Provisional

For participants only

16 June 2022

Original: English

International Law Commission

Seventy-third session (first part)

Provisional summary record of the 3569th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 27 April 2022, at 11 a.m.

Contents

Present:

Chair:	Sir Michael Wood (First Vice-Chair)
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez

Secretariat:

Mr. Llewellyn	Secretary to the Commission

Sir Michael Wood, First Vice-Chair, took the Chair.

The meeting was called to order at 11 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 4) (*continued*) (A/CN.4/747 and A/CN.4/748)

Ms. Escobar Hernández said that the Special Rapporteur, in his fifth report on peremptory norms of general international law (*jus cogens*) (A/CN.4/747), had endeavoured to address all comments made by States, whether in writing or orally, comprehensively. The references to the commentaries to the draft conclusions adopted in 2019 were particularly interesting, since it was the first time that States had had the opportunity to comment on the commentaries. Although all the comments received from States were of considerable interest, it was regrettable that relatively few had been received, and that certain regional groups were at the origin of the vast majority of them. That point was worth highlighting, given the importance of peremptory norms of international law for the international legal system, but it did not undermine the value of the comments or the value of the work. In the interests of representativeness, it would be helpful to include more references in the commentaries to works in the Spanish language, rather than just to works by Spanish authors, and she would be happy to assist the Special Rapporteur in identifying suitable candidates for inclusion.

The Special Rapporteur's responses to the various comments were not always sufficiently substantiated. In some cases, his position was based solely on the number of comments received while, in others, he interpreted the lack of responses as a sign of support for the proposed text. While the number of comments received was not irrelevant, she did not believe that a lack of responses should automatically be interpreted as being indicative of support, although it could certainly be taken as indicative of a lack of opposition.

Turning to specific draft conclusions, she said that she did not consider draft conclusion 3 to be redundant, contrary to the views of certain States, and she saw no problem in the relationship between draft conclusion 3 and draft conclusion 4. Draft conclusion 3 set forth the characteristics of peremptory norms that defined the very nature of *jus cogens*, and those characteristics could not be confused with the technical criteria set out in draft conclusion 4, which were used to identify a norm as a peremptory norm. The connection between *jus cogens* and the fundamental values of the international community was, for her, beyond doubt. The reference to fundamental values in draft conclusion 3 emphasized the axiological dimension of peremptory norms, which, to a great extent, explained their special position in the international legal system. For that reason, she fully supported the Special Rapporteur's recommendation that the text of draft conclusion 3 should not be modified. Nonetheless, to allay concerns, the Drafting Committee might consider adjusting its title, replacing the words "General nature" with, for example, "Characteristics". She was also in favour of retaining the term "international community", in preference to "international community of States as a whole", in draft conclusion 3. On the other hand, she doubted that draft conclusion 3 would be better placed immediately after draft conclusion 1: it would be somewhat odd to describe the general nature or characteristics of peremptory norms before providing a definition.

Draft conclusion 5 had been keenly debated as it addressed the important question of how *jus cogens* norms came into existence. *Jus cogens* norms were norms or general principles of international law, but there was nothing to prevent other norms, such as treaty provisions, from contributing to their formation, and likewise nothing to prevent *jus cogens* norms from being reflected in treaties and principles: indeed, that was one of the singularities of such norms. The question of how *jus cogens* norms emerged was thus a complex one; it was not simply a matter of deciding whether it was more appropriate to refer to their "bases" or "sources". She was open to the use of either term, provided that an adequate response to the substantive question that the draft conclusion actually addressed was provided in the commentary.

With regard to draft conclusion 7, she agreed that fulfilment of the "acceptance and recognition" requirement should be evaluated in qualitative as well as quantitative terms. From that perspective, she strongly supported the addition of the words "and representative" in the second paragraph, since it emphasized both the qualitative dimension of the

requirement and the universal nature of *jus cogens* norms. That addition aside, she saw no need to adjust the expression "a very large majority", still less to replace it with the words "an overwhelming majority". The use of the word "overwhelming" might be interpreted as implying a requirement for a close to unanimous majority, and might thus create confusion. It might also introduce an excessive stringency to the acceptance and recognition requirement, giving rise to the mistaken perception that peremptory norms were irreversible or set in stone. She doubted that moving the third paragraph of draft conclusion 7 to draft conclusion 9 would allay the concerns raised by certain States in respect of that particular paragraph. She did not see how "the positions of other actors" were relevant to a draft conclusion on subsidiary means.

While fully supporting the Special Rapporteur's proposal for draft conclusion 8, she would like to place on record her opinion regarding the value of decisions of national courts. Decisions of national courts undoubtedly constituted State practice, irrespective of the seniority of the issuing court and the possibility of decisions of lower courts being overturned by a higher court. In the latter case, the decisions of the lower and higher court would need to be assessed jointly in order to determine their value for the purpose of establishing State practice.

