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Held at Headquarters, New York, on Friday, 1 June 2018, at 10 a.m.

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Present:

Chair: Mr. Valencia-Ospina

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

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 7) (*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 on peremptory norms of general international law (*jus cogens*) (A/CN.4/714 and A/CN.4/714/Corr.1).

Mr. Zagaynov, speaking for the first time in a plenary meeting of the Commission, thanked the other Commission members for supporting his candidacy and for their kind words upon his election, and said that he would do his utmost to work with them to find solutions to the complex tasks facing the Commission.

The topic “Peremptory norms of general international law (*jus cogens*)” was an important, multi-faceted and complicated one. He agreed with the Special Rapporteur that the issue of the consequences of peremptory norms of general international law was the most challenging, controversial and sensitive part of the topic. Its study had required great professionalism and courage on the part of the Special Rapporteur, whose thoughtful report gave the Commission much food for thought and would enable it to engage in a meaningful and lively debate.

The topic was difficult for a number of reasons. First, relevant practice of States and international courts was limited. The International Court of Justice had for years hesitated to acknowledge the existence of *jus cogens* norms. In its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court had simply indicated that the Commission had expressed the view that the principle prohibiting the use of force by parties to a dispute had the character of *jus cogens*. The Court had explicitly recognized the existence of *jus cogens* norms only in 2006, in its judgment in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, in which, rather than shed light on any rules, it had noted, in paragraph 64, that the fact that a dispute related to compliance with a *jus cogens* norm could not of itself provide a basis for the jurisdiction of the Court to entertain that dispute, and that under its Statute, jurisdiction was always based on the consent of the parties. The Court had again weighed in on the topic of *jus cogens* in 2012, in its judgment in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. It could not be claimed, therefore, that questions related to the application of *jus cogens* had been extensively

examined by the Court. Rulings by national courts were also few and far between and were not uniform.

Secondly, even in academic circles, discussions on many aspects of the topic were made difficult by political considerations. Thirdly, there was a strong moral component to *jus cogens* norms, which explained the natural desire of some authors and judges to promote the application of those norms beyond what the current practice of States permitted. It would therefore be advisable for the Commission to take a conservative approach by focusing on the object of the study of the topic, as stated by the Special Rapporteur at the outset: to reflect the current law and practice relating to *jus cogens* and to avoid entering into theoretical debates.

An attempt had been made in the report to cover the full range of complex practical and theoretical issues that arose in connection with *jus cogens*, including those that were the subject of fierce debate and on which States had not reached a consensus. Although the Special Rapporteur was to be recognized for his boldness and willingness to take on very sensitive issues, the Commission should take a cautious and balanced approach and meticulously examine every aspect of the issue of consequences of *jus cogens*.

Turning to draft conclusion 10 (Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)), which was based on the 1969 Vienna Convention on the Law of Treaties, he noted that it would make sense to begin the draft conclusion by drawing attention to the general requirement that States should not enter into international treaties that conflicted with *jus cogens* norms. The question of consequences of peremptory norms of general international law for the interpretation of treaties deserved a more comprehensive treatment than had been provided in paragraph 3; indeed, it could be the subject of a separate draft conclusion.

Paragraph 3, which read: “[...] a provision in a treaty should, as far as possible, be interpreted in a way that rendered it consistent with a peremptory norm of general international law (*jus cogens*)”, could be misinterpreted as an attempt to formulate a new rule of interpretation of international treaties in addition to those set out in the Vienna Convention. In fact, in paragraph 57 of his report and in his oral introduction, the Special Rapporteur had drawn attention to article 31 (3) (c) of the Convention, according to which any relevant rules of international law applicable in the relations between the parties, which of course included *jus cogens* norms, must be taken into account. For its part, the Commission had explained, in the commentaries to the draft articles on the law of treaties,

that the process of interpretation was a unity and that the provisions of the article formed a single, closely integrated rule. It would therefore make sense to reaffirm that the proposed draft conclusion was inextricably and organically linked to other existing elements of the rule of treaty interpretation, as had been done, for example, with the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Lastly, he said he was uncomfortable with the paragraph's introductory phrase: "[t]o avoid conflict with a peremptory norm of general international law", which could be read as an attempt to "tailor" interpretation to peremptory norms. Those introductory words could be corrected or omitted.

Turning to draft conclusion 11 (Severability of treaty provisions in conflict with peremptory norm of general international law (*jus cogens*)) and the question raised by the Special Rapporteur in his oral introduction as to whether the word "invalid" should be retained or replaced with "void" in that draft conclusion and in the remaining draft conclusions, he said that consistent language should be used. In his view, the word "void" would be preferable. With regard to paragraph 2, a detailed explanation should be provided in the commentary regarding the severability of the provisions of a treaty that remained applicable even after a conflict arose between other treaty provisions and a new *jus cogens* norm.

With regard to draft conclusion 12 (Elimination of consequences of acts performed in reliance of invalid treaty), he was grateful to the Special Rapporteur for having made an important correction to the formulation of paragraph 1 that brought the draft conclusion closer to the wording of article 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law) of the Vienna Convention. In its discussion of the draft conclusion, the Drafting Committee should also consider whether the wording of paragraph 2, which deviated from that of article 71 (2), was appropriate.

With regard to draft conclusion 13 (Effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties), he agreed on the whole with the Special Rapporteur's decision to reproduce wording from the Guide to Practice on Reservations to Treaties. It would make sense to add another paragraph to address the situation described in the case concerning *Armed Activities on the Territory of the Congo*, where the International Court of Justice had determined that the fact that a dispute related to compliance with a *jus cogens* norm did not mean that a

reservation to a treaty provision that provided for the Court's jurisdiction was invalid. In that connection, it might also be appropriate to state that the inclusion of a *jus cogens* norm in a treaty did not imply that all reservations to such treaty were invalid.

Turning to draft conclusion 14 (Recommended procedure regarding settlement of disputes involving conflict between a treaty and a peremptory norm of general international law (*jus cogens*)), he agreed with the view of the Special Rapporteur, as expressed in paragraphs 49 and 135 of the report, that article 66 (a) of the Vienna Convention established the jurisdiction of the court to settle a dispute over the validity of a treaty, not over general issues pertaining to peremptory norms and the violation thereof. However, he had doubts with regard to the recommendation made in paragraph 1, which was based on article 66 (a), that States should submit any dispute concerning whether a treaty conflicted with a *jus cogens* norm to the International Court of Justice for a decision, unless the parties to the dispute agreed to submit the dispute to arbitration. That recommendation appeared to apply even to States that were not party to the Convention. Furthermore, according to paragraph 54 of the report, an interpretation of article 66 (a) that excluded States that were not participating in the treaty from approaching the International Court of Justice for a determination of the validity of the treaty created the potential for uncertainty.

