

Provisional

For participants only

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Provisional summary record of the 3459th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 8 May 2019, at 10 a.m.

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Present:

Chair: Mr. Šturma

Members: Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Tladi
Mr. Valencia-Ospina
Mr. Wako
Sir Michael Wood
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

Peremptory norms of general international law (*jus cogens*) (agenda item 5)
(A/CN.4/727)

Mr. Tladi (Special Rapporteur), introducing his fourth report on peremptory norms of general international law (*jus cogens*) (A/CN.4/727), said that the report addressed only two issues and contained only one proposed draft conclusion. The first issue, in relation to which no draft conclusion was put forward, was that of regional *jus cogens*. The second, on which a single draft conclusion was proposed, concerned the long-standing question of whether or not to draw up an illustrative list of *jus cogens* norms.

With regard to the first issue, in his first report (A/CN.4/693), which had been considered by the Commission in 2016, he had expressed his preliminary view that regional peremptory norms of international law would be incompatible with the universal scope of the concept of *jus cogens*. That view had been echoed by States from different regions during the debate on the topic in the Sixth Committee in 2018.

With the possible exception of the decision of the Inter-American Commission on Human Rights in the case of *James Terry Roach and Jay Pinkerton v. United States*, there was no authority in practice for the notion of regional *jus cogens*. Moreover, there were no international or regional court cases, domestic jurisprudence or other conduct by States that could be cited as evidence of the acceptance, by States, of the notion.

Even in the absence of practice, the notion had continued to receive a degree of support in the literature. In his report, having assessed some of the relevant academic literature, he identified three conceptual difficulties with the concept of regional *jus cogens*.

First, it was hard to explain, theoretically, why a State in a particular region, perhaps a region hostile to it, should be bound, in an absolute sense, to a norm that was not universally peremptory and that it had either not consented to or not accepted as peremptory, with all the attendant consequences. Secondly, the concept of “regional” in the context of regional *jus cogens* was indeterminate. That was particularly significant, as the fact that no active consent was required for the emergence of *jus cogens* meant that an objective criterion was needed to determine its scope of application. Thirdly, many of the examples given for the potential application of regional *jus cogens* were related to treaty regimes. Consequently, it appeared that the concept of regional *jus cogens* being advanced was a kind of consensual system of rules in which a group of States agreed to establish a particular legal regime to govern their relations, rather than a set of legal rules that were binding on States and from which no derogation was permitted. The implication of those conceptual difficulties was that regional norms were, by definition, norms from which some derogation was always permitted.

Although he was of the view that international law did not recognize regional *jus cogens*, at least not as defined by the Commission, he considered it unnecessary to include a draft conclusion on the matter. The commentaries were the appropriate place to address the question of regional *jus cogens*.

The issue of whether or not to compile an illustrative list of *jus cogens* norms had been with the Commission since the topic had first been introduced in its long-term programme of work. Some members of the Working Group on the Long-term Programme of Work had already raised concerns over attempts to produce any sort of list. There had been two main concerns.

The first was that drawing up a list would be inordinately difficult, in that it would require an extremely detailed study of a very large number of norms. As a result, it had been suggested that the Commission should not embark on that process unless it was prepared to engage with the topic for several decades. He saw some merit in that argument.

The second concern was that, no matter how carefully any list was qualified as non-exhaustive or illustrative, it would still be interpreted by some as being definitive, thereby precluding, or at least making difficult, the emergence of other norms. Though that argument for the non-inclusion of a list was not without merit, he was less convinced by it.

The two concerns had been repeated by some members of the Commission during the debates on his first and second reports. According to his records, over the period in which the inclusion of some form of illustrative list had been debated, a slight majority of members had expressed support for it. Many of those members had pointed out that, while they were sympathetic to the aforementioned concerns, drawing on the Commission's previous work would go some way towards alleviating them.

Debates had also taken place within the Sixth Committee, most recently in 2018, and many of the same arguments had been raised. As in the Commission, there had been a slight majority in favour of including a carefully drafted list. As Special Rapporteur, he had oscillated between the two main positions. He was not convinced by the argument that a list would inevitably be interpreted as closed. The risk of misinterpretation was inherent to all drafting processes and could never be the reason for not adopting a text. It was the Commission's responsibility to ensure that its text and the accompanying commentaries were clear enough that any reasonable person, acting in good faith, would understand them properly.

That said, the comments made by States during the Sixth Committee debate in 2015 had indirectly raised the question of whether providing a list would change the general nature of the topic, which fundamentally concerned methodology, or secondary rules. The analysis of primary rules to determine whether or not they were peremptory norms of general international law was, quite rightly, not part of the topic. To give an example, the question of whether or not the prohibition of crimes against humanity was a *jus cogens* norm should be addressed under the topic "Crimes against humanity", in the context of which a detailed study of the norm had been conducted. By the same logic, should the Commission ever decide to place the topic of self-determination on its agenda, it would necessarily have to consider the status of the principle of self-determination, including whether or not it was peremptory.

Nevertheless, he was aware, from the comments made by States and, informally, by other stakeholders, that a list would be seen as helpful, and that the Commission's not producing some sort of a list would be viewed as a missed opportunity.

In short, the Commission had a difficult decision to make, with compelling arguments on both sides. Given the circumstances, and in response to comments from certain States and some members of the Commission, including Mr. Hassouna, Mr. Nolte and Mr. Ouazzani Chahdi, he had been inspired to search, in his fourth report, for a middle ground, namely a list in a draft conclusion that reproduced, in a single, operative text, norms that the Commission had previously recognized in scattered commentaries. Thus, the proposed draft conclusion contained nothing different to what the Commission had produced in the past, but did go further in the sense that norms were presented in an operative text, and not just in the commentaries.

He knew the views of all the members of the Commission on the issue, since he had asked for them before. On the basis of their responses and those of States, he had produced his fourth report. It would be helpful, at the current stage, for members, particularly those who were not happy with the compromise that he suggested, to indicate how, given the division of opinion in the Commission and the Sixth Committee, a compromise could be reached. The issue of whether or not to include a list could not be resolved through a legal analysis; it was simply a choice that had to be made taking into account a number of factors that, unfortunately, pulled in different directions.

Taking into account those considerations, he assessed, in his report, whether there was evidence or support for the peremptory character of those norms that the Commission had, in the past, recognized as peremptory norms of general international law. In the proposed draft conclusion, he provided a list based on the Commission's work on its draft articles on the law of treaties, its articles on responsibility of States for internationally wrongful acts, and the work of the Commission's Study Group on fragmentation of international law.

Given the methodological nature of the topic, he did not attempt to be comprehensive in his treatment of the various norms. Rather, he sought to determine whether there was support for their peremptory character, and concluded that there was, on

the basis of an array of evidence that reflected the views of States. Materials that might constitute subsidiary evidence for the determination of the peremptory character of norms, such as decisions of international courts and tribunals, and academic writings, were also considered.

What he did not do was test whether the norms had acquired peremptory status at the time when the Commission deemed them to be peremptory, or whether the Commission's determination had had the effect of producing the practice needed to establish that status.

