

Provisional

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Seventieth session (second part)

Provisional summary record of the 3418th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 3 July 2018, at 10 a.m.

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

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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 10.10 a.m.

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

The Chair invited the Commission to resume its consideration of the third report of the Special Rapporteur on peremptory norms of general international law (*jus cogens*).

Mr. Rajput said that he wished to congratulate the Special Rapporteur on his excellent third report, which drew upon both theory and practice and represented an attempt to address a complex area of international law. Care should be taken, however, to ensure that the increased importance of *jus cogens* norms in modern times did not disturb the balance of treaty relations. In his view, while some of the draft conclusions proposed in the report maintained that balance, others did not.

With regard to procedure, the Commission should endeavour to make its work on the topic of peremptory norms of general international law accessible to States, even while it was in progress, in accordance with the practice followed for other topics. If a topic was considered towards the end of the second part of the session, the commentaries should be presented and adopted the following year at the latest. No exception should be made for the topic at hand on the grounds that it had to be addressed in the Working Group on working methods.

As for the distinction between the words “invalid” and “void” in relation to treaties that conflicted with peremptory norms, he noted that, in the 1969 Vienna Convention on the Law of Treaties, the word “invalid” seemed to be used in a manner similar to the word “voidable” in common law jurisdictions, namely to describe imperfections that the parties could waive or correct in order to preserve a treaty. The word “void”, however, was used in the 1969 Vienna Convention to refer to an error in a treaty that could not be corrected and thus rendered the treaty unworkable. For example, a treaty that was procured by the threat or use of force was void under article 52 and a treaty that conflicted with a peremptory norm was void under articles 53 and 64. However, the word “invalidity” had been used as a generic term in the titles to the relevant part and section of the 1969 Vienna Convention, and article 71 used the word “invalidity” in its title and the word “void” in the text. Thus, the word “invalid” could be used in a title, and the word “void” could be used in the text in order to ensure consistency with the 1969 Vienna Convention.

Turning to the draft conclusions themselves, he agreed with draft conclusion 10 (1) and (2). However, although he agreed with the overall objective of avoiding conflicts between peremptory norms and interpretations of treaties, he was uncomfortable with the current text of draft conclusion 10 (3), as it risked giving the impression that, even when there was no inconsistency between the interpretation of a treaty and peremptory norms, and the treaty operated independently of the scope of peremptory norms, it was nevertheless preferable that the treaty should be interpreted in a manner consistent with such a norm. His argument might seem overly cautious, but it was important to preclude any interpretation of the draft conclusions that could upset the negotiated outcome of a treaty in force.

With regard to draft conclusion 11, the Special Rapporteur had diligently followed the outcome of the Commission’s work on severability in the context of the law of treaties. As reflected in its commentaries to the draft articles on the law of treaties, the Commission had taken the view that the very fact of entering into a treaty contrary to peremptory norms was unconscionable. However, he (Mr. Rajput) was not convinced by the Commission’s reasoning on that point. It was possible to envisage a treaty that dealt with a range of subjects, only one of which conflicted with a pre-existing peremptory norm. In addition, such conflicts would be identified at the interpretation stage. There was no need to presume that every treaty found to be in conflict with a pre-existing peremptory norm had necessarily been entered into in the knowledge that it was in conflict with that norm. However, despite those reservations, he did not think that the position adopted by the Commission and subsequently by States in the 1969 Vienna Convention should be changed, as it was necessary for consistency and stability. He therefore supported draft conclusion 11.

He agreed with draft conclusion 12. However, a new paragraph could be inserted between its two constituent paragraphs in order to reflect States' obligation under article 71 (1) (b) of the 1969 Vienna Convention to bring their mutual relations into conformity with a peremptory norm of general international law if a treaty was void because it conflicted with the norm in question, as that obligation was currently not reflected in draft conclusions 10 to 13.

He agreed with draft conclusion 13.

With regard to draft conclusion 14, he wondered whether a provision on dispute resolution was necessary, as the purpose of the Commission's work on the topic was to clarify the situation of the law as it existed rather than to produce a draft convention. As article 66 (a) of the 1969 Vienna Convention already provided for a dispute settlement procedure, the recommendation contained in the draft conclusion was in effect intended for States that had entered a reservation to the relevant provisions of that instrument or were not parties to it. In his view, States did not need a recommendation from the Commission on the ways in which they should resolve disputes arising from peremptory norms. It was ultimately for States to select the appropriate dispute resolution procedure, as there was no hierarchy *per se* among the various methods mentioned in Article 33 of the Charter of the United Nations. His preference would be to omit the provision in question from the draft conclusions.

He agreed with the Special Rapporteur's decision to expand his analysis of the relationship between peremptory norms and treaties to include other sources of international law. However, such an approach should be taken with caution. The report included a discussion of the relationship between peremptory norms and customary law, unilateral acts and resolutions of international organizations, including the Security Council, but the relationship between peremptory norms and general principles of law should also be considered. According to draft conclusion 5 (3), general principles of law could form the basis of peremptory norms. However, the discussion of general principles as a source of peremptory norms in the absence of a discussion of the effect of peremptory norms on general principles created an anomaly. As conflicts between treaties and peremptory norms were dealt with in the 1969 Vienna Convention, the absence of a reference to general principles gave the impression that customs had been singled out.

