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Summary record of the 3369th meeting

Topic:
Jus cogens

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was expressed in draft conclusion 8, paragraph 1. However, evidence of such acceptance and recognition had also to be provided, a fact that was the subject of paragraph 2.

14. The nature of the materials that could be offered as evidence was covered in draft conclusion 9. In his report, the Special Rapporteur concluded that a norm is acceptance and recognition as one from which there could be no derogation, which could be discerned from a wide variety of materials. Those materials were similar to those that could be used as evidence of acceptance as law. The idea that the relevant materials could take a variety of forms was reflected in draft conclusion 9, paragraph 1, and a list of materials, inspired by materials that could serve as evidence of acceptance as law, was contained in paragraph 2.

15. Judgments and decisions of international courts could serve as secondary evidence of acceptance and recognition of a norm as not being susceptible to derogation, and that was reflected in draft conclusion 9, paragraph 3. The work of the Commission itself—which contained the most authoritative list of norms that constituted *jus cogens*—as well as scholarly writings and the work of expert bodies could provide context for assessing the weight of primary materials. The role of the secondary materials was reflected in draft conclusion 9, paragraph 4.

16. In paragraph 90 of the report, it was proposed that the name of the topic be changed to “Peremptory norms of international law”, a proposal on which there had virtually been consensus at the previous session. One of the important reasons advanced had been the need for consistency with article 53 of the 1969 Vienna Convention, but for that purpose, the word “general” should be included. The title would thus be “Peremptory norms of general international law (*jus cogens*)”.

17. Although it had been suggested at the previous session that the draft conclusions went too far—or, alternatively, not far enough—the truth was that they reflected practice, the decisions of international courts and tribunals and the weight of doctrine. He hoped that members of the Commission would allow themselves to be led forward in that direction.

The meeting rose at 3.45 p.m.

3369th MEETING

Tuesday, 4 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Jus cogens (continued) (A/CN.4/703, Part II, sect. C, A/CN.4/706)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on *jus cogens* (A/CN.4/706).

2. Mr. MURASE said that he wished to thank the Special Rapporteur for his well-researched report on a difficult, theoretical topic. Some of the assumptions made and conclusions drawn in the report were, however, problematic. The Special Rapporteur highlighted three descriptive and characteristic elements of *jus cogens* norms that were seemingly excluded from the normative criteria for identifying such norms, namely, that they protected “fundamental values”, were “hierarchically superior” and were of “universal application”. The three characteristics were not properly defined and were used almost interchangeably, which rendered the Special Rapporteur’s arguments circular. Moreover, the Special Rapporteur did not give any concrete examples related to the formation and identification of *jus cogens*, and it was difficult to understand the arguments that he put forward on an extremely abstract level.

3. Although no one had openly objected to *jus cogens*, there appeared to be widespread scepticism towards it. In the report, the Special Rapporteur essentially stated that *jus cogens* norms: (a) reflected and protected fundamental values for the international community as a whole; (b) were hierarchically superior norms of general international law from which no derogation was permitted; and (c) were accepted and recognized as *jus cogens* norms by the international community of States as a whole. The Special Rapporteur stressed that the International Court of Justice and other courts and tribunals, including domestic courts, referred to those three concepts. Unfortunately, however, such courts and tribunals, in referring to *jus cogens* norms, did not elaborate on the meaning of “general international law”, “hierarchical superiority”, “fundamental values”, “acceptance and recognition” or “international community (of States) as a whole”. The courts did not have to explain their judgments, and the implicit message in the report was that the judgments should be accepted unquestioningly. However, until the substantive contents of relevant notions were laid bare, the Commission would be unable to free itself from the circular arguments advanced in the report.

4. He had doubts about introducing the concept of “fundamental values” in international law, given that it was extralegal and fell outside the Commission’s mandate to codify and progressively develop international law. The domestic law of a nation was grounded in a particular basic value that it had chosen and that constituted the essence of its basic constitutional norm. International law, by contrast, was based on a multitude of value systems. Each State had its own system, and, in principle, there were no uniform values in the international community of sovereign States.

5. Nevertheless, there had to be certain fundamental public policy values in order to prove the existence of *jus cogens*, which was a difficult task for a positivist international lawyer. He wondered whether that was the reason why the Special Rapporteur had not included fundamental values among his normative criteria for identifying *jus cogens*, and had instead referred to them merely as “descriptive” elements, despite also noting that the idea that *jus cogens* norms reflected and protected fundamental values of the international community was a “predominant theory”. In his own view, fundamental values were key to the identification of *jus cogens* norms and should not be considered as simply descriptive.

6. In the Commission’s commentaries to the draft articles on the responsibility of States for internationally wrongful acts,²⁶⁴ mention had been made of the “vital interests of the international community”²⁶⁵ and of the “fundamental character”²⁶⁶ of peremptory norms, whereas the expression “fundamental values” had been avoided. It might be appropriate to insert the language from those commentaries in draft conclusion 4 as normative criteria for identifying *jus cogens*.

7. The question arose as to what was meant by the term “general international law”, as the report provided no definition. In draft conclusion 5, paragraph 1, it was stated that such law had “a general scope of application”, but the same was true of customary international law. Indeed, many experts viewed the expressions “general international law” and “customary international law” as synonymous. It was important for the Special Rapporteur to prove that norms of general international law were hierarchically superior to other norms of international law, yet he failed to do so in the report. In paragraph 51, he referred to the conclusions of the work of the Study Group on fragmentation of international law, but the Study Group had not taken a position on the definition of “general international law”;²⁶⁷ in fact, it had asserted that there was “no accepted definition”.²⁶⁸

8. In paragraph 43 of his second report, the Special Rapporteur stated that “[t]he most obvious manifestation of general international law is customary international law”. He personally did not believe, however, that the Special Rapporteur’s intention was to equate the two. The Special Rapporteur further stated that treaty law, as *lex specialis*, was not itself general international law. If general international law was not either customary international law or treaty law, did that mean that it was a third source of international law? Was it a part of positive international law, or more akin to natural law? Natural law was, by definition, a higher law, but was it possible to contemplate a higher law within the realm of positive international law?

²⁶⁴ The draft articles adopted by the Commission 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.

²⁶⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 56 (para. (7) of the commentary to draft article 12).

²⁶⁶ *Ibid.*, p. 111 (para. (4) of the commentary to Part Two, chapter III, of the commentary to the draft articles).

²⁶⁷ See *Yearbook ... 2006*, vol. II (Part Two), pp. 177–184, para. 251.

²⁶⁸ *Ibid.*, p. 179, footnote 976.

9. Paragraph 18 of the report indicated that the Special Rapporteur did “not intend to resolve the natural law versus positive law debate or adopt one approach over the other”. In his own opinion, however, the Commission could not even begin to discuss the topic until the Special Rapporteur had decided which approach to take. If the Special Rapporteur was a proponent of the positivist school, he should find ways to place the concept of a “higher law” within the confines of positive international law.

