

Provisional

For participants only

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Seventy-first session (first part)

Provisional summary record of the 3460th meeting

Held at the Palais des Nations, Geneva, on Thursday, 9 May 2019, at 10 a.m.

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Peremptory norms of general international law (*jus cogens*) (*continued*)

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Present:

Chair: Mr. Šturma

Members: Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
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
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) (continued)
(A/CN.4/727)

Ms. Galvão Teles said that she would concentrate her remarks on the issue of regional *jus cogens* and the question of an illustrative list of norms of *jus cogens*. She supported the general approach taken by the Special Rapporteur in his fourth report (A/CN.4/727) and agreed with his conclusion that the notion of regional *jus cogens* had not found support in the practice of States. In the debate held in the Sixth Committee during the seventy-third session of the General Assembly, a number of delegations had expressed the view that the concept of regional peremptory norms would undermine the integrity of universally applicable peremptory norms of general international law. One delegation had suggested that the debate on the issue should proceed with caution so as not to jeopardize norms that were universally recognizable and applicable.

Even though it could be argued that different regions or groups of States might have a common set of unifying and binding norms that had a higher status than other rules, at least among those regions or groups – as in the case, for instance, of the prohibition of the death penalty in the countries of the European Union – that did not mean that such norms had the status of regional *jus cogens*. She therefore agreed with the Special Rapporteur's proposal, in paragraph 47 of his report, that no draft conclusion should be adopted on regional *jus cogens* and that an appropriate explanation should be included in the commentary.

The most sensitive issue raised in the report concerned the illustrative list of peremptory norms of general international law. The first question to be addressed was whether to have or not to have such a list. Differing views on that subject had been expressed by delegations in the Sixth Committee. Some had voiced support for the development of an illustrative list without qualifications, considering such a list to be one of the crucial benefits of the Commission's work on the topic. Others supported a non-exhaustive list accompanied by a clarification that the list did not prejudice the legal status of norms not included therein. One delegation had reiterated that the Commission should provide the grounds and evidence for considering the listed norms as *jus cogens*. Other delegations had nonetheless advised against the inclusion of an illustrative list at all, arguing, for instance, that it could prevent the emergence of State practice in support of other norms or hinder the development of the very concept of peremptory norms of general international law. It would also be a difficult task that would generate significant disagreement among States, with the risk that the concept itself might be diluted. One delegation had suggested that, if such a list was nonetheless included, reference should be made to the commentaries to articles 26 and 40 of the articles on responsibility of States for internationally wrongful acts, which included a tentative and non-exhaustive list of peremptory norms of general international law (*jus cogens*).

On balance, it seemed that the Commission had support from States for the inclusion of an illustrative list, provided that the list did not prejudice the legal status of norms not included on it; the grounds and evidence on the basis of which the Commission considered the listed norms to have acquired the status of *jus cogens* were provided; the inclusion of the list did not hinder the development of the concept of peremptory norms of general international law (*jus cogens*) itself; and reference was made to the commentaries to articles 26 and 40 of the articles on State responsibility.

In her view, if the draft conclusions were to be consistent with the Commission's previous work, an illustrative list would have to be provided. If the Commission did not list even the norms that it had referred to previously, it would be departing from the approach it had taken in its work on topics such as the law of treaties, State responsibility, reservations to treaties and fragmentation of international law. In those contexts, the Commission had explicitly listed some norms that it considered to have attained the status of *jus cogens*; not to do the same when dealing with peremptory norms of general international law as an autonomous topic would appear to be somewhat contradictory. The norms generally recognized by the Commission as having attained the status of *jus cogens* were the law of the Charter of the United Nations concerning the prohibition of the use of force, aggressive

force and aggression; the prohibition of genocide, crimes against humanity and torture under international law; the prohibition of slavery and the slave trade; the prohibition of piracy; the prohibition of racial discrimination and apartheid under international human rights law; the equality of States; the right to self-determination; the prohibition of war crimes and hostilities directed against a civilian population; and the intransgressible basic rules of international humanitarian law that were applicable in time of armed conflict.

Without the inclusion of an illustrative list with concrete examples, the Commission's methodological work would not be supported by actual examples of norms that met the criteria set out in the draft conclusions. The Commission was clearly the most appropriate entity to draw up an illustrative list because it had been entrusted with the task of providing methodological and conceptual clarity on the issue. Nevertheless, the Commission must emphasize that the list was illustrative and not exhaustive and that its purpose was to demonstrate both the processes underlying the formation of the *jus cogens* status of certain norms and the application of the criteria established by the Commission.

With regard to the form and status of the list and its content, she could support the overall approach taken by the Special Rapporteur in the proposed draft conclusion 24, though there was room for some drafting improvements in the chapeau and in the wording of the norms listed. However, she wished to suggest an alternative solution that might be supported by Commission members and States. In the past, the Commission had included illustrative lists of *jus cogens* norms in the commentary, so as not to elevate them to the same level as the main text. As a middle ground between inclusion in the commentary and inclusion in the draft conclusions, the list could be placed in an annex but referred to in a draft conclusion. The annex would bring together the examples contained in the commentary to articles 26 and 40 of the articles on State responsibility and would include a clarification that the list was without prejudice to other norms that had already attained the status of *jus cogens* or that might attain it in the future. The commentary to the draft conclusion and the annex could explain the purpose of the list and the instances where the norms on the list had been confirmed by State practice and international case law, including, but not limited to, that of the International Court of Justice. It could also refer to all the caveats already mentioned and to other norms that had also been put forward as possibly having *jus cogens* status.

A precedent for such an approach could be found in the Commission's articles on the effects of armed conflicts on treaties, article 7 of which stated that "An indicative list of treaties, the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present articles." The annex was entitled "Indicative list of treaties referred to in article 7".

She thus proposed that draft conclusion 24 should read simply "A non-exhaustive list of norms that have been generally accepted as having attained the status of peremptory norms of general international law (*jus cogens*) is contained in the annex to the present draft conclusions." She then proposed a text for the annex, which would read:

Annex

Non-exhaustive list of peremptory norms of general international law (*jus cogens*) referred to in draft conclusion 24

Without prejudice to the existence or emergence of other peremptory norms, the following norms have been generally accepted as having attained the status of peremptory norms of general international law (*jus cogens*):

- (a) the prohibition of aggression;
- (b) the prohibition of genocide;
- (c) the prohibition of crimes against humanity;
- (d) the prohibition of war crimes and other intransgressible basic rules of international humanitarian law;
- (e) the prohibition of torture;
- (f) the prohibition of slavery and the slave trade;

- (g) the prohibition of apartheid and racial discrimination; and
- (h) the obligation to respect the right to self-determination.

She offered that suggestion in a spirit of compromise, believing that it represented more of a middle ground than the proposal made by Sir Michael Wood at the Commission's 3459th meeting, though many of his comments merited careful consideration. In conclusion, she said that she was in favour of referring the proposed draft conclusion 24 to the Drafting Committee, taking into account the suggestions made by Commission members.

