International Law Commission
Seventy-first session (first part)
Provisional summary record of the 3463rd meeting
Held at the Palais des Nations, Geneva, on Wednesday, 15 May 2019, at 10 a.m.

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Peremptory norms of general international law (jus cogens) (continued)
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
         Mr. Ouazzani Chahdi
         Mr. Park
         Mr. Petrič
         Mr. Rajput
         Mr. Reinisch
         Mr. Ruda Santolaria
         Mr. Saboia
         Mr. Tladi
         Mr. Valencia-Ospina
         Sir Michael Wood
         Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission
The meeting was called to order at 10.05 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 5) (*continued*)

(A/CN.4/727)

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. Laraba said that the Special Rapporteur was to be commended on his fourth report and his treatment of the two issues covered in it. Overall, he agreed with the Special Rapporteur’s analysis of regional *jus cogens* but continued to have doubts as to the relevance of an illustrative list of norms of *jus cogens*.

On the question of regional *jus cogens*, dealt with extensively in paragraphs 21 to 46 of the report, the Special Rapporteur confirmed the reservations he had hinted at since his first report and drew the logical consequences in paragraph 47: the notion of regional *jus cogens* did not find support in the practice of States and it was not necessary to propose a draft conclusion on the question, as an explanation in the commentary would suffice. He supported that pragmatic solution but would urge caution in the drafting of the commentary.

The Special Rapporteur noted in paragraph 22 that, in the course of the debate of the Commission’s report in 2018, States had generally rejected the possibility of regional *jus cogens*. According to the topical summary of the discussion held in the Sixth Committee, a number of delegations had not supported the concept of regional peremptory norms, and it had also been suggested that the debate on the issue should be held in a cautious manner so as not to jeopardize norms that were universally recognizable and applicable. Most delegations, such as Finland, had made relatively cautious, moderate statements and expressed reticence on the question; only Greece had firmly dismissed the possibility of regional *jus cogens*. It might thus be going too far to conclude that States had rejected the possibility outright. Indeed, the Special Rapporteur had made a more nuanced analysis of State views at a later stage.

Concerning the literature, in paragraph 42 the Special Rapporteur concluded that “it would be tempting to dismiss Tunkin’s arguments as *passe*”. In his view, it was not necessary to refer to them at all, as Tunkin’s later work, including the courses he had given at The Hague Academy of International Law in 1975 and 1989, had shown an evolution in his thinking and highlighted the relativity of analyses based on particular situations and contexts.

As the Special Rapporteur rightly pointed out in paragraph 31 of the report, “the fact that a set of rules binding on a particular community of States are, for that community of States, of special status does not make that set of rules *jus cogens*, regional or otherwise”. The link between those rules and *jus cogens* was often the result of academic speculation. The debate that had taken place in Africa in the late 1960s and early 1970s was a good example in that regard. That debate had centred on the existence of African international law, a hypothesis that had enjoyed considerable doctrinal popularity, some writers having concluded that *jus cogens* norms, such as the right to self-determination, territorial integrity and the inviolability of borders, had emerged in African international law. To a certain extent, the International Court of Justice had echoed that mood in paragraph 20 of its judgment of 22 December 1986 in the case concerning the Frontier Dispute (*Burkina Faso/Mali*), in which it had stated that it could not “disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers. Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties.” However, any hopes of reigniting the debate on the existence of African *jus cogens* were dashed later in the same paragraph, as the Court had stated that “the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.” It added that the impact of *uti possidetis* was not limited to Africa but must be seen as the application in Africa of a
rule of general scope. In subsequent decisions, such as the judgments of 2005 in *Frontier Dispute (Benin/Niger)* and of 2013 in *Frontier Dispute (Burkina Faso/Niger)*, the Court had avoided the issue entirely. In his general course at the The Hague Academy in 2004, Judge Bedjaoui had concluded that there was no regional Islamic legal order, given the progress made in the formation of international legal norms and, in particular, the emergence of *jus cogens*.

He therefore supported the solution put forward by the Special Rapporteur in paragraph 47 of the report, although perhaps greater flexibility was required and it might not be necessary to include a commentary.

The question of an illustrative list of *jus cogens* norms had grown in importance and risked overshadowing other issues. The Special Rapporteur had repeatedly stressed the difficulties involved in drawing up such a list, yet in introducing his first report had argued that the Commission could not decide not to provide an illustrative list simply because some might interpret it as a *numerus clausus*. At the same time, he had noted that deciding to provide an illustrative list might blur the fundamentally process-oriented nature of the topic by shifting the focus towards the legal status of particular norms. In the current report, the Special Rapporteur expressed the view that, while that was a compelling reason for not having an illustrative list, it would be a missed opportunity if the Commission did not present “something”. Ultimately, the Special Rapporteur had decided to draw up a list of norms previously identified by the Commission in a draft conclusion rather than in the commentaries. Given the difficulties the Special Rapporteur had highlighted, in his view it would have been preferable to stress in the title and body of the draft conclusion that the list drew on the Commission’s previous work.

The Special Rapporteur’s analysis of the Commission’s commentary to draft article 50 of the 1966 draft articles on the law of treaties in paragraph 56 of the report raised a number of questions. The Special Rapporteur simply recalled that the commentary stated that the Commission had “decided against including any examples of rules of *jus cogens* in the article”. However, it was important to also bear in mind the two reasons given at the time for doing so: “First, the mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles.” The two reasons cited touched on matters of principle that went beyond the topic at hand and could even be considered timeless, as they concerned a fundamental methodological problem. In his view, it could not be said that those concerns were no longer relevant and that the idea of drawing up an illustrative list had gained legitimacy.

As to the content of the illustrative list, he wondered whether it was even possible to draw up a single list. First, the qualifier “illustrative” was problematic, as it would be extremely difficult to ensure that the list was not seen as exhaustive or, at the very least, as establishing some sort of hierarchy of *jus cogens* rules. The fact that the list was illustrative would not prevent some from questioning why certain rules had not been included; there would inevitably be criticisms of the choices made. Indeed, all States could draw up their own lists of *jus cogens* norms. For example, articles 193 (4) and 194 (2) of the Swiss Constitution prohibited the violation of mandatory provisions of international law. In 2017, the Swiss Federal Council had clarified that, in Swiss practice, the mandatory provisions of international law comprised peremptory norms of international law (*jus cogens*) and the non-derogable rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and the International Covenant on Civil and Political Rights. Under the Algerian Constitution, meanwhile, the right to self-determination had always been a peremptory norm par excellence. Thus, if States were called upon to draw up their own lists, they would do so on the basis of very different and complex priorities.