Although the inclusion of a general proposition on the hierarchical superiority of peremptory norms over customary norms was understandable, it was necessary to clarify the relationship between the two. A middle ground should be sought between the Special Rapporteur's argument that a customary norm that conflicted with a peremptory norm always had to be set aside and the opposing argument that a conflict between *jus cogens* and customary international law was not possible. The Special Rapporteur's reasoning was based on an analogy between customs and treaties. Although the negotiation of a treaty could be a long process, the obligations that it set out were created instantaneously: it was harder to identify the precise moment at which a custom was created. In addition, as noted in draft conclusion 5 (2), customary law was a prominent source for the creation of peremptory norms. If it was not possible for a customary norm to emerge contrary to a peremptory norm, a new peremptory norm that contradicted or altered an existing peremptory norm would never arise. The absolute negation of the possible emergence of a customary international law rule that conflicted with a peremptory norm, as proposed in draft conclusion 15 (1), created practical problems. In addition, the decisions of domestic and regional courts cited in paragraph 140 of the report to demonstrate the hierarchical superiority of peremptory norms were limited to situations of conflict between existing norms of customary law and peremptory norms and did not relate to peremptory norms that might arise in the future. The possibility that customary norms might develop contrary to peremptory norms should be left open in order not to stifle the development of peremptory norms. For that reason, he did not support the inclusion of draft conclusion 15 (1). However, he agreed with draft conclusion 15 (2).

The persistent objector rule was a related point. There were two temporal phases to the creation of a peremptory norm via customary law: a norm first had to become part of customary law before it could eventually become a peremptory norm. The persistent objector rule would continue to apply until the second of those two stages had been

completed. However, it was not clear whether draft conclusion 15 (3) took that reality into account. It should be made clear that the persistent objector rule would cease to apply only once a peremptory norm had been created. He agreed with the Special Rapporteur's position, as set out in draft conclusion 7 (3), that a persistent objector could not prevent a norm from being identified as a peremptory norm if it had been accepted by a large majority of States.

Despite the lack of practice relating to the relationship between peremptory norms and unilateral declarations, he agreed with the text of draft conclusion 16 for the reasons given in the report.

He understood that there was a trend in legal scholarship that supported the Special Rapporteur's position regarding the relationship between peremptory norms and binding resolutions of international organizations. Although it could in principle be agreed that States would not be bound by a resolution that called for or perpetuated a breach of a peremptory norm — say, a Security Council resolution calling for the commission of genocide — the expression of doubts about such institutions might in practice have unintended consequences. Non-intervention and respect for sovereign equality were pillars of international relations and could safely be argued to be of the nature of peremptory norms. In his view, the Commission should refrain from expressing a position on such matters, which should be dealt with on a case-by-case basis. For that reason, he did not see the need for draft conclusion 17.

Turning to draft conclusions 18 to 21, although he agreed with the Special Rapporteur that it was necessary to consider the relationship between State responsibility and peremptory norms, he found that the draft conclusions did not fully take into account the structure, content and purport of the articles on responsibility of States for internationally wrongful acts in relation to peremptory norms. Draft conclusion 18 was the clearest example in that regard.

The Special Rapporteur suggested in the report and in draft conclusion 18 that peremptory norms established obligations *erga omnes*. However, articles 40 and 41 of the articles on State responsibility stipulated that only serious breaches of obligations arising under peremptory norms gave rise to *erga omnes* obligations. *Erga omnes* obligations that had no connection with peremptory norms and obligations *erga omnes partes* were dealt with separately under article 48 of the articles on State responsibility.

In the context of the articles on State responsibility, the Commission's decision that only serious breaches of peremptory norms should be treated as giving rise to *erga omnes* obligations had been the outcome of a compromise reached in an open-ended working group and subsequently in the Drafting Committee. In paragraph (7) of its introductory commentary to chapter III of the articles on State responsibility, the Commission had noted that, although there was a substantial overlap between peremptory norms and *erga omnes* obligations, they were not the same and had thus been treated separately. There had been practical reasons for that decision, namely the danger that any provision to the contrary could be misused. Chapter II of part III of the articles on State responsibility provided for a range of countermeasures that could be taken in response to a single breach of a peremptory norm. The fact that more than one State would be able to take action in such situations would result in consequences that were not commensurate with the injury caused.

If all *jus cogens* norms were deemed to establish *erga omnes* obligations, even a single instance of torture in a State that was a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment would give other States the right to take countermeasures against it. Other States that did not enjoy cordial relations with that State would be able to take retaliatory measures against it without having suffered any injury at all. A "gross and systematic" practice of torture would constitute a serious breach of a peremptory norm, which would give rise to an *erga omnes* obligation. Torture was an important example for other reasons. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice had held that the Convention against Torture created an obligation *erga omnes partes*, or an obligation for its States parties only. Article 5 of the Convention required a State party to establish its jurisdiction over relevant offences if they had been committed in a territory under its

jurisdiction, if the alleged offender was one of its nationals or if the alleged offender was present in a territory under its jurisdiction. However, if a single instance of torture in a given State was deemed to give rise to an *erga omnes* obligation, all States could take measures against that State irrespective of the provisions of article 5. In effect, the Special Rapporteur's proposal would rewrite the law and impose obligations on States higher than those already provided for in treaties that related specifically to the protection of peremptory norms. For that reason, draft conclusion 18 should be limited to serious breaches of peremptory norms.

He agreed with draft conclusion 19, as proposed.