She had no specific comments to make on draft conclusion 19 but wished to express her support for the Special Rapporteur's proposal that the content of the commentaries should be revised to incorporate references to most recent practice in respect of the consequences of serious breaches of *jus cogens* norms. The aggression perpetrated against Ukraine by the Russian Federation warranted particular attention, and, in that connection, she suggested that the Special Rapporteur should take into account not only the practice of States and international organizations but also the recent decisions on interim measures adopted by the International Court of Justice.

The main question raised by States in respect of draft conclusion 21 was whether it was appropriate to include a dispute settlement clause in a draft text that was not intended to become an international treaty. That question had been raised on several previous occasions, including during the Commission's consideration of the topic "Immunity of State officials from foreign criminal jurisdiction", and was undoubtedly of great importance. A prudent response from the Commission was called for; the Special Rapporteur's proposal to change the title and wording of draft conclusion 21 to expressly indicate that the procedure described therein was a "recommended" procedure was a good solution in the context of the current topic. Two important objectives would thus be achieved. First, States would be offered a useful tool that might help to prevent the type of unilateral action that undermined *jus cogens* norms, whether by denying their existence or repeatedly and abusively invoking them. Second, the new language proposed would help to clarify the difference between the "recommended" procedure and the procedure for settling disputes established in the Vienna Convention on the Law of Treaties. That distinction was already made clear in paragraph 5 of draft conclusion 21, but it was undoubtedly reinforced by the new paragraph 6 proposed by the Special Rapporteur. The use of the term "recommended procedure" would not diminish the practical value of the draft conclusion: even the dispute settlement procedures provided for in the Vienna Convention and other treaties could, as a rule, be unilaterally rejected by the parties concerned. For that reason, while certainly not "recommended" procedures, they were not mandatory either, but rather dispositive or optional procedures. For those reasons, she supported the changes proposed by the Special Rapporteur, including the change in the location of the draft conclusion.

She had two additional points to make in connection with draft conclusion 21. First, drawing attention to paragraph 194 of the report, she wished to express her surprise about comments from Colombia and the United States of America to the effect that "the Commission should not be seen as suggesting that the International Court of Justice is the preferred forum for addressing particular legal issues". It was difficult to see why the International Court of Justice, as the principal judicial entity of the United Nations, should not be the first body called upon to express an opinion on matters that affected key aspects of the international legal system. Although the Special Rapporteur made clear in the report that he could not fully respond to all the comments and concerns of States, comments of that nature needed to be addressed.

Second, she did not entirely understand the Special Rapporteur's comments, in paragraph 202, regarding the applicability of the recommended procedure in the event that a national court sought to invalidate an international treaty on the grounds that it conflicted with a peremptory norm. The Special Rapporteur stated that such a scenario "would not be dependent on the application of either the procedure in draft conclusion 20 or, for that matter, the Vienna Convention regime unless the State concerned wished to give effect to that invalidation at the international level". However, she could not see how a national court might invalidate a treaty other than by applying the Vienna Convention regime. Clearly, a national court could declare a treaty to be unconstitutional – as, for example, the Constitutional Court of Italy had done in the *Jurisdictional Immunities of the State* case – but that was not at all the same thing as declaring the treaty invalid. Invalidation was possible only in accordance with the Vienna Convention regime. She also wondered how it might be possible for a national court to declare a treaty invalid without the invalidation having effect at the international level. That suggestion contained a contradiction in terms: a declaration of invalidity would have direct effects between the States parties, and thus also at the international level, whether because of its implications for the validity of the treaty or because of its implications in terms of international responsibility for the non-application of the treaty by the State whose courts had declared the treaty invalid by invoking a conflict with *jus cogens*.

Turning to draft conclusion 23, she reiterated her strong support for the inclusion of a list of peremptory norms. Since the Commission had identified certain norms as peremptory in previous outputs, it would seem odd not to refer back to those outputs in its work on the current topic. In addition, the norms included in the list would aid understanding of how the other draft conclusions should be applied. She was well aware, however, that drawing up a list was not an easy task, and that there were conflicting opinions on the inclusion and content of such a list. For that reason, she considered the Special Rapporteur's position, which was neatly summed up in paragraph 224 of his report, to be prudent and appropriate and she fully supported his recommendation that the draft conclusion should remain in its current form. She was in favour of sending all the draft conclusions to the Drafting Committee.

Mr. Tladi (Special Rapporteur) said that he was grateful for the thoughtful views, comments and suggestions received from members of the Commission and would endeavour to address them as comprehensively as possible in summing up the debate. Focusing first on methodological concerns, he recalled that Mr. Forteau was of the view that it was contrary to the practice of the Commission to conduct a full second reading in one session. He could not agree with that view since, in the 10 years since he had joined the Commission, all the second readings in which he had been involved had been completed in one session. The second reading of the articles on responsibility of States for internationally wrongful acts had indeed extended over several years, as Mr. Murase had pointed out, but that circumstance had been dictated by the nature of the topic and was not in any way indicative of an *a priori* practice of conducting second readings over lengthy periods of time. There might well be reasons to do so at some point in the future, but, in that event, the approach should be adopted because circumstances so dictated, not because of an *a priori* belief that second readings should necessarily be protracted.