10. Though interesting, the two-step process for the emergence of *jus cogens* norms proposed by the Special Rapporteur was somewhat artificial. It was not clear from the report whether what the Special Rapporteur had in mind was a sociological process involving the formation of a *jus cogens* norm, or simply a process of legal reasoning. If it was the former, an empirical study was needed to demonstrate the process, which seemed to involve double counting the materials used to identify customary international law. If it was the latter, the Special Rapporteur should explain why, as a logical consequence, a particular rule had to be elevated from a normal customary rule to a *jus cogens* rule. After all, it had never been proved that there was a hierarchy in positive international law, nor had it been demonstrated that international law had the same pyramidal structure as domestic law. The theory of the hierarchy of laws formulated by Hans Kelsen did not apply to international law, as it was based on the equality of sovereign States.

11. With that in mind, it was difficult to accept the Special Rapporteur’s reference to the “general principles of law” mentioned in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, principles that he considered to be a “source of international law”. Unless the Commission adopted a natural-law approach to the topic, those principles should be regarded as stemming from domestic law.

12. His own interpretation of Article 38, paragraph 1, was that the general principles of law referred to in subparagraph (c) could not be a source of international law, unlike treaties and customary international law, which were mentioned in subparagraphs (a) and (b). Subparagraph (c) had to be interpreted meaningfully, in accordance with the principle of effectiveness, so that it did not overlap with subparagraphs (a) and (b). Consequently, the general principles of law had to be regarded as stemming from domestic law, and as commonly applicable among the parties. In that scenario, the elevation of a given domestic-law principle to *jus cogens* would require a three-step process: the first step would be from domestic law to a general principle of law; the second would be from a general principle to customary international law; and the third would be from normal customary law to *jus cogens*. That was, however, too artificial an argument.

13. Although the Special Rapporteur had mentioned that the drafters of what had become article 53 of the 1969 Vienna Convention had considered general principles of law to be part of general international law, the fact was that the reference to general principles of law had ultimately been dropped, because of the lack of a common understanding of them and the possibility of confusion. He believed that the Commission should refrain from

addressing general principles of law in its consideration of *jus cogens*. In any event, draft conclusion 5 required a great deal of substantiation and justification.

14. He also had misgivings about the expression “accepted and recognized by the international community of States as a whole”. The Special Rapporteur referred to the “opinion” of the international community in draft conclusion 6, paragraph 2, and to the “attitude” of States in draft conclusion 7, paragraph 1, but opinions could change and attitudes were always ambiguous.

15. It seemed that, in the Special Rapporteur’s view, acceptance and recognition demanded a far lower level of commitment from States than consent, yet *jus cogens* obligations imposed a heavy burden on States that should logically require a much stronger manifestation of agreement than “normal” treaties or customary norms. Draft conclusion 7, however, provided that “[a]cceptance and recognition by a large majority of States is sufficient” and that “[a]cceptance and recognition by all States is not required”. He personally would favour a more balanced formula requiring the consent of virtually all States in order for a *jus cogens* norm to be identified as such.

16. In draft conclusion 9, paragraph 2, the Special Rapporteur enumerated materials that might provide evidence of *jus cogens*. Those materials were, however, the same as the ones used to identify a normal customary rule. If the Commission wished to prove that such a rule had been elevated to the status of *jus cogens*, it would have to use qualitatively different materials in order to avoid double counting.

17. He had no problem with changing the name of the topic to “Peremptory norms”, followed by “*jus cogens*” in parentheses, but he did have some reservations about the reference to “international law”. In his first report,²⁶⁹ the Special Rapporteur had focused entirely on *jus cogens* in the context of the law of treaties, which was why he himself had stated that the topic should have been named “*Jus cogens* in the law of treaties”. However, if the Special Rapporteur intended to deal with the topic from the perspective of State responsibility too, he personally would be in favour of a title that included the words “in international law” or “in general international law”, after the meaning of “general international law” had been clarified.

18. The Special Rapporteur stated in his second report that the issue of State responsibility would be dealt with in the context of the effects or consequences of *jus cogens*. He himself believed that the law of State responsibility should be considered not only in the context of effects and consequences but also from the perspective of the criteria for, and definition and content of, *jus cogens*. For example, unlike the law of treaties, the law of State responsibility did not necessarily require hierarchical superiority in order for a norm to qualify as *jus cogens*. Moreover, the effect of violating a *jus cogens* norm under the law of treaties was simply to render any agreement among the parties responsible null and void. Under the law of State responsibility, meanwhile,

the effect was more far-reaching and included reparations and countermeasures. The Special Rapporteur and the Commission would thus need to elaborate an integrated concept of *jus cogens* that covered both branches of international law.

19. He supported the referral of the draft conclusions to the Drafting Committee, which he hoped would give full consideration to the views expressed in the plenary.

20. Mr. RAJPUT said that *jus cogens* was a rule of international law that was emotive as well as practically important. From one perspective, it was the way to uphold fundamental values of the international community, even if some States or other actors wanted to act differently. From another perspective, though, any rule of law that was declared to be *jus cogens* trumped State consent. However much some academics decried the consensual nature of international law, it was a characteristic that could not be undermined and that continued to define contemporary international relations. The consensual nature of international law not only ensured compliance with, and the acceptability of, legal norms but also protected smaller and weaker States by giving them an equal role in determining and shaping the legal principles that regulated the international legal order. If the approach adopted in declaring a norm to be *jus cogens* was excessively flexible, with insufficient support in State practice, it would inevitably allow recalcitrant States to deny the existence of international obligations, particularly treaty obligations, with regard to which the consent of the States concerned was clear and direct. At the same time, an overly rigid approach might make the identification of *jus cogens* norms impossible. Any work on *jus cogens* therefore had to strike the right balance between flexibility of identification and the consensual nature of international law. He wished to congratulate the Special Rapporteur for achieving that objective in his well-researched second report.

21. The origins of the doctrine of *jus cogens* were attributed to natural-law traditions, but the doctrine was well accepted and recognized in doctrinal international law and was, accordingly, applied in practice. The practice of the International Court of Justice and other international courts and tribunals had confirmed the presence, content and application of *jus cogens* in international law. Despite the distinction between the natural-law origin of *jus cogens* and doctrinal practice, he agreed with the Special Rapporteur’s decision not to engage in the debate concerning natural law and doctrinal law. The concept of *jus cogens* should be dealt with as it was, in particular as reflected in literature and in State and judicial practice.