The proposed formulation of the draft conclusion diverged from the Vienna Convention and how it had been understood by States. That disconnect was not resolved with the addition of the reference to the jurisdictional rules of the International Court of Justice. First, articles 65 and 66 of the Convention gave the parties the opportunity to use any peaceful means to settle their dispute, as provided under Article 33 of the Charter of the United Nations, within a period of twelve months. It was therefore unclear why the Commission should limit their options in that regard. He also recalled that many States parties had formulated reservations and objections to article 66 and that dozens of States were not party to the Convention. With regard to the hypothetical option that a State that was not party to the treaty would have to seek adjudication by the International Court of Justice when a treaty conflicted with a *jus cogens* norm, it was his understanding that, although article 66 referred to "parties to a dispute", rather than "parties to a treaty", when read together with article 65 and other articles in Part V of the Convention (Invalidity, termination and suspension of the operation of treaties), article 66 could be understood as referring to parties to a dispute from among the parties to a treaty,

as defined in article 2 (1) of the Convention. That understanding was also reflected in the literature. For example, Tomuschat had asserted, in his article entitled “Obligations arising for States without or against their will”, that the authors of the Vienna Convention had made conflict of a treaty with *jus cogens* a legal occurrence that should be settled exclusively between the parties to the treaty, no third State being allowed to invoke the nullity of a treaty. The same view had also been put forward by Krieger in her commentary on the negotiations of the Convention. He recognized, however, that other opinions were also represented in the literature.

Lastly, he noted that the Special Rapporteur had acknowledged explicitly that the draft conclusion did not reflect the state of international law and was only recommended practice.

For all the above reasons, he was of the view that the draft conclusion required extensive reformulation. It seemed doubtful that it was appropriate to revise the provisions of the Vienna Convention.

Turning to draft conclusion 15 (Consequences of peremptory norms of general international law (*jus cogens*) for customary international law), he noted that paragraph 1, which stipulated that “[a] customary international law rule does not arise if it conflicts with a peremptory norm of general international law (*jus cogens*)”, should be corrected to bring it in line with rules of formal logic, as something that had not yet arisen could not conflict with anything. In that connection, he suggested that alternate wording should be considered to indicate that State practice and *opinio juris* that conflicted with an existing *jus cogens* norm could not create rules of customary international law.

On a separate note, he fully agreed with the conclusion drawn by the Special Rapporteur in paragraph 139 of his report that widespread practice of States that conflicted with a *jus cogens* norm would not create a rule of customary international law even if States believed that that practice was law. In his view, such a situation was not as “highly unlikely” as the Special Rapporteur had indicated. It would be helpful to include the analysis laid out in paragraph 139 in the commentary.

The stipulation in paragraph 3 of the draft conclusion that the persistent objector rule was not applicable to *jus cogens* norms required more careful consideration, despite the Special Rapporteur having characterized the issue as trite. Although he appreciated that the wording of the paragraph was spare, direct and unequivocal, it did not fully reflect the complexity of the topic and departed from the classical principle

according to which obligations could arise only if States consented to them. In that regard, Koskenniemi had written that the relationship between *jus cogens* and persistent objection was a point where an irresistible force and an immovable object of international legal theory collided. Allowing persistent objection to *jus cogens* norms would undermine the superior nature of those norms, turning them into ugly, regular rules; if *jus cogens* norms could steamroll even otherwise legitimate objections, then that would undermine the idea that persistent objection acted to protect State consent. In paragraph 142 of his report, the Special Rapporteur had rightly observed that the key question was whether, in the event that the international community as a whole accepted and recognized the non-derogability of the norm in question, a persistent objector State would be bound by that norm. Although he fully agreed with the Special Rapporteur that once a peremptory norm emerged, all States, without exception, were bound by it, it remained unclear exactly how many States would need to object for the norm to fail the test of acceptance and recognition of the non-derogability. If, as Mr. Nguyen had suggested, three quarters of the countries of the world needed to accept a new norm as a *jus cogens* norm for it to be accepted and recognized as such, that put at around 50 the number of States that would need to object to it for it not to be accepted as a *jus cogens* norm. By contrast, the Russian Federation had stated in the Sixth Committee at the seventy-second session of the General Assembly that for a *jus cogens* norm to emerge, recognition by all States was required. Mr. Kolodkin and some of the other members of the Commission had been leaning toward the opinion that “a very large majority”, representative of all regions, all groups of States and all legal systems, was necessary. Meanwhile, China had indicated that the standard of “a very large majority” was as imprecise as “a large majority”, while Romania had understood “a very large majority” to mean “quasi-unanimity”. He apologized for reopening the previous year’s discussion of the criteria for identifying *jus cogens*, but they were tightly intertwined with the question of the persistent objector State. He suggested that the Drafting Committee could reflect on ways to more strictly distinguish between the inadmissibility of objections to an existing peremptory norm and objections to the norm during its formation.

Turning to draft conclusion 17 (Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations), he cautioned that it needed to be carefully studied in light of the diverging opinions as to whether the resolutions of international organizations could be viewed as a source of law; the need to study the consequences of *jus cogens* norms for decisions of

international organizations in light of the relevant constituent instruments; the unique nature of resolutions of the Security Council, which were rooted in Article 103 of the Charter of the United Nations; and the theoretical nature of the discussion in the absence of relevant State or international court practice, despite its potential consequences having entirely practical and rather dangerous implications. According to the draft conclusion, States and courts could decide whether to comply with a resolution of an international organization, including that of the Security Council, based on their own assessment of the resolution's compliance with peremptory norms. States that wished to avoid their obligation to comply with binding decisions could interpret the draft conclusion as an invitation to do just that, on the basis of such *jus cogens* norms as the prohibition against the use of force, the right of people to self-determination, or non-interference in the internal affairs of States. A signal of that sort from the Commission could have a negative impact on the work of the Security Council to promote international peace and security, which already faced well-known challenges, and on the overall effectiveness of international organizations.

When negotiating the draft of any document in any international organization, all delegations were always convinced that they were acting in accordance both with peremptory and other norms of international law and with the objective of ensuring compliance with those norms. The draft conclusion should be reworded to reflect that reality by using more descriptive wording and by emphasizing the role that *jus cogens* norms played in guiding States in the adoption of resolutions in the context of international organizations.

Draft conclusions 19, 20 and 21 pertained to State responsibility and largely incorporated the relevant provisions of the Commission's articles on responsibility of States for internationally wrongful acts. Like Mr. Nguyen, he wondered why the report only addressed the responsibility of States and not that of international organizations, and expressed the hope that the draft conclusion could address that issue.

Draft conclusion 20 (Duty to cooperate) was based on articles 40 and 41 of the articles on State responsibility. In the commentary to article 41, it was stated that, because of the diversity of circumstances which could possibly be involved, the provision did not prescribe in detail what form that cooperation should take. Similarly, no emphasis had been placed on the measures States could undertake to prevent serious breaches. In that connection, it would be useful to consider once again the need for, and the content of, paragraph 3, which concerned the various forms

cooperation could take. In particular, all references to the primary and essential international collective security system, including the Security Council, which had been rightly mentioned by the Special Rapporteur in paragraph 90 of his report, had been omitted from the text, which used instead the phrases "institutionalized cooperation mechanisms" and "ad hoc cooperative arrangements". Moreover, the Committee against Torture had been cited in paragraph 91 of the report as an example of such a mechanism, whereas it was composed of independent experts and therefore could not be considered a mechanism that facilitated cooperation among States.

