally adopted draft conclusions until the following session; however, such exceptions should not become the rule.

Secondly, the response by States to the Commission's work was often limited. The Special Rapporteur himself had, in a different context, suggested that that might be attributable in part to the lack of resources by a number of States to digest the Commission's work within the available time frame. If the Commission did not express its considered view on the progress made at each session, and if it presented the results of its work over several years by presenting a single large set of commentaries to an entire set of draft conclusions, it would be impossible for many States, especially developing States, to take a meaningful position on the Commission's work.

He was aware that the way in which the Commission had proceeded with the topic of identification of customary international law had set a certain precedent for the method that seemed to be envisaged for the topic currently under discussion. The difference between the two situations, however, was that the draft conclusions on the topic of identification of customary international law had been dealt with essentially over two sessions — in 2014 and 2015 — and that the consideration of the topic in 2014 had taken place at such a late stage in the session that it had been impossible to prepare commentaries. For the current topic, the Drafting Committee was already in its third year of work, yet had produced no output in a form on which States could confidently comment on.

In raising such concerns, he did not mean to suggest that the Special Rapporteur or the Commission were consciously disregarding important aspects of established procedures; rather, it seemed that they were, almost unconsciously, slowly and nearly imperceptibly changing the Commission's working methods. While the Special Rapporteur no doubt had understandable concerns of efficiency, he wished to note that such an approach entailed serious costs for the legitimacy and transparency of the Commission's work and for the ability of States to respond meaningfully to the work. Such a question of procedure was not

one that could simply be delegated to the Working Group on methods of work; the Commission had a usual method of work and, if it wished to change it, it should do so only on the basis of a conscious, well-considered decision.

Mr. Ruda Santolaria, welcoming the Special Rapporteur's excellent, well-documented third report, said that he wished to address certain specific aspects raised therein. First, there was a clear distinction between the nullity *ab initio* of a treaty that, at the time of its conclusion, conflicted with a peremptory norm of general international law, as provided for in article 53 of the 1969 Vienna Convention on the Law of Treaties, and the situation covered by article 64 thereof, under which the emergence of a new peremptory norm of general international law caused an existing treaty that was in conflict with that norm to become void and terminate. In that regard, he agreed with the Special Rapporteur that the provisions of a treaty that were inconsistent with a new peremptory norm of international law should be considered to be separable from other, properly severable provisions and that the rest of the treaty should be regarded as still valid.

In respect of the possibility of formulating reservations to *jus cogens* norms, reference could usefully be made to paragraph 8 of general comment No. 24 of the Human Rights Committee on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights and its Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (CCPR/C/21/Rev.1/Add.6), which stated that reservations that offended peremptory norms would not be compatible with the object and purpose of the Covenant.

He fully agreed with the relevance of the reference to the articles on responsibility of States for internationally wrongful acts, notably in respect of a serious breach of an obligation arising under a peremptory norm of general international law and the duty of States not to recognize as lawful a situation created by a serious breach, which stemmed from the Stimson doctrine of non-recognition of situations created as a result of an act of aggression, as in the case of the puppet state of Manchukuo, the creation of which had violated the sovereignty and integrity of China.

He also agreed with the emphasis placed by the Special Rapporteur on the duty to cooperate to bring an end through lawful means to serious breaches of peremptory norms and the useful reference to the 2006 judgment of the Inter-American Court of Human Rights in the *Case of La Cantuta v. Peru*. That was fully compatible with the Special Rapporteur's assertion that such norms established obligations *erga omnes*, the breach of which concerned all States. At the same time, the consequences of non-recognition should not negatively affect or disadvantage the civilian population in areas such as the registration of births, deaths and marriages, as stated by the International Court of Justice in its 1971 advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

Regarding the effects of *jus cogens* norms in respect of immunity, he underlined the distinction between immunity, which was of a procedural nature, and the irrelevance of official capacity, which had substantive effect, as provided for in article IV of the Convention on the Prevention and Punishment of the Crime of Genocide and article 27 of the Rome Statute of the International Criminal Court. He agreed that current law did not allow exceptions to immunity *ratione personae* based on the *jus cogens* nature of the crime concerned. The reasoning of the Supreme Court of Appeal of South Africa in its judgment in case No. 867/15 concerning the arrest warrant for President Al-Bashir of Sudan was of particular interest in that it made a distinction between the situation of a State party to the Rome Statute, which had accepted the implications of article 27 on immunity, and a non-State party, in which case the removal of immunity for the Sudanese president would be based on United Nations Security Council resolution 1593 (2005).

The real question was therefore whether *jus cogens* crimes excluded the applicability of immunity *ratione materiae*. His position was more nuanced than that of the Special Rapporteur, who considered that such immunity did not apply to any offence prohibited by a *jus cogens* norm. First, any overlap with the topic "Immunity of State officials from foreign criminal jurisdiction" should be avoided. He considered that draft article 7 on the

topic, approved by the Commission by majority the previous year, which listed the crimes under international law in respect of which immunity *ratione materiae* should not apply and, in an annex to the draft articles, the international instruments in which they were defined, reflected an appropriate balance in the developing trend towards not granting immunity from jurisdiction *ratione materiae* when doing so might lead in practice to situations of impunity for horrendous crimes repugnant to human conscience.

