

Provisional

**For participants only**

9 August 2017

Original: English

---

**International Law Commission**

**Sixty-ninth session (second part)**

**Provisional summary record of the 3372nd meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 11 July 2017, at 10 a.m.

**Contents**

*Jus cogens* (continued)


---

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad\_sec\_eng@unog.ch).

GE.17-11450 (E) 170717 090817



\* 1 7 1 1 4 5 0 \*

Please recycle 



***Present:***

*Chairman:* Mr. Valencia-Ospina

*Members:* 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. Petrič  
Mr. Rajput  
Mr. Reinisch  
Mr. Ruda Santolaria  
Mr. Saboia  
Mr. Šturma  
Mr. Tladi  
Mr. Vázquez-Bermúdez  
Sir Michael Wood

***Secretariat:***

Mr. Llewellyn Secretary to the Commission

*The meeting was called to order at 10.05 a.m.*

**Jus cogens** (agenda item 7) (*continued*) (A/CN.4/706)

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

**Mr. Kolodkin** said that article 53 of the 1969 Vienna Convention on the Law of Treaties was undoubtedly the starting point for examining the whole legal regime of *jus cogens*. That regime included the notion of peremptory norms, their effects within the scope of the law of treaties, the law of responsibility in the context of jurisdiction, and so on. If one was to speak of the definition or notion of the peremptory norm, article 53 merely served as a framework, and not a starting point, for considering the question of how to define peremptory norms. Draft conclusion 1 restricted the scope of the topic to peremptory norms of general international law, and, as had been stated in the interim report of the Drafting Committee the previous year, that was without prejudice to the possibility of the existence of regional *jus cogens*. Mr. Nolte had referred to the possible existence not only of regional *jus cogens* but also of “particular” peremptory norms. It was to be hoped that the Special Rapporteur would pursue that issue. The fact that the Commission was dealing only with peremptory norms of general international law without prejudice to the possible existence of regional or particular norms of *jus cogens* should be made clear in the draft conclusions. In that regard, he supported the Special Rapporteur’s suggestion to change the name of the topic.

The definition of a peremptory norm of general international law adopted by the Drafting Committee in draft conclusion 2 reproduced the definition set out in article 53 of the 1969 Vienna Convention. Although that may have been the only possible approach, it presented certain difficulties. One lay in the Special Rapporteur’s decision to use only two of the three criteria laid down in article 53 as the criteria for the identification of *jus cogens*, and to consider the means by which a *jus cogens* norm could be modified as a description of *jus cogens*, rather than as one of such criteria. Mr. Murphy’s and Mr. Park’s critiques in that regard deserved attention. The Drafting Committee had viewed the fact that a norm of *jus cogens* could only be modified by a subsequent norm of general international law having the same character as a key element of the definition contained in the 1969 Vienna Convention.

The Special Rapporteur had pointed out in his second report that the first sentence of article 53, which stipulated that a treaty was void if, at the time of its conclusion, it conflicted with a peremptory norm of international law, was not definitional but set out the consequence of a conflict between a treaty provision and a norm of *jus cogens*. Jiménez de Aréchaga had already taken the view that the definition of *jus cogens* in article 53 was based on the legal effects of a rule and not on its intrinsic nature. If that were the case — and he believed it to be so — the Commission should include the consequences of conflicts between a treaty provision and a peremptory norm of general international law as one of the criteria for identifying *jus cogens* norms. The work of the Special Rapporteur tended in that direction. As the criterion of being a norm of general international law did not on its own distinguish a *jus cogens* norm from any others, he had rightly specified the need for norms of *jus cogens* simultaneously to meet that criterion and the criterion of acceptance and recognition by the international community of States as a whole as a norm from which no derogation was permitted.

The question of whether it was sufficient for a norm to meet the two criteria chosen by the Special Rapporteur in order to be identified as one of *jus cogens*, distinct from all other norms of general international law, required further consideration. There might be other norms of general international law from which no derogation was permitted, including through “contracting out” by concluding an international treaty. For example, if the Charter of the United Nations were taken to contain norms of general international law, would it be permissible to conclude a treaty derogating from its provisions?

Another question was whether it was permissible to derogate from obligations *erga omnes*.

At first sight, derogation from such obligations, including by contracting out through a bilateral treaty, was not permitted. If so, then the criterion of non-derogability, even taken in conjunction with the criterion of being a norm of general international law, would not distinguish *jus cogens* norms from some other norms of general international law. More specifically, the issue must first be considered from the point of view of the relationship between peremptory norms, norms providing for obligations *erga omnes* and the obligations set out in the Charter of the United Nations, taking into account Article 103 thereof. In his view, what set *jus cogens* norms apart from all others was their invalidating effect, as provided for in articles 53 and 64 of the 1969 Vienna Convention. It was difficult to think of any other norms of general international law, including those from which it was impossible to derogate by contracting out or otherwise, that would have the same invalidating effect, including on treaties. That was precisely why the second sentence of article 53 must be read in conjunction with the first sentence thereof, and with article 64.

The invalidating effect of peremptory norms, not just their non-derogability, was the most important, integral and necessary criterion for their identification. As Grigory Tunkin had observed, a specific feature of an imperative norm was that it did not permit derogation by agreement between two or several States, and an agreement contravening it was invalid. Robert Kolb had also expressed a preference for defining peremptory norms by their effect, which lay in the invalidation of treaty provisions that contradicted norms of *jus cogens*. The Special Rapporteur was intending to examine the effects of peremptory norms in his third report; it would be useful if he would consider the relationship between peremptory norms and other norms of international law from which no derogation was permitted. The Commission should leave open the possibility of returning to the issue of defining peremptory norms and the criteria for identifying them at a later stage.

