

Provisional

For participants only

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Seventy-first session (first part)

Provisional summary record of the 3461st meeting

Held at the Palais des Nations, Geneva, on Friday, 10 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. Gómez-Robledo
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) (*continued*)
(A/CN.4/727)

The Chair invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on peremptory norms of general international law (*jus cogens*) (A/CN.4/727).

Mr. Nolte said that he wished to thank the Special Rapporteur for his rich and readable report. He much appreciated the fact that the Special Rapporteur had set out his sources and reasoning transparently, and had fairly indicated possible alternatives.

The report first addressed the question of regional *jus cogens*. The Special Rapporteur proposed that no draft conclusion on that matter should be adopted, and that it should be explained in the commentary that “international law does not recognize the notion of regional *jus cogens*”. He agreed with the Special Rapporteur that the Commission should not adopt a draft conclusion on regional *jus cogens*, but he did not believe that a definite negative statement in the commentary about its possible existence would be justified. In his view, the Commission should leave the question open and not address it at all, as had been suggested by, among others, Sir Michael Wood, Mr. Park and Mr. Hmoud. He would now set out the reasons on which that view was based.

He agreed with the Special Rapporteur that peremptory norms of general international law (*jus cogens*) often originated from certain regions, in particular from regional treaty law, and that regional bodies had sometimes played a crucial role in identifying existing universal *jus cogens*. But that observation did not, in his view, carry any negative implication regarding the possible existence of regional *jus cogens*; quite the contrary, in fact. It thus could not justify the Commission’s dismissing the existence of regional *jus cogens* definitively, even if only in a commentary.

The Special Rapporteur put forward a number of arguments in his fourth report, which, according to that report, militated against the possibility of regional *jus cogens*. The Special Rapporteur relied, *inter alia*, on the text of article 53 of the 1969 Vienna Convention on the Law of Treaties, the previous work of the Commission, a lack of State practice and a lack of support in the Sixth Committee, as well as on considerations of legal certainty and practicality, in particular with regard to non-regional parties. He would address each of those arguments in turn and then elaborate on why he considered it unwise for the Commission to make a statement in the commentary definitively excluding the existence of regional *jus cogens*.

Article 53 of the 1969 Vienna Convention provided that “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole”. That definition referred only to norms of general international law and its wording thus did not exclude the possibility of regional *jus cogens*. In echoing concerns formulated by some States and scholars, the Special Rapporteur seemed to be convinced that the words “accepted and recognized by the international community of States as a whole” argued against the possibility of regional *jus cogens*. Yet, the *travaux préparatoires* showed that the words “as a whole” had not been inserted to exclude regional *jus cogens*. According to the report of the Chairman of the Drafting Committee, those words had been inserted only to ensure that recognition and acceptance by all States was not necessary. Indeed, the term “general international law” simply indicated that, at the time of the adoption of the Vienna Convention, regional *jus cogens* was considered to be outside the scope of article 53. Its possible existence was not rejected; it was simply not further examined, and thus excluded from the scope of article 53.

He did not share the Special Rapporteur’s observations, in paragraphs 26 and 37 of the report, that there was no State practice indicating the possible existence of regional *jus cogens*. The practice of Latin American States with regard to the prohibition of enforced disappearance and to the prohibition of arbitrary discrimination, mentioned by the Special Rapporteur in paragraphs 126 and 127, deserved closer attention in that regard. The Inter-American Commission on Human Rights, in *James Terry Roach and Jay Pinkerton v. the United States*, had explicitly referred to the acceptance and recognition of the prohibition of

the execution of children by the member States of the Organization of American States. That conclusion was not altered by the fact that the Inter-American Commission had later found that that prohibition had a universal *jus cogens* character.

Practice in Europe suggested that the core of the right of access to a court might be an example of regional *jus cogens*. European courts had described such access as a “foundation” of the “European public order”. They had occasionally attributed effects to that guarantee which were comparable to the legal effect attributed to peremptory norms of general international law, such as the invalidity of reservations to the jurisdiction of the European Court of Human Rights. While he would not go so far as to say that the courts’ reasoning in the cases in question was correct, their judgments could not simply be dismissed.

While it was true that a number of States had expressed reservations about regional *jus cogens* in the Sixth Committee, there had been others, notably Spain, Belarus and the Netherlands, that had adopted a positive attitude in that regard. The question had not, however, been fully debated owing in part to the paucity of Commission work on the subject which could have provided a basis for discussion.

It was thus not simply a few authors who supported the position that the definition of peremptory norms of international law in article 53 was not exhaustive, or the possibility of regional *jus cogens*; there was also support in regional practice and in statements by States.

Considerations of legal certainty and predictability should not prevent the possible recognition of regional *jus cogens*. The latter could apply only among the members of a regional legal system (*inter partes*) and could not be invoked against non-members. He agreed with Ms. Lehto that the term “regional” could simply be defined according to the basis of the regional *jus cogens* norm concerned: if that basis was a regional treaty, the States who were parties to it were bound by that norm. If the basis was regional custom, the region encompassed all States which were bound by the customary rule or particular custom concerned. In accordance with the Commission’s conclusions on identification of customary international law, no member of the region could be bound without its consent by a norm of regional *jus cogens*.

