

Provisional

For participants only

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Provisional summary record of the 3462nd meeting

Held at the Palais des Nations, Geneva, on Tuesday, 14 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. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Tladi
Mr. Valencia-Ospina
Mr. Wako
Sir Michael Wood
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.10 a.m.

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

Mr. Aurescu, welcoming the comprehensive description provided in the Special Rapporteur's fourth report on peremptory norms of general international law (*jus cogens*) (A/CN.4/727) of the doctrinal views on the question of regional *jus cogens*, said that some of the references included were not necessarily relevant. For instance, the Special Rapporteur noted that the views of Grigory Tunkin concerning the norms applicable in the socialist States during the cold war period were of theoretical value even though the norms themselves were no longer valid. However, the report went on to conclude that those norms were in fact related not to *jus cogens*, but to a regional set of rules of international law, and even noted that Professor Tunkin himself had not suggested that they were *jus cogens*. The reference could thus have been omitted.

He would have welcomed more information concerning the Special Rapporteur's views on existing State practice with regard to regional *jus cogens*, but such practice was referred to only in the paragraph outlining the views expressed by delegations in the Sixth Committee of the General Assembly in 2018. International courts, tribunals and commissions were mentioned only tangentially, and the differences and similarities between the inter-American, European and African human rights systems and the legal documents on which they were based could have been addressed more comprehensively; in particular, it would have been interesting to know whether those systems appeared to have the potential to create regional *jus cogens* norms in the future. He had strong reservations about the statement in paragraph 45 that the right to development and the right to the environment were "collective" rights, as he regarded them as rights that were individual, like any other human rights, but that could be exercised in community with others.

Although the report offered no direct analysis of State practice in respect of regional *jus cogens*, he agreed fully with the Special Rapporteur's conclusion that the notion did not find support in the practice of States. He also agreed that the Commission should not include a draft conclusion mentioning that current international law did not recognize the notion of regional *jus cogens*, although he would have welcomed the inclusion of a rationale for that decision in the report. In his opinion, the issue of regional *jus cogens* fell outside the scope of the topic as it was currently designed.

Noting that, in the suggested illustrative list of peremptory norms, the Special Rapporteur had opted to use the term "prohibition of aggression" rather than any of the possible alternatives, he said that the decision to use the term "aggression" instead of "use of force" should have been explained in more detail, given that most of the direct quotations mentioned in the report used the latter term. He also noted the absence of any reference to the prohibition of the threat to use force, which, together with the prohibition of the use of force, was considered by many scholars to be a fundamental principle of international law and thus a peremptory norm. He would be interested in hearing the Special Rapporteur's view on whether the threat to use force should be included in the list.

He noted the Special Rapporteur's statement that, although the International Court of Justice did not use the terms "*jus cogens*", "peremptory norms" or "*erga omnes* obligations" in describing the prohibition of genocide, the language that it used was nevertheless consistent with the description of *jus cogens*. The relationship between *erga omnes* obligations and *jus cogens* norms could usefully have been defined in paragraph 78, where the issue was mentioned for the first time. There were some references to that relationship later in the report, but he did not find the explanation given in paragraph 93 to be convincing: it asserted that the concepts of *erga omnes* obligations and *jus cogens* norms were different but related, whereas he was of the view that, while the two were to some extent related, in that they were addressed and opposable to the whole international community, some *erga omnes* norms, such as the provisions of a treaty establishing an international organization, did not qualify as *jus cogens* as such. It was therefore difficult to conclude that a norm that qualified as *erga omnes* was also a *jus cogens* norm, as the report seemed to suggest.

He agreed that the prohibition of genocide, as well as that of apartheid and racial discrimination, should be included in the proposed list of *jus cogens* norms, if the Commission decided to adopt such a list. In that connection, more details on why the Special Rapporteur had decided to treat apartheid and racial discrimination as a single, albeit “composite”, act and on the similarities and differences between the two concepts that were considered to justify the inclusion of both of them as *jus cogens* norms would have been useful.

He supported the idea of an illustrative list of *jus cogens* norms, noting that it should be left open-ended, as new norms might emerge in the future. However, the list should be described as “non-exhaustive” rather than “illustrative” and should not be restricted to the norms already recognized by the Commission as peremptory norms. Rather, it should go beyond those limits in order to give impetus to the generation of further evidence of acceptance and recognition by the international community of States as a whole of the peremptory character of additional norms, as stated in paragraph 122 of the report; otherwise, it would discourage further efforts. For that reason, he was in favour of including an expanded list of peremptory norms, provided that they were underpinned by evidence of acceptance and recognition as *jus cogens*. The right to life should be included in the list, as should the prohibition of terrorism. He wished to echo Mr. Murase’s question as to why only some of the fundamental principles of international law were included, given that only two of the seven principles mentioned in the General Assembly’s 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations had been included, whereas the other five were also generally considered as having the character of *jus cogens*.

He understood and agreed in principle with the arguments against including such a list in the draft conclusions unless each entry was thoroughly justified. However, the sharp criticism that had been directed at almost all the norms proposed for inclusion, even though the Commission had already mentioned or used those norms in the past, could lead to a situation where almost nothing was included on the list. That might seem to call into question the validity of the Commission’s previous work.

In respect of draft conclusion 24, he noted that the prohibition of “aggression” was discussed in the report but that the term “aggressive force” was added in the draft conclusion. A number of other conceptual clarifications were also necessary regarding the terminology used: why the term “aggression” was preferred over “use of force”; the reason for the addition of “aggressive force” and an explanation of how it differed in law from “aggression”; and why the “threat to use force” had not been included. He suggested that draft conclusion 24 (a) should refer only to the prohibition of aggression, as it would then be consistent with the list of peremptory norms given in the commentary to the articles on responsibility of States for internationally wrongful acts.

The commentary to paragraph (d) of the draft conclusion should include detailed clarification of why the two concepts of apartheid and racial discrimination were mentioned together. The concept of apartheid was generally considered to be based on racial discrimination and was thus encompassed by the latter term. For instance, article 7 (2) (h) of the Rome Statute of the International Criminal Court could be interpreted as defining apartheid as institutionalized racial discrimination. Proposed paragraph (e) of the draft conclusion covered crimes against humanity, which, including apartheid, were addressed in article 7 of the Rome Statute. It therefore appeared that “apartheid” did not need to be included separately in the list, as it was already covered by the references to racial discrimination and crimes against humanity. He suggested that, to support the statement at the beginning of the draft conclusion that the list was “without prejudice to the existence of other peremptory norms”, the word “and” at the end of paragraph (g) should either be deleted or be replaced with “or”. It was also important that the Commission should take a decision on the inclusion of further *jus cogens* norms.