In his second report (paras. 18 to 27), the Special Rapporteur had revisited the issues of the values protected by peremptory norms and of hierarchical superiority, covered in paragraph 2 of draft conclusion 3. The universal applicability of *jus cogens* was in fact included in the definition of general international law contained in paragraph 1 of draft conclusion 5. The values and hierarchical superiority of peremptory norms were considered descriptive. Mr. Murase had rightly referred to them as extra-legal elements; as such, they should not be included in the text of the draft conclusions. If the Special Rapporteur and Commission believed them to be particularly important, they could be mentioned in the commentary. Legally speaking, the hierarchical superiority of *jus cogens* norms was a result of their invalidating effect. Taking into account the significance of that effect in the identification of *jus cogens* norms, it could be that a second paragraph dealing with the invalidating effect of such norms should be added to draft conclusion 2. Such an addition would bring the definition into line with that contained in article 53 of the 1969 Vienna Convention and would express the concept of the hierarchy headed by *jus cogens*. Scholars had also rightly noted that the hierarchy applied to norms of international law, not the sources thereof.

He agreed with the concept of “double consent” applied to peremptory norms and with the Special Rapporteur’s statement that the attitude of non-State actors could not constitute acceptance and recognition of peremptory norms by the international community. As many other members of the Commission had said, the international community of States as a whole should be understood as a very large majority of States, not simply a majority; as Roberto Ago had pointed out, it should also include all regions, groupings of States and, he himself would add, legal systems.

The Special Rapporteur had taken the view that, as general international law comprised customary international law and general principles of law, only custom and general principles could serve as sources of peremptory norms of general international law, and international treaties could not. However, to the three authors he had cited in footnote 144 as espousing a different viewpoint could be added a number of others, including McNair, Virally, El-Arian and Zemanek, along with several members of the Commission, particularly Mr. Rajput and Mr. Šturma. In 1993, Tunkin had referred to the Commission’s conviction that it was preparing draft articles intended to be part of general international law and to the fact that it never used the terms “general international law” and “customary international law” as synonyms. It was well known that socialist and developing countries

had been the principal supporters of consolidating the category of peremptory norms in international law. For them and those who represented their doctrine, the main source of international law, including general international law, was the international treaty. That seemed to be reflected in the Commission's work from the 1960s to the 1980s. The composition of the Commission had changed many times since then, but it was only in the 2000s that it seemed to have begun equating general international law with customary international law in some contexts, as could be seen in its work on State responsibility and fragmentation. In principle, however, the Commission had never excluded treaties from the possible sources of general international law.

He supported Mr. Rajput's comments concerning the meaning of paragraph (4) of the Commission's commentary to draft article 50 of the draft articles on the law of treaties (1966) and consequently disagreed with what the Special Rapporteur had said on the subject in paragraph 55 of his second report. The Commission had clearly recognized that a peremptory norm could be modified by an international treaty. Accordingly it must acknowledge that a peremptory norm of general international law could be created by a treaty. In citing the principles on the use of force as an example of a norm of general international law of universal application, for example, the Commission had stated that those principles were actually laid down in the Charter of the United Nations, not reflected therein. In his view, international treaties could serve as a source of peremptory norms of general international law, in other words, they could create them directly. A treaty — specifically, a universal, norm-setting international treaty, sometimes called a general international treaty — could stipulate that its States parties could not conclude treaties that contradicted its provisions and that any such treaties would be inherently invalid.

The majority of the Commission seemed to consider that the “international community of States as a whole” required for the creation of a peremptory norm of general international law did not necessarily have to comprise all States: a very large majority of States would suffice. That prompted the question of why such an international community of States could not be represented by the parties to an international treaty with very wide representative participation. If the parties to a universal international treaty could establish such a hierarchy, as was provided for in Article 103 of the Charter, why could they not elevate a norm of universal general international law to the status of *jus cogens*? The Special Rapporteur appeared to have come close to admitting such a possibility in paragraph 75 of his report but had stopped just a step away from doing so.

The possibility of establishing a peremptory norm by an international treaty gave rise to another question. In his view, the formation of a norm of general international law and its acceptance and recognition as peremptory were not two necessarily sequential stages. They were to be viewed as sequential only under the hypothesis that a peremptory norm was formed from custom. If it was accepted that a peremptory norm could be created by a treaty, then it became evident that all the criteria could be fulfilled simultaneously.

In addition to the issues already identified by the Special Rapporteur for future work, he agreed with Mr. Park and Mr. Šturma that consideration should be given to the relationship between peremptory norms, jurisdiction and immunity. After examining the effects of peremptory norms outside the sphere of treaty law, the Commission might come up with some new reasoning about the effects of peremptory norms or their consequences, since the definition of those norms was borrowed from treaty law. He reiterated his suggestion that the Commission leave open the possibility of returning to the definition of peremptory norms and the criteria for identifying them once it had considered the effects of *jus cogens* in areas other than the law of treaties.

**Ms. Lehto** said that the Special Rapporteur's choice of two criteria for the identification of *jus cogens*, based on article 53 of the 1969 Vienna Convention, was consistent with State practice, decisions of international courts and tribunals, scholarly views and the Commission's earlier work. In all those contexts, article 53 had been treated as a general definition of *jus cogens* for the purposes of international law, including beyond the limits of the law of treaties. Different views regarding those two criteria had nevertheless been expressed during the debate. Mr. Nguyen had proposed that they should be construed as three cumulative criteria. Mr. Murphy had suggested that the criteria should include the final portion of article 53, which concerned the modification of a *jus cogens*

norm, a proposal echoed by Mr. Hmoud, Mr Hassouna and Mr. Kolodkin. While Mr. Nguyen's proposal seemed merely a matter of presentation, it gave rise to the question of whether presenting non-derogability as an independent criterion, and placing it before acceptance and recognition, could give the impression that non-derogability was seen as an inherent quality of *jus cogens* norms. Article 53, however, was fully anchored in the consensual view of international law and made State acceptance the principal — if not the only — test of *jus cogens*.