Furthermore, he did not attempt to define the scope and limits of each norm. With regard to the right to self-determination, for example, he did not seek to ascertain whether the norm covered only internal self-determination, or whether external self-determination, including secession, was also covered. A more detailed study would also address the question of the beneficiaries of the right to self-determination as a peremptory norm. Lastly, concerning scope, he did not address the question of whether the norm, particularly the external form of self-determination, applied only in a colonial context. Similarly, with the prohibition of torture, he made no attempt to define the types of conduct that qualified as torture. As a final example, one of the questions that had arisen in the Drafting Committee had concerned the scope of the peremptory norm relating to the prohibition on the use of force. His view was that it was the law of the Charter concerning the prohibition of the use of force that had a peremptory character. That included the rule in Article 51, strictly defined, the contents of Chapters VII and VIII, and even General Assembly resolution 377 (V), known as the "Uniting for Peace" resolution. He did not enter into those complexities in the report – although the name given to the prohibition served to indicate the broader scope of the peremptory norm – nor did he think that such questions should form part of the Commission's discussion. It was sufficient simply to name the norms in question in a list, with the understanding that the content of the norms was defined elsewhere.

The list in the proposed draft conclusion was preceded by a chapeau that made plain that the norms in the list were merely examples. The word "recognized" in the chapeau was not intended to convey the same meaning as it had in the other draft conclusions. It signified only that the norms were the most cited or referred to in discussions on peremptory norms, both in literature and in practice.

Whatever the Commission decided to do, he would not recommend tinkering with the list of norms, which was based on what the Commission had previously determined to be peremptory. There might well be other norms that qualified, perhaps even more so than the norms currently in the list. However, since the criterion for determining the list was that the norms included therein should have been previously identified by the Commission, there should be little scope for additions or subtractions. To do so would entail taking a completely different approach that departed from the methodological nature of the Commission's project. The approach adopted in the fourth report was based on what Brazil had referred to as a search for "a creative way of elaborating an illustrative list of *jus cogens* norms while respecting the understanding that the Commission should be discussing process and method, as opposed to the content of the peremptory norms", and the suggestion by the Netherlands that a creative way might be to refer to those norms that the Commission had already identified as having a peremptory character.

He recognized, however, that the language relating to some of the norms might need to be redrafted. For example, he could well imagine that the Drafting Committee, and eventually the Commission, might wish to reformulate the language referring to the norm on the use of force, by speaking either of the prohibition on the use of force, as the most common shorthand for the norm, or, as the Commission had done in 1966, of the law of the Charter concerning the prohibition of the use of force. By the same token, the Commission might feel a need to revisit the phrase "the basic rules of international humanitarian law", which, though used by the Commission in its articles on responsibility of States for internationally wrongful acts, was not particularly precise. Other formulations that might be considered included "the prohibition of war crimes" and even "the prohibition of grave breaches".

While he would not support the renegotiation of the content of the list, he accepted that there were other norms that might meet the criteria for peremptory status. In paragraphs

122 to 136 of the report, he considered, without reaching any conclusions, some norms whose peremptory status had a degree of support in practice and in literature, including the prohibition of enforced disappearance, the prohibition of arbitrary deprivation of life and the principle of *non-refoulement*. He also identified norms that, in his view, had a strong moral claim to peremptory status, but for which there was insufficient practice to satisfy the criteria set out in draft conclusion 4 as adopted by the Drafting Committee. Such norms included the prohibition of gender discrimination and the duty to prevent serious and irreversible harm to the environment.

The norms in question could be addressed in the commentaries, with appropriate qualifiers. He would be interested in hearing the views of other members on whether such an approach was advisable, and, if so, what the appropriate qualifiers should be.

Though much remained to be done, he hoped that the Commission could complete its first reading of the draft conclusions on peremptory norms of general international law (*jus cogens*) at the current session.

Sir Michael Wood said that he wished to thank the Special Rapporteur for his fourth report and his concise and characteristically fair and open presentation thereof.

Chapter II of the report contained an account of earlier debates on the topic in the Commission and the Sixth Committee. He would refrain from commenting on what seemed a rather dogmatic classification of statements as either positive or negative, and wished to assure the Special Rapporteur that, at least on his part, any criticism was intended to be constructive.

In paragraphs 6 and 15 of the report, the Special Rapporteur returned to the question of the difficulties that States encountered when draft conclusions and commentaries were adopted only once a full set of first-reading draft conclusions was available. The Commission needed to take seriously what had been said in the Sixth Committee on that and other matters, which it should perhaps address in the context of the Working Group on methods of work.

Chapter III of the report concerned the possibility that peremptory norms might exist at the regional level. He wished to thank the Special Rapporteur for his careful analysis of the matter, and agreed that there was no need for a draft conclusion thereon, although he did not necessarily agree completely with the Special Rapporteur's reasoning in that regard. As demonstrated by the Special Rapporteur, "the notion of regional *jus cogens* does not find support in the practice of States". But rather than taking the position that "international law does not recognize the notion of regional *jus cogens*", he believed that the Commission should acknowledge that the matter was more nuanced, either by saying nothing or by saying, somewhere in the commentaries, that the draft conclusions did not deal with any question concerning the possibility of regional rules having a *jus cogens* character.

Chapter IV of the report addressed the question of a possible "illustrative list" of *jus cogens* rules. Again, the Special Rapporteur had done a service to the Commission by setting out the various considerations, both on whether to have a list and on the possible content of any list. He noted that, within the Sixth Committee, States held a range of different views on the matter, as could be seen from paragraph 28 of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-third session, prepared by the Secretariat ([A/CN.4/724](#)).

A preliminary question was what was meant by an "illustrative list". The term might suggest that there were a lot of other *jus cogens* norms; otherwise, what would the Commission be illustrating? However, was that really what the Commission intended to indicate by having a list, or did it simply mean that any list would not necessarily be exhaustive?

The question of whether to have a list was dealt with in chapter IV, section A, of the report. The Special Rapporteur recalled that the same question had arisen at the United Nations Conference on the Law of Treaties in 1968 and 1969, and earlier, too, within the Commission. One participant, Mr. Wilhelm Riphagen, looking back at the Conference, had noted – in remarks made at an international colloquium and subsequently published in a chapter in *Change and Stability in International Law-Making* – that "even those who

accepted the idea of *jus cogens* as a possibility were wary about certain examples of *jus cogens* made by other States”; “if you start giving examples”, he had observed, “you get disagreement”.

His own strong view was that the Commission should not attempt to include a list either in the draft conclusions or in an annex thereto. The Special Rapporteur came down in favour of a middle way, and cited, in support, remarks made by Brazil and the Netherlands. He would not disagree with that approach, but did not think that the proposed draft conclusion listing “the most widely recognized examples of peremptory norms of general international law (*jus cogens*)” was a middle ground. In the past, indeed quite recently, the Commission had adopted a more cautious approach, in effect providing a list, but doing so in its commentaries. As the Commission had said in the commentary to article 40 of its articles on responsibility of States for internationally wrongful acts, “it is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the Vienna Convention”. The Commission’s earlier practice pointed to the best middle ground.

Following that earlier practice was the right course of action for at least four reasons. First and foremost, it would be consistent with the basic purpose of the draft conclusions, which was to set out the methodological and structural aspects of *jus cogens*, rather than to address substantive rules of law. To attempt to draw up a list of rules of *jus cogens* would, in his view, completely change the nature of the topic, from one concerning secondary rules to one addressing some of the most controversial substantive issues of international law. Second, it would avoid giving the impression that the list was set in stone. However clearly the Commission explained that a list in the draft conclusions themselves was non-exhaustive, such a list would inevitably be treated in practice as closed or almost closed. Dealing with the matter in the commentaries would allow for more flexibility. Third, if the matter was dealt with in the commentaries, there would be less need to agree on precise definitions of each rule and its content. To develop precise language appropriate for a draft conclusion would by no means be as simple as the Special Rapporteur suggested in his fourth report. Fourth, not seeking to have a list in the draft conclusions themselves would make the draft conclusions less controversial and more acceptable to States generally. It would avoid linking the draft conclusions directly to what would inevitably be a contested list in many quarters, including among States, non-governmental organizations and writers.