22. While he did not wish to reopen past debates, he believed that there was an inescapable link between draft conclusion 3,²⁷⁰ which had been proposed in the first report, and the outcome of the second report, particularly draft conclusions 4 to 8. The Special Rapporteur had made it clear in paragraph 3 of his second report that the report’s purpose was “to consider the criteria for *jus cogens*”, while draft conclusion 3 was entitled “General nature of *jus cogens* norms”. The Special Rapporteur

²⁶⁹ *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/693 (first report).

²⁷⁰ For draft conclusion 3 proposed by the Special Rapporteur in his first report, see *ibid.*, para. 74.

appeared to want draft conclusion 3 to reflect the general nature of *jus cogens* norms, and draft conclusions 4 to 8 to reflect the criteria for identifying such norms. Although the theoretical distinction between the two concepts was comprehensible, its practical use was unclear. A provision on the general nature of *jus cogens* might simply serve to create confusion. If the criteria for identification were established in draft conclusions 4 to 8, and the consequences of treaties or actions contrary to *jus cogens* norms were to be presented in the third report, was a draft conclusion 3 on the general nature of *jus cogens* norms needed? In practical terms, when an adjudicating or other body dealing with a *jus cogens* norm had to make a decision regarding its existence, should it look at the nature, the criteria, or both? The content of draft conclusion 3, paragraph 1, was not textually very different from that of draft conclusion 4 (a), though draft conclusion 3, paragraph 2, did contain an important reference to the normative superiority of *jus cogens* norms. That reference could be inserted in the preamble, if the Special Rapporteur chose to have one, but if the Commission wanted it to be reflected in the text, it could be included in the third report.

23. While it was to be understood that draft conclusion 4 set out the elements for identifying *jus cogens* norms and draft conclusions 5 to 8 elaborated on each of those elements in turn, the link between the content of draft conclusion 4 and the descriptions provided in draft conclusions 5 to 8 should be made explicit. For example, draft conclusion 4 (a) could be redrafted to read: "It must be a norm of general international law, as elaborated in draft conclusion 5." Similar changes could be introduced for the other draft conclusions.

24. He agreed with the Special Rapporteur regarding the content of draft conclusion 4, which very successfully captured the philosophy of article 53 of the 1969 Vienna Convention and the Commission's work on State responsibility for internationally wrongful acts. He did have one technical drafting proposal aimed at reducing verbosity, namely that, in the *chapeau*, the words "To identify a norm as one of *jus cogens*" should be replaced with "To identify a *jus cogens* norm". He endorsed the description of criteria for *jus cogens* contained in paragraphs 31 to 39 of the report, and in particular the fact that the first two elements of article 53 of the 1969 Vienna Convention—namely that the relevant norm should be a norm of general international law and that it should be accepted and recognized as one from which no derogation was permitted—were appropriate criteria for identifying *jus cogens* norms.

25. Although he agreed that customary international law and general principles of law could constitute the basis of a *jus cogens* norm, he did not agree that a treaty rule could not do so or could do so only in a subsidiary manner. In draft conclusion 5, the Special Rapporteur appeared to establish a hierarchy of sources of *jus cogens* in descending order from customary international law to general principles of law and then to treaty rules, while also placing a differing emphasis on each. Such a hierarchy was not necessary, as in order for a norm to be declared as *jus cogens*, it must exist in and be developed to a sufficiently advanced degree in each of the three sources.

26. In stating his reasons for such a hierarchy in paragraphs 40 to 59 of his report, the Special Rapporteur had indicated that, in the conclusions of the work of the Study Group on fragmentation of international law, which had been adopted by the Commission in 2006, the Study Group had observed that there was no accepted definition of the term "general international law". However, the Special Rapporteur then went on to rely upon the discussion on *lex specialis* in the 2006 report of the Study Group²⁷¹ to suggest that the jurisprudence of international courts and tribunals excluded treaty law from the purview of general international law. Since the discussion in that report was in the specific context of *lex specialis*, it would be wrong to argue that general international law excluded treaty law. Such an assertion would have serious repercussions for the understanding of general international law as such. Since there was no agreed definition of the expression "general international law", it might be appropriate to interpret it in the light of article 31, paragraph 3 (c), of the 1969 Vienna Convention, which used the phrase "any relevant rules of international law applicable". The spirit represented there seemed more appropriate, since it included all sources of international law.

27. The role of treaty rules in initiating the process of the creation of a *jus cogens* norm could not be relegated to a secondary or tertiary status, as was done in draft conclusion 5, because those rules represented the clearest statement of the views of States and conveyed direct consent, unlike customary international law and general principles of law, which conveyed tacit consent. In fact, certain *jus cogens* norms had originally been treaty norms, but had become *jus cogens* norms due to their general acceptability and embodiment in other sources, such as customary international law and general principles of law. That had been the case, for example, with the rule outlawing the use of force, which had been enunciated in two treaties before finally being embodied in the Charter of the United Nations. In that development, treaty law had played the largest role. The prohibition of piracy had also started as a treaty rule and remained one, even after its recognition as a *jus cogens* norm, having been embodied in a succession of treaties from 1443 to 1958, and having ultimately been incorporated into the United Nations Convention on the Law of the Sea in 1982.

28. He did not agree with or find appropriate the Special Rapporteur's interpretation, set out in paragraph 55 of his report, that the Commission's commentary to article 50 of the draft articles on the law of treaties²⁷² excluded the possibility of the creation of a *jus cogens* norm through treaty law. In his own view, the last two sentences of paragraph (4) of the commentary to article 50 were an affirmation that a new *jus cogens* norm replacing an existing one would emerge through a multilateral treaty. Although that affirmation related to the replacement of an old *jus cogens* norm, he saw no reason why the same test should not be applied to the creation of a new one.

²⁷¹ *Yearbook ... 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

²⁷² 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.* For the commentary to draft article 50, see *ibid.*, pp. 247–249.

In its work on the law of treaties, the Commission had, in fact, laid emphasis on the possibility of a *jus cogens* norm originating in treaty law.

29. Moreover, the International Court of Justice and other courts and tribunals had suggested that, in order to constitute *jus cogens*, a norm must have developed to a sufficient degree in all three sources, namely, customary international law, general principles of law and treaty rules. That methodology was expressed in paragraph 99 of the Court's judgment in *Questions relating to the Obligation to Prosecute or Extradite*, in which it considered that the prohibition of torture was part of customary international law and had become a peremptory norm (*jus cogens*). Four elements emerged from the Court's description of the basis for that prohibition that could be viewed as criteria for the formation of *jus cogens*. They were: "widespread international practice and ... *opinio juris*"; "numerous international instruments of universal application"; "introduced into the domestic law of almost all States"; and "regularly denounced within national and international fora". While the fourth element could be one of the forms of evidence mentioned in draft conclusion 9, custom, treaty and general principles were all equally important for draft conclusion 5. The requirement for a *jus cogens* norm to have originated in a treaty rule was also illustrated by the finding of the International Tribunal for the Former Yugoslavia in its judgment in the *Prosecutor v. Anto Furundžija* case, in which it concluded: "It should be noted that the prohibition of torture laid down in human right treaties enshrines an absolute right, which can never be derogated from" (para. 144).