Ms. Oral said that the Special Rapporteur was to be congratulated on his meticulously prepared and very well written fourth report, which had been delivered in a timely manner, and on his clear and succinct introduction.

Regarding the methodological issues that had been raised within the Commission and the Sixth Committee, she could understand why some States might prefer to review the draft commentaries in tandem with the draft conclusions as and when the latter were submitted to the Sixth Committee instead of at the very end of the process. The United Kingdom representative, for example, had expressed the view that States had a fuller understanding of draft provisions and were able to engage more productively with the Commission when commentaries were produced simultaneously. On the other hand, she also understood the very logical reasoning behind the holistic approach, as adopted by the Special Rapporteur on identification of customary international law. Experience would show whether there was any real advantage or disadvantage to either of those approaches, which could be discussed in the Working Group on methods of work.

On the issue of regional *jus cogens*, the Special Rapporteur had provided a concise and excellent overview of the different views expressed by States and in doctrine. A good number of States had observed that the notion of regional *jus cogens* ran counter to the underlying foundation of *jus cogens*, which was universality. The Commission itself, in its draft conclusion 7 on the current topic, stated that "acceptance and recognition by the international community of States as a whole" was the factor of relevance in the identification of norms of *jus cogens*; that would implicitly exclude any notion of regional norms. Introducing the concept of regional *jus cogens* in the draft conclusions would require a modification of that definition, which would not be appropriate. Furthermore, allowing for the parallel existence of regional norms of *jus cogens* might open the door to the emergence of conflicting peremptory norms, as discussed by the Drafting Committee in relation to draft conclusion 16.

Moreover, the notion of regional *jus cogens* raised many questions, such as how a "region" should be defined, when there was no accepted legal or political definition. The Special Rapporteur, in paragraphs 33 to 36 of his report, rightly pointed to the conceptual and practical questions that arose with respect to the consequences of regional norms of *jus cogens*. How would the nullity of a treaty that was in conflict with a norm of *jus cogens*, or the non-binding nature of decisions of an international organization that were in conflict with such a norm, apply within a purely regional context? While the topic of regional *jus cogens* might be an excellent subject for academic discourse, she was of the view that the Commission should not include it.

With regard to draft conclusion 24, as rightly pointed out by the Special Rapporteur in paragraph 49 of the report, the question of whether or not to include an illustrative list of peremptory norms was one that the Commission had considered before. Some current and past members of the Commission had expressed doubts about the elaboration of such a list, while many others had supported it. Their views mirrored the views of States, as the Special Rapporteur had pointed out. The main concerns of States that were not in favour of including an illustrative list centred on the impact that such a list could have on other current and future peremptory norms that were not included in the list. For example, the representative of the Netherlands in the Sixth Committee had expressed the concern that the authoritative nature of a list compiled by the Commission, whether illustrative or otherwise, would prevent the emergence of State practice and *opinio juris* in support of other norms. Nevertheless, she agreed with the Special Rapporteur that the Commission should not rule out the inclusion of a list simply for fear that it might be erroneously interpreted as *numerus*

clausus, provided that the Commission stated very clearly that the list was non-exclusive and open-ended.

On the other hand, many States had expressed views in favour of a list. Brazil had challenged the Commission to find a creative way to elaborate such a list. Japan was open to the idea if the list included the grounds and evidence for the inclusion of each norm on the list. New Zealand had also expressed a favourable view, though it had called for the Commission to continue to take a cautious and balanced approach, given the lack of State practice in that area and the serious consequences that arose from either breach of or conflict with a peremptory norm.

At the Commission's previous session, she had spoken in favour of including an illustrative list of peremptory norms of general international law. She still held that position, but wished to add some comments. Some 50 years earlier, the Commission had debated whether or not to include an illustrative list of *jus cogens* norms in draft article 50, "Treaties conflicting with a peremptory norm of general international law (*jus cogens*)", of the draft articles on the law of treaties, which had later become article 53 of the 1969 Vienna Convention on the Law of Treaties. The arguments raised then had been more or less the same as those raised in the current context.

In the 1960s, the emergence of rules having the character of *jus cogens* had been a comparatively new development. There had been very little State practice or jurisprudence. That had changed, and the Special Rapporteur had gone to great lengths to outline the developments in respect of certain norms of a peremptory nature since that time. Nevertheless, she had some reservations about the methodology followed by the Special Rapporteur. In chapter IV (B) of his report, entitled "Norms previously recognized by the Commission as possessing peremptory character", the Special Rapporteur referred to the commentary to draft article 50 of the draft articles on the law of treaties. However, in those commentaries the Commission gave examples of *jus cogens* norms as illustrations of "the most obvious and best settled rules of *jus cogens*" without specifying the methodology used in selecting those norms. Likewise, in the commentary to article 40 of the 2001 articles on responsibility of States for internationally wrongful acts, the Commission referred only to its own previous work as "support" for the view that the prohibition of aggression was a peremptory norm.

She questioned the Special Rapporteur's use of the word "recognized" in the title of chapter IV (B), as that word appeared to add a normative element. In paragraph 134, the Special Rapporteur took care to indicate that he was not taking any position on the character of the norms themselves, but then went on to note that there was strong support for the *jus cogens* status of the norms covered in that section, and differentiated between those norms and others whose *jus cogens* status enjoyed only "some" support. She was not comfortable with differentiation on that basis for the purpose of determining inclusion on the list. She questioned the wisdom of identifying in the commentaries norms that had only "some support", especially if the intent of the list was simply to bring together a collection of norms that the Commission had previously identified as *jus cogens*.

It was not the content of the illustrative list *per se* that was of concern to her, but the terminology used to explain why some norms but not others had been selected for inclusion. That approach might inadvertently create a methodology for identifying norms of *jus cogens* rather than for simply compiling an illustrative list. The methodology used by the Special Rapporteur in preparing the list should not become a template for the identification of norms of *jus cogens*.

She was also concerned about the thematic nature of the list. In general, draft conclusion 24 was focused on norms related to international criminal law and international humanitarian law. That could easily lead to the conclusion that the norms of *jus cogens* did not apply in other areas of law. She was not contesting the Special Rapporteur's selection of a certain set of norms for inclusion on the list, as she understood that he had not intended to create a methodology for the identification of norms of *jus cogens*. Her main concern was that the non-exclusive and open-ended nature of the list needed to be made very clear in the text of the draft conclusion itself, and not simply in the commentaries.

A week earlier, some 500 biodiversity experts had gathered to discuss the *Global Assessment Report on Biodiversity and Ecosystem Services* produced by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. The report concluded that some 1 million species were facing extinction and that many could disappear completely within a decade if nothing was done. Unlike genocide, however, “ecocide” was not a *jus cogens* norm. While protection of the environment and natural resources might not have been recognized as a peremptory norm in the past, it was a potential candidate for inclusion on a future list of *jus cogens* norms. The manner in which the Commission elaborated an illustrative list should not hinder the potential inclusion of such norms. The list adopted by the Commission must not be fixed in the year 2019, but must remain open-ended.