Commending the Special Rapporteur for his work, he said that he supported the referral of the draft conclusion to the Drafting Committee.

Mr. Saboia said, in respect of the methodology used to address the issue of peremptory norms of international law (*jus cogens*), that he agreed on the importance of providing readers, particularly those in the Sixth Committee of the General Assembly, with a clear understanding of the substance and breadth of each draft conclusion by ensuring that the accompanying commentary was developed as soon as possible and provisionally adopted by the Commission. A second methodological issue was the choice of sources used in analysing practice in order to determine the peremptory nature of a norm. Even in the first report on the topic, the Special Rapporteur had noted the scarcity of State practice, meaning that secondary sources, such as the case law of international and national courts, would have to be used. Decisions of national courts were indicative of State practice; those of international courts, especially the International Court of Justice, were authoritative sources in the field, as were certain resolutions of the General Assembly or the Security Council, when they were clearly representative of the view of the international community of States as a whole.

On the issue of regional *jus cogens*, the analysis provided in the report recognized that there might be legal rules or a normative system within a region that stood at a higher hierarchical level than the normal rules of international law. Special regional norms such as the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) or decisions such as that of the Inter-American Commission on Human Rights in *Roach and Pinkerton v. United States* might have become customary rules of regional international law or acquired constitutional status, which might be deemed to be essential to the group of States concerned. However, while such examples demonstrated the existence of a regional core of rules that helped to define the identity and commonly shared values of the group in question, such rules did not meet the criteria for determining which norms had the status of peremptory norms of general international law. As stated in the report, issues arose with regard to the formation of the norms, their non-derogability and even the definition of "region". The fact that a treaty that violated a norm of regional *jus cogens* presumably would be void as between the States of the region but not as between any such State and a State outside the region also showed that such norms did not meet the test of non-derogability.

The notion of regional *jus cogens* thus seemed difficult to accept. As indicated in previous reports of the Special Rapporteur, norms could not be considered peremptory unless they belonged to general international law and were accepted and recognized by the international community of States as a whole as being non-derogable.

As to the inclusion of an illustrative, non-exhaustive list of peremptory norms of general international law, he was of the view that the opportunity to take such a step forward should not be wasted. In 1966, the Commission, despite opposition and scepticism, had addressed the question of the existence of *jus cogens* norms and their effect on treaties. In its commentary to draft article 50, the draft article that would, in 1969, become article 53 of the Vienna Convention on the Law of Treaties, the Commission had emphasized the law of the Charter of the United Nations concerning the prohibition of the use of force as a conspicuous example of a rule in international law having the character of *jus cogens*. It had then mentioned other possible norms that could also be seen as having that status, but had cautiously refrained from going further, possibly because the world had been in the midst of the cold war and a provision on the prevention of aggression had perhaps been more likely to rally consensus. In his opinion, such possible reasons of political convenience showed that the consideration of secondary rules, particularly when they were of such crucial nature, could not be seen as clinically isolated from that of primary substantive rules.

The articles on responsibility of States for internationally wrongful acts, and the commentary to article 40 thereof, together with the results of the work of the Study Group on the fragmentation of international law, provided a contemporary and broader basis for the development of a possible list of the currently recognized rules of *jus cogens*, as offered in paragraph 60 of the report and in proposed draft conclusion 24.

Chapter IV (B) of the report provided a useful analysis and discussion of the ways in which each of the eight categories of rules set out in the proposed draft conclusion could be dealt with in the outcome of the Commission's work on the topic. The inclusion of the list

was a cautious step forward that was based on matters that the Commission had dealt with previously, when the question of *jus cogens* had not been the main focus of its work. Now that that question was the main focus, the step should be taken. He therefore did not object to the inclusion of the list in the draft conclusion but, given that there was resistance to that idea, he could also accept the compromise proposed by Ms. Galvão Teles that the list should be included as an annex to the draft conclusion. If that was agreed to, the Commission would need to examine the content of each of the rules listed in chapter IV (B). The discussion in the report was useful but the plenary debate had shown the need for further clarification in several areas. However, he did not think it necessary to conduct an exhaustive examination of each rule, as would have been done if they had been specific topics on the agenda; that work could be carried out by the Drafting Committee on the basis of the report and the plenary discussions.

Noting that Mr. Aurescu had made some good points on the matter, he said that the Special Rapporteur's choice of the term "prohibition of aggression" rather than "non-use of force" or other similar terms needed to be clarified. In addition, clarification was required in respect of the prohibition of racial discrimination when such discrimination was not linked to situations of institutionalized segregation such as apartheid. The Special Rapporteur referred to the International Convention on the Suppression and Punishment of the Crime of Apartheid but did not examine the International Convention on the Elimination of All Forms of Racial Discrimination or subsequent instruments and decisions related to racial discrimination, including the decisions of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

On the right to self-determination, although he believed that there was no doubt as to its peremptory nature, which had been clearly affirmed by the International Court of Justice and in numerous resolutions of the General Assembly and the Security Council, he agreed that account should be taken of both the internal and the external aspects of self-determination, as well as the issue of the legitimate use of force. In 1993, the participants in the World Conference on Human Rights had, after intense negotiations, reached a consensual solution on the issue by combining the language of common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, that of the 1970 Declaration on Principles of International Law and some of the wording of General Assembly resolution 47/83 on the right to self-determination. That exercise had resulted in the adoption without a vote, in a conference attended by representatives of over 190 States, of paragraph 2 of the Vienna Declaration, which might offer some language of interest that could be reflected in the commentaries.

Other proposed norms that needed to be discussed further were "the prohibition of slavery" and "the basic rules of international humanitarian law".

He thought that it would be possible to discuss, with caution and moderation, other norms of *jus cogens* that the Commission had not previously identified in its work. As shown in chapter IV (C), the creation of *jus cogens* norms was an open-ended process, but the standard for the recognition of norms as such was high and the process therefore took time.

In conclusion, he said that he was in favour of referring draft conclusion 24 to the Drafting Committee.

Mr. Cissé, expressing his appreciation for the Special Rapporteur's fourth report, said that his views on the topic had remained largely unchanged since the Commission's sixty-ninth session, during which he had made a statement on the Special Rapporteur's second report at the Commission's 3373rd meeting. However, he would like to take the opportunity to clarify and expand on some of his previous points in the light of the comments made by other members of the Commission during the discussion at the current session.