Lastly, and perhaps most importantly, regional *jus cogens* must not contradict or undermine universal *jus cogens*. If the Commission were to say anything regarding the subject, it should be that universal *jus cogens* took precedence over any possible regional *jus cogens* and that the peremptory rules of general international law would deprive any regional international law, including regional *jus cogens*, of its validity and legal effects.

For all those reasons, he was of the view that the report did not provide a sufficient basis for the Commission categorically to reject, in the commentaries, the possibility of regional *jus cogens* norms. The question should be left open. The Commission should simply explain, in the commentaries, that the draft conclusions did not deal with that matter, since it was outside the scope of the topic.

The second question submitted to the Commission by the Special Rapporteur was whether the draft conclusions should include an illustrative list of norms of *jus cogens*. In a change from the preference he had expressed in his first report, the Special Rapporteur was now in favour of the inclusion of such a list and proposed a draft conclusion to that effect. He himself had previously expressed a preference for not having an illustrative list, even in the commentaries; after reading the fourth report and listening to the debate, his view remained unchanged in that regard.

Before explaining why he was of the view that the Commission should not adopt an illustrative list of norms of *jus cogens*, he wished to make clear that it was not because he disagreed with the Special Rapporteur about the fact that the norms referred to in draft conclusion 24 were, in substance, *jus cogens* norms. He thought, however, that the difficulties involved in formulating and explaining those norms, in the context of the current project and at the current stage, were such that they should deter the Commission from seeking to adopt such a list, either as part of a conclusion or in the commentaries.

Of the many reasons why the Commission should not adopt a conclusion such as proposed draft conclusion 24, he wished to focus on two of particular importance.

The first reason concerned the character of the topic. As the Special Rapporteur had himself repeatedly emphasized, the topic was fundamentally concerned with methodology. That was why the outcome of the Commission's work would consist mainly of conclusions that described how *jus cogens* norms were to be identified and what their effects were. In other words, the topic was about secondary rules. The Commission had never claimed or suggested that the purpose of the topic was to identify the content of specific primary rules of *jus cogens*, a matter which deserved to be dealt with in a separate project.

Indeed, the Special Rapporteur did not state that draft conclusion 24 would satisfy such an ambitious claim. He merely proposed an "illustrative" list. Two questions that arose in that regard were, first, what was meant by "illustrative" and, second, what exactly should be "illustrated". In his view, illustrations should illustrate the object concerned, namely the other draft conclusions, not *jus cogens* as such. Accordingly, the word "illustrative" should mean showing how the methodology set out in the draft conclusions should be, or had been, used. However, neither the report nor the draft conclusion did that. The report did not shed any light on how the existence of certain *jus cogens* norms could be explained by applying the methodology of the draft conclusions provisionally adopted by the Drafting Committee. It merely acknowledged that the Commission had recognized those norms. Three examples would serve to illustrate the point.

First, the Special Rapporteur explained the *jus cogens* character of "the basic rules of international humanitarian law" by referring to decisions of the International Court of Justice, dissenting opinions of individual judges, decisions of international criminal tribunals and three domestic courts' decisions. Although those rules were indeed *jus cogens* norms, mere references to court judgments did not illustrate the methodology proposed in the draft conclusions, in that they did not demonstrate that the norm had been accepted and recognized by the international community as a whole as a norm from which no derogation was permitted, as was required by draft conclusion 4. Court decisions certainly constituted an element of acceptance and recognition, but they could not form the sole basis thereof.

Second, the Special Rapporteur's justification for including the prohibition of apartheid and racial discrimination, and the right to self-determination, in draft conclusion 24 relied heavily on United Nations General Assembly resolutions. However, the Commission, in its draft conclusion 12 on identification of customary international law, and States in the Sixth Committee had taken a cautious approach to the weight of such resolutions. In the context of *jus cogens* it would therefore have been helpful to know why and under what circumstances General Assembly resolutions could serve as a form of evidence of the acceptance and recognition requirement in the sense of draft conclusion 8 (2) and hence be indicative for the identification of the prohibition of apartheid as a *jus cogens* norm. He wondered if there was any difference between, for example, the prohibition of apartheid and the right to water, on which the General Assembly had adopted resolution 70/169 of 17 December 2015, which affirmed that "human rights to safe drinking water ... are essential for the full enjoyment of the right to life and all human rights".

Third, the report based the *jus cogens* character of the prohibition of aggression on indirect references in two decisions of the International Court of Justice, on General Assembly resolution 3314 (XXIX), statements by some 20 States and four decisions of domestic courts. He wondered whether those sources could be taken to reflect recognition and acceptance by the international community as a whole of a specific, delineated norm and whether, in fact, the answer to that question basically depended on the scope and content of the prohibition. Ms. Lehto had pointed to the difficulties that arose in any attempt to answer those questions.

In the light of those and other possible examples, he was convinced that an illustrative list, based on arguments such as those set out in the report, would generate more questions than answers. In fact, he would even go one step further: such a list, and the explanation thereof, would undermine the other conclusions and thus the methodological standards which the Commission was primarily trying to identify and establish. Indeed, the Special Rapporteur explained the *jus cogens* articulated in draft conclusion 24 on the basis

of diverging argumentative patterns. He was therefore not convinced that the justification given in the report for those norms adhered to the methodology as articulated in the provisionally adopted draft conclusions.