Draft articles 40 and 41, on State responsibility, had a substantive and a procedural element. The procedural part, which formed the basis of draft conclusions 20 and 21, related to the procedure for redress in the event of serious breaches of peremptory norms. Draft conclusion 20 (1), which was based on draft article 41 (1), captured the idea that there was a duty to cooperate in order to bring serious breaches of peremptory norms to an end. Paragraph 2 of that draft conclusion, which was based on draft article 40 (2), was an attempt by the Special Rapporteur progressively to develop cooperation through institutions, or in an *ad hoc* manner, and constituted a welcome step forward from the draft articles on State responsibility.

While draft conclusion 20 expressly referred to serious breaches of peremptory norms, draft conclusion 21, which was based on draft article 41 (2) of the draft articles on State responsibility, failed to do so. Paragraph 100 of the report claimed that the duty imposed by the latter draft article was absolute. The commentary, text and title of that draft article clearly connected it to serious breaches of peremptory norms, whereas draft conclusion 21 did not specify that the duty to which it referred applied only to serious breaches of peremptory norms. Paragraph 95 of the report asserted that the obligations under draft article 41 (2) were already *lex lata*, yet the cases cited in paragraphs 96 to 99 of the report did not support the proposition that there was a general rule on the duty to cooperate to end every breach of a peremptory norm.

He disagreed with the description in paragraph 96 of the report of the findings in the advisory opinion of the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*. While he could sympathize with a desire to regard peremptory norms as central to those findings, the opinion did not mention them and the reference to *erga omnes* obligations in paragraph 126 of the opinion suggested that what the Court had in mind were in fact *erga omnes partes* obligations. In paragraph 97 of his report, the Special Rapporteur referred to the advisory opinion of the Court in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, but once again the Court appeared to have been more concerned with the relationship between *erga omnes* obligations and *jus cogens*, because the norm in question was an *erga omnes* obligation which itself imposed a duty on States to cooperate. If draft conclusion 21 was adopted without the insertion of the word "serious" before "breach", it would be inconsistent with the draft articles on State responsibility. It should therefore be revised accordingly.

He disagreed with draft conclusions 22 and 23, which were interlinked. There was no obligation in customary international law on States to exercise jurisdiction in the manner proposed by the Special Rapporteur in draft conclusion 22. In situations where States had undertaken to exercise jurisdiction over offences prohibited by peremptory norms, that duty had flowed from the express provisions of a treaty, a good example being *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, where the House of Lords of the United Kingdom had found that its jurisdiction was restricted to offences committed after the entry into force in the United Kingdom of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Draft conclusion 23 excluded the immunity *ratione materiae* of a person holding an official position, despite the fact that draft article 1 (2) on the immunity of State officials from foreign criminal jurisdiction acknowledged the immunity of diplomats and other officials under special rules of international law. He was in fact astonished to find a provision on immunity in the draft articles on the topic under consideration and, in that connection, referred to the statement he had made on the subject of immunity at the previous session of

the Commission. Any attempt to capitalize on the divided opinion which had emerged on that matter would discredit the topic of *jus cogens* and damage collegiality within the Commission.

With regard to future work, any indicative list of *jus cogens* norms would have to be supported by sufficient material demonstrating that each rule that was allegedly a peremptory norm satisfied all the provisions which had been adopted so far on the creation and identification of peremptory norms, a process that could last for decades.

Mr. Hmoud said that certain *erga omnes* obligations derived from the peremptory norm of self-determination, which had been one of the issues at stake in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Mr. Rajput said that self-determination was both a peremptory norm and an *erga omnes* obligation. All such obligations were, by their very nature, covered by draft article 48 of the draft articles on State responsibility, which gave rights to other States. However, not all peremptory norms were also *erga omnes* obligations; those which were not would have the consequences identified in the above-mentioned draft articles only in the event of a serious breach of those norms. The provisions of draft articles 40 and 41 on State responsibility therefore functioned independently of draft article 48. For that reason, while self-determination was itself both a peremptory norm and an *erga omnes* obligation, the wording of the text required very careful consideration; otherwise it might be assumed that the level of the breach entailing consequences had been lowered in respect of other *erga omnes* obligations which were not peremptory norms. Lastly, he wished to clarify that draft conclusions 22 and 23 should not be referred to the Drafting Committee.

Mr. Hmoud said that when serious breaches of the peremptory norm of self-determination occurred, they triggered consequences under draft articles 40 and 41 on State responsibility and the international community had a collective interest in the enforcement of that norm.

Mr. Šturma said that the right to self-determination and the prohibition of genocide and torture were peremptory norms giving rise to *erga omnes* obligations under the primary rules of international law. The position might, however, be different under secondary rules on State responsibility. Hence a violation of the prohibition of torture had to be systematic in order to set in motion the legal consequences stemming from an internationally wrongful act.

Mr. Grossman Guiloff said that it would be wise for the Commission to examine whether, in some circumstances, a single violation of a peremptory rule might amount to a systematic violation thereof.

Mr. Jalloh said that the Special Rapporteur's third report was particularly valuable in that it dealt with the legal consequences of *jus cogens* in several substantive areas of international law and proposed 14 new draft conclusions. He agreed with the practical approach outlined in paragraphs 21 and 22 of the report. He also concurred with the Special Rapporteur that it was not the Commission's task to choose between the "narrow" or "broad" approaches which had formed the subject of much scholarly debate, and that it would be safer to address the potential consequences of *jus cogens* norms in the fields where they had been most frequently identified. He was pleased to note that the third report was firmly rooted in the Commission's earlier work, since that would further the stability of the international order, ensure institutional continuity and legitimacy and promote the draft conclusions' acceptability to States.