Turning briefly to the question of whether the draft conclusions were reflected in State practice, he agreed with Mr. Murphy that draft conclusion 5 (2) and draft conclusion 21 were not supported by practice. He did not concur with the view expressed by Mr. Vázquez-Bermúdez, who appeared to share Mr. Forteau's concern about draft conclusion 21 going beyond existing law: there were particular reasons for that being the case. Draft conclusion 21 was not intended to reflect existing law, as he had stated when introducing the proposed text, and the changes he was proposing in the current draft made that point even clearer. He would not object to the inclusion of an explanatory sentence in the commentary, although he did not think such an addition necessary. He would address the reasons why there was no practice to support draft conclusion 5 (2) when he commented on draft conclusion 5 as a whole. For the moment, he would simply state that the two provisions put forward to support the argument that the Commission's work on the topic did not reflect State practice were not the best examples, since neither provision purported to be based on State practice.

Another methodological concern, in that case raised by Mr. Murphy and Mr. Rajput, was that, in his assessment of the views of States in the report, he tended to place greater emphasis on the number of States that had expressed a concern than on the substance of their arguments. However, Mr. Rajput's arguments were polemical and based on non sequiturs: he suggested, for example, that Slovenia and Switzerland should not be included in the list of States that supported draft conclusion 3, despite having expressed support for it, because they had also highlighted certain problems. In fact, Switzerland had simply called for a drafting change in the French version of the text. Mr. Murphy, meanwhile, had suggested that the report's analysis of States' comments emphasized numbers rather than the merits of a given State's argument. He felt that, on the contrary, his response provided a good example of how a quantitative assessment of the arguments interacted with the quality of those arguments. His position was that draft conclusion 3 should not be changed without a compelling reason to do so, because a large number of States supported the current formulation. Only Mr. Rajput had disputed that assessment, at least explicitly. However, while the quantitative assessment was important, the report did in fact also provide a qualitative assessment; paragraphs 51 to 55 all offered qualitative responses to arguments put forward by a minority of States. Thus, while some members might find the report's qualitative assessment of the arguments unconvincing, it could not be said that the report failed to address their substance. He accepted that views might differ, but that was not a methodological issue.

In connection with that point, he recalled that, while Mr. Murphy had stated that whether or not State practice was sufficient was dependent on the eye of the beholder, many members of the Commission, including Mr. Cissé, Mr. Grossman Guiloff, Ms. Galvão Teles, Mr. Hassouna, Mr. Jalloh, Mr. Nguyen, Ms. Oral, Mr. Ruda Santaloria, Mr. Ouazzani Chahdi and Mr. Vázquez-Bermúdez, agreed that there was sufficient practice to support the draft conclusions. Of particular interest was the view expressed by Mr. Saboia, who considered that the minority of States that considered the Commission's work to be insufficiently supported by practice were adopting a particularly narrow view of State practice that was inconsistent with the Commission's approach. As he had stated previously, and Mr. Grossman Guiloff had recalled at the current session, it appeared at times that the Commission was not permitted to engage in deductive reasoning: a given source apparently could not be relied upon unless expressly recognized as *jus cogens* or a peremptory norm. The Commission should be permitted to engage in a degree of deductive reasoning; indeed, that was its function.

The comments of Mr. Hmoud and Mr. Saboia regarding the importance of decisions of the International Court of Justice should also be noted: it was precisely because of the views expressed by Commission members and by certain States that he believed it was important for the Commission to consider the topic of subsidiary means. On a related point, while he agreed with Mr. Hmoud that statements, including resolutions, were very often motivated by political considerations, other forms of practice could also be influenced by such considerations; in his view, however, that fact did not diminish their value as practice. Recalling Mr. Forteau's suggestion that, in the commentaries, the Commission might wish to clarify the meanings of terms such as "in conflict with" and "in conformity with", he said that he would be happy to do so, perhaps in the commentary to draft conclusion 20, but that he did not personally consider such clarification to be necessary.

On a more general note, he agreed with the positions expressed by Mr. Hmoud, Mr. Grossman Guiloff, Mr. Jalloh and others regarding the need to be sensitive to States' unequal abilities to comment meaningfully on the Commission's work. However, Sir Michael Wood's statement on that subject might be taken to imply that the factors that affected ability to comment were the same for all States: that was certainly not the case. He very much welcomed Mr. Jalloh's call for increased interaction with the Sixth Committee, which had been echoed by Ms. Galvão Teles. He would add, however, that the recommendation should be made not in the context of the current topic but in respect of the work of the Commission more generally.

As for the Commission's general approach, there were no grounds for a *de novo* reading of the draft conclusions. On the contrary, the text should be retained as it stood, save when reasonable concerns of States gave cause to alter it.