In the chapeau of draft conclusion 24, the list was described as comprising the “most widely recognized” examples of peremptory norms. However, by inserting “most widely” before “recognized”, the Commission appeared to be introducing a “criterion” into the list instead of providing a neutral descriptor. That description could easily be confused with the definition of *jus cogens* that the Commission had provisionally adopted.

As an alternative, she suggested that the chapeau should read “Without prejudice to the existence of other peremptory norms, present or future, the following are solely provided as an illustrative list of certain peremptory norms.” The commentary to that draft conclusion would need to be carefully drafted to ensure that the draft conclusion did not inadvertently prevent other norms, especially those outside the fields of international criminal law and international humanitarian law, from acquiring the status of *jus cogens*.

In conclusion, she recommended that draft conclusion 24 should be referred to the Drafting Committee.

Mr. Murphy said that the Special Rapporteur appeared to be well aware of the differing views within the Commission as to the core subject of the fourth report, and was diligently seeking to find common ground. However, he did not see why the Special Rapporteur had resurrected parts of his summing-up of the debate at the Commission’s previous session for inclusion in the report, or why it was necessary to address, in paragraph 13 of the report, a dispute between the Special Rapporteur and one representative in the Sixth Committee on a matter unrelated to the subject of the report.

In paragraph 15 of the report, the Special Rapporteur defended his decision to keep all of the draft conclusions in the Drafting Committee rather than follow the usual practice of drafting and adopting commentary in the year that the draft conclusion was completed or, if necessary, the following year. That approach had been criticized by a number of delegations in the Sixth Committee. For example, the representative of Finland, speaking on behalf of the Nordic States, had expressed concern that the method might hamper a thorough analysis and an optimal exchange of views between the Commission and Member States, as the full set of draft conclusions and commentaries, representing a very significant body of work, would be presented to the full Commission and the Sixth Committee all at once at the time of the first reading. That would limit States’ opportunities for meaningful interaction with the Commission over the whole span of its work on the topic.

Other delegations in the Sixth Committee had also criticized that approach, which made it harder for them to react on an annual basis to draft conclusions that had not been provisionally adopted by the Commission or explained by detailed commentary. The response provided in the report, to the effect that the same approach had been taken in the case of one other topic, was inadequate. He also found it difficult to reconstruct various nuances that the Drafting Committee had discussed years previously that were to be captured in the commentary, and would prefer to be able to do so closer in time to the relevant discussions. Although it was too late to change the approach in the current case, he thought it worth highlighting that States appeared to prefer the Commission’s normal practice and that continued departure from it on other topics might only serve to worsen relations with the Sixth Committee.

Paragraph 16 of the report noted the criticisms expressed by various States with regard to the methodology used. The Czech Republic, for instance, had stated that the Special Rapporteur’s approach to the topic was based primarily on references to doctrine

rather than to international practice and that a deeper analysis of international and national case law and State practice relevant to the topic would have been appreciated, particularly in relation to the methodology used for the identification of peremptory norms. The response offered in the report, that none of the States had pointed to a single draft conclusion that was entirely unsupported by practice, set a low bar for determining the existence of a rule of international law, implying that the existence of a single example of “practice” would be sufficient for establishing the rule. That response was also inaccurate, at least if “practice” was taken to mean State practice; Slovakia, for instance, had asserted that several of the proposed draft conclusions were based merely on doctrinal opinions rather than State practice, and the United Kingdom had stated, in relation to draft conclusion 17, that it did not believe there was State practice to support the contention that a State could refuse to comply with a binding Security Council resolution based on an assertion of a breach of a *jus cogens* norm. While opinions on such comments might differ, it was not helpful to make sweeping statements about the views of Sixth Committee delegations that were not accurate or to use the term “practice” in a particular way.

He was not persuaded by the view, expressed in paragraph 17, that the conflicting reactions to draft conclusion 14 on the part of Sixth Committee delegations showed that the optimal outcome had been reached. Draft conclusion 14, which concerned procedural requirements, appeared not to be supported by any State practice, unless the treaty-based Vienna Convention procedures could be regarded as such practice. The report gave no response to some of the criticisms voiced in the Sixth Committee, such as the point raised by Greece that the procedure appeared to be inter-State in nature and thus could not adequately address a dispute between a State and an international organization. Moreover, several States had simply called for the deletion of draft conclusion 14.

No clear explanation was given of the term “regional *jus cogens*”, the possible existence of which was considered in chapter III of the report. If it meant peremptory norms of general international law that operated solely within a particular region, such norms obviously did not exist: “general” international law was not regional law, and draft conclusion 2 provided that peremptory norms of general international law were “universally applicable”. The arguments outlined in chapter III thus appeared to be something of an afterthought. If, on the other hand, “regional *jus cogens*” was intended to mean peremptory norms of regional international law, that issue was arguably not the focus of the topic and should, as some other members had suggested, be omitted.

The discussion in chapter IV (A) of the report about whether or not a “non-exhaustive list” of *jus cogens* norms should be included in a draft conclusion was both balanced and helpful. However, the Special Rapporteur’s preference was unclear: on the one hand, he mentioned “compelling” reasons not to have such a list and appeared to favour the proposal by the Netherlands to include a reference to the list contained in the commentaries to the articles on responsibility of States for internationally wrongful acts; on the other, he proposed that an actual list should be included in the draft conclusions themselves, with no reference to past Commission practice.

Although the idea of including a list of *jus cogens* norms in the draft conclusions might seem attractive, the reasons put forward for doing so were not persuasive, and a number of problems might arise. The argument that the Commission’s project would be a failure if it did not identify *jus cogens* norms was not compelling; the Commission would in any case not identify all *jus cogens* norms but would, at best, only develop a partial list. Moreover, doing so would not be consistent with the Commission’s practice in previous draft articles or draft conclusions: in its work on other topics such as customary international law and unilateral acts of States, it had not sought to catalogue substantive rules or examples of such acts, although such a list had been included in the work on the topic “Effects of armed conflicts on treaties”, as Ms. Galvão Teles had mentioned. Analysing the methodology of a source had not in the past required the Commission to identify the substantive or primary rules that had emerged from that source, and the topic at hand should be no different in that regard.

Second, as the Netherlands had noted, however such a list was described, it would be perceived by others as a claim by the Commission that certain norms were *jus cogens* and others were not. It would, in all likelihood, prevent the emergence of State practice and

opinio juris in support of other norms; thus, for example, a future claim that discrimination on the basis of sexual orientation was a violation of *jus cogens* would be much harder to substantiate. The same would be true in relation to the prohibition of ecocide.

Third, although the report indicated that the list in draft conclusion 24 was “only a confirmation in a text (as opposed to a commentary) of a previous list of *jus cogens* norms identified by the Commission”, the draft conclusion itself did not contain such a statement and there was no basis on which the reader could draw that conclusion.