The comments made by other members concerning the concept of regional *jus cogens* implied that *jus cogens* existed only as defined in article 53 of the 1969 Vienna Convention on the Law of Treaties. If the Commission limited itself to the sphere of treaty obligations, it would be fully in line with the letter of article 53, but not its spirit, which in

his view did not require a static interpretation of *jus cogens*. The Commission should therefore draw not only on treaties, but also on other relevant sources of international law, including regional sources, and particularly the regional practices that reflected the provisions of many multilateral treaties and particular norms and principles of international law.

The very question of whether the concept of regional *jus cogens* was recognized under international law was misplaced, as regionalism was itself intended as an instrument in the service of international law. For example, the Regional Seas Programme developed norms for the protection of the coastal and marine environment that were specific to particular regions, while ensuring that those norms were aligned with universal standards for the protection of the oceans and seas. More broadly, Chapter VIII of the Charter of the United Nations, on regional arrangements, provided that the Security Council could utilize regional arrangements or agencies for enforcement action under its authority in order to settle serious crises involving violations of international humanitarian law or international human rights law or situations in which peace and security had been breached or were under threat.

Those examples showed that regions did not exist in isolation from international law and that artificial distinctions between legal systems should not undermine the protection of fundamental values. Universal international law would not exist without regional legal systems, which made a major contribution to the production of legal norms, including the establishment and consolidation of *jus cogens* norms. The development and promotion of regional *jus cogens* in no way undermined the *jus cogens* of general international law as set out in article 53 of the Vienna Convention. The idea that the requirement of acceptance and recognition by the international community of States as a whole ruled out the possibility of regional *jus cogens* was too narrow an interpretation of article 53. Thus, he fully agreed with Mr. Nolte that the Commission should not reject the concept outright. In that context, he wished to recall the maxim that, where the law did not distinguish, no distinction should be made (*ubi lex non distinguit, nec nos distinguere debemus*). Article 53 did not establish a distinction between regional *jus cogens* and international or universal *jus cogens*, although the drafters of that article could easily have done so if they had wished to rule out the possibility of regional *jus cogens*.

In any case, regionalism could not be separated from internationalism. Like certain other members, he did not accept the claim that the concept of regional *jus cogens* was invalidated by the lack or scarcity of relevant State practice. Although members who called for the concept to be rejected were concerned that conflicts might emerge between regional *jus cogens* and universal *jus cogens*, the *jus cogens* of general international law would prevail, in the event of any such conflict, by virtue of its hierarchical superiority. In addition, State practice was not the sole determinant of the content and scope of *jus cogens*. In other words, the Commission's study of *jus cogens* could not be limited to treaties, as article 53 of the Vienna Convention did not deal with the concept exhaustively. Peremptory norms could be identified on the basis of State practice, but also on the basis of the practice emerging from regional systems, such as those in Europe, Africa and Latin America.

Not all matters concerning human rights protection, some of which could certainly be considered to give rise to *jus cogens* norms, received the same treatment under international law, which tended to focus on crimes that shocked the conscience of humanity. Since legal multilateralism was slow to establish norms and therefore to legislate on matters involving peremptory norms, he did not see why regionalism should be denied a role in the production of norms of general international law.

The matter of statelessness offered a specific example. Given that a stateless person had no nationality, he or she was unprotected by any State from multiple forms of abuse, including slavery, human trafficking and the worst forms of discrimination. As the solutions to the problem of statelessness, which brought into play both national and international law, had to be found at the regional level, why should the possibility of regional *jus cogens* be ruled out on the sole basis that it was not supported by State practice? Was the Commission working to achieve progress or to maintain the *status quo*? In his view, when identifying peremptory norms of general international law, the Commission should take a progressive approach that kept open the possibility of regional

jus cogens, as that concept had a useful role to play in furthering the progressive development of international law on certain matters, including statelessness.

Under an initiative put forward by Côte d'Ivoire, 15 States of the Economic Community of West African States (ECOWAS) were working to combat statelessness at the regional level, as the right to a nationality was widely recognized as a fundamental human right. That initiative lent further support to his argument that a hard and fast distinction between regional *jus cogens* and international *jus cogens* could not easily be drawn. Article 53 of the Vienna Convention did not seek to draw any such distinction, as the reference to international law in that article also encompassed regional law.

The initiative of Côte d'Ivoire was an example of a national initiative to provide region-wide legal protection to a right that could be elevated to the status of a peremptory norm. If the 15 States members of ECOWAS harmonized their legislation on statelessness with a view to creating a Community-level law that was non-derogable for all of those States, did that not constitute regional *jus cogens* on statelessness? If so, and if the regional *jus cogens* in no way conflicted with the peremptory norms of general international law, the clear implication was that the Commission should not be too quick to conclude that regional *jus cogens* did not exist.

With regard to the question of whether or not an illustrative list should be included in the draft conclusions, the Commission and the Sixth Committee seemed to be in agreement. In his view, there was much to be gained from such a list. One of the achievements of the fourth report was the proposal of a non-exhaustive list of peremptory norms of general international law (*jus cogens*), including the prohibitions of genocide; war crimes; crimes against humanity; torture; aggression; cruel, inhuman or degrading treatment; the use of force; arbitrary detention; slavery; apartheid; the principles of self-determination, non-discrimination and *non-refoulement*; and the rights of access to justice and to a fair trial. The list should also include the prohibitions of human trafficking, international terrorism, statelessness and piracy.

A strict reading of article 53 of the Vienna Convention implied that national or international courts, as creators of law, were responsible for fleshing out the notion of *jus cogens* by clarifying its scope, underlying principles, identification criteria and supporting evidence, and the penalties for non-compliance with *jus cogens* norms. He agreed with Mr. Petrič that the Commission should not become a legislator of *jus cogens*. Nevertheless, it could and should systematically compile and analyse *jus cogens* norms to enable States to take note of them and judges to interpret them in an objective, considered and progressive manner on the basis of national, regional and general international law. The importance of compiling and progressively adding to a list of *jus cogens* norms arose from the fact that such norms were not set in stone, but were constantly evolving in line with the progress made in expanding the protection of human beings and human life under international law. Ultimately, the constantly evolving nature of peremptory norms meant that such a list could never be closed. Thus, the Commission might wish to adopt a non-exhaustive list of *jus cogens* norms to which it would prudently and progressively make ongoing additions based on judicial decisions in cases involving peremptory norms of general international law.