30. The findings by the Court and the Tribunal had not been intended to lay down the criteria for the identification of *jus cogens* norms; however, since that was precisely the Commission's task, it might be appropriate for it to examine those findings, since they used language that closely resembled the kind that might help the Commission to meet its objectives. On the assumption that a norm must be present in all three sources—namely treaty law, customary international law and general principles of law—in order for it to constitute a norm of general international law, draft conclusion 5 should confer the same stature on all three sources.

31. He agreed with the Special Rapporteur that merely establishing that a norm was a norm of general international law was insufficient for it to constitute evidence of *jus cogens*. The norm also had to satisfy the requirements of acceptance and recognition, since, otherwise, the distinction between *jus dispositivum* and *jus cogens* was meaningless. Of the draft conclusions that related to acceptance and recognition, draft conclusion 6 did not seem to achieve much, other than to reiterate that there had to be acceptance and recognition by the international community as a whole. The statement in draft conclusion 6, paragraph 2, that the requirement of recognition required "an assessment of the opinion of the international community of States as a whole" was, in his view, problematic and gave rise to a number of questions: What constituted an opinion? How was it to be assessed? Was it related to evidence contained in draft conclusion 9? Or did it require something more or something less? Furthermore, given that draft conclusion 8 addressed acceptance and recognition, draft conclusion 6

was perhaps unnecessary and could be deleted. Draft conclusion 8 could then be moved up to take the place of draft conclusion 7. In order to make draft conclusion 8 more comprehensive, the words "by States" in paragraph 2 should be replaced with the phrase "and recognized by the international community of States as a whole".

32. Although he agreed that there was a need for draft conclusion 7, its contents needed to be reconsidered, as paragraph 3 indicated that acceptance and recognition by all States was not required, even though, in identifying the criteria for *jus cogens*, draft conclusion 4 (b) referred to acceptance and recognition by "the international community of States as a whole". Moreover, the title of draft conclusion 7 contained the word "whole", but the need for consent was subsequently limited in paragraph 3 of that draft conclusion to a "large majority of States". To his mind, the word "whole" meant the entire international community, not just a large majority of States. If acceptance and recognition were required from only a "large majority of States", then *jus cogens* norms would be no different than customary international law, evidence of which also required a large majority. It could not be that the only distinction between *jus cogens* and customary international law was the absence of the persistent objector. Furthermore, a declaration by the Commission that a large majority was sufficient might create excessive flexibility, making it easy both to declare a norm as *jus cogens* and for States to wriggle out of binding legal commitments. The agreement of the entire international community was needed; a potential *jus cogens* norm could not achieve acceptance and recognition unless it was completely universal and no derogation from it was permissible. That requirement might slow down the process of the creation of *jus cogens* norms, but it did not make the goal unachievable, as was illustrated by the evolution of the prohibitions of slavery, torture and the use of force into *jus cogens* norms.

33. He agreed with the overall framework of draft conclusion 9, noting that the only area requiring elaboration was paragraph 2, where there was a reference to "resolutions adopted by international organizations". Perhaps it could be clarified that those resolutions were to be adopted by the member States of the organizations concerned. The word "unanimous" should also be added.

34. It might be unwise for the Commission to provide an illustrative list of *jus cogens* norms, since doing so would be tedious and time-consuming. Indeed, each item on the tentative list would have to be discussed at great length, pass the tests that the Commission would devise as part of the outcome of its work on the topic and require a separate report, which would make such a task unmanageable. The Commission had decided against including any examples of rules of *jus cogens* in article 53 of the 1969 Vienna Convention for several reasons, including the consequences of such an enumeration and the time it would take to provide the list. Those reasons remained valid in relation to the present topic. Rather, the Commission should agree on the methodology for identifying *jus cogens*, and once it had the formula right, the authority competent to determine whether a norm constituted *jus cogens* would simply apply the formula in order to determine whether the norm in question had achieved that status.

35. He supported the Special Rapporteur's proposal in paragraph 5 of his report to change the title of the topic to "Peremptory norms of general international law (*jus cogens*)" and agreed with him that the new title was consistent with the Commission's work on the law of treaties.

36. He did not fully understand the purpose of the last sentence of paragraph 15 of the report, relating to disputed State practice, and hoped that the Commission did not want to rely on State practice that was under dispute or discredited in some other manner. Lastly, he was in favour of referring all the draft conclusions to the Drafting Committee.

37. Mr. PARK said that he agreed with the Special Rapporteur's basic approach of taking article 53 of the 1969 Vienna Convention as the starting point for the identification of the criteria used to determine whether a norm had reached the status of *jus cogens*. Although he had no objection to the Special Rapporteur's proposal to change the name of the topic from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)" or to "Peremptory norms of general international law (*jus cogens*)", which the Special Rapporteur seemed to prefer, it was not always clear what was meant by the term "general international law". For that reason, it might be useful to revisit the scope of applicability of "general international law" when the Commission discussed the existence of regional *jus cogens*.

38. At its sixty-eighth session, the Commission had not finalized its discussion of draft conclusion 3, paragraph 2, which stated, *inter alia*, that norms of *jus cogens* protected the fundamental values of the international community and were hierarchically superior to other norms of international law. Although he agreed in part with the Special Rapporteur's view, expressed in paragraph 30 of his second report, that *jus cogens* reflected the "fundamental values of the international community", it was unclear whether, in the practice of States and courts, that was a consistently accepted view. Moreover, the meaning of the term "fundamental values" needed to be clarified, since there was a high risk that States might interpret it differently. It was also worth considering whether it was really necessary to refer to "fundamental values" in order to describe the general nature of *jus cogens* norms. Most importantly, article 53 of the 1969 Vienna Convention did not mention the term "fundamental values" but defined *jus cogens*, or a peremptory norm of general international law, as a norm accepted and recognized by the international community as a whole as a norm from which no derogation was permitted.

39. In his opinion, State practice in that regard was still not entirely consistent, despite the Special Rapporteur's reference in paragraph 20 of his report to "countless separate and dissenting opinions and scholarly writings in support of the idea that *jus cogens* norms protect the fundamental values of the international community". Such opinions and writings did demonstrate that the idea had broad support, but they did not imply that it was consistently accepted without question by the main domestic and international tribunals. As he had indicated in his statement on the topic at the Commission's sixty-eighth session, the international legal order had not been formed out of a single State's domestic legal system but rather was based on diverse cultural, religious, political and

economic regimes.²⁷³ It might therefore be too hasty to conclude that international and domestic practice shared the same basic ideas. It would be more objective to refer to such practice as moving towards full acceptance of the notion that *jus cogens* norms reflected fundamental values of the international community, but without clear consensus as yet; as a result, the Special Rapporteur should perhaps use less absolute terms.

