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Summary record of the 3323rd meeting

Topic:
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approached with extreme caution to ensure that it did not mislead, create confusion or prejudice the future development of the draft conclusions. Seen from that perspective, it was both insufficient and excessive. It was insufficient because paragraph 1 reproduced only some of the defining elements of *jus cogens* listed in article 53 of the 1969 Vienna Convention, and with different wording, as the expression “from which no derogation is permitted and which can be modified only” was replaced with “from which no modification, derogation or abrogation is permitted”. Although, in his oral introduction, the Special Rapporteur had explained why he was proposing that modification, the reasons given were not convincing or justified by the content of his first report. In addition, the draft conclusion did not reproduce the clause “which can be modified only by a subsequent norm of general international law having the same character”. The omission was unjustified, particularly since the two characteristics of *jus cogens* norms were cumulative, as demonstrated by the use of the conjunction “and” in article 53 of the Vienna Convention, and since neither the concept of *jus cogens* nor its legal nature could be understood solely on the basis of just one of them. In short, she considered that draft conclusion 3 should conform to the definition of peremptory norms in the 1969 Vienna Convention, which the Commission had not modified in the work that it had carried out since the adoption of that instrument on peremptory norms of international law, particularly in relation to the responsibility of States for internationally wrongful acts.

89. Draft conclusion 3, paragraph 2, contained very diverse elements that, in her opinion, could not be associated or confused with the elements that defined the nature of *jus cogens* in normative terms. While she agreed with the Special Rapporteur that norms of *jus cogens* protected the fundamental values of the international community, that characteristic was not a normative element of *jus cogens*, but the reason for its existence. Furthermore, she was not sure that the expression “hierarchically superior” properly defined the position that *jus cogens* occupied, in structural terms, in the international order, or the relationship of *jus cogens* with *jus dispositivum*. Lastly, the statement that the norms were “universally applicable” prejudged the outcome of the future debate on whether there existed a “regional *jus cogens*”, a matter that, as indicated by the Special Rapporteur himself, would be analysed in a subsequent report. In addition, she believed that the content of draft conclusion 3, paragraph 2, was not justified by the analysis in the first report. The paragraph should be deleted and the elements that it contained should be addressed in separate draft conclusions.

90. In conclusion, she recommended that the draft conclusions presented by the Special Rapporteur be referred to the Drafting Committee, on the understanding that the Committee would analyse them in the light of the observations made in the plenary meetings by all the members of the Commission, including those related to the deletion of draft conclusion 2 and draft conclusion 3, paragraph 2.

The meeting rose at 6.10 p.m.

3323rd MEETING

Tuesday, 19 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice- Chairperson)

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/689, Part II, sect. H,³⁸⁶ A/CN.4/L.878³⁸⁷)

[Agenda item 11]

1. The CHAIRPERSON, drawing attention to the revised programme of work for the third week of the second half of the session, which had been distributed to Commission members, said that Mr. Gómez Robledo, the Special Rapporteur on the provisional application of treaties, would introduce his fourth report on the topic on the morning of Wednesday, 20 July 2016. The report would be issued in all six official languages of the United Nations during the course of that day. In the meantime, advance versions of the report in English, French and Spanish had been circulated. He wished to emphasize that commencing a debate on a topic on the basis of advance versions of a report in only some of the official languages was an exceptional procedure, and he was grateful to Commission members for their flexibility in being prepared to proceed on that basis.

2. Mr. GÓMEZ ROBLEDO said that he, too, wished to thank members of the Commission for adapting to the difficult circumstances, of which he hoped there would be no repeat during the next quinquennium. To that end, it was important that the Planning Group saw to it that a very strong message reach the General Assembly recommending that measures be taken to enable the Commission to continue fulfilling its mandate in the future. The current page limits on documents had led to undue pressure being put on the Secretariat.

3. Mr. HMOUD, noting that some language versions of the Special Rapporteur's fifth report on the immunity of State officials from foreign criminal jurisdiction would not be ready until early August 2016, said that consideration by the Commission of reports that had not yet been translated into all the official languages should be regarded as exceptional and should not create a precedent.

³⁸⁶ Available from the Commission's website, documents of the sixty-eighth session.

³⁸⁷ *Idem*.

The Commission should request the Secretariat to draft a document, for consideration at the sixty-ninth session of the Commission, explaining the failure to issue certain language versions of documents in a timely fashion.

4. Mr. KITTICHAISAREE said that the six official languages of the United Nations should be treated equally. It was important for Special Rapporteurs to adhere strictly to the deadlines that the secretariat had set for the submission of documents so as to allow sufficient time for translation. He was concerned that the late issuance of certain language versions placed unfair burdens on the Special Rapporteurs concerned and members of Commission, who at times were forced to use valuable meeting time double-checking translations that had been done in haste.

5. Mr. FORTEAU said that he wished to endorse what had been said regarding the need for accurate, timely translations of documents and regarding the problems the Commission had experienced in that connection over the years. That said, it should be acknowledged that the Commission perhaps bore some responsibility for the situation. It had included nine topics on its agenda for the current session and had not always followed its own 2011 recommendation that the reports of Special Rapporteurs not exceed 50 pages.³⁸⁸ The Commission might therefore have somewhat overburdened the translation services. He agreed that the Planning Group should address the matter.

6. Mr. MURPHY said that the Commission found itself in a very exceptional situation and that it was not satisfactory for translations to be made available on the first day of the debate on a topic. Commission members needed time not only to read reports but also to analyse sources and conduct research. However, before sending any messages, the Commission should look into whether Special Rapporteurs were meeting the deadlines that had been set for the submission of reports.

7. The CHAIRPERSON said that, time permitting, it would be helpful to schedule a private meeting to discuss deadlines, page limits and other matters pertaining to the submission and consideration of reports. He took it that the Commission wished to adopt the revised programme of work as proposed by the Bureau.

It was so decided.

***Jus cogens (continued) (A/CN.4/689,
Part II, sect. H, A/CN.4/693)***

[Agenda item 10]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

8. The CHAIRPERSON invited the Commission to pursue its consideration of the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693).

9. Mr. NIEHAUS said that he wished to thank the Special Rapporteur for his valuable report on a topic that had, for a long time, required further study. The importance that States attached to the subject of *jus cogens* and their

interest in it were clear from their widespread approval of the Commission's decision to address the topic and the statements that they had made before the Sixth Committee.

10. Regarding the relationship between the natural law and positivist schools, he agreed with the Special Rapporteur's assertion in paragraph 42 of his first report that the work of the Commission should be based on a sound and practical understanding of the nature of *jus cogens*, which necessitated a study of some of the theoretical bases that had been advanced. While the Special Rapporteur ably avoided trying to provide a solution to the theoretical debate, he did not deny its importance. Personally, he agreed with the view cited in paragraph 59 of the report that *jus cogens* was best understood as an interaction between natural law and positivism.