He generally agreed with the substance and wording of draft conclusion 10, which was based on a combination of articles 53 and 64 of the 1969 Vienna Convention. He had no objection to the helpful clarification that, in accordance with the Convention, treaties which were void because they conflicted with peremptory norms of general international law did not create any rights or obligations for States. He had some limited reservations about stating that parties were released from any further obligation to perform when existing treaties became void and terminated owing to a conflict with a new *jus cogens* norm that emerged after a treaty's conclusion. He was, however, concerned that the Commission was potentially offering States a pretext unilaterally to denounce treaty

obligations on the grounds that they violated *jus cogens* norms that were not independently verified or verifiable by third parties.

Although the Special Rapporteur's focus on treaties was understandable, since draft conclusion 10 was based on the 1969 Vienna Convention, he tended to agree with Mr. Park that the theoretical and practical implications of justifying the proposed text by the *pacta sunt servanda* principle had not been fully reconciled. Even though the good faith principle was embodied in article 26 of the 1969 Vienna Convention and Article 2 (2) of the Charter of the United Nations, he doubted whether it warranted a strong interpretative rule on a *jus cogens* norm. In point of fact, as far as the aforementioned article 26 was concerned, he wondered how, if a treaty was void within the meaning of article 53 of the Convention because it conflicted with *jus cogens* at the time of its conclusion, it could be in force for the parties to it, thereby requiring them to perform the obligations under it in good faith and to interpret the treaty in accordance with articles 31 and 32 of the Convention.

He agreed with Mr. Nolte that, in principle, there was no reason why the rule of interpretation set forth in draft conclusion 10 (3) could not be broadened to apply to other rules of customary international law and, perhaps, even other sources of obligations addressed in other draft conclusions. Perhaps that paragraph would be more appropriately located in a different draft conclusion dealing specifically with that issue.

He had no substantive concerns with regard to draft conclusion 11, since it was based on article 44 (3) of the 1969 Vienna Convention. He supported Mr. Murphy's suggestions with regard to the structuring of draft conclusions 10 and 11, provided that the Special Rapporteur and the Drafting Committee were also in favour of them.

He agreed with the overall thrust of draft conclusion 12, but if the Drafting Committee decided to retain it as it stood, in order to avoid any confusion, the commentary should explain why the Commission had decided to depart slightly from the wording of article 71 of the 1969 Vienna Convention. There was, however, no need to refer to provisions from articles 69 and 70 of the Convention: the draft conclusion had already been made strong enough by reinforcing elements of article 71.

Draft conclusion 13, which drew on guideline 4.4.3 from the Guide to Practice on Reservations to Treaties, concisely reflected the key points of the guideline. Nevertheless, it would be prudent to explain clearly in the commentary why it differed from the guideline.

The initial phrase in draft conclusion 14, "subject to the jurisdictional rules of the International Court of Justice", might obviate the potential risk of conflating any breach of *jus cogens* rules with automatic jurisdiction of the International Court of Justice, bearing in mind the fact that the Court had itself emphasized the importance of consent to its jurisdiction when it stated in *East Timor (Portugal v. Australia)* that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things". It might therefore be useful to make it plain in the commentary that a breach of *jus cogens* did not automatically mean that a State was subject to the Court's jurisdiction. The fundamental consent requirement embodied in the relevant provisions of the Charter of the United Nations ought to remain and when the draft conclusion was discussed in the Drafting Committee the latter should not go further than the Court was willing to go without a formal amendment of its Statute.

He fully agreed with the content of draft conclusion 15. If, however, paragraph 3, concerning the persistent objector rule, proved to be controversial, it might be wise to move it to the commentary. If the Drafting Committee decided to keep the paragraph, it would be advisable to elaborate more on why *jus cogens* norms were binding in order to eliminate any potential ambiguity.

While he had no objection to draft conclusion 16, he agreed with Mr. Murphy on the advisability of clarifying, either in the provision or in the commentary, what exactly was meant by "unilateral act".

Draft conclusion 17, which addressed the consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations, was an important one, especially as States continued to create more such organizations and delegate to them responsibilities in various fields of international law. He supported the

Special Rapporteur's decision to highlight the resolutions of the United Nations Security Council, given that the Council increasingly adopted binding resolutions on the basis of Chapter VII of the Charter of the United Nations that were often highly regarded and had profound legal consequence both for States and — when they related to human rights and the law of armed conflict — for individuals. It therefore made sense to him to include a direct reference to such resolutions rather than group them together with the resolutions of other bodies, particularly given the impact of the binding nature of such decisions under Article 25 of the Charter.

Article 103 of the Charter should not be interpreted to mean that resolutions that violated *jus cogens* norms should prevail. Indeed, as Judge Lauterpacht had found in his separate opinion in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, “the relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot — as a matter of simple hierarchy of norms — extend to a conflict between a Security Council resolution and *jus cogens*”. The same point had been made by others, including the International Law Association in its third report on the accountability of international organizations.