Fourth, if the aim was simply to list norms that the Commission had identified in previous lists, a question arose as to why those particular lists were considered “the only objective means by which to determine which norms to include” in an illustrative list. Some of the norms taken from the Commission’s previous work were based on isolated or unspecified cases and might thus be considered extremely arbitrary rather than objective; furthermore, the list given did not even include all the norms that the Commission had identified previously.

Fifth, the analysis presented in the report did not focus on what the Commission had or had not said; it made the substantive claim that the norms on the illustrative list were supported by various sources of international law and that other norms did not have enough support to be included. Norms in the latter category included, for example, the prohibition of enforced disappearance and the principle of *non-refoulement*; the prohibition of racial discrimination was considered a *jus cogens* norm, but the prohibition of discrimination against women was not; the prohibition of slavery was *jus cogens*, but the prohibition of human trafficking only enjoyed “some degree of support” and thus did not merit inclusion on the list. If the commentary was worded in the same manner as the report, such a list would be viewed as an indication of which rules had been identified by the Commission as meeting the definition of *jus cogens* as of 2019.

Sixth, in his view, the methodology followed in chapter IV (B) and (C) was not consistent with the one applied in relation to prior draft conclusions on the topic, which had drawn upon a wide range of evidence to determine whether a “very large majority” of States accepted and recognized that the rule in question was of *jus cogens* character. He agreed with Mr. Park that, for the most part, the analysis in the report regarded a rule as *jus cogens* if the Commission or the International Court of Justice, perhaps with the support of a few academic views, had identified it as such. Furthermore, the analysis glossed over the fact that, in many cases, those bodies had not actually claimed that the norm in question was *jus cogens*.

The report offered no serious analysis of State practice to establish whether the right to self-determination was recognized and accepted by a very large majority of States as being of *jus cogens* character. The report relied heavily on the jurisprudence of the International Court of Justice, but that Court had asserted only that the right to self-determination had an *erga omnes* character. The existence of an obligation *erga omnes* did not necessarily mean that there was an obligation imposed by a norm of *jus cogens*. There were, for example, obligations owed *erga omnes* that operated in common spaces, such as the sea, outer space and Antarctica, and that did not relate to a peremptory norm of general international law. In the recent advisory proceedings in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, several States had urged the International Court of Justice to declare the right to self-determination to be of a *jus cogens* character, but the Court had pointedly declined to reach that conclusion, instead simply noting the *erga omnes* character of the right to self-determination.

The obvious reason that the Court had not recognized the right to self-determination as *jus cogens* was that doing so would have accorded that right equal stature with the rules on the use of force in international law, meaning that action to exercise the right to self-determination might be taken even if it entailed a violation of the rules on the use of force. If, for instance, his own country, the United States of America, were to carry out an invasion into Venezuelan territory, other States would claim that it had violated the Charter of the United Nations. However, if the proposed illustrative list included that right, the United States could argue that the invasion was permissible because its purpose was to help the people of that country to exercise their right to self-determination, which, as a *jus*

cogens norm, had a status comparable to that of the Charter. He suspected that a careful analysis of State practice would show that States were unlikely to support that conclusion.

He was of the view that no systematic effort had been made in chapter IV (B) and (C) to uncover and analyse the practice of States with regard to each of the norms in question. As Mr. Park had observed, there had been no attempt at comprehensiveness, to the point where the report did not present opposing views with respect to the norms discussed. Consequently, the robust methodology outlined in the Special Rapporteur's first report on the topic (A/CN.4/693) seemed to be lacking in substance, at least if the analysis that purportedly supported the norms proposed for the illustrative list was deemed sufficient.

He agreed with Mr. Murase that, if such a normative study were to be conducted seriously, it would take several years and involve careful analysis and deliberation by the Commission, which would need to seek evidence from States on their practice with respect to each of the norms under consideration, in order to ensure that as much of that practice as possible was uncovered. As Mr. Murase had suggested, consideration could be given to the establishment of a working group of the Commission to assist the Special Rapporteur in sifting through such evidence.

A further problem was that the norms listed in draft conclusion 24 were very unclear or undefined. Both the Special Rapporteur and Ms. Lehto had acknowledged that fact, but did not consider it a significant impediment to the Commission's work. However, the case that Ms. Lehto had made did seem to indicate that moving forward was problematic. It might be asked what was meant by, and whether there were differences between, the terms "aggression" and "aggressive force"; whether they were the same as an "act of aggression" as understood in article 8 *bis* of the Rome Statute, as amended in 2010; and whether that definition corresponded to the definition of aggression set out in General Assembly resolution 3314 (XXIX) or in the Charter of the United Nations. Arguably, those three sources did not describe the underlying rule in the same way, and some of the differences were very important, as Mr. Murase had stressed. Perhaps, as the Special Rapporteur had suggested, the meaning was rather the "law of the Charter concerning the prohibition of the use of force", which, as Ms. Lehto had pointed out, could mean that all uses of force, including those falling well below the threshold of an "armed attack", were a violation of *jus cogens*.

Similar questions could be raised about the other norms on the list. For instance, were crimes against humanity defined as in the Nuremberg Charter, the Statutes of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, article 7 of the Rome Statute or draft article 3 of the Commission's draft articles on crimes against humanity? Those different possible sources did not describe the underlying prohibition in exactly the same way.

The right to self-determination needed to be defined, as did the "basic rules of international humanitarian law". If the latter referred solely to the "prohibition of hostilities directed at a civilian population", as might be interpreted from the report of the Study Group on the fragmentation of international law (A/CN.4/L.682), a wide range of rules regarding the treatment of prisoners of war would be excluded; if that was not the case, a decision would need to be taken as to whether rules from the Geneva Convention relative to the Treatment of Prisoners of War, such as the rule that footwear must be supplied to prisoners of war, were *jus cogens*. Although that issue might seem hypothetical, it had been sharply debated before the Eritrea-Ethiopia Claims Commission. The suggestion by Mr. Park that reference should be made to the prohibition of "war crimes" raised the question of whether those crimes concerned all violations of the 1949 Geneva Conventions, only "grave breaches" of those Conventions, violations of the Additional Protocols or violations of the Rome Statute. Like "basic rules of international humanitarian law", "war crimes" was defined differently in different instruments and was a very difficult term to interpret.

Such questions should not be dismissed; it was incumbent upon the Commission to be clear about the exact meaning of the draft articles and draft conclusions it adopted. The Commission's strength derived from the rigour of its work. In the case of the topic on immunity, it had decided to develop an annex to draft article 7 that referred to specific

treaties in order to define exactly what was meant by the terms listed, several of which, such as “genocide”, “crimes against humanity” and “torture”, also appeared on the list in draft conclusion 24. It was therefore natural to ask why the same approach was not being taken in the context of the current topic. As both of those lists might be used for important purposes within national legal systems, a lack of clarity would be undesirable.