40. Even though the Study Group on fragmentation of international law established by the Commission, as noted in paragraph 23 of the second report of the Special Rapporteur, had already concluded that *jus cogens* norms were hierarchically superior to other rules, international courts and tribunals had not always upheld the hierarchical superiority of *jus cogens* norms over all other norms. For example, with regard to how the hierarchical superiority of *jus cogens* affected certain procedural aspects, the International Court of Justice, in its judgment in the case concerning *Jurisdictional Immunities of the State*, had concluded that the rules of State immunity were procedural in character and were confined to determining whether or not the courts of one State might exercise jurisdiction in respect of another State (para. 93). As noted by Judge Cançado Trindade in his dissenting opinion, the separation between the procedural and substantive aspect of law was problematic. The Special Rapporteur should thus further examine that controversial issue in order to establish clearly the hierarchical superiority of *jus cogens*.

41. Another example of international case law that did not support the conclusion that the hierarchical superiority of *jus cogens* norms was beyond question was the judgment in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, in which the International Court of Justice had found that the fact that a norm at issue in a dispute had the character of a peremptory norm of general international law (*jus cogens*) could not, of itself, provide a basis for the jurisdiction of a court to entertain that dispute (para. 64). Moreover, in the case of *Al-Adsani v. the United Kingdom*, the European Court of Human Rights had been unable to discern a firm basis for concluding, as a matter of international law, that a State no longer enjoyed immunity from civil suit in the courts of another State where acts of torture were alleged, despite its finding that the prohibition of torture had achieved the status of *jus cogens*. Those examples highlighted the need for the Special Rapporteur to examine the jurisdictional issues relating to *jus cogens* in order to ensure the effectiveness of the draft conclusion in providing guidance to States.

42. With regard to the general structure of the draft conclusions proposed by the Special Rapporteur, the criteria for establishing *jus cogens* were set out in six different draft conclusions numbered from 4 to 9, with draft conclusion 4 establishing the legal basis and the others serving to complement it. Despite its logical nature, such a methodology was complicated and redundant. Rather than setting out the main and secondary criteria in six distinct draft conclusions, it might make more sense to combine the secondary criteria contained in draft conclusions 5

²⁷³ See *Yearbook ... 2016*, vol. I, 3316th meeting, p. 227, para. 59.

to 9 with the main criteria set out in draft conclusion 4. Another option would be to leave draft conclusion 5 as it currently stood and merge the secondary criteria set out in draft conclusions 6, 7, 8 and 9. That would simplify the definition of *jus cogens* and the criteria to be used for identifying it, while avoiding repetition and overlap. A further simplification might be to reference some of the secondary criteria in the footnotes or commentary.

43. In addition, although draft conclusions 6, 8 and 9 addressed important aspects of acceptance and recognition as a criterion for the identification of *jus cogens*, their contents, as well as that of draft conclusion 7, seemed to overlap in many respects. It might therefore be appropriate to combine all four draft conclusions into a comprehensive provision that would explain the nature of the acceptance and recognition criterion as well as the actors involved and the evidence required for such acceptance and recognition, and that would also clarify how it was to be distinguished from other forms of acceptance and recognition. Another option would be to combine draft conclusions 6 and 8 in one provision, with draft conclusion 8, paragraphs 1 and 2, for example becoming draft conclusion 6, paragraphs 3 and 4, and to place draft conclusion 9 in a footnote or the commentary in order to specify what materials had to be presented as evidence, since it was questionable whether a separate provision on the subject was required.

44. Commenting specifically on draft conclusion 4, he said that, while he agreed with the two criteria set forth therein, the “two-step process” referred to in paragraph 40 of the second report called for further discussion, if the Special Rapporteur held that the elevation of a norm of general international law to the status of *jus cogens* resulted from practice. Although in theory the sequence was that described in paragraph 61, in reality it was difficult to say that the formation of a norm of general international law always preceded its elevation to *jus cogens* status because, in some cases, the two steps were either conflated or not clearly distinguishable.

45. A historical study might be necessary, but there was already no doubt that many international crimes which were currently accepted and recognized as violations of *jus cogens*, such as genocide, crimes against humanity and aggression, had not been identified until after the Second World War. The first definition of genocide had been provided in article II of the 1948 Convention on the Prevention and the Punishment of the Crime of Genocide, while article 6 (a) and (c) of the Charter of the International Military Tribunal²⁷⁴ defined crimes against peace and crimes against humanity. In paragraphs 33 and 34 of its judgment of 5 February 1970 in the *Barcelona Traction* case, the International Court of Justice had found that the outlawing of acts of aggression and genocide gave rise to obligations *erga omnes*, and some scholars, such as Jochen Frowein, considered that such obligations “by their nature must also form part of *jus cogens*”.²⁷⁵ If that position was accepted, it was likely that the formation of customary international law and the elevation

of a norm to *jus cogens* had happened simultaneously. Hence Alexander Orakhelashvili might have been right in suggesting that “the norm of general international law” requirement could be proven after the determination that the norm in question was a norm of *jus cogens*.²⁷⁶

46. However, the wording of draft conclusion 4 (a) and (b) could be retained, as it set forth the criteria for the identification of *jus cogens* rather than for the formation thereof. The commentary could simply explain that, in certain cases, the formation of *jus cogens* might not follow the sequence presented in that draft conclusion. Alternatively, a phrase could be added to the draft conclusion itself, so that the first sentence read, for example: “To identify a norm as one of *jus cogens*, it is necessary to show that the norm in question meets two criteria, but not necessarily formed in such order.”

47. The Special Rapporteur had indicated in his second report that non-derogation was a consequence and not a criterion of *jus cogens*, whereas other learned writers contended that non-derogability was a primary criterion. While the Special Rapporteur’s approach might well be valid, it was too abstract to be accepted unanimously by lay lawyers and the international community of States, for which the final outcome was intended to serve as guidance.

48. He generally agreed with the wording of draft conclusion 5. However, paragraph 3 thereof required further discussion, primarily because it was difficult to find a case where a general principle of law had served as the basis for *jus cogens*; actual State practice could not be ignored for theoretical purposes. It was indeed questionable whether there was any State practice that supported the status of general principles of law as the basis of *jus cogens*, and it would therefore be helpful if the Special Rapporteur were to provide some concrete examples to substantiate his view. If he was unable to do so, the Commission should examine reasonable candidates for elevation to *jus cogens*.