The draft conclusion might be stronger if it was indicated that resolutions that violated *jus cogens* norms would not only no longer be binding, but would also be invalid, thus emphasizing that such resolutions should not be legitimized in any way. After all, the Security Council had adopted resolutions in the past in the knowledge that they violated a *jus cogens* norm, including resolutions 731 and 748 of 1992 on the Libyan Arab Jamhiriya. In those resolutions, the Council had supported threats made in a bilateral setting to the Libyan Government to extradite two suspects of the Lockerbie bombing or face the use of force, contrary to Article 2 (4) of the Charter, which prohibited the use or threat of force, even though the threats had not fallen within the scope of Article 51.

Although draft conclusion 18 was substantively on point, he recommended elaborating in the commentaries on what was meant by the phrase “concerns all States” so as to clarify whether States were expected to immediately take action and, if so, of what kind. He did not see any need to revise draft conclusion 19.

The Special Rapporteur's explanation of the differences between draft conclusions 20 and 21, namely that the former required States to take positive action while the latter required them to abstain from conduct, supported the use of the qualifier “serious” in draft conclusion 20 and not in draft conclusion 21. However, he would not object if the Drafting Committee decided to delete the word “serious” from draft conclusion 20. While he appreciated the Special Rapporteur's explanation of his reasoning, naturalism or positivism should not generally serve as the framework for the Commission's work, and he therefore welcomed the reliance on the authorities cited in paragraphs 96 to 101 of the report.

In its 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)*, the International Court of Justice had declared that States were “under obligation” to recognize the illegality of the conduct of South Africa. Draft conclusion 20 provided that: “States shall cooperate to bring to an end through lawful means any serious breach of a peremptory norm of general international law (*jus cogens*).” Given that both “States shall” and States are “under obligation” reflected an obligatory intent, he did not see any reason to depart from the language used by the Court in both that advisory opinion and its opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

He strongly supported the substantive thrust of draft conclusion 22, as it might be important should the Commission wish to adopt universal jurisdiction as a topic in the future.

Regarding draft conclusion 23, which was inevitably controversial given that it dealt with the issue of immunity, he supported in principle the idea that violation of a *jus cogens* norm should not constitute a ground excluding criminal responsibility. His position on that issue was well known, and he had played a role in forging a compromise text when the

Commission had dealt with the issue at its previous session. That said, in view of the sensitive nature of the issue, he wondered whether it might not be wiser to revisit the matter at a later date in order to assuage the concerns of those members who had strongly opposed the adoption of draft article 7 on the immunity of State officials from foreign criminal jurisdiction.

Taking into account the debate in the plenary, he would be in favour of transmitting all the draft conclusions to the Drafting Committee.

Mr. Chahdi said that the Special Rapporteur's third report was concise and well structured and contained a wealth of references, despite the scarcity of practice in the area of peremptory norms of general international law. He wondered whether the Special Rapporteur had given any consideration to the possibility of compiling a selective bibliography to be annexed to the Commission's final output on the topic. The Special Rapporteur had opted for an analytical approach that focused on the consequences of *jus cogens* that had most often been identified. While that approach had resulted in a slightly lengthier report, it was appropriate given that *jus cogens*, which had its origins in treaty law, had spread from that field of law to others, such as international State responsibility. The concept of *jus cogens* was now well established in international law.

In treaty law, the consequences of *jus cogens* were severe, given that a treaty was void if, at the time of its conclusion, it conflicted with a peremptory norm of general international law, as stipulated in article 53 of the 1969 Vienna Convention. As the Special Rapporteur had noted, that consequence struck at the heart of a fundamental and foundational element of international law, namely *pacta sunt servanda*, and significantly limited the freedom to conclude treaties.

It seemed that it was the severity of the consequences that accounted for the Commission's reticence, in its 1966 draft articles on the law of treaties, to include any examples of *jus cogens* norms in draft article 50, which later became article 53 of the 1969 Vienna Convention. The Special Rapporteur's argument in paragraph 41, in relation to article 71 of the Convention, that it might not be possible to undo all the consequences of acts performed in reliance on a treaty provision that was in conflict with a *jus cogens* norm was an interesting one, but should have been backed up with some practical examples.

The Special Rapporteur recalled that, under article 64 of the 1969 Vienna Convention, the emergence of a new rule of *jus cogens* was not to have retroactive effects on the validity of a treaty. He also addressed other problems such as the severability of treaty provisions in conflict with a *jus cogens* norm in the context of articles 64 and 44 of the 1969 Vienna Convention. On that basis, he had proposed draft conclusion 11, which in the speaker's view was interesting and quite satisfactory. The Special Rapporteur could have elaborated further on the term "conflict", which he addressed only briefly in paragraph 35, noting that not much attention had been paid to it in the literature.

Concerning the effects of *jus cogens* on the interpretation of treaties, the Special Rapporteur put forward an interesting proposition in paragraph 68 of the report, namely that "a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*)". To support that proposition, the Special Rapporteur cited the Treaty of Guarantee between Cyprus, Greece, Turkey and the United Kingdom, which was in fact the 1960 treaty on the independence of Cyprus.

The statement in paragraph 62 of the report that "the Front Polisario successfully sought to have the Fisheries Partnership Agreement annulled" was incorrect: the judgment of the General Court of the European Union, which had been set aside on appeal by the Grand Chamber of the European Court of Justice, concerned the annulment of a decision of the Council of the European Union on the conclusion of an agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural and fishery products, and not the annulment of the agreement itself. In any case, he agreed with Mr. Park that the relevance of the case to the report was not clear.