The second reason why he was not in favour of the Commission's adopting draft conclusion 24 was more substantive. At the Commission's 3459th meeting, Mr. Petrič had asked why the Commission should not state the obvious, namely that the prohibition of genocide was a *jus cogens* norm. His own answer to that question was that, if the Commission wished to state the obvious, it had to decide and explain what the obvious was, something which, unfortunately, was far from obvious, as was plain from the significantly different reasons given for the *jus cogens* nature of the right to self-determination by Mr. Petrič and the Special Rapporteur. Given the importance of *jus cogens* for international law, the Commission should not simply "provide 'something'", as the Special Rapporteur put it in paragraph 54 of his report, by just adding a few examples of those norms of *jus cogens* that the Commission itself had previously recognized.

Putting the substance of draft conclusion 24 in the commentaries, as had been proposed by some members, would resemble a classic form of compromise to which the Commission often reverted. Such a middle-ground solution would be neither fit for purpose nor elegant. It would constitute an anticlimax and be counterproductive. The mountain would have given birth to a mouse.

In his view, it would not be a sign of weakness if the Commission restricted itself to the secondary rules regarding the identification of peremptory norms of general international law and their consequences. It would, however, be a sign of weakness if it merely repeated the examples which it had previously recognized, whether in a draft conclusion, an annex or in the commentaries. Perhaps the aim of such an approach was to show that the Commission was not retreating. The Commission would not be retreating, however, if it simply did not address the issue of the primary norms of *jus cogens*. It could, in the general introduction to the commentary, make clear that it had not addressed that matter, and it would thereby avoid all the possible negative implications connected with the adoption of a list.

Peremptory norms of general international law were the most important norms of international law. Their significance, force and status should not be called into question, least of all by the Commission. It was precisely that concern for the importance of those norms which prevented him from supporting draft conclusion 24 or its referral to the Drafting Committee. He was also unpersuaded by proposals to put similar wording in the commentary.

Mr. Reinisch said that the highly theoretical issue of the possible existence of regional *jus cogens* was far from settled. Merely asserting that a *jus cogens* norm required recognition and acceptance by the international community as a whole in order to rebut a claim concerning the existence of regional *jus cogens* norms was too facile an argument. It was quite plausible that certain regions might have agreed on a core of norms that had attained a higher standard than ordinary customary law, treaty law or general principles of law. However, it was not necessary, in the context of the topic, to resolve the difficulties which would be entailed by having to determine whether regionally reinforced norms of international law should be considered to have a *jus cogens* nature.

The most convincing approach would probably be to restrict the Commission's considerations to norms of general international law that had attained *jus cogens* status and to disregard the issue of regional *jus cogens*. It would, however, be going too far to state that regional *jus cogens* law could not exist. He therefore endorsed the Special Rapporteur's suggestion that no provision on the subject should be included in the draft conclusions.

The reasons for drawing up an illustrative list put forward by the Special Rapporteur appeared to be well founded and good grounds for including such a list in a draft conclusion rather than in the commentary. He had previously expressed his support for the inclusion of such a list and he still thought that it would be very useful for the Commission to go beyond its previous practice of referring to *jus cogens* norms only in commentaries, as it had done, for example, in the context of its articles on State responsibility. The danger of any potential misunderstanding that it might be a closed list was fairly low, as it had always

been understood that the list would be merely illustrative. The potential difficulties of reaching a consensus on the content of the list were not *a priori* a reason not to attempt achieving agreement, as such a list would be of substantial benefit to the international community.

He was unconvinced by the argument that the topic concerned the methodology for developing criteria for the identification of *jus cogens* rather than the identification of *jus cogens* rules themselves. It was unhelpful to compare in that regard the topic of identification of customary international law with that of *jus cogens*, given the different nature of the two projects. Some people even questioned the very concept of *jus cogens*, while others were uncertain whether certain norms possessed that character. For that reason, however, unless the Commission used the agreed methods for identifying *jus cogens* rules in order to actually identify them, it would be impossible to know whether those methods were really useful.

An illustrative list of norms already recognized by the Commission in past commentaries, as proposed by the Special Rapporteur, would do little to resolve the debate about which rules had attained *jus cogens* status. The Commission should go a step further and possibly draw up a broader list. He shared some of the concerns with regard to the formulation of some *jus cogens* norms as they stood in the fourth report. Some difficult questions that deserved closer attention were whether the term “basic rules of international humanitarian law” was sufficiently precise, whether the omission of any reference to human trafficking or the slave trade did not unduly restrict the notion of the prohibition of slavery and what aspects of discrimination and the right to self-determination could be regarded as *jus cogens*. All those factors reinforced his view that drawing up an illustrative list would be a difficult task requiring additional time. The Commission therefore needed to decide whether it was willing to devote so much time and energy in the context of the current topic. For that reason, he was uncomfortable with the idea of referring draft conclusion 24 to the Drafting Committee until that decision had been taken.

Mr. Jalloh said that he wished to begin by commending the Special Rapporteur on his excellent fourth report, which provided a good foundation for the Commission’s discussions on the two outstanding topics that it addressed. He was glad to count himself among the many colleagues who had formed a generally positive impression of the report, the analysis contained therein and its main conclusions. Of course, given some of the methodological difficulties that could arise when discussing such a complex topic, he had also appreciated the constructive criticisms made by several colleagues.