49. One theoretical question that arose in that context was whether the fact that general principles of law recognized by civilized nations could be deemed to serve as the basis of *jus cogens* implied that municipal principles of law could also be used as its basis. It was plain from Article 38, paragraph 1, of the Statute of the International Court of Justice that there was a hierarchy of sources of international law and that subparagraphs (a) and (b) thereof should be distinguished from subparagraph (c), which had been included in order to avoid deadlock in the Court. That situation therefore gave rise to a theoretical issue, namely what the status of a *jus cogens* norm based on a general principle of law would be compared with one based on customary international law or treaty law, and whether there were any grounds for claiming that they were or ought to be equally peremptory.

50. Draft conclusion 6 seemed to be redundant because most of its contents were dealt with in draft conclusions 4, 7, 8 and 9. It should therefore be deleted. If there was a particular element in that draft conclusion which deserved emphasis, it could be added to draft conclusion 7, 8 or 9.

²⁷⁴ For the Charter of the International Military Tribunal, see the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

²⁷⁵ J. A. Frowein, “*Jus cogens*”, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. VI (2012), at p. 444.

²⁷⁶ See A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, 2006, p. 119.

51. With regard to draft conclusion 7, the term “as a whole” merited examination. The Special Rapporteur suggested that the phrase “as a whole” signified “collective” acceptance and recognition and, in his report, he noted that the material for identifying a *jus cogens* norm was almost identical to that for identifying customary international law. However, collective acceptance by the international community as a whole was not a requirement for the formation and identification of customary international law and, as noted in draft conclusion 8, the requirement for acceptance and recognition as a criterion for *jus cogens* was distinct from acceptance as law for the purposes of identification of customary international law. In addition, paragraphs 1 and 2 of draft conclusion 7 could be combined to explain which subject had to accept and recognize a norm in order for it to be *jus cogens*, and the first sentence of paragraph 2 could be deleted, since its final sentence was sufficient to explain the relevance of the attitudes of other actors.

52. As far as draft conclusion 8 was concerned, while the distinction drawn between mere law and *jus cogens* was important, the phrase “cannot be derogated from” should be modified, in order to stress further the normative nature of *jus cogens*. Moreover, it was the international community of States as a whole and not just individual States which had to accept the norm in question for it to become *jus cogens*. It would therefore be more pertinent to state, “... the norm in question is accepted by the international community of States as a whole as one which ought not to be derogated from”. Furthermore, the issue of acquiescence should be discussed in that draft conclusion or elsewhere. The Special Rapporteur should comment on whether acquiescence, as a form of acceptance and recognition, might be a valid method of forming *jus cogens*.

53. The format of draft conclusion 9 could be improved. Although the idea expressed in paragraph 1 was correct, it seemed strange to leave it on its own. He also wondered whether the wording of paragraph 4 implied that the materials referred to in paragraphs 2 and 3 were the primary means of identifying *jus cogens* and whether there was any qualitative difference between the materials mentioned in paragraphs 2, 3 and 4. Paragraph 4 should also reflect the idea that the decisions of international courts and tribunals were subsidiary evidence of acceptance and recognition, along the lines of draft conclusion 13 on the identification of customary international law, which stated that such decisions were subsidiary means of determining rules of customary international law.²⁷⁷

54. While he generally agreed with the Special Rapporteur’s approach to future work on the topic and the aspects he intended to address in 2018, he still considered that the Commission could provide a minimum list of *jus cogens* norms, or of candidates for elevation to that status, possibly in an annex to the draft conclusions, as such a list would be a helpful guide to future work on the topic.

55. He hoped that the Drafting Committee would make the six draft conclusions more concise by merging or deleting some of them.

56. Mr. NGUYEN said that peremptory norms played an important role in international law, having been presented in treaties and State practice, quoted in international case law and formulated in domestic law, even though the exact definition and constituent elements of *jus cogens* still required some clarification. Since the adoption of the Vienna Convention on the Law of Treaties in 1969, debates had mainly focused on the nature, substance and hierarchy of the norms of international law and the criteria for recognizing a *jus cogens* norm. The Commission’s work in codifying and progressively developing the topic would therefore help to define the place of *jus cogens* within the international legal order.

57. Commenting generally on the topic, he said that article 53 of the 1969 Vienna Convention regulated the relationship between treaty norms and *jus cogens* norms. However, *jus cogens* went beyond treaty law because it was hierarchically superior, universal and non-derogable. It was applied to resolve conflicts not only with treaty norms but with the resolutions of international organizations and it extended to the law on the international responsibility of States, for instance in prohibiting the use of or the threat of the use of force in inter-State relations. The three core descriptive elements of *jus cogens* helped to distinguish it from other norms of international law. *Jus cogens* existed independently of State will in order to preserve the world’s legal order. Its precedence over other norms of international law had been settled by natural law and voluntarily accepted and recognized by States. While it was only exceptionally modifiable or substitutable, it was not immutable and could evolve. Nevertheless, article 53 made it clear that any modification of a *jus cogens* norm had to be universally accepted and recognized by the international community of States as a whole, in other words by sovereign States placed on an equal footing. A non-State actor had no right to modify a *jus cogens* norm. States’ acceptance and recognition of a *jus cogens* norm would depend on their own practice and attitude and on time factors. States universally recognized a pre-existing *jus cogens* norm on perceiving its existence. The criterion of universal acknowledgement was therefore akin to the *opinio juris* element of customary international law. A *jus cogens* norm arose through the elevation to that status of an ordinary norm of customary international law or a general principle of international law. He agreed with the Special Rapporteur that, while a treaty rule could not constitute a *jus cogens* norm, treaty provisions might reflect peremptory norms of customary international law that could be elevated to *jus cogens* status.

58. The question arose of whether the Charter of the United Nations could be considered a product of the creation of *jus cogens* norms by the international community. Any treaty norm in conflict with it was null and void. Only the international community of States could change a *jus cogens* norm and it was responsible for implementing such norms and preventing any treaty norms from conflicting with them. While he concurred with the suggestion in paragraph 59 of the Special Rapporteur’s first report that the binding and peremptory force of *jus cogens* was best understood as an interaction between natural law and positivism,²⁷⁸ he encouraged the Special Rapporteur

²⁷⁷ See *Yearbook ... 2016*, vol. II (Part Two), p. 77 (draft conclusion 13).

²⁷⁸ *Ibid.*, vol. II (Part One), document A/CN.4/693, para. 59.

to further explore the nature of *jus cogens* and the role played by natural law therein. It would also be useful to have a summary of cases related to the implementation of *jus cogens* and to know how many treaty norms had been rejected on the grounds that they were incompatible with *jus cogens* norms.