Regarding the effects of *jus cogens* norms on reservations to treaties, he supported the Special Rapporteur's proposal that the Commission should reproduce guideline 4.4.3 of the Guide to Practice on Reservations to Treaties in draft conclusion 13, given that the Commission had decided at the time of drafting the Guide not to include a provision prohibiting reservations to treaty provisions that reflected *jus cogens* norms.

The sections of the report on the consequences of *jus cogens* for the law of State responsibility, and specifically on the non-applicability of circumstances precluding wrongfulness and the particular consequences of serious breaches of *jus cogens*, were important and interesting, and contained relevant references to jurisprudence, as well as to the Commission's 2001 articles on responsibility of States for internationally wrongful acts, articles 40 and 41 of which served as the basis for draft conclusions 20 and 21.

The Special Rapporteur's proposed draft conclusions also dealt with other effects of *jus cogens* beyond the law of treaties. Some of the draft conclusions, such as draft conclusions 10 and 17, contained redundancies. Draft conclusions 12 and 14 needed to be redrafted. As for draft conclusion 15, he agreed with the Special Rapporteur that the persistent objector doctrine did not apply to *jus cogens* norms. Draft conclusion 16 required some revision to clarify the concept of "unilateral acts".

With regard to draft conclusion 17, he was not convinced of the need to emphasize the resolutions of the United Nations Security Council, particularly since they could be vetoed and States were also called on to comply with resolutions of the General Assembly. He also questioned whether the word "binding" was necessary and, if so, what characterized a "binding resolution". While the Special Rapporteur had attempted to provide explanations in his report, that draft conclusion should be revised.

Draft conclusion 18 placed greater emphasis on the relationship between peremptory norms of general international law (*jus cogens*) and *erga omnes* obligations than on their effects, and should therefore be reformulated. He agreed with Mr. Rajput that reference should be made to general principles of law. In his view, draft conclusions 20 and 21 could be merged. Draft conclusion 23 called to mind the draft article 7 proposed in the fifth report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction. Although that draft article had not yet been definitively adopted, the draft conclusion could perhaps be redrafted and split into two conclusions reflecting the two parts of its title.

He urged caution in drawing up an indicative list of *jus cogens* norms. During the debate in the Sixth Committee on the work of the Commission's sixty-ninth session, some delegations had expressed support for a "non-exhaustive list based on a clear legal rationale and on prudence". It had also been noted that, in identifying peremptory norms, the Commission should include grounds and evidence on which it would base its selection, or that the selection should be based on States' consent and that peremptory norms should fulfil criteria already identified by the Commission.

In conclusion, he said that he would not object to all of the draft conclusions being sent to the Drafting Committee.

Mr. Vázquez-Bermúdez said that the Special Rapporteur's ambitious third report addressed a wide range of aspects related to the legal effects of *jus cogens* norms with legal rigour, based on the practice of States, jurisprudence and the literature. In general, he supported the approach adopted by the Special Rapporteur. When it came to terminology, however, it was not clear why a distinction was made between the words "effects" and "consequences". For example, the titles of draft conclusions 15, 16 and 17 referred to "consequences", while the title of draft conclusion 19 referred to "effects". It might be preferable to refer simply to the "effects of peremptory norms of international law (*jus cogens*)", it being understood that what was meant was the legal effects. Draft conclusion 20, on the duty to cooperate, and draft conclusion 21, on the duty not to recognize or render assistance, referred to "consequences" but in the sense of the consequences of a violation of a breach of a *jus cogens* norm. Those issues should be taken up by the Drafting Committee.

He agreed with the Special Rapporteur's analysis in the section of the report concerning the legal effect of the invalidity of treaties on account of conflict with

peremptory norms of general international law (*jus cogens*), as codified in articles 53 and 64 of the 1969 Vienna Convention. With regard to a treaty that was invalid *ab initio* because, at the time of its conclusion, it conflicted with a peremptory norm of general international law, by definition a treaty that did not come into being did not give rise to any rights or obligations. However, as the Special Rapporteur had rightly noted, in accordance with article 71 of the 1969 Vienna Convention, the consequences of any act performed in reliance on a provision which conflicted with the peremptory norm of general international law should be eliminated as far as possible. Article 71 (2) applied in the case of existing treaties that had become void and terminated when a new peremptory norm of general international law had emerged with which they were in conflict, because such treaties had come into being and created rights, obligations or legal situations that would be maintained despite the subsequent invalidity and termination, but only to the extent that their maintenance was not in itself in conflict with the new peremptory norm of general international law.

While article 71 (2) of the 1969 Vienna Convention provided only that certain rights, obligations or legal situations would be maintained, the Special Rapporteur's analysis of article 44 (5) of the Convention with regard to the non-separation of the provisions of the treaty seemed appropriate, as that provision did not include cases falling under article 64. It could thus be concluded that some provisions could be maintained. That analysis was in line with the commentary to draft article 61 on the law of treaties adopted by the Commission. He therefore supported draft conclusions 10, 11 and 12.

While it was evident that the principle of systemic integration set out in article 31 (3) (c) of the 1969 Vienna Convention — which necessarily included *jus cogens* norms — applied as part of the basic rule of treaty interpretation, he agreed with Mr. Nolte that it would be preferable to have a general conclusion that referred to the interpretation not only of treaties but also of rules arising from other sources of international law, such as customary norms, general principles of law and unilateral acts, and of obligations derived from binding decisions of international organizations, although the latter, not being a true source of international law, would require separate treatment.