He supported the Special Rapporteur's statement that, subject to the application of article 66 of the 1969 Vienna Convention, the fact that a dispute involved a peremptory norm of general international law was not sufficient to establish the jurisdiction of the International Court of Justice without the necessary consent to jurisdiction in accordance with international law.

He also agreed with the idea that the hierarchical superiority of *jus cogens* norms was applicable both to customary international law, whether general or specific, and to unilateral acts. He believed it was consistent to state that a customary international law rule did not emerge if it conflicted with a peremptory norm of international law and that a customary international law rule not of *jus cogens* character ceased to exist if a new conflicting peremptory norm of general international law arose. At the same time, in accordance with customary international law, since peremptory norms of general international law were binding on all subjects of international law, the persistent objector doctrine did not apply.

The Special Rapporteur's reasoning whereby it would make little sense if States were precluded from assuming obligations in conflict with *jus cogens* through treaties, but permitted to assume those same obligations through unilateral acts was logical. As reservations to treaties were unilateral acts, it would be useful to refer to guideline 4.4.3 of the Guide to Practice on Reservations to Treaties, which stated that a reservation to a treaty provision which reflected a peremptory norm of general international law did not affect the binding nature of that norm, which should continue to apply as such between the reserving State or organization and other States or international organizations, and a reservation could not exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

Regarding Security Council resolutions, he agreed that, as in the case of treaties, their compatibility or conformity with *jus cogens* norms should be determined. However, in the hypothetical case of incompatibility between a resolution and a peremptory norm, the latter should prevail.

Lastly, subject to what he had stated regarding immunity *ratione materiae* when considering draft conclusion 23 (2), he agreed with the proposed draft conclusions. Accordingly, he supported the referral of the draft conclusions to the Drafting Committee.

Mr. Murphy said that he would welcome clarification of Mr. Ruda Santolaria's views on immunity *ratione materiae* and whether he supported draft conclusion 23.

Mr. Ruda Santolaria said that he agreed with the draft conclusions in general but, in respect of immunity *ratione materiae* under draft conclusion 23, he was concerned that any overlap with immunity of State officials from foreign criminal jurisdiction should be avoided. The form that had been agreed during the previous year's discussion on draft article 7 should be retained, as Mr. Nolte had suggested. It had been agreed then that some elements were *lex lata* and others *lex ferenda*, and a trend could be seen to be appearing from the wording of draft article 7 and that of draft conclusion 23 of exceptions being recognized for a number of crimes, as defined in the international instruments specified. He was thus advising caution, with a view to preserving the balance that had been achieved the previous year.

Ms. Lehto said that she wished to commend the Special Rapporteur for his excellent third report, the subject of which was the most difficult and challenging part of the concept of *jus cogens* and an area that had not been elaborated upon extensively by the international courts and tribunals. As for the literature, the question of the effects of *jus cogens* had been the subject of conflicting, and some fairly eccentric, views. Against that background, she

welcomed the Special Rapporteur's careful analysis, notably of those potential consequences of *jus cogens* that were most often referred to in practice.

The consideration of treaty law in paragraphs 30 to 76 of the report built for the most part on the Vienna Convention on the Law of Treaties and the Commission's work preceding it. While it was worth noting that a treaty could be invalidated only as a result of conflict with a peremptory norm in accordance with the procedure laid out in article 65 of the Vienna Convention, it was unnecessary to include the relevant procedural requirements in the draft conclusions, as Mr. Murphy had proposed; they could instead be reflected in the commentaries.

She supported the proposal in draft conclusion 14 (1) that States should make use of the procedure for dispute settlement provided in article 66 (a) of the Vienna Convention, and welcomed Mr. Nolte's comment concerning the customary nature of articles 65 and 66. The wording of the draft conclusion could be discussed in the Drafting Committee.

She noted the suggestion in paragraph 66 of the report and in draft conclusion 10 (3) that a treaty should, as far as possible, be interpreted in a way that rendered it consistent with a peremptory norm of general international law. The point had been welcomed by some colleagues as a helpful recommendation, while others had highlighted the potential conflict of such a recommendation with the provisions of the Vienna Convention concerning the invalidation of treaties, as well as the potential for abuse. As the Special Rapporteur had suggested, article 31 (3) (c) of the Vienna Convention could be taken as the basis for that principle, which had been endorsed in the work of the Commission and the jurisprudence of international courts. In the judgment of the European Court of Justice in the *Front Polisario* case, the Court had interpreted the Association Agreement and Liberalization Agreement between the European Union and Morocco as being consistent with the right of self-determination, thus setting aside the decision of the General Court to invalidate the treaties. The European Court of Justice had come to the same conclusion in the *Western Sahara Campaign UK* case, in which the Grand Chamber had interpreted the Fisheries Agreement between the European Union and Morocco as being inapplicable to the waters adjacent to the territory of the Western Sahara and therefore compatible with the right of self-determination, despite the Advocate General's opinion declaring the Agreement null and void. Those judgments thus lent support to the interpretative rule reflected in draft conclusion 10 (3). At the same time, the question arose as to whether that reduced the force of article 53 of the Vienna Convention. She did not object to the proposed draft conclusion but it would be useful in the commentary to attempt to explain how the words "as far as possible" were to be understood.