He recommended the referral of draft conclusion 24 to the Drafting Committee.

Mr. Petrič, thanking the Special Rapporteur for an excellent fourth report and oral presentation, said that he shared the view expressed by the majority of the States that had commented on the concept of regional *jus cogens*, namely that it should be rejected. As the United Kingdom had argued, the concept “would undermine the integrity of universally applicable *jus cogens* norms”. It was clear that *jus cogens* norms could be of general international law only, as a norm had to be accepted and recognized by the international community of States as a whole in order to acquire that status. While some of the views put forward by academic authors on regional *jus cogens* were interesting, they did not confirm the existence of regional *jus cogens de lege lata*. There was also insufficient State practice in support of such a concept.

In one section of the report, the Special Rapporteur analysed the rather sparse doctrinal views in favour of regional *jus cogens*. He fully endorsed the Special Rapporteur's approach and agreed that the existence of a “common set of unifying and

binding norms in different regions” did not translate into a recognition of regional *jus cogens* and that the notion of regional *jus cogens* did not find support in the practice of States.

Regions, or groups of States defined in accordance with geographical or other criteria, could certainly have a common set of unifying and binding norms that were, at least as between those States, “even more important than other rules”. However, the law governing the European Union, for example, was a legal system *sui generis* with no ambition either to regulate relations among third States or to achieve hierarchical superiority over general international law, by which the States members of the European Union, like all other States, were bound. European law, in other words, was not above general international law. It was not a *lex specialis* under which derogation from general international law was permitted, nor was it in any way a kind of regional *jus cogens*.

The European human rights system included States that were not members of the European Union, such as the Russian Federation and Turkey. That system was a subsidiary human rights protection system based on the consent of the States parties to the European Convention on Human Rights. However, in accordance with the Vienna Convention and the Special Rapporteur’s draft conclusions, the peremptory nature of *jus cogens* norms derived from the consent of the international community of States as a whole. *Jus cogens* reflected and protected fundamental human values and the common interests of humanity at a particular stage in its development. The rationale for the capacity of *jus cogens* norms to bind *sans* consent could be found in the fact that they were fundamental to the international community as a whole and were, by definition, part of general international law.

He fully agreed with the Special Rapporteur’s decision not to propose a draft conclusion on regional *jus cogens* and to make clear in the commentaries that the concept was not sufficiently supported by theoretical foundations or practical examples.

With regard to the work of Grigory Tunkin, he wished to comment briefly on socialist international law, which had been an interesting but dangerous concept based not only on the sovereign equality of States, but also on proletarian solidarity. The concept had provided a theoretical framework for the so-called Brezhnev Doctrine, in accordance with which socialist States had a duty to intervene in other socialist States when necessary for reasons of proletarian solidarity. However, that concept had since been consigned to history.

Divergent views had been expressed, including in the Commission, with regard to the question of an illustrative, indicative and non-exhaustive list of the most widely recognized peremptory norms of general international law. It would be useful to provide a list of the norms of general international law that were the most widely recognized by States, in both their words and their actions, and by international courts, the Commission itself, doctrine and indeed the general public.

If the Commission chose to provide such a list, whether in a draft conclusion, an addendum or the commentary, it would not be issuing an authoritative statement specifying which norms of general international law constituted *jus cogens*. Rather, it would merely be indicating which norms of general international law had become the most widely recognized examples of peremptory norms since the conclusion of the 1969 Vienna Convention. He could not see how such a list, which merely stated the facts as to which norms of *jus cogens* were the most widely recognized as such by the highest legal authorities, such as the International Court of Justice, other courts, the International Law Commission and States, could cause confusion. On the contrary, it would offer greater clarity.

He had given serious consideration to the reservations expressed by other members regarding the proposed list. He agreed that the Commission did not have sufficient time in which to draft detailed explanations of the rationale for the inclusion of the norms proposed by the Special Rapporteur. In the past, the courts, States and international organizations that had recognized particular norms as *jus cogens* had, depending on the context, often not provided detailed explanations of their reasoning. Nevertheless, it seemed clear that norms of international law dealing with, for example, the right to self-determination and the prohibition of genocide, torture, slavery, aggression and crimes against humanity could be

included in a list, as they had been referred to as *jus cogens* norms by authoritative institutions such as the International Court of Justice, other courts and States. If those norms were unclear, courts should not use them, as they would not meet the standards of *lex certa*.

He believed that the norms included in the proposed list were sufficiently clear to enable courts to apply and interpret them in accordance with the circumstances of each case. Explanations of most of those norms could be found in treaties, court decisions and statements made on behalf of States and international organizations. Certain norms had been authoritatively interpreted. Some of the fundamental principles of the Charter of the United Nations, for example, had been interpreted in the 1970 Declaration on Principles of International Law. In his view, greater attention should have been paid, in the fourth report, to the fundamental principles of the Charter that had acquired *jus cogens* status.

The questions of whether to establish a list, where to place it and what norms should be enumerated therein were best left to the Drafting Committee. Having listened carefully to the statements of those colleagues who were sceptical of the proposed list, he was no longer sure whether it should be presented as a separate draft conclusion. Doing so might imply that the Commission's intention was to determine conclusively what was and was not a norm of *jus cogens*, but that was neither the purpose of the topic under discussion nor the Commission's task. It might be better to present an indicative, illustrative list as an addendum, including only those norms of general international law that were most widely recognized as *jus cogens*. The commentary to such an addendum should clarify that the list was intended only to provide examples of what could be considered norms of *jus cogens*.

There was no doubt that the right to self-determination was a right recognized in respect of all peoples under general international law. The view that the right to self-determination was related only to decolonization was outdated, as had been proved in practice by the dissolution of the former Soviet Union, the dissolution of the former Yugoslavia and, more recently, the cases of Eritrea and South Sudan. It was also a permanent right, meaning that a people could exercise it more than once at different times in history. That much was clear. What was unclear was the nature of the relationship between the right to self-determination, as a right of peoples mentioned in the Charter of the United Nations, and the right of States to territorial integrity, sovereign equality and non-interference. Those rights were equal and must be balanced in line with the criterion of free will. If the legitimacy of a State was built on the free will of its inhabitants and respect for their fundamental rights, the integrity of that State would prevail. As was made clear in the 1970 Declaration on Principles of International Law, in States whose inhabitants were subjected to colonialism or any other form of foreign domination, the right of peoples to self-determination would prevail. The outcome of the exercise of that right was not important; what was crucial was that it should be a reflection of free will.