The report of the Study Group on fragmentation of international law had already indicated that, in determining the relation between two or more rules, such rules should be interpreted in accordance or by analogy with the 1969 Vienna Convention, in particular articles 31 to 33 thereof. In that context, he agreed that it would be difficult for a conflict to arise between a general principle of law and a norm of *jus cogens* and that, in any event, a potential conflict could be resolved by interpreting the principle consistently with the *jus cogens* norm. That point should be explicitly mentioned in a draft conclusion.

Paragraph 1 of draft conclusion 12 should include wording to the effect that parties to a treaty invalidated by being in conflict with a peremptory norm of general international law at the time it was concluded had a legal obligation to eliminate the consequences of any act performed in reliance of the treaty “as far as possible”, in line with article 71 of the 1969 Vienna Convention. Reference should also be made to the obligation set out in article 71 (1) (b) of the Convention, whereby States or international organizations should bring their mutual relations into conformity with the peremptory norm of general international law.

Draft conclusion 13 dealt appropriately with the effects of peremptory norms on reservations to treaties. States and international organizations could not avoid the peremptory nature of a *jus cogens* norm by entering a reservation to a treaty provision that reflected such a norm, and a reservation to a treaty could not, therefore, exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

Draft conclusion 14 set out an appropriate procedure for settling disputes involving conflict between a treaty and a peremptory norm of general international law, including disputes between States parties and non-parties to the treaty, but it should expressly refer to cases in which article 66 of the 1969 Vienna Convention, establishing the jurisdiction of the International Court of Justice, applied. Paragraph 2 of draft conclusion 14 correctly stated

that the fact that a dispute involved a peremptory norm of general international law was not sufficient to establish the jurisdiction of the Court without the consent of the parties.

As others had said, the draft conclusions on *jus cogens* and treaties applied equally to international organizations, which were subjects of international law and could conclude treaties that might, theoretically, conflict with a *jus cogens* norm. In line with the Commission's articles on the responsibility of international organizations, which included a chapter on serious violations of obligations under peremptory norms of general international law, international organizations should also be included in the Special Rapporteur's analysis of the consequences of peremptory norms for the law of State responsibility.

Draft conclusions 19, 20 and 21 were well founded in the work of the Commission, particularly its articles on responsibility and associated commentaries, and were supported by other materials identified by the Special Rapporteur.

With reference to paragraph 137 of the third report, he assumed that it was not the Special Rapporteur's intention to add resolutions of the Security Council to the sources of international law listed in Article 38 (1) of the Statute of the International Court of Justice. The binding nature of Security Council resolutions was rooted in a treaty — specifically, Chapter VII of the Charter of the United Nations — but resolutions of the Security Council were not a source of international law *per se*. In the event of a conflict between a *jus cogens* norm and an obligation arising from a Security Council resolution, the peremptory norm would clearly take precedence, rendering the resolution invalid. If a conflict between a *jus cogens* norm and a treaty resulted in the treaty being invalidated, there was even greater reason to suppose that an analogous conflict with a resolution of a body created by such a treaty would result in invalidation. Again, it was to be hoped that interpreting resolutions in a manner consistent with hierarchically superior *jus cogens* norms would avoid that consequence. The same applied to resolutions and decisions of other international organizations.

In general, he agreed with draft conclusion 15, particularly in terms of the non-applicability of the persistent objector rule, although he would prefer the word “rule” to be altered to “doctrine”. There could be no persistent objection to the prohibition of genocide or crimes against humanity, or to other norms reflecting the fundamental values of the international community. With reference to draft conclusion 16, he suggested that an explanation could be included in the commentary to point out that the draft conclusion referred to unilateral acts that aimed or attempted to create rights or obligations, which must for that purpose be compatible with peremptory norms of general international law. Similarly, the commentary to draft article 18 should specify that *jus cogens* norms created obligations *erga omnes* but that such obligations could also be created by norms that were not necessarily peremptory in nature.

While not disagreeing with draft conclusions 22 and 23, he cautioned against duplicating the Commission's work on immunity of State officials from foreign criminal jurisdiction, particularly in terms of exceptions to such jurisdiction *ratione materiae*. To that end, the Drafting Committee should postpone discussion of paragraph 2 of draft conclusion 23 at least until draft article 7 of the Commission's draft articles on immunity of State officials from foreign criminal jurisdiction had been approved on second reading.

With those comments, he expressed support for referring all 23 draft conclusions to the Drafting Committee. He looked forward to seeing how the issue of providing an illustrative list of norms of *jus cogens* would be tackled.

Mr. Murase, while expressing appreciation for the Special Rapporteur's well-researched third report, said that he was troubled by the number of draft conclusions proposed. Four or five should be the maximum presented at a single session of the Commission if they were to be given the careful consideration they deserved, and the 14 currently before the Commission should have been divided between two or three reports, perhaps along the lines suggested by Mr. Murphy. The topic of *jus cogens* was an important and difficult one and its consideration should not be rushed.

It was also regrettable that commentaries had not yet been submitted for the draft conclusions already adopted by the Drafting Committee. Waiting until all draft conclusions on an issue were ready before provisionally adopting them with accompanying commentaries was an undesirable practice: it would be better to discuss commentaries each year, when memories of the debate on the conclusions to which they related were fresh. Prolonging the process of adopting draft conclusions and commentaries also deprived the Sixth Committee of the General Assembly of the chance to comment on them in a timely manner.

