

Document:-  
**A/CN.4/3322**

**Summary record of the 3322nd meeting**

Topic:  
***Jus cogens***

Extract from the Yearbook of the International Law Commission:-  
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matter. Draft principle I-1 was not borne out by the analyses in the report and was worded too broadly. He wondered why draft principle I-2 was missing. By not setting out the basis for draft principle I-3, the Special Rapporteur gave the impression that it constituted more a personal wish than a principle deriving from practice or existing international instruments. The same was true of draft principles I-4 and III-1. The latter drew no distinction between international and non-international armed conflicts. In practice, the reference to the “restoration and protection of the environment damaged by the armed conflict” might amount to no more than pious wishes, since it was hard to see what national armed groups who had participated in the conflict could do to implement that provision. Draft principle III-3 was very loosely worded. The first paragraph did not specify who was to carry out the activities in question and it was unrealistic to demand the clearance, removal and destruction of all mines without delay. The second paragraph referred to “the parties” – presumably the parties to the armed conflict, in other words the States parties to an armed conflict – which meant that it excluded non-international armed conflicts, despite the fact that they formed the majority of current armed conflicts.

69. He was in favour of referring the draft principles, apart from draft principles I-1, I-3, I-4, III-1 and III-3, to the Drafting Committee.

70. For 10 years, he had admired the Special Rapporteur’s elegance of mind and her tenacity in seeking progress in topics related to women’s rights and the rights of certain categories of vulnerable persons. He wished her every success in the future.

71. Mr. CANDIOTI said that he wished to thank the Special Rapporteur for her third report, which contained a detailed account of many aspects of the protection of the environment in relation to armed conflicts, along with a wealth of information on State practice, treaty law, international and municipal case law and *opinio juris*, as well as a very useful bibliography. She had adopted a highly professional approach to what was an extremely difficult subject. She had made a very valuable contribution to the Commission’s consideration of the topic and had provided ample material for further urgently needed work by the international community on it. Her three-phase approach had been a wise choice. All the rules and recommendations contained in the draft principles proposed in her third report would promote the development of the topic. He was sure that the Drafting Committee would pay due heed to the various suggestions that had been made with a view to improving their wording.

72. The use of the term “principle” did not diminish the relevance of the Special Rapporteur’s proposals. The Commission should, however, ensure that the final form of the provisions was consistent with their content. It should not confuse principles, in other words general basic rules or standards for the codification or progressive development of international law, with recommendations concerning advisable or desirable conduct.

73. The Commission had received a mandate from the General Assembly to codify and progressively develop the law on the protection of the environment in relation to

armed conflicts. It should therefore press on with the good work already done in order to fulfil that mandate.

74. Lastly, he paid tribute to the Special Rapporteur’s commitment to the rule of law in the international community. He also wished her every success in the future.

*The meeting rose at 12.50 p.m.*

## 3322nd MEETING

*Monday, 18 July 2016, at 3 p.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Al-Marri, Mr. Caffisch, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kitichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, 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.

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

[Agenda item 10]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)\*

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

2. Mr. PETRIČ said that he wished to congratulate the Special Rapporteur on his excellent first report and on his oral presentation on *jus cogens*, a topic that was important and stimulating on a theoretical level. The report contained an interesting summary of the main past and contemporary views and conflicting opinions elicited by *jus cogens*, a detailed analysis of the legal nature of the concept and the controversies over its theoretical basis, and three draft conclusions. He endorsed the Special Rapporteur’s approach and shared most of the views expressed in his first report. While he agreed that the purpose of the work was to identify *jus cogens* and its effects, not to resolve theoretical debates, he believed that the Commission could not truly understand the role of *jus cogens* in the contemporary international community or expand on the definition of the concept established in articles 53 and 64 of the 1969 Vienna Convention unless it analysed the nature and peremptory character of *jus cogens*, its hierarchical position in international law and various other theoretical aspects. He therefore commended the ambitious approach adopted by the Special Rapporteur, who had not ignored the thorny issue of the theoretical basis of *jus cogens*.

\* Resumed from the 3317th meeting.

3. By adopting article 53 of the 1969 Vienna Convention, States had accepted that, in terms of concluding treaties, their will was limited by *jus cogens*. However, the Convention did not resolve the question of which norms had the status of *jus cogens* in international law, as it provided only that a *jus cogens* norm was a norm of general international law that was accepted and recognized by the international community of States as a whole as being a norm from which no derogation was permitted. Consequently, the express, general consent of the international community of States seemed to be a *sine qua non* for a norm, legal rule or legal principle to acquire the status of *jus cogens*.

4. He concurred with the Special Rapporteur's analysis and conclusions on the subject of the controversy over the role of consent in the formation of *jus cogens*. It should be added that the consent of the international community of States as a whole referred *ipso facto* to the consent of human society, since one could not exist without the other. He also considered that the Special Rapporteur was right to include the protection of values among the core elements of *jus cogens*. When one considered norms that had, at the current time, undeniably acquired the status of *jus cogens*, such as the prohibition of genocide, the prohibition of the use of force in international relations or the prohibition of torture, slavery or piracy, two elements stood out: such norms enjoyed general recognition that went beyond mere consensus among the community of States, and they protected essential values related to human life and dignity, and to peace and security.

5. Article 53 of the 1969 Vienna Convention provided that no derogation was permitted from a *jus cogens* norm, but that such a norm could be "modified" by a subsequent norm of general international law having the same character. The Special Rapporteur rightly endeavoured to distinguish between modification, derogation and abrogation in relation to *jus cogens* norms, but further explanation in that regard would be welcome. *Jus cogens* norms were stable by nature, since they protected basic values that were slow to change, but that did not mean that they were unchangeable. Like other legal norms, they reflected society and protected the values that were dominant at a given stage in the development of the international community. While slavery, torture and the use of force in international relations had, at one time, been acceptable, they were now prohibited by *jus cogens* norms.

6. As to the first report itself, he believed that the summary of the debate in the Sixth Committee was accurate and confirmed not only the general acceptance by States of the concept of *jus cogens* and, therefore, of the relevance of the topic but also the fact that the scope and content of *jus cogens* remained unclear. The Special Rapporteur paid particular attention to the differing views on whether the Commission should compile an illustrative list of norms that could be considered as *jus cogens*, a matter that also divided the Commission and on which the Special Rapporteur himself did not express an opinion. He was among those who felt that an illustrative list would be useful and even necessary. It was clear that, by general consensus, some norms, such as the prohibition of genocide or torture, were *jus cogens* norms, and there was thus no reason not to list them as such. As was evident

from article 53 of the 1969 Vienna Convention, norms that were not accepted and recognized as *jus cogens* by the international community as a whole could not belong to that category. Those norms that were not yet *jus cogens de lege lata* could become *jus cogens de lege ferenda*. Although he was not proposing the establishment of an exhaustive list, the Commission could give some indications regarding existing norms whose *jus cogens* character was undeniable in the commentaries, in footnotes, in a list or in an annex, as it had done with the indicative list of treaties that continued in operation during armed conflict, which was annexed in the draft articles on the effects of armed conflicts on treaties.<sup>370</sup> It would be wrong not to take advantage of the opportunity, especially as the task was by no means impossible. The aim of the Commission was not to decide which norms were *jus cogens* and which were not, but to provide examples of norms that were generally and clearly accepted as *jus cogens* by the international community as a whole and reflected as such in State practice, in case law and in legal writings.

7. He fully agreed with the position set out by the Special Rapporteur in paragraph 11 of his first report, to the effect that the conclusions should reflect contemporary practice and the current state of international law relating to *jus cogens*. He did not, however, see how the Special Rapporteur could achieve that without at least indicating which norms of international law were already *jus cogens*. As to the methodological approach, he fully supported the Special Rapporteur's recommendation that the Commission follow its standard practice of considering the variety of documents and sources at its disposal. Despite being relatively meagre, State practice was the most significant element in determining the existence and content of a *jus cogens* norm, since acceptance and recognition by the international community as a whole was a *conditio sine qua non* for a norm of international law to acquire the status of *jus cogens*. States were expected to accept and recognize a norm as *jus cogens* as soon as it was generally recognized as such and was protecting a basic value, thereby excluding any possibility of derogation by agreement of States.

8. The discussion of the historical evolution of *jus cogens* in the first report was interesting and useful. It showed that the idea of there being peremptory norms, in other words norms from which the parties or, in international law, States, could not derogate at will, was ancient and had survived for centuries. He firmly believed that, in every era, there were norms from which no derogation was possible, either by the will of the legislator or, in the case of international law, by that of States. The existence of, and respect for, those rules and principles were indispensable conditions for the development of human society and for the protection of the rule of law, of security and of people's welfare. While the nature of those basic norms could be disputed, their existence was irrefutable. Defining the criteria and means for determining their content, essentially by analysing State practice, was an important task that the Commission had undertaken by embarking on the study of the topic of *jus cogens*.

<sup>370</sup> The draft articles on the effects of armed conflict on treaties and the commentaries thereto adopted by the Commission at its sixty-third session are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101. See also General Assembly resolution 66/99 of 9 December 2011, annex.

9. In paragraphs 28 to 42 of his first report, the Special Rapporteur detailed the process that had led to the inclusion of a provision on *jus cogens* in the 1969 Vienna Convention. He wished to make two remarks in that regard. It was clear from paragraphs 30 and 31 of the report that for Fitzmaurice, Waldock and, later, McNair, *jus cogens* norms included both rules and principles of international law. In fact, the prohibition of the use of force, which was considered to be a *jus cogens* norm, was a basic principle of international law. Since all legal orders contained fundamental principles, it was perhaps wrong to refer to *jus cogens* “rules” or “norms” while excluding the word “principles”; the Special Rapporteur might wish to give the matter some thought. Second, it was also clear from the *travaux préparatoires* of article 53 of the 1969 Vienna Convention that *jus cogens* norms were exceptions. As a result, any list of such norms that the Commission did establish would necessarily be short.