He was happy to see that the Commission was making good progress with its consideration of the draft conclusions on the topic that, due to a lack of time, had been held over in the Drafting Committee from the previous year. He wished to join other colleagues in thanking the Special Rapporteur for having circulated the commentaries to the provisionally adopted draft conclusions 1 to 14 before the start of the current session. He very much welcomed the transparent and collegial approach demonstrated by the Special Rapporteur, which was further exemplified by the fact that the second draft of the commentaries that he had circulated appeared to have taken on board some of the changes proposed by members.

His statement on the topic would focus on two main issues. First, he would briefly comment on the issue of regional *jus cogens*, highlighting, specifically, some of the main difficulties that he had in accepting the doctrine owing to some inherent conceptual issues. He would then make a few observations on draft conclusion 24, which advanced an interesting proposal, rooted in the prior work of the Commission, for an illustrative, but non-exhaustive, list of peremptory norms of general international law.

As a preliminary matter, he would address issues of methodology which had attracted some criticism. First, the previous year, some well-meaning colleagues had strongly criticized the methodology used, whereby the draft conclusions would remain in the Drafting Committee until a full set had been completed before being brought back to the plenary for adoption along with the commentaries thereto, in keeping with the Commission’s approach to the topic of “Identification of customary international law”. That important matter had then been picked up by a relatively small number of States,

which had been critical of it and had amplified it. Attention should be paid to the concerns expressed in order to ensure that States had the opportunity to fully comment on and engage with the Commission's work through written observations as well as annual international law week debates. That was the foundation of the legitimacy of the work of the Commission as a body of independent legal experts who, though nominated and elected by States, were not State representatives. The experience overall suggested to him that, especially in the current environment of general pushback against international law and international institutions, the Commission might wish to proceed cautiously in its plenary discussions so as to avoid undermining its own cause, so to speak, especially on sensitive topics, such as the current one.

However, as other colleagues had correctly pointed out, those were issues that should probably be addressed in the Working Group on methods of work, which could aim to produce a short report on that and other matters related to methods of work for inclusion in the Commission's annual report to the General Assembly. He was happy to note that there would appear to be sufficient time available for a thorough discussion of working methods at the current session. Following the plenary debates, he would be submitting the proposal that he had been asked to prepare by the Commission's former Chair, Mr. Valencia-Ospina, on the nomenclature of conclusions, guidelines and principles as outcomes and looked forward to engaging with colleagues on that subject.

Second, as described by the Special Rapporteur in his report, a number of delegations in the Sixth Committee had highlighted the importance of focusing on State practice rather than relying on theories and doctrine in the formulation of draft conclusions. In that respect, on a subject like *jus cogens*, which could be rather abstract and theoretical in nature, he agreed with those States and colleagues who had already welcomed the Special Rapporteur's focus on State and international practice in his current and previous reports. He especially agreed with the views of Austria, Brazil, Japan, Portugal and South Africa, mentioned in footnote 44 of the fourth report, who had affirmed that the Commission had struck a good balance between theory and practice in its work.

Turning to the question of regional *jus cogens*, he recalled that, in the debate on the topic during his first year as a member of the Commission, he had kept an open mind on the subject. Now, having had the benefit of the rich discussion in paragraphs 21 to 47 of the report, including the positions of several States such as Finland and the other Nordic countries, Malaysia, Thailand and South Africa, and of the insights of colleagues in the plenary, including Mr. Murase, Ms. Lehto and Mr. Nguyen, he could concur with the Special Rapporteur's view that there were so many conceptual and consequential difficulties with the notion that it might well run counter to the very understanding of *jus cogens* within the meaning of article 53 of the 1969 Vienna Convention on the Law of Treaties.

A number of colleagues who were open to the notion of regional *jus cogens* had pointed to norms that had emerged in different regions such as Africa, Europe and the Americas, which could be deemed to be of a fundamental character in those particular regions. He did not take issue with the idea that there were probably many norms that were of a more fundamental character in certain regions of the world than in others. The development of such norms, including the concept of a European or African public order, which often served to advance human rights and other standards, was not something that the Commission needed to debate. Those higher regional norms were not the issue at hand, except if the phrase regional *jus cogens* was being used in a loose sense rather than technical sense of the term as defined in the 1969 Vienna Convention and in the Commission's provisionally adopted draft conclusions. For that reason, like many other colleagues, he fully concurred with the Special Rapporteur's conclusions in paragraph 47, namely that there was no need to include a draft conclusion stating that international law did not recognize the notion of regional *jus cogens* and that the issue could be briefly discussed in the commentary. Care would have to be taken in that connection not to undermine the idea of super norms in various regions.

The second issue, highlighted by the Special Rapporteur in his first report, concerned "whether the project should aim to provide, as indicated in the syllabus, an illustrative list of norms that currently qualify as *jus cogens* or whether it would be best not

to include such a list". In his fourth report, the Special Rapporteur offered insights into whether or not to include such a list and concluded that it should do so. His own concern about having a list was that, no matter how clear the explanation, it could be read as being exhaustive. At the same time, he did not wish to foreclose the possibility of the emergence of other *jus cogens* norms, for instance, those relating to the environment that Ms. Oral had mentioned the previous day. He agreed with the view that, provided that it was prepared carefully, a non-exhaustive illustrative list might be a useful and valuable exercise for the development of that area of international law. He was also in agreement that the illustrative list, if presented carefully, would demonstrate how the criteria developed by the Commission as part of the project, which had the specific aim of also fleshing out the consequences of *jus cogens*, could be applied.