The word "illustrate" referred to the use of concrete examples to explain a concept, statement or situation. That was the exact purpose of the list proposed by the Special Rapporteur. It did not proclaim specific norms of general international law as having the status of *jus cogens*, nor did it preclude the consideration of other norms as having that status. Rather, it had an illustrative function, providing concrete examples that helped to elucidate what norms of *jus cogens* were and which norms might have such a status.

The list should be discussed and completed in the Drafting Committee and should be accompanied by commentaries explaining its purpose. The list should also be short, containing only those norms of general international law that were indeed most widely recognized as *jus cogens*. It should be based primarily, though not exclusively, on the practice of States, as indicated by the Special Rapporteur. Since *jus cogens* was based on the consent of the large majority of the international community of States as a whole, "practice" should be understood in a broad sense and should reflect the consent of the international community.

Opinions within the Commission were divided, but a compromise must be found. The Commission would send a poor signal if it, as the United Nations body responsible for the progressive development and the codification of international law, could not achieve a consensus among its members as to which norms of general international law were the most

widely recognized examples of peremptory norms. He hoped that the Special Rapporteur would be able to propose a compromise after careful consideration of the members' views, including his suggestion that the list should be placed in an addendum. In conclusion, he suggested that draft conclusion 24 should be submitted to the Drafting Committee.

Mr. Argüello Gómez said that he appreciated the Special Rapporteur's oral presentation and well-documented report. He had not been able to participate in the discussion of the current topic at the Commission's two previous sessions but, not wishing to revisit issues that had already been covered and agreed upon, he would limit his comments to the topic of the fourth report.

Like most of the speakers who had preceded him, he had doubts as to the existence of regional *jus cogens*, which seemed to be a contradiction in terms. So-called regional *jus cogens* norms did not derive from general international law, were not non-derogable and could not be invoked against peremptory norms of general international law. By their very definition, they were not peremptory norms of general international law.

What had, in fact, been recognized was the existence of customary rules within certain regions or among certain groups of States. The examples given by Mr. Nolte and other members as evidence of the existence of regional *jus cogens*, such as those concerning the practice of Latin American States, were not convincing. It was incorrect to state that, in Latin America, the prohibition of enforced disappearance and the prohibition of child execution were considered, or had been considered, to be merely regional *jus cogens* norms, since they were considered by the relevant regional bodies to be peremptory norms of general international law. Moreover, the prohibition of enforced disappearance could not be exclusively attributed to any single region.

The example of European law was also inappropriate, insofar as such law was not simply regional in nature. Europe was a union of States and, as such, had its own norms with which its members must comply, some of which were non-derogable so long as the union or agreement from which they emanated remained in force. He agreed with Mr. Petrič's comments regarding European norms in that regard.

He agreed with Mr. Reinisch that the concept of regional *jus cogens* was "highly theoretical", and did not consider it to be germane to the discussion of *jus cogens* proper. However, as the concept was addressed in the Special Rapporteur's report, something must be said about it. The Commission should clearly state that regional law was not relevant to the topic under discussion and that regional norms, whatever their nature and legal value, could not take precedence over *jus cogens* norms of general international law.

Chapter IV (B) of the report addressed the norms that had previously been recognized by the Commission as possessing a peremptory character. They were the norms that the Special Rapporteur had included in the proposed illustrative list in draft conclusion 24 as the most widely recognized examples of peremptory norms of general international law. Chapter IV (C) of the report proposed an additional list of possible norms of *jus cogens* not identified in the Commission's previous work.

A simple reading of the list of norms that had been excluded from the illustrative list should help the Commission to decide whether to include the proposed list, which supposedly contained only those norms that had received the Commission's seal of approval. It was hard to understand how, at the current stage of human development, norms such as the prohibitions of enforced disappearance, human trafficking, discrimination and terrorism, the right to life and environmental rights, all of which were mentioned in paragraph 123 of the report, could be excluded.

The right to life and the equality of human beings were the fundamental concepts underpinning all other peremptory norms, such as the prohibitions of aggression, genocide, crimes against humanity, slavery, torture, apartheid and all forms of discrimination. He therefore failed to understand how the Commission could claim that the right to life was not a *jus cogens* norm. If the reason was that some States imposed the death penalty, then surely the prohibition of torture should also have been excluded from the list, since some States openly practised it in the guise of "enhanced interrogation".

In his opinion, it would have been preferable to avoid raising the issue of an illustrative list altogether. Given that the Special Rapporteur's report was public, the fact that such a list had been proposed to the Commission could not be ignored. The decision that the members took in that regard would be noted and interpreted. The fact that other norms, such as the right to life, had been considered and, if the Special Rapporteur's proposal was accepted, had not been included in the list of peremptory norms would also be a matter of public knowledge.

Another problem posed by the list was that some topics had not even been considered for inclusion therein. In that regard, he agreed with Mr. Huang that the principles and norms of the Charter of the United Nations, the 1970 Declaration on Principles of International Law and the Five Principles of Peaceful Coexistence, such as respect for sovereignty, the prohibition of the use of force, and non-interference in the internal affairs of other States, were all peremptory norms of general international law. The fact that the Commission had overlooked those norms would not go unnoticed.

The Commission's inclusion of a particular norm in a list of norms having the status of *jus cogens* could not confer such a status on that norm, nor did it provide any added value. For example, he questioned whether the inclusion of the prohibition of torture in the list afforded it any added value.

It was not appropriate for the Commission to act as the arbiter of which norms were not of a peremptory nature. As stated in the report, some rules, such as those relating to the environment, might well have a *jus cogens* status that had yet to be accepted and recognized by the international community of States as a whole, with the result that they did not yet produce the effects in law of *jus cogens*.

The environment was a good example of an area that was indisputably governed by peremptory norms. No one held the view that damaging the environment was a lawful act. The question was therefore not whether norms relating to environmental damage were of a peremptory nature, but rather which norms should be applied. In his view, the Commission should not attempt to identify those norms.

Moreover, the Commission should not lose sight of the fact that the International Court of Justice was the authority that had a mandate, under article 66 of the Vienna Convention, to rule on the application or interpretation of articles 53 and 64 of the Convention. Ultimately, it fell to the Court to determine what the peremptory norms of general international law were in a given situation.