As to the norms to include in the list, there were clearly differing views in the Commission and, in his opinion, only an in-depth study would help clarify matters and reconcile the various points of view. However, he understood that, in addition to the time
constraints, there was also the risk that such a study would lead into another topic and he would thus not insist on that point. The norms not included in the proposed list presented methodological problems and it was not clear what was meant, in paragraph 138 of the report, by them enjoying “some support”.

He recommended referring draft conclusion 24 to the Drafting Committee with the suggestion to follow the Special Rapporteur’s initial proposal to refer generally to the Commission’s previous work on the matter. Even Ms. Galvão Teles’s attractive proposal would not resolve the problems inherent in the notion of an illustrative list.

Mr. Grossman Guiloff said that, in his interesting and well-researched report, the Special Rapporteur addressed sensitive topics in a transparent manner, providing arguments for each of his proposals while also acknowledging the difficulties involved and giving a good summary of the views expressed by States.

Concerning the possible existence of regional _jus cogens_, he fully agreed with the Special Rapporteur that the notion was not currently supported by sufficient State practice. However, he did not agree with the arguments provided to reject the notion at the theoretical level. He shared the view expressed by several other colleagues that the issue of regional _jus cogens_ was not within the scope of the topic under consideration; however, if the Commission wished to provide reasons to justify its exclusion, as proposed by the Special Rapporteur in paragraph 47, it should exercise caution so as not to close the door to possible future developments in that area.

The Special Rapporteur recalled that the notion of regional _jus cogens_ would not be compatible with the definition of peremptory norms in article 53 of the Vienna Convention, which required those norms to be norms of general international law. Some members had shown openness towards the idea of certain norms enjoying special status within a region with effects that went beyond mere treaty or customary obligations. Although there did not need to be a hierarchical relationship between those rules and other norms, the special status that they enjoyed could provide a starting point for the development of regional _jus cogens_ norms in the future, provided they were not in conflict with the notion of _jus cogens_ embodied in the Vienna Convention.

In that sense, if a group of States considered that a given norm enshrined special values that needed to be protected, those States could have compelling reasons to vest it with special effects. For many Latin American States, an example could be the prohibition of reinstating the death penalty if it had been abolished. Needless to say, a State that had accepted the peremptory status of a rule could not derogate from it, unless the rule was modified by all the States bound by it.

In paragraph 26 of the report, the Special Rapporteur asserted that there were two main problems with the notion of regional _jus cogens_: the lack of State practice supporting the concept and the existence of theoretical difficulties related to it. According to the explanations given in the following paragraphs, the notion of regional _jus cogens_ was not possible even at the theoretical level. He acknowledged that regional _jus cogens_ norms were not consistent with the definition in article 53 of the Vienna Convention, but that did not necessarily exclude the possibility of conceiving another category of rules vested with analogous effects, if such an outcome was sanctioned by general international law.

Indeed, the very concept and effects of _jus cogens_ norms were matters governed by customary international law, an approach that the Commission had implicitly supported in its articles on the responsibility of States for internationally wrongful acts and in the ongoing consideration of the current topic. In any event, as far as he was aware, no State maintained that that category of norms existed only in the narrow framework provided by the Vienna Convention.

Turning to the Special Rapporteur’s concerns regarding the potential for regional _jus cogens_, he said that the reasoning applied in paragraph 28 of the report appeared to be based on two premises: first, that the consent of States was never relevant for the purposes of _jus cogens_; and second, that rules of “regional customary international law” should be applicable to all the members of a given region, unless a State had objected to being bound
by them. Although he understood the point that the Special Rapporteur was trying to make, he was not persuaded by either premise.

According to one legal scholar, Professor Ulf Linderfalk, the first premise took for granted that just because the creation of a rule of positive law required the express or implicit consent or acquiescence of those meant to be bound by that rule, it could not be non-derogable. Indeed, the initial premise of paragraph 28 ignored the fact that peremptory norms of general international law had to be accepted and recognized by the international community as a whole, a requirement that showed the importance of express and implicit consent in the creation of such rules. Even if a State explicitly objected to the peremptory character of a given norm, consent had a role to play. As eloquently explained by Professor Linderfalk in 2013 in the *Nordic Journal of International Law*:

It is not decisive whether that state has consented to be bound by that rule or not. The important question is whether the [State] has consented to, or acquiesced in, the relevant law-creating processes. Arguably, states give their consent to, or at least acquiesce in, the process creating customary international law, and a fortiori *jus cogens*, by claiming to be recognised as states and by participating in international legal relations.

If the Commission decided that consent was irrelevant for the purposes of creating peremptory norms, it would be adopting a natural law approach, which he did not believe it necessarily wanted to do. The concept and effects of *jus cogens* were embedded in positive law, to which States had consented.

Regarding the second premise, after expressing his concern that a State should not be bound by “regional norms” to which it had not consented – a concern that he shared – the Special Rapporteur seemed to assume that certain rules of customary international law could become binding on a given State purely on the basis of the State’s geographical location. However, one issue that the Special Rapporteur did not properly address was that rules of particular customary international law needed to comply with a fundamental requirement in order to become binding on a State. The matter had been dealt with by the Commission in its draft conclusions on identification of customary international law. It was correctly asserted, in draft conclusion 16 (2), that a rule of particular customary international law would exist if “there is a general practice among the States concerned that is accepted by them as law (opinio juris) among themselves”.

In other words, such a rule would be binding only upon those States that had consented to it, which was a logical requirement if the norm in question had not gained enough acceptance to become universal. The requirement had been acknowledged by the International Court of Justice in the *Asylum (Colombia /Peru)* case, in which the Court had found that “the Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party”. That would be the case when the State concerned abided by the usage in question and accepted it as law.

In that context, the persistent objector rule was of no relevance for the purposes of particular customary international law, whether regional, local or other, since no rule of that kind would become binding on a State on the sole basis of its geographical location.