He had been somewhat surprised by Sir Michael Wood's comments on the overall objective of the second reading, which appeared to suggest that the Commission's purpose on second reading was not primarily to address the comments and observations of States, despite his past insistence on the need for the Commission to focus on States' comments at that stage. Personally, he took the view that, while other considerations might be taken into account, it was the Commission's practice to use the comments and observations of States as the main driver of its work at the second-reading stage. He agreed with Sir Michael Wood that the Commission should aim to produce a text that represented the greatest possible agreement among its members: the Commission was an independent body and should present a text that it believed accurately reflected the position in law. While it had been his understanding that the Commission would revisit some issues in the light of States' comments, he hoped that the Commission would not seek to reopen the delicately balanced wording of draft conclusion 16.

He stood by the comments that he had made in his fifth report on whether a State's silence could be taken as evidence of acceptance. While he had been strongly opposed to regarding silence as a form of State practice, or an expression of *opinio juris*, in the context of the identification of customary law, the position was different when it came to *jus cogens.* It could not be contended that Botswana, for instance, which had not commented on the draft conclusions at all, supported them. However, the United Kingdom had submitted many comments, and so its silence on draft conclusion 10 was more likely to indicate support for, rather than opposition to, that provision. In any event, silence had played only a minor role in the instances where the fifth report had relied on the number of States for or against a particular provision.

Although members had expressed widely differing views on the question of regional *jus cogens*, they had all agreed that the commentary addressed it in an acceptable manner. Generally speaking, the commentaries should avoid any suggestion that the draft conclusions were conjecture rather than codification and should therefore make it plain that any paucity of practice was due to the nature of *jus cogens*.

Although he did not intend to produce a multilingual bibliography, references in the commentary should ideally be drawn from the literature in as many of the official languages of the United Nations as possible. As the commentaries were those of the Commission, not the Special Rapporteur, members should provide material with an indication of its relevance to the topic, in order that it might be reflected in the commentary.

There had been almost universal support for changing the title of the draft conclusions to "Identification and legal consequences of *jus cogens*": indeed it was normal for the title of an instrument to be coextensive with the provision on scope. It was to be hoped that the Drafting Committee would retain draft conclusion 1 without any changes. One member had suggested that the commentary to draft conclusion 2 should make it clear that no derogation meant no derogation in whole or in part, but that notion was covered in the context of other draft conclusions. Given the number of members who had thought that it might be helpful to move draft conclusion 3 to make it the second draft conclusion, the Drafting Committee should consider changing the order of the first three draft conclusions.

While most members wished to retain draft conclusion 3, on the grounds that the reference to fundamental values was essential, some had raised questions about it. The first question raised by Mr. Murphy concerned the difference between the "nature" and the "definition" of a peremptory norm. What was characteristic of the nature of peremptory norms was that they were undergirded by particular fundamental values shared by the international community. One metaphor which might explain that idea was that the rules of the road were based on certain values, such as the sanctity of life, but when those rules, or a breach of them, were identified, there was no need to refer to the sanctity of life. In other words, the identification of the rule or breach was different from the identification of the value or values underpinning a particular rule.

As many members had understood, the elements contained in draft conclusion 3 were descriptive. According to Ms. Galvão Teles, the notion of fundamental values was the most fundamental and distinctive feature of *jus cogens*, and draft conclusion 3 reflected the characteristics and objectives of *jus cogens*. Mr. Šturma had made the point that fundamental

values shed light on the respective *jus cogens* norms and helped to identify them; he had gone on to show how each element of the draft conclusion served a particular function. Mr. Vázquez-Bermúdez had held that the hierarchical superiority and universal applicability of the norms flowed from the fundamental values that underpinned them.

If members felt that the word "nature" in the title of draft conclusion 3 implied a definition, the title could be changed to make the point that the draft conclusion contained descriptive elements. He found the amendments proposed by Sir Michael Wood to the text of that draft conclusion unobjectionable, and looked forward to discussing them in the Drafting Committee. He agreed with Mr. Park and Mr. Murphy that it would be better to speak of the "international community as a whole", whereas a reference to the "community of States as a whole" would risk turning that draft conclusion into one of the provisions concerning identification. Moreover, draft conclusion 3 denoted a broader vision of the international community than one consisting solely of States. One example which might illustrate that point was that the sanctity of life was a value shared by the international community as a whole, whereas the prohibition of genocide carried legal implications and consequences, not because of its value, but because it had been accepted and recognized by the community of States as a whole. The commentary should also explain that the view that the only fundamental values protected by *jus cogens* were those which had been accepted and recognized by States conflated the peremptory norms for which acceptance and recognition was necessary with their underlying values.