While he welcomed the fact that the Special Rapporteur had taken up the issue of State responsibility, it should be considered not only in the context of effects and consequences but also from the perspective of the overall categorization of *jus cogens*, including the definition and content thereof. In the context of the law of treaties, hierarchical superiority was essential to define a norm as one of *jus cogens*, but that was not the case for the law of State responsibility. The effect of a violation of a *jus cogens* norm under the law of treaties was simply to nullify any agreement that conflicted with the higher norms of *jus cogens*. Under the law of State responsibility, the effects of such a violation went much further.

Draft conclusions 19 to 21 reflected part II, chapter III, of the articles on the responsibility of States for internationally wrongful acts adopted in 2001, but the Special Rapporteur had failed to address other aspects of the legal consequences of such acts, such as reparations, cessation and non-repetition, or the implementation of the international responsibility of a State. Nor did the report cover the provisions of articles 48 or 50 (1) (d) of the articles on State responsibility.

While *jus cogens* in the law of treaties concerned the invalidity of agreements, in the law of State responsibility it concerned the actual conduct of States. The Special Rapporteur and the Commission would need to develop an integrated concept of *jus cogens* that covered both branches of international law.

Paragraphs 146 to 149 of the third report and draft conclusion 16 referred to unilateral acts. States' unilateral actions were divided into three categories: unilateral acts, unilateral declarations and unilateral measures. If unilateral declarations were understood as relating to unilateral acts *stricto sensu*, in accordance with the Commission's 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, they could be assimilated to unilateral acts. For the topic at hand, what mattered were unilateral acts and unilateral measures.

Unilateral acts were juridical acts binding not only on the addressee State but also on the State that undertook them. Even though they were unilateral, their function was to apply existing rules of international law arising from either treaty or custom. Examples based on treaties included entering a reservation to a treaty and unilaterally submitting a contentious case to the International Court of Justice under Article 36 (2) of its Statute, while the recognition of a State or Government was a unilateral act based on customary international law.

Jus cogens could be relevant to recognition of a new State. In the 1930s, a policy known as the Stimson Doctrine had been advocated by the United States of America to the effect that "illegally" created States, such as Manchukuo, should not be recognized. Later, the United Nations had called for non-recognition in regard to Southern Rhodesia, Namibia and Transkei. However, there seemed to be a significant difference between the recognition of States and of situations: the former was a question of the applicability of a centuries-old rule of international law, while the latter normally referred to a composite application of relevant rules leading to the situation in question. The question of recognition of States would be better addressed as a unilateral act.

It was regrettable that the International Law Association's Committee on Recognition/Non-Recognition in International Law had not referred to *jus cogens* in the context of the recognition of States in its reports; however, at a meeting of the Committee in December 2014, Professor Keun-Gwan Lee had remarked that there was a broadly recognized obligation of non-recognition in cases where *jus cogens* had been breached. The question of *jus cogens* should therefore be considered in the context of recognition or non-

recognition of States or Governments as a unilateral act based on customary international law.

In parallel to unilateral acts, unilateral measures should also be considered in the context of *jus cogens*. While the former, as juridical acts, were based on existing treaties or customary international law, the latter were taken by States where the applicable law was obscure or still in flux. Some unilateral measures were opposable, but others were not. Unilateral extensions of maritime jurisdiction, unilateral economic sanctions and unilateral law enforcement actions were some examples of unilateral measures; in some cases, they might be regarded as violations of *jus cogens*.

The reminder of the *erga omnes* nature of *jus cogens* obligations contained in draft conclusion 18 was perhaps unnecessary as a conclusion and could be better explained in the commentary. The concept of *erga omnes* obligations had emerged in contrast to the traditional reciprocal obligations in bilateral State relations and demonstrated the horizontal expansion of obligations under international law. *Jus cogens*, at least in the context of treaty law, dealt with the vertical relations between higher law and lower agreements. Draft conclusion 18 gave the erroneous impression that *erga omnes* and *jus cogens* obligations occupied the same horizontal plane. If the definition of *jus cogens* were to be reformulated in line with the law of State responsibility, then the relations between the two sets of obligations could be meaningfully discussed, but that did not appear to be the position taken by the Special Rapporteur.

Draft conclusions 22 and 23 would be acceptable provided that it was known in advance what crimes prohibited by peremptory norms of general international law were to be covered. The report provided no details in that respect. Identifying what crimes were envisaged should logically precede discussion of issues such as the State's duty to exercise jurisdiction, criminal responsibility and immunity.

With reference to the Special Rapporteur's plan for future work, he expressed doubts about whether consideration of the third report could be concluded during the present session. It would take some time to agree on how to proceed with the question of a list of *jus cogens* norms, even if it were purely illustrative. Moreover, he considered any discussion of regional *jus cogens* to be absurd in the context of the present topic: it was contrary to the basic notion of *jus cogens* as a norm accepted and recognized by the international community of States as a whole. The danger of fragmentation through the introduction of regional *jus cogens* would be much more serious than the recognition of particular customs in customary international law.

He wished to express concern about the proliferation of sets of conclusions on various topics: in fact, it was not proper to call the product of the Commission's work "conclusions", and he hoped that the Special Rapporteur and Commission would give that matter serious consideration. Nevertheless, he was in favour of referring all the draft conclusions contained in the Special Rapporteur's third report to the Drafting Committee, taking into account the views expressed during the discussion.

The meeting rose at 1 p.m.