11. Beginning in paragraph 61 of his first report, the Special Rapporteur correctly stated that article 53 of the 1969 Vienna Convention contained the basic elements of *jus cogens* norms, which were norms of general international law that were recognized by the international community and from which no derogation was permitted. In addition, practice and writings revealed that such norms were universally applicable, were superior to other norms of international law and protected the fundamental values of the international community. He had reservations about the notion of regional *jus cogens*, which in his view was not only inappropriate but even potentially dangerous in that it could lead to thoughts of subregional, multinational or bilateral *jus cogens*, something that was contrary to the essence of *jus cogens*.

12. Given that the fundamental values of the international community were not static and could evolve over time, it was essential to stress that *jus cogens* had the potential to transform the legal order as a whole and, by extension, international society. It was, for example, possible that *jus cogens* norms could emerge, in the not-too-distant future, in relatively new fields such as environmental protection. The transformative potential of *jus cogens* therefore warranted further detailed study.

13. Although the proposal to provide an illustrative list of *jus cogens* norms had met with some criticism and opposition, such a list would be highly desirable as it would help shed light on the characteristics of *jus cogens*. Although such a list did not yet exist, it was possible, on the basis of the elements identified above, to have a fairly clear idea of what it would include. For example, there was no doubt that the prohibition of genocide, torture, racism and apartheid, the right to self-determination and fundamental norms of humanitarian law were part of what should be understood by "*jus cogens*".

14. He agreed with the Special Rapporteur that draft conclusions were the most appropriate format for presenting the Commission's work. The conclusions should reflect current law and practice concerning *jus cogens*; unnecessary theoretical debates should be left aside.

15. Turning to the draft conclusions, he said that, in the Spanish version at least, draft conclusion 1 was confusing and more of a statement of intent than a conclusion. It should therefore be redrafted, as necessary. The text of

³⁸⁸ See *Yearbook ... 2011*, vol. II (Part Two), p. 176, para. 372 (b).

draft conclusion 2, paragraph 1, was acceptable. In draft conclusion 2, paragraph 2, he would prefer the opening phrase to refer to "An exception to the provision contained in the previous paragraph" rather than to "An exception to the rule set forth in paragraph 1". However, he would leave the matter in the hands of the Drafting Committee. He had no objection to draft conclusion 3, which was very clear, appropriate and undoubtedly the most important of the three proposed draft conclusions. In view of its importance and for reasons of logic, he proposed reversing the order of draft conclusions 2 and 3. Provided that his proposed changes were taken into account, he supported the referral of the three draft conclusions to the Drafting Committee.

Mr. Nolte, First Vice-Chairperson, took the Chair.

16. Mr. COMISSÁRIO AFONSO said that the first report was a model piece of scholarship and research and presented a succinct discussion of the many complex issues involved. The statements made by Member States in the Sixth Committee had shown the importance that they attached to the matter. As it was the first time since the adoption of the Vienna Convention on the Law of Treaties in 1969 that the Commission had addressed the subject in depth, care must be taken to ensure that the result could not be interpreted as deviating from that text. In the analysis of the theoretical basis presented in the first report, both the tension between natural law and positivist theories and the conclusion drawn in that respect were of particular interest. As other members of the Commission had said, the two approaches were not contradictory and could both be used to explain the concept of *jus cogens*.

17. He agreed with the Special Rapporteur that the Commission should not depart from its traditional method of work based on State practice, jurisprudence and writings; the particular weight to be accorded to each in the final output would necessarily vary. Although the Commission was divided on the question of the preparation of an illustrative list of *jus cogens* norms, such a list was important and necessary because substance needed to be given to the concept of *jus cogens*, which enjoyed quasi-universal acceptance and was no longer seriously challenged. Since the signing of the 1969 Vienna Convention, the legal structure of the international community had changed enormously and had developed in ways that called for certainty and security in the present international legal order. A global society needed global norms. It would be hard for Member States to understand that the Commission could have engaged in progressive development of *jus cogens* based solely on its definition and other theoretical matters, without mentioning and listing norms with the status of *jus cogens*. As the Special Rapporteur stated in paragraph 73 of his first report, the essential character of the work on the topic should be to clarify the state of the law based on current practice.

18. The implications of the notion of the universal applicability of *jus cogens* norms set out in paragraph 68 of the first report, namely that the doctrine of the persistent objector was not applicable to *jus cogens* and that *jus cogens* norms did not apply on a regional or bilateral basis, perhaps resulted from too close a parallel being drawn between customary international law and

jus cogens. It was a matter that deserved further consideration in future reports. A careful reading of article 53 of the 1969 Vienna Convention and Article 38, paragraph 1, of the Statute of the International Court of Justice showed that those articles had only two words in common, namely "accepted" and "recognized". While the scope of the Statute of the International Court of Justice was clearly limited to a certain category of States, article 53 of the 1969 Vienna Convention stated that a peremptory norm of general international law was a norm accepted and recognized by the international community of States as a whole. To extract from that text the notion of a regional *jus cogens* would require an enormous academic exercise, which might erode rather than reinforce the Vienna regime and ultimately lead to legal relativism and further fragmentation of international law. Peremptory norms of a regional character were quite acceptable and might well exist, but they did not on that basis qualify as *jus cogens* norms; the latter had, among other things, to be accepted and recognized by the international community as a whole. In order to be so accepted and recognized, the value requiring protection must be not only of a universal character, but also a matter of fundamental human concern. The same reasoning held true, *mutatis mutandis*, with respect to the question of the persistent objector, which, in his opinion, had no place in *jus cogens*.

19. Regarding the final product, he agreed with the Special Rapporteur that draft conclusions were the most appropriate outcome for the Commission's work on the topic. The three draft conclusions proposed in the first report, although not uncontroversial, should all be sent to the Drafting Committee in the light of the comments that followed. Draft conclusion 1 was acceptable in terms of its content; as to its form, the Commission should follow the approach adopted for the topic of protection of the environment in relation to armed conflicts. If it was considered that the provision did not deal with the scope of the topic as such, it would need to be renamed. Draft conclusion 2 was unnecessary; the distinction it sought to draw between *jus cogens* and *jus dispositivum* could be made in the commentary. He agreed with the comments made by Mr. McRae with respect to draft conclusion 2. He endorsed draft conclusion 3, which was of crucial importance. However, with regard to paragraph 1 thereof, the Commission should be cautious in its approach and not depart from article 53 of the 1969 Vienna Convention; if necessary, paragraph 1 should reproduce the text of article 53, with minor adaptations. He supported the main thrust of paragraph 2, which was well founded; in fact, it should stand as a separate draft conclusion.

20. Mr. KAMTO said that he wished to commend the Special Rapporteur on his remarkable first report, in particular chapter III thereof, which presented an overview of the historical evolution of the concept of *jus cogens* and formed a good starting point for discussion of the subject.