59. Since *jus cogens* extended beyond treaty law, the criteria for *jus cogens* had to be sought in article 53 of the 1969 Vienna Convention and elsewhere. In paragraph 37 of his second report, the Special Rapporteur set out a two-step approach for the identification of *jus cogens*, namely, that the relevant norm must be a norm of general international law and that the norm of general international law must be accepted and recognized as being one from which no derogation was permitted and one which could be modified only by a subsequent norm of *jus cogens*. Non-derogation was not itself a criterion for *jus cogens* status. An analysis of article 53 could, however, also point to a three-step approach, namely that *jus cogens* must be a norm of general international law, that it must be peremptory among norms of general international law from which no derogation was permitted, and that the peremptory norm must be accepted and recognized by the international community of States as a whole. The existence of a *jus cogens* norm was independent from the will of States. The criterion of non-derogation meant that no treaty-based exceptions were permissible. The implementation of peremptory norms was realized by the acceptance and recognition of the international community of States as a whole. In turn, from a position of *jus dispositivum*, such acceptance and recognition depended on States' conscience. The Special Rapporteur was right to indicate that the fact that a *jus cogens* norm could be modified only by a subsequent norm of *jus cogens* was not a criterion but merely a consequence. However, he needed to provide some convincing arguments for the choice of a two-step or three-step approach to the identification of *jus cogens* norms.

60. Another question concerned the fact that the criteria developed by the Special Rapporteur might go beyond the aim of identifying *jus cogens* to indicate how *jus cogens* norms were created or formed, because such norms were an exception to the general rule that international law was *jus dispositivum*. At the Commission's preceding meeting, the Special Rapporteur had mentioned the formation of *jus cogens* in his introductory statement. While most of the draft conclusions proposed in the second report used the term "identification" or "identify", draft conclusion 5, paragraph 2, used the term "formation".

61. The report indicated that *jus cogens* norms protected or reflected fundamental values of the international community, but did not address the definition of those values. Most delegations in the Sixth Committee used the verb "reflect", not "protect", in that context. Statements by State representatives and the case law of the International Court of Justice and national courts and tribunals tended to invoke *jus cogens* in cases relating to human rights, the prohibition of the threat or use of force, or State immunity. While some effort was made, in paragraph 71 of the first report on the topic, to describe "considerations of humanity",²⁷⁹ there were no descriptions of "fundamental

values" in other domains. With regard to territorial sovereignty, the exclusive rights of States within their territory were universally accepted and recognized by the community of States; he wondered whether that would thus be considered a *jus cogens* norm. Clean air, which was related to the topic covered by Mr. Murase (Protection of the atmosphere), was a fundamental value in the environmental domain, yet some States had taken a controversial stance on the Paris Agreement under the United Nations Framework Convention on Climate Change.

62. It was clear that "protect" and "reflect" had different meanings and that the Special Rapporteur was correct to state that "*jus cogens* norms reflect and protect fundamental values of the international community". The order of the verbs in that expression should be kept consistent throughout the study.

63. Even though the term *jus cogens* was concise and commonly used, he supported the proposal to change the title of the topic to "Peremptory norms of general international law (*jus cogens*)", for three reasons: the phrase was used in article 53 of the 1969 Vienna Convention and in previous outputs of the Commission; a simple, non-technical formulation was desirable in view of the need for universal acceptance by the international community of States as a whole; and the new title clearly reflected the nature and scope of *jus cogens* as a norm of general international law, its universal acceptance by the international community, its peremptory character and its superiority over other norms, while not excluding the concepts of regional or even domestic *jus cogens*.

64. With respect to draft conclusion 4, he proposed that the first sentence be shortened and simplified, either along the lines proposed by Mr. Rajput or with wording such as "*Jus cogens* norms must meet the following criteria:". The rest of the draft conclusion could then reflect either a two-step or a three-step approach. One option would be to list two criteria: a peremptory norm among norms of general international law from which no derogation was permitted; and a norm accepted and recognized by the international community of States as a whole. The other option would be to list three criteria: a norm of general international law; a peremptory norm of general international law from which no derogation was permitted; and a norm accepted and recognized by the international community of States as a whole.

65. He proposed that the title of draft conclusion 5 refer to the sources of *jus cogens* norms, as paragraphs 2, 3 and 4 listed the sources from which such norms were drawn. It should be noted that, while a general principle of international law could become a *jus cogens* norm, not all such principles had that status. In paragraph 3 of the draft conclusion, the use of the wording "within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice" to refer to the general principles of law accepted and recognized by civilized nations was inconsistent with the definition of *jus cogens* as norms that were universally accepted, and could open up the possibility that domestic and regional *jus cogens* norms could be imposed on the international community of States as a whole. In paragraph 1, the definition "A norm of general international law is one which has a general scope of application" was

²⁷⁹ *Ibid.*, para. 71.

too simple. The definition in that paragraph should reflect the outcome of the discussions under the topic “General principles of international law”, which was included in the Commission’s long-term programme of work.

66. In draft conclusions 6 and 7, the recognition of a norm and the question of who recognized the norm were treated as separate criteria, but his view was that “acceptance and recognition by the international community of States as a whole” was a single criterion that could not be split. Draft conclusion 7, paragraph 1, did, in fact, assert the unity of that criterion, and was thus inconsistent with the separate treatment of the two elements in draft conclusions 6 and 7. In addition, the wording of draft conclusion 6, paragraph 1, was similar to that of draft conclusion 4, and the title of draft conclusion 8 also referred to “acceptance and recognition”. To address that redundancy, he proposed that draft conclusions 6, 7 and 8 should be merged. The new draft conclusion should retain the title of the current draft conclusion 6 and should state that: (1) acceptance and recognition by the international community of States as a whole was relevant in the identification of norms of *jus cogens* from which no derogation was permitted; (2) acceptance and recognition by a large majority of States was sufficient for the identification of a norm as a norm of *jus cogens*; and (3) non-State actors had no right to accept and to recognize a *jus cogens* norm, but their attitude might be relevant in providing context and assessing the attitudes of States. Regarding the second of those points, he took note of Mr. Rajput’s view that the phrase “the international community of States as a whole”, not “a large majority of States”, should be used; perhaps the reference to “a large majority of States” could be moved to the commentary.

67. As draft conclusion 9 was very long, he proposed that its presentation be reconsidered. Moreover, given that even the modification of a *jus cogens* norm depended on acceptance and recognition by the international community of States as a whole, as noted in paragraph 37 of the second report, he proposed that a draft conclusion on that subject should be included. Since article 53 of the 1969 Vienna Convention was the point of departure for the draft conclusions, all the factors mentioned in that article should be reflected.

68. He looked forward to the Special Rapporteur’s studies on the effects of *jus cogens*, the hierarchy of *jus cogens* over other norms of *jus dispositivum* and the effect of persistent objection regarding *jus cogens*, as well as the open list of *jus cogens* norms. He was in favour of referring the proposed draft conclusions to the Drafting Committee, which should reconsider their wording with a view to consolidating and shortening them.