The suggestion by Mr. Nguyen that the adjective "certain" should be inserted before "fundamental values" would pose a problem. Draft conclusion 3 did not imply that every fundamental value was protected by and reflected in every *jus cogens* norm. Rather, it made an abstract point about the general nature of those norms, namely that they had the descriptive characteristics reflected in that draft conclusion. It did not seek to determine all or particular *jus cogens* norms, or to make any claims about all fundamental values. Mr. Nguyen's proposed amendment might imply that some fundamental values could not have the function described in draft conclusion 3. It would likewise be problematic to refer to the Charter of the United Nations in the qualification of fundamental values, as suggested by Mr. Argüello Gómez, because the Charter contained rules, norms and principles, but did not specify values. If anything, those rules were themselves underpinned by particular values.

He agreed with Mr. Hassouna that the structure of the introductory phrase in draft conclusion 4 was somewhat clumsy, but since most members were content with it, it could be retained, unless the Drafting Committee decided otherwise.

Mr. Murphy had been correct to say that he had sometimes argued against making a modification and had then recommended making it anyway, on account of the number of States supporting it. That was true in the case of his suggestion that "base" and "bases" should be changed to "source" and "sources" in draft conclusion 5. As many members had pointed out, such a change would require a lengthy explanation of the different ways in which the term "sources" could be used. At any rate, given members' overwhelming support for the retention of "basis" and "bases", he would withdraw his suggestion.

Regarding draft conclusion 5 (2), although there was no State practice in support of it, its wording, together with the explanation provided in the commentary, made it abundantly clear that the provision was included because the Commission did not wish to foreclose the possibility that treaties and general principles of law might serve as a basis for peremptory norms. Part of the difficulty lay in the fact that Commission members and States held differing opinions on whether treaties and general principles really did serve as a basis of *jus cogens*. Any attempt by the Commission to resolve that issue would be mere conjecture. It therefore had two options: the first would be to leave the compromise text intact; and the second would be to ask the Drafting Committee to consider redrafting the second paragraph as a "without prejudice" clause – although that, in essence, was what the current version actually was.

As far as draft conclusion 6 was concerned, while he did not oppose the wording proposed by the United States of America for paragraph 1, as recorded in paragraph 77 of his fifth report, he wished to point out that the same notion was already expressed in draft conclusion 7. Moreover, the text proposed by the United States would not achieve the purpose

of the current text, which was to highlight that acceptance as law for the purposes of customary international law and recognition for the purposes of general principles were different from "acceptance and recognition" under draft conclusion 6. To avoid any possible confusion, he suggested adopting Mr. Murphy's proposal, with a slight variation, so that the end of the first paragraph of draft conclusion 6 would read "is distinct from the criteria for the identification of a norm of general international law".

In his report, he had recommended inserting the phrase "by the international community of States as a whole" in draft conclusion 6 (2). However, as Mr. Reinisch had correctly pointed out, that would make draft conclusion 7 (1) redundant. The Drafting Committee could discuss whether to make the change or not.

In draft conclusion 7 (2), most members had been in favour of replacing "a very large majority of States" with "a very large and representative majority of States". That amendment would require an explanation that it referred to representation "across regions, legal systems and cultures", a matter best addressed in the commentary. Mr. Park had suggested replacing "a very large majority" with "an overwhelming majority", but most members had rejected that idea. He personally had been attracted by Mr. Murphy's proposal that the paragraph should speak of "widespread and representative acceptance and recognition" because it implied acceptance and recognition by many States without seeking to quantify what that meant. Several members had expressed a preference for deleting the entire paragraph, but that did not seem to be a strongly held position.

The retention of draft conclusion 7 (3) in its current position had received wide support.

The discussion of draft conclusion 8 had turned mainly on how to couch the reference to resolutions of international organizations. While many members had been happy with the text as it stood, Mr. Argüello Gómez and others wished to insert "conduct of States in connection with" before "resolutions adopted by an international organization or at an intergovernmental conference". That suggestion seemed to be based on the idea that a mere reference to such resolutions without the qualifying phrase would imply that it was the views of the organization itself which were at issue. However, international organizations' resolutions were adopted by States, a point which could be clarified in the commentary. If no such amendment was made, there would be no need to insert the new paragraph proposed by Mr. Argüello Gómez. As he had pointed out in his oral introduction, in the case *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal)*, the International Court of Justice had referred not to "conduct in connection with" General Assembly resolution 3452/30 of 9 December 1975, but to the resolution itself.

In his response to those arguments, Mr. Murphy had focused on the qualifiers attached to conclusion 12 of the Commission's conclusions on identification of customary international law. He would note, however, that all the forms of evidence listed in draft conclusion 8 were subject to those qualifiers. For example, no decision of a domestic court had a *jus cogens* character in and of itself. In addition, reference was already made to those qualifiers in the commentary to the provision, notably in paragraph (6). With the assistance of members who had concerns in that regard, he would be prepared to consider how to provide further clarification in the commentary. He would even be willing to consider, in the context of the Drafting Committee, the possibility of making that point explicit in the text of the draft conclusion itself. However, to his mind, it would be incorrect to suggest that the text of a resolution could not serve as evidence of acceptance and recognition unless it was accompanied by some additional conduct by a State. After all, resolutions were in effect acts of States. It was not clear why they should be the only form of evidence subject to the qualifiers in question.