10. Concerning the legal nature of *jus cogens*, he fully endorsed the position expressed by the Special Rapporteur in paragraph 42 of his first report to the effect that the work of the Commission must be based on a sound and practical understanding of the nature of *jus cogens*, which necessitated a study of some of its theoretical bases. He also agreed with the way in which the Special Rapporteur defined the core elements of *jus cogens*, by taking article 53 of the 1969 Vienna Convention as a starting point and adding other elements, including the idea, discussed in paragraphs 70 and 71 of the first report, that *jus cogens* norms served to protect the fundamental values of the international community. That criterion, related to content, and that of consent, in the sense that the norm had to be recognized by the international community of States as a whole, were two essential conditions for a norm to acquire the status of *jus cogens*.

11. Article 53 of the 1969 Vienna Convention unequivocally established that a *jus cogens* norm was a norm of general international law. *A priori*, his response to the questions of whether regional *jus cogens* might exist and whether the persistent objector rule could be applied to *jus cogens* would thus be a categorical “no”, but he did not exclude the possibility of considering those questions at a later stage, as envisaged by the Special Rapporteur.

12. As to the form of the outcome of the Commission’s work on the topic, draft conclusions did indeed appear to be the most appropriate option. The conclusions and the commentaries thereto should reflect the current law and practice on *jus cogens* norms and contain information on how to determine their existence and content. The three draft conclusions required several changes, which could be made by the Drafting Committee. Draft conclusion 2, in particular, should be reworded, and paragraph 1 thereof should perhaps be moved to the commentaries. Draft conclusion 2, paragraph 2, should be placed after the definition of *jus cogens*, which should reflect the wording of article 53 of the 1969 Vienna Convention and the elements of draft conclusion 3, paragraph 2.

13. Lastly, he endorsed the programme of work, even though it exceeded the scope of article 53 of the 1969 Vienna Convention, which, it should be recalled, had been drafted more than half a century before. He supported

the referral of the three draft conclusions to the Drafting Committee and hoped that the text of the draft conclusions on the scope and definition of *jus cogens* norms could be agreed upon at the current session.

14. Mr. VÁZQUEZ-BERMÚDEZ said that he wished to thank the Special Rapporteur for his excellent first report on *jus cogens* which, thanks to the in-depth analysis that it contained and the extensive research on which it was based, provided a solid foundation for the Commission’s discussions on that important topic. Regarding the scope of the topic, he recalled that the syllabus provided for the consideration of four main issues: the nature of *jus cogens*; the requirements for the identification of *jus cogens*; an illustrative list of norms that had acquired that status; and the consequences or effects of *jus cogens*. Although it had already examined various issues related to *jus cogens* in its previous work, including on the law of treaties,<sup>371</sup> the responsibility of States for internationally wrongful acts,<sup>372</sup> the fragmentation of international law,<sup>373</sup> the responsibility of international organizations<sup>374</sup> and the Guide to Practice on Reservations to Treaties,<sup>375</sup> the Commission had never before undertaken the study of *jus cogens* as a topic in its own right. It was an opportunity for the Commission to deal with the topic as broadly as possible, without necessarily limiting itself to the four issues in the syllabus. As stated by Mr. Murase and other members of the Commission, the study of the topic must go beyond the scope of the law of treaties and cover the law of the responsibility of both States and international organizations for internationally wrongful acts, which the Special Rapporteur could be expected to address in his report on the consequences or effects of *jus cogens*. Indeed, when a norm was considered as *jus cogens*, the rights and obligations to which it referred were protected to a greater extent than those which stemmed from norms and principles that were not of a peremptory nature, as in the case of the law of the responsibility of States for internationally wrongful acts. *Jus cogens* norms should also be studied in relation to unilateral acts.

15. In the light of those considerations, and given that it had already drawn up lists of examples of *jus cogens* norms in the context of other work, the Commission should *a fortiori* compile one as part of the study of *jus cogens*. The content of specific *jus cogens* norms

<sup>371</sup> The draft articles on the law of treaties adopted by the Commission at its eighteenth session (1966) with commentaries thereto are reproduced in *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*, para. 38.

<sup>372</sup> The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

<sup>373</sup> For the conclusions of the Study Group on the fragmentation of international law, see *Yearbook ... 2006*, vol. II (Part Two), pp. 177 *et seq.*, para. 251.

<sup>374</sup> The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

<sup>375</sup> The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 23 *et seq.* See also General Assembly resolution 68/111 of 16 December 2013, annex.

could also be a useful source of information for characterizing *jus cogens* norms in general. The Commission should use all the documents and sources at its disposal, namely treaties, State practice, national and international case law and writings.

16. Over the previous two decades, jurisprudence related to *jus cogens* had developed, including within the International Court of Justice, international criminal tribunals and national and regional courts. The Special Rapporteur referred, in his first report, to numerous examples of judgments – delivered by, among others, the Inter-American Court of Human Rights – in which specific norms had been recognized as *jus cogens* norms, for example the prohibition of enforced disappearance and access to justice in *Goiburú et al. v. Paraguay* and the prohibition of crimes against humanity in *Almonacid-Arellano et al. v. Chile*. In its advisory opinion OC-18/03 (*Juridical Condition and Rights of Undocumented Migrants*), the Inter-American Court of Human Rights had also asserted that the principle of equality before the law, equal protection before the law and non-discrimination belonged to *jus cogens*, because the whole legal structure of national and international public order rested on it, and it permeated all laws. The wealth of jurisprudence would need to be further analysed as the study of the core elements of *jus cogens* norms progressed.

17. As to the methodology, the Commission should keep to its usual practice of not revisiting approved draft conclusions prior to their adoption on first reading, unless absolutely necessary in order to ensure the consistency of the text as a whole.

18. The chapter of the first report devoted to the historical evolution of the concept of *jus cogens* and to the different legal doctrines that had attempted to explain the foundation for the concept was highly instructive and based on a considerable amount of research, for which the Special Rapporteur should be commended. The report showed that, when the 1969 Vienna Convention had been adopted, the concept of peremptory norms of international law had already been a part of international law. Currently, *jus cogens* was unquestionably an established and essential notion in international law. The emergence of peremptory norms of general international law contributed to the progressive development of an international public order that legally protected the fundamental values and interests of the international community as a whole. The content of the rights and obligations stemming from those norms was of paramount importance for the international community, which therefore recognized them as peremptory norms from which no derogation was permitted.

19. In his analysis of the nature of *jus cogens*, the Special Rapporteur provided some interesting information about the doctrinal debate on the theoretical basis for the peremptory character of *jus cogens*, while pointing out that, for the purposes of the topic, there was no need to resolve the debate. He himself did not, however, agree that customary international law was consent-based, a conclusion that the Special Rapporteur drew from an analysis of the jurisprudence of the International Court of Justice, which, he said, seemed at times to “rely on positivist and consent-based thinking”. In particular, he could

not go along with the Special Rapporteur when he said, with regard to the Court’s judgment in *Questions relating to the Obligation to Prosecute or Extradite*, that the Court had “adopted what might be interpreted as a consent-based approach to the identification of *jus cogens*, at least to the extent that customary international law is seen as consent based”, when the Court had in fact held that the prohibition of torture was “grounded in a widespread international practice and on the *opinio juris* of States” (para. 99 of the judgment). Even though, in the judgments cited in paragraph 55 and the antepenultimate footnote to the same paragraph, the Inter-American Court of Human Rights had focused on consent as a basis for the peremptory character of certain norms, that did not mean that consent was indeed the basis for *jus cogens*.

20. It should be recalled that, as the International Court of Justice itself had said, norms of customary international law originated from a general practice accepted as law, in other words a general practice undertaken with a sense of legal right or obligation. They were defined in the same way in the draft conclusions on the identification of customary international law adopted by the Commission on first reading.<sup>376</sup>

21. *Jus cogens* norms were essentially norms of customary international law applicable to all subjects of international law, including States and international organizations. While they could be embodied in treaties, as the prohibition of the use of force was in the Charter of the United Nations, it was through their consolidation or crystallization as norms of customary international law, before or after the adoption of a treaty, that they acquired the character of peremptory norms of general international law. As confirmed by the Commission, a treaty could reflect a rule of customary international law, lead to the crystallization of a customary rule or generate a new rule of customary international law by giving rise to a general practice accepted as law. Rules of customary international law could be contained in treaties that had achieved universal or near-universal ratification, in which case customary rules and treaty rules coexisted.

22. That said, a *jus cogens* norm was not an ordinary norm of customary international law. The existence of a general practice of States accepted as law was not enough; there must be not only a sense of legal right or obligation, but also a sense that the right or obligation had a peremptory character and was non-derogable. In other words, there must be a general practice accompanied by what might be called an *opinio juris cogens*.

23. It should be added that the general principles of law laid down in Article 38 of the Statute of the International Court of Justice were another key source of international law and thus also had the status of general international law. In that regard, the work that the Special Rapporteur planned to carry out to establish whether general principles of law could also be a source of *jus cogens* was of great importance. It would be advisable, in the near future,

<sup>376</sup> See 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).

for the Commission to start a different stream of work on the topic of general principles of law as a source of international law, in order to clarify the nature and scope of those principles and the means of determining their content.

24. As to the core elements of *jus cogens*, he broadly agreed with the Special Rapporteur's analysis and hoped that those elements, particularly the non-derogability of *jus cogens* norms and the need for them to be "accepted and recognized by the international community ... as a whole", would be examined in greater detail in the next report. Concerning the latter element, he would simply state, like Mr. Caffisch, that "acceptance" and "recognition" were not synonyms of "consent".

25. The rule set forth in article 53 of the 1969 Vienna Convention whereby a *jus cogens* norm could be modified only by a norm having the same character meant that a *jus cogens* norm could be modified only by another *jus cogens* norm, in other words another norm that protected the fundamental values of the international community and brought together all the elements of a peremptory norm of general international law.

26. He fully agreed with Mr. Caffisch that *jus cogens* norms were, by their very nature, incompatible with the doctrine of the persistent objector. It was inconceivable, for instance, that a State could evade the prohibitions of genocide or of crimes against humanity because it had persistently opposed them, since that would be tantamount to allowing it to flout the fundamental values and essential interests of the international community as a whole without facing any legal consequences whatsoever.