It was important to recall, in that respect, that *jus cogens* was a very special category of international law, constituting fundamental norms with potentially far-reaching effects. The criteria for *jus cogens* must be strict enough to distinguish peremptory norms from other categories of international law. The first criterion presented in paragraph 39 of the second report was not relevant in that sense: that a norm capable of being elevated to the status of *jus cogens* must be a norm of general international law was a necessary precondition for that status but did not help to differentiate peremptory norms from others. Neither was it clear that the second criterion performed that function.

Non-derogability, which in the case of *jus cogens* was of a very particular nature, was a term used in other contexts and for other purposes, most obviously, non-derogation clauses in human rights treaties. The Human Rights Committee had noted, in its general comment No. 29 on derogations during a state of emergency, that proclamation of certain provisions of the International Covenant on Civil and Political Rights as being of a non-derogable nature could be seen partly as recognition of their *jus cogens* nature. It had pointed out, however, that that was not the case for the whole list of non-derogable provisions of the Covenant, and that some provisions had been proclaimed non-derogable solely because it could never become necessary to derogate from such rights during a state of emergency. The enumeration of non-derogable provisions was thus “related to, but not identical with, the question of whether certain human rights obligations bore the nature of peremptory norms of international law”. The Special Rapporteur might wish to address the issue of non-derogation clauses in human rights treaties in his third report, when he came to consider the consequences of *jus cogens* norms.

The two criteria proposed did not seem to make full use of the potential of article 53 of the 1969 Vienna Convention. As pointed out by Mr. Murphy and echoed by others, a further criteria could be seen in the final portion of article 53, stating that a peremptory norm could be modified only by a subsequent norm having the same character. Adding such a requirement to the criteria would raise the threshold and underline the special nature of peremptory norms. In particular, it would be a way to highlight the fact that violations of peremptory norms, such as the practice of torture by some States, did not weaken or alter such norms, which could only be modified by the special procedure described in article 53.

In paragraph 18 of his report, the Special Rapporteur referred to three “descriptive and characteristic elements, as opposed to constituent elements (or criteria) of norms of *jus cogens*”. It might be asked, however, whether there were any peremptory norms that were not characterized by fundamental values, hierarchical superiority and universal applicability. She echoed the view expressed by Mr. Nolte, Mr. Hmoud and Mr. Šturma that the three elements, in particular the notion that *jus cogens* norms reflected and protected fundamental values of the international community, were essential in complementing the criteria drawn from article 53. Mr. Nolte had pointed out that peremptory status must be linked to the substantive content of *jus cogens* norms and to the values they reflected. The Commission, in paragraph (2) of its commentary to what had become article 53, had likewise emphasized the importance of the content of peremptory norms, stating it was not the form of a general rule of international law but the particular nature of the subject-matter with which it dealt that could give it the character of *jus cogens*. She therefore agreed with the Special Rapporteur's statement, in paragraph 76 of his second report, that the content of peremptory norms and the values that such norms served to protect were the underlying reasons for the norms' “peremptoriness”, although it was the acceptance and recognition of such status by the international community of States as a whole that identified them as norms of *jus cogens*. The two were intrinsically linked: it was because of their content and the values they reflected that such norms were accepted and recognized as peremptory.

The concept of double acceptance presented in paragraph 77 of the report was a useful analytical tool to underline the specific nature of *opinio juris cogentis*. She agreed with the Special Rapporteur that the phrase “international community of States as a whole” meant that the acceptance or consent of States must be given, not individually, but through some collective act. As Conklin had said, the will of States as parts of the international community should not be construed as an aggregate of the particular wills of States.

She agreed with other speakers that the draft conclusions required some streamlining and condensing. Nevertheless, she would be in favour of adding a third subparagraph to draft conclusion 4 along the lines of the last sentence of article 53 of the Vienna Convention, which would entail consequential changes to some of the subsequent draft conclusions. As for draft conclusion 5 (1), she endorsed Mr. Nolte’s point regarding the definition of the concept of general international law, which seemed to exclude the possibility of regional *jus cogens*, and she agreed that it would be better not to take a position on the issue, which the Special Rapporteur intended to address at a later stage. She had no substantive problem with the statements in paragraphs 2 to 4 of draft conclusion 5 to the effect that the three main sources of law could provide a basis for *jus cogens* and she agreed that draft conclusions 6 and 8 could be merged.

Regarding draft conclusion 7, she questioned the need for the second sentence of paragraph 1. In paragraph 3, the phrase “a large majority” should be amended to read “a very large majority”, in line with the statement by the Chairman of the Drafting Committee at the Vienna Conference referred to in paragraph 67 of the report. Although draft conclusion 9 was closely modelled on draft conclusions 11 to 14 on the topic of the identification of customary international law, the Special Rapporteur had departed from those texts by highlighting the value of the Commission’s work.

She endorsed the proposal to change the title of the topic to “Peremptory norms of general international law (*jus cogens*)” and the proposals for the future programme of work set out in paragraph 93 of the report. As for the question of whether, on what basis and in what form the Special Rapporteur should present an illustrative list of *jus cogens* norms, it would be preferable to refer to particular *jus cogens* norms in the body of the next report — and ultimately in the commentaries to the draft conclusions — rather than to embark on the potentially time-consuming exercise of drawing up a list.

In conclusion, she said that she supported the referral of all the draft conclusions to the Drafting Committee and commended the Special Rapporteur on his work.

**Sir Michael Wood** said that the Special Rapporteur’s approach to the topic was essentially practical, as was appropriate for the Commission’s work. The idea of formulating draft conclusions seemed to have been accepted, and the Special Rapporteur’s intention that the draft conclusions should reflect the current law and practice on *jus cogens* and avoid entering into theoretical debates was welcome. He endorsed the proposal to change the title of the topic.

The topic of *jus cogens* was not easy. For many, it was a concept shrouded in mystery and controversy, the subject of a vast, largely theoretical and often contradictory literature. It was invoked by the courts, but above all in the speculations of authors, far more often than it was actually applied. There were very few rules that seemed to have been accepted as *jus cogens*. That was probably a good thing, as the scope for abuse was obvious. Even, indeed especially, the basic principle of international law, *pacta sunt servanda*, had to give way to *jus cogens*.