A similar rationale would be applicable if peremptory norms could possess a regional or other particular scope. If a norm had not attained enough acceptance to become a peremptory norm of general international law, it would not seem reasonable to impose it, with the status of non-derogability, on a State that did not accept its fundamental importance, purely on account of the State’s geographical location. Therefore, a rule of that kind could have a peremptory character only for those States that had accepted it as non-derogable. If the norm later became peremptory under the terms of article 53 of the Vienna Convention on the Law of Treaties, all States would be bound by it, even objectors.

It should be remembered that *jus cogens* norms were most frequently based on rules of customary international law. Therefore, a rule of particular customary international law could become universally applicable and even attain *jus cogens* status. Similarly, if the notion of regional *jus cogens* were incorporated into international law in the future, it would be perfectly possible for a rule of particular customary international law to become peremptory for the States bound by it.
For the reasons that he had set out, he did not agree with the two premises in paragraph 28 of the report, and believed that the necessary relationship between State consent and regional *jus cogens* was insufficient to preclude the existence of the latter, all the more so if one considered that State consent already played an important role in the creation of peremptory norms of international law.

A second conceptual difficulty was addressed in paragraph 29 of the report, in which the Special Rapporteur asserted that the concept of regional *jus cogens* normally “depend[s] on and will, for the most part, require the agreement on the part of the States for [that] particular purpose”, before explaining that “the concept of regional *jus cogens* would create the conceptual and practical difficulty of knowing which States were bound by a particular norm of regional *jus cogens*”. However, that problem would not arise, since, as already explained, norms of regional *jus cogens* would become binding only on those States that accepted and recognized them as non-derogable.

A third conceptual objection to regional *jus cogens*, which was examined in paragraph 30 of the report, could also be easily resolved. The Special Rapporteur stated that the main examples of regional *jus cogens* norms were based on treaties, arguing that “as treaty systems based on the agreement of the parties to those regional systems, it is unclear to what extent those could generate norms of *jus cogens* properly so called”. In that regard, he wished to recall his previous assertions concerning the role of consent in the creation of *jus cogens* norms, and specifically that the existence of consent in law-creating processes was precisely what had allowed some rules to attain a peremptory character. With that in mind, consent would always be necessary for a State to be bound by a rule of regional *jus cogens*, and nothing would prevent such consent from being manifested through a treaty. Similarly, the Drafting Committee, by provisionally adopting draft conclusion 5 (2), seemed to have accepted that States could consent, by means of a treaty, to the creation of peremptory norms of general international law.

In any event, the Special Rapporteur acknowledged a further possible solution, namely that “these regional treaty norms could lead to the evolution of norms of *jus cogens* properly so called”. He was referring to the situation in which the norms concerned became customary rules of general international law and were accompanied by *opinio juris cogens*. If regional *jus cogens* norms came to be recognized in the future, they could also emerge from treaty regimes in a similar manner.

A fourth objection was mentioned by the Special Rapporteur in paragraph 32 of his report, in which he asserted that “to the extent that norms of regional *jus cogens* are deemed to flow from the free exercise of the will of States to constrain their sovereignty, then these are not norms of *jus cogens* properly so called”. That assumption was also problematic, because it again rejected the relevance of consent for the creation of regional *jus cogens* norms. Consequently, the argument could be countered with the same points that he had raised in relation to the two premises in paragraph 28 of the report.

In any event, it was clear that regional *jus cogens* norms could never prevail over peremptory norms of general international law, as Mr. Nolte and other members had rightly observed. For the reasons that he had given, he believed that the theoretical existence of regional *jus cogens* norms should not be readily excluded, as general international law might come to recognize the notion in the future. Therefore, while he concurred with the Special Rapporteur that the notion was not currently supported by State practice, he agreed with other members that the Commission should be very careful if it decided to address the matter in the commentaries. He believed that the draft conclusions should be silent on the issue of regional *jus cogens*. If an approach like the one supported by Mr. Rajput and Mr. Petrić prevailed, he could, at most, agree to mention, in the commentaries, that the concept was not currently supported by State practice, but that such a conclusion was without prejudice to future developments.

Turning to chapter IV of the report, concerning the “illustrative list” proposed by the Special Rapporteur, he said that there was a crucial decision to be made. He wished to thank the Special Rapporteur for summarizing the main arguments in favour of each position, which had made it possible to have an open and rich debate. Having carefully analysed many of the methodological concerns expressed by other members of the Commission, he shared the view that any decision to include examples of *jus cogens* norms
should not undermine the draft conclusions or the methodological standards that the Commission had adopted in that regard.

He strongly believed that the Commission should draw up a non-exhaustive list. It could mention, explicitly, that the list contained only examples that it had identified as peremptory norms in its previous work. That would address some of the methodological concerns raised by other members, and would allow the Commission to provide the examples that were needed in order for it to be consistent with its past work. It seemed that such an approach could be accepted by those who had initially rejected the idea of a list.

While he acknowledged the difficulties involved in compiling an illustrative list of *jus cogens* norms, he continued to believe that a list would be extremely useful, an opinion that had been echoed by several States. As Ms. Galvão Teles had rightly pointed out, if the Commission failed to mention any examples whatsoever, the consistency of its previous work would be called into question, given that it had provided examples in the context of other topics. He agreed with Mr. Petrič that it would be inconceivable for the Commission to remain silent on the *jus cogens* character of the prohibitions against genocide and torture. In the same vein, as Mr. Aurescu had put it, was the Commission prepared to challenge its previous work? It could find ways of watering down that work, but why should it?

He found the arguments presented by the Special Rapporteur in favour of including a non-exhaustive list in the draft conclusions very persuasive, especially bearing in mind the proposal from the Netherlands referred to in paragraph 54 of the report. In that sense, it was important for the list to include the examples found in the commentaries to articles 26 and 40 of the Commission’s articles on responsibility of States for internationally wrongful acts, which were also non-exhaustive. Those examples had been confirmed by extensive State practice, of which the Special Rapporteur also provided good examples.

One of the problems that had repeatedly been raised in opposition to the proposed list was the ambiguity of some of the rules put forward for inclusion, such as the prohibition of the threat or use of force. However, all rules were ambiguous to some degree and left room for interpretation. For instance, it was accepted that rape could constitute torture, but that had not always been the case in the past. The idea that ambiguity should prevent a norm from attaining the status of *jus cogens* went against the idea that the law was open-ended by nature, as noted by other members of the Commission.

In addition, if the Commission were to include in the list those norms that it had previously identified as widely recognized *jus cogens* rules, he saw no need to address the specific scope of those rules. As many other members of the Commission had noted, even some “broad” rules, like the prohibition of the use of force, had a core that could not be overlooked.