21. In contrast to most of the other subjects dealt with by the Commission, the topic of *jus cogens* was purely conceptual; consequently, the theoretical questions that it raised could not be ignored or dealt with in a cursory manner. It was only on the basis of a clear understanding of how a legal norm came to be considered as *jus cogens* that the nature of the latter could be discussed. Despite

what might have been stated in the literature, *jus cogens* was not and could not be a technical norm. Rather, it was a value norm that was enshrined in law; it was not necessarily a moral norm and the sphere of values to which it belonged was of little importance. That was the meta-juridical source of the *jus cogens* norm, not the *instrumentum* of the rule, and it was to that question that the discussion concerning the nature of *jus cogens* sought to find an answer. The *instrumentum* could be either a treaty or custom, while the meta-juridical source could be religious, philosophical, deduced from natural logic or reason, or linked to the emergence of an international public order.

22. The Special Rapporteur was thus no doubt right to consider the two main legal theories of natural law and legal positivism. It was not a matter of re-examining those theories or their component parts, but rather of taking them as a starting point to explain the basis of legal normativity, either to try to identify the origin of *jus cogens*, or to draw out its characteristic features as compared to other, “ordinary”, rules of law. On that point, there was a certain lack of clarity regarding the Special Rapporteur’s understanding of the concept of “nature”, inasmuch as he referred, in paragraph 42 of the first report, to the concept of the “foundations” of *jus cogens*, while, in paragraph 43, he spoke of its “role” beyond the 1969 Vienna Convention. Technically, article 53 of the Convention should certainly form the starting point of the study; however, although that article explained how a norm of general international law became a peremptory norm, it did not explain why such a norm came to have the particular characteristic of rendering void any treaty that conflicted with it. If that question were not addressed, the emergence of *jus cogens* would be limited to cases in which such a norm was provided for in a treaty, where it was a clear expression of the will of the States concerned. However, that would not explain why a customary norm should become *jus cogens*.

23. To establish why only some rules of customary international law or general international law became *jus cogens*, a distinction had to be made between those *jus cogens* rules that arose from treaties and those that emerged from customary international law or general international law. In the former case, a norm became a *jus cogens* norm when it was designated as such by a treaty to which the international community of States as a whole was party. However, a treaty norm that was not designated as *jus cogens* in the treaty concerned could be declared as such on a customary basis by an international court in a dispute submitted to it, as had happened with the rule on the prohibition of torture through the judgment of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Anto Furundžija* case, referred to in paragraph 55 of the first report.

24. A norm of customary law origin could become *jus cogens* on the basis of article 66 of the 1969 Vienna Convention, which allowed the International Court of Justice to decide on the peremptory nature of a norm. However, it could also be argued that a norm of customary international law or general international law was peremptory because it expressed a fundamental value of the international community of States.

25. In his view, the two ideas should be combined. If, as some members had said, non-treaty *jus cogens* should be determined on the basis of practice, it would not be clear why a practice should become a legal rule or, *a fortiori*, *jus cogens*. Even if *opinio juris* were added to the requirement of practice, it would still identify only a customary rule, not a *jus cogens* rule. In the context of the present topic, reference should be made to practice accompanied by *opinio juris* of a peremptory nature, which could perhaps be called *opinio juris cogens*.

26. With respect to the second theoretical issue, the idea of the superiority of *jus cogens* over other norms of international law, mentioned in paragraph 63 and the following paragraphs of the first report, he agreed with other members that no convincing basis had been provided for such a hierarchy of norms. Such hierarchy was essentially based on the distinction between *jus cogens* and *jus dispositivum*. However, in the classical theory of international law, that distinction was grounded in the origin of norms, not their legal force or scope. He agreed with the statement in paragraph 66 of the first report that States could not escape from *jus cogens* by agreement. However, according to article 53 of the 1969 Vienna Convention, a norm of *jus cogens* could be modified by a new norm of *jus cogens*. If the superiority of *jus cogens* were recognized, it would be tantamount to saying, for example, that it always prevailed over any non-*jus cogens* rule, including in procedural matters. However, such an idea could not be argued in the light of the judgment of the International Court of Justice of 3 February 2006 in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, in which the Court had stated that “the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties” (para. 125 of the judgment).

27. A third theoretical question linked to *jus cogens* as a customary law rule was that of the persistent objector. To accept the idea of persistent objection as a way of evading the application of *jus cogens* would amount to departing from the provisions of article 53 of the 1969 Vienna Convention, which stated that a peremptory norm of general international law was a norm from which no derogation was permitted and which could be modified only by a subsequent norm of general international law having the same character.

28. The provisions of article 53 of the 1969 Vienna Convention also argued against the fourth theoretical question raised, that of the possibility of regional *jus cogens*. The States of a given region could use whatever term they wished to describe the rules they established to impose obligations on one another, without those rules being on the same level as *jus cogens* in the sense of article 53. Most *erga omnes* obligations established at the regional level could indeed be regarded as *jus cogens* by and for the States concerned; however, like any other non-peremptory rule, they would be rendered void if they conflicted with a peremptory norm of general international law and they could not be applied to third party States outside of the region concerned.

29. As to methodological issues, the Special Rapporteur should have begun his study of the topic by clarifying its key terms. Thus, he should have defined the concept of *jus cogens* in relation to *erga omnes* obligations, on the one hand, and intransgressible norms and non-derogable norms, on the other. *Jus cogens* norms were *erga omnes*, as the International Court of Justice understood that expression in its jurisprudence. However, not all *erga omnes* rules were automatically *jus cogens*. It should be explored whether *jus cogens*, intransgressible norms and non-derogable norms were synonyms and, if so, why different terms were used for the same concept.

30. Institutional or jurisdictional mediation was central to explaining the emergence of non-treaty *jus cogens*, as it was the nexus between the meta-juridical basis of *jus cogens* and the mechanism provided for in article 66 of the 1969 Vienna Convention. It was clear from that article that, apart from cases in which *jus cogens* status was conferred by treaty, it was in practice generally for the International Court of Justice to rule whether an alleged peremptory norm was indeed *jus cogens*. The provisions of article 66 clearly translated the awareness of the authors of the Convention that it would be difficult for States to agree on the application or interpretation of a norm alleged to be peremptory. The Court would thus serve as mediator, as it did with respect to determining customary international law. That was, at least for the moment, the best way of determining *jus cogens*. In fact, he was not aware of any treaty-based *jus cogens*, as the examples generally cited came from case law.

31. As to whether to compile a list of *jus cogens* norms or to refer to examples in the commentaries, he had no particular preference. First, such a list could never be exhaustive and so it would be no different from simply providing examples. Second, although the Commission was required to identify the guiding principles or method for determining *jus cogens*, it should not itself seek to identify the norms concerned. Although it had done so in the past – as had been recalled by the International Court of Justice in its judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua* – that had been before the adoption of the 1969 Vienna Convention. He was of the opinion that article 66 of the Convention, together with article 53 thereof, indicated that the determination of such norms was a matter for States within the framework of a treaty and that, outside that framework, in the context of a dispute between States, it was a matter for the International Court of Justice. It would not be advisable for the Commission to take such a step and risk disavowal by the Court.

