Provisional

For participants only

16 June 2022

Original: English

International Law Commission

Seventy-third session (first part)

Provisional summary record of the 3565th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 20 April 2022, at 11 a.m.

Contents

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

Present:

Chair:	Sir Michael Wood (First Vice-Chair)
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez

Secretariat:

Mr. Llewellyn	Secretary to the Commission

Sir Michael Wood, First Vice-Chair, took the Chair.

The meeting was called to order at 11 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 4)
(*continued*) (A/CN.4/747 and A/CN.4/748)

Mr. Murase, after thanking the Special Rapporteur for his excellent fifth report on peremptory norms of general international law (*jus cogens*) (A/CN.4/747), said that the current, deplorable situation in Ukraine underscored the importance of the topic. In that context, it was not difficult to identify *jus cogens* violations by the Russian Federation, including the illegal use of force, aggression, genocide, crimes against humanity, gross human rights violations, violations of the basic rules of international humanitarian law and the infringement of sovereignty. It was unbelievable that such atrocities were being openly perpetrated in the twenty-first century. He was convinced that, when the State responsibility of the Russian Federation and