In view of the need for the Commission to be, as far as possible, consistent with itself, he appreciated the Special Rapporteur’s efforts to include many references in his second report to other topics. He had briefly covered the negotiating history of article 53 of the Vienna Convention in his first report. Given that much of the debate from that period remained highly relevant to the Commission’s current work, perhaps a more thorough, systematic and chronological account of the negotiating history — not only of article 53 but also of the other relevant provisions of the 1969 and 1986 Vienna Conventions — might be needed.

Turning to the substantive issues raised by the second report, he said that, in paragraphs 18 to 30, the Special Rapporteur returned to his proposal — discussed extensively the year before — for a paragraph to be included in the draft conclusions, setting out what he variously described as descriptive characteristics or elements. For the reasons he and others had given, he was not convinced of the merits of such a descriptive paragraph. Nor was he convinced of the distinction that the Special Rapporteur continued to insist on, namely between “constituent elements (or criteria)” for identifying *jus cogens* and “descriptive and characteristic elements” of *jus cogens*, which might be relevant in “assessing” the criteria for *jus cogens* norms. The confusing explanations provided in the second report only confirmed his view that such a provision would not only be superfluous, but potentially harmful. No clear distinction between descriptive elements on the one hand and criteria for identification on the other was apparent from the report, and he wondered whether the Commission might not alter the meaning of article 53 of the Vienna Convention if it adopted such an approach. Any descriptive elements that might be considered helpful — and he was not convinced there were any — could be mentioned in the commentary to the draft conclusions.

The first criterion for identifying *jus cogens* norms was that the relevant norm should be a “norm of general international law”. He tried to avoid using the terms “norm” and “general international law”, but they could not be avoided in the present context. While the term “general international law” was discussed in the report, it might be worthwhile to explain in the commentary that, in the present context, the term “norm” was simply another word for “rule”.

A more serious issue was how to clarify the meaning of the term “general international law” in the context of *jus cogens*, bearing in mind the possible wider implications. He drew attention to a footnote to the commentary to draft conclusion 1 of the text on the identification of customary international law (A/71/10, footnote 249), according to which the term “general international law” was used in various ways, including to refer to rules of international law of general application, whether treaty law, customary international law or general principles of law. Also worthy of note were Mr. Kolodkin’s interesting comments on the term.

The issue under the current topic was how the term was used in article 53 of the Vienna Convention. The Special Rapporteur seemed to conclude that it referred primarily to customary international law, and might also refer to general principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice, but did not refer to treaty law, though treaty law might reflect general international law. However, he was not sure that the Commission could be so categorical. The question of whether general principles of law within the meaning of Article 38 (1) (c) could be general international law for the purposes of article 53 seemed to depend upon how such principles were viewed.

As far as treaties were concerned, it was true that they were rarely general in the sense that they could be binding on all States or virtually all States. As other speakers had observed, however, there was no reason, in principle, why treaties might not be binding in that way. It was difficult not to agree with Mr. Kolodkin’s earlier analysis in that regard. Another question, which was not addressed in the second report, was how far norms of general international law bound subjects of international law other than States. That question obviously related to the effects of *jus cogens* and might be taken up by the Special Rapporteur in a future report.

A clearer analysis of the second criterion for the identification of *jus cogens* than the second report provided was necessary. He shared the view of many others that the requirement that a *jus cogens* norm “may only be modified by a subsequent norm of *jus cogens*” should also be included. Such a requirement was not only a consequence of *jus cogens*, in the sense that it had to do with what happened after a *jus cogens* norm came into being.

One matter that might benefit from closer analysis was the meaning of the two words “accepted and recognized”. The Special Rapporteur seemed to explain the phrase by reference to its use in Article 38 of the Statute of the International Court of Justice; yet the drafting history given in paragraph 67 of the report was not very illuminating in that regard.



It was not easy to see why the wording of Article 38 should be relevant to the recognition and acceptance of a rule as one from which no derogation was permitted and which could be modified only by a subsequent norm of *jus cogens*. It could not simply be assumed that the terms “accepted” and “recognized” were alternatives, depending on the source concerned. Perhaps they had different meanings and were cumulative, as the ordinary meaning would suggest. For example, it might be thought that “recognition” of *jus cogens* norms as customary international law implied that silence could not suffice for that purpose, whereas it might be evidence of acceptance. It might also be asked why the term “accepted” should come before “recognized”, especially since the latter appeared first in the list in Article 38. The Special Rapporteur went into some detail on the question of whether the words “accepted and recognized” referred to general international law rather than to non-derogability, but that was a non-issue since both the English and French texts clearly referred to non-derogability.

The expression “as a whole” in “international community of States as a whole”, was not adequately explained in the report. It was by no means evident that it meant that only collective acceptance and recognition was possible rather than individual acceptance and recognition. Indeed, by referring to the potential evidence of “acceptance as law” for purposes of identification of customary international law as also relevant for *jus cogens*, the Special Rapporteur seemed to accept that individual acceptance might be relevant. He shared the view that the expression “a large majority” did not capture the requirement; whether the expression “a very large majority” did so was open to question.

He was not convinced that the two-step process proposed by the Special Rapporteur for the emergence of *jus cogens* norms was inevitable in every case, though it was methodologically attractive and it was how things quite often worked in practice. The reference in paragraph 40 of the report to the Commission’s prior work on State responsibility did not seem to support the two-step process. Perhaps the solution would be to avoid suggesting that the two steps were successive.

In conclusion, he agreed that all of the texts should be referred to the Drafting Committee, there to be made more concise and more consistent.

**Mr. Vázquez-Bermúdez** said that the Special Rapporteur was to be commended on his very succinct second report, based on extensive research and careful analysis of relevant materials. The draft conclusions he proposed would enable the Commission to make important progress in clarifying the legal nature of *jus cogens* norms and the elements for their identification. He welcomed the decision to use the 1969 Vienna Convention as a point of departure in developing the criteria for *jus cogens* norms, given that the definition and basic elements of such norms contained in the Convention were those generally accepted by States, in international and national jurisprudence and in the literature.