32. Turning to the draft conclusions, he said that, if all three draft conclusions were to be retained, the order of draft conclusions 2 and 3 should be reversed. However, in his view, not all the draft conclusions should be submitted to the Drafting Committee.

33. Draft conclusion 1 was couched in peremptory terms that were unsupported by the content of the first report and ill-suited to the very notion of a “conclusion”. It would be advisable to replace the phrase “The present draft conclusions concern the way in which *jus cogens* rules are to be identified” with “The present draft conclusions concern

the manner of identifying *jus cogens* rules ...” because the purpose of the draft conclusions was simply to identify the manner of proceeding, not to lay down a legal obligation in that respect.

34. Draft conclusion 2, especially its first paragraph, seemed complicated, obscure and irrelevant, because, in effect, it amounted to saying that *jus cogens* could be modified, derogated from or abrogated, unless otherwise provided by *jus dispositivum*. He wondered what was so special about *jus cogens* in that connection; the same could be said of *jus dispositivum* itself. Since the first paragraph was irrelevant, the second paragraph setting forth a non-existent rule was otiose, as the initial rule to which it was deemed to make an exception was incorrect.

35. Draft conclusion 3, paragraph 1, could be improved by repeating the exact wording of article 53 of the 1969 Vienna Convention and should be entitled “Character of *jus cogens* norms”. The second paragraph of that draft conclusion deserved a more thorough examination and should be turned into a separate draft conclusion. While he did not rule out the Special Rapporteur’s idea that *jus cogens* norms protected the fundamental values of the international community, that idea must be substantiated theoretically and practically with examples drawn from State practice and case law. The Special Rapporteur had not provided sufficient evidence in his first report.

36. He was in favour of referring draft conclusion 1 and draft conclusion 2, paragraph 1, to the Drafting Committee, but not draft conclusion 2, paragraph 2, and draft conclusion 3, paragraph 2.

37. As far as future work on the topic was concerned, it would be inadvisable to assess the draft conclusions already adopted with a view to enhancing their overall coherence, because that would introduce an element of uncertainty into the outcome of that work which, albeit provisional, would already be in the public domain. Second, the Special Rapporteur should make clear that, in his third report, he would deal with the consequences of *jus cogens* in relation to State responsibility. It would be illogical to broach that aspect of the topic before defining the notion of consequences and examining the legal rules pertaining to it.

38. Lastly, he concurred with a number of other members of the Commission that, since *jus cogens* also existed in municipal law, it would be wise to make the title of the topic more precise and to change it to “international *jus cogens*” or “*jus cogens* in the international legal order”.

39. Mr. EL-MURTADI SULEIMAN GOUIDER said that he wished to commend the Special Rapporteur on his excellent first report on a very complex issue and his flexible and cautious approach to it.

40. In chapter II of his first report, the Special Rapporteur discussed the idea of compiling an illustrative list of *jus cogens* rules in the light of the views expressed during debates. There was a risk, however, that some States might regard that list as comprehensive when it was not, or that it might be incomplete. On the other hand, there was nothing to prevent the Commission from clarifying the nature of *jus cogens* rules by providing examples in the commentary.

41. While there might well be many examples of cases where national and international courts had referred to *jus cogens* rules, in order to assuage the concerns of States which had expressed reservations about the inclusion of the topic on the Commission's long-term programme of work, the Commission must follow its usual practice of basing its work on effective State practice.

42. In view of what was said in paragraph 28 of the first report, it would be advisable for the Commission to focus its attention on article 53 of the 1969 Vienna Convention, the rules on *jus cogens* established therein and the *travaux préparatoires* at the 1968–1969 United Nations Conference on the Law of Treaties. The positions adopted by States provided the necessary framework for determining the current nature of *jus cogens*. Since the United Nations Conference on the Law of Treaties, they had accepted the existence of *jus cogens* as an exception to the general rules of international law.

43. None of the theories set out in paragraph 50 and the following paragraphs of the first report fully explained why *jus cogens* was peremptory. As the decisions of courts had not sufficiently clarified that matter, he supported the Special Rapporteur's preference for using international public law as his theoretical basis and for defining *jus cogens* rules as non-derogable rules embodying the fundamental values of the international community.

44. He was in favour of sending all three draft conclusions contained in chapter VI of the first report to the Drafting Committee and he welcomed the flexible approach advocated by the Special Rapporteur in chapter VII on future work.

45. Mr. AL-MARRI congratulated the Special Rapporteur on his first report and the promising start that he had made on the consideration of an important issue. He said that the three draft conclusions should be referred to the Drafting Committee, as they reflected broad consensus among practitioners and learned writers. The Special Rapporteur had identified the core nature of *jus cogens* and had proposed some practical solutions. The principle of *jus cogens* had been embodied in article 53 of the 1969 Vienna Convention and there was general recognition that it applied to the prohibition of genocide and aggression, as well as to the right of self-determination, *inter alia*.

46. Mr. TLADI (Special Rapporteur), summing up the debate on his first report, said that the robust and rich exchanges of views would ensure that the Commission's work on the topic would be of the highest quality.

47. He had not taken any particular stance on the natural law versus positive law debate in his first report. He did not agree with Mr. Valencia-Ospina's suggestion that the adoption of article 53 of the 1969 Vienna Convention as a point of departure necessarily implied a consent-based approach. The consent/content dichotomy referred to by Mr. Petrič was most interesting. The first element, consent, raised questions about the meaning of the phrase "recognized and accepted by the international community of States as a whole" and would undoubtedly form the subject of future debates in the Commission. He was sympathetic to the view of Mr. Vázquez-Bermúdez and

Mr. Caflisch that this phrase did not necessarily indicate a positivist inclination. He disagreed with Mr. Nolte and Mr. Kolodkin that article 53 necessarily resolved the debate and, like Mr. Hmoud, he did not think that it was even essential to resolve that debate. The issue of treaty-based *jus cogens* raised by Mr. Kamto would have to be considered in the second report. Contrary to Mr. Kamto's opinion, resolution of the theoretical debate was not a prerequisite to addressing that question. However, he largely agreed with what Mr. Kamto had said about the approach that should be adopted to the topic.

48. He was open to Mr. Candioti's idea that the title should clearly indicate that the peremptory norms of international law were *jus cogens*. Indeed, draft conclusion 3, paragraph 1, did that, by including the words *jus cogens* in parenthesis after "peremptory norms". There ought not to be any confusion with regard to the phrases "fundamental rules", "fundamental values" and "fundamental principles", which were not used interchangeably. While they might be related, fundamental values were not in and of themselves rules, laws or principles. Rules, principles or laws, fundamental or otherwise, might reflect fundamental values, but that did not mean that fundamental values and fundamental laws, principles or rules were the same thing. That was the reason why draft conclusion 3, paragraph 2, said only that *jus cogens* protected fundamental values.