He had no objection to Mr. Ouazzani Chahdi's suggestion that national constitutions should be listed as one of the forms of evidence. However, in at least some national systems, constitutions would be covered under legislative acts. He would be curious to hear the reactions of members of the Drafting Committee in that regard.

With regard to draft conclusion 9, he wished to make two points in response to Mr. Forteau and Mr. Argüello Gómez, who had questioned why the special role of the International Court of Justice, as reflected in article 66 of the Vienna Convention on the Law

of Treaties, was not mentioned in the commentary. First, it was not suggested in article 66 of the Convention that the Court had any special role in the identification of peremptory norms. Irrespective of the fact that article 66 (a) of the Convention was specific to *jus cogens* and that, when acting under that provision, the Court was likely to be called upon to identify *jus cogens* norms, article 66 (a) was a treaty rule and applicable to particular States and for a particular purpose, namely the settlement of disputes relating to termination, withdrawal or suspension. Second, a special place was reserved for the Court in draft conclusion 21, in the context of dispute settlement. Taken together, those two points served to emphasize that draft conclusion 9 was not a dispute settlement provision.

He agreed that the International Court of Justice had a special role to play in the identification of *jus cogens* norms. Indeed, in his view, the Court's special role in that regard was more extensive than had been recognized even in doctrine. Yet that role was not limited to *jus cogens* and did not flow from article 66 of the Vienna Convention on the Law of Treaties. In other words, the Court had a special role in determining the rules of international law generally, although the draft conclusions were not the place to address it.

He was sympathetic to Mr. Hmoud's concern regarding the use of the word "subsidiary" to qualify the decisions of the International Court of Justice and was grateful that, at the first-reading stage, Mr. Hmoud had agreed, albeit reluctantly, to go along with the consensus that had been reached. On reflection, he agreed with Sir Michael Wood's suggestion that the decisions of national courts should be mentioned in draft conclusion 9. As for Mr. Hassouna's suggestion that, in the commentary, other courts and tribunals should be mentioned and the reference to expert bodies explained, the possibility of adding further examples could be discussed when the commentaries were under consideration. He agreed with Mr. Grossman Guiloff's comments on the importance of expert bodies and was grateful for the examples that he had provided in that regard.

In relation to draft conclusion 10, Mr. Forteau had reiterated the concern expressed by the United States of America that paragraph 1 contradicted draft conclusion 11. That concern had already been addressed in the fifth report, and he was prepared to provide further explanations in the context of the Drafting Committee. He had no objection in principle to Mr. Hassouna's suggestion that draft conclusion 10 could be merged with draft conclusion 11, which could be considered in the Drafting Committee.

Concerning draft conclusion 11, while the Drafting Committee could consider Mr. Hassouna's proposal that a less subjective criterion than "unjust" should be found, he was in favour of retaining that word, not only because it was used in the Vienna Convention on the Law of Treaties but also because of its breadth of scope. In that connection, he was grateful to Ms. Lehto for providing a reference to the articles on the effects of armed conflict on treaties.

The main question, however, was whether to apply the criteria of separability to treaties that, at the time of their conclusion, conflicted with *jus cogens*. Although he considered that such a position was the correct one from a policy perspective and would be acceptable from a legal perspective, it would be preferable not to modify the provision along those lines. The fact that such a possibility was excluded under the Vienna Convention on the Law of Treaties and that there was little in the way of supporting evidence made it difficult to justify such a modification. Several members had nevertheless expressed their support for it. Mr. Reinisch, for example, had argued convincingly that it would be preferable, for practical reasons, to move to a single standard of separability. He found the arguments put forward by Mr. Argüello Gómez, however, less convincing. Article 71 of the Vienna Convention concerned not the treaty provisions themselves but the consequences flowing from the treaty. It was difficult to argue, therefore, that separability was foreseen under the Convention.

Most members were in favour of retaining draft conclusion 13. Mr. Forteau had suggested that paragraph 1 should be reviewed, noting that it applied equally to acts other than reservations. However, the draft conclusion concerned reservations only. He supported Mr. Hassouna's proposal that the language proposed in the third report should be reinstated, but, owing to a general lack of support on the part of States and members of the Commission, that suggestion was unlikely to gain any traction.

Most members had expressed support for his proposed modification of draft conclusion 14. He did not agree with Mr. Grossman Guiloff that such a modification would weaken the provision, since it was essentially a drafting amendment with no bearing on the substance. In any case, Mr. Grossman Guiloff's proposal for the insertion of the words "at the time of its conclusion" was problematic, since rules of customary international law were not "concluded".