In conclusion, he said that he very much appreciated the analysis contained in the fourth report and the Special Rapporteur’s hard work in seeking to bring the project to a conclusion. There were two possible paths forward in respect of the proposed illustrative list. The Commission could embark on an extensive effort to comprehensively analyse State practice and other evidence with respect to the norms listed in proposed draft conclusion 24; that would entail asking a detailed question, in the annual report to the General Assembly, about Member States’ practice in that regard. On the basis of the information gathered, probably together with comments from international organizations, treaty bodies, special rapporteurs and other interested organizations, the Special Rapporteur would write a report or series of reports analysing the evidence in depth. That could ultimately lead to the establishment of an illustrative list that would represent a normative claim that the norms listed were supported by the kind of evidence identified in the Commission’s existing draft conclusions.

The alternative would be not to make any normative claims about State practice or other evidence, but instead to develop a purely descriptive list based solely on the Commission’s previous statements. That should be stated clearly in the chapeau, with a clear indication of what the Commission or a study group of the Commission had previously stated and how it had done so. The commentary would contain no further assertions as to evidence supporting or not supporting such norms; it would solely indicate assertions previously made by the Commission. If that second path was chosen, the list could appear in a draft conclusion or a draft annex to the draft conclusions. However, given that it would be a short, descriptive list that simply repeated what the Commission had previously indicated in commentaries, it might be best located in the commentary to the project under consideration as well. He therefore was not in favour of referring proposed draft conclusion 24 to the Drafting Committee, but was willing to work with the Special Rapporteur on commentary of the kind he had described.

Mr. Jalloh, responding to Mr. Murphy’s comments on the right to self-determination, said that, in accordance with draft conclusion 4, to identify a peremptory norm of general international law (*jus cogens*), it was necessary to establish that it was a norm of general international law and that it was accepted and recognized by the international community of States as a whole as a norm from which no derogation was permitted and which could be modified only by a subsequent norm of general international law having the same character. Draft conclusion 8 stated that evidence of such acceptance and recognition could take a wide range of forms, including public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.

In paragraphs 108 to 115 of the report, the Special Rapporteur provided several forms of evidence that the right to self-determination was a norm of *jus cogens*, including General Assembly resolutions such as those containing the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV)) and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV)); Security Council resolutions; treaty practice; and national and regional court decisions.

In that context, he would be grateful if Mr. Murphy could explain the conclusion that the evidence provided in the report was insufficient for the purpose of identifying the right to self-determination as a norm of *jus cogens*.

Mr. Murphy said that, in accordance with draft conclusion 7 (2), acceptance and recognition by “a very large majority of States” was required for the identification of a

norm as one of *jus cogens*. While various forms of evidence were indeed listed in draft conclusion 8 (2), most of them concerned the views of States, as expressed in public statements made on their behalf, official publications, government legal opinions and diplomatic correspondence. In the relevant section of the report, the Special Rapporteur did not refer to any of those forms of evidence in support of the proposition that the right to self-determination was a norm of *jus cogens*.

Draft conclusion 8 (2) also mentioned resolutions adopted by an international organization or at an intergovernmental conference, but the right to self-determination was not explicitly accepted and recognized as a norm of *jus cogens* in any of the resolutions to which the Special Rapporteur referred. In order to identify the peremptory status of that right, a more systematic analysis of the available evidence would need to be conducted with a view to determining the level of acceptance and recognition it enjoyed.

Mr. Petrič, welcoming the opportunity for a mini-debate on the right to self-determination, said that the history of the twentieth century, which involved the break-up of empires, decolonization and the formation of some 100 new States, offered ample evidence of State practice in support of the peremptory status of the right to self-determination. The Atlantic Charter of 14 August 1941, which stated the wish of its signatories to see sovereign rights and self-government restored to those who had been forcibly deprived of them, and the Declaration by United Nations of 1 January 1942 represented two key moments in that historical process. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations offered an authoritative interpretation of the principle of equal rights and self-determination of peoples. It clearly stated that all peoples had the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development. That meant that Mr. Murphy's hypothetical example of an invasion in the name of self-determination could not be regarded as such under the United Nations definition of the concept.

More generally, he strongly agreed that the Commission should not become a legislator of *jus cogens*. However, it could indicate, perhaps in the commentaries, that there were certain basic norms from which States could not derogate. In that regard, the Commission's decision to introduce the concept of *jus cogens* in the 1960s had been a brave step, as it had represented an attempt to place certain limits on the conduct of States.

Mr. Jalloh said that, as Mr. Murphy had acknowledged, the forms of evidence cited in the report in support of the proposition that the right to self-determination was a norm of *jus cogens* were among those listed in draft conclusion 8 (2). There was thus no doubt in his mind that the right to self-determination should be identified as such a norm.

Mr. Murphy said that he could not agree with Mr. Jalloh's reasoning. The Special Rapporteur did not provide sufficient evidence to support the claim, in paragraph 110 of the report, that the *jus cogens* status of the right to self-determination had been recognized in the practice of States in the context of multilateral instruments. Moreover, none of the General Assembly resolutions cited in the report referred to the *jus cogens* status of the principle; merely proclaiming the fundamental character of a right was insufficient to give it the status of *jus cogens*. In addition, the Special Rapporteur's claim, also in paragraph 110, that the General Assembly had declared an agreement invalid on the ground that it was inconsistent with the right to self-determination was not borne out by the resolution cited, namely General Assembly resolution 33/28 A, which did not appear to have invalidated anything. In any case, the General Assembly did not have the authority to apply article 66 of the 1969 Vienna Convention on the Law of Treaties.

With regard to the claims made in paragraphs 111 and 112, neither the affirmation of the right to self-determination in a Security Council resolution nor the reflection of that right in treaty practice supported the proposition that it had a *jus cogens* character. Although the Federal Constitutional Court of Germany had identified the right to self-determination as a rule of *jus cogens* in a judgment of 26 October 2004, as noted in paragraph 113 of the report, it had also identified as having that status other norms that did not appear in the Special Rapporteur's illustrative list, including central norms on the protection of the environment. The Special Rapporteur's selective approach to the evidence

called into question its authority. If the Commission wished to identify particular norms as norms of *jus cogens*, it must take a more systematic approach than the one taken in the report.

Mr. Hmoud, thanking the Special Rapporteur for the comprehensive fourth report on the topic, said he was pleased that the issues raised in 2018, both in the Commission and in the Sixth Committee, had been analysed and addressed. With regard to the methodology followed in the reports on the topic, although the Special Rapporteur had taken account of doctrinal views, and the writings of legal scholars and jurists underpinned the legal analysis and proposed draft conclusions, the approach taken depended primarily on State and international practice. That was significant, as one of the reasons for the Commission's decision to address the topic was the fact that the identification of peremptory norms of general international law (*jus cogens*) had previously not been based on actual practice.