49. All the members of the Commission had agreed that work on the topic should rest on the material traditionally relied upon by the Commission, namely State practice, judicial decisions and the writings of scholars. Sir Michael and Mr. Valencia-Ospina had questioned whether the current report remained faithful to that approach. In fact, each and every element of the draft conclusions was based on practice. He thanked Mr. Caflisch for drawing attention to a provision of the Swiss Constitution which constituted an important example of practice and Mr. Kolodkin for his references to Russian jurisprudence.

50. It would be unwise for the Commission to base its work on a theoretical debate of *jus cogens* in order to circumvent the problem of the scarcity of practice, an issue raised by Ms. Jacobsson and Mr. Valencia-Ospina. The diversity of opinions meant that relying on theory in the absence of practice would lead to a policy-preference approach, which he had criticized elsewhere. He was grateful to Mr. Hmoud for rightly highlighting the distinction that should be made between the use of international jurisprudence as a subsidiary means of identifying rules and domestic jurisprudence, which not only identified rules, but also constituted practice. The use of the phrase "State and judicial practice" in the first report might have obfuscated that distinction. Paragraph 10 of the report merely described the views on practice expressed in the Sixth Committee and did not imply an opinion on their correctness.

51. The members of the Commission had been divided on the advisability of drawing up an illustrative list. Mr. Comissário Afonso, Mr. Caflisch, Ms. Escobar Hernández, Mr. Forteau, Mr. Hmoud, Mr. Kolodkin, Mr. Niehaus, Mr. Park, Mr. Petrič, Mr. Saboia and Mr. Šturma had been in favour of producing a list, while

Mr. Kittichaisaree, Ms. Jacobsson, Mr. Murase, Mr. Nolte, Mr. Singh and Sir Michael Wood had been against it. He assured members that any list drawn up by the Commission would be based on State practice and the decisions of international courts and not on the Commission's policy preferences. As Mr. Kolodkin had rightly said, there was a wealth of material that could be included and, as Mr. Caflisch and Mr. Comissário Afonso had indicated, such a list would be most welcome in many quarters.

52. Although the idea of an illustrative list might therefore sound attractive, the question of whether *jus cogens* was a methodological or process-oriented topic was still a matter of concern. He took Mr. Forteau's point that what distinguished the current topic from the methodologically inclined topic of customary international law was that a normative/substantive element had been explicitly included in the syllabus approved by the Commission. That syllabus did not, however, bar the Commission from deciding to proceed in a different direction, as it had sometimes done in the past. On the other hand, Mr. Petrič might have been correct in saying that, even if the Commission decided to compile an illustrative list, it would not have to depart from a process-oriented method, provided it included only universally accepted *jus cogens* norms. The list to which Mr. Park had alluded had been produced not by the Commission but by the Study Group on the fragmentation of international law and, in some respects, it departed from the Commission's own list. There seemed to be agreement within the Commission that some examples of *jus cogens* norms would have to be provided, at least in the commentaries. However, he took Mr. Murphy's point that distilling a list from the commentaries for inclusion in an annex would create difficulties, because the material referred to in the commentaries had been chosen for the purposes of methodology and not because it illustrated the substance of the rules. The wisest course of action would be to follow the suggestion made by Mr. Hassouna, Mr. Koldodkin and Mr. McRae and to postpone a decision until a later stage.

53. Mr. McRae, Mr. Murphy and Sir Michael had raised a methodological objection to what he had termed the "fluidity" of the topic, and Mr. Nolte and Mr. Singh had maintained that, once a draft conclusion had been adopted, it could no longer be treated as fluid. Mr. Hassouna had, however, rightly noted that what the first report meant by a fluid approach was that proposed draft conclusions could be reconsidered, if necessary, in light of the direction chosen by the Commission. Of course, to use the language of Mr. Nolte, that would require a "positive decision". He personally endorsed the view of Mr. Vázquez-Bermúdez that the Commission would certainly not adopt a provision of dubious correctness. Paragraph 68 of the first report did not, as Mr. Murphy had asserted, declare that the conclusion that *jus cogens* norms were universal was provisional and subject to revision. Paragraph 67 of the report stated unequivocally that *jus cogens* norms were universally applicable. What was provisional was the finding that there could be no persistent objectors to *jus cogens* and that there was no such thing as regional *jus cogens*. Since no draft conclusions were proposed on regional *jus cogens* or persistent objectors, it was misleading to imply that paragraph 68 was an example of a fluid approach

leading to the provisional adoption of draft conclusions that would have to be revisited once the Commission was confident that they were correct.

54. Even if future reports were to uncover a huge amount of material supporting the notion of regional *jus cogens*, that would not alter the basic premise that *jus cogens* was universally applicable. In that connection, he noted that in the topic "Identification of customary international law", the reference in draft conclusion 16 [15], paragraph 2, to "general practice among the States concerned" did not require the revision of draft conclusion 8 [9], which established that "the relevant practice must be general, meaning that it must be sufficiently widespread and representative".³⁸⁹ He therefore agreed with Mr. Nolte that the universal character of *jus cogens* did not exclude the possibility of regional *jus cogens* and with Ms. Jacobsson's assumption that, even if the Commission were to deal with regional *jus cogens*, the general rule was that *jus cogens* applied universally. Regional *jus cogens* would form the subject of a detailed study in future reports; it had not been excluded, as Mr. Forteau, Mr. Hassouna, Mr. Nolte, Mr. Park and Sir Michael Wood had thought.

55. Contrary to the assertions of Mr. Forteau, Mr. McRae, Mr. Murphy, Mr. Nolte and Sir Michael, the first report did not suggest that the Commission should adopt conclusions with the intention of reconsidering them and, in any case, the Commission often reconsidered texts which it had adopted. For example, such a review had been proposed with respect to draft conclusion 4, paragraph 3, in the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"³⁹⁰ and also with respect to draft article 1 in the topic "Immunity of State officials from foreign criminal jurisdiction".³⁹¹

56. Turning to the draft conclusions themselves, he said that draft conclusion 1 had been widely supported, subject to some comments about the text, but draft conclusion 2 had been almost universally criticized. Draft conclusion 3, paragraph 1, had been broadly supported with some suggested amendments, while a few members had criticized draft conclusion 3, paragraph 2.

57. With respect to the text of draft conclusion 1, to the scope of the topic as a whole and to issues of definition, Mr. Murase, supported by Ms. Escobar Hernández, had expressed puzzlement over why the first report limited the scope of the topic only to the law of treaties and did not deal with the meaning and function of *jus cogens* in the context of the law of State responsibility. He agreed with Mr. Murase that the Commission could not ignore the implications of *jus cogens* in the context of State responsibility; indeed, the Commission could not ignore those implications for any area or subject of international law.

³⁸⁹ See draft conclusions 8 [9] and 16 [15] in the report of the Drafting Committee on the identification of customary international law (A/CN.4/L.872, available from the Commission's website, documents of the sixty-eighth session). The Commission adopted the draft conclusions on first reading on 2 June 2016 (see the 3309th meeting above, para. 5).