A practical consideration was that seeking to include a list in a draft conclusion would prolong considerably the time needed to complete the topic. It would require a much more rigorous study than the one presented in the fourth report. Such an exercise could not be rushed, and would inevitably take a significant amount of time. If the Commission were to go down that path, he did not see how it could complete a first reading at the current session, or complete the topic within the timescale proposed by the Special Rapporteur. The Commission would need to know far more than it did at present about the views of States. The issues that it would need to consider would include the order of the items on the list, their weight, the evidence for them, and, more generally, the application of the methodology set out in the draft conclusions that had already been adopted provisionally by the Drafting Committee. The Commission would inevitably be seen to be endorsing a particular methodology in relation to the norms that did make it onto the list. It would be especially harmful if the way in which the Commission set about formulating the draft conclusion were to set a poor example in terms of methodology and rigour. There was a risk that readers might look at the evidence referred to in the commentary to any draft conclusion and take it as reflecting a sufficient standard for the identification of a peremptory norm.

Turning to the content of the list proposed in the fourth report, he said that paragraph 55 was an interesting place to start. It illustrated just how cautious the Commission needed to be if it was to retain the confidence of States. At first sight, it seemed to be implied, in paragraph 55, that all the Commission needed to do was to list those rules that the Commission itself, or the International Court of Justice, had previously indicated were, in their view, rules of *jus cogens*. However, it was then rightly noted that “it would not be sufficient to refer only to the work of the Commission and the International Court of Justice”, and that the commentary would still need to show “evidence of acceptance and

recognition”, by the international community of States as a whole, of the peremptory character of the rule in question. A close reading of paragraph 55 and what followed gave the impression that the reference to “other evidence” was something of an afterthought. There were important questions about the nature and scope of the “other evidence” that was required. Was it evidence of acceptance and recognition by the international community of States as a whole, as indicated in paragraph 61 of the report, or was it something else? How much evidence was the Commission looking for? What counted as evidence for that particular purpose? What was the standard of proof? The Commission had dealt with those matters in the draft conclusions provisionally adopted by the Drafting Committee, but those draft conclusions did not seem to have been followed in chapter IV of the report. That was, in his view, a fundamental problem with the approach suggested in the report.

Another question that was not clear from the report was what precisely the list was meant to be. Was it simply a list of rules that the Commission and/or the International Court of Justice had suggested were *jus cogens* norms, without taking a final position on the matter? Or was it a list of rules that the Commission now definitely proclaimed to be of a *jus cogens* character? An even more serious question concerned the use the Commission expected States, courts and others to make of the list. It was not the Commission’s task to campaign for or against the *jus cogens* status of particular rules; however, if the Commission included a selective list in the draft conclusions, it would be doing just that.

Some guidance on those questions could be found in chapter IV, section B, which consisted of a general part followed by detailed consideration of eight proposed *jus cogens* rules. While he did not necessarily disagree with the eight rules proposed, he had considerable doubts about the way in which they were formulated. Furthermore, he had very serious concerns about the methodology adopted by the Special Rapporteur in drawing up the list.

In the first part of section B, the Special Rapporteur described previous efforts by the Commission to identify rules of *jus cogens* and then set out a list of eight norms that, according to the report, the Commission had previously recognized as having attained the status of peremptory norms.

The Special Rapporteur began by referring to four elements of the Commission’s past work on identifying rules of *jus cogens*: first the commentary to draft article 50 of the 1966 draft articles on the law of treaties; second, the commentaries to articles 26 and 40 of the 2001 articles on State responsibility; third, a list in the 2006 report of the Study Group on fragmentation of international law; and, fourth, the somewhat different list in the 2006 conclusions of that same Study Group. He noted that the list in the commentary to article 26 of the articles on State responsibility had been quoted by the Commission 10 years later, in 2011, in the commentary to article 26 of the articles on the responsibility of international organizations.

The commentary to draft article 50 of the 1966 draft articles on the law of treaties had indeed identified “the law of the Charter concerning the prohibition of the use of force” as “a rule of international law having the character of *jus cogens*”. It was, however, not entirely accurate to say that the other rules mentioned in paragraph 56 of the report had been “considered” to be *jus cogens* norms by the Commission in 1966; rather, they had been examples suggested by individual Commission members. Nor was it entirely accurate to describe the Commission’s position in the 1966 commentary as “ambiguous”. In 1966, the Commission had been quite clear; it had taken no position on the *jus cogens* status of the other rules mentioned, since it had not considered it appropriate to do so in the context of its topic on the law on treaties.

Contrary to what the Special Rapporteur said in paragraph 56 of the report, it was not the case that, in the commentary to article 40 of the articles on State responsibility, the Commission seemed to be of the view that all the norms in the 1966 draft articles constituted a list of norms that the Commission had accepted as having attained the status of *jus cogens*. In fact, what the Commission had actually said in 2001 was that “it is generally agreed that the prohibition of aggression is to be regarded as peremptory” and that there also seemed to be widespread agreement with “other examples” – not “all” other examples, as stated in the report.

Of the various lists drawn up by the Commission, perhaps the most useful was that set out in the commentaries to article 26 of the 2001 and 2011 responsibility articles. It read: “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”. Although the list in paragraph 60 was apparently based on the commentary to article 40, it also included the prohibition of apartheid and the basic rules of humanitarian law.

The second part of section B of chapter IV in effect sought to analyse what the Commission had said previously about the substantive rules that might have a *jus cogens* nature, and proposed a list based on that analysis. If the Special Rapporteur had stopped there, he might have been less concerned. The Commission would simply be recalling its previous views. Where he began to have real difficulty with the methodology used by the Special Rapporteur was when the latter sought to verify the list by referring, on apparently the same level to State practice, to the opinions of international courts and tribunals, and to writings. That was problematic because what was required was acceptance and recognition “by the international community of States as a whole”. International courts and tribunals were not States and they were not legislators; article 53 of the 1969 Vienna Convention did not refer to acceptance and recognition by international courts and tribunals, let alone of writers. The decisions of international courts and tribunals, and teachings, were subsidiary means for the determination of the rules of *jus cogens*, as indicated in draft conclusion 9 provisionally adopted by the Drafting Committee. It could not be right, either, to rely on those decisions of the International Court of Justice which, according to the report, “indirectly” found something to be a norm of *jus cogens*. Such “indirect” findings were not convincing; in many cases, the Court seemed deliberately to have avoided mentioning *jus cogens*. The Commission could not speculate on the reasons for that silence or read something into decisions which was not there. Calling something an obligation *erga omnes*, or intransgressible, was not necessarily the same thing as saying that a rule had *jus cogens* character.

The same difficulties arose with the Special Rapporteur’s invocation of General Assembly resolutions, which for the most part did not use the language of “*jus cogens*”.

Particular caution was required with reliance upon the decisions of domestic courts; any references would have to be carefully checked. For example, the passage from a decision of the French *Cour de Cassation* cited in footnote 211 was merely a recitation of one of the party’s arguments, which had not in fact been addressed by the Court.

Furthermore, the Special Rapporteur stated that the list set out in paragraph 61 had been “generally accepted and recognized by States and by writers”. He might be right, but he gave no authority. In fact, the footnote supporting the argument, footnote 166, only mentioned one State which had not recognized one of the listed rules. In any event, the Special Rapporteur used the word “generally”, which might be thought to fall well below the threshold in article 53 of the Vienna Convention and in the draft conclusions already provisionally adopted by the Drafting Committee.