The report recognized that some peremptory norms were not clearly defined. By way of example, it did not resolve the issue of whether the right to self-determination was applicable solely in the context of decolonization or whether it also applied in cases of secession. The Special Rapporteur's conclusion in that regard was that a decision by the Commission to include the right to self-determination, however it might be defined, as one of the widely accepted norms of *jus cogens* would be justifiable.

There was some disagreement with that view, however. Various members had pointed out that some of the norms proposed for inclusion in the illustrative list were not clearly defined. They had presented that argument as an additional reason not to enter into a discussion on specific norms that could be set out in a list. He agreed with those observations. Mr. Murase had been right to say that the task of defining the norms should be addressed separately and that it would probably take years to complete.

In order to avoid establishing a list of norms that were, in some cases, not clearly defined, the Commission could consider drafting a list of topics of fundamental value to the international community; in other words, a list of topics deduced from the nature of the *jus cogens* norms mentioned in draft conclusion 24. Identifying topics and values that were protected, rather than norms, would be a way to avoid having to define complicated norms that would ultimately be defined over time by society itself.

Mr. Murphy and other members had pointed out that the Commission had not drawn up an illustrative list under the topic on the identification of customary international law, and that it should therefore avoid doing so for norms of *jus cogens*. However, the comparison was flawed. Rules of customary law were a source of international law and

were therefore innumerable, while norms of *jus cogens* were few in number, were not a source of law and were themselves derived from treaty law and customary law.

Some colleagues had sought to draw conclusions regarding the *jus cogens* status of some of the norms in the proposed list from the recent advisory opinion of the International Court of Justice in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, which had been requested by the General Assembly. They had pointed out, in particular, that the norms governing the right to self-determination had not been identified by the Court as norms of *jus cogens*.

In that regard, he wished to recall that in its request for the Court's advisory opinion, the General Assembly had made no reference to *jus cogens* or to peremptory rules of international law and had not asked the Court to rule on whether the right to self-determination was a norm of *jus cogens*. Moreover, none of the States that had participated voluntarily in the proceedings had requested the Court to rule on whether the right to self-determination was a norm of *jus cogens*.

The Court's practice was to avoid making pronouncements that were not strictly necessary for the purposes of its decisions. In the case in question, the General Assembly, in the second question of its request, had asked the Court to determine the consequences arising from the continued administration of the Chagos Archipelago by the United Kingdom if the process of decolonization of Mauritius was considered not to have been completed. On that point, the Court's task had been to rule on the effects produced by the norms under consideration, not on the nature of the norms themselves. It had ruled that the norms in question produced *erga omnes* effects; in other words, the same effects produced by *jus cogens* norms.

Even that view had been criticized by one of the Court's members, Judge Tomka, who, in a declaration annexed to the advisory opinion, argued that the Court, despite its statement that it was not dealing with a bilateral dispute between Mauritius and the United Kingdom, had made an unnecessary pronouncement on "an unlawful act of a continuing character" of the latter in its answer to the second question of the General Assembly, and that advisory proceedings were not an appropriate forum for making those kinds of determinations, especially when the Court had not been asked to make them and they were not strictly necessary for providing advice to the requesting organ. In the case in question, the Court had not been required to identify the right to self-determination as a *jus cogens* norm because it had not been requested to do so and such a finding had not been strictly necessary for the issuance of the advisory opinion.

Mr. Murphy had indicated that one possible reason that the Court had not identified the right to self-determination as a norm of *jus cogens* was that doing so could open the door to attempts to justify armed attacks against the Governments of States that were allegedly not respecting the rights of their inhabitants. Although it was clear that Mr. Murphy did not subscribe to that view, the example was an unfortunate one. The Court could not possibly have entertained the idea that stating that the right to self-determination was a peremptory norm could give rise to a right of States to intervene in the internal affairs of other States on the basis of disagreement with their political, economic, social and cultural systems.

Various colleagues had pointed out that the report of the Special Rapporteur relied too heavily on doctrinal opinions and did not make sufficient reference to State practice, which was what truly mattered. Part of the difficulty of the topic was the fact that *jus cogens* norms were, in many respects, derived from concepts of natural law and ethical values. Identifying State practice in that regard was difficult, since all States claimed to comply with the rules of international law, including *jus cogens* norms, but seldom did they declare, or consider themselves obliged to declare, that a particular norm had the status of *jus cogens*. Consequently, very little in the way of practice had been identified. One of the few situations in which a State might need to invoke the *jus cogens* status of a norm would be in order to impeach the validity of a treaty on the basis of articles 53 and 64 of the Vienna Convention. As far as he was aware, that had never occurred.

In the *Chagos Archipelago* case, various States that had participated in the proceedings before the Court, including Botswana, Brazil, Cyprus, Guatemala, Kenya,

Nicaragua, Nigeria, Serbia, South Africa and Vanuatu, had explicitly stated that self-determination was a *jus cogens* norm. In its oral statement before the Court, the African Union had stated that any act intended to separate the Chagos Archipelago from Mauritius should be considered null and void due to the *erga omnes* and *jus cogens* nature of the right to self-determination.

In conclusion, he said that the issue of the illustrative list proposed by the Special Rapporteur required further consideration and study. Some of the norms proposed for inclusion in the list needed to be defined more clearly, and the list omitted some important peremptory norms of general international law. For those reasons, draft conclusion 24 was not ready for submission to the Drafting Committee.

Ms. Escobar Hernández said that she wished to thank the Special Rapporteur for the presentation of his fourth report and to congratulate him on his excellent work. The report focused on two recurrent themes in the Commission's discussions of the topic of peremptory norms of international law (*jus cogens*): so-called regional *jus cogens* and the drafting of a list of *jus cogens* norms that would accompany the Commission's draft conclusions on the identification and effects of such norms. The Special Rapporteur had presented a well-documented and well-structured report that took due account of the opinions expressed by various members of the Commission at previous sessions. The report also referred to issues of methodology, particularly the question of how and when the commentaries to each of the draft conclusions that had already been adopted by the Drafting Committee should be presented. She did not wish to address that issue at the current meeting, since it would be dealt with more appropriately by the Working Group on methods of work.

With regard to so-called regional *jus cogens*, she wished to recall that, in a statement she had made at the Commission's 3421st meeting regarding the third report of the Special Rapporteur (A/CN.4/714), she had expressed serious reservations about the existence of regional *jus cogens* and had asked the Special Rapporteur to address the issue cautiously and comprehensively in his subsequent report, taking due account of the concerns expressed by various members of the Commission in that regard. She therefore welcomed the approach taken by the Special Rapporteur in his fourth report, which presented a thorough and well-founded study of the issue.