³⁹⁰ See *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/694, paras. 118–122.

³⁹¹ See *Yearbook ... 2013*, vol. II (Part Two), p. 39, footnote 237.

The syllabus for the topic,³⁹² particularly in paragraph 17, expressly included the law of State responsibility, not only as an important source of materials on which the Commission would base its work but also in relation to the effects of *jus cogens* on State responsibility; moreover, the materials referred to in the syllabus and his first report included materials relevant to State responsibility. As Mr. Murase had noted, the case law of the International Court of Justice and other courts on *jus cogens*, including that relied on in the first report, overwhelmingly related to matters other than treaty law. The scope of the topic was certainly broader than just the law of treaties and would also include the law of State responsibility, particularly in relation to consequences.

58. Mr. Murase's statement could be read to suggest that the definition and nature of *jus cogens* differed between areas of law, which was a view he did not share. The Commission had considered *jus cogens* in a number of contexts, including the law on responsibility of States for internationally wrongful acts and on the fragmentation of international law, and not once had such a thing ever been suggested. The implications of *jus cogens* differed but its nature and definition did not. It was therefore unnecessary to identify *jus cogens* for the purposes of treaty law and *jus cogens* for the purposes of the law of State responsibility.

59. Mr. Forteau had expressed surprise that the first report did not address article 41 of the 1969 Vienna Convention, a provision which, in a way, addressed derogation. However, paragraph 4 of the report clearly indicated that issues such as the relationship between *jus cogens* and non-derogation would be addressed in subsequent reports. The same applied to the relationship between *jus cogens* and obligations *erga omnes*, raised by Mr. Kamto, which would be considered as part of the consequences or effects of *jus cogens*.

60. He expressed support for Mr. Nolte's suggested amendment to draft conclusion 1, namely to replace the phrase "concern the way in which *jus cogens* rules are to be identified, and the legal consequences flowing from them" with "concern the identification of norms of *jus cogens* and their legal consequences". Mr. Murase had made an alternative proposal; however, unless there was overwhelming support for it, he favoured it less than Mr. Nolte's suggestion, as it implied that the topic was concerned with the existence and content of *jus cogens* rules, which was not the case. He agreed with Mr. McRae that it should be for the Drafting Committee to determine what draft conclusion 1 should be called, but it should base itself on any decision that the Commission might take in relation to the topics of customary international law, protection of the atmosphere and protection of the environment in relation to armed conflicts, so as to ensure a consistent approach. With regard to the French version of draft conclusion 1, he thanked Mr. Kamto for his comments and expressed the hope that the issue could be rectified.

61. The main thrust of the criticism of draft conclusion 2 was that its first paragraph addressed matters that fell outside the scope of the current topic, particularly

by looking at how the rules of *jus dispositivum* could be modified, abrogated or derogated from. That concern had been raised by many members, and he had become convinced that there was merit in the criticism and that the draft conclusion strayed too far in addressing issues of a general nature that fell outside the scope of the topic. Trying to summarize such a broad area in one swift draft conclusion meant that important nuances were inevitably lost. The principal reason for proposing the draft conclusion had been to highlight the fact that international law as it currently stood recognized *jus cogens* as an exception to the general rule. He still believed that it was necessary to include that idea and hoped that it could be maintained, but without the current complications of the first paragraph of draft conclusion 2. Perhaps the Drafting Committee could consider incorporating it into draft conclusion 3, paragraph 1. He confessed to some uncertainty regarding Ms. Escobar Hernández's reasoning as to why *jus cogens* was not exceptional. Both Mr. Hmoud and Mr. Al-Murtadi Suleiman Gouider had emphasized its exceptional nature, and paragraphs 65 and 66 of the first report, especially the penultimate footnote to paragraph 65, provided ample authority in that regard.

62. The comments made on draft conclusion 3, paragraph 1, which mainly concerned drafting, were very helpful. In his introductory statement, he had already proposed deleting the additional terms "modification" and "abrogation" and replacing "rules" with "norms", both of which had met with the support of many members. He agreed with Sir Michael's suggestion, supported by Mr. Hassouna and Mr. Kittichaisaree, among others, to bring the paragraph fully into line with article 53 of the 1969 Vienna Convention.

63. The majority of members of the Commission had supported the substance of draft conclusion 3, paragraph 2, and some drafting suggestions had been offered. Some members had expressed doubt not about the content of the paragraph, but rather about the timing of the consideration of the paragraph. Others had expressed opposition to its content. He strongly disagreed with those who had sought to suggest that there was no support for the elements identified therein, either in general or in the first report. Like a number of other members of the Commission, he considered draft conclusion 3, paragraph 2, to be very important. Virtually all members had highlighted the need for the Commission to base its work on practice, but Sir Michael, supported by Mr. McRae and Mr. Forteau, had essentially suggested that the first report paid lip service to that methodological approach and that there was no practice to support the elements contained in draft conclusion 3, paragraph 2.

64. The view that fundamental values were a core characteristic of *jus cogens* was so widely accepted that even a distinguished author who did not share it, Robert Kolb, had acknowledged its predominance. He was therefore surprised that some members of the Commission would wish to question it. As Mr. Petrič had correctly observed, norms that were without doubt *jus cogens* reflected important values, while Mr. Šturma had pointed out that peremptory norms protected the fundamental values of the international community. In its advisory opinion on *Reservations to the Convention on Genocide*, the International

³⁹² See *Yearbook ... 2014*, vol. II (Part Two), annex, sect. D, pp. 173–174.

Court of Justice had described the basis of the prohibition of genocide as preventing a crime “that shocks the conscience of mankind” and “which is contrary to moral law” (p. 23 of the advisory opinion). According to the Court, the prohibition therefore reflected “the most elementary principles of morality” (*ibid.*). The Court’s statement confirmed that the prohibition of genocide, which it had subsequently confirmed several times as a norm of *jus cogens*, reflected fundamental human values. It had been restated several times with approval by the Court, particularly in decisions confirming the *jus cogens* nature of that prohibition, and by a number of other tribunals, including the International Tribunal for the Former Yugoslavia.

65. In response to Mr. Murphy’s statement that the Court had never referred to “fundamental values”, he referred the Commission to the authorities cited in the second footnote to paragraph 71 of the first report, including the 2007 and 2015 judgments in, respectively, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, in which the Court had described norms of *jus cogens* as those protecting “essential humanitarian values” (paras. 147 and 85, respectively). It was therefore not true to say that the inclusion of fundamental values in the draft conclusion was based on unsubstantiated extrapolations from the 1969 Vienna Convention. In *Prosecutor v. Anto Furundžija*, the International Tribunal for the Former Yugoslavia had been more explicit in linking the status of the prohibition of torture as a *jus cogens* norm to “the importance of the values it protects”. It had stated: “Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community” (para. 154). Its words had been quoted in several jurisdictions, including by the European Court of Human Rights in *Al-Adsani v. the United Kingdom*. In *Michael Domingues v. United States*, the Inter-American Commission on Human Rights had stated that norms of *jus cogens* derived their status from fundamental values held by the international community. The cases cited were all mentioned in the first report; moreover, the Commission had approved the persistent objector requirement essentially on the strength of two *obiter dicta* in the *Fisheries case* and in the *Colombian-Peruvian asylum case*, far less than what was referred to in the present instance.