With regard to draft conclusion 21 (Duty not to recognize or render assistance), he suggested that a new paragraph should be added, drawing on the wording of the International Court of Justice in its advisory opinion in the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, which the Special Rapporteur had referenced in paragraph 100 of his report. In that opinion, the Court had said that "the consequences of non-recognition should not negatively affect or disadvantage the affected population and, consequently, that acts related to the civilian population, such as registration of births, deaths and marriages, ought to be recognized notwithstanding the breach."

Turning to draft conclusion 22 (Duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law) and draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*), he noted that they revived the discussion that had already taken place concerning draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction. It was his view that the issues raised in those draft conclusions, having to do with the criminal responsibility of individuals, lay outside the scope of the topic at hand. It was also impossible to comprehend why the focus was on those aspects in particular. Given that the specific consequences of certain *jus cogens* norms in connection with crimes under international law, such as the crime of genocide, were being considered, then it was unclear why the consequences of violations of other *jus cogens* norms, such as the right to self-determination, had not been included. During the contentious discussion of the topic of immunity, many arguments had been put forward against draft article 7. Mr. Kolodkin in particular had provided a detailed analysis and had proposed an alternative approach to the subject of that draft article.

The Commission's two-track consideration of the current topic was methodologically unjustifiable. The approach that had been put forward by the Special Rapporteur diverged from the one that had been taken by the Special Rapporteur on the topic of immunity and draft article 7. For example, while draft article 7 contained a finite list of crimes, draft conclusion 23 had been left open to interpretation, which made it even harder for the Commission to reach a consensus. The duplication of the work that was being done on the topic of immunity created a greater risk that the profound disagreements among the Commission's members, which had surfaced during the previous year's discussion of that topic, would reappear in the already-challenging discussion on the topic of *jus cogens*. The inability to come to an agreement on one conclusion could become a pattern, undermining the credibility of the Commission — an outcome that needed to be avoided at all costs.

He agreed with those who believed that proposals to allow for exceptions from immunity *ratione materiae* had no basis in current international law and did not reflect it or any sort of consistent trend in the practice of States or courts. Consequently, such exceptions were not suitable for inclusion in the draft conclusions, which by definition needed to reflect the law as it currently stood.

In light of the foregoing, he was of the view that draft conclusions 22 and 23 should not be sent to the Drafting Committee.

He thanked the Special Rapporteur for his extensive work in preparing the report and the draft conclusions, and assured him of his commitment to contribute constructively to the search for solutions to the challenging questions that made the topic all the more interesting.

Mr. Šturma said that the report was clear, concise and well documented; its length was fully justified by the important issues it addressed and the 14 new draft conclusions it contained. He generally agreed with the Special Rapporteur's approach and with his draft conclusions. At the previous session, he had supported both the general nature of peremptory norms of general international law and the criteria for the identification of such norms, as both were necessary to capture the elements distinguishing them from other norms of international law. All that had remained to give a complete picture had been to address all the legal consequences of *jus cogens*.

He agreed with the Special Rapporteur that various systematic approaches were possible and he had no problem with the approach taken in the report. In his view, what was important was to faithfully attempt to

address all possible consequences of peremptory norms, not only in the law of treaties but also beyond it. It was natural that the main areas where the consequences of *jus cogens* could be identified were treaty law and the law of State responsibility; the Commission's previous codification work was relevant in both areas. It was, however, equally important for the Special Rapporteur's legal analysis to focus also on other effects of peremptory norms, including their effects on individual criminal responsibility in international criminal law, jurisdiction of international courts, customary international law, and even Security Council resolutions in the light of Article 103 of the Charter of the United Nations. Not only were all those issues discussed in doctrinal writings, but they also presented important practical problems, including for the International Court of Justice and other courts and tribunals. The fact that international and national case law sometimes showed divergent views was no reason not to deal with those issues. All the aspects seemed to be more or less interrelated and as a whole they captured not only the consequences *stricto sensu* of peremptory norms but also the characteristic features of the development of contemporary international law. Rather than looking back to the past, the Commission should draw conclusions on matters of international law that were relevant in the present and for the future.

The draft conclusions concerning effects of *jus cogens* on treaties generally flowed from the relevant articles of the 1969 Vienna Convention. With regard to draft conclusion 10, paragraphs 1 and 2 were based on articles 53 and 64 of the Convention. Paragraph 3 was different in that it offered useful interpretive guidance, which was particularly helpful in regard to draft conclusion 17. In countries where the State was required by a constitutional provision to respect all its obligations under international law, such an interpretive rule was obvious and was followed by the Constitutional Court and other courts; moreover, direct conflicts between a treaty provision and a *jus cogens* norm, resulting in the nullity of the treaty, were extremely rare; it seemed that most such issues could be resolved by way of interpretation.

Accordingly, he also supported draft conclusions 11 and 12, the consequences of which again flowed from the Vienna Convention, and agreed with draft conclusion 13, which was based on the Commission's Guide to Practice on Reservations to Treaties. Draft conclusion 14 at first sight seemed more like a provision for an intended treaty; however, its careful wording as a recommendation on procedure, together with the analysis in the report, had convinced him that it was appropriate. The Vienna Convention itself contained

provisions on procedure, in articles 65 and 66 thereof. An individual State should not on its own take a final decision to invalidate a treaty by reference to a *jus cogens* norm.

With regard to draft conclusion 15, he supported the wording of paragraphs 1 and 2, and was particularly satisfied with paragraph 3 concerning the non-applicability of the persistent objector rule, which mirrored what had recently been formulated as a “without prejudice” clause in the draft conclusions on the identification of customary international law. He also agreed with draft conclusion 16.

Draft conclusion 17 was more controversial. He agreed that peremptory norms could also have consequences for binding resolutions of international organizations, including Security Council resolutions. For example, in the joined cases concerning *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, the European Court of Justice had not concluded that Security Council resolutions were not subject to *jus cogens*, but had set aside the effects of the binding Security Council resolution on the basis of a less convincing argument regarding the autonomy of the legal order of the European Union. However, he would prefer to replace the phrase “do not establish binding obligations” with the wording “do not apply if and to the extent that they conflict with a peremptory norm of general international law”, as that seemed to capture more clearly the idea that a resolution might be legally binding in all regards except where it conflicted with a *jus cogens* norm. The interpretive guidance provided in paragraph 2 was helpful, given that most issues could be resolved by interpretation. He also supported the content of draft conclusion 18. *Jus cogens* norms and *erga omnes* obligations were indeed different concepts: *jus cogens* norms established obligations *erga omnes*, but not all obligations *erga omnes* were a consequence of *jus cogens*. That could be better explained in the commentary.