There were of course implications associated with having such a list. The Special Rapporteur proposed limiting its content to examples of norms that had previously been recognized by the Commission. In his view, that was a good starting point as it meant that there would be no need to undertake a more extensive survey of the items that could qualify. It was also a good place to begin because creating such a list from scratch would be inordinately difficult as a matter of methodology. Such a list might even face some pushback from States and, indeed, the international community, including global civil society. The difficulties with the idea of a list were, however, not lost on him; he therefore concurred with the view that the Commission had to be cautious. The Commission could either be seen as having done too much or as having done too little. It risked not satisfying anyone, and more importantly, perhaps, hampering the development of international law.

Members should consider, for example, the implications of using a list dating back to the immediate post-decolonization period, to a bipolar world characterized by the Cold War and the fear of nuclear annihilation. The International Bill of Human Rights had just been completed and its implications had not yet been fully absorbed. It was the age before computers, the Internet and social media. The world today was significantly different from that world. The list proposed by the Special Rapporteur reflected the most widely recognized examples of peremptory norms at that time and the preoccupations of that period. It was based on the examples proposed in the commentaries to the 1966 draft articles on the law of treaties, in which the Commission had pointed out that the use of force, which was contrary to the principles of the Charter of the United Nations, constituted an example of a rule that could have the character of *jus cogens*. The draft commentaries also included the prohibition of slavery, piracy, genocide and other criminal acts under international law. In the final draft of the law of treaties, the Commission had deliberately dispensed with listing concrete examples of *jus cogens* norms. While that had perhaps been the wise choice, the notion of *jus cogens* had become a part of the international legal imagination.

At that earlier time, there had been no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*. Nevertheless, the list of such rules had remained more or less constant throughout the decades; it had, for example, appeared again in the commentaries to the articles on responsibility of States for internationally wrongful acts. In his view, sticking to such a list was a cautious approach, and a wise one when dealing with a sensitive topic with systemic implications. Perhaps for similar reasons, the International Court of Justice had been rather cautious about referring to *jus cogens* in its decisions. Although there were ample references in the separate opinions of several judges, including as recently as February 2019 in connection with the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, an explicit mention could be found in very few cases.

In short, he was suggesting that the project, if approached carefully, provided the Commission with an opportunity to add value to the international community, to be creative and to really delve into its mandate of advancing the progressive development of international law and its codification. While international bodies such as the International Court of Justice had been cautious about adding "new" examples of peremptory norms, various judicial and other organs at the national, regional and international levels had proposed ideas of what might constitute *jus cogens*.

He wished to briefly discuss some of the rights that States had accepted but which were said not to have attained the level of *jus cogens* at the international level. He would approach the issue from a human rights perspective, from the perspective of those who were often not seen by the law: ordinary human beings for whom the promise of *jus cogens* was the promise of some type of legal salvation. Those *jus cogens* norms included the prohibition of gender discrimination, the right to same-sex marriage and the right to life.

The right to equality and non-discrimination was a foundational principle of human rights law and was included in the Universal Declaration of Human Rights and in international and regional instruments. That right was more or less based on the consensus that arbitrary discrimination was prohibited by international law, a conclusion that had found its clearest expression in the Americas, where the Inter-American Court of Human Rights had ruled that the right to equality and non-discrimination had reached the level of a *jus cogens* norm. While the prohibition of racial discrimination was said to be an established *jus cogens* norm, apparently the same could not be said of gender-based discrimination, specifically discrimination against women, which he found very troubling. The argument could of course be made that certain gender-based crimes, such as discrimination, trafficking in women, forced prostitution and forced marriage could be protected by *jus cogens* norms, for example the prohibition of crimes against humanity. However, as things stood, it appeared that greater weight was being given to the prohibition of and protection against racial discrimination at the international level than to gender-based discrimination.

A second example was the right to life or, more specifically, the prohibition, or abolition, of the death penalty, which was yet another example of a norm that had been widely embraced. At least 111 countries had abolished the death penalty in law or in practice, reflecting an emerging custom according to which capital punishment was wrong; however, that figure represented only 66 per cent of countries worldwide and might therefore fall short of the high level of approval required for the Commission's draft conclusions. While the Universal Declaration of Human Rights made a general reference to the right to life, that right had since been more substantively developed in regional instruments.

He suggested that the Commission should pause and reflect on examples that had been excluded from the draft conclusions but which clearly had some level of support in the international community and which could perhaps be included in an illustrative list. In 1966, the drafters of the Vienna Convention on the Law of Treaties had shied away from including such a list. In 2019, the Commission could go further and be bold by including such an ambitious list and perhaps think of itself as forward-looking by giving more of those kinds of examples. For him, the key point was that the list from the 1960s was now widely accepted by States. In his view, a compromise could be found if members worked together to ascertain what the added value of the project was, cautiously using examples that were more established without foreclosing developments in other important areas.