27. Moreover, the rules on the responsibility of States and international organizations for internationally wrongful acts provided for particular consequences for violations of *jus cogens* norms, namely that States should not recognize as lawful a situation created by such a breach and should cooperate in putting an end to the violations in question.

28. Regarding the draft conclusions, one might wonder, from reading draft conclusion 1 on the scope of the topic, whether crucial aspects such as the legal nature of *jus cogens* and its content, which were not mentioned explicitly, were included in the study of the topic. He proposed that the text be redrafted to read: "The present draft conclusions concern *jus cogens* rules, their nature and legal consequences, and the way in which these rules are to be identified."

29. As it stood, draft conclusion 2, paragraph 1, was a source of confusion rather than clarification. First, reference was made only to States and not to other subjects of international law, such as international organizations. Second, while the notion of *jus dispositivum*, which was commonly used in domestic law to distinguish between private and public law, could potentially apply to norms of international law modified through treaties, it could not apply to norms of international law modified by new norms of customary international law. Lastly, the proposed wording gave the impression that customary international law was a form of agreement, which was incorrect, as noted by Mr. Nolte. The theory likening customary international

law to a tacit agreement, which had held sway until the beginning of the twentieth century, had long since been discounted. Norms of customary international law originated from a general practice accepted as law, in other words a general practice undertaken with a sense of legal right or obligation. As had already been proposed, it might be better to include and clarify the elements contained in draft conclusion 2, paragraph 1, in the commentaries.

30. Once reworded, draft conclusion 2, paragraph 2, could be inserted into draft conclusion 3, in which an attempt was made to define *jus cogens* and to provide elements concerning its legal nature. It would be preferable, in draft conclusion 3, paragraph 1, to reflect the wording of article 53 of the 1969 Vienna Convention. The Commission should consider using the expression "international community as a whole", without referring to States, so as to encompass other subjects of international law, such as international organizations, whose practice could also contribute, in certain circumstances, to the formation of norms of customary international law. It should be noted that the expression was frequently used in the articles, commentaries and other texts adopted by the Commission.

31. Rather than merely reproducing the language of article 53 of the 1969 Vienna Convention, draft conclusion 3 should clarify the legal nature of *jus cogens*. In that respect, paragraph 2 contained two important elements – norms of *jus cogens* protected the fundamental values of the international community as a whole and were hierarchically superior to other norms of international law – that had been explicitly recognized by the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Anto Furundžija* with regard to the prohibition of torture.

32. The Commission had already had the opportunity to express its views on the hierarchical superiority of *jus cogens* norms in 2006, as part of its study on the fragmentation of international law, in the conclusions of which it had stated, with regard to recognized hierarchical relations by the substance of the rules, that a "rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law".<sup>377</sup>

33. Lastly, unlike those members of the Commission who considered that the possibility of regional *jus cogens* should not be excluded, he believed that, while some regional normative frameworks might provide for norms of a peremptory character, generally through treaties, that aspect did not fall within the definition of *jus cogens* itself as an element of general international law and should not be examined for the purposes of the topic, as doing so might overly broaden the scope of the work. Another aspect that should, however, be explored in subsequent reports was the relationship between *jus cogens* norms and *erga omnes* obligations. He supported the referral of draft conclusion 1, draft conclusion 2, paragraph 2, and draft conclusion 3 to the Drafting Committee.

<sup>377</sup> *Yearbook ... 2006*, vol. II (Part Two), para. 251, pp. 177 *et seq.*, at p. 182, conclusion (32).

34. Mr. KOLODKIN said that the first report on *jus cogens*, which was very interesting and well substantiated, augured well for the success of the Commission's work on what was a particularly complex topic. The Special Rapporteur had taken the right approach by presenting the main theoretical bases for *jus cogens* in his report and by steering clear of the endless disputes over the nature of law in general and of peremptory norms of international law in particular. It was after all unlikely that the members of the Commission, who had differing views on the matter, would be prepared to change their mind during the debate.

35. He agreed with the Special Rapporteur that the outcome of the Commission's work should take the form of conclusions. Indeed, non-binding conclusions would be of great use to practitioners in resolving the issues related to the determination of applicable law with which they inevitably were and would be confronted. In order to make them as useful as possible, the Commission should compile an illustrative list of peremptory norms of international law. When it had had the opportunity to do so some 50 years previously in the context of its work on the law of treaties, it had decided to reject that option. At the time, however, it had just begun to develop rules related to *jus cogens* norms that had only subsequently become an integral part of international law. The 1969 and the 1986 Vienna Conventions had not been in existence, nor had the draft articles on the responsibility of States for internationally wrongful acts, which contained provisions on peremptory norms. There had not yet been any national or international jurisprudence or resolutions of international organizations referring to *jus cogens* norms. The international community had not yet been convinced of the existence of certain fundamental norms from which no derogation was permitted. In the light of those circumstances, should the Commission proceed as if nothing had changed over the previous 50 years and once again decide against compiling an illustrative list of peremptory norms of international law for the benefit of States? It seemed to him that a list would be very helpful and an important step forward, as it would enable domestic courts to substantiate their decisions on the determination of such norms. It must be recognized, however, that there was no consensus on the matter within the Commission, which would need to return to it at a later date.

36. Noting that the first report contained several examples of decisions by national and regional courts in which reference was made to *jus cogens*, he said that he wished to cite a few examples of decisions taken by courts in his region and country of origin. In 2003, the Supreme Court of the Russian Federation had, in a plenary decision, given judges of lower courts guidance on how to apply the universally recognized principles of international law, which, pursuant to the Constitution of the Russian Federation, were an integral part of domestic law. In so doing, it had affirmed that those principles, including universal respect for human rights and the good-faith implementation of international commitments, were fundamental peremptory norms of international law that were recognized by the international community as a whole and from which no derogation was permitted.

37. In a 2003 decision concerning a coal company in the Kuznetsk Basin region, the Court of the Eurasian

Economic Community (now the Eurasian Economic Union) had referred to the peremptory character of the principle of *pacta sunt servanda*, emphasizing that any act or deed that ran counter to, or did not comply with, a court decision was null and void. It should also be noted that in 2015 the Constitutional Court of the Russian Federation, in a decision on the constitutionality of a provision of the law on the ratification of the European Convention on Human Rights and its Protocols, had indicated that the principle of the sovereign equality of States, respect for the rights inherent in State sovereignty and the principle of non-interference in the internal affairs of States were peremptory *jus cogens* norms.

38. All those decisions were highly instructive because they reflected the position of judges who had been taught the Soviet and Russian doctrines of international law, the latter of which had drawn heavily on the former. According to that doctrine, and to the judicial practice on which it was based, peremptory norms were, first and foremost, basic principles of international law; a more nuanced approach had since been adopted. In any event, he wished to point out that it had been precisely those views on *jus cogens* norms – on which the positions of the delegations of the Union of Soviet Socialist Republics (USSR) and of the federative Republics of the USSR had largely been based at the time – that had played an important role in the insertion of a provision on *jus cogens* norms in article 53 of the 1969 Vienna Convention. In that regard, he wished to draw members' attention to the fact that in paragraph 40 of the first report the Special Rapporteur stated that the United Nations Conference on the Law of Treaties had adopted a slightly modified version of the Commission's text (article 50 of the draft articles on the law of treaties<sup>378</sup>) as article 53. It was questionable, however, whether that was an accurate description of the differences between the two texts, which some authors had considered to be substantial. It was well known that article 53 had been split into two sentences, the second of which was currently regarded as setting out the definition of *jus cogens* norms, in other words norms accepted and recognized as such by the international community of States as a whole. That was crucial because, in that way, the very concept of the "international community as a whole" was established in law. As underlined by the Commission in paragraph (2) of the commentary to article 64 of its draft articles on the law of treaties between States and international organizations or between international organizations, "what makes a rule of *jus cogens* peremptory is that it is 'accepted and recognized by the international community of States as a whole' as having that effect".<sup>379</sup>

39. As to the scope of the topic, he understood that the Special Rapporteur intended to study the issue of *jus cogens* in international law in general and not only in the context of the law of treaties, which would inevitably lead him to examine, *inter alia*, the relationship between rules of *jus cogens* and rules of customary international law, general principles of law, *erga omnes* obligations, resolutions of international organizations and unilateral acts of

<sup>378</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*, at p. 247.

<sup>379</sup> *Yearbook ... 1982*, vol. II (Part Two), p. 62.

States. In that context, he wished to make some remarks on the concept of derogation, which he felt was important in terms of the characteristics of rules of *jus cogens*. Currently, it was widely believed that one of the main characteristics of peremptory norms was their non-derogability, but it could also be argued that it was impossible to derogate from *erga omnes* obligations because of their nature. Non-derogability was thus a characteristic of both peremptory norms and *erga omnes* norms and obligations. However, peremptory norms differed from other rules of international law in that acts derogating from them were considered null and void, whereas acts derogating from *erga omnes* obligations engaged international responsibility but were not considered null and void – provided, of course, that those *erga omnes* obligations were not also peremptory norms of international law.

40. Generally, rules of international law authorized certain conduct, conferred a right or prescribed an act or deed. Peremptory norms were, above all, prescriptive norms, from which one could imagine there being derogations, but how could one imagine there being derogations from a peremptory norm that authorized certain conduct?

41. It was stated on several occasions in the first report that some aspects of the topic would be dealt with at a later stage. While it would have been preferable to prepare draft texts after examining the main aspects of *jus cogens*, the Special Rapporteur had chosen to propose three; he personally was not opposed in principle to the referral of draft conclusions 1 and 3 to the Drafting Committee. Draft conclusion 3 did, however, require some major changes, and he shared the view that the definition of *jus cogens* norms in paragraph 1 of the draft text should not stray too far from the one set out in article 53 of the 1969 Vienna Convention. In addition, the first sentence of that article, on the nullifying effect of *jus cogens* rules, was closely related to the definition of those rules, even though it was generally considered not to form part of it. In his opinion, its purpose was twofold: to specify the legal effects of peremptory norms and to describe their main characteristics. Admittedly, it concerned the law of treaties, but its focus was on the relationship between peremptory norms and other sources of international law. It would therefore be preferable to include it in the definition proposed in draft conclusion 3, paragraph 1, even though that aspect had not yet been examined. Lastly, he believed that it would be premature to refer draft conclusion 2 to the Drafting Committee and endorsed the criticisms voiced by those members who felt that the provisions of that draft text could appear in a commentary.