As for draft conclusions 19, 20 and 21 on the effects of *jus cogens* in the law of State responsibility, he found them acceptable, since they flowed from the articles on State responsibility; however, some issues might be clarified in the commentary.

With regard to the issue of individual criminal responsibility in international criminal law, the analysis in paragraphs 112 to 131 of the report was very important. Although the matter was covered in two draft conclusions, namely, draft conclusion 22 (Duty to exercise domestic jurisdiction over crimes prohibited by

peremptory norms of general international law) and draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*), they should be read in context. The rule of irrelevance of official position was already well established and its inclusion in the draft articles on crimes against humanity, adopted by the Commission on first reading at its sixty-ninth session in 2017, was just one example of a category of crimes prohibited by *jus cogens* norms. While paragraph 2 of draft conclusion 23 on the non-applicability of immunity *ratione materiae* was perhaps more problematic for some members, he considered that all the aspects were interrelated and paragraph 132 of the report put them into context. If a State dutifully exercised domestic jurisdiction, not only by establishing its jurisdiction, but also by investigating and prosecuting international crimes in violation of *jus cogens* norms, that State should have no problem with the exception to immunity, simply because the issue of a waiver of immunity would not arise. That interrelationship and the exceptional nature of non-applicability of immunity should be reflected in the commentary. The Special Rapporteur had correctly distinguished the issue of non-applicability of immunity *ratione materiae* from cases before the International Court of Justice dealing with immunity *ratione personae* and from cases concerning civil jurisdiction, and had discussed only aspects relating to criminal jurisdiction, with respect to the very limited scope of breaches of *jus cogens* norms that also constituted international crimes. Immunity *ratione materiae* protected the official acts of States rather than persons as such. That being so, and if the effects of *jus cogens* included the nullity of a treaty or a unilateral act of a State in conflict with a *jus cogens* norm, as well as the duty not to recognize or render assistance, as a matter of State responsibility, and the duty to exercise domestic jurisdiction, as a matter of international criminal law, there was no good reason why such acts contrary to *jus cogens* should be protected by immunity *ratione materiae*. He concluded by recommending the referral to the Drafting Committee of all the draft conclusions.

Mr. Murphy, thanking the Special Rapporteur for his third report on the topic and for his oral introduction of it, said that he did not object to the length of the report. Given the Special Rapporteur’s admission in his oral introduction that the subject being addressed was “challenging, controversial and sensitive” and in view of the number of draft conclusions being proposed, the report perhaps should have been longer. While it contained much to admire, in several instances the analysis was not as thorough as it might have been.

The first cluster of proposed draft conclusions, 10 to 14, addressed the consequences of *jus cogens* for secondary rules of international law relating to the law of treaties. The draft conclusions were based on select provisions from the Vienna Convention and the Commission's 2011 Guide to Practice on Reservations to Treaties. There was no inherent problem in selectively aggregating provisions, but the manner in which it had been done meant that draft conclusions 10, 11, 12 and 14 did not reflect the original balance expressed in part V of the Vienna Convention. One structural problem was that the titles of draft conclusions 10 and 12 referred only to invalidity, while the corresponding articles in the Vienna Convention were in both part V, section 2 (Invalidity of treaties) and part V, section 3 (Termination and suspension of the operation of treaties). It was incorrect to indicate that the draft conclusions addressed only invalidity when in reality their provisions concerned both invalidity and termination.

There were also other, even more difficult, structural problems with the draft conclusions. Article 42 (Validity and continuance in force of treaties) of the Vienna Convention made it clear that the possibility of a treaty being found invalid under part V, section 2, or terminated under part V, section 3, could occur only in accordance with the provisions of the Convention. Those provisions included the procedure set out in part V, section 4. Pursuant to article 65, that procedure must begin with a treaty party notifying the other parties that it was invoking a ground for impeaching the validity of a treaty or terminating the treaty. The other parties then had the opportunity to respond. In accordance with article 67, such notification must be made in writing by a duly authorized official. The Special Rapporteur had not included any of those procedural provisions in the draft conclusions and had not provided an explanation for their omission.

Furthermore, in accordance with article 66 of the Vienna Convention, if other parties objected to the claim that a treaty was void or had been made void by *jus cogens*, the dispute could be submitted to the International Court of Justice or to arbitration after a period of 12 months. That part of the procedure was partially reflected in draft conclusion 14, but was described as a "recommended procedure". It was true that the Commission could not grant jurisdiction to the International Court of Justice. However, characterizing as a recommendation a step that was actually legally binding on States parties to the Vienna Convention in treaty relations among themselves was problematic. Moreover, in his report the Special Rapporteur only briefly attempted to disentangle the Vienna Convention obligations at issue from customary international law,

which did not necessarily have to be in line with the Vienna Convention.

A more significant problem was that the draft conclusions did not set out a definitive process for establishing or rejecting a party's assertion that a treaty was invalid or terminated as a result of conflict with a *jus cogens* norm, if other treaty parties raised objections. That created the precise problem that States had been determined to avoid when introducing the concept of *jus cogens* into the Vienna Convention: the potential for a State party to invoke *jus cogens* in a cavalier manner, without there being any way to determine whether the party's assertion was correct. It must be made clear in the draft conclusions that a unilateral assertion by a party that a treaty was void owing to conflict with a *jus cogens* norm did not, in and of itself, provide a basis for that party to abandon the treaty. Some other means must be found to establish whether the assertion was correct or incorrect.

It should also be noted that, in the Vienna Convention, the provisions on procedure in part V, section 4, preceded the provisions concerning the consequences of the invalidity or termination of a treaty, which were in part V, section 5. Thus, it was only after the appropriate procedure had been followed and the invalidity or termination of the treaty duly established, either by non-objection or through dispute settlement, that the consequences of that invalidity or termination were considered. However, the structure of the draft conclusions in the report inverted that order, as the consequences were addressed in draft conclusion 12 and the procedure in draft conclusion 14. By both its placement and its terms, the procedure set forth in draft conclusion 14 was downplayed almost to the point of vanishing, even though that procedure was a critical component of the overall structure of part V of the Vienna Convention, in particular with regard to *jus cogens*. The Special Rapporteur's divergence from the structure of the Convention might explain his apparent view that the terms "void" and "invalid" were interchangeable, while, in the Vienna Convention, invalidity was associated with the impeachment by a treaty party of the validity of a treaty and a treaty could be considered void only if its invalidity had already been established.