In chapter II.C of the report, the Special Rapporteur discussed issues arising from the debates in the Commission and the Sixth Committee concerning draft conclusion 3 (2) and provided further material to support the draft conclusion. According to the latter, *jus cogens* norms protected the fundamental values of the international community, were hierarchically superior to other norms of international law and were universally applicable. Those aspects were inherent in the legal nature of *jus cogens* and explained why the international community had accepted or recognized certain rules as falling within the category of *jus cogens*: they protected, not the individual interests of a State or a group of States, but the general fundamental interest of the international community as a whole or a fundamental shared value. They were thus norms which enshrined the rights and obligations of the utmost importance to the international community, were non-derogable and could be modified only by another *jus cogens* norm. That was in line with the view expressed by the Commission in the commentary to what would ultimately become article 53 of the Vienna Convention that it was not the form of a general rule of international law but the particular nature of its subject matter which gave it the character of *jus cogens*. Aside from statements by States, there was international, national and regional jurisprudence to support that view.

It was generally accepted that *jus cogens* norms were hierarchically superior to other rules of international law, as was borne out by the Commission’s 2006 report on

fragmentation of international law and various other sources referred to by the Special Rapporteur and clearly enunciated in articles 53 and 54 of the Vienna Convention. The fact that *jus cogens* norms were non-derogable and could be modified only by a norm of the same character also implied their hierarchical superiority. He agreed with the Special Rapporteur that such norms were universally applicable and binding on all States and other subjects of international law.

Referring to paragraph 18 of the report, he said that the higher rank of *jus cogens* norms in the hierarchy, instead of being criterion for their formation or identification, was a logical legal effect of *jus cogens* norms, owing to their peremptory, non-derogable nature and the fact that they could be modified only by rules of the same character and status.

In chapter III of the report, the Special Rapporteur discussed the criteria for the identification of *jus cogens* norms based on the definition contained in article 53 of the Vienna Convention, which comprised three elements. Yet he employed only the first two elements, discarding the third one, namely that such norms could be modified only by a subsequent norm of *jus cogens*. He personally considered that all three elements were necessary. While he endorsed the first criterion identified by the Special Rapporteur — that the norm must be a norm of general international law — he found the analysis of the criterion in the report to be unclear, particularly the references to *lex specialis* and to rules which could be derogated from by more specific rules. In fact, the general or special character of a *jus cogens* norm was determined by its content. Moreover, under the current topic, a norm of general international law was defined as one that was binding on all States and other subjects of international law. That was apparently the intent of draft conclusion 5 (1), although it was not clear what was meant by the phrase “general scope of application”.

The importance of the first criterion was confirmed by that fact that it was mentioned several times in relation to norms of *jus cogens* in the Vienna Convention. He expressed support for the Special Rapporteur’s proposal to change the title of the topic to “Peremptory norms of general international law (*jus cogens*)” so as to fully reflect the reference to that category of norms contained in the Vienna Convention. As the Special Rapporteur stated in paragraph 51 of the report, the dearth in practice of instances when general principles of law were said to be the basis of a norm of *jus cogens* did not justify the conclusion that general principles of law could not form the basis of *jus cogens* norms. In addition to the examples given in the report, he drew attention to the 2003 advisory opinion of the Inter-American Court of Human Rights on the juridical condition and rights of undocumented migrants, which stated that “the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws”.

The notion that general principles of law could constitute a basis for *jus cogens* norms was broadly supported in the literature and in previous declarations by States; State practice also largely supported the notion that customary international law could serve as a basis for the formation of *jus cogens* norms.

While some multilateral treaties, such as the Charter of the United Nations, were of universal or quasi-universal application and could therefore be considered general international law, most treaties were not so considered, since their provisions were binding solely on the parties. Likewise, treaty rules did not themselves generate peremptory norms of general international law; rather, what afforded them peremptory status was acceptance and recognition by the international community of States as a whole that they were rules from which no derogation was permitted and which could be modified only by subsequent *jus cogens* norms. Nevertheless, a relationship sometimes existed between rules of general international law, in particular customary international law, and treaty rules. That was why he generally supported draft conclusion 5, subject to a few amendments, including the redrafting of paragraph 4 to better reflect the potential relationships between treaty rules and *jus cogens* norms.

In draft conclusions 4, 6 and 8, the Special Rapporteur had included three elements of the definition of a *jus cogens* norm under article 53 of the Vienna Convention but, for reasons that were not entirely clear, he had omitted the remaining element, namely, that a

*jus cogens* norm could “be modified only by a subsequent norm of general international law having the same character.” He argued that the issues relating to that element emerged only after the identification of a norm as a *jus cogens* norm and could therefore not be a criterion for its identification. However, he also recognized that for the purposes of establishing criteria for the identification of such norms, those elements could not be described as legal consequences of or rules for the modification of *jus cogens* norms *per se*, but rather should be considered evidence of that which the international community of States as a whole could be shown to have “accepted and recognized”. While the content of the norms was the underlying reason for the norm’s “peremptoriness”, it seemed that the Special Rapporteur had confused the terms “peremptoriness” and “non-derogability” or had considered them to be synonymous, and as a result had not included the limits to modifying such norms as a criterion for their identification. That approach was unfounded.

In his view, article 53 of the Vienna Convention maintained that “peremptoriness” referred to both non-derogability and the limitations on modifying *jus cogens* norms. While derogation from *jus cogens* norms was precluded, the modification of such norms was not, provided that such modification arose from a subsequent norm having the same character.