42. Mr. ŠTURMA said that he wished to thank the Special Rapporteur for his excellent first report on *jus cogens*, which was, quite rightly, introductory and largely focused on methodological issues and on the historical evolution of the concept of *jus cogens*, which was particularly welcome given the complexity and theoretical nature of the topic. While it was acknowledged that the concept of *jus cogens* fell under positive international law, the criteria for determining the existence and content of *jus cogens* rules remained controversial. The dispute between naturalists and positivists over the nature of *jus cogens* was seemingly endless. While the natural law theory had historically played a key role in promoting

the concept, there were now enough new elements in contemporary international law to determine the nature and effects of *jus cogens* in positive law. He agreed with the Special Rapporteur that there was no natural law theory to *jus cogens*, just as there was no positive law theory to *jus cogens*; rather, there were natural law theories and positivist theories that could be reconciled. Martti Koskeniemi, for example, considered that the binding and peremptory force of *jus cogens* was best understood as an interaction between natural law and positivism. In his own view, however, it was the link between the content of *jus cogens* and its form that was essential in that regard, since substantive and formal conditions had to be met in order for a genuine *jus cogens* rule to exist. It was hard to deny that peremptory norms (at least within the meaning of article 53, which was the obligatory starting point for work on the topic) protected the fundamental values of the international community. However, those basic values were not in themselves sufficient to establish that a *jus cogens* rule existed. Modern positivism, unlike natural law, held that there was no direct and immediate connection between those values and peremptory norms, and that the values must be given a legal form ensuing from the consent or practice of States and from *opinio juris*.

43. In other words, *jus cogens* was also a legal technique aimed at preventing the fragmentation of certain international norms, but could not, in his view, be reduced to that alone. It might help to distinguish peremptory norms (such as the prohibition of genocide, torture or the use of force), sometimes called “public order” norms, from the other legal techniques that provided for the binding or non-binding character of other rules, or simply for their priority application. Those other rules might be non-derogable for reasons of public utility or logic, and he recalled, in that connection, the rule of inviolability of diplomatic missions and representatives, which was also set forth in the draft articles on the responsibility of States for internationally wrongful acts, or the principle of *pacta sunt servanda*.

44. He approved of the Special Rapporteur’s approach, which involved starting from the definition or general nature of *jus cogens* norms before dealing, in future reports, with the question of the sources of *jus cogens*, the identification of *jus cogens* norms and their effects. Therefore, he did not understand why some members had argued that the scope of the topic was limited to the law of treaties. Given that the 1969 Vienna Convention (specifically articles 53 and 64) had been the first positive-law instrument to recognize the existence of *jus cogens* rules explicitly, the elements contained therein must serve as the starting point for work on the topic. He hoped that, when it examined the consequences of *jus cogens*, the Commission would also address the rules on State responsibility and other branches of international law.

45. He was in favour of compiling an illustrative list of *jus cogens* norms, even though doing so might pose some problems, or, at the very least, of providing examples of such norms in the annex to the draft conclusions, for a variety of methodological and practical reasons. First, it seemed difficult to identify true peremptory norms if the Commission gave no examples of *jus cogens* norms. Second, the general characteristics of, or criteria for, *jus cogens* should be supported by at least some examples

of such norms. Lastly, the necessarily non-exhaustive list would give some theoretical and practical indications and would not prevent the future development of new norms. It would also serve as a warning against the unjustified invocation, by some authors whose approach was based on natural law, of the peremptory character of norms that had not yet actually acquired that status.

46. With regard to draft conclusion 1, on the scope, he agreed that the draft conclusions should concern the way in which *jus cogens* rules were to be identified and the legal consequences flowing from them. He had not formed an opinion on the use of the word “rule” rather than “norm”, but while some English-speaking members preferred the former, it was the latter that was used in article 53 of the 1969 Vienna Convention. In any event, the Commission should be consistent and use the same word throughout the draft conclusions, unless there were good reasons to use one or the other.

47. The order of draft conclusions 2 and 3 should be reversed. Indeed, the current draft conclusion 3, on the general nature of *jus cogens* norms, set out a definition, whereas draft conclusion 2 was devoted to one element of the definition of *jus cogens* norms, which, in contrast to *jus dispositivum*, could be derogated from only by a rule having the same character. With regard to harmonizing the wording of the two draft conclusions, the words “modification, derogation or abrogation” departed from the definition in article 53. There was nothing to prevent the adoption of such an approach, provided, however, that further justification was given for the choice. Draft conclusion 3, paragraph 1, which captured the elements contained in article 53, did not pose any particular problem, except that it repeated, in part, what was already said in draft conclusion 2. Judging from the comments made thus far, he believed that draft conclusion 3, paragraph 2, was the most problematic. Although he approved of the three elements contained in the paragraph, which were, in his opinion, particularly important, he believed that they could be moved to another draft conclusion supported by a more detailed analysis. As to the assertion that *jus cogens* norms protected the fundamental values of the international community, he had already expressed his full support, but that aspect could be linked to the consideration of different theories related to non-derogable norms. The issue of hierarchy was equally important, but there was a need to specify the distinctive features of the hierarchy enjoyed by *jus cogens*, which was based on the nullity of treaties that ran counter to a peremptory norm and was thus different from other types of hierarchy in international law, such as the one established by Article 103 of the Charter of the United Nations. Lastly, he supported the final element of paragraph 2, according to which norms of *jus cogens* were universally applicable, but considered that it would be necessary to explore the question of regional *jus cogens* norms, of which one of the most emblematic examples was the European Convention on Human Rights, viewed by the European Court of Human Rights as an instrument of European public order. The issue could be studied from the perspective of the relationship between *jus cogens* and the non-derogation clauses in human rights treaties. The likely conclusion would be that peremptory norms within the meaning of article 53 and of the draft conclusions under consideration must be

universally applicable, but such an analysis would have the merit of clearly substantiating that statement. Lastly, he supported the referral of all the proposed draft conclusions to the Drafting Committee.

48. Mr. HMOUD said that he wished to thank the Special Rapporteur for his first report on *jus cogens*. Well written and well researched, it was based on a wealth of material and on a very detailed analysis of the historical development of the concept of *jus cogens*, its doctrinal underpinning and its core elements. The Special Rapporteur clearly indicated how he intended to proceed with and finalize his work. He had adopted a cautious yet flexible approach and had refrained from drawing predetermined conclusions about the content of the final product, which was welcome. It was clear from his introduction of his first report that the outcome of the Commission’s work should be a collective effort that reflected the state of the law, State practice and jurisprudence. The topic of identification of *jus cogens* norms and their consequences, while limited in scope, raised a number of difficulties, ranging from the identification of its theoretical bases and position in the international legal architecture to the consideration of legal policy implications and the avoidance of unintended consequences. The Special Rapporteur should therefore be commended, once more, for adopting a cautious and flexible approach, thanks to which the Commission’s work would contribute to a better understanding by States and the international community in general of the intricacies of *jus cogens*. The Commission should not seek to create new rules on *jus cogens*. It should also be careful not to open the door to assertions that a particular norm was *jus cogens* if those assertions were motivated by subjective considerations. Without disturbing the current structure of international law, it should take as its starting point the idea that *jus cogens* norms were not ordinary norms, but a very limited exception. In that way, it would avoid the imbalance resulting from an expansive treatment of the topic and from the adoption of rules not based on well-established practice.

49. It was tempting to deconstruct the concept of *jus cogens* in order to clarify its elements and their consequences, but it might be more judicious to describe the legal facts underpinning the concept, as reflected in State practice and in the jurisprudence of international courts and tribunals. In other words, the approach adopted could be more inductive than deductive. Although the Special Rapporteur did not wish to dwell on the theoretical debates concerning *jus cogens*, he deemed it important to describe the theoretical basis for the concept. That was, of course, crucial to gaining a better understanding of the nature of *jus cogens* but, as the Special Rapporteur and other members had stressed, the focus should be on a normative exercise based on the description of the content of *jus cogens* rules, their relationship with other rules of international law and their effects. In that regard, a distinction should be drawn between the pronouncements of international courts and tribunals, as sources for identifying *jus cogens* norms, and the practice by which States recognized *jus cogens* norms and gave them a peremptory character. The former might reveal the existence of a norm, whereas the latter was an element in its creation. That did not mean, of course, that the pronouncements

of international courts and tribunals could not trigger the emergence of a *jus cogens* norm, but it was State practice that determined its form and content. The Special Rapporteur should look more carefully at the sources of State practice and distinguish between the pronouncements and verbal acts of States that were a form of practice and those that reflected an *opinio juris* or a recognition of the peremptory character of a *jus cogens* rule.

50. Within that descriptive approach, there was no reason not to include, within the scope of the topic, a non-exhaustive list of *jus cogens* norms that were currently recognized by the international community. That did not in any way contradict the nature of the work undertaken by the Commission or its purpose, which was to provide guidance on how to identify *jus cogens* norms. In the draft articles on the effects of armed conflicts on treaties, the Commission had specified the criteria for terminating, suspending or withdrawing from treaties, but had also compiled a list of treaties that were presumed, because of their subject matter, to continue in operation during armed conflict. Thus, laying down the criteria for identifying a *jus cogens* norm did not preclude the establishment of an indicative list, and he failed to see how such a list could become closed. It would not be binding on States and other actors and would assist them in applying the criteria set out in the draft conclusions in order to identify *jus cogens* norms. Its legal value would depend on how it was presented by the Commission, which could decide to be less prescriptive by indicating that the list gave examples of *jus cogens* norms drawn from the Commission's work on the topic.