By way of conclusion, he wished to thank the Special Rapporteur for all his efforts to advance the topic over the years. Of course, important questions had been raised by a number of colleagues, especially of a methodological nature. Although he had begun to hear mention of compromise positions, they would need to be clarified. Whatever the Commission ultimately did, especially if it could find common ground to satisfy colleagues and, very importantly, States on both sides of the issue of a list, he fully supported the Special Rapporteur's goal of carrying out a successful reading during the current session. His only words of caution were that it would be better, for the sake of doing justice to that important topic, that important field of international law and the important authority of the Commission, if members could work together in a collegial way to address all concerns and all the complexities that had been revealed in his mini-debate with Mr. Murphy the previous day.

In the light of all his positive comments, it went without saying that he supported the referral of draft conclusion 24 to the Drafting Committee.

Mr. Huang said that he wished to thank the Special Rapporteur for the timely submission of his fourth report on the topic and for his concise oral presentation. The

current report, like the three previous ones, was characterized by strong ambition and the hope that a new breakthrough could be made on some issues of great controversy. As the Special Rapporteur stated in paragraph 54, "it would be a missed opportunity if the Commission did not provide 'something'". While he admired the ambition, vigour and courage of the Special Rapporteur, he did not consider the research approach of seeking new breakthroughs as either scientific or advisable. The Commission was not a purely academic institution of international law or a private, non-governmental body of codification. It was a subsidiary body of the United Nations General Assembly and its work was an integral part of official and multilateral international legislation.

States were always the source and driving force of the progressive development and codification of international law. The outcome of the Commission's work needed to reflect a diversified world and different legal civilizations and needed to be widely accepted. For that purpose, it was necessary to seek the greatest common denominator both within the Commission and among Member States. Therefore, the basis of the Commission's work in the development and/or codification of international law should be objective State practice, not personal academic interest, ideology or any other subjective or utilitarian purposes. That was especially so when deliberating on a specific legal issue, when the focus should be on existing practice and *opinio juris* of States. When a proposed rule involved the progressive development of international law, there was a need to exercise extreme caution and to not blindly seek "new development" or attempt to transcend reality in order to "set rules" for the members of the international community; that would lead to an endless debate.

He wished to stress in particular that the remaining draft conclusions on *jus cogens* should avoid controversial and sensitive issues. Some of the draft conclusions contained in the three previous reports had led to intensive debates in the Commission and the Sixth Committee, especially those on the effect of Security Council resolutions and on denial of *ratione materiae* immunity of State officials. In his view, in those extremely sensitive areas of progressive development of international law, the Commission must not go too far because any change to the long-existing contemporary principles and norms of international law might result in serious consequences and might even shake the foundation of the current international order. Therefore, he hoped that the Special Rapporteur could approach controversial issues in a spirit of maximum openness, inclusiveness and compromise. He recalled that, when the Commission was dealing with the controversial issues related to draft conclusions 22 and 23 at its seventieth session, the original draft conclusions had been wisely withdrawn and replaced with a "without prejudice" clause, and that an agreement had been reached in the Drafting Committee at the current session not to single out the Security Council in draft conclusion 17. He was convinced that the Special Rapporteur's efforts would help the Commission to reach consensus, accommodating, to a certain extent, the concerns expressed by many States in the Sixth Committee.

In that connection, there was also an issue of methodology. The Commission was a subsidiary body of the General Assembly that enjoyed a high reputation in connection with the codification and development of international law. Any conclusion drawn by the Commission should be supported by strong evidence as well as solid and rigorous argumentation. That required the Commission, when drawing each conclusion, not to be overly imaginative by replacing objective facts with theoretical assumptions or actual State practice with academic assertions. That also required the Commission to avoid, whenever possible, using analogy or indirect proof to arrive at potentially highly controversial conclusions. That was particularly important for the current topic.

Turning to specific issues highlighted in the report, he said that he agreed with the conclusion drawn by the Special Rapporteur that "the notion of regional *jus cogens* does not find support in the practice of States". The Special Rapporteur pointed to four difficulties in substantiating the existence of regional *jus cogens*, which were convincing. From a practical point of view, State practice on regional *jus cogens* was almost non-existent. It was not possible to deduce by analogy that regional *jus cogens* existed because regional customary international law existed. Indeed, the latter existed in Latin America, and its relevant rules had been respected and approved by the international community. However, there was no similar basis for regional *jus cogens*. In addition, as pointed out by

the Special Rapporteur, if regional *jus cogens* existed, its legal consequences would be full of contradictions and almost all the draft articles discussed in the third report would be facing great difficulties, making regional *jus cogens* completely unfeasible.

To his mind, theoretically, it was inconceivable that regional *jus cogens* would ever meet the definition contained in article 53 of the Vienna Convention on the Law of Treaties on peremptory norms of general international law, particularly the criterion of being “recognized by the international community of States as a whole”. For it was fundamentally illogical: how could a region represent the entire international community? Furthermore, it was also at variance with the general nature of *jus cogens* in draft conclusion 2 on the topic, namely, to “reflect and protect fundamental values of the international community”. Many States had expressed the same concerns in the Sixth Committee. Recognition of regional *jus cogens* would also aggravate the fragmentation of international law. For all those reasons, he supported the Special Rapporteur’s decision not to formulate draft conclusions on regional *jus cogens*.