Using a broad notion of the term “non-derogability”, as the Special Rapporteur did in his second report, could result in inconsistencies with the Vienna Convention. Practice suggested that non-derogability was not the only criterion for “peremptoriness”. In addition, the Study Group on fragmentation of international law had suggested in its final report that non-derogability in itself did not necessarily mean that a norm was one of *jus cogens*: it was a necessary but insufficient characteristic. Furthermore, although some had observed that non-derogability as referred to in article 53 was different from non-derogability in human rights instruments, the Human Rights Committee, in its general comment No. 29, had stated that “the enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law.” Therefore, it was clear that non-derogability was not equivalent to “peremptoriness” and that the criteria for identifying a *jus cogens* norm should be aligned with those in article 53 of the Vienna Convention, which covered both non-derogability and limitations on the modification of *jus cogens* norms.

Article 53 of the Vienna Convention, as originally drafted, had contained no mention of acceptance and recognition by the international community of States as a whole, but it had eventually been amended to include those terms, by analogy with Article 38 of the Statute of the International Court of Justice. However, the words “accepted” and “recognized” should not be viewed as being used cumulatively: the former applied to *jus cogens* rules grounded in customary international law, and the latter, to *jus cogens* rules grounded in general principles of law or, where appropriate, treaty rules. To refer to any given rule of *jus cogens* as being both “accepted” and “recognized” was meaningless, and the literature devoted to the so-called double acceptance theory was artificial and erroneous. The evidence necessary to identify a *jus cogens* norm based on a customary norm was the same as that necessary to identify an ordinary norm of customary law, except that such evidence must demonstrate *opinio juris cogentis*. In addition, the evidence necessary to identify a *jus cogens* norm based on a general principle of law was the same as that necessary to identify a general principle of ordinary law, except that it had to show recognition of its peremptory character.

An ordinary rule of customary law, meaning one formed from a general practice accompanied by *opinio juris*, could be elevated to a rule of *jus cogens* if the *opinio juris* of States became *opinio juris cogentis*. However, nothing prevented a *jus cogens* norm from emerging directly, without first having constituted a rule of customary international law. Similarly, nothing prevented a general principle of law from being transformed directly into *jus cogens* if its peremptory character was recognized by the international community of States as a whole. He suggested that the draft conclusions should be amended accordingly.

He supported the Special Rapporteur’s proposals in relation to the future work programme and the referral of all the draft conclusions to the Drafting Committee.

**Mr. Jalloh** said that he welcomed the Special Rapporteur’s second report, containing an in-depth analysis grounded in relevant State practice, the case law of national

and international courts and the writings of highly qualified publicists. In the first part of the report, the Special Rapporteur had rightly placed emphasis on the controversies surrounding draft conclusion 3 (2), which lay out the characteristic elements of *jus cogens*. He himself supported the Special Rapporteur's ultimate finding, rooted in both practice and doctrine, that the three features identified in draft conclusion 3 were indeed the generally accepted characteristics of *jus cogens* norms and, like him, he had found the controversy around those characteristics somewhat surprising.

It would be useful for the Special Rapporteur to clarify the meaning of the phrase "general international law". He did not agree that there was an implicit hierarchy of sources of international law, since treaties, custom and general principles of law could all form the basis of *jus cogens* norms, in accordance with Article 38 of the Statute of the International Court of Justice.

Citing the former Secretary-General of the United Nations, Kofi Annan, he said that societies of all types needed to be bound together by common values. Through the development and application of value-based rules to regulate their relations, States could know what to expect of each other and act accordingly, thus creating international stability and reducing the use of violence. International law, specifically, was based on the bedrock of State consent. It enabled States to manage their differences by giving them the flexibility to adopt, amend, derogate from and even abrogate rules — the so-called *jus dispositivum*. Rules of *jus cogens* were an exception: they were rules so fundamental to the very existence of international society that States could not simply derogate from or abrogate them. In other words, their peremptory nature derived from their reflection of fundamental universal values of the international community as a whole. He did not share the views of some Commission members that *jus cogens* norms protected, but did not necessarily reflect, such fundamental values.

The Commission's work on the topic of *jus cogens* in the lead-up to the Vienna Convention on the Law of Treaties had played a crucial role in consolidating the status of peremptory norms as part of international law. With the adoption of the Convention, particularly articles 53, 64 and 66, the notion of *jus cogens* had become a basic feature of positive international law.

That *jus cogens* norms reflected the values of the international community was clear from the various statements in the Sixth Committee and from the rulings of international courts. While it seemed clear that the notion of peremptory norms was no longer under credible challenge, the question of which criteria should guide its identification and content was still under debate. As correctly noted by the Special Rapporteur in his first report, the differences of view in that regard had largely flowed from philosophical differences on the foundations of *jus cogens* and its content. While the debate on naturalism and positivism could be helpful in framing the Commission's discussion, the Commission's work must be rooted in State practice. It might nonetheless be advisable for the Special Rapporteur to clarify which philosophy was guiding his work, if nothing else for the purpose of appeasing concerned States.

He agreed that the starting point for the elements of *jus cogens* norms was set out in article 53 of the Vienna Convention. However, it was important to go beyond the starting point and consider the effects of *jus cogens* on treaty law and on other sources of international law. Indeed, while it might have been prudent for the Commission to adopt a more restrictive approach in 1996, that approach must now necessarily give way to a more expansive one. That said, in fleshing out the basic elements of article 53, appropriate emphasis must be placed on State practice and on national and international court decisions.

The views of the Commission's membership in 2016 as to whether it should produce an illustrative list of *jus cogens* norms had been evenly split. However, with the Commission's new composition, the same even split of views might no longer exist. So far, those in favour of providing an indicative list appeared to be in the majority. He urged the Special Rapporteur to retain his original proposal, namely to offer illustrations of *jus cogens*; in his own view, that represented the key added value of the project.

While he understood the methodological difficulties involved in producing a list, he did not think that long debates and detailed analysis of substantive areas of international

law would necessarily be required in order simply to draw up a non-exhaustive list of sample *jus cogens* norms. The Commission had already presented a non-exhaustive list, in the commentary to article 26 of the text on responsibility of States for internationally wrongful acts: “peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination”. That list was unlikely to be contested. In addition, the report of the Study Group on fragmentation of international law gave a list of the most frequently cited candidates for the status of *jus cogens*. In other words, the Commission had both a preliminary, non-exhaustive list and a list of prospective norms based on which it could start its work.