51. The historical evolution of the concept of *jus cogens* showed that the international community now recognized its legal validity. Nevertheless, it should be recalled that the recognition of *jus cogens* essentially stemmed from the adoption of the 1969 Vienna Convention and from article 53 thereof, which raised the question of whether the treatment of the concept of *jus cogens* should focus on its relationship with the law of treaties and with the ability of the State to assume certain treaty obligations. Of course, the issue of *jus cogens* went beyond its relationship with the law of treaties, as it was based on the prohibition of acts that ran counter to it, which had particular consequences. To put the concept into historical perspective, believers in both natural and positive law had considered from the outset that States could not derogate from their *jus cogens* obligations. It was important to decide on the matter so as to understand how *jus cogens* norms were created and the consequences of their existence. If such a norm could be modified or derogated from only by a norm of international law having the same character but, at the same time, any practice contrary to that norm was null and void, how could a subsequent norm be created to replace the existing one? How could the international community, which recognized *jus cogens* norms, withdraw that recognition? Was a universal treaty that modified or derogated from a *jus cogens* norm legally valid? Article 53 of the 1969 Vienna Convention provided a negative answer, but if State practice could not violate an existing norm and universal treaties that contradicted *jus cogens* were null and void, it was impossible to modify or derogate from the norm. Since there were no examples of subsequent *jus cogens* norms replacing previous norms, it

was essential to examine the process by which the international community could do so, including through the creation of a new norm by common agreement.

52. The historical evolution of the concept of *jus cogens* raised the question of who determined the fundamental values shared by the international community as a whole. Courts naturally had a role to play in that regard, but it was the international community as a whole that recognized the norm and determined its content. As a result, the project should also deal with the relationship between the existence of fundamental values underlying a *jus cogens* norm and the expression of their existence.

53. Returning to the theoretical basis for the peremptory character of *jus cogens*, he said that neither the natural law approach nor the positivist approach offered a satisfactory explanation of its nature. Natural law held that essential values of the international community existed independently of the will of the State and lay at the root of the hierarchical superiority of *jus cogens*. However, that approach ignored an essential constitutive element of *jus cogens*, namely that it was the common recognition and acceptance by States as a whole that elevated the norm in question to the status of *jus cogens*, and also failed to explain how a norm modifying or derogating from a *jus cogens* norm could be created by the will of the international community of States. By contrast, the positivist school placed emphasis on the role of the consent and will of States in the creation of the norm, but did not explain why, once the norm had been created, its peremptory character did not depend on the will of any State. It was clear from the background material that States and international courts, including the International Court of Justice, had not given an explicit opinion on the basis for *jus cogens* or on its peremptory character. How, then, could that theoretical uncertainty be resolved? An easy solution would be to merge the two doctrines or to adapt the natural-law approach to a positivist framework. While the theoretical basis for *jus cogens* was clearly useful for understanding its nature, it was not essential, for the purposes of the topic, to adopt a particular theoretical approach. The Commission should study the conditions for the creation of *jus cogens* rules, how to identify them and their consequences. It should also clarify the relationship between the will of States to recognize a *jus cogens* rule and the modification of that rule as part of a descriptive approach to the state of the law on *jus cogens*, bearing in mind available practice and jurisprudence without taking a position on either of the theoretical bases for *jus cogens*.

54. Regarding the core elements of *jus cogens* and the draft conclusions as contained in the first report, he wished to make a few comments about paragraph 61 of the report, which described the elements of *jus cogens* set out in article 53 of the 1969 Vienna Convention. He was not sure, first of all, whether those elements were exhaustive or whether, as stated in the report, practice and doctrine revealed other key elements that characterized *jus cogens*. While article 53 of the 1969 Vienna Convention defined *jus cogens* for the purposes of that instrument, he wondered whether it was appropriate, at the current stage of the Commission's work, to include in the draft conclusions a description of the concept that did not necessarily

match the content of article 53. Moreover, although he agreed that *jus cogens* norms were universally applicable, that point would need to be discussed in a future report, in connection with the consequences of such norms. It was against that background that related issues, such as the doctrine of the persistent objector and the possibility of regional *jus cogens*, could be explored. However, stating that *jus cogens* norms were universally applicable without examining the basis for them would be tantamount to prejudging the issue of their consequences, including with regard to the persistent objector and regional *jus cogens*. The same could be said about hierarchical superiority. While it was established that a treaty was or became void if it conflicted with a *jus cogens* norm and that *jus cogens* norms were superior to other norms, it was nevertheless crucial to analyse further the relationship between *jus cogens* norms and other norms of general international law. He also agreed that *jus cogens* norms aimed to protect fundamental values of the international community, such as the prohibition of genocide or torture. That statement, however, did not reveal anything about the content of the fundamental values purportedly being protected. Were there any international constitutional principles that were protected by *jus cogens*? Those issues warranted further analysis and should, in any event, be addressed in the commentaries. Concerning the elements set out in article 53, he wondered whether the “non-derogable” character of *jus cogens* norms was part of their nature or simply a consequence of their belonging to the category of *jus cogens*, it being understood that non-derogability, together with acceptance and recognition by the international community as a whole, should be considered a single element. In addition, assuming that it was a constitutive element of *jus cogens*, the requirement that *jus cogens* could be modified only by a subsequent norm of general international law having the same character should also be included. In the light of those considerations, he agreed to the referral of draft conclusion 1 to the Drafting Committee provided that it addressed the identification of not only *jus cogens* rules but also their elements.

55. Draft conclusions 2 and 3 should be reformulated to reflect the content of article 53 of the 1969 Vienna Convention and to avoid any possible contradiction between draft conclusion 2, paragraph 2, and draft conclusion 3, paragraph 1. Noting, with regard to modification by subsequent norms, that the 1969 Vienna Convention was based on the idea that subsequent norms derogated from earlier norms, he said that he would prefer the Commission not to deviate from the wording of article 53, as doing so might upset the balance of the article and needlessly give the impression that the Commission had undertaken to modify the Convention. Given that the topic under consideration was not about derogation from, or the modification or abrogation of, rules of international law, draft conclusion 2, paragraph 1, should be deleted. The referral of draft conclusion 3, paragraph 2, to the Drafting Committee should be deferred until the superiority and universal applicability of *jus cogens* norms had been studied in greater depth.

56. Ms. JACOBSSON said that she wished to congratulate the Special Rapporteur on his first report on *jus cogens*, which was underpinned by an impressive body of research, and on his thorough and informative

introduction of it, complete with welcome modifications to some of the proposed draft conclusions. Although the topic did not lend itself to codification, it was important and should be the subject of a detailed study by the Commission, for the reasons given by the Special Rapporteur in his first report and those put forward during the discussions of the Working Group on the long-term programme of work, which had helped to shape the final syllabus.

57. Starting with some general remarks, she noted that the Special Rapporteur had very skilfully condensed the historical evolution of *jus cogens* into a few pages, thereby providing an essential foundation for the Commission’s future work on the topic. It was crucial to place *jus cogens* in its historical context in order to analyse “the state of international law on *jus cogens*” and to provide an authoritative statement of its nature, as that was the aim of the project as described in the syllabus annexed to the report of the Commission on the work of its sixty-sixth session.<sup>380</sup> Work on the topic would present some methodological challenges, such as the apparent paucity of State practice, of which the Special Rapporteur was well aware and to which he had responded in a satisfactory manner in the report and in his introduction of it. He was right to point out, in paragraph 45 of the first report, that what was important for the purposes of the Commission’s work was whether *jus cogens* found support in the practice of States and jurisprudence of international and national courts.

58. The Special Rapporteur had asked the members of the Commission whether they felt that it would be appropriate to compile an illustrative list of *jus cogens* norms or whether it would suffice to identify the elements of *jus cogens*. She was highly sceptical about including such a list, for several reasons. Experience showed that, as well as being time-consuming, the establishment of a list, even an indicative or open-ended one, entailed making a final choice as to which elements should or should not be included. One might recall, in that regard, the discussions on the indicative list of treaties the subject matter of which involved an implication that they continued in operation, in whole or in part, during armed conflict, which was annexed to the draft articles on the effects of armed conflicts on treaties. All the norms that might be included in the initial list would have to convince the members of the Commission. Those that were included would be regarded not only as the first generation of *jus cogens* norms but also as hard-core *jus cogens* norms. It would thus be difficult to add new norms – or to modify existing norms, if that was ever considered a possibility for *jus cogens* – on the basis of, for example, convincing jurisprudence to the contrary, so even an illustrative list risked freezing the state of the law. She wished to make it clear, however, that her objections were driven not by a desire to see a never-ending expansion of *jus cogens* norms, but, on the contrary, by a belief that one of the key tasks at hand for the Commission was to ensure that the value of other (non-peremptory) rules of international law was not diluted just because they were not considered to belong to *jus cogens*. The syllabus suggested that the Commission’s consideration of the topic could focus on four elements, namely the nature of *jus cogens*, the requirements for the identification of a norm as *jus cogens* (in paragraph 12

<sup>380</sup> See *Yearbook ... 2014*, vol. II (Part Two), annex, p. 173, para. 13.

of the first report, the Special Rapporteur referred to “the requirements for the elevation of a norm to the status of *jus cogens*”, which was not the same), the establishment of an illustrative list of norms that had achieved the status of *jus cogens*, and the consequences or effects of *jus cogens*. In paragraphs 12 and 13 of his first report, the Special Rapporteur emphasized the links between the different elements and stated that he intended to adopt a fluid and flexible approach. If that was done – and the Special Rapporteur did indeed appear to have moved in that direction – the focus should be on the requirements for identification. Otherwise, there was a danger that the Commission’s work would be centred on the question of which norms could be recognized as belonging to *jus cogens* and not on the constitutive elements of *jus cogens*. Once those elements had been identified, they could be exemplified in the commentaries, which would be far better than having a list. In that respect, she shared Mr. Nolte’s concerns about the overeagerness to list certain key legal rules as *jus cogens* rules on the basis of claims that they belonged to that category. In his statement, Mr. Nolte had mentioned the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, in which the European Court of Human Rights had found that the right of access to a court was not – yet – a *jus cogens* norm. In her work as a legal adviser, she had witnessed similar attempts by parties to a particular case to elevate certain rules to the status of *jus cogens*, and that trend could also be seen in the debate on the status of various human rights. She therefore agreed wholeheartedly with Mr. Nolte that the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, among others, demonstrated that currently the challenge was not to establish what norms belonged to *jus cogens* in order simply to add to them, but to find the right balance between, on the one hand, ordinary rules of international law that could be modified through regular procedures and, on the other, certain exceptional, foundational rules that could not. The topic under consideration should not serve as a tool for promoting and expanding *jus cogens*. Rather, the Commission’s central task should be to safeguard the rule of law at all levels, whether that involved protecting *jus dispositivum* or taking a restrictive view on what constituted a *jus cogens* norm. *Jus cogens* norms were, and should remain, the exception; otherwise, they would lose their value.