It would be particularly problematic if a decision not to draw up a list had the impact of weakening the *jus cogens* status of certain norms, particularly in the absence of a universal judicial organ endowed with compulsory jurisdiction that was always open to engaging in the identification of such norms. A failure to provide examples would give rise to important questions to which satisfactory answers could not be found in the context of horizontal discussions shaped by the conflicting views of States.

Turning to the content of the proposed list, he said that he wished to make only a few comments about the prohibition of torture. Although he acknowledged that there were time constraints, he considered that including references to decisions of the human rights treaty bodies and relevant thematic special procedures mandate holders would enrich the analysis contained in the report. Specifically, he believed that it was important to refer to the April 2014 report (A/HRC/25/60) of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, in which it was stated that “the prohibition against torture and other cruel, inhuman or degrading treatment or punishment enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law”. Furthermore, the Committee against Torture had asserted, in its general comment No. 2, on the implementation of article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States parties, that “article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that *no exceptional circumstances whatsoever* may be invoked by a State
Party to justify acts of torture in any territory under its jurisdiction”. In the same general comment, it was argued that “the provisions of article 2 reinforce this peremptory *jus cogens* norm against torture and constitute the foundation of the Committee’s authority to implement effective means of prevention”. The general comment had been the subject of extensive consultations, and he could find no evidence of any State holding that the prohibition against torture was not a *jus cogens* norm.

In addition, in paragraphs 8 and 9 of its general comment No. 4, the Committee against Torture had recalled that the prohibition of torture, as defined in article 1 of the Convention, was absolute. In its decision in the case of *Guengueng et al. v. Senegal* (communication No. 181/2001), the Committee had noted that the prohibition of torture had a peremptory character. In that case, it had stated that Senegal had included torture in its Criminal Code as an international crime arising from *jus cogens*, pursuant to article 4 of the Convention.

In its general comment No. 20, on article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee had stated that the prohibition against torture allowed no limitation.

Lastly, it was important to mention probably one of the most emblematic cases concerning the absolute prohibition of torture: *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*. In that case, the House of Lords of the United Kingdom had granted the extradition of the former Chilean dictator General Augusto Pinochet to Spain to face charges of torture, finding, among other relevant considerations, that “the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed”.

He wished to finish by thanking the Special Rapporteur for his diligent and valuable work, which had provided an excellent basis for the discussion within the Commission.

He supported the referral of proposed draft conclusion 24 to the Drafting Committee.

**Mr. Zagaynov**, welcoming the Special Rapporteur’s fourth report, which provided a solid basis for the Commission’s debate, said that he supported the Special Rapporteur’s view that it would be inadvisable to formulate a draft conclusion on regional *jus cogens* norms. The latter subject was outside the framework of the current topic, which related to peremptory norms of general international law. Nevertheless, the Special Rapporteur’s report provided ample food for thought on the role of regions in the formation of peremptory norms in a broader context. In analysing such norms as the prohibition of enforced disappearance, the principle of *non-refoulement* and the principle of non-discrimination and their eligibility for *jus cogens* status, the Special Rapporteur mainly referred to the practice of Latin American States and of the Inter-American Court of Human Rights; and in his analysis of others, such as the right to life and the right not to be arbitrarily deprived of life, he relied on the practice of the European system of rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Perhaps an independent study of such issues could be carried out.

Regarding the illustrative list of *jus cogens* norms, he shared the opinion expressed by a number of other members that the Commission should not produce such a list as part of its work on the present topic. Although the drawing up of an illustrative list had been a subject of much discussion and controversy since the Commission had taken up the topic, the identification of specific peremptory norms was not the main purpose of the Commission’s work in the current context. Accordingly, a separate draft conclusion containing an illustrative list of specific peremptory norms did not seem necessary within the framework of a topic that was concerned mainly with methodology. In fact, putting forward such a list might falsely imply that the ultimate purpose of the Commission’s work on the topic was precisely the development of a list, whether it was included in a draft conclusion or in an annex. In that case, any practical, methodological guidance relating to the identification of *jus cogens* norms would appear less important. In his view, each of the norms included in the illustrative list warranted a separate study in respect of their content and their consistency with the criteria established by the Commission. To his knowledge, no such in-depth study had been undertaken in the past. At the same time, it was important
to recall that the consequences of referring to the norms in the commentaries to the articles on responsibility of States for internationally wrongful acts and of referring to them in a separate draft conclusion on the present topic were very different propositions.

Governments and judicial bodies were known to pay close attention to the Commission’s work. Therefore, the Commission’s decision with regard to the illustrative list could significantly influence the future development of the concept of peremptory norms under international law. Regardless of the title the Commission gave to such a list, the norms included therein would be perceived as having passed the Commission’s test, and those that were not included as having not yet achieved *jus cogens* status. In the future, if a person wished to challenge the peremptory nature of a norm, he or she could refer to the fact that it was not included in the list approved by the Commission. As Mr. Petrič had pointed out, the Commission should not act as legislator in the area of *jus cogens*.

With regard to the norms included in the proposed illustrative list, as had been pointed out by several other members, the Commission had, at various times, referred to specific norms and their peremptory nature; in addition to those included in the list contained in draft conclusion 24, reference could be made to the equality of States, the prohibition of piracy, and respect for human rights, all such examples being based on the commentary to draft article 50 of the 1966 draft articles on the law of treaties. As pointed out by the Special Rapporteur in his report, while the commentary to draft article 50 was rather ambiguous as to the status of such norms, the commentary to draft article 41 clearly indicated that they had attained the status of *jus cogens*. In his view, the differences in the formulations of 1966 and 2001 in that respect were not major. In any event, no in-depth study had been carried out in that connection.

It was important to recall that, in 2001, the Commission had approached the question precisely from the point of view of State responsibility, which necessarily had an impact on the selection of norms mentioned in the commentary. At the same time, had the matter been examined in a broader context, a different set of norms might have been identified. He shared the point of view expressed in the 1966 commentary that, if examples were to be provided, it would be undesirable to appear to limit the scope of an article – or draft conclusion, in the context of the current topic – to cases involving acts which constituted crimes under international law. At the very least, the question arose as to whether the Commission should, in referring to the most fundamental rules governing relations between States, focus almost solely on the prohibition of the most serious crimes.