In order to make clear that it was not embarking upon the production of an exhaustive list, to the potential detriment of other candidate norms, the Commission could employ the frequently used formulation of “including, but not limited to”, for example in draft conclusion 9 (2) or the commentary thereto. He supported the views expressed by Mr. Hassouna and Mr. Park in that regard. Ultimately, the Commission must make every effort to produce at least a minimal list of examples of *jus cogens* relevant for the progressive development and codification of international law. However, if that was not feasible or not deemed desirable by the majority of the members, a compromise could be to craft a list of candidates for *jus cogens* status, rather than *jus cogens* norms *per se*.

He supported the Special Rapporteur’s proposal to change the name of the topic to “Peremptory norms of general international law (*jus cogens*)”, although the concern raised about the vagueness of the term “general international law” should be kept in mind. He shared the views expressed by Mr. Nolte in that regard, including in relation to particular or regional *jus cogens*.

As to the future programme of work, he supported the Special Rapporteur’s proposal to examine in his third report the effects of *jus cogens*, including in relation to treaty law and other areas of international law. He endorsed the proposals by Mr. Hassouna and Mr. Kolodkin in that regard, but would also propose that the Special Rapporteur should examine whether *jus cogens* could be a source of limitations on the powers of the Security Council. The International Law Association had affirmed that peremptory norms of international law applied both to States and to international organizations. In his separate opinion in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judge *ad hoc* Lauterpacht had supported the view that such norms unconditionally bound the Security Council, which must respect the core values protected by *jus cogens*, as they were non-derogable — a position that was also supported by a wealth of academic literature. It was therefore important to examine the scope and legal effects of the limitations imposed on the Security Council by the operation of peremptory norms, for example under article 2 (4) of the Charter on the use of force. Additional issues for consideration might be the interaction between *jus cogens* norms and human rights and humanitarian law.

The draft conclusions were generally well written and well structured and followed a logic that was easy to understand and justify. Nonetheless, a number of interesting proposals for merging some of the draft conclusions had been made, and he had the impression that at least one or two could indeed be condensed. The thrust of the entire project was to clarify the concept of *jus cogens*, but having overly long and repetitious conclusions might merely generate confusion. He agreed that the Special Rapporteur should revisit the notion of the “international community as a whole” and the threshold of a “large majority of States” and he supported referring all the draft conclusions to the Drafting Committee.

**Mr. Ruda Santolaria** said that he agreed with the Special Rapporteur that *jus cogens* norms reflected the fundamental values and interests of the international community and were hierarchically superior to other norms of international law in that derogation from them was impermissible. As the Special Rapporteur noted, *jus cogens* norms were not simply norms of general international law, but must be accepted and recognized by the international community of States as a whole through *opinio juris cogentis*. Reference could be made to the fundamental values and interests of the international community when

the overwhelming majority of States accepted and recognized that there could be no derogation from the norms that reflected those values and interests.

He fully agreed with the emphasis placed on the universal application of *jus cogens*, including the very relevant reference to the advisory opinion of the Inter-American Court of Human Rights on the juridical condition and rights of undocumented migrants, in which the Court had noted that the principle of equality and non-discrimination “belongs to the realm of *jus cogens* and is of a peremptory character, entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals”. He also welcomed the fact that the Special Rapporteur had taken an objective approach based on State practice and the decisions of international tribunals, rather than a positivist position or one based on natural law. He agreed with the emphasis placed on the two criteria for identification as a norm of *jus cogens*: that it must be a norm of general international law and that it must be accepted and recognized by the international community of States.

In that respect, as had been noted by others, it was fundamental to understand what was meant by general international law. As he understood it, it comprised customary international law and general principles of law, which were a specific source of international law. However, for a general principle of law to be considered a *jus cogens* norm, it must also be customary in nature. Indeed, as noted in paragraphs 43 to 47 of the report in relation to the jurisprudence of international and national courts, *jus cogens* norms were primarily based on customary law.

He agreed with the Special Rapporteur that treaty law did not qualify as *jus cogens* but that it could reflect or provide evidence of the existence of norms of customary international law that could reach the status of *jus cogens*; that was particularly relevant with respect to certain multilateral treaties. Given the close connection between both sources of international law highlighted in the report, treaties could codify existing rules of customary law, crystallize emerging rules or come to reflect a rule based on practice; nevertheless, the norm of general international law was not the treaty but rather the rule of customary international law, which must combine practice with *opinio juris sive necessitatis*.

In addition to being a rule of general international law, the norm must also be accepted and recognized as a peremptory norm from which there could be no derogation by the international community of States. On that point, he agreed with the Special Rapporteur and other members of the Commission that States were the subjects of international law that created *jus cogens* norms, but also that article 53 of the Vienna Convention on the Law of Treaties referred to the international community of States collectively and not individually. He stressed that the acceptance and recognition of all States was not required, as that could give rise to the absurd situation in which a State or small group of States could attempt to block a widespread conviction that a particular norm of general international law was peremptory in nature. However, he agreed with certain other members that a large majority of States would not suffice; as had been noted by João Ernesto Christófaló, cited in footnote 180 of the report, it must be the “overwhelming majority of States”.

He supported the proposal made by the Special Rapporteur to change the name of the topic to “Peremptory norms of general international law (*jus cogens*)”. He also supported the draft conclusions, albeit with several caveats. First, as had been noted by other members, repetition could be avoided by merging some of the six draft conclusions: they could be reduced to three without affecting the substance or diluting the Special Rapporteur’s arguments. In draft conclusion 5 (3), the reference to general principles of law should be more nuanced, as he had already discussed. He proposed replacing the word “*actitud*” in the Spanish version of draft conclusion 7 (1) with “*conciencia*” or “*convicción*”. In draft conclusion 7 (3), “large majority” should be replaced with “overwhelming majority”.