Turning to his concerns with regard to the methodology followed in the second part of chapter IV, section B, he said that the Special Rapporteur’s lack of any attempt to adopt a comprehensive approach was rather unsatisfactory, particularly if the Commission was going to propose a conclusion on the matter. More broadly, the Commission itself suggested in its draft conclusions on the topic at hand that the classification of a rule as *jus cogens* required a very heavy burden of proof. The Commission should not itself be seen as paying little respect to that essential point.

There was a lack of rigour in chapter IV, section B, of the report, in which it was noted in paragraph 60 that the Commission had only “alluded” to the *jus cogens* status of certain rules – although later the word “recognized” was used. The Special Rapporteur cast his net wide, as could be seen, for example, in paragraph 86. Yet reference was made to very limited State practice and case law.

It was highly questionable to reach conclusions based on resolutions or case law that did not in fact refer to *jus cogens* but dealt with quite different concepts such as obligations *erga omnes* or non-derogable treaty obligations. In addition, some decisions of international

courts or tribunals were of doubtful quality, especially those of courts that seemed particularly enthusiastic about pushing the bounds of peremptory norms. It was also inappropriate to place much weight on views expressed in separate or dissenting opinions.

The role of treaties, referred to in the report as “treaty practice”, needed to be viewed with a degree of caution. Furthermore, the Special Rapporteur seemed to place great weight on writings regardless of their quality.

The list itself gave rise to a number of unanswered questions, particularly concerning the precise definition of certain items and their exact content. He wondered, for example, why the Special Rapporteur referred to both “aggression” and “aggressive force”. Paragraph 62 seemed to suggest that the two terms were synonymous. He assumed that the word “aggression” did not have the special meaning given in the Kampala amendments to the Rome Statute; that needed to be made clear. In addition, the Commission needed to consider carefully whether “the prohibition of torture” was the right term to convey the proper scope of that rule of *jus cogens*.

He wondered what the scope of the prohibition of “torture” was and which definition of “torture”, if any, was being referred to. In paragraph 74, reference was made to three international instruments: the Convention against Torture, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, all of which contained different definitions of “torture”, with the definition in the Convention against Torture being the most elaborate and specific with regard to the actors and circumstances. Earlier, for example in paragraph (5) of the commentary to article 40 of the articles on State responsibility, the Commission had referred specifically to torture as defined in article 1 of the Convention against Torture.

He further wondered what the content of “crimes against humanity” was in the context of the topic. As the Commission had seen elsewhere, the term did not have a clear and fixed meaning.

He had been particularly interested in the analysis of apartheid and racial discrimination in the report, but wondered whether it was really correct to say that they were not separate prohibitions. Did the prohibition of “apartheid and racial discrimination” really signify a composite act, namely the prohibition of apartheid with racial discrimination as an integral part thereof, as suggested in paragraph 91 of the report? It was strange that the report omitted any reference to the International Convention on the Elimination of All Forms of Racial Discrimination.

Although the report went to great lengths to describe the different instruments, texts and cases that had defined slavery, the Commission’s concern in the present context was to determine what the *jus cogens* prohibition of slavery covered. Did it encompass modern slavery and, if so, how was that to be defined? It was also worth noting, as the report did in paragraph 59, that the Commission had referred earlier to “the prohibitions against slavery and the slave trade”.

The Commission also needed to give some thought to why, in a recent case, the International Court of Justice had avoided referring to the right of self-determination as having a *jus cogens* character. He also noted, as the Special Rapporteur detailed in paragraph 59, that the Commission had previously referred in the commentary to the State responsibility articles to “the right to self-determination” and to “the obligation to respect the right to self-determination”.

It was also necessary to clarify what was meant by the “basic rules of international humanitarian law”. The International Court of Justice had qualified such rules as “intransgressible”, but without spelling out which rules it was referring to. In any event, it did not qualify the rules as *jus cogens*. As Judge Higgins pointed out in her separate opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, “these intransgressible principles are generally binding because they are customary international law, no more and no less”. In its report (A/CN.4/L.682), the Commission’s Study Group on fragmentation of international law described that category of *jus cogens* rules as the prohibition of “hostilities directed at civilian population (‘basic rules of international humanitarian law’).” He wondered how, in the absence of more precision, it

was possible to know which international humanitarian law rules were “basic” ones. Especially in the context of *jus cogens*, greater clarity and precision would be required if the Commission wished to provide useful guidance to States and others.

Section C of chapter IV, entitled “Other possible norms of *jus cogens* not identified in the Commission’s previous work”, made interesting reading. Apparently, the Special Rapporteur had in mind that the Commission might wish to refer to such norms in the commentaries “with the necessary caveats and qualifiers”. He was not in favour of including in the commentaries speculative references, and so would discourage that option.

Furthermore, the approach in section C seemed rather unclear. The Special Rapporteur began the section by stating that “there most certainly are other norms of *jus cogens* beyond the ones identified [in the previous section]”, but he gave no examples, admitting that his analysis was very brief. The Special Rapporteur then discussed three norms for the *jus cogens* status of which he saw wide or strong support but, in each case, he apparently relied on judicial decisions, especially those of certain regional human rights courts, on the non-derogable provisions of human rights treaties and on certain writings, which could hardly be termed strong evidence of acceptance and recognition by the international community of States as a whole. The Special Rapporteur was right not to seek the Commission’s endorsement of any of the possible norms described in that section.

As for future work on the topic, completion of the topic within the current quinquennium was an ambitious timetable, but certainly a worthy aim. However, it would require much hard work from all concerned. There would also be a need for flexibility, but not at the cost of care and accuracy. Sufficient time must be allotted to the adoption of the commentaries as part of the annual report. He recalled that, as recorded in the above-mentioned topical summary, there had been calls in the Sixth Committee for the Commission to slow down the pace of its work in order to provide States with an opportunity to more carefully analyse its output. Although he did not support that view, it went without saying that the Commission must take the requisite amount of time to deal with the topic carefully and thoroughly and must allow States enough time to consider it in-depth and to offer their oral and written comments.

If the Commission completed a first reading, with commentaries, at the current session, members must be allowed to have second thoughts on second reading and, if necessary, to revise substantially the draft conclusions and draft commentaries at that time in light of States’ reactions and members’ own further study of what was certainly a very difficult subject. Texts from the first reading stage could not be regarded as sacrosanct.

For the various reasons that he had set out in his statement, he did not favour sending draft conclusion 24 to the Drafting Committee. He considered that the matter should be dealt with in the commentaries.

Mr. Petrič said that Sir Michael Wood’s statement had been thought-provoking. Although he agreed that there was a need for greater precision and that court decisions did not have the same status as State practice, he wondered why it was not possible for the Commission to say, for example, that the prohibition and punishment of genocide could be regarded as part of *jus cogens*, part of the fundamental law which all humankind should respect. Surely no one would object to that proposition. Personally, he had never heard anyone opposing that view. The same thing could be said of slavery, apartheid and torture, *inter alia*. In the future, the question might well be asked why such an authoritative body as the Commission, which had been tasked with the progressive development of international law, had not seized the opportunity to act on those subjects. He wished to hear the comments of Sir Michael Wood in that connection.

Sir Michael Wood said that he did not regard making statements about what did or did not constitute *jus cogens* as part of the topic. On the other hand, if the middle ground meant dealing with the matter carefully in the commentaries, that would involve making statements along the lines suggested by Mr. Petrič. He would not dream of denying that the prohibition of genocide was *jus cogens*. The question was whether the Commission was going to inscribe it as a rule in tablets of stone, or adopt a more subtle, flexible approach in commentaries.