Draft conclusion 13, on reservations to treaties, reflected the essential content of guideline 4.4.3 of the Guide to Practice on Reservations to Treaties. Regarding draft conclusion 15, on customary international law, she welcomed the clear statement in paragraph 3 that the persistent objector rule was not applicable to *jus cogens* norms, as had been noted in the context of the topic "Identification of customary international law". In draft conclusion 16, on unilateral acts, it would be useful to add some detail, for example the insertion of the words "of States" after "unilateral acts".

In respect of draft conclusion 17, while binding resolutions of the United Nations Security Council were obviously relevant in that context, she agreed with Mr. Murphy that other international organizations with competence to take binding decisions should not be excluded. The use of the term "resolutions" might be too restrictive and could be reconsidered by the Drafting Committee. The wording of draft conclusion 18 addressed the relationship and overlap between obligations *erga omnes* and peremptory norms quite elegantly, but she would be prepared to consider other drafting proposals.

On State responsibility, the Special Rapporteur had relied on the Commission's earlier work and taken account of relevant case law, but, in draft conclusion 21, had departed from article 41 (2) of the articles on responsibility of States for internationally wrongful acts in not qualifying the breach as "serious". The examples mentioned in paragraphs 96 to 101 of the report mostly seemed to meet that description, but the Special Rapporteur explained that the authorities concerned, including the International Court of

Justice, had not required such a qualifier. She could accept the proposal but considered that a departure from the articles on State responsibility should be explained in the commentary.

She agreed with Mr. Park that the limits set by peremptory norms on the use of countermeasures could also be addressed in the draft conclusions, since the 2001 articles on State responsibility did so. Unless the Special Rapporteur intended to limit the scope of draft conclusion 16 to unilateral declarations creating legal effects — a question that had been raised by Mr. Murphy and Mr. Nolte — countermeasures could be referred to in a separate guideline or as a category of unilateral acts.

As Mr. Nguyen and Mr. Murphy had suggested, the responsibility of international organizations should also be addressed. While peremptory norms had been addressed in a “without prejudice” clause in the 2011 articles on the responsibility of international organizations, article 26 thereof made it clear that international organizations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with peremptory norms. The inclusion of international organizations would also be in line with the Commission’s work on other current topics, such as “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”.

On the effects of peremptory norms on individual criminal responsibility, immunity and jurisdiction, she did not share the view that those topics would be an arbitrary choice, but saw them as following from the stated aim of focusing on the most frequently identified potential consequences of *jus cogens*.

Regarding establishment of jurisdiction, addressed in draft conclusion 22, she noted the view of the Special Rapporteur set out in paragraph 117 of the report that the existing “substantial practice” formed “a strong basis for the evolution of” a duty to prosecute crimes the prohibition of which constituted a *jus cogens* norm. She agreed that the number of States with domestic legislation providing jurisdiction for genocide, crimes against humanity or war crimes was substantial, given that, even in the case of binding obligations, implementation at the national level remained a challenge.

On immunity, the focus of draft conclusion 23 (2), she agreed with the Special Rapporteur that the real issue was whether *jus cogens* crimes excluded the applicability of immunity *ratione materiae* and that practice related to criminal responsibility — and not civil proceedings — must form the basis of any international law rule relating to exceptions to immunity on account of *jus cogens* crimes. It was also relevant in that respect that the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* specifically excluded cases of persons who no longer held office. She believed that the purpose of immunity *ratione materiae* was to protect official acts rather than persons who had held an official position.

In conclusion, the legal analysis given in paragraphs 121 to 129 was both sound and convincing. At the same time, it was clear that draft conclusion 23 (2) was closely related to the topic “Immunity of State officials from foreign criminal jurisdiction” and to draft article 7 adopted by the Commission the previous year. Account should therefore be taken of the framework that had — and was being — developed in the context of that topic as far as the list of crimes and delimitations were concerned. Similarly, any procedural safeguards that might be agreed in that context would be relevant for draft conclusion 23 (2) as well. However, it should be noted that draft conclusion 23 (2) stated only a general rule, while the topic of immunity specifically addressed the rules and procedures related to the immunity of State officials from foreign criminal jurisdiction. There was no need to repeat those specifications in the draft conclusions but they could be explained in as much detail as necessary in the commentary. Draft conclusion 23 (2) should not be considered as an attempt to create new rules on immunity; rather, there should be coordination between the two topics so as to send a coherent message to States. She believed that a pragmatic way would be found to accommodate the slight overlap between those topics. Any useful coordination with the topic “Crimes against humanity” should also be encouraged.

In conclusion, she supported sending all 13 draft conclusions to the Drafting Committee.

The meeting rose at 6 p.m.