66. Many statements had been made by States expressing the view that *jus cogens* norms protected the fundamental values of the international community. In addition to those of Lebanon and Nigeria, referred to in the first report, there were countless others, particularly in relation to the Commission’s work on the law of treaties. During the twenty-fifth session of the General Assembly, under the agenda item on the review of the role of the International Court of Justice, Belgium had noted that the prohibition of the use of force in Article 2, paragraph 4, of the Charter of the United Nations was “so fundamental that it had become a peremptory norm of international law”.³⁹³ At the twenty-seventh session, under an item on the review

of the Charter of the United Nations, Spain had noted that voting procedures, important though they were, could in no way be equated with fundamental principles, asserting that, while they were part of positive law, they were not peremptory and were therefore not untouchable.³⁹⁴ During the thirty-first session, commenting on the draft articles on the responsibility of States for internationally wrongful acts, Yugoslavia had described *jus cogens* norms as obligations that were “essential for the protection of fundamental interests of the international community”,³⁹⁵ and Mali had described them as those that “served the fundamental interests of mankind”.³⁹⁶ Greece, during the forty-ninth session, had considered the prosecution of international crimes, which it had said were prohibited by *jus cogens*, to be for the protection of “fundamental interests of humanity”.³⁹⁷

67. The statement of France to the fifty-first session of the General Assembly, on the Commission’s work on the responsibility of States for internationally wrongful acts, was particularly important given that at that stage France had yet to recognize *jus cogens*. Expressing doubt about what had then been article 19 of the draft articles on the responsibility of States for internationally wrongful acts, France had noted that “the concept of an ‘international obligation so essential for the protection of fundamental interests of the international community’ seemed roughly to correspond to the concept of a ‘peremptory norm of general international law’”.³⁹⁸ While it denied the existence at that time of *jus cogens*, it had clearly linked *jus cogens* to fundamental interests of the international community. The idea that *jus cogens* norms reflected fundamental interests had similarly been advanced by South Africa during the fifty-fifth session, while Germany had referred to “fundamental humanitarian values”³⁹⁹ and Costa Rica, represented by Mr. Niehaus, had referred to “fundamental interests”.⁴⁰⁰ At the fifty-sixth session, Portugal had said that: “The concepts of *jus cogens*, obligations *erga omnes* and international crimes of State or serious breaches of obligations under peremptory norms of general international law were based on a common belief in certain fundamental values of international law which, because of their importance to the international community as a whole, deserved to be better protected than others.”⁴⁰¹

68. Similarly, in its application in *Questions relating to the Obligation to Prosecute or Extradite*, Belgium, with Sir Michael Wood as its counsel, had observed that the prohibition of torture was *jus cogens* because of, *inter alia*, the importance that the international community as a whole attached to the suppression of torture.

69. Domestic jurisprudence advancing the same idea was similarly plentiful. In the United Kingdom, the court in *Regina (Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Another* had

³⁹⁴ A/C.6/SR.1380, para. 7.

³⁹⁵ A/C.6/31/SR.30, para. 43.

³⁹⁶ *Ibid.*, para. 69.

³⁹⁷ A/C.6/49/SR.17, para. 90.

³⁹⁸ A/C.6/51/SR.36, para. 26.

³⁹⁹ A/C.6/55/SR.14, para. 56.

⁴⁰⁰ A/C.6/55/SR.17, para. 63.

⁴⁰¹ A/C.6/56/SR.14, para. 66.

³⁹³ A/C.6/SR.1210, para. 9.

stated that the prohibition of torture was a *jus cogens* norm because of the importance of the values it protected. Similarly, the United States Court of Appeals, in *Siderman de Blake v. Argentina*, had stated that *jus cogens* norms were derived from values taken to be fundamental by the international community. One possibility that the Drafting Committee might consider was to refer to “fundamental interests”, although he retained a preference for “values”. Another drafting suggestion, for which he expressed some support, had come from Ms. Jacobsson, who had suggested replacing “protect” with “reflect”.

70. Many members had agreed that *jus cogens* norms were superior to the other rules of international law, but a few members had expressed doubt about the reference to hierarchy. Those doubts seemed to stem from two sources: first, that there was no material support for the inclusion of hierarchy; and second, the view that hierarchical superiority, to the extent that *jus cogens* norms had such a quality, was a consequence and should be addressed in that context. He disagreed with both criticisms. The first was particularly curious as the Commission had previously expressly endorsed the hierarchical superiority of *jus cogens*. In paragraph 70 and in the second footnote to paragraph 69, the first report referred to conclusion 32 of the work of the Study Group on the fragmentation of international law, which had recognized that *jus cogens* was an example of a rule of international law that was “superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority”.⁴⁰²

71. The idea of hierarchical superiority was supported in domestic and international jurisprudence. The United States Court of Appeals, in *Committee of United States Citizens Living in Nicaragua v. Reagan*, had referred to *jus cogens* norms as those that enjoyed the highest status in international law, and that had been reiterated in several other Court of Appeals decisions. Many individual opinions in United States Court of Appeals decisions cited *Committee of United States Citizens Living in Nicaragua v. Reagan* favourably. Other United States Court of Appeals decisions supporting that conclusion included *Sarei v. Rio Tinto, PLC*, which had described *jus cogens* norms as those deserving of the highest status under international law. The same line of reasoning could also be discerned in United States district court rulings: for example, in *Sabbithi v. Al Saleh*, the United States District Court for the District of Columbia had defined *jus cogens* norms as those which enjoyed the highest status in international law and which prevailed over both customary international law and treaties.

72. The notion of *jus cogens* being hierarchically superior could also be seen in a number of United Kingdom judgments, including the various opinions in the *Pinochet* case. Lord Browne-Wilkinson, for example, had stated that *jus cogens* enjoyed a higher rank in the international hierarchy than treaty law and even “ordinary” customary international law. Lord Bingham, in *A and others v. Secretary of State for the Home Department*, had adopted a similar approach, which had subsequently been followed in several other decisions of the House of Lords.

The notion of hierarchical superiority had been supported in many decisions of the Canadian courts, such as the Supreme Court’s ruling in *Kazemi Estate v. Islamic Republic of Iran* that *jus cogens* norms were a higher form of customary international law, and in those of the domestic courts of Argentina. In *Mazzeo, Julio Lilo, et al.*, the Supreme Court of Argentina had recognized *jus cogens* as the highest source of international law. Similarly, in the *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad* case, that Court had stated that *jus cogens* norms were above not only treaty law, but all international law. Practice, in the form of domestic court decisions recognizing hierarchical superiority, was also available from the Philippines, such as *Bayan Muna v. Alberto Romulo and Blas F. Ople*, and Zimbabwe, such as *Mann v. Republic of Equatorial Guinea*.