Turning to the individual draft conclusions in the first cluster, he suggested that the first paragraph of draft conclusion 10 and the first paragraph of draft conclusion 11 should be combined to create a new draft conclusion 10 focused solely on invalidity. The second paragraphs of the two draft conclusions could then be combined to create a new draft conclusion 11, on termination. Considering draft conclusion 10 as it currently stood, he

said that the first sentence of paragraph 1 was unobjectionable, as it essentially reflected the first sentence of article 53 of the Vienna Convention. The second sentence of paragraph 1 did not appear in the Vienna Convention and, in his view, its current placement in draft conclusion 10 was not desirable, not because it was redundant, as the Special Rapporteur had suggested, but because it addressed consequences, which should be covered by a later draft conclusion. With regard to paragraph 2, it was not clear to him why the first sentence did not reflect the language of article 64 of the Vienna Convention. The second sentence should also be moved to a later draft conclusion on consequences of the invalidity or termination of a treaty. Paragraph 3 was unrelated to invalidity or termination and, if it were retained, should appear in a separate draft conclusion on the interpretation of treaties. Unlike Mr. Saboia and perhaps Mr. Zagaynov, he did not object to the content of that provision, as he considered that it was helpful to indicate, somewhere in the text, that ambiguous treaty provisions should be interpreted in a way that did not conflict with *jus cogens*. He also had no objections to the content of draft conclusion 11.

Draft conclusion 12 would be better placed after the provisions on procedure currently contained in draft conclusion 14, since it dealt with the consequences that arose once it had been established that a treaty was invalid or had terminated. It seemed strange that the draft conclusion focused on only two relevant provisions of the Vienna Convention, namely article 71 (1) (a) and 71 (2), to the exclusion of articles 69 and 70. The Special Rapporteur seemed to believe that articles 69 and 70 dealt with situations that did not involve *jus cogens*, but that was not the case; they covered all situations of invalidity and termination. Article 71 then addressed certain supplementary points specifically related to conflicts with *jus cogens* norms. In that connection, it would be appropriate to replicate article 71 in its entirety in the draft conclusions, rather than reflecting only parts of it.

Draft conclusion 13 was very similar to guideline 4.4.3 of the Commission's Guide to Practice on Reservations to Treaties, but it contained some unexplained differences. He had doubts about equating in value the language of the Vienna Convention and the language of the Commission's Guide to Practice. However, any draft conclusions that were based on the Guide to Practice should remain faithful to that text, unless there was a convincing reason to change the language. Furthermore, the placement of draft conclusion 13 was curious. It was preceded and followed by provisions on invalidity and termination drawn from the Vienna Convention, which gave the

impression that the provisions of draft conclusion 13 were part of the procedure envisaged in draft conclusion 14. If that was the intent, the Special Rapporteur had not sufficiently explained why a dispute concerning a reservation to a treaty should be submitted by States to the International Court of Justice, since that was not envisaged in either the Vienna Convention or the Commission's Guide to Practice. If that was not the intent, draft conclusion 13 should be moved.

Draft conclusion 14 should be amended to include all the relevant steps set forth in part V, section 4, of the Vienna Convention, and to differentiate between treaty obligations deriving from the Vienna Convention and comparable obligations arising under customary international law. It should also be moved to precede the draft conclusion concerning the consequences of treaties that were invalid or terminated owing to a conflict with *jus cogens*.

Draft conclusions 15 to 17 concerned the consequences of *jus cogens* for secondary rules of international law relating to other sources of international law. He wished to raise three general points before turning to the individual draft conclusions. First, it was curious that the Special Rapporteur had chosen to propose draft conclusions relating to customary international law, unilateral acts and acts of international organizations but not general principles of law. The implication was that a general principle of law that conflicted with a peremptory norm of general international law might nevertheless be valid.

Secondly, he had doubts about the lack of a parallel structure in the three draft conclusions. Paragraphs 1 and 2 of draft conclusion 15 were based on the concepts expressed in articles 53 and 64 of the Vienna Convention. They concerned the invalidity *ab initio* of customary rules and the termination of such rules at some point after they had emerged. If that structure was deemed appropriate with regard to sources of international law other than treaties, it should presumably also be applied in the provisions on unilateral acts, acts of international organizations and any other sources that might be covered in the draft conclusions, such as general principles of law. Similarly, paragraph 2 of draft conclusion 17 indicated that resolutions of international organizations should be interpreted in a manner consistent with *jus cogens* norms, but there was no such provision in respect of the other sources of law. If that provision on interpretation was deemed appropriate for resolutions of international organizations, it should presumably also apply in the case of customary international law, unilateral acts and any other source of international law, including general principles of law.

Thirdly, the question of who had the authority to decide that a particular source of international law in a given situation conflicted with a *jus cogens* norm loomed as large in the current cluster of draft conclusions as it did in those relating to treaty law. Allowing a State, or any other actor, to unilaterally claim that a conflict with *jus cogens* existed in order to escape its obligations under customary international law or any other legally binding rule of international law would be dangerous and destabilizing. The States negotiating the Vienna Convention had sought to address that danger through a procedure of invocation, response and dispute settlement, but the Special Rapporteur had done nothing of the kind in the draft conclusions.

With regard specifically to draft conclusion 15, he, like Mr. Zagaynov, was struck by a conceptual problem that the report mentioned but did not analyse or resolve. Draft conclusion 3 [3 (1)], as provisionally adopted by the Drafting Committee, followed the Vienna Convention in providing that a *jus cogens* norm could be modified by a subsequent norm having the same character, and it was stated in draft conclusion 5 that customary international law was the most common basis for *jus cogens*. If both of those statements were true, there was no apparent reason why a rule of customary international law that conflicted with *jus cogens* could not arise, provided that the new customary rule was accepted and recognized as a norm from which no derogation was permitted. If that possibility was accepted, it should be recognized in draft conclusion 15.

The meaning of the phrase “a unilateral act” in draft conclusion 16 should be clarified. If the intention was to refer to unilateral declarations of States capable of creating legal obligations, which were the subject of the Commission’s 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, that should be made explicit. If, however, the term was meant to encompass all unilateral acts of States, it would mean that the draft conclusion was addressing not a source of international law but rather the totality of State action, so long as that action was not collective in nature. Since the draft conclusion did not explicitly refer to States, a third possible interpretation was that “a unilateral act” meant any unilateral act by any actor. If that were the case, draft conclusion 17 would be redundant.

Turning to draft conclusion 17, he said that in recent years the Commission had considered the legal acts of international organizations in the context of its work on identification of customary international law, provisional application of treaties, subsequent agreements and subsequent practice in relation to

interpretation of treaties, and responsibility of international organizations. The Commission had often referred to the possible existence of legal acts of intergovernmental conferences. While such references had usually been supported by very little practice, it would nevertheless be appropriate, for the sake of consistency, to refer in draft conclusion 17 to such legal acts, not just those of international organizations. The scope of the draft conclusion should therefore be expanded to cover relevant acts of intergovernmental conferences, given that such conferences were empowered under treaties to take decisions that had legally binding effects on States. Furthermore, the draft conclusion should cover any act of an international organization capable of creating legal obligations. By referring only to “binding resolutions” of international organizations, it currently failed to take into account other binding legal acts such as regulations, directives and decisions of the European Union. As indicated by Mr. Zagaynov, the specific reference to the Security Council of the United Nations was inappropriate. The Security Council was just one of many organs capable of performing legally binding acts, and there was no reason for it to be singled out in the draft conclusions. He also considered that the issue of separability was pertinent and should be taken into account in the draft conclusion. He saw no reason for an entire resolution to be regarded as incapable of creating binding legal obligations simply because one of its provisions was in conflict with a *jus cogens* norm.