Mr. Jalloh had suggested that further consideration should be given to the proposal of the United States of America for the replacement of the words "does not come into existence" with "is void". France had made a similar proposal. He did not support Mr. Jalloh's suggestion, since it had garnered little support in the Commission and, as explained in the fifth report, he was not sure that rules of customary international law could be said to be "void".

The key issue, however, was whether existing peremptory norms could be modified. In that regard, he was prepared to explore the possibility of providing further explanations in the commentary. He did not agree with Mr. Forteau and Mr. Hmoud that, under the draft conclusions, *jus cogens* norms could never be modified. The commentary included a brief explanation of how such modification could occur. In any case, that issue fell outside the scope of the topic, which might provide a further reason to amend the title of the draft conclusions, as had been proposed by Italy and overwhelmingly endorsed by the Commission.

Paragraph 3 of draft conclusion 14 had attracted few comments, although some members had expressed support for its retention. The comments received from States suggested that the text should be retained.

Regarding draft conclusion 16, there was general agreement in the Commission that the finely balanced compromise reached on first reading should not be disturbed and that reference should be made in the commentary to the fact that the provision did not permit unilateral invocation to avoid obligations arising from Security Council resolutions or indeed other obligations. He tended to agree with Mr. Reinisch that the issue of separability could be further clarified in the commentary. However, he did not agree with Mr. Murphy's suggestion that the divergent reactions of States to the provision should be described in the commentary. If such a description was added, it would be necessary to give an indication of the numbers of States on each side so as to demonstrate the sheer weight of support in favour of the provision. While numerical strength was not always important, it was critical in the case of draft conclusion 16. Such an approach would also risk placing the spotlight on States, which might not be appropriate.

He wished to make three points in response to Sir Michael Wood's strongly worded comments on draft conclusion 16. First, there was nothing either in the provision itself or in the commentary to suggest that the Commission was "cavalierly accepting" unilateral decisions to disregard Security Council resolutions. He was prepared to provide further clarification on that point in the commentary, and members had expressed widespread support for the specific language that he had proposed in that regard. Second, he was very concerned at Sir Michael Wood's use of the phrase "important constituency", as all States were important constituencies. Third, as the commentary had been put before the Commission after a difficult process of negotiation, it would be preferable not to disturb the delicate balance that had been achieved. Much of the criticism directed at draft conclusion 16 could be attributed to the fact that, to achieve that balance, references that justified the provision had been omitted from the commentary.

Draft conclusion 17 had not attracted many comments, but Mr. Murase had made the interesting assertion that it was not *jus cogens* norms that produced *erga omnes* obligations but vice versa. That assertion was both incorrect and logically very difficult to understand. Even if the relationship between *jus cogens* and *erga omnes* could logically be constructed in that way, to make such an assertion would require the Commission to go against the commonly held understanding of that relationship and its own previous work. Some members had suggested that it should be clarified what was meant by "a legal interest". Such clarification could be provided in the commentaries. In addition, several members had welcomed his intention to supplement the commentaries with information on the role of

international organizations and a reference to the International Court of Justice order of 23 January 2020 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. The role of international organizations would also be addressed in relation to draft conclusions 18 and 19.

There had been few comments on draft conclusion 18. Mr. Hassouna had indicated that a discussion of the rules on the use of force in self-defence might be warranted in the commentary. While interesting, that issue fell squarely beyond the scope of the topic. However, if members so wished, an explanation of why it had not been addressed could be added to the commentary.

Draft conclusion 19 had been well received. Indeed, Mr. Reinisch had described it as being of "central importance" to the Commission's work. While he was sympathetic to the point made by Mr. Forteau, the Commission's role was not to be creative but to restate the law as it saw it. Many members would presumably support the proposition that, in cases of serious breaches of *jus cogens*, a veto in the Security Council would not apply, but the Commission should refrain from setting out such a position. While there were scholars in academia who had made precisely that case, the Commission was not supposed to "push the envelope".

Mr. Reinisch, supported by other members, had suggested that the word "serious" should be deleted from draft conclusion 19, as he had previously proposed. He remained convinced that, normatively, the position taken by those members was the correct one. However, as the Commission had previously decided not to take that approach, and as States were more or less evenly divided on the question, there was little to be gained from reopening the debate. After reading reactions to the text of the draft conclusions adopted on first reading, he had formed the view that any breach of *jus cogens* norms was serious. Even draft conclusion 19 (3) did not preclude that interpretation, although it might suggest otherwise. For that reason, he was now more comfortable with the inclusion of the word "serious". He agreed with the suggestion that further examples of practice should be supplied in the commentaries.

He was grateful to Ms. Lehto for providing many examples of practice that could be used. One excellent example was the establishment, by the General Assembly, of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. Some of the other examples, however, were less convincing. Many of the examples of the exercise of universal jurisdiction by individual States did not fall squarely within the scope of draft conclusion 19. While it might be possible to find other examples, he wished to reiterate Mr. Argüello Gómez's call for caution: the Commission's intention was to restate the law, or rather to identify the principles of the law, not to insert itself into ongoing conflicts. Mr. Reinisch had suggested that it might be useful to explain in the commentary that draft conclusion 19 was without prejudice to the possibility of countermeasures, and paragraph 4 provided a good basis for doing so.