73. Regional courts had also referred to the hierarchical superiority of *jus cogens* courts. The European Court of Human Rights, in *Al-Dulimi and Montana Management Inc. v. Switzerland*, had referred to the preemptory effect of the higher-ranking norm of *jus cogens*. In the inter-American system, *Michael Domingues v. United States* had referred to *jus cogens* as “a superior order of legal norms” (para. 49).

74. The hierarchically superior character of *jus cogens* was virtually unchallenged, except, it seemed, by some members of the Commission. Portugal, during the fifty-sixth session of the General Assembly, had noted that “[j]us cogens focused on the idea of a material hierarchy of norms, the superior norms being non-derogable”.⁴⁰³ At the sixty-eighth session, the Netherlands had stated that “[j]us cogens was hierarchically superior within the international law system, irrespective of whether it took the form of written law or customary law”.⁴⁰⁴ Other statements recognizing the hierarchical superiority of *jus cogens* included those of Cuba during the twenty-second session, Greece during the thirty-fifth session and Slovakia and Cyprus during the fifty-fourth session. In its pleadings before the International Court of Justice in *Jurisdictional Immunities of the State*, Germany had noted that the notion of hierarchical superiority flowing from *jus cogens* was a product of post-Second World War international law.

75. With respect to the second criticism, namely that hierarchical superiority was more a consequence than a characteristic of *jus cogens*, it was not clear why that should be the case, nor why, as suggested by Mr. Murase and others, that hierarchical superiority applied only with respect to treaty law. In the conclusions of the work of the Study Group, the Commission had not limited the description of *jus cogens* as hierarchically superior to its application in the context of treaty law, nor had it suggested that it was a consequence. Moreover, the cases and statements by States previously cited referred in the main to hierarchical superiority in the context of State responsibility.

76. In his view, one of the consequences of hierarchical superiority was invalidity, but hierarchical superiority itself was not a consequence, as could also be seen

⁴⁰² *Yearbook ... 2006*, vol. II (Part Two), para. 251, pp. 177 *et seq.*, at p. 182, conclusion (32).

⁴⁰³ A/C.6/56/SR.14, para. 66.

⁴⁰⁴ A/C.6/68/SR.25, para. 101.

from the Commission's conclusions on the work of the Study Group on the fragmentation of international law. Conclusions (32) and (33) described *jus cogens* in terms of, *inter alia*, superiority, while conclusion (41) set out effects, including invalidity.⁴⁰⁵ The Commission had not seen hierarchical superiority solely as a consequence.

77. He was surprised by the claim made by some that there was no support for the universal application of *jus cogens*, recalling that he had already referred to the advisory opinion of the International Court of Justice on *Reservations to the Convention on Genocide*, which described genocide, a norm it later confirmed as *jus cogens*, as one having a universal character. The notion of universal application had been affirmed in decisions of other courts, both international and domestic. The United States Court of Appeals, in *Siderman de Blake v. Argentina*, had stated that, while customary international law derived solely from the consent of States, the "fundamental and universal norms constituting *jus cogens*" were different, while in *Smith v. Socialist People's Libyan Arab Jamahiriya*, the Court had said that *jus cogens* norms were universally binding by their very nature. The Federal Court of Australia had referred to *jus cogens* in terms of universality in *Nulyarimma and Others v. Thompson*.

78. As noted by Mr. Vázquez-Bermúdez, the Inter-American Court had, in an advisory opinion, noted that the fundamental principle of equality, which it had deemed *jus cogens*, was applicable to all States. States, too, had routinely referred to the universal character of *jus cogens* in deliberations of the General Assembly. Moreover, in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Democratic Republic of the Congo had referred to *jus cogens* as being imposed on all States independent of their acceptance. Belgium, in its application in *Questions relating to the Obligation to Prosecute or Extradite*, had stated that *jus cogens* was "a body of legal rules applicable to all States" (para. 2.3.2.1 of the application). In its application in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Bosnia had stated that *jus cogens* norms were "binding on all States of the World Community" (para. 132). As noted in the report, the United States, in its counter-memorial in *Military and Paramilitary Activities in and against Nicaragua*, had also pointed to the prohibition on the use of force as having *jus cogens* status, *inter alia* owing to the fact that it was a "universal norm" (para. 314). In addition, there were countless individual opinions of judges and many references in the literature, as reflected in the first report. Those elements were ubiquitous in practice, and it would be strange and disconcerting if the Commission were to cast doubt on them.

79. In the light of comments made and the changes he intended to propose to draft conclusion 3, paragraph 1, he would be happy to change the title of draft conclusion 3 to refer to the definition of *jus cogens* norms, rather than their general nature. He recommended that draft conclusion 1 be referred to the Drafting Committee, where no doubt some improvements could be made. He would not

propose referral of draft conclusion 2 to the Committee. With regard to draft conclusion 3, he recommended its referral to the Drafting Committee on the understanding that amendments, in particular those seeking that paragraph 1 more closely follow the 1969 Vienna Convention, should be considered by the Commission.

80. Finally, although he did not agree with the criticism directed at his fluid approach, he was willing to adopt the approach that the Commission had followed in its work on the topic of the identification of customary international law, namely that draft conclusions referred to the Drafting Committee should remain in the Drafting Committee until it had finalized a full set of draft conclusions. The Commission could, of course, continue to be appraised of the work of the Commission through interim reports when necessary.

81. Many members of the Commission had commented on the title of the topic: Mr. Hassouna, Mr. Kamto and Mr. Murase, and several others had suggested that it should be changed to "*Jus cogens* in international law". He agreed that, without the qualifier, the title might suggest that the Commission was considering *jus cogens* in its entirety, including *jus cogens* under domestic law. As not all members had expressed their view on the subject, he intended to make a specific proposal in that regard in his next report so that the Commission could take a decision.

82. Mr. FORTEAU said that it would be very helpful if the Special Rapporteur could provide the Drafting Committee with a list of the practice and jurisprudence cited in his summing up, much of which did not appear in the first report.

83. The CHAIRPERSON said that he took it that the Commission wished to refer draft conclusions 1 and 3 to the Drafting Committee, taking into account the recommendations made by the Special Rapporteur and leaving open the question of how to proceed further.

It was so decided.

84. The CHAIRPERSON said that the Drafting Committee on the topic of "*Jus cogens*" would meet that afternoon.

85. Mr. MURASE, expressing surprise that the composition of the Drafting Committee on the topic had been discussed the previous day before the Commission had decided whether to refer any text to it, said that he wished to be included among its members.

86. The CHAIRPERSON invited him and any other interested members to make themselves known to the Chairperson of the Drafting Committee.

87. Mr. SINGH said that he would also like to join the Drafting Committee.

The meeting rose at 12.55 p.m.

⁴⁰⁵ See *Yearbook ... 2006*, vol. II (Part Two), pp. 182–183.