Draft conclusions 18 to 21 concerned the consequences of *jus cogens* for secondary rules of international law relating to the law of State responsibility. The basic proposition expressed in draft conclusion 18 seemed to be correct. However, it should be noted that the Commission’s 2001 articles on State responsibility did not contain the term “*erga omnes*”. Moreover, it was not clear from the phrasing of the proposed text whether the term “breach” referred to a breach of obligations *erga omnes* or a breach of *jus cogens*. He proposed the following wording, which was closer to that of article 48 of the articles on State responsibility: “Any State is entitled to invoke the responsibility of another State for its breach of a peremptory norm of general international law (*jus cogens*).”

Turning to draft conclusion 19, he said that paragraph 1 reflected article 26 of the articles on State responsibility and appeared to be correct. Paragraph 2, which addressed the temporal application of the provision, was also sensible.

Draft conclusions 20 and 21 drew heavily on articles 40 and 41 of the articles on State responsibility.

Paragraph 1 of draft conclusion 20 essentially replicated article 41 (1), while paragraph 2 echoed, but was not identical to, article 40 (2). He recommended bringing paragraph 2 into line with the articles on State responsibility by amending it to read as follows: “A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.” Paragraph 3 did not appear in the articles on State responsibility; rather, it drew inspiration from article 7 of the Commission’s articles on the protection of persons in the event of disasters.

Draft conclusion 21 was based on article 41 (2) of the articles on State responsibility, but the draft conclusion referred to “a breach” where the articles referred to “a serious breach”. He did not find the reasons given in the report for the omission of the word “serious” to be convincing. The Special Rapporteur argued that draft conclusion 21 did not require positive conduct by States and that therefore the threshold did not need to be as high as it was in draft conclusion 20, which required positive conduct in the event of a “serious breach”. However, the comparable provision in the draft articles on State responsibility did not require positive conduct either. The Special Rapporteur also stated, in paragraph 101 of the report, that some of the case law and resolutions supporting the draft conclusion flowed from the character and importance of the rules in question but not from the intensity or the systematic way in which the breach was carried out. However, the articles on State responsibility drew on many of those same sources while maintaining the threshold of a “serious” breach. The Special Rapporteur’s report also referred to many of the same sources to support the higher threshold in draft conclusion 20, which made it clear that those sources did not point definitively in the direction of a lower threshold. In short, he considered that the language of draft conclusions 18 to 21 should be brought into line with that of the articles on State responsibility, since they were based on that text and there was no compelling reason to depart from it, particularly in the case of draft conclusion 21.

Draft conclusions 22 and 23 addressed issues of criminal prosecution under national law and were very different in nature from the other draft conclusions. All the others concerned secondary rules of international law and addressed the ways in which *jus cogens* interrelated with sources of international law or affected rules on State responsibility. In contrast, draft conclusions 22 and 23 related to primary rules of international law and focused solely on the area of international criminal law. Furthermore, they did not deal with inter-State relations but rather with the conduct of a State within its national criminal

jurisdiction. The draft conclusions were therefore inappropriate, given that the Commission’s objective was not to explain how *jus cogens* affected substantive rules on matters such as extradition, military intervention, the treatment of vessels that might be used for trafficking in persons, or even foreign sovereign immunity. That alone was reason enough to refrain from referring the two draft conclusions to the Drafting Committee. However, he also wished to draw attention to a number of substantive problems concerning the individual draft conclusions.

Draft conclusion 22 asserted the existence under international law of a duty on every State to exercise national criminal jurisdiction over offences prohibited by *jus cogens* that were committed on its territory or by its nationals. However, the report provided no credible evidence that State practice supported the existence of such a duty. Half of the world’s States had no statute on crimes against humanity and were therefore incapable of fulfilling such a duty. Moreover, the overwhelming majority of States had no national statute on the crime of aggression, and that was probably also the case with regard to a number of other crimes, such as apartheid, that were arguably prohibited by *jus cogens* norms. Thus, the practice of those States evinced no belief on their part that they had a duty to establish national criminal jurisdiction over those crimes, even at the territorial or national level. The report provided examples of States exercising national criminal jurisdiction in some circumstances, but those examples proved nothing if the acts concerned were carried out in implementation of a treaty. Moreover, the mere fact that a State exercised jurisdiction over crimes that were committed in its territory or by its nationals abroad did not prove that it felt bound by international law to do so.

The Commission had considered the same issue — and had been unable to resolve it — during its work on the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)”. While some treaties that addressed certain crimes required States parties to establish and exercise national jurisdiction in some circumstances, such obligations were treaty-based, including those that arose in the context of a violation of *jus cogens*, as the International Court of Justice had indicated in connection with the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

Draft conclusion 23 was even more striking, especially in light of the debates that had taken place at the Commission’s sixty-ninth session, in the plenary and in the Drafting Committee, concerning the topics “Immunity of State officials from foreign criminal jurisdiction” and “Crimes against humanity”. The draft

conclusion should not be referred to the Drafting Committee, as doing so would rule out the possibility of reaching a consensual outcome on the topic of immunity of State officials and would seriously jeopardize the chances of the adoption of a convention on crimes against humanity. The sparse case law on “exceptions” to the immunity of State officials, which had led to great difficulties and been the subject of much debate at the sixty-ninth session, had essentially been reproduced in the third report on *jus cogens*, accompanied by some novel arguments that were both incredible and misleading. The Commission’s difficulties on the topic of the immunity of State officials had also been reflected in the Sixth Committee’s discussions at the seventy-second session of the General Assembly, with delegations equally divided on the merits of the Commission’s work. Those difficulties had at least been limited by the decision taken at the outset of the Commission’s work on immunity to exclude from the scope of the topic the special rules of international law relating to persons connected with diplomatic missions, consular posts, special missions, international organizations, and military forces of a State. However, no such exclusion appeared in draft conclusion 23 on the current topic. At its sixty-ninth session, the Commission had been convulsed by the provisional adoption of draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) on the topic of immunity of State officials. However, the list of crimes in that draft article was at least limited to six, which were described in detail in an annex. No such limits appeared in draft conclusion 23. Certain members of the Commission who had supported draft article 7 on immunity had asserted that they were doing so in anticipation of procedural mechanisms that would prevent abusive and vindictive prosecutions at the national level. Again, no such mechanisms were envisaged in connection with draft conclusion 23. The Special Rapporteur had stated in his oral introduction that he hoped that the debate on draft conclusion 23 would take place under less tense circumstances than the debate on draft article 7 of the draft articles on immunity of State officials. He could not imagine why the Special Rapporteur thought that that would be the case. If draft conclusion 23 was referred to the Drafting Committee, it would give rise to at least as much controversy as there had been over draft article 7 of the draft articles on immunity, and probably more, since the implications of draft conclusion 23 were even more wide-ranging than those of draft article 7.