Sir Michael Wood's suggestion that draft conclusion 20 should be placed elsewhere in the sequence of draft conclusions could be considered in the Drafting Committee.

Of the members who had commented on his fifth report, most had expressed support for the proposed modifications to draft conclusion 21, on recommended procedure, while of course noting that some revisions might be in order. Mr. Murphy had pointed out that it was not clear from paragraph 3 that a State claiming a breach of *jus cogens* could not institute any measures while dispute resolution procedures were being pursued. If necessary, language could be added to the provision or the commentary to provide further clarification on that point.

Other members, notably Mr. Park and Mr. Forteau, had been more sceptical about draft conclusion 21, while Mr. Šturma had suggested adding language to the commentary to explain that it was different in nature from the other draft conclusions. In response to Mr. Forteau's comment that the status of the provision as customary international law was doubtful, he would simply reiterate that it was not intended to reflect existing law, as he had made clear when introducing the proposed text. Mr. Forteau had also suggested that draft

conclusion 21 created two parallel regimes. Leaving aside the fact that, as a "recommended procedure", draft conclusion 21 could not create any regime, parallel regimes were in the nature of international law. Article 66 of the Vienna Convention on the Law of Treaties itself created parallel regimes, since, while some States parties were bound by article 66 (a), those that had entered the necessary reservations were not. Draft conclusion 21 simply recognized that different regimes might, and often did, apply in international law, particularly in the area of dispute settlement.

He agreed with Mr. Hmoud that the application of draft conclusion 21 would not be without difficulty, but the same could probably be said of many rules of international law. He had no difficulty with Mr. Reinisch's suggestion that consideration should be given to the question of whether international organizations might also be able to provide notification proactively.

He was grateful that so many members had expressed agreement with the substance of draft conclusion 21, as modified. It was important to retain a provision along the lines of the current text. He agreed with Sir Michael Wood that paragraph 6 was not necessary, but, as it caused no harm and gave comfort to some members of the Commission and some States, he hoped that it could be retained.

To respond to Ms. Escobar Hernández's concerns regarding the draft conclusion, he would note simply that the procedure set out in the provision did not apply in the event that a domestic court sought to invalidate a norm of *jus cogens*. Such decisions were taken at the national level and, as such, had no application or effect under international law, save perhaps as State practice. To his mind, any obligations under a vitiated treaty, rule of customary international law or Security Council resolution would continue to apply to that State under international law. It was not until that State wished to avoid a conflict between its domestic rules and international law that it would be necessary to rely on a procedure under international law such as that set out in draft conclusion 21.

The only member to comment on draft conclusion 22, Mr. Rajput, had stated that it should be deleted, as it did not serve any purpose. However, only one State, namely the Islamic Republic of Iran, had proposed its deletion.

While several members had supported the retention of draft conclusion 23 and the annex, others had suggested that they should be deleted and their contents incorporated into the commentaries. In his view, the current wording of the chapeau captured the idea that Mr. Nguyen was seeking to convey with his proposal. It would be inappropriate to use the word "recommended", as Mr. Nguyen had proposed, since the Commission was not recommending anything in draft conclusion 23. Mr. Petrič had indicated that, while he supported the list, he would not oppose its deletion. Other members had opposed draft conclusion 23 and the annex in very strong terms. Mr. Murase had stated that he supported the idea of draft conclusion 23 but not the provision in its current form. In fairness, some of the members who had expressed support for the provision had nevertheless suggested that the commentaries could be modified and the methodology clarified. Concerning methodology, it would not be possible to go beyond the approach adopted in 2019, but further explanation of that approach would certainly be possible.

In general, the members of the Commission who had expressed support for retaining draft conclusion 23 had repeated the reasons that he had set out in his fifth report and in his introductory statement. He hoped that it would be possible to retain the provision in some form. Several members, including Mr. Nguyen, had commented on the implications of the project for the Commission's future work. Going forward, the Commission might have an opportunity to apply its methodology to other topics in a manner that addressed many of the concerns raised in the debate.

He was confident that the Drafting Committee would be able to make further improvements to the draft conclusions. He intended to produce commentaries to facilitate the adoption of the full set of draft conclusions with commentaries on second reading. He recommended that, on the basis of the fruitful debate that had taken place, the Commission should refer the full set of draft conclusions to the Drafting Committee.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Park (Chair of the Drafting Committee) said that, for the topic "Peremptory norms of general international law (*jus cogens*)", the Drafting Committee was composed of Mr. Argüello Gómez, Mr. Cissé, Mr. Forteau, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Jalloh, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Tladi (Special Rapporteur) and Mr. Šturma (Rapporteur), *ex officio*.

The meeting rose at 12.45 p.m.