Noting that a number of members of the Commission had mentioned the importance of the principles laid down in the Charter of the United Nations and further developed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, he said that he wished to recall that the Commission had decided to examine specifically the question of norms of *jus cogens*, as the term “norms” encompassed both rules and principles. If the Commission were to consider an illustrative list, it would be appropriate to analyse within that context the role of the Charter of the United Nations and its purposes and principles, without limiting itself to the principles of the non-use of force and the right to self-determination.

A number of the authors, including those cited in the Special Rapporteur’s report described the major role and significance of the Charter of the United Nations in the development of the concept of *jus cogens*. The Commission itself had recognized the essential role played by the Charter in establishing the concept of peremptory norms of *jus cogens*: for example, in the draft commentary to draft article 19 of the draft articles on State responsibility, adopted on first reading in 1976, it had been noted, in the context of *jus cogens* norms, that “there is no need to emphasize the decisive influence which the Charter of the United Nations has had on this development of international law, especially those provisions of the Charter which set out the purposes and principles of the United Nations”. Although that draft article had been deleted subsequently in view of unresolved differences among members, the Commission’s conclusions in respect of the role and significance of the Charter of the United Nations for the concept of *jus cogens* nevertheless continued to hold true.
The Charter had most influenced the development of peremptory norms through the case law of international courts, for example, in the advisory opinion of the International Court of Justice on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), the Court had noted that the policy of apartheid and racial discrimination constituted a denial of fundamental human rights that was a flagrant violation of the purposes and principles of the Charter. In his report, the Special Rapporteur had concluded that, based on that advisory opinion, the International Court of Justice would likely consider the prohibition of apartheid and racial discrimination as an example of *jus cogens*. Another noteworthy example was the judgment of the International Court of Justice in the case concerning East Timor (Portugal v. Australia), which stated, among other things, that the principle of self-determination of peoples had been recognized by the United Nations Charter and in the jurisprudence of the Court. In another case, the Court had singled out the principle of non-intervention and noted that it had been presented as a corollary of the principle of the sovereign equality of States. In sum, the crucial role of the Charter of the United Nations and its purposes and principles in establishing *jus cogens* norms in general international law warranted further study in seeking to identify potential candidates for such norms.

Mr. Park, in his statement at the Commission’s 3459th meeting, had already drawn attention to the fact that the list of crimes the prohibitions of which were considered norms of *jus cogens* differed significantly from those that had caused so much controversy in respect of draft article 7 of the draft articles considered under the topic “Immunity of State officials from foreign criminal jurisdiction”. Indeed, the Commission had decided not to include, in the list of crimes in respect of which immunity *ratione materiae* must not apply, the crimes of aggression, slavery and racial discrimination – the very crimes the prohibitions of which were now being proposed as *jus cogens* norms. Yet both draft articles were being proposed for referral to the General Assembly. He was not calling for a reconsideration of the Commission’s decision in respect of draft article 7, nor did he believe it necessary that the respective lists proposed under the topic of immunity of State officials from foreign criminal jurisdiction and the current topic should be identical. Nevertheless, a comparison of the methodology used in the two topics called into question the Commission’s preparedness to formulate an illustrative list of *jus cogens* norms.

He shared the reservations expressed by a number of Commission members regarding chapter IV, section C, of the Special Rapporteur’s report, on other possible norms of *jus cogens*. The identification of such norms required a more detailed analysis of State practice. One example of such practice was the decisions of the Supreme Court of the Russian Federation in 2003 and 2007, respectively, to recognize as peremptory norms universally recognized principles of international law, including the principle of universal respect for human rights, good-faith implementation of international commitments and the jurisdictional immunity of States and their property. He was not proposing that such principles should necessarily be included in the Commission’s conclusions; however, further exploration of the practice of States and of domestic courts in that regard was warranted.

Regarding the content and scope of the norms included in the illustrative list that had been proposed by the Special Rapporteur, he agreed that a more in-depth study emphasizing State practice was required in respect of certain proposed peremptory norms, namely the right to self-determination, the basic rules of international humanitarian law and the prohibition of apartheid and racial discrimination. It would be difficult to conclude that a given norm was a *jus cogens* norm without agreeing first on its content and ensuring that it had achieved *jus cogens* status in practice. Furthermore, it was important to answer the question raised by a number of Commission members relating to the application of the concept of the prohibition of aggression or the use of force in accordance with the Charter of the United Nations. The Commission’s position on the matter would be of great significance and the issue warranted a detailed discussion. In his view, it was clearly preferable for the Commission to align its work with the language of the Charter.

He shared the view expressed by other colleagues that it would be premature for the Commission to refer draft conclusion 24 to the Drafting Committee. It was unlikely, given
the serious reservations expressed by Commission members during its debate on the topic, that submitting the illustrative list to States for their comments would serve to strengthen the concept of *jus cogens* norms.

Mr. Ouazzani Chahdi welcomed the Special Rapporteur’s fourth report, which was well-structured, concise and easy to follow. Noting that, in the Sixth Committee, some Member States had called for a cautious approach given the need to secure wide support from States, he said that the Commission should therefore tread carefully, especially when dealing with issues such as regional *jus cogens* and the drawing up of an illustrative list of *jus cogens* norms.

Regarding the notion of regional *jus cogens*, he agreed with Ms. Lehto and Mr. Rajput that it was not difficult to define the term “regional”. Furthermore, although in the Sixth Committee Member States had generally rejected it, the concept of regional *jus cogens* or of regional peremptory norms was not necessarily to be ruled out. Indeed, in his report, the Special Rapporteur cited several authors who had referred to a European system of peremptory human rights; he also cited a decision of the Inter-American Court of Human Rights that had been advanced as evidence of the existence of regional *jus cogens*. He agreed with the Special Rapporteur that a draft conclusion explicitly stating that international law did not recognize the notion of regional *jus cogens* was not necessary. The Commission should avoid making such assertions, either in the draft conclusions or in the commentary thereto. In the event of a contradiction between a regional peremptory norm and a universal *jus cogens* norm, the latter would take precedence.