Mr. Murase, after having thanked the Special Rapporteur for his excellent fourth report, said that he fully supported the Special Rapporteur's position on the exclusion of any mention of regional *jus cogens* in the draft conclusions, because the concept of regional *jus cogens* contradicted the very notion of peremptory norms of general international law and was not supported in practice.

If a provision on regional or particular *jus cogens* were included, the Commission would face the same problem as that which it had encountered in the context of the conclusions on identification of customary international law. He had been opposed to the inclusion of "particular custom" in that project, especially without clarification of its effects on third parties, which could have been specified in wording along the lines of article 34 of the 1969 Vienna Convention on the Law of Treaties. The third-party effects of particular *jus cogens* would, however, be even more intricate than in the case of treaties and customary international law. Moreover, the inclusion of regional *jus cogens* would not be consonant with the title of the draft text, which referred to the peremptory norms of general international law.

He was in favour of an illustrative list provided that the Commission spent enough time on carefully examining each item. It was true that the draft conclusions would be only half as valuable without such a list. However, if only a few weeks during the current session could be devoted to it, he would regretfully have to oppose the idea of drawing up a list under the current agenda. In preparing any such list, the Commission would be entering the realms of the primary rules of *jus cogens*. For that reason, the content of each rule needed to be precisely defined and its scope of application clearly delimited. The list proposed by the Special Rapporteur could well give rise to some problems and difficulties.

Before commenting on each candidate for inclusion in the illustrative list of *jus cogens* norms, he wished to express his doubts about the methodology and criteria used to select them. It was perhaps naivety on his part, but his initial reaction had been to question why respect for State sovereignty was not at the top of the list of *jus cogens* norms, since sovereignty, or sovereign equality, was the most fundamental norm in international law. Was not respect for international law or *pacta sunt servanda* supposed to be the basic norm, or *Grundnorm*, of international law and therefore a *jus cogens* norm?

The Special Rapporteur's selection was based on the Commission's previous work. He was not sure whether the references, which were sometimes only passing references, in the commentaries to the relevant instruments, were good enough criteria. In that connection, he found it regrettable that the fourth report did not refer to the illustrative list included in the text of draft article 19 of the draft articles on State responsibility provisionally adopted by the Commission in 1976, to which rich commentaries were attached. The text of draft article 19 (3) provided an illustrative list of international crimes, which were tantamount to *jus cogens*, namely aggression, self-determination, slavery, genocide, apartheid and, most importantly to his mind, massive pollution of the atmosphere and of the sea. He noted that, while torture and the basic rules of international humanitarian law were new additions to the fourth report, which also made reference to the catastrophic destruction of the environment as a possible candidate for inclusion in the illustrative list of *jus cogens* norms, no mention was made of massive pollution of the atmosphere and of the sea. While he himself would certainly have included the protection of the atmosphere as a *jus cogens* norm, he understood that, at the current juncture, the Commission had not wished to take that proposal forward.

He wished to examine some of the proposed *jus cogens* norms enumerated in the fourth report in order to illustrate the difficulty of drawing up a list of *jus cogens* norms within a short period of time. He was sure that the Commission could complete the list if it had sufficient time to consider it.

First, on the prohibition of aggression, he was troubled by how the Special Rapporteur had described the prohibition of the use of force, the prohibition of aggressive force and the law of the Charter on the prohibition of force as possible alternatives to the prohibition of aggression in paragraph 62. To his mind, there was a significant difference between "aggression" and "the use of force" or "the law of the Charter on the prohibition of force". Article 103 of the Charter of the United Nations had been unduly exaggerated. It

merely provided that obligations under the Charter prevailed over obligations under international agreements, which did not in any way imply that the Charter was a “higher law”. Article 103 was simply a part of the miscellaneous provisions of the Charter, not part of the “Principles” provisions of Article 2. He noted that, in that respect, the Commission itself recognized, in its commentary on the draft articles on the law of treaties, that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*”. However, the Special Rapporteur had chosen the prohibition of aggression, not the prohibition of the use of force, to be a *jus cogens* norm, which he believed to be the right choice.

Article 2 (4) of the Charter did not provide for a comprehensive ban on the use of force. Rather, it prohibited the use of force only in international relations, allowing some room for the use of force in civil war or internal conflict. It prohibited the use of force only against the territorial integrity and political independence of another State, perhaps allowing certain “in-and-out operations”. It also prohibited the use of force in any other manner inconsistent with the Purposes of the United Nations, leaving some room for an *a contrario* interpretation that the use of force might be permissible if it was consistent with the Purposes of the United Nations. While he was not proposing that such interpretations should be supported for Article 2 (4), there were obviously certain exceptions. Besides, Article 2 (4) was part and parcel of Chapter VII of the Charter, allowing the use of force in individual and collective self-defence under Article 51 and compulsory enforcement actions under Articles 39, 42 and 43. The normativity of Article 2 (4) of the Charter was dependent on the effective functioning of Chapter VII. However, as the Commission was aware, Chapter VII did not always function as expected, with the result that the use of force by Member States might be permissible in certain situations. It was clear that the prohibition of the use of force provided for in Article 2 (4) could not be equated with prohibition of aggression.

Although Article 39 of the Charter provided for an “act of aggression”, “aggression” was only referred to a few times and had never been determined to be a ground for the application of enforcement measures under Chapter VII. The lack of a definition of aggression in the Charter had prompted the General Assembly to adopt resolution 3314 (XXIX) on the definition of aggression in 1974. However, the definition of aggression contained in that resolution was meant to be used as a guide for the Security Council and was not intended to be used as an independent definition. Furthermore, it did not really give any substantive definition of aggression. In paragraph 65 of the report, the Special Rapporteur examined the preamble to the definition; however, it was necessary to consider the operative articles. Article 1 of the resolution simply repeated Article 2 (4) of the Charter. Article 2 of the resolution referred to the “first use of armed force” as *prima facie* evidence of aggression while hastily cautioning that the Security Council might conclude otherwise in certain circumstances. Article 3 of the resolution illustrated various acts that qualified as aggression, such as invasion or attack by armed forces, bombardments and blockades and other uses of armed forces, all of which were seemingly covered by and were in line with Article 2 (4) of the Charter. In other words, the General Assembly resolution on the definition of aggression did not go further than Article 2 (4) of the Charter and did not define aggression, as such.

While he had no objection to the Special Rapporteur’s inclusion, in paragraph 63, of the reference to the 1986 judgment of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, he noted that the report merely quoted the Commission’s commentaries for justification. Notwithstanding the legal principle of *jura novit curia* (the court knows the law), the Court did not give any detailed explanation as to why it had considered the use of force in that case to be an act of aggression and a violation of *jus cogens*.

Further, the definition of the crime of aggression adopted at the 2010 Review Conference of the Rome Statute of the International Criminal Court merely recited General Assembly resolution 3314 (XXIX). Thus, there was no viable definition of aggression and,

in such circumstances, it was difficult to conclude definitively at the present juncture that the prohibition of aggression was a *jus cogens* norm.

Second, on the right to self-determination, just like aggression, nobody denied that, at face value, self-determination was an important rule in international law. However, once again, it was not clear what it meant in concrete situations; there was no viable definition of self-determination and the scope of application of the concept was unknown. What was the relationship between so-called “internal” and “external” self-determination? Should the principle of self-determination be dealt with from the perspective of the “right of the people” or from that of the “obligations imposed on other States”? He believed that the Commission should focus on the aspect of obligations on other States when it came to determine whether the right to self-determination was a *jus cogens* norm.