59. While it was important to analyse the historical background to the concept, and stimulating to examine its theoretical underpinnings, the Special Rapporteur was correct in saying, in paragraph 42 of his first report, that the Commission needed to focus on a practical understanding of the nature of *jus cogens*. In that regard, the 1969 Vienna Convention offered a fitting solution to all practical challenges, and taking it as the starting point for the Commission’s work would not amount to limiting that work to the law of treaties. On the contrary, it was recognized in article 64 of the Convention, in a manner that was particularly relevant to the topic under consideration, that a new peremptory norm could emerge in parallel with existing treaty law, the effect of which would be that “any existing treaty which is in conflict with that norm becomes void and terminates”.

60. Turning to the draft conclusions, she said that, although she supported the idea of having a short and

focused draft conclusion on the scope, and welcomed draft conclusion 1, on the condition that the word “rules” was replaced with “norms”, the text could be shortened to read: “The present draft conclusions concern how *jus cogens* norms are to be identified, and the legal consequences flowing from them.” With regard to draft conclusion 2, she was concerned that devoting a general provision to the modification and abrogation of, and derogation from, rules of international law might be confusing. If (and since) the focus of the Commission’s work was on the state of *jus cogens* norms and of international law, it should be assumed that there were other rules of international law that could be modified or abrogated. To embark on an examination of how that modification or abrogation could come about would be to address a different, albeit connected, topic. Draft conclusion 2, paragraph 2, was related to draft conclusion 3, paragraph 1. If the Commission decided that draft conclusion 2, paragraph 1, was not needed, the “exception” issue in draft conclusion 2, paragraph 2, could be set aside, which would be preferable. Draft conclusion 3 was a good starting point for describing what constituted the essence of a peremptory norm. She had doubts, however, as to the advisability of straying from the definition in the 1969 Vienna Convention for several reasons, even though, as stated clearly in article 53, that definition was for the purposes of the Convention. Needless to say, there was always a “risk”, when a definition of a norm or concept was included in a treaty, that it would be perceived as general and valid also for purposes outside the context of the treaty. That was true of the definition of crimes against humanity in the Rome Statute of the International Criminal Court, from which the Commission now struggled to deviate. However, a definition sometimes deserved to be recognized outside the scope of the treaty in which it appeared, as was the case of the definition of peremptory norms in the 1969 Vienna Convention, not least because it had long been used by courts. While she supported the inclusion of draft conclusion 3, paragraph 2, its wording should be refined, particularly the expression “hierarchically superior” and the phrase “universally applicable” should be retained, even if the Commission decided that it would also address the possible existence of regional *jus cogens* norms. It would also be better to replace the word “protect” with “reflect”. The reference to fundamental values of the international community was essential; what did *jus cogens* norms reflect if not precisely those values, and what would be their purpose otherwise? Those fundamental values were not confined to human rights; they included other norms, such as the prohibition of aggression, whose aim was to preserve the sovereignty and equality of States, and their obligation to settle disputes by peaceful means. She was in favour of referring all the draft conclusions to the Drafting Committee, despite her reservations about the need for draft conclusion 2, which it would, however, be premature to delete at that stage.

61. Before concluding, she wished to make two additional comments about the methodology and the sources. First, the Special Rapporteur should make further use of the Commission’s work on the fragmentation of international law; much of the work carried out by the Study Group, in particular on issues such as the hierarchy of norms, the relationship between *jus cogens* norms and *erga omnes* obligations, and the connection between *jus cogens* and State responsibility, should be further

taken into consideration. Although the Commission had devoted a considerable amount of work to the study of the fragmentation of international law, not all of that work was easily accessible, as it had not been published in the traditional sense of the word, and failing to take full advantage of it would be regrettable. Second, the purpose of *jus cogens* norms was often to protect individuals and, given their nature, they should be universal and offer equal protection to men and women. That matter had been addressed by Hilary Charlesworth and Christine Chinkin,<sup>381</sup> who had argued that the human rights principles most frequently designated as *jus cogens* norms were gendered and therefore did not protect men and women equally. For instance, focusing on protection from abuse by State actors left women at a disadvantage, since most cases of violence against women occurred in the private sphere. Other authors such as Philip Alston and Bruno Simma had also dealt with the issue, which the Special Rapporteur and the Commission should take into consideration in their future work on the topic.

62. Mr. SINGH said that he wished to thank the Special Rapporteur for his excellent first report on *jus cogens*, which was the result of in-depth research and contained very rich analyses, and for his oral introduction of it. He was pleased to read that the Special Rapporteur agreed with the words of caution expressed by States in the Sixth Committee and that he intended to ensure that his reports reflected contemporary practice and did not stray into untested theories. Moreover, many States were of the view that the greatest contribution that the Commission could make to the understanding of *jus cogens* concerned the requirements for the elevation of a norm to the status of *jus cogens*. As to the methodological issue of the sequence of the study, he agreed with Sir Michael, Mr. Nolte and other members that the “fluid and flexible approach” proposed by the Special Rapporteur was problematic, because as soon as a draft conclusion was provisionally adopted, it ceased to be “fluid” and its modification would require another decision by the Commission. When certain draft conclusions were closely interconnected, it would be preferable to wait for them to be adopted together, as a full set of provisions. He shared the doubts expressed in the Sixth Committee and by some members of the Commission over the wisdom of establishing an illustrative list, the risk being that other norms of international law would in effect be accorded an inferior status. Although the matter was mentioned in the syllabus, the Special Rapporteur, while stating that the Commission should not refrain from producing such a list only because it might be misinterpreted as being exhaustive, noted in paragraphs 15 and 16 of his first report that there might be different reasons to reconsider the appropriateness of a list. He himself agreed, however, that even if it did not compile an illustrative list, the Commission would need to provide some examples of *jus cogens* norms in order to provide some guidance about what norms constituted *jus cogens*. In other words, as noted in paragraph 17 of the first report, by addressing various elements of the topic, the Commission would need to provide examples in the commentaries to substantiate its conclusions, which meant that it would, even if only indirectly, establish an illustrative list.

<sup>381</sup> See H. Charlesworth and C. Chinkin, “The gender of *jus cogens*”, *Human Rights Quarterly*, vol. 15, No. 1 (February 1993), pp. 63–76, at p. 75.

63. In chapter IV, section A, of his first report, the Special Rapporteur convincingly demonstrated, on the basis of State practice and case law, that *jus cogens* was now part of international law. It was on that solid foundation that the Commission’s work on the topic was based. As to chapter V, he agreed with the Special Rapporteur that draft conclusions would be the most appropriate outcome of the Commission’s work and that the draft conclusions should reflect the current law and practice on *jus cogens* and avoid the theoretical debates that often accompanied discussions on the topic.

64. Turning to the draft conclusions, he said that draft conclusion 1 reflected the object of the work as described in paragraph 11 of the first report, namely “to provide a set of conclusions that reflect the current state of international law relating to *jus cogens*”. Like other members, however, he had doubts about the usefulness of draft conclusion 2, since, to the extent that it appeared to be trying to explain how rules of international law were modified, abrogated or derogated from and why *jus cogens* was different in that regard, it did not appear to fall within the scope of the topic. Concerning draft conclusion 3, he agreed with those members who had stated that it would be better to include a definition of *jus cogens* at the start of the draft conclusions than to attempt to explain its “[g]eneral nature”, and he also believed that, in defining *jus cogens*, the Commission should follow the wording of the second sentence of article 53 of the 1969 Vienna Convention, without trying to change it or to come up with a new definition. Draft conclusion 3, paragraph 2, was problematic in that it was not clear how describing *jus cogens* norms as “hierarchically superior to other norms of international law” enhanced their peremptory nature or non-derogability, as set out in article 53 of the 1969 Vienna Convention. The matter should be dealt with at a later stage of the work, when the Special Rapporteur addressed the issue of the legal consequences of *jus cogens* rules. It was also unclear what was meant by “fundamental values of the international community” and how they could be identified.

65. Mr. VALENCIA-OSPINA said that he wished to congratulate the Special Rapporteur on his first report on *jus cogens* and recalled that, while it was an important and sensitive topic, it was not being dealt with for the first time by the Commission. It was thanks precisely to the Commission’s work on the law of treaties that the concept of *jus cogens* had found its way into positive international law, and the Commission had also made a significant contribution to the identification of *jus cogens* in its work on other topics, in particular the responsibility of States for internationally wrongful acts and the fragmentation of international law. Given the highly controversial nature of the topic, it came as no surprise that there had already been a wide-ranging debate. Without repeating what had already been said, he intended to focus his observations on certain issues that seemed to him to call for an approach different from the one taken by the Special Rapporteur.

66. The question of the extent to which the Commission’s work on the topic should be informed by theory was fundamental. It seemed, from paragraphs 11 and 73 of his first report, that the Special Rapporteur was afraid of straying into theoretical considerations and, from paragraph 59,

that he did not want to resolve the theoretical debate on the source of the peremptory character of *jus cogens*, even though he devoted an entire section (section B of chapter IV) of his first report to the issue. He himself did not support that approach, for two main reasons.