He supported the proposed programme of work. It was important to address the way in which a *jus cogens* norm could be amended or derogated from by another *jus cogens* norm, as well as to analyse possible contradictions between *jus cogens* norms and to consider whether to refer to regional *jus cogens*, as some had suggested.

With regard to the possibility of drawing up an illustrative list, he agreed with Mr. Rajput that it would be most useful for the Commission to provide a methodology for identifying *jus cogens* norms. If concrete examples were cited, it would be necessary to proceed with caution, to include only those whose status as peremptory norms of general international law was absolutely clear and to avoid an overly long or descriptive list that might give the impression that it was exhaustive, which would not be in line with the evolutive nature of *jus cogens*, under articles 53 and 64 of the Vienna Convention.

In conclusion, he was in favour of sending the proposed draft conclusions to the Drafting Committee.

**Mr. Reinisch** said that the Special Rapporteur's excellent second report on *jus cogens* contained very useful sections on the criteria for *jus cogens*. Regarding whether the Commission should draw up an illustrative list of *jus cogens* norms, such a list, whether it was appended to the draft conclusions in an annex or included in the conclusions themselves, would be most useful and would provide exactly the kind of guidance that was expected from the Commission. The concern that the list might be seen as exhaustive rather than illustrative would not justify abstaining from such an important task.

Turning to the proposed draft conclusions themselves, he said that draft conclusion 4 did not appear to be particularly controversial, as it was based on article 53 of the Vienna Convention on the Law of Treaties. While it clearly provided the background for the more detailed discussion of the various elements of a norm of general international law in draft conclusion 5 and of the general acceptance and recognition of non-derogability in draft conclusion 6, the relationship between draft conclusion 4 and draft conclusion 3 (1) was unclear. The ostensible emphasis of draft conclusion 4 was on "identifying" a *jus cogens* norm, but the norm thus identified appeared to be identical to the one defined in draft conclusion 3. As had already been observed by other colleagues, that overlap might lead to confusion among readers; the possibility of streamlining the two draft conclusions so that there was only one provision defining *jus cogens* should therefore be considered.

According to the Special Rapporteur's report, only norms of general international law could acquire the status of *jus cogens*. Draft conclusion 5 defined those as norms with "a general scope of application". Like Mr. Murphy, he wondered whether that meant that the norms applied to all States in the sense of being "universally applicable", as suggested by draft conclusion 3 (2). If so, norms of general international law would obviously exclude regional custom or the general principles of European law to which the Court of Justice of the European Union had frequently referred when developing its fundamental rights jurisprudence. Like Mr. Nolte, he wondered whether that had really been the Special Rapporteur's intention and, if so, whether the Commission should indeed exclude the possibility of regional *jus cogens* or whether it might not be preferable to simply indicate that the work on *jus cogens* addressed only universal *jus cogens* but did not exclude the possibility of peremptory norms existing on a regional level. According to paragraph 68 of the first report (A/CN.4/693), the subject of whether international law permitted the doctrine of regional *jus cogens* was to be considered in the final report.

Draft conclusion 5 (2) provided that the most common basis for *jus cogens* was customary international law, while paragraph 3 stated that general principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice could also serve as a basis for *jus cogens* norms. While he was sympathetic to that idea, he wondered whether actual practice could be identified for that proposition. An answer to that question appeared all the more important since the Court and most domestic courts seemed to have limited *jus cogens* norms to customary law. For instance, the language of the International Court of Justice in paragraph 79 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, referring to "intransgressible principles of international customary law", left little scope for other sources to form *jus cogens* norms. Similarly, the jurisprudence cited in paragraphs 44 to 46 of the Special Rapporteur's report in most cases not only allowed for custom to be elevated to *jus cogens*, but described *jus cogens* as a form of elevated custom.

In his view, draft conclusion 6 was an example of the duplication that might be remedied at the drafting stage. He did not see what it contained that had not already been

said in draft conclusions 3 and 4. A number of questions arose due to the distinction between *opinio juris* and a “qualified” *opinio juris* (more aptly described as *opinio juris cogentis*) required for a norm to become *jus cogens*.

Draft conclusion 7 raised the threshold question: how many States had to accept a norm as *jus cogens* in order for it to qualify as having gained the acceptance of the international community of States as a whole? Paragraph 3 should be clarified by a comparison of the high threshold of acceptance required for a norm to qualify as *jus cogens* with the lower threshold for the emergence of customary norms or general principles of law. It might also be prudent to clarify the fact that the required majority must be something like the “very large majority” described by the Chairman of the Drafting Committee at the Vienna Conference, as cited in paragraph 67 of the report. With regard to the possibility that general principles of law could attain the status of *jus cogens*, he said that it would be helpful if the Special Rapporteur could clarify whether any specific general principle of law had yet been considered to be *jus cogens* by States and, if so, how such recognition had come about. That would also be most welcome since the report gave the impression that the Special Rapporteur’s extensive analysis of cases related only to customary international law.

Draft conclusion 8, as currently worded, did not appear to add much to illuminate the question of how the requirement of acceptance differed for *jus cogens*, customary international law and general principles of law. Instead, it merely reiterated what had already been reflected in draft conclusions 3, 4 and 6, namely that *jus cogens* norms were those that were considered to be non-derogable by States. It might be helpful to hear the Special Rapporteur’s view on whether *opinio juris cogentis* should differ from regular *opinio juris* only with regard to its content or also with regard to form. In any event, a different wording might give guidance on the question.

Draft conclusion 9 discussed the different types of evidence of the existence of a *jus cogens* norm. The wording of the draft conclusion suggested that the pronouncements of international courts and tribunals were on the same plane as the positions of States themselves. That was somewhat in conflict with draft conclusion 7, which provided that only “the attitude of States” was relevant, as well as the status of judgments as subsidiary means under Article 38 (1) (d) of the Statute of the International Court of Justice.

In conclusion, he supported sending the draft conclusions to the Drafting Committee.

*The meeting rose at 1.05 p.m.*