Regarding the illustrative list, he noted the statement by Brazil on the Commission’s report in 2018, encouraging the Commission to discuss process and method, rather than the content of peremptory norms. It was precisely because of the methodological problems involved that, in 2017, he had proposed including such a list in the commentary to the draft conclusions on the topic. While maintaining that position, he supported the proposal made by the Netherlands to refer to the tentative and non-limitative lists of *jus cogens* norms that had already been recognized by the Commission in its commentaries to articles 26 and 40 of the articles on State responsibility; those lists should then be supplemented with the work of the Commission’s Study Group on fragmentation of international law. He agreed with Ms. Escobar Hernández that the Commission needed to identify a criterion on which to base the inclusion of norms in the illustrative list. The commentary might also indicate that the list was open-ended, so that norms that attained the status of *jus cogens* in the future could also be added to the list. Whether such a list was included in the commentary or in a separate draft conclusion, it should be preceded by a well-reasoned introduction that explained the Commission’s selection of norms considered to have *jus cogens* status; the statements of several Member States in the Sixth Committee appeared to support that suggestion.

He welcomed the Special Rapporteur’s analysis of the norms put forward in chapter IV, section B, of the report, which was based on, *inter alia*, international and national case law, treaty practice and the literature. He wondered whether it would be useful to consider national constitutions, some of the more recent of which expressly prohibited genocide and crimes against humanity, as well as reports submitted by States parties to treaty bodies. The Commission might also wish to prepare a questionnaire to obtain the opinions of States on such matters.

Some of the norms described needed to be clarified or reformulated. For instance, it was not clear what was meant by “the basic rules of international humanitarian law”. The right to self-determination, which had political connotations, was also problematic in terms of its exact definition and scope in international law.

With regard to chapter IV, section C, of the report, it would be desirable to include, among other possible norms of *jus cogens* not identified in the Commission’s previous work, the principle of sovereign equality of States, enshrined in Article 2 (1) of the Charter of the United Nations, and referred to in the commentary to draft article 50 of the 1966 draft articles on the law of treaties.

In conclusion, he supported the Special Rapporteur’s proposal in paragraph 139 of his report regarding the future work of the Commission.
Mr. Valencia-Ospina said that he wished to congratulate the Special Rapporteur on his well-structured report, which had put the Commission on track to conclude its work on the topic at the end of the quinquennium by facilitating the completion of its first reading of a full set of draft conclusions during the current session.

He wished, at the outset, to acknowledge the careful manner in which the Special Rapporteur had addressed the issue of regional *jus cogens*. Regional international law and, by extension, regional *jus cogens* were particularly germane from a Latin American perspective, and thus he could not agree totally with the finding that regional *jus cogens* did not exist; he supported the strong objective arguments put forward by Mr. Nolte in that regard. He concurred with the Special Rapporteur that there should not be a draft conclusion on the matter. For the sake of consistency, the approach of not explicitly mentioning regional *jus cogens*, either affirmatively or negatively, in the body of the draft conclusions, should be followed in the commentaries, in line with the outcome of the Commission’s discussion on the issue at its fifteenth session in 1963, when it had been decided that questions of regional international law and regional *jus cogens* were beyond its mandate.

Turning to the sensitive issue of whether or not to compile some kind of list of peremptory norms, he said that, while he had spoken in favour of such a list in 2016 and still considered that one would be useful under certain circumstances, he might have to backtrack somewhat after studying the Special Rapporteur’s fourth report and listening to the statements made by other members of the Commission.

He was not persuaded by the methodology used by the Special Rapporteur in drawing up the list included in proposed draft conclusion 24, although he was in no way implying that any of the norms enumerated therein were not, or should not be considered, peremptory. Listing peremptory norms in any manner was clearly not the easiest of tasks. As had been asserted by Australian jurist Sir Kenneth Bailey in relation to the inclusion of peremptory norms in the Vienna Convention on the Law of Treaties, just accepting the existence of *jus cogens* norms was only stating the problem, not solving it. The basic question was to identify such peremptory norms.

He wished to discuss two concerns that were relevant to the Commission’s work in general. First, the impact of its work in the wider sphere of international law could not be underestimated. He shared the fear voiced by other members that an indicative list might hinder the future development of *jus cogens*. In paragraph 52 of his report, the Special Rapporteur repeated the argument that he had advanced in his first report that the Commission could not “decide not to provide an illustrative list simply because some might interpret it as a *numerus clausus* when [the Commission had] clearly described it as an illustrative list”. If the Commission’s work on the topics of State responsibility and identification of customary international law was any guide, no amount of description or explanation of what the list was about would prevent it from being interpreted as the most authoritative list of *jus cogens* norms. Although the articles on responsibility of States for internationally wrongful acts, which had been adopted by the Commission in 2001, had not yet been transformed into an international convention, they were regarded as the global “law of the land” and had been cited even by the International Court of Justice. Similarly, even before the Commission’s adoption, in 2018, of its definitive draft conclusions on identification of customary international law, the reports presented by the Special Rapporteur, Sir Michael Wood, were being used by law professors in various countries in lieu of textbooks. If the Commission decided to include a list of any kind in its draft conclusions, it would have to face the fact that the list would most likely be accepted as the *de facto numeros clausus* of peremptory norms for decades to come. That was more than a mere hypothesis; it was a reality of the contemporary world, which placed a considerable burden of responsibility on the Commission. Given the importance of peremptory norms for the maintenance of international peace and security and the protection of human rights, any list had to be elaborated very carefully, on the basis of work whose depth and breadth far exceeded those of the study presented in the fourth report. The improvement of what some previous speakers had characterized as the “vague formulations” of the list in proposed draft conclusion 24 could and should not be merely a semantic exercise, but the result of further detailed analysis.
Secondly, the Commission, while recognizing the influence of its work on most topics, should not think of itself as some kind of international legislature. It was not for the Commission alone to decide which norms were *jus cogens* or could potentially be considered as such, yet that was the very attitude that it would take by including in a list, whether illustrative or not, norms that it had previously recognized or simply referred to as peremptory norms of general international law. In that connection, it was worth recalling the discussion that had taken place in the Drafting Committee in 2018, as summarized by the then Chair of the Committee, Mr. Jalloh, who had stated in his oral interim report:

The Drafting Committee discussed, *inter alia*, whether the work of the International Law Commission should be explicitly mentioned in the text of the draft conclusion […] the Drafting Committee agreed to delete any explicit reference to its work because this was not in line with its usual practice. It will be explained, in the commentary, that the Commission, as an expert body, has played a significant role in the emergence and development of peremptory norms of general international law (*jus cogens*).