There was another difficult issue. Supposing that the right to self-determination was a *jus cogens* norm, was it permissible to use force, which was otherwise prohibited, to achieve its objective? Which *jus cogens* norm should prevail over the other? General Assembly resolution 3314 (XXIX) on the definition of aggression addressed that intricate question by providing that: “Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, ...”. The question of conflicting *jus cogens* norms might become a serious problem, as an increasing number of *jus cogens* norms were being proposed in various forums.

He recalled that, a few years before, a proposal had been made for the Commission to take up a new topic on self-determination. Members had started talking about specific cases, such as the Chagos Archipelago, Gibraltar and Quebec. Self-determination could not be sensibly discussed without also discussing its implications for such concrete issues. He did not think that the Commission could include the right of self-determination in the list of *jus cogens* norms without further examining its precise content and its defined scope of application, which would take a long time.

Third, on the prohibition of slavery, there appeared to be consensus that the practice of slavery had now been prohibited in an absolute manner and that its prohibition had been accepted as a *jus cogens* norm. However, it should be noted that the historical developments preceding the prohibition of slavery had taken a more complex course than what was summarized in paragraph 103 of the report. Originally, the focus of the prohibition of slavery had been on the use of human beings as goods for trade. In recent years, however, there had been a tendency to expand the scope of slavery to cover other slavery-like activities or treatment for the purpose of including them as *jus cogens* norms. He would call that tendency “*jus cogens* inflation”. It was somewhat difficult to give a precise scope to the prohibition or to the definition of slavery itself in contemporary international law.

The slavery issue had been the subject of the first dispute that Japan had been involved in with a foreign country immediately after the establishment of the Meiji Restoration of 1868. The case, known as the *María Luz* incident of 1872, concerned a dispute between Peru and Japan. A Peruvian cargo ship, the *María Luz*, had been carrying some 230 Chinese labourers *en route* from Macao to Peru. When the ship had anchored at a port in Japan, a labourer had escaped and it had been found that the labourers on board had been severely mistreated and found themselves in a situation similar to that of slaves. A Japanese court had stopped the ship from leaving Japan and had ordered that the labourers should be freed and allowed to return to China. Peru had protested, claiming that the Chinese labourers had voluntarily signed a contract to work as indentured labourers on plantations in Peru. One of the issues raised in that case had been whether the Chinese labourers had signed the contract of their own free will. The Japanese court had found that the labourers were unable to read or to understand the document and that they had no idea of their final destination, leading it to conclude that there had been no voluntary acceptance of the contract on the part of the Chinese labourers.

Most Western States, except the United Kingdom, had supported Peru and had opposed the way in which Japan had handled the dispute. The case was brought to international arbitration. Tsar Alexander II of Russia had confirmed the position of Japan in 1875, which was a great victory for the country when it was still bound by unequal treaties

with the West. The outcome of the incident had accelerated the decline of the “coolie trade” in South America. In China, the Government of the Qing Dynasty sent an official letter thanking the Government of Japan for having taken a strong stance and for the assistance that it had rendered to the Chinese nationals.

The legal issue of slavery was thus related in part to the element of involuntary servitude. The Commission must be very cautious in setting out the precise scope of slavery, if it was to be recognized as a *jus cogens* norm, so as to avoid its abuse.

Fourth, on the basic rules of international humanitarian law, there was a terminology-related issue. The Commission had tried to avoid using the term “international humanitarian law” in connection with the topic “Protection of the environment in relation to armed conflicts”. In his view, it was grossly misleading to call the law of armed conflict, or *jus in bello*, “humanitarian law”. The essence of the law of armed conflict was to authorize the killing and injuring of enemy combatants as long as there was a military necessity to do so, which was not “humanitarian” at all. The obligation imposed by that law was to kill or injure the enemy “in a humane manner”; or, at least, the law tolerated incidental loss of innocent civilian life and injury to innocent civilians where such loss or injury would not be excessive in relation to the military advantage anticipated.

As indicated in paragraph 121 of the report, there was an obvious issue of uncertainty and ambiguity as to which rules of international humanitarian law were the most basic. Without a clear answer, the Commission would not be able to conclude which rules should be considered as *jus cogens*.

Fifth, on other prohibitions, such as the prohibition of genocide, torture, crimes against humanity and apartheid, while there might be less controversy over their inclusion as *jus cogens* crimes, circumstantial elements such as the scale of the crime and its consequences might have to be considered in order to elevate its status to that of *jus cogens*.

If the term “racial discrimination” was an integral part of apartheid, as explained by the Special Rapporteur in paragraph 91 of his report, it might be better to simply call it “apartheid”. Many people might mistakenly understand the term “racial discrimination” to be a separate and independent notion and suggest including other vulnerable groups, such as women, children, older persons and persons with disabilities.

As he had mentioned, there was a tendency to expand *jus cogens* norms, particularly in the area of human rights law, which might be attributable to the fact that human rights bodies themselves had a tendency to try and expand their mandates and that evolutionary interpretations were quite popular in those bodies. A lack of coordination among such bodies might lead to conflict, fragmentation and the inflation of *jus cogens* norms, which should be avoided.

All the candidates for inclusion as *jus cogens* norms proposed by the Special Rapporteur were serious international crimes; whether they were in fact *jus cogens* norms was a different matter. Their precise content and precise scope of application would need to be examined by means of careful study and in-depth discussion. He did not believe that the Commission could accomplish that task within the limited time that it had at the current session. It would take at least 5, if not 20 years. Perhaps the Commission should establish a working group to decide whether the list should be elaborated under the present topic or whether it should form the subject of a new topic.

Mr. Park said that he wished to express his sincere gratitude to the Special Rapporteur for his fourth report, which dealt with two primary issues: whether the concept of regional *jus cogens* should be recognized by the Commission and whether the Commission should provide an illustrative or non-exhaustive list of *jus cogens* norms. In order to draw a conclusion on each of those issues, the Special Rapporteur analysed relevant practice of States, international and domestic jurisprudence and theoretical debates. It was on the basis of those findings that he would explain his position on both of those issues.

Jus cogens norms were defined as universally applicable norms; however, it was the case that some scholars and practitioners proposed the concept of regional *jus cogens* based on the existence of a hierarchy of norms in the international system and the emergence of

regional human rights norms. The Special Rapporteur illustrated such theoretical positions in paragraphs 23 and 24 of his report.

In 2016, at the preliminary stage of the discussion on the topic, he had suggested that the question of regional *jus cogens* should not be left out at that stage because article 53 of the 1969 Vienna Convention on the Law of Treaties was silent on a peremptory norm of regional international law and mentioned only “a peremptory norm of general international law”. Moreover, some authors, including Professor Eric Suy, did not exclude the possibility of regional *jus cogens*.

Consequently, in theoretical and practical terms, the possible existence of regional *jus cogens* could not be excluded totally, especially when it was accepted that the creation or emergence of *jus cogens* norms was closely related to universal or regional conventions or customary international law.

On the other hand, as explained by the Special Rapporteur in paragraphs 26 to 37 of his report, it was also true that many States and scholars challenged that theoretical concept in its entirety because that notion went against the fundamental meaning of *jus cogens* under article 53 of the 1969 Vienna Convention and the draft conclusions on the topic at hand provisionally adopted by the Drafting Committee, which defined *jus cogens* as universal norms that were to be applied to all States and not to certain States. Most importantly, insufficient State practice made it more difficult for States to recognize the concept of regional *jus cogens*.