67. First, it was essential for the Commission to take a clear position on certain theoretical issues, including the question of whether to revive the not only useful but also central idea of providing a list of *jus cogens* norms, irrespective of the illustrative or indicative character of that list. Two decades previously, the Commission had decided to identify certain norms that had a particularly close link with the concept of State crime as belonging to *jus cogens*, incorporating them into article 19 of the draft articles on State responsibility adopted on first reading.<sup>382</sup> The Special Rapporteur was right to point out, in chapter II of his first report, on methodology, that the theoretical underpinnings of *jus cogens* would have an impact on the definition given to *jus cogens* for the purposes of the Commission's work. Therefore, unlike other members who had spoken earlier, he believed that the Special Rapporteur should not be wary of theory; rather, he should embrace it. When compared to the depth and breadth of the scholarly discourse on *jus cogens*, relevant practice, whether that of States or courts, remained fairly limited. Regarding judicial practice, it should be noted that, for almost 40 years following the adoption of the 1969 Vienna Convention, the International Court of Justice had skilfully eschewed making a clear and firm pronouncement on its conception of *jus cogens*. In its jurisprudence, references to *jus cogens* prior to the 2006 judgment in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* had been merely neutral citations from the pleadings of the parties or from the Commission's draft articles on the law of treaties and the commentaries thereto, as in the case of *Military and Paramilitary Activities in and against Nicaragua*. As a result, the Commission might find itself in a situation where, since even that limited practice was largely shaped by previous theoretical considerations, ignoring the theory would inevitably lead to an incomplete assessment of contemporary *jus cogens*.

68. Second, even though the Special Rapporteur repeatedly stressed his intention not to enter into theoretical debates, he himself agreed with Mr. McRae that important theoretical choices had already been made in the first report. In particular, the understanding of *jus cogens* advanced in the report was firmly grounded in consent, insofar as it largely reproduced the definition contained in article 53 of the 1969 Vienna Convention. It would therefore be advantageous to address that choice openly in the light of its theoretical underpinnings, instead of basing it only on an alleged practice and omitting the theoretical explanation. Furthermore, it became necessary for the Special Rapporteur to explain his choice when he expanded on his uncritical adoption of the approach to *jus cogens* in the Vienna Convention, which reflected the consensus reached by States in the 1950s. It was doubtful that this consensus still represented the approach most conducive to defining peremptory norms in international

law, if it ever had. Sir Michael had observed that the Commission had always followed article 53 of the 1969 Vienna Convention when mentioning *jus cogens*, but in all those cases, the references had been incidental, as *jus cogens* had not yet been included in the programme of work as a separate topic. Despite the value that he attached to consistency in the Commission's work, he considered that the previous occasions on which the Commission had dealt with *jus cogens* should not deter it from reviewing its position now that the topic was the very focus of its work.

69. The approach taken by the Special Rapporteur in section C of chapter IV of his first report, on the core elements of *jus cogens*, was also problematic. By taking the requirement of "a norm accepted and recognized by the international community of States as a whole" from article 53 of the 1969 Vienna Convention, the Special Rapporteur included among the core elements of *jus cogens* a criterion for identification centred on consent. However, some of the limitations of a consent-based approach were highlighted in the report itself, in relation to the issue of States' inability to withdraw their consent at a later stage. As indicated in paragraph 53 of the first report, "[e]ven if there were a way to address the question of emergence of peremptory rules through consent – or consensus – it is not clear why those States that have joined in the consensus could not later withdraw their consent, thus damaging the consensus". Ultimately, basing *jus cogens* on State consent failed to provide a plausible explanation of what made a peremptory norm peremptory. Several members of the Commission had established a connection between the core elements of *jus cogens* identified in the report and the concept of customary international law that was being examined in parallel by the Commission. The recurring issue of the treatment of persistent objectors attested to the pertinence of that comparison. According to their reasoning, *jus cogens* could be described as customary law plus non-derogability. The element of consent would thus be similar to *opinio juris*. Nevertheless, viewing *jus cogens* as customary law, albeit a special form of it, appeared to overstretch the traditional concept of customary international law, which required both practice and *opinio juris*, since State practice was lacking or contradictory for many norms considered to be *jus cogens*. In addition, it was debatable whether it was possible in practice to achieve the unanimous general consent (*opinio juris*) of all States, or the "international community of States as a whole". It should be borne in mind that article 53 of the 1969 Vienna Convention had not been adopted unanimously at the United Nations Conference on the Law of Treaties and that, of the seven States that had voted against its adoption in plenary, two had yet to become parties to the Convention.

70. If the Commission were, however, to retain the criterion of consent, its decision would need to be substantiated by coherent reasoning. As a final remark on the issue of consent, he said that the Commission should not overlook its parallel debates on topics such as crimes against humanity and the immunity of State officials from foreign criminal jurisdiction. There was undoubtedly a strong link between *jus cogens* norms and human rights norms. The latter frequently suffered from the fact that law-making and law enforcement were in the hands of States, which were also the main, and sometimes by definition the only

<sup>382</sup> *Yearbook ... 1980*, vol. II (Part Two), para. 34, pp. 30 *et seq.*, at p. 32.

perpetrators of human rights violations. The reluctance displayed by States in the debates concerning the Commission's ongoing work on those topics, for example to accept limitations to the immunity of their officials, might foreshadow a similar reluctance to consent to *jus cogens* norms, which could considerably restrict States' actions or give rise to State responsibility. Thus, a consent-based approach, as the lowest common denominator, could prove to be the only feasible way for the Commission to attain the requisite endorsement by States of the outcome of its work on the topic. The Special Rapporteur and the Commission would therefore be well advised to give careful consideration to whether to aim for the most acceptable outcome or the one that the Commission would deem the most coherent, bearing in mind the fundamental role that it had been given with regard to the progressive development of international law.

71. Concerning values as a core element of *jus cogens* norms, the questions arose as to how and by whom those values were supposed to be identified. If that element was meant to add substantially to the definition of *jus cogens*, it seemed counterintuitive to leave its determination entirely in the hands of States, as it might become indistinguishable from the consent of States to certain *jus cogens* norms. In that context, the first report mentioned both the international community and the international law community, which seemed to indicate that the Special Rapporteur did not necessarily see the community in which the values had validity as being identical to the community of all States. Unfortunately, the report provided no clues as to which community was being referred to. The observation that "the primary difficulty remains the question of who determines the content of natural law" made a cameo appearance, and the issue of the identification of values was further complicated by the reference in the report to the civilizing essence or purpose of those values, which connected the topic to the ubiquitous discourse opposing cultural relativism to the universality of international law. The Special Rapporteur's departure from article 53 of the 1969 Vienna Convention in that respect was understandable, but the role of values in the definition and identification of *jus cogens* called for much greater explanation and analysis if it was to contribute to the work on the topic.

72. The first report also focused strongly on the contrast between natural law and positive law, thereby implicitly subsuming value-based approaches under approaches based on natural law. The rebuttal of the latter was based mainly on an aspect said to be specific to natural law, namely its immutability, but the report did not explain the extent to which the same applied to other value-based understandings of *jus cogens*. One could therefore consider natural law to be a possible source of values, but not subsume all value-based approaches under natural law. The distinction between consent- and non-consent-based approaches mentioned in the footnote to paragraph 50 seemed more appropriate.

73. In addition, it might be interesting, in that context, to discuss the relationship between the concepts of *jus cogens* and *erga omnes* obligations, but the Special Rapporteur indicated in paragraph 4 of his first report that he intended to examine that relationship only in the context of the consequences of *jus cogens* norms. Yet

*erga omnes* obligations, since their first appearance in an *obiter dictum* in the judgment handed down in the *Barcelona Traction* case, were often understood as protecting basic values and interests common to all, which was why a discussion of that relationship as part of a values-based analysis of *jus cogens* could shed light on the nature of the values thus invoked.

74. Lastly, the question of hierarchy gave rise to three observations. As underlined by several members of the Commission, the hierarchical superiority of *jus cogens* norms was already well established, not to say obvious. The Commission's report on the fragmentation of international law attested to that hierarchical relationship; the lack of firm and clear determinations in most parts of that report was indicative of the Commission's almost unequivocal acceptance of that hierarchy. Second, in a more philosophical vein, the question arose as to whether that hierarchical superiority was inherent to the concept of *jus cogens*, or whether it required an external framework of hierarchies in international law. If the latter was true, there would, third, need to be a reality check: was the number of hierarchical structures in international law and international relations increasing, or was the idea of hierarchically structured international law and international relations – probably inspired by the Westphalian conception of the State – ever more unrealistic? The answers to those questions should help the Commission to determine how much emphasis to place on hierarchy in the context of *jus cogens*.

75. To conclude, he invited the Special Rapporteur to consider theoretical questions and to look outside the narrow frame of article 53 of the 1969 Vienna Convention. As Mr. Murphy had emphasized at a previous meeting, drawing up draft conclusions at that early stage in the Commission's work, before the substantive issues outlined in the first report had been settled, was not the best way to advance the work on that important topic.

76. Ms. ESCOBAR HERNÁNDEZ said that the report under consideration served as an introduction to the topic, as evidenced by the Special Rapporteur's considerations on issues such as the sources to be used, whether it would be appropriate to compile an illustrative list of existing *jus cogens* norms in contemporary international law, the form that the outcome of the work should take and the future programme of work, which was outlined in paragraphs 75 and 76 of the first report.

77. From a normative and structural standpoint, *jus cogens* was of particular significance in contemporary international law. The Commission had addressed it on a number of occasions, particularly in relation to the law of treaties and to international responsibility, two issues that, as noted by other members, including Mr. Murase, would need to be taken into consideration in the work on the topic. Thus, while it was true that the 1969 Vienna Convention was the inevitable starting point for any discussion on *jus cogens*, the Commission could not leave aside the special regime that it had defined for the violation of peremptory norms of international law in not only article 26 but also articles 41, 48 and 50 of the draft articles on the responsibility of States for internationally wrongful acts. Attention should also be paid to the

special interpretative effect of *jus cogens* norms, which the Commission had already examined. Moreover, *jus cogens* contained a significant value dimension, referred to by the Special Rapporteur himself in his first report, that could not be overlooked without modifying the concept and nature of *jus cogens*, and without which it was not possible to understand the role played by peremptory norms in contemporary international law. All those aspects should be taken into account and dealt with jointly in the work on the topic.