Using references from previous discussions within the Commission as indicators of whether or not to include a given norm in the draft conclusions unduly exaggerated the Commission’s role, especially when those references were incidental, and not themselves based on an analysis of State practice and jurisprudence. The Commission, unlike international courts and tribunals, should not invoke the principle of *iura novit curia*. Without having conducted a substantive analysis, it had never, in the past, claimed to “know the law”. The Commission was not mandated to be the gatekeeper of international law, but by elevating its work in the fashion described, it would be assuming that role.

If an illustrative list were to be included in the draft conclusions, the Commission should not use what in the past it had regarded as a decisive criterion but should have recourse to the criteria for identification set forth in draft conclusions 4 to 9, as adopted by the Drafting Committee. While proceeding in that manner would fulfil the objective of demonstrating how the criteria developed by the Commission were to be applied, it might prove to be not merely a Herculean task, but a Sisyphean one as well. If the Special Rapporteur received as many comments from States, non-governmental organizations and individuals on each of the proposed norms as the Special Rapporteur on the topic “Crimes against humanity” had received on his subject, a timely analysis of those submissions would surpass the logistical capacity of any Special Rapporteur or the Commission. Moreover, the outcome of that examination might show that, no matter how much members might value the aspirational properties of some norms, they were not sufficiently well supported in State practice to warrant inclusion in a definite list.

The scope and complexity of any such investigation were further confirmation that excessive reliance should not be placed on the Commission’s past work, where most references to *jus cogens* had been made in passing in the final output on related but different topics. Since none of those references had been accompanied by in-depth analysis of State practice or the existence of *opinio juris cogentis*, it would be unwise to use those slim references as the basis of a list to accompany the Commission’s work on the topic of *jus cogens*. In fact, draft conclusion 9 (2), as adopted by the Drafting Committee, made it plain that the work of the Commission qua expert body could serve only as a subsidiary means of determining the *jus cogens* character of a norm.

As far as methodology was concerned, it was problematic to use the recognition of the *erga omnes* obligations stemming from a norm as evidence of its peremptory nature. He was unconvinced that, although their relationship might well be that described in the report, not all norms with *erga omnes* consequences necessarily enjoyed a *jus cogens* character, or conversely that it was possible to deduce the *jus cogens* character of a specific norm from the acceptance of its *erga omnes* consequences. That was particularly true of the norms of international environmental law.

He was not implying that the only evidence of the peremptory nature of a norm was when it was explicitly qualified by the words “*jus cogens*” or “peremptory”. Obviously, account should also be taken of the fact that a norm was one from which no derogation was permitted. At the same time, it was necessary to bear in mind that, for almost 40 years following the adoption of the 1969 Vienna Convention on the Law of Treaties, the
International Court of Justice had skilfully eschewed the expression *jus cogens* in any of its pronouncements and had taken no clear position on the concept of *jus cogens*. Earlier references to the term *jus cogens* in its pronouncements had merely been citations from parties’ submissions or from the commentary to the draft articles on the law of treaties.

Despite the references to “fundamental values” in draft conclusion 2 and in paragraphs (2) and (3) of the revised draft commentary thereto, which had been informally circulated, chapter IV of the report referred to those values only in quotations and in footnotes. Nonetheless, they remained a most important factor in determining which norms should be incorporated in any list which might be retained as part of the draft conclusions, even if they were not specifically mentioned as a criterion for the identification of peremptory norms of general international law. In fact, an analysis of those values might answer some of the questions raised during the debate and explain why certain principles, such as that of *pacta sunt servanda*, were not featured in the list. It might also help to assess which norms deserved to be included in the list in addition to those drawn from the Commission’s past work.

The view of *jus cogens* which seemed to be emerging from the list of norms and from statements in the debate was predicated on the rather static attitude that, once a *jus cogens* norm had achieved that status, it could not lose it. It was, however, necessary to remember that the list rested primarily on a commentary to a draft text written 50 years earlier and that subsequent lists had just been rehashed versions thereof. In order to avoid the dangers inherent in using such an old list, it would be wise to conduct a thorough, substantive analysis to ascertain which norms were still supported by State practice and which were outdated. The Special Rapporteur had apparently adopted that approach in respect of the prohibition of piracy which had been excluded from draft conclusion 24.

The time had come to decide how to proceed with the aforementioned draft conclusion. If the methodology employed in the fourth report were to be used and the norms in the list were simply those which the Commission had previously deemed to have *jus cogens* status, it would be better to put such a list in the commentary, preferably in an introductory one, or in an annex, and it would have to be labelled as a list of norms which the Commission had previously considered to be widely acknowledged as possessing *jus cogens* status. That approach would probably enable the Commission to conclude its work on the topic in the current quinquennium. If the Commission preferred to incorporate an indicative or illustrative list in a draft conclusion, the Special Rapporteur would have to adapt his methodology by identifying which norms were peremptory according to the criteria set forth in draft conclusions 4 to 9, invite comments from States and other stakeholders and ultimately give fuller treatment to each potential *jus cogens* norm. If that approach were adopted, it was extremely doubtful whether the work could be completed before the end of the current quinquennium.

Although he firmly believed that such a decision was for the plenary Commission to take at the current stage of its work, he would not, if that was the preponderant view in the Commission, oppose leaving it to the Drafting Committee to resolve the issue. The latter would then be seized of the text proposed by the Special Rapporteur for draft resolution 24, as one element among others to be taken into account in arriving at a generally acceptable recommendation for submission to the Commission meeting in plenary session.

Mr. Gómez-Robledo said that, with regard to the question of regional *jus cogens*, he agreed with the general view that, from a strictly theoretical standpoint, it was always possible that a regional norm might emerge that could qualify as a *jus cogens* norm within the meaning of the 1969 Vienna Convention on the Law of Treaties, but that State practice was insufficiently developed in that area. The current position was rather that a generally applicable rule, such as the right of self-determination, or other important norms with varying connotations in different regions, such as the right of asylum in Latin America, were universal and therefore not purely regional in nature. It would therefore be going too far to devote a draft conclusion to regional *jus cogens*. Instead, it would be advisable to consider the possibility of referring to it in the commentary, or indeed in any other manner which the Drafting Committee might consider suitable.
Any consideration of the question of regional *jus cogens* would entail consideration of the complex issue of defining what was meant by a region. Any such definition would be political rather than legal. He was in favour of the notion of a community of shared values, since that idea was closer to the essence of *jus cogens* and inseparable from the natural law roots of *jus cogens*. As the ideals of a community of States as a whole advanced, *jus cogens* would certainly move on as new norms developed organically within that community.