Draft conclusion 23 would also have a damaging effect on the Commission’s work under the topic “Crimes against humanity”, as it would send a strong signal that the Commission regarded it as settled law

that the functional immunity of all sitting and former government officials, including ambassadors, ministers of defence, envoys and military personnel engaged in relief operations, and the functional immunity of all representatives of international organizations, including United Nations peacekeepers and special representatives, whether arising under treaties or custom, would be stripped away in the face of any allegation of crimes against humanity brought before a national court. At its sixty-ninth session, the Commission had, after careful consideration, decided against including a provision on immunity in the draft articles on crimes against humanity. That had been the right decision, and he had believed that it had been taken in good faith on all sides. The Sixth Committee had also largely supported the decision. Yet now, through the back door, the denial of immunity had reappeared in an amplified form. He would not comment on whether the Special Rapporteur had been kind or wise in proposing draft conclusion 23 without consulting the special rapporteurs on other relevant topics. However, his conversations with representatives of Governments had left him convinced that if draft conclusion 23 were referred to the Drafting Committee and subsequently adopted, all hope that the Sixth Committee would consider the adoption of a convention on crimes against humanity might well be extinguished.

He concluded by reiterating that he supported the referral of all but the final two proposed draft conclusions to the Drafting Committee.

Mr. Park said that he wished to thank the Special Rapporteur for his report, which discussed the most challenging aspects of *jus cogens*, namely, consequences of peremptory norms of general international law in relation to treaties, State responsibility, individual criminal responsibility and other sources of international law, on the basis of abundant State practice, case law and doctrine. The discussion was particularly meaningful given that, in practice, courts and tribunals had not addressed in depth the legal consequences of the fulfilment of particular criteria for the qualification of a norm as *jus cogens*. All the draft conclusions seemed to be well structured. However, as mentioned by the Special Rapporteur in paragraph 161 of his report, it would be better to divide the draft conclusions into different parts, according to the logical context.

Most of the draft conclusions presented in the report were based mainly on the provisions of the Vienna Convention or on the Commission’s own work. He would discuss only those proposals that he considered new or original but first wished to make it

clear that he fully supported draft conclusion 23 as proposed by the Special Rapporteur.

Before discussing specific draft conclusions, he wished to stress the importance of clarifying the notion of “conflict”, a significant term referred to repeatedly in the draft conclusions. In view of the lack of related practice in courts and tribunals, questions might arise as to its exact meaning. As the Special Rapporteur had noted in paragraph 35 of the report, based on the ordinary meaning of the term, “conflict” with a norm of *jus cogens* would amount to (an impermissible) derogation. Guidance might therefore usefully be given to States regarding the elements they should take into account in deciding whether a treaty or a particular act was, as a matter of law, in conflict with a peremptory norm of international law. Questions might also emerge as to who should decide whether a treaty and such a peremptory norm were in conflict with one another; States might hold different views in that regard. For example, some States might consider certain acts of force to be a form of self-defence, while others might regard them as a violation of *jus cogens* norms. Such different interpretations and characterizations might create difficulties for the implementation of the draft conclusions on the topic. Although draft conclusion 14 suggested that States could refer any dispute regarding the existence of a conflict to the International Court of Justice, the Court’s decision would, as noted in the report, be only declaratory in nature; moreover, it would be difficult in practice to refer such a dispute to the Court, since that would require the consent of both parties. Further guidance or criteria for deciding whether there was, as a matter of law, a conflict between a treaty and *jus cogens* norms would therefore be helpful.

Turning to draft conclusion 10, he said that he agreed with the Special Rapporteur’s conclusion, in paragraph 3, that a treaty should, as far as possible, be interpreted in a way that rendered it consistent with a peremptory norm of general international law (*jus cogens*). The Special Rapporteur had explained the basis of the provision by reference to a fundamental rule of the international legal system, *pacta sunt servanda*, and the rule of interpretation that all treaties should be interpreted in good faith. The Special Rapporteur had also, in paragraph 56 of his report, noted the need to avoid what had been called the “draconian” impact of invalidating a treaty reflecting the true consensus of parties to a treaty. *Jus cogens* should indeed play a substantial guiding role in treaty interpretation; however, the approach taken by the Special Rapporteur could lead to a misuse of interpretation as a means of saving a treaty from invalidation. Almost all treaties

reflected a consensus and *pacta sunt servanda* applied to all treaties: consensus and *pacta sunt servanda* did not therefore provide the best basis for a draft conclusion concerned primarily with *jus cogens*. Ultimately, given the nature of *jus cogens*, the principle of *pacta sunt servanda* did not apply when there was a conflict with a *jus cogens* norm. Good faith, however, could serve as the basis for paragraph 3. The parties to a treaty, and also States not party to it, should view and understand the treaty in question within the structure of the international legal order, so that, even when some obscure aspect of the treaty might conflict with a *jus cogens* norm, it should be interpreted in good faith. Nevertheless, it was quite difficult to distinguish a case requiring mere treaty interpretation from a case calling for invalidation of the treaty. A case in point was the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, referred to in paragraph 62 of the report. The Front populaire pour la libération de la sagaia-el-hamra et du rio de oro (Front Polisario) had obtained an annulment of the Agreement before the General Court of the European Court of Justice; however, on appeal, the Grand Chamber had sought to interpret the Agreement in such a manner as to make it consistent with the right to self-determination, which was a good example of a *jus cogens* norm. Thus, it had first been annulled by the General Court, then later addressed by the Grand Chamber within the framework of treaty interpretation. He wondered what had led the Court to change its view. It would be important to study the zero-sum game between the annulment and the interpretation of a treaty in order to distinguish between them. Without further guidance, almost no treaties would ever be annulled on account of a conflict with a rule of *jus cogens*. While he supported the proposed paragraph 3, that issue needed to be clarified in order for the draft conclusion to effectively serve its purpose. The phrase “as far as possible” in the same paragraph was vague and consideration could be given to what further criteria should be established. While the Vienna Convention did set out basic rules of interpretation, requiring treaties to be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of the treaty’s object and purpose, those principles, and even the *pacta sunt servanda* principle, did not necessarily explain the extent to which the term “as far as possible” applied. Further clarification was needed, since there was a risk that States might misuse interpretation in that regard.

With regard to draft conclusion 11, the issue of severability seemed to demand clarification in respect of the formation of *jus cogens*. In paragraph 42 of the report, the Special Rapporteur had stated that, since the

validity of the treaty between its conclusion and the emergence of a new peremptory norm remained unaffected, the acts performed in reliance on the invalid treaty or treaty provisions prior to the emergence of the *jus cogens* norm should remain valid. That explanation was acceptable in theory, since such acts should not be affected retroactively. However, without further clear guidance on the formation of *jus cogens*, the concerned parties might contest when the *jus cogens* rule had been formed. One party might wish to date the emergence of the new peremptory norm as late as possible in order to protect acts performed in reliance on the treaty, while another party wishing to nullify such acts might seek to set the point of emergence earlier. In the absence of further clarification regarding the formation of the peremptory norm, paragraph 2 of draft conclusion 11 would therefore give rise to further complication.