78. The first general observation that she wished to make about the report under consideration concerned the disproportionate coverage given to the historical analysis, which comprised one third of the report. The Special Rapporteur's desire for completeness and rigour led him, in his search for the origins of peremptory norms, to go back to Roman law and to the "founding fathers" of international law, but it was a shame in that regard that he had not gone back to the sources of the Spanish school of the sixteenth century, where he would undoubtedly have found precedents that were in some ways closer to the modern concept of *jus cogens*, such as Franciscus de Victoria's definition of *jus gentium* in *Relectio de Indis*<sup>383</sup> as a consensus of the majority of the world (the international community or community of nations), especially in the name of the common good. A theologian and jurist, he had argued that international law was valid not only because of the existence of treaties and consensus among human beings but also because the world was a single political community within which general norms and the norms of nations were valid both in peacetime and in wartime. The complementary position adopted by Francisco Suárez (in his *De Legibus*<sup>384</sup>), Domingo de Soto, Baltasar de Ayala and Alonso de la Veracruz was no less important and, from the standpoint of values, it might be interesting for the Special Rapporteur to analyse the thoughts of Bartolomé de las Casas on the rights of the indigenous inhabitants of the New World. In any event, any historical analysis should be performed in its proper context to avoid transpositions that would be difficult to sustain. That issue should also be borne in mind in the work on the topic.

79. Second, it should be noted that the Special Rapporteur began his work with the laudable intention of not engaging in purely theoretical analyses, since the ultimate goal of the work on the topic had a strong practical dimension that needed to be preserved in order for the outcome to be of use to States and, more generally, to all legal practitioners. Nevertheless, and inevitably, the intricacies of *jus cogens* prompted him to analyse the different doctrinal approaches to gain a better understanding of the legal nature of that category of norms and their basis. He continued along the same lines when analysing the historical dimension as being directly linked to the legal nature of *jus cogens*. That led him to address the "controversy" that opposed naturalists and positivists. Although she could understand the Special Rapporteur's

concern in that regard, she believed that the outcome was not sufficiently clear to overcome the problems that the Commission had to face. The matter could not be resolved by opposing natural law and positivism, let alone the primacy of the will of the State and the exclusion thereof. The nature of *jus cogens* could not be anything other than that of a positive norm, because otherwise it could not produce the effects attributed to it by the 1969 Vienna Convention and the draft articles on the responsibility of States for internationally wrongful acts. The issue was not to establish whether or not *jus cogens* norms were norms of positive law – in her view, they definitely were – but to determine how they were formed, what role the will of States played in their formation and why that will, which was vital to that formation even when diluted in a consensus, was relegated to a position of secondary importance once the *jus cogens* norm had emerged and until it was modified by another norm having the same character. That was the real problem that the Commission had to tackle.

80. With regard to the methodological aspects mentioned by the Special Rapporteur in the report under consideration and in his oral introduction, three points were worth commenting on briefly.

81. First, concerning the elements to be borne in mind, there was no reason to stray from the Commission's traditional method of work. Due consideration would therefore need to be given to normative practice, national and international jurisprudence and any other manifestation of State practice. In that respect, she had been surprised to read, in paragraph 10 of the first report, the suggestion that the Commission should consider the topic on the basis of actual State practice rather than solely on the basis of judicial practice. It might be because of the Spanish translation, but that sentence was unfortunate in that it could give the impression that national jurisprudence was less relevant to the work than the other manifestations of State practice to be borne in mind.

82. Second, in terms of the establishment of an illustrative list of norms that were currently considered to belong to *jus cogens*, she completely agreed with those members of the Commission who had argued that such a list would add value to the work on the topic and should thus be included in the draft conclusions. Indeed, what for years had been fuelling the debate on *jus cogens* was not so much the very concept of peremptory norms or their effects as the uncertainty over which norms belonged to that category. It was therefore hard to understand why the Commission would undertake the complex task of defining the core elements of peremptory norms, and of explaining how to identify such norms in practice and their effects in the international order, without indicating which norms it was dealing with. Unlike the Special Rapporteur, she did not think that the topic was of a purely procedural and formal nature, like that of the identification of customary international law; on the contrary, *jus cogens* displayed certain characteristics that made it necessary to examine its substantive dimension and content. Lastly, the Commission had already addressed the topic and, though it had not adopted a list, it had identified certain norms as belonging to *jus cogens* and would therefore expose itself to criticism if, precisely when it was dealing with peremptory norms, it failed to mention those precedents.

<sup>383</sup> F. de Victoria, *De Indis et de Ivre Belli Relectiones being parts of Relectiones Theologicae XII*, in J. B. Scott (ed.), *The Classics of International Law*, Washington, D.C., The Carnegie Institution, 1917.

<sup>384</sup> F. Suárez, *Selections from Three Works: De Legibus, Ac Deo Legislatore, 1612; Defensio Fidei Catholicae, Et Apostolicae Adversus Anglicanae Sectae Errores, 1613; De Triplici Virtute Theologica, Fide, Spe, Et Charitate, 1621*, vol. I, Oxford, Clarendon, 1944.

83. Another issue was that of the form that the list should take. In her view, it was a matter not of deciding whether to draw up a list but of setting criteria for how that should be done; in particular, there was a need to give priority to those norms that, according to practice, were not controversial, and to accept that the list would be necessarily short. While it was true that the list might be regarded as exhaustive or static and that the Commission might be seen as intending to favour certain *jus cogens* norms over others, the Commission could eliminate that risk by conducting an in-depth study of practice and by preparing detailed commentaries to the draft conclusions affected by the list and to the list itself. The Commission could decide where to place the list within the draft conclusions at a later stage.

84. As a final point on methodological issues, she endorsed the principle presented by the Special Rapporteur in paragraph 13 of his first report, according to which the work on the topic should be “fluid and flexible”. That approach did, however, require a great deal of caution, because it was important not to allow the work to turn into an open-ended, circular debate that prevented the achievement of reasonable results, and she was thus unable to support the Special Rapporteur’s proposal whereby adopted draft conclusions could be reconsidered if the Commission deemed it necessary. The proposal ran counter to the Commission’s working methods and would cause a significant number of problems when it came to determining whether a particular draft conclusion should be modified. If the Commission considered it necessary to review draft conclusions that had already been adopted, it could always do so on second reading. In any event, the clearer the programme of work proposed by the Special Rapporteur and the more faithfully it was implemented once it had been adopted, the more stable the draft conclusions would be. The future programme of work proposed in the first report was thus particularly important, but the Special Rapporteur should present a more detailed version of it.

85. Turning to the proposed draft conclusions, she said that draft conclusion 1 defined the scope of the topic, as was customary in the Commission’s work and in accordance with the syllabus, in which the Commission had underlined the need to define clearly the scope and limits of the project. While it therefore posed no problem in principle, its content was more questionable. Reference was made simply to “the way in which *jus cogens* rules are to be identified, and the legal consequences flowing from them”. However, even leaving out the use of the verb *determinar* rather than *identificar* in the Spanish version, the draft conclusion addressed only two of the issues for consideration mentioned in the syllabus, namely the “requirements for the identification” of *jus cogens* norms and the “consequences or effects of *jus cogens*”, and omitted the “nature of *jus cogens*” and the establishment of an “illustrative list” of norms having that character.<sup>385</sup> Without wishing to revisit the issue, she felt that the scope of the topic as set out in draft conclusion 1 was very limited and not really in line with the objective specified in the syllabus and in the report of the Special Rapporteur himself, who asserted that the

objective was to “clarify the state of the law based on current practice”. The draft conclusion should therefore be revised by the Drafting Committee.

86. Draft conclusion 2 was problematic for several reasons. First, paragraph 1 bore no relation to the topic. Although the Special Rapporteur’s wish to establish a basis for comparison between *jus cogens* norms and other norms of international law was understandable, paragraph 1 did not serve that purpose and might give rise to doubts and major controversies. The first sentence appeared to focus solely on treaty rules, because it contained the expression “by agreement of States”, whereas in the second sentence reference was made to customary international law, which could spark a debate on the very nature of that category of norms and on the role played by the “agreement of States” in their formation. Second, the word “prohibited” seemed to refer to cases in which non-peremptory norms of international law (or, to use the Special Rapporteur’s wording, *jus dispositivum*) could not be modified, derogated from or abrogated, which did not seem compatible with what was, precisely, the *jus dispositivum* character of those norms. An analysis of practice would show that the situation was better and more commonly reflected through the use of expressions such as “is not permitted” or “unless otherwise provided”. The notion of prohibition appeared to refer to the category of peremptory norms. Third, the general reference to the modification, derogation from or abrogation of a norm of international law through a treaty or through customary international law, without further explanation as to the relationship between the two categories of norms, could be misleading in that it might be interpreted as meaning that a custom could modify, derogate from or abrogate a treaty, which was not the case in international law and was surely not what the Special Rapporteur had had in mind. Moreover, the reference to “other agreement” was inappropriate, especially as it raised the inevitable question of what other agreement that could be, without proposing any kind of answer. Lastly, the report under consideration did not contain any analysis that could serve as a basis for the paragraph in question.

87. Draft conclusion 2, paragraph 2, meanwhile, was directly related to the topic, but its form was problematic. First, it partly duplicated draft conclusion 3, paragraph 1, and should for that reason be incorporated therein. Second, it presented *jus cogens* norms as an “exception”. While the use of the term “exception” was understandable given the *jus dispositivum* character of other norms of international law, the term did not strike her as the most appropriate to denote *jus cogens* norms. Indeed, although such norms were extraordinary and limited in number, they could not be considered an “exception” in contemporary international law, particularly since they reflected essential values of the international community and, as a result, played a special role in the normative process and with regard to international responsibility. For those reasons, draft conclusion 2 should be deleted and the content of paragraph 2 thereof incorporated into draft conclusion 3, paragraph 2.

88. Draft conclusion 3 was the real starting point for the consideration of the topic and, as such, should be

<sup>385</sup> See *Yearbook ... 2014*, vol. II (Part Two), annex, p. 173, para. 13.

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. Cafilisch, 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,<sup>386</sup> A/CN.4/L.878<sup>387</sup>)**

[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.

<sup>386</sup> Available from the Commission’s website, documents of the sixty-eighth session.

<sup>387</sup> *Idem.*