Regarding the illustrative list of norms of *jus cogens*, it was important that the Commission should first decide on the necessity and feasibility of drafting such a list. If the majority of members deemed the task unnecessary at present or, if in spite of its necessity, the task appeared impossible to complete in the time allotted, the Commission should avoid entering into a lengthy, fruitless debate on which rules had achieved *jus cogens* status.

Overall, he agreed with Sir Michael Wood that the inclusion of an illustrative list of *jus cogens* norms, whether in the draft conclusions or in an annex, was likely to create further problems. The Commission continued to contend with the same two difficulties that it had encountered in 1966 during the formulation of draft articles on the law of treaties, namely, the fear that such a move would mire the Commission in prolonged discussions and cause potential misunderstandings concerning the status of norms not included in the list. History had shown that the Commission had done well to decide not to include a list as part of the draft articles on the law of treaties.

As stated in draft conclusion 3, the core characteristic of *jus cogens* norms was their acceptance and recognition by the international community of States as a whole. The Commission was in no position to determine, on behalf of the international community of States, whether a norm had achieved *jus cogens* status. While the Commission could compile the *jus cogens* norms that were already accepted and recognized by the international community of States, there was no real point to such an exercise, since such rules were usually self-evident, had been universally accepted and required no meticulous examination.

Furthermore, it was highly likely that the elaboration of an illustrative list of *jus cogens* norms might substantively change the nature of the current topic; the Commission should do its best to avoid such an outcome. He wished to draw attention to the similarities between the current topic and others on, for example, the identification of customary international law and State responsibility, for which the Commission had not attempted to list existing customary rules or to enumerate which acts constituted internationally wrongful acts. The Commission should follow the same approach with the current topic.

Regarding the method of work on the topic of *jus cogens*, he understood the purpose of the Special Rapporteur’s strategy, which might be described as “tactical ambiguity”, when controversial issues were involved. However, without clearly defined criteria for what determined the *jus cogens* character of a given norm – “the basic rules of international humanitarian law” being the most obvious example in the illustrative list – it was difficult even for the Commission to know which rules exactly were covered by the list. The four terms used in paragraph 116 of the report to refer to “the basic rules of international humanitarian law” did not have the same associations. In the absence of a clear definition, it was difficult for the Commission to conclude that certain rules had already been recognized as *jus cogens* norms. He therefore shared the view expressed by Mr. Murase that, if such a list were to be included, the scope of application of each *jus cogens* norm must be clearly delimited. In that event, it would be necessary to carry out an in-depth study of all the norms to be included; the Commission would not be able to quickly conclude its work on the topic.

While he did not deny that the *jus cogens* status of some norms had been recognized by the international community, the inclusion of such norms in an illustrative list would potentially lead to excessive debate. The norms proposed by the Special Rapporteur for inclusion focused on recently developed international human rights law, particularly international criminal law. Yet, those norms were either considerably controversial or not sufficiently well defined. For example, the prohibition of enforced disappearance had been listed as a possible *jus cogens* norm. In his view, that prohibition was more of an obligation of States parties under the International Convention for the Protection of All Persons from Enforced Disappearance; it was, moreover, far from being recognized as a *jus cogens* norm by the international community. If the Commission decided to draw up an illustrative list of *jus cogens* norms, the norms therein must be selected objectively and impartially. While he supported the Special Rapporteur's goal for the Commission to adopt the draft conclusions on first reading at its current session, it was unrealistic to expect that an illustrative list acceptable to all could be finalized within that short period of time. It would, furthermore, show a lack of responsibility if the Commission were to adopt hastily the draft conclusions, including an illustrative list. He would oppose such an act, for the sake of the Commission's renowned reputation.

In sum, he was not in favour of referring draft conclusion 24 to the Drafting Committee at the current stage.

Mr. Rajput said that he welcomed the Special Rapporteur's fourth report, which was both concise and thorough.

He agreed with the Special Rapporteur's rejection of the notion of regional *jus cogens*; the Special Rapporteur ably demonstrated in his report that the theoretical construct of regional *jus cogens* contradicted universality – the defining characteristic of a *jus cogens* norm. Indeed, draft conclusions 3 (1) and 4 (b) set out acceptance and recognition by the international community of States as a whole as one of the main criteria for identifying a norm of *jus cogens*. He agreed with most of the Special Rapporteur's analysis of the arguments arising from that contradiction contained in his report, with the exception of the conceptual reservations raised in paragraph 29. In his view, the concept of regional *jus cogens* could not be challenged on the basis of the indeterminacy of the definition of the term "region", which was not always strictly geographical. Although it was an inconsequential point for the purposes of the ultimate work on the topic, the conceptual difficulty relating to the understanding of the term "region" might affect regional customary law.

Scholars who claimed that regional *jus cogens* existed appeared to be referring to regional customary law, rather than to regional *jus cogens*, as such. Although certain developments, especially in the field of human rights, were particular to a region, the resulting norms were not necessarily superior to other norms in that region or outside it. Some regions might have norms that were specific to that region and that could be fundamental in nature, but they regulated relationships only within the region in question; those norms could, at best, be characterized as regional customary law, because they could not be said to have attained non-derogable status. If they had, they might come into conflict with obligations that arose under *jus cogens* norms or even other obligations that were generally applicable to the international community as a whole.