The Special Rapporteur had addressed the possibility of determining the existence of regional *jus cogens* norms from various perspectives, taking account of elements such as the concept of a "region" (which, as far as she was concerned, did not pose any major problems); the origin of norms of particular importance in a given regional system; the procedure for the establishment of such norms; their regional and universal effects; and the relationship between so-called regional *jus cogens* norms and norms of *jus cogens* in the strict sense, which, as pointed out by the Special Rapporteur and agreed upon by the Commission, were eminently universal in nature.

However, the report did not sufficiently address what, in her opinion, was the essential question relating to the concept of regional *jus cogens*: the question of its relationship to the concept of international public order, or, in the case at hand, "regional public order". The Special Rapporteur referred several times to the notion of public order, particularly the European public order as it related to human rights (and, indirectly, the inter-American public order), but he did not provide enough evidence to determine whether there were other sectors of the various regional legal orders in which elements of public order that were protected by regional *jus cogens* norms could be identified. Furthermore, the Special Rapporteur's emphasis on the treaty origin, or at least the treaty basis, of regional *jus cogens* norms had caused her to doubt whether such norms were truly peremptory norms of general international law.

There could be no doubt that some norms of the various regional systems were considered to have a higher status than others, or that regional legal systems did indeed exist within the international legal system as a whole. However, she continued to have serious doubts as to whether such norms were considered important because they could be qualified as peremptory norms of international law as defined in the Vienna Convention, which was the basis of the Commission's work on the topic. The identification of the

ultimate rationale for such “higher” regional norms and their effects would require an in-depth study, which did not accord with the purpose of the Commission’s work on the topic.

She therefore considered that the Special Rapporteur’s proposal not to include a draft conclusion on regional *jus cogens* was the right choice, not for reasons related to the Commission’s ability to rule definitively on the existence and nature of such “higher norms” of regional systems, but because the issue fell outside the scope of the topic at hand.

In his fourth report, the Special Rapporteur proposed a draft conclusion containing an illustrative and non-exhaustive list of the main norms of *jus cogens*, based essentially on the previous work of the Commission, decisions of the International Court of Justice and other international tribunals, and various decisions adopted by international bodies, in particular the General Assembly of the United Nations. He also drew upon legal doctrine, which was not in itself a bad idea, as that was precisely the area in which the greatest effort had been made to identify *jus cogens* norms.

Throughout the debate on the current topic, she had consistently argued that the elaboration of an illustrative list of *jus cogens* norms added value to the Commission’s work and that such a list should be included in the draft conclusions. In her view, the fact that the debate on *jus cogens* had lasted for years was attributable not so much to the nature of the concept itself, or even its effects, as to uncertainty over which norms were or were not *jus cogens* norms. It was hardly conceivable that the Commission could embark on the difficult exercise of defining what constituted a peremptory norm, how to identify one in practice and what effects such norms had on the international legal order, without giving examples of the norms in question, especially since the Commission had already done precisely that when considering the law of treaties, the responsibility of States for internationally wrongful acts and the fragmentation of international law.

Even if it was accepted, for the sake of argument, that the topic under consideration was of a purely procedural and formal nature, rather like the topic of identification of customary international law, that should not prevent the Commission from preparing an indicative list of *jus cogens* norms. There was a clear difference between the two topics in terms of the number of norms concerned. Moreover, the specific features of *jus cogens* were such that its substantive content and scope were impossible to ignore in the Commission’s work. States expected more from the Commission than a mere commentary on what might be considered *jus cogens* norms, since the Commission had previously given them precisely that. Since *jus cogens* was at the core of the current topic, the Commission could not, in the draft conclusions, remain silent on which specific norms fell into that category, unless, of course, the Commission wished to convey to the international community its doubts as to what those norms were, which might give the impression that it had doubts about the very existence of the concept of *jus cogens* and its effects on the international legal order.

It was true, as some colleagues had pointed out, that the Commission had not referred to specific examples in its work on the identification of customary international law, but she was not sure that it could take the same approach to the topic at hand without prejudice to the outcome. She was not comfortable with the possible consequences of taking the same approach or the way in which that might be interpreted. To illustrate her point, she would like to invite members to imagine asking their assistants to prepare, on the spot, a list of ten important norms of international law. Undoubtedly, the assistants would have no difficulty in doing so, and their lists would be very similar, if not identical. However, if the assistants were asked to do the same exercise with the norms of *jus cogens*, they would surely need more time, and the content of their lists would not be nearly as homogeneous. The primary reason was not that the technical rules for identifying customary norms were better understood; rather, it seemed to be that there was ambiguity in the way *jus cogens* was perceived, and even doubts about the very existence of peremptory norms of general international law.

She was not convinced that the best way forward was to take a lukewarm and hesitant approach limited to repeating the exercise of mentioning some examples of *jus cogens* norms in the commentaries. Not to include any reference in the draft conclusions to already existing norms of *jus cogens*, after several decades of work on the topic, could be

misinterpreted as meaning that the Commission had serious doubts about the very existence of that category of norms, since it was not able to provide even an illustrative list. In her view, the Commission was ready to take a step forward and move on from its previous position.

The form that the list would take was a different matter entirely. The issue was not whether to have or not to have a list, but rather what criteria should be followed in drawing it up. That would involve giving priority to non-controversial norms and accepting the fact that the list would necessarily be short. However, there was undeniably a risk that an illustrative list might be confused with an exhaustive or final list, or that the Commission might be seen as preferring some peremptory norms over others.

The real question was whether the Commission had time to prepare a list, given that the Special Rapporteur wished to complete the first reading of the draft conclusions at the current session. Probably the best option was to focus exclusively on the previous work of the Commission and on decisions of the International Court of Justice, which were undeniably authoritative. On the other hand, the usefulness of drawing on legal doctrine for the purpose of drafting the list was debatable, especially in view of the disparate positions held by different authors. The result of that exercise should be a short, non-exhaustive and illustrative list that would be included as a separate draft conclusion. Alternatively, but only as a last resort, the list could be referred to in a draft conclusion and included in an annex, as had been proposed by Ms. Galvão Teles.