The nature of *jus cogens* norms was somewhat enigmatic: their peremptory character, namely their hierarchical superiority and universal applicability, derived not from a particular attribute or manner of construction in the international legal system but from a decision by the international community of States to bestow that character on them. Although they purported to reflect and protect fundamental values of the international community, so too did other rules of international law that did not possess the same status. For that reason, although the Commission had identified the teachings of the most highly qualified publicists and the decisions of international courts and tribunals as subsidiary means for the determination of the peremptory character of *jus cogens* norms, it should not downplay evidence from such sources in its work on the topic; in fact, the commentary to draft conclusion 9 should indicate that those constituted primary sources for a number of *jus cogens* norms.

With regard to regional *jus cogens*, although some support for the validity of the concept could be found in academic writings, it was clear from the debates in the Sixth Committee that States generally rejected it. As explained in the report, the criteria for the identification of *jus cogens* norms were not applicable to the concept of regional *jus cogens*, which encompassed the rules that might apply between States in a particular region. The rules in question would not be universally applicable even between the States in that region and States in other regions.

The peremptory character of what purported to be regional *jus cogens* norms was undermined by the fact that a peremptory norm of general international law would prevail in the event of a conflict. Even international obligations that were not of a *jus cogens* character, such as binding Security Council decisions, might prevail over such regional norms. Although those norms might reflect the fundamental values of a particular region, they would not necessarily reflect the fundamental values of the international community as a whole. However, it could be argued that certain peremptory norms of general international law (*jus cogens*) had originated in legal norms reflecting the fundamental values of particular regions.

Thus, he did not believe that regional *jus cogens* should be dealt with in the draft conclusions. In order to address the concern expressed by certain members that the possible validity of the concept should not be ruled out, the Commission could explain in the commentary that the concept was beyond the scope of the topic and that, in any case, a regional rule, whatever its character in the region in question, was hierarchically inferior to a peremptory norm of general international law.

With regard to the illustrative list, he maintained the view that he had expressed in relation to the Special Rapporteur's first report, namely that a non-exhaustive list should be provided in an annex. He did not see how the Commission could address the topic without taking a position regarding the most widely accepted examples of peremptory norms of general international law; indeed, it had identified such norms in the past. One way or another, the Commission would have to assess the value of the evidence in favour of the acceptance and recognition of particular norms of general international law as peremptory. The challenge was to avoid giving the impression that the list was exhaustive.

An illustrative list would assist States, courts, tribunals and others in identifying *jus cogens* norms, applying the relevant criteria and assessing the peremptory character of other

rules of general international law. The question was not whether an illustrative list should be prepared, but where it should be placed and how it should be described in the draft conclusions.

The first objective of the exercise should be to ensure that no controversy was generated by the inclusion of a particular norm in the list. Prior to the inclusion of a norm, the criteria for its identification as a peremptory norm of general international law should be applied and the evidence for its peremptory character should be assessed. The fact that some States did not recognize the peremptory character of a particular norm did not rule out the possibility of its inclusion. Draft conclusion 7 provided that the threshold for identification of a norm was its acceptance and recognition “by a very large majority of States”. The refusal by a given State to apply a particular norm for political reasons was irrelevant, as its consent was not required in order for it to be bound by such a norm.

He agreed with other Commission members that determining the content of the list would be a long and difficult exercise. The Commission would need to assess all the available evidence of acceptance and recognition of the norms proposed for inclusion and would need to apply the identification criteria in a prescriptive manner. Scholarly writings and the pronouncements of international courts and tribunals offered the most readily available forms of evidence in that regard. As it did not seem feasible to use State practice as a basis for assessing the acceptance and recognition of particular norms by the international community of States as a whole, particularly if the Commission tackled a wide range of specific areas of international law, such as environmental law, the list should be based on other sources. Of course, the list was intended to be indicative and should not hinder the determination of the content of peremptory norms by practitioners, judges and others.

In accordance with its previous practice, the Commission should avoid giving the impression that the list was exhaustive. The Commission’s approach to the provision of examples had varied over the years. In the commentary to article 50 of the 1966 draft articles on the law of treaties, only one norm had been identified as *jus cogens*. Various norms had been identified as being “clearly accepted and recognized” as *jus cogens* in the commentaries to the articles on responsibility of States for internationally wrongful acts. The 2006 report of the Study Group on the fragmentation of international law included a reference to “the most frequently cited candidates for the status of *jus cogens*”, and thus avoided making an authoritative pronouncement on their content.

The Commission should continue to use language of that kind in the draft conclusions and the commentaries. In his view, the examples included in the list should be described as the most widely accepted and recognized examples of norms that had achieved peremptory status.

The legal value of such a descriptive and illustrative list would not be altered whether it was placed in a draft conclusion or in an annex. His preference would be to place the list in an annex, as the draft conclusions should be primarily concerned with the methodological aspects of the topic. The necessary evidence of acceptance and recognition could be cited in the commentaries.

The specific norms included in the list should be in line with those previously cited by the Commission. The Drafting Committee would determine the specific language to be used to describe the various *jus cogens* norms in the list, including the phrasing of the prohibition of the use of aggressive force, the prohibition of apartheid and/or racial discrimination and the basic rules of international humanitarian law.

The commentary should clarify that the Commission had limited itself to examples that it had identified previously and should acknowledge that other norms of general international law might have achieved the status of *jus cogens*. He would prefer not to devote too much of the commentary to examples of less well-supported norms, such as those discussed in chapter IV (C) of the report. In addition, the commentary should include specific evidence to support the inclusion of the norms on the list.

He recommended that draft conclusion 24 should be referred to the Drafting Committee. He hoped that, by the end of the current session, the Commission would be

able to adopt a full set of draft conclusions on first reading, which would then be submitted to the Sixth Committee for consideration.

Mr. Hassouna, expressing his appreciation for the Special Rapporteur's fourth report, said that, as the discussion had shown, the concept of *jus cogens* remained a source of considerable controversy. It had been described as an "obscure term" denoting an "obscure notion" as early as 1968, at the first session of the United Nations Conference on the Law of Treaties. The Commission faced the challenge of clarifying that notion by adopting the set of draft conclusions before it, which, once approved by States, would help to strengthen the rule of law in international relations.

In the debates in the Sixth Committee, some States had expressed dissatisfaction with the Commission's decision to retain the draft conclusions in the Drafting Committee until a full set had been completed, and others had questioned the Special Rapporteur's reliance on theory and doctrine rather than State practice. He agreed with the Special Rapporteur that those criticisms were unfounded. With regard to the first criticism, the Commission had tended to consider the topic of *jus cogens* during the second part of its sessions, which left insufficient time in which to finalize proposals in the Drafting Committee and prepare the commentaries for adoption. The Commission should take a flexible approach to its programme of work: at times, it should reduce the number of topics considered at a session in order to give States ample time in which to review and comment on its proposals, while at other times, when it completed the consideration of a number of topics on second reading, it should consider adding new topics to the programme of work. With regard to the second criticism, the Special Rapporteur had clearly relied on relevant State practice, among other sources, despite the dearth of such practice. Concerning the issue of individual criminal responsibility, which many States had addressed, he supported the Special Rapporteur's proposal to include a "without prejudice" clause.