69. Mr. MURPHY said that he agreed with many aspects of the analysis contained in the Special Rapporteur’s well-researched second report. For example, he agreed that customary international law was the principal source of *jus cogens* norms and that the sequence for the identification of a *jus cogens* norm entailed first the determination that a norm had been created and then the determination that it had been accepted and recognized as a peremptory norm. Like the Special Rapporteur, he endorsed the “double acceptance” concept

whereby a norm must first be accepted and recognized as a norm of international law and then be accepted and recognized as *jus cogens*. He believed that the Special Rapporteur was correct to focus on acceptance and recognition by States, rather than other actors, and had no concerns about the proposal to change the title of the topic to “Peremptory norms of general international law (*jus cogens*)” or about the future work programme outlined in the second report.

70. His views nonetheless diverged from those of the Special Rapporteur in a number of areas. Concerning draft conclusion 3, paragraph 2, which was still pending in the Drafting Committee, he noted that the statements made in the Sixth Committee during the General Assembly’s seventy-first session generally neither supported nor opposed that proposal. In his view, the paragraph was confusing because it appeared to assert that elements additional to those contained in article 53 of the 1969 Vienna Convention were necessary in order for a norm to constitute *jus cogens*. Although the Special Rapporteur indicated, in paragraph 18 of the second report, that those elements were not “additional” but only “descriptive and characteristic”, that distinction was not clear, as all the elements referred to in draft conclusion 3 were in some sense descriptive or characteristic. He believed that the draft conclusion, which essentially defined *jus cogens*, should refer only to the elements identified in the 1969 Vienna Convention.

71. Another difficulty with draft conclusion 3, paragraph 2, was that the arguments contained in paragraphs 20 to 22 of the second report conflated the idea that *jus cogens* “protected” fundamental values with the idea that it “reflected” those values, yet those were two very different things. The sources supporting one concept thus could not be marshalled in support of the other. Further, the notion that *jus cogens* norms were “hierarchically superior to other norms” primarily concerned the consequences of *jus cogens*, particularly their ability to prevail over other norms with which they conflicted. Thus, that issue would best be addressed in the Special Rapporteur’s future report on the consequences of *jus cogens*. Lastly, if the Special Rapporteur intended to study the possibility of non-universal *jus cogens*, as indicated in paragraph 68 of the first report, then draft conclusion 3, paragraph 2, should not assert that such norms were “universally applicable”.²⁸⁰ In sum, while he was willing to consider the new proposal that the Special Rapporteur was to make in the Drafting Committee, he urged the Special Rapporteur to reconsider whether draft conclusion 3 was the best place in which to address the issues referred to in paragraph 2.

72. With respect to draft conclusion 4, he agreed on the two criteria specified as necessary for the identification of a norm as one of *jus cogens*, but did not agree that the third criterion set out in article 53 of the 1969 Vienna Convention, which was that the norm must be one that could be modified only by a subsequent norm of *jus cogens*, was irrelevant for identifying a norm as *jus cogens*. In his view, it was clear from article 53 and its negotiating history that the “accepted and recognized” clause referred

²⁸⁰ *Ibid.*, para. 74 (draft conclusion 3).

to two things: acceptance or recognition of a norm from which no derogation was permitted, and acceptance or recognition of it as a norm which could be modified only by a subsequent norm of general international law having the same character. Unlike the Special Rapporteur, he did not think that the third criterion came into play only after the norm was identified; rather, it was one of the means of identifying the norm, and that was why it appeared in the definition of *jus cogens* contained in article 53. The third criterion qualified the nature of the second criterion: the norm must be one that could not be derogated from but could be changed through modification by another *jus cogens* norm. The third criterion should thus be included in draft conclusion 4, either as a subparagraph (c) or as part of subparagraph (b). If that was done, it might be worth considering whether draft conclusion 4 was really necessary, as it seemed to duplicate draft conclusion 3, paragraph 1. While he thus agreed with Mr. Rajput that there was an overlap between draft conclusions 3 and 4, he would prefer to retain draft conclusion 3 and delete draft conclusion 4.

73. Draft conclusion 5 addressed the issue of where norms of general international law could be found. The discussion in paragraphs 42 and 43 of the report, concerning the definition of “general international law”, was somewhat obscure. That term had been used in various ways by States, courts and scholars, with the result that a single meaning was difficult to define. In his view, the most plausible interpretation was that “general international law” referred to law that was binding on all States. That might be the intended meaning of the words “general scope of application” in draft conclusion 5, paragraph 1, but it would be clearer to state directly that the relevant norms were norms that were binding on all States. He wondered why the Special Rapporteur had included a reference to universal applicability in draft conclusion 3 but not in draft conclusion 5, where it seemed to be more relevant.

74. While he agreed that customary international law was the most common basis for the formation of *jus cogens*, as stated in draft conclusion 5, paragraph 2, he was less convinced by the claim made in paragraph 43 of the report that customary international law was a manifestation of general international law, unless it referred solely to customary international law that was not regional or special in nature. Draft conclusion 5, paragraph 3, identified “[g]eneral principles of law” as another source of *jus cogens* norms, but, as noted by the Special Rapporteur in paragraph 48 of the report, there was significantly less authority for that proposition. A central problem was that most such principles were drawn by analogy from municipal law and were viewed essentially as gap fillers for the main sources of international law; they were not of a peremptory nature. The Commission must therefore be very cautious about identifying general principles of law as a basis for *jus cogens*. If it decided to do so, it should point out, both in the draft conclusion and in the associated commentary, that this proposition was much less grounded in practice.

75. He had doubts about draft conclusion 5, paragraph 4. He agreed that treaty rules, like other factors such as resolutions of international organizations or

decisions of intergovernmental conferences, could influence the development of customary international law. It was unclear, however, why the indirect influence of treaties with respect to *jus cogens* should be singled out from among those factors. A more plausible proposition was that multilateral treaties that had garnered universal or near-universal adherence, such as the Charter of the United Nations or the Geneva Conventions for the Protection of War Victims, played a unique role in helping to establish general international law. The expression “[a] treaty rule” seemed far too open-ended.

76. He had no particular concerns about draft conclusion 6, which addressed the issue of acceptance and recognition. It did, however, include considerable repetition, especially in relation to draft conclusions 3, 4 and 8. Repetition was not necessarily problematic, but it could be confusing if different terms were used in very similar provisions. At a minimum, draft conclusions 6 and 8 could be combined into a single draft conclusion addressing all aspects of acceptance and recognition.

77. In view of time constraints, he would deliver the rest of his statement at the Commission’s next plenary meeting.

The meeting rose at 1.05 p.m.

3370th MEETING

Wednesday, 5 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Jus cogens (continued) (A/CN.4/703, Part II, sect. C, A/CN.4/706)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on *jus cogens* (A/CN.4/706).

2. Mr. MURPHY, continuing the statement he had begun at the previous meeting, expressed general support for draft conclusion 7 but said that he was not convinced that the concept of “States as a whole” referred to collective recognition of non-derogability, as opposed to individual recognition by sufficient States to constitute