Nonetheless, he did not think it necessary to completely exclude the possibility of the development of regional *jus cogens* as a theoretical concept. Although, owing to a lack of State practice, it might be difficult to recognize its existence in current practice, regional *jus cogens* could at least be recognized as a concept with the possibility of further development in the future; there was still room for it to evolve based on existing regional human rights regimes. Although human rights were considered to be universal and inalienable, different regions had adopted their own set of human rights standards that were applicable in their own regional contexts. In that regard, the possibility of the development of regional *jus cogens* norms should not be ruled out completely.

For that reason, he agreed with the opinion expressed by the Special Rapporteur in paragraph 47 to the effect that, while it was not necessary to explicitly state that international law did not recognize the notion of regional *jus cogens*, the current debates on the issue could be explained in the commentary and the fact that certain scholars supported the notion of regional *jus cogens* could be recognized.

Another issue that must be addressed was whether the Commission should adopt an illustrative list of *jus cogens* norms. Before entering into the substance of the matter, he wished to address, from a critical point of view, the methodological approach adopted by the Special Rapporteur for the purpose of examining and presenting the illustrative list. As the Special Rapporteur mentioned in paragraph 52 of his report, those methodological issues were important since the draft conclusion in question would have a demonstrative function in relation to “how the criteria developed by the Commission are to be applied”. In that connection, he would mention two points.

First, on the methodological approach adopted by the Special Rapporteur, he noted that, in discussing each norm that appeared in the list of *jus cogens*, the Special Rapporteur seemed to emphasize decisions of international courts and tribunals, which were a subsidiary means for determining the peremptory character of norms of general international law, as mentioned in draft conclusion 9 (1) provisionally adopted by the Drafting Committee.

For example, in discussing the prohibition of aggression, specific reference was made, in paragraph 63, to *Military and Paramilitary Activities in and against Nicaragua*. In the section on the prohibition of torture, mention was made to another International Court of Justice case, namely *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, and to a case adjudicated by the International Tribunal for the Former Yugoslavia, *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as “Pavo”, Hazim Delić, Esad Landžo also known as “Zenga”*. In reviewing the prohibition of genocide, the

advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* was quoted prior to the discussion on State practice. Decisions of international courts and tribunals were similarly emphasized in the remainder of the items on the list.

In view of the above-mentioned examples, it was clear that the Special Rapporteur paid greater attention to relevant decisions of international courts and tribunals than to State practice. Of course, he had in that connection noted that, in paragraph 55, the Special Rapporteur mentioned that his report would focus on norms that had been recognized by both the Commission and the Court. However, the methodology for applying the criteria developed by the Commission to actual cases needed to be clarified. If the subsidiary means, namely decisions of international courts and tribunals, also implied the practice of States, mention should be made of that fact. If decisions of international courts and tribunals were actually one of the primary guides for identifying *jus cogens* norms, that raised the question of why such items should still be labelled as subsidiary means in draft conclusion 9 provisionally adopted by the Drafting Committee.

Although he understood the Special Rapporteur's decision to omit most references to dissenting and concurring opinions, in his view, it would be helpful to present any opposing views for the purpose of discussion. The task of identifying and recognizing the peremptory norms in general international law was not necessarily limited to formulating an argument that provided evidence solely in support of such identification and recognition. In carrying out that task, the Commission should adopt a more objective method, involving the analysis of any differing views, even if they were no longer held by the international community of States as a whole. Indeed, a review of the development of opposing views might prove useful for readers, who could learn how a particular norm had been recognized as such, given that most *jus cogens* norms had not initially been peremptory norms. Further, reflecting on the development of different views would be helpful in understanding how future *jus cogens* norms might be accepted by the international community as a whole.

As he had stated at previous sessions, the illustrative list could be helpful in providing guidance to States as to the norms that had already attained the status of *jus cogens*. Because of the challenges involved in identifying all *jus cogens* norms, the list should be non-exhaustive, identifying some of the most widely accepted forms of such norms. As some had pointed out, an illustrative list might create the impression that items not included in the list were not *jus cogens* norms, but that was not necessarily the case. As long as such a list explicitly stated that it was non-exhaustive in nature and recognized that other *jus cogens* norms could exist – as was the case in draft conclusion 24 as it currently stood – it would not exclude the possible existence of other *jus cogens* norms.

He also welcomed the alternative proposal made by the Netherlands to refer to the tentative and non-limitative lists of *jus cogens* norms that had already been recognized by the Commission in its commentaries to articles 26 and 40 of the articles on responsibility of States for internationally wrongful acts. Although the illustrative list should not be limited to the norms mentioned in those commentaries, it could be developed on the basis of such norms. Accordingly, it was appropriate for the illustrative list to include the norms provided in the report, including the prohibition of aggression, genocide, slavery, apartheid and racial discrimination, crimes against humanity, torture, and the right to self-determination and the basic rules of international humanitarian law.

Regarding draft conclusion 24 (*h*), the use of the term “basic rules of international law” was acceptable in the articles on State responsibility, but it seemed to cover a vast number of rules in the international humanitarian law regime. The Special Rapporteur himself had noted the uncertainty surrounding the issue of *jus cogens* and basic rules of international humanitarian law, especially with regard to the question of which rules of international humanitarian law qualified as the “most basic”.

In his view, the term “prohibition of war crimes” was clearer and more straightforward than “basic rules of international law”. There were two reasons for that view: first, the criteria for establishing a norm as one of *jus cogens* could vary depending on one's perspective as to the status of the basic rules enshrined in each treaty of international humanitarian law; and second, because of the non-derogatory nature of *jus cogens* norms,

such uncertainty was unacceptable and should be avoided wherever possible. In order to minimize misunderstanding, he proposed replacing the current text of draft conclusion 24 (*h*) with “the prohibition of war crimes”.

Although it did not appear in the illustrative list proposed by the Special Rapporteur, the prohibition of enforced disappearance was referred to in chapter IV as a possible norm of *jus cogens* not identified in the Commission’s previous works. However, the norm was included in the list provided under draft article 7, adopted provisionally within the context of the topic “Immunity of State officials from foreign criminal jurisdiction”. There, “enforced disappearance” was treated as one of the “crimes under international law”, namely, the most serious international crimes, to which immunity *ratione materiae* would not apply. While the scope and objective of *jus cogens* norms and the prevention and punishment of crimes under international law were not identical, the two topics were so closely related that the Commission should seek to harmonize its treatment of them. If the Commission was to deal with the prohibition of enforced disappearance differently under the current topic, it should carefully explain its reasons for doing so.

The challenge inherent to the norms described in chapter IV, section C, was that they had not been formally recognized as *jus cogens* norms in international instruments, but rather had received some support as *jus cogens* norms on the basis of State practice and doctrine. Therefore, it was debatable whether such norms had actually become *jus cogens* norms as a matter of law. It might also be possible for some such norms to be interpreted as *jus cogens* norms already recognized by the Commission: for example, the prohibition of human trafficking could fall under the prohibition of slavery if it was interpreted as a modern form of slavery.

In considering possible norms of *jus cogens*, one of the main criteria should be whether it was possible to derogate from the norm in question, in other words, whether a State had discretion as to its application. “Non-derogation” was one of the essential characteristics of a *jus cogens* norm, as was made clear in draft conclusion 3, provisionally adopted by the Drafting Committee. Many of the norms referred to in chapter IV, section C, with the exception of the prohibition of enforced disappearance, appeared to be derogable when a State had reasonable and appropriate grounds for derogation. Consequently, the norms set out in chapter IV, section C, did not seem ripe for acceptance as norms of *jus cogens*.

Aside from the two previously mentioned aspects concerning the prohibition of enforced disappearance and the phrase “the basic rules of international humanitarian law”, he supported the structure of draft conclusion 24, which provided a non-exhaustive list of peremptory norms that had been recognized previously by the Commission and also allowed for the existence of other possible norms, some examples of which would be given in the commentary. Sufficient evidence for the norms that would feature in the commentary must be provided, based on an objective criterion to illustrate that it had garnered support for recognition as a *jus cogens* norm.