Given that the indicative or illustrative list had naturally proved to be controversial, since it was related to questions of methodology and the determination of secondary rules, it had initially been decided to set it aside temporarily. However, that decision in no way implied that such a list was incompatible with the topic. The comparison with the Commission’s treatment of the identification of customary international law was inappropriate. Back in the 1960s, the Commission and the United Nations Conference on the Law of Treaties had decided not to adopt a list of *jus cogens* norms because it had been feared that any such list would upset the fragile balance of treaty law and jeopardize the entry into force and universal application of the 1969 Vienna Convention. It should be borne in mind that, in the long period of time which had elapsed since then, the Commission, the International Court of Justice and other international tribunals had bestowed peremptory status on a small, select list of norms. None of the reasons given by members who were adamantly opposed to, at the very least, taking note of such a list, even one excluding less self-evident norms, were convincing. The list in question must be simply indicative rather than exhaustive, not only for substantive reasons but also owing to time constraints. He could therefore support the creative proposal of Ms. Galvão Teles that the list should be placed in an annex to the draft conclusions, since that solution would make it plain to the reader that the list was only illustrative. It would then be up to the Drafting Committee to decide whether each of the norms would have to be accompanied by a footnote outlining its origin and containing a reference to the most significant findings of the Commission and the International Court of Justice.

If no attempt were made to prepare such a list, the Commission would be missing a once-in-a-lifetime opportunity and would seriously undermine its own credibility. The Commission appeared to be inherently unable to play its role of a body that could and should adopt a policy stance. The outcome of the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” had clearly demonstrated the function of organs of international organizations in interpreting the constituent treaty of the organization concerned. The Commission had the objective and subjective authority to interpret the United Nations Charter and major treaties negotiated under the auspices of the United Nations, many of which had been the fruit of the Commission’s own work. The current world situation was characterized by indiscriminate attacks by certain States on the remarkable legal architecture that had been built since 1945. The Commission must rise to that historical challenge and not be afraid of defending the validity of international law.

He therefore supported referring the text of draft conclusion 24 to the Drafting Committee for its adoption in the form of an annex.

**Mr. Šturma**, speaking as a member of the Commission, said that he agreed with the proposal to omit a draft conclusion on regional *jus cogens*. The title of the topic “Peremptory norms of general international law” justified that decision. The draft conclusions on the general characteristics and definition of *jus cogens* which had been provisionally adopted helped to distinguish peremptory norms within the meaning of article 53 of the 1969 Vienna Convention from other mandatory or non-derogatory rules, or those which took precedence, including norms that were non-derogable for public utility or logical reasons. While some concepts which had been formulated by treaty-based regional human rights courts were appealing in that they captured the idea that a norm had priority status without it being called *jus cogens*, the term regional *jus cogens* recalled other concepts, such as socialist international law, which obviously had less pleasant historical connotations, or *jus publicum Europaeum*, which he did not like. He was therefore of the view that a draft conclusion on regional *jus cogens* was unnecessary and that the reasons for that could be explained in the commentary. The Commission should not, however, rule out the possibility that some regional norms might progressively evolve into peremptory norms of general international law over time.
He was still in favour of an illustrative list, but not necessarily the one included in draft conclusion 24. The question was not whether to give some examples of norms, but how to draft them. As some 50 years had passed since the adoption of the 1969 Vienna Convention the time had come for the Commission to say something about *jus cogens* norms and at least to confirm its support for the short list thereof which it and the International Court of Justice had identified as peremptory norms in the past.

While the topic was mainly concerned with general secondary rules for the identification of *jus cogens* and the latter's effects, unlike the topic “Identification of customary international law” it was not limited to identification. Moreover, the concept of *jus cogens* transcended the sphere of formal sources of international law such as treaty, custom and the general principles of law, and although no one seriously challenged the existence of customary rules as a source of law, that of *jus cogens* was still questioned by some States and writers. Lastly, it would be useful for readers of the Commission’s final product who were not international law specialists to have an illustrative list of the most widely recognized examples of peremptory norms.

As far as the issue of methodology was concerned, he did not consider that the adoption of an illustrative list based chiefly on earlier decisions of the Commission and the International Court of Justice would be wrong or that it would be at odds with the methods provided for in the draft conclusions which had already been provisionally adopted. He was likewise doubtful about attempts to set too high a threshold and wondered why it would not be possible for the Commission to use the best and most expedient evidence available to determine whether a norm existed, along the lines of the practice followed by the International Court of Justice in order to identify customary international law.

Some misunderstanding of the nature of the examples of *jus cogens* listed in draft conclusion 24 might have arisen from a failure to distinguish between principles and specific rules. If the topic and draft article 24 concerned detailed rules, it was true that the Commission would need many years to deal with them properly. He personally believed that the purpose of the illustrative list was to highlight the most widely recognized examples of the hard core of principles which had a *jus cogens* character. Of course, the commentary should make it clear that the current draft conclusions did not in the future preclude the possible codification of detailed rules informed by and related to the above-mentioned principles. Indeed, any list must be formulated without prejudice to the existence of current or future norms which might qualify as peremptory.

The main problem lay in deciding how to draft such a list. It should not be prescriptive as the Commission was not a legislator, but rather it should be descriptive and based on earlier decisions. For those reasons, draft conclusion 24 should reflect the open-ended nature of peremptory norms and take the form of an annex. That solution would satisfy the concerns of both advocates and opponents of the list and would more accurately reflect its non-prescriptive purpose.

The formulation of the examples of peremptory norms proposed in draft conclusion 24 should be discussed in the Drafting Committee. Their formulation should not be difficult apart from the example in subparagraph (h), which referred not to a single principle but to a large, potentially unlimited corpus of international humanitarian law. Although the Martens Clause and some other fundamental rules of international humanitarian law should be respected by States regardless of whether they had ratified the Geneva Conventions, as had been made plain by the International Court of Justice in paragraph 79 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, many provisions of the Geneva Conventions could not be described as *jus cogens*. In fact, only the principles underlying common article 3 could be said to have reached the relevant standard.

He supported the referral of draft conclusion 24 to the Drafting Committee without prejudice to the form which the illustrative list might have following drafting work. 

*The meeting rose at 12.50 p.m.*