With regard to chapter III of the report, during the debate in the Sixth Committee, States had generally rejected the possibility of regional *jus cogens* on the ground that it contradicted the supreme and universal nature of *jus cogens*. However, some prominent legal scholars, including former Commission members, had contended that there might be norms that acquired a peremptory character only in a regional context. Nonetheless, he shared the views of the Special Rapporteur, whose report included a detailed discussion of the lack of practice to substantiate the existence of regional *jus cogens* and the practical and conceptual difficulties deriving from the inherently universal character of *jus cogens*.

In the report, the Special Rapporteur noted the importance of distinguishing between the existence of a common set of unifying and binding norms in different regions, on the one hand, and the notion of regional *jus cogens*, on the other. Since those regional unifying and binding norms had assumed great importance in a variety of fields, such as the conception of human rights in the African, European and inter-American systems, the distinction between them and regional *jus cogens* ought to be clearly emphasized in the commentary. In that context, he suggested that the commentary should highlight three main elements: that the notion of regional *jus cogens* did not find support in the practice of States; that that notion was the subject of a doctrinal debate among legal scholars, many of whom regarded the formation of regional *jus cogens* as a plausible eventuality; and that regional *jus cogens* was distinct from existing regional unifying and binding norms in various fields.

Concerning chapter IV of the report, he agreed with the Special Rapporteur that the time had come for the Commission to take a decision on whether or not to draw up an illustrative list of norms of *jus cogens*. The diverging views on the question within the Commission had also been reflected in the Sixth Committee. The Special Rapporteur himself had oscillated between the two views.

At the Commission's seventieth session, he had stated that the consideration of an illustrative list would be welcome, as the idea had received support from both States and Commission members. The list could build on the oft-cited list of the most frequently cited candidates for the status of *jus cogens* produced by the Study Group on the fragmentation of international law, as well as the non-exhaustive list set out in the commentary to the articles on State responsibility. He had further emphasized that the Special Rapporteur

should make it clear that the list was not exhaustive and could offer illustrative examples and provide context for the identification of new *jus cogens* norms in the future. As a middle ground between those who favoured and those who opposed the idea of a list, he had suggested that an illustrative list could be provided in the commentaries. He stood by that position and thus supported the Special Rapporteur's compromise proposal that an illustrative list of norms recognized by the Commission and the International Court of Justice as having the status of *jus cogens* should be included in the commentaries rather than in a separate draft conclusion. Alternatively, the Commission could consider the proposal put forward by Ms. Galvão Teles to provide a non-exhaustive list in an annex to the draft conclusions.

While he supported the Special Rapporteur's proposal to include the most widely recognized examples of peremptory norms of general international law, he was also aware that the content, scope and application of most of those examples, such as the prohibition of aggression, the prohibition of slavery, the right to self-determination and the basic rules of international humanitarian law, were still debatable and open to interpretation. In the light of the views expressed in the Commission's debate, the Special Rapporteur should provide in the commentary all available evidence of acceptance and recognition of those proposed *jus cogens* norms, while emphasizing that the list built upon lists that had previously been adopted by the Commission.

The Special Rapporteur referred to other possible norms of *jus cogens* not identified in the Commission's previous work that might acquire the status of *jus cogens* in the future, as they already enjoyed a degree of support. However, he doubted that the examples given by the Special Rapporteur had already attained that status or were likely to do so in the near future. For instance, support for the *jus cogens* nature of the prohibition of enforced disappearance relied mainly on the impermissibility of derogation from that prohibition under the International Convention for the Protection of All Persons from Enforced Disappearance, yet there were only 59 States parties to that instrument. The peremptory status of the principle of *non-refoulement* had a great deal of support in treaty practice; however, although that principle was provided for in article 33 of the Convention relating to the Status of Refugees, it was also, under that same article, made subject to the security interests of the State where the refugee was located. Furthermore, there was some support for the peremptory status of the principle of non-discrimination, but there seemed to be no universal recognition regarding the prohibition of discrimination in general, including gender discrimination. There were many declarations and treaties on the protection of the environment, but none provided strong evidence of non-derogability. Despite the fact that there was strong support, or at least some support, for the *jus cogens* status of all those norms, their status was still highly contested, and it would be premature to assert, without conclusive evidence, that they had already or would soon become peremptory norms.

Concerning future work on the topic, he supported the proposal that a full set of draft conclusions should be adopted on first reading at the current session. The Commission should finalize all outstanding issues, including the question of an illustrative list, with a view to referring the set of draft conclusions to States and, in the light of their comments and concerns, completing the second reading in 2021.

Mr. Nguyen said that the Special Rapporteur was to be commended on his excellent fourth report, which included a more balanced analysis of doctrine and State practice than his previous reports. He welcomed the explanation given by the Special Rapporteur in paragraph 15 concerning the decision not to present the draft conclusions and commentaries to States gradually, as was the Commission's standard practice, but to wait until the full set of draft conclusions and commentaries had been completed.

The Special Rapporteur's in-depth analysis of article 53 of the Vienna Convention on the Law of Treaties, the doctrine and the literature had confirmed his doubts about the possibility of including regional *jus cogens* in the project. While practice in relation to universal *jus cogens* was difficult to prove, evidence of regional *jus cogens* was almost impossible to find. The three examples of regional *jus cogens* cited by Professor Reza Hasmath – the Brezhnev Doctrine in the regional grouping of socialist countries, the prohibition of juvenile execution in the Organization of American States and the human rights practice of Islamic States – had not stood up to scrutiny. The Special Rapporteur had

quite rightly rejected two other examples – a notion of European peremptory human rights defended by some writers and a notion of a particular *jus cogens* applicable among socialist States invoked by G.I. Tunkin – on the grounds that they were not *jus cogens* or even a species of *jus cogens*, since they allowed derogation in several ways. Most *jus cogens* norms had roots in the field of human rights, and different regions might well have different conceptions of human rights, some of which went further than more widely accepted notions on particular matters. Acceptance of the existence of different regional *jus cogens* norms might thus contradict the universality of human rights values.