With regard to draft conclusion 14, he wondered what could be done to overcome the strong reluctance of States to allow a dispute to be submitted to the International Court of Justice in the absence of the consent of all the parties thereto, as was already reflected in the reservations of many States to article 66 of the Vienna Convention. He would like to support the idea of general compulsory jurisdiction in the case of the identification of *jus cogens*, but did not consider that the international community was currently ready to follow. However, it was reasonable for the Commission to consider and stress the progressive development of the rule of *jus cogens*; perhaps it might brainstorm various ideas on the issue. A third paragraph could possibly be added to recommend that the International Court of Justice should be vested with a new type of advisory jurisdiction on *jus cogens*, since States might be less opposed to such an idea. In any case, the Commission might need to consider what measures could be taken to develop the rule of *jus cogens* one step further.

In draft conclusion 15, paragraph 1 placed a draconian prohibition on a nascent rule of customary international law. He recalled draft conclusion 5, paragraph 1, provisionally adopted by the Drafting Committee in 2017 and also referred to by Mr. Murphy, which stated: “Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*)”. The scope of every legal concept necessarily evolved over time, hand in hand with the profound structural changes experienced by the international community over the course of history on such issues as slavery versus anti-slavery, gender discrimination versus non-discrimination, *jus ad bellum* versus the prohibition of the use of force. The question therefore arose as to how to correctly determine whether or not an emerging rule of customary international law

was in conflict with a *jus cogens* norm. He reiterated the need to define the term “conflict” so as to clearly explain and reflect the gradual cultural, moral and legal changes affecting the international community.

With regard to paragraph 3 of draft conclusion 15, he recalled that draft conclusion 15, paragraph 3, of the draft conclusions on identification of customary international law, recently adopted on second reading, stated: “The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*)”. Given the nature of *jus cogens*, it was proper to state that the persistent objector rule was not applicable in relation to the current topic, as indeed had been affirmed by the Special Rapporteur. However, in draft conclusion 4 (Criteria for *jus cogens*) as proposed by the Special Rapporteur in his second report, it was stated that “To identify a norm as one of *jus cogens*, it is necessary to show that the norm in question meets two criteria: (a) It must be a norm of general international law; and (b) It must be accepted and recognized by the international community of States as a whole as a norm from which no delegation is permitted”. It was important to discuss what would happen after a rule of customary international law had become *jus cogens*, if a State had been accepted as a persistent objector at the stage of the formation of customary international law. He wondered whether the persistent objection would be abruptly denied. That question was based on the assumption that *jus cogens* was formed in two steps; first it was accepted as general international law and then it became *jus cogens*. It was, however, difficult to conclude that all cases of the formation of *jus cogens* in practice occurred in two such clear and distinguishable steps. That being so, he wondered whether the persistent objector principle did not apply to emerging norms that had the potential to become *jus cogens* norms. There might be some emerging norms that were neither customary international law nor *jus cogens* but would very likely become both in the near future, whether consecutively or at the same time. Additionally, the concept of “as a whole” used in draft conclusion 4 was vague and should be analysed if it was to serve as a guiding standard. It might not be necessary to include the issue in the draft conclusion itself but it would be helpful to discuss or at least clarify it in the commentary.

One issue not dealt with in the report was that of countermeasures. Article 48 (1) of the articles on State responsibility read: “Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) ... ; (b) the obligation breached is owed to the international community as a whole”. All States were, by definition,

members of the international community as a whole, and the obligations in question were by definition collective obligations protecting interests of the international community as such. Article 50 (1) stipulated: “Countermeasures shall not affect ... (d) other obligations under peremptory norms of general international law”. As stated in the commentary to article 50, a peremptory norm, not subject to derogation as between two States even by treaty, could not be derogated from by unilateral action in the form of countermeasures. Consequently, the issues covered by articles 48 (1) (b) and 50 (1) (d) of the articles on State responsibility, although they were closely related to the subject matter addressed by draft conclusion 18 on obligations *erga omnes*, should be regarded as consequences of peremptory norms of general international law in relation to State responsibility and should be treated separately as such in the draft conclusions.

A second issue not dealt with in the report, that of liability, could have been taken into account in draft conclusion 19 (Effects of peremptory norms of general international law (*jus cogens*) on circumstances precluding wrongfulness), which discussed State responsibility. While the commission of an internationally wrongful act attributable to a State involved State responsibility, liability did not require the act in question to violate the international rule of law. He acknowledged that liability was a complicated issue, recalling that it had been addressed in relation to transboundary environmental effects in the Commission’s work on draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The nature of *jus cogens* was such that all possible situations should be discussed, including situations where the violation of a rule of *jus cogens* had consequences but no State was responsible or, at least, it was difficult to hold any State accountable. Such situations could arise in particular when the *jus cogens* norm in question was still emerging and/or was related to an environmental issue. It might be argued that the claims of intertemporal law should not allow alleged perpetrators to elude justice in ambiguous situations, especially when the rule involved became a new *jus cogens* rule shortly thereafter. However, that might not always be certain in all situations and the issue might therefore be usefully discussed. He recalled that the Commission had already shown a similar concern in its commentary to the former draft article 19 of the articles on State responsibility, entitled “International crimes and international delicts”, which had been adopted on first reading but then abandoned. In that commentary, the Commission had recognized that “States (...) are becoming more and more aware of the

serious harm which may result from certain activities and (...) realize the need for international law to set strict limits to an excessively dangerous exercise of freedom”.

For the future work on the topic, he supported the view that an illustrative list of norms should be provided, with explanations, to serve as examples not only of existing but also of possible future *jus cogens* norms. He also supported the Special Rapporteur’s proposed aim of adopting the draft conclusions on first reading at the Commission’s next session.

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

The Chair drew attention to the proposed programme of work for the second part of the Commission’s seventieth session, to be held in Geneva from 2 July to 10 August 2018. The programme, which was available in English and French, had been circulated to the members of the Commission.

Mr. Tladi said that he supported the proposed programme of work. However, he wished to highlight that it might not be possible for him to sum up the debate on the topic “Peremptory norms of general international law (*jus cogens*)” on Wednesday, 4 July 2018, as scheduled, depending on the number of statements made on Tuesday, 3 July 2018.

The Chair said that, if necessary, Mr. Tladi could sum up the debate on the topic of peremptory norms of general international law (*jus cogens*) during the week beginning Monday, 9 July 2018. He took it that the Commission wished to adopt the programme on that understanding.

It was so decided.

After the usual exchange of courtesies, **the Chair** declared the first part of the seventieth session closed.

The meeting rose at 12.30 p.m.