Most members had expressed support for avoiding any reference to regional *jus cogens*, whether in the text of the draft conclusions or in the commentary thereto; he agreed with that position. If the commentary were ultimately to make mention of regional *jus cogens*, it should be to reject the concept, for the convincing arguments laid out by the Special Rapporteur in his report.

Furthermore, a major practical problem was set out in paragraph 34 of the report: if a norm were accorded regional *jus cogens* status, all treaties between States in the region concerned would become void if found to be in conflict with the *jus cogens* norm. Despite the Special Rapporteur's assertion that it was "inconceivable that such treaties concluded with third States would become void", the possibility of such a complication nevertheless remained, since a State from the region concerned could challenge a treaty it had concluded with a State from outside the region on the basis of a conflict with a regional *jus cogens*

norm. In addition, there was a lack of State practice supporting regional *jus cogens*; in fact, States had rejected the concept. It was not appropriate, therefore, for the Commission to recognize the concept.

Regarding the illustrative list of *jus cogens* norms, two positions seemed to have emerged during the Commission's debate on the topic. The first was that the list was an opportunity for the Commission to pronounce itself on which norms were in fact *jus cogens* norms; and the second was that the Commission could provide a list of peremptory norms based on the rules and criteria identified by the Commission thus far. If the Commission decided to commence work on drawing up such a list as that provided in draft conclusion 24, it would take a long time to agree on which norms to include, as well as their scope and content.

The illustrative list could be seen as unproblematic in that the Special Rapporteur had simply reproduced norms that had been noted in the Commission's previous work. As stated in the report, the Special Rapporteur did not intend to take a position on the status of those norms. Whether a list was to be proposed in the text of the draft conclusions or in an annex, several years' additional work would be required in order to discuss and agree on each of the elements in the list. There appeared to be a temptation to simply declare the items listed in draft conclusion 24 to be norms whose *jus cogens* status was obvious and could not be challenged. After having worked hard to identify several criteria for the identification of *jus cogens* norms, the Commission, if it were now to apply the test of obviousness in order to declare a given norm to be one of *jus cogens*, would render its previous work worthless. The same would be true even if the Commission decided to simply reproduce the norms that it had referred to as *jus cogens* norms in the past. When making such references, the Commission had not had the opportunity to conduct a detailed analysis of said norms or to determine the criteria for identifying them as *jus cogens* norms, as it had since beginning its work on the current topic.

Taking a casual approach to drawing up an illustrative list of *jus cogens* norms was problematic, as had become clear during the Commission's discussion of the topic. For example, in the list proposed in draft conclusion 24, it was not clear what aspect of the right to self-determination was considered a peremptory norm; the right of secession might arguably be covered by the right of self-determination. He and no doubt many other members would be strongly opposed to such a position. Other items on the list, such as the prohibition of slavery, the basic rules of international humanitarian law and the prohibition of aggression or aggressive force, presented similar problems. Therefore, the items to be included in an illustrative list would require significant discussion and clarification.

The fact that the list of eight items proposed in draft conclusion 24 was indicated as being merely "illustrative" could also be problematic, as it would reinforce the potentially perilous tendency to expand the list of *jus cogens* norms. Until now, a *jus cogens* norm had been capable of disrupting a treaty; there was a mechanism under article 66 of the 1969 Vienna Convention on the Law of Treaties for submitting disputes in that connection to the International Court of Justice for resolution. However, considering the wide range of issues concerned by the present topic, the Commission's work would, once a norm was declared a peremptory norm, affect many aspects of international relations, including sources and State responsibility.

Despite indicating that the list of norms was simply illustrative, the exclusion of certain important norms from the list could raise a number of questions. One such norm was the prevention and punishment of terrorism – a fundamental norm on which the international community agreed and which had attained the status of *jus cogens*. By excluding that norm from the illustrative list, questions might arise as to the exact status of a norm that was of contemporary concern of the international community.

Regarding potential *jus cogens* norms, he supported the point made by Mr. Hassouna at the Commission's 3460th meeting in respect of *non-refoulement* which, even under the Convention relating to the Status of Refugees, was not an absolute rule, since there was an exception related to national security. If the Commission's position was that a peremptory norm was necessarily non-derogable and if a treaty itself provided for exceptions to such a norm, it was difficult to see how the Commission could declare such a

norm as a peremptory norm. Moreover, the principle of *non-refoulement* was applied differently under different treaty regimes.

In his view, it was inappropriate, at present, for the Commission to undertake the task of identifying a list of norms, either in the text or in the form of an annex. Nevertheless, if other members and the Special Rapporteur were in favour of drawing up such a list, an agreeable compromise might be to include it in the commentaries to the draft conclusions. In view of his comments on substantive sections of the report, he did not think it was appropriate to refer draft conclusion 24 to the Drafting Committee.

Regarding methodology, he wished to reiterate a point he had made in the past, namely that the commentaries should be issued together with the draft conclusions for adoption. It was high time for the Working Group on methods of work to take up States' comments regarding the need for commentaries to be produced within the year that followed the issuance of draft conclusions.

The meeting rose at 11.45 a.m.