In addition to the conceptual difficulties raised by the notion of regional *jus cogens*, there were several other points to bear in mind. Unlike universal *jus cogens*, for which there was a well-known definition in article 53 of the Vienna Convention, regional *jus cogens* had no recognized definition. Did the two criteria for the identification of universal *jus cogens* set out in draft conclusion 4 apply to the identification of regional *jus cogens*? If so, what was the hierarchy between regional and universal *jus cogens*? Ordinarily, the universal *jus cogens* norms that were generally accepted and recognized by the international community would be considered to have the higher status, in which case the non-derogable character of regional *jus cogens* would be breached; regional *jus cogens* norms could be modified either by other regional norms having the same character or by universal norms. The other theoretical possibility was that regional *jus cogens* might have a higher status than existing universal norms, as was argued by some writers to justify the notion of regional *jus cogens* in Europe. While a rule of regional customary law could form a basis for the formation of a *jus cogens* norm under international law, a norm of regional *jus cogens* did not have the same character as, and thus could not modify, existing peremptory norms of international law that were accepted and recognized by the international community. Finally, the lack of State practice was the strongest evidence pointing to a lack of acceptance of regional *jus cogens*. He agreed with the Special Rapporteur that the notion of regional peremptory norms appeared to be incompatible with the universal application of peremptory norms of general international law. Regional *jus cogens* should therefore not be included in the draft conclusions, and an appropriate explanation should be given in the commentary.

There were diverging views on the idea of including an illustrative list of *jus cogens* norms. In 1966, the Commission had decided not to include any examples of rules of *jus cogens* in the draft articles on the law of treaties because there was “no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*”. However, that had not prevented successive attempts to draw up lists in the commentary to the 2001 articles on responsibility of States for internationally wrongful acts and the 2006 report of the Study Group on the fragmentation of international law. The inclusion of an illustrative list might either give the impression that other norms not included in it were not *jus cogens* or lead to debate on other norms that could potentially have been included. On the other hand, the absence of a list might result in abuse of the peremptory character of such norms.

Peremptory norms were a feature more of theoretical writing than of State practice. The purpose of the Commission’s work on the topic was to clarify the general nature of *jus cogens* and the criteria for its identification. The two criteria in draft conclusion 4 had yet to be tested in practice, but after 50 years of debate on the subject, the time had come for the Commission to finally provide a tentative list of norms that had achieved the status of *jus cogens*. In so doing, it would be responding to the wishes of most States. Given that international law was an open-ended system in which *jus cogens* was an evolving notion, new peremptory norms could be incorporated as the law developed. An exhaustive list of peremptory norms would be impossible to compile and would not, in any case, be broadly welcomed. The expansion or reduction of the list would depend on State practice. The concept of *res communis* in the context of the law of the sea or the law of outer space, for example, could be considered a peremptory norm. While he respected the Special Rapporteur’s decision to confine the list to norms that had previously been recognized by the Commission as having a peremptory character, a list of possible *jus cogens* norms would be of great value in guiding the in-depth study of those norms.

The Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights must be the starting points for a survey of peremptory norms, since the provisions of those instruments were generally accepted and recognized by the international community. A tentative list of norms recognized by the Commission and the International Court of Justice would provide a useful perspective from which to examine State practice with a view to identifying the emergence and crystallization of specific peremptory norms.

If the Commission decided to proceed with such a list, the first norm included on it should be the prohibition of the illegal use of force. Like Ms. Lehto, he had noted that the examples cited in paragraphs 63 to 66 of the report referred more to the “prohibition of the use of force” than to the “prohibition of aggression”. Given that aggression was the most serious and dangerous form of illegal use of force, any reference to the prohibition of the latter would also apply to the former. Mentioning only the prohibition of aggression could give the misleading impression that the draft conclusion did not apply to other illegal acts involving the use of force and that only the prohibition of aggression was a norm of *jus cogens*. There was general agreement that the prohibition of aggression should be regarded as a peremptory norm of general international law. However, under the topic of immunity of State officials from foreign criminal jurisdiction, the crime of aggression had not been included in draft article 7 on crimes in respect of which immunity *ratione materiae* did not apply. In his view, the Special Rapporteur on *jus cogens* should broaden the scope of his survey to assess whether the prohibition of the illegal use of force, like the prohibition of aggression, had achieved *jus cogens* status. The Special Rapporteur might also consider providing some commentary on the relationship between crimes against peace and the prohibition of aggression.

Torture, genocide and crimes against humanity were the most serious and dangerous international crimes. There was an abundance of State practice, jurisprudence and literature to confirm the absolute *jus cogens* character of the prohibition of genocide. Many examples of State practice in Africa, the Americas and Europe were cited in the report, but in order to ensure the universality of that norm, practice in Asia must also be considered. One example of such practice could be found in the 2018 judgment of the Extraordinary Chambers in the Courts of Cambodia in case 002/02.

The status of the prohibition of slavery as a *jus cogens* norm, which followed from the rational and moral force of that prohibition, had been consolidated in the multilateral instruments that had qualified that practice as a crime against humanity, in the wake of the earlier conventions on slavery adopted in 1926 and 1956. Article 99 of the United Nations Convention on the Law of the Sea reflected the peremptory nature of the prohibition of slavery by requiring that any slave taking refuge on board any ship, whatever its flag, should *ipso facto* be free. The peremptory character of the prohibition of slavery obliged States to completely abolish slavery in all its forms. However, it was unclear whether the definition of slavery in those instruments covered new forms of slavery such as trafficking in persons, commercial sexual exploitation and commercial surrogacy. The Special Rapporteur had not identified the different forms of slavery, stating only that modern forms of slavery, however they might be defined, fell within the scope of the prohibition. In his view, the Commission should proceed with caution, given that the scope of the prohibition and the definition of modern slavery were unclear.

The right to self-determination was widely accepted. As Orakhelashvili had noted, the right of peoples to self-determination was “undoubtedly part of *jus cogens* because of its fundamental importance”. The biggest obstacle to the recognition of the peremptory nature of that right was its association with sovereignty and human rights, which inevitably led to different approaches. Most, but not all, States and writers believed that the scope and content of the right had moved beyond the colonial context. The position that the right to self-determination presented only certain aspects of *jus cogens* status did not provide a convincing basis for regarding it as a peremptory norm.

The illustrative list would serve a dual function: to indicate the peremptory norms that were accepted and recognized and to highlight other norms that might potentially achieve *jus cogens* status in the future. However, the proposed list must be confirmed by

State practice. For example, the fact that a considerable number of States had ratified the International Convention for the Protection of All Persons from Enforced Disappearance had not sufficed to strengthen the *jus cogens* character of the prohibition of that crime.

The purpose of the principle of *non-refoulement* was to protect individuals from the risk of persecution, but the principle could be abused in order to harm national security. For instance, a State official who had committed an act of corruption could invoke the principle of *non-refoulement* in order to avoid punishment.

The Special Rapporteur's report clearly showed that the question of which norms of general international law should be included in the illustrative list had proved to be controversial. The lack of evidence that those norms were generally accepted and recognized had prevented the Commission from codifying and progressively developing the very complicated and sensitive question of peremptory norms of general international law. The time was not ripe for an expansion of the list of *jus cogens* norms. In his view, the content of the lists that the Commission had compiled in 2001 and 2006 should be studied in depth and carefully redrafted. The list of possible norms that could reach peremptory status must be without prejudice to the existence or emergence of other peremptory norms of general international law. Accordingly, he recommended that draft conclusion 24 should be referred to the Drafting Committee for reconsideration and reformulation.

The meeting rose at 12.55 p.m.