Draft conclusion 24, as proposed by the Special Rapporteur, was a good starting point, but some drafting changes were needed, especially in the introductory paragraph, and the examples of norms included in the list would need to be considered carefully. While the examples on the Special Rapporteur's list were undoubtedly peremptory norms, the list did raise a number of problematic issues. For instance, she was not convinced by the Special Rapporteur's arguments regarding the formulation of the prohibition of the use of force. It was essential to determine whether the peremptory character of the norm referred to the prohibition of the use of force in any form or only the prohibition of aggression. Moreover, the expression "aggression or aggressive force" did not seem appropriate; on the contrary, it introduced uncertainty by making no distinction between the prohibition of the use of force and the prohibition of aggression.

In relation to the right to self-determination, she was concerned that the Special Rapporteur saw its inclusion in the list as independent of the scope of that right. That seemed to her to be an extremely dangerous approach, given the different interpretations of that right and the important practical consequences it could have for States and peoples. Either any reference to the content of that right should be avoided, or its scope should be defined, which would be impossible to do at the current time. However, that concern in no way affected her conviction that the right to self-determination was without doubt a peremptory norm of general international law.

The terminology to be used in relation to the basic rules of international humanitarian law presented fewer problems, as did the express mention in the list of the prohibition of both apartheid and racial discrimination and the prohibition of slavery, together with the prohibition of trafficking in persons. In those cases, the issues raised by members of the Commission could largely be resolved in the commentary.

With regard to the possible inclusion in the list of other norms mentioned by the Special Rapporteur, it should be emphasized that the so-called "candidates" for classification as norms of *jus cogens* differed widely from each other and were thus difficult to evaluate in comparative terms. Moreover, as the Commission had not previously considered them from the perspective of *jus cogens*, it had no solid basis for including them on the list. While that did not prevent the Commission from examining such "candidates" for the purposes of inclusion on the list, to do so would take time, which the Commission did not have. The question of new norms of *jus cogens* could be better addressed in the commentary. She wished to stress that the Commission needed to proceed carefully in drafting the commentary to the draft conclusion, in order to avoid the many risks and problems that had been mentioned in the debate.

She trusted that the Special Rapporteur's excellent work would enable the Commission to complete the first reading of the draft conclusions during the current session. And, of course, she was in favour of referring the draft conclusion containing the indicative list of norms of *jus cogens* to the Drafting Committee.

Mr. Ruda Santolaria said that he had read with great interest the extensive references to the jurisprudence of national and international courts, which reflected the diligent and rigorous work carried out by the Special Rapporteur. The references included cases dealt with in regional human rights systems and even a ruling handed down by the Constitutional Court of Peru on 12 August 2005 in relation to enforced disappearance. In another important ruling, issued on 21 March 2011, that Court had alluded directly to the norms of *jus cogens*, the fundamental right to the truth and the imprescriptibility of crimes against humanity.

On the question of regional *jus cogens*, he fully agreed with the Special Rapporteur that the concept was difficult to reconcile with the concept of *jus cogens* proper, which, by its very nature, was universal. Peremptory norms of general international law that were accepted and recognized by the international community as a whole were norms of such overriding importance that they were binding without the need for consent and were non-derogable.

In that respect, State practice reflected a conception of *jus cogens* that was based on a hierarchy of norms and was intended to safeguard, via primacy, a universal common core of human values. Like the Special Rapporteur, he believed that, rather than proposing the existence of regional *jus cogens*, it would be more accurate to speak of norms that had a special status for a region or group of States and that were considered more important than other norms by members of the region or group. At the same time, a norm of *jus cogens* could originate in a process initiated in a given region. He saw no particular difficulties in identifying which States belonged to a region.

He understood that regional norms did not conflict with peremptory norms of general international law (*jus cogens*), since, in the hypothetical event that such a conflict arose, the latter would prevail. In most cases, such regional norms were binding for the States of the region concerned and represented further advancements or developments over and above what constituted *jus cogens* proper, the latter being a sort of universal minimum to be preserved at all costs. However, since such regional norms were neither peremptory nor non-derogable, it was quite possible that the subjects of international law affected by those norms might replace them with treaty-based or customary norms.

Moreover, even though the Inter-American Commission on Human Rights had stated, in paragraph 56 of its resolution No. 3/87 of 22 September 1987, in *Roach and Pinkerton v. United States*, that the members of the Organization of American States recognized a norm of *jus cogens* which prohibited the State execution of children, the Commission itself had not reiterated that idea when, years later, it had ruled on a similar case. In fact, in paragraph 84 of its report No. 62/02 of 22 October 2002, in the case of *Michael Domingues v. United States*, it had expressed the view that "a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime". It had gone on to state, in paragraph 85, that the rule had been "recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*" that could not "be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise". He therefore supported the Special Rapporteur's proposal not to devote a draft conclusion to regional *jus cogens*, but to address it in the commentary.

He shared the Special Rapporteur's concerns, as expressed in paragraph 52 of the report, as to whether "the provision of an illustrative list would substantially change the nature of [the] topic", which was concerned with "methodological and secondary rules", not "the substantive or normative rules in different areas of international law". As the Special Rapporteur noted, although all members of the Commission could agree that genocide was *jus cogens*, there might be other norms that were not as clear and whose inclusion in the list might require an in-depth study.

He proposed that draft conclusion 24 should not be retained as currently drafted, but that some elements of the list should be included in the commentary as representative examples of peremptory norms of general international law (*jus cogens*), with a clear indication that the list was not exhaustive. The norms that could be mentioned might include the prohibition of genocide, the prohibition of apartheid and racial discrimination, the prohibition of crimes against humanity and the prohibition of torture. Some subtle distinctions would need to be drawn when referring to the prohibition of the use of force, the prohibition of aggression and the prohibition of the aggressive use of force. The prohibition of slavery and the slave trade was undoubtedly a peremptory norm, but, as noted by other members of the Commission, there had as yet been no analysis of whether that prohibition extended to current tragedies such as human trafficking.

It would not be appropriate, in his view, to mention the right to self-determination without specifying its scope. There was a need to clarify whether it applied only in cases of decolonization or foreign occupation or whether it could lead in some situations to secession, which was a very sensitive issue from the perspective of preserving the territorial integrity of States. Nor would it be appropriate to include the “basic rules of international humanitarian law”, since, as the Special Rapporteur rightly pointed out, there were obvious uncertainties involved in determining which rules of international humanitarian law qualified as the most “basic” and met the criteria for being considered *jus cogens*.

He agreed that the Special Rapporteur’s proposal should be referred to the Drafting Committee. He hoped that the first reading could be completed at the current session and that the second reading could be completed by the end of the Commission’s current five-year term, in 2021.

The meeting rose at 12.55 p.m.