He proposed replacing, in the chapeau of draft conclusion 24, the word “are” with “include”, as the former seemed to restrict the boundaries of widely recognized examples of peremptory norms of general international law to the norms contained in subparagraphs (*a*) to (*h*); the word “include”, on the other hand, would leave room for additional norms to be identified as widely recognized examples.

As for chapter VI, on future work, he supported the Special Rapporteur’s proposal that the Commission should adopt the draft conclusions on first reading at the current session, with the proviso that sufficient time would be allotted to deal with the topic thoroughly.

Ms. Lehto said that she welcomed the Special Rapporteur’s clear, well-argued and coherent fourth report and the draft commentaries to the provisionally adopted draft conclusions, which had been circulated informally. Both paved the way for the Commission’s adoption of the full set of draft conclusions together with the draft commentaries on first reading at its current session.

With regard to regional *jus cogens*, she agreed with the main reason given by the Special Rapporteur for omitting references to the concept in the draft conclusions, namely, that regional *jus cogens* could not easily be reconciled with the Commission's approach to the present topic. According to that approach, *jus cogens* was based on a hierarchy of norms and seen as reflecting and protecting the core values of the international legal order, which were necessarily universal. The lack of State practice was also a relevant consideration. In her view, establishing a definition of the term "region" was not overly difficult where the argument of regional *jus cogens* was based on an institutional arrangement, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) or the legal order of the European Union, which provided a basis for arguments relating to "a European public order" or "European *jus cogens*". Another relevant example was the inter-American human rights system. In all the aforementioned examples, it was sufficient to review the list of States parties or member States to determine whether a particular State belonged to a particular region. Chapter III of the report had the merit of recognizing the specificity of such regional frameworks without making an exception to the general principle of the universal application of *jus cogens* norms.

She welcomed the Special Rapporteur's approach to the illustrative list of *jus cogens* norms, in building on the Commission's earlier work, particularly the brief list of such norms set out in the articles on State responsibility, while providing further evidence of the acceptance and recognition of such norms as peremptory norms of general international law. Even that approach, however, was not without pitfalls. While the list of norms as currently presented in draft conclusion 24 was relatively straightforward, it might prove difficult to avoid all questions of the definition and delimitation of the norms concerned. The Special Rapporteur seemed aware of that risk, based on his statements in paragraphs 115 and 116 of his report. Other paragraphs, however, highlighted the risks involved when a basically methodological study spilled over into the area of substantive law.

While she agreed with the substance of draft conclusion 24, she wished to make some remarks mainly relating to the future commentaries, which would have to be drafted with great care. Regarding the prohibition of aggression and the varying terminology used by the Commission in different products of its work, it might be misleading to characterize such differences as a terminological matter, as had been done in paragraph 62 of the report, particularly if it was implied that the terms "prohibition of aggression" and "aggressive use of force" could be used interchangeably. Paragraphs 63 to 66 only strengthened that impression: the examples given in support of the prohibition of aggression as a *jus cogens* norm almost invariably referred to "use of force". Of the many examples given in the report, only Cyprus had referred solely to aggression, rather than to the use of force, but those references were to acts that could be so qualified. While she agreed with the Special Rapporteur that such issues should not be commented on in great detail during the Commission's debate, they nevertheless should not be ignored, at least not in the commentary, to the extent that ignoring them might be inadvertently taking a substantive position on the issue.

Regarding the difference between the concepts "use of force" and "aggression", reference could be made to the International Court of Justice, which, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, had taken the view that all prohibited use of force did not exceed the threshold of an armed attack. Similarly, General Assembly resolution 3314 (XXIX), on the definition of aggression, characterized aggression as "the most serious and dangerous form of the illegal use of force". The resolution furthermore set forth a *de minimis* rule according to which the first use of armed force by a State was not necessarily to be considered as an act of aggression, if the acts concerned or their consequences were not of sufficient gravity. Needless to say, the distinction between the concepts of an armed attack or act of aggression and the use of force served the ultimate purpose of the rules on the use of force under the Charter of the United Nations: to minimize the risk of escalation. There was nevertheless also an argument against recognizing such a difference; therefore, the commentaries must be drafted with the utmost care.

Another substantive issue concerned the scope of *jus cogens* norms, namely, whether the law of the Charter of the United Nations on the use of force, as a whole, in other words, the prohibition of the use of force qualified by the right to self-defence and the provisions on collective measures, was to be seen as having *jus cogens* status, or whether only the prohibition of aggression had such status. It had been argued in the literature that only the core provision of Article 2 (4) of the Charter and the corresponding customary rule constituted a peremptory norm; it had also been argued that the prohibition of the use of force could not possibly be peremptory because of the exception of self-defence. In any event, the Commission did not need to debate such issues in the context of the present topic, since it could align its approach with that taken in the drafting of the articles on State responsibility, which referred to the prohibition of aggression as a clearly accepted and recognized *jus cogens* norm. It might be noted, however, that the commentaries to articles 26 and 40 of the State responsibility articles did not provide much explanation as to the Commission's decision to refer to aggression rather than to the broader concept of the law of the Charter, which nevertheless appeared in the Draft Code of Crimes against the Peace and Security of Mankind of 1996. It was difficult to interpret such a decision as anything but deliberate. It should be recalled in that regard that the articles on State responsibility had been adopted in 2001 – the high point in the debate on humanitarian intervention. At the same time, article 40 somewhat confusingly referred to statements that addressed both aggression and the illegal use of force. In any case, the broader concept encompassed the narrower one. In conclusion, she was in broad agreement with the proposed illustrative list, which was consistent with the articles on State responsibility and did not contradict the list provided in the Commission's report on fragmentation of international law. In any event, a list based on the earlier work of the Commission might not be a simple undertaking and would require great care in the drafting of the commentaries.

While the inclusion of the prohibition of apartheid and racial discrimination in the illustrative list was self-evident, she had some concerns as to some of the evidence chosen to support its inclusion. Specifically with regard to General Assembly resolution 32/105 J, referred to by the Special Rapporteur in paragraph 96 of his report, she supported his conclusion that that and other resolutions related to the national liberation movements of South Africa and the struggle against apartheid were relevant from the point of view of *jus cogens* because they used language describing the prohibition in terms akin to those used to describe, for example, genocide and torture. However, she did not believe that the singular mention in the aforementioned resolution of "armed struggle" was relevant and she would not wish to see it included in the commentary to the draft conclusions. There was reason to recall that General Assembly resolution 32/105 J had not been adopted by consensus and that some States that had been staunch supporters of the opposition to the apartheid regime had abstained from voting because of the mention of armed struggle in the text of the resolution.

Chapter IV, section C, which listed norms that had frequently been cited as candidates for *jus cogens* status, was a useful complement to the preceding considerations and could also be reflected in the commentary. She specifically welcomed the consideration of environmental protection as a potential *jus cogens* norm that had yet to be accepted and recognized as such. The references to the dissenting opinion of Judge *ad hoc* Dugard in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and to the scholar who had described the protection of the environment to be an essential interest of all individuals within the entire international society were relevant in that regard. The Commission might also wish to refer to the acknowledgement of the International Court of Justice in its judgment in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* that the protection of the environment was an essential interest of all States.

In conclusion, she supported referring draft conclusion 24 to the Drafting Committee and looked forward to the Commission's completion of its first reading of the draft conclusions at its current session.

The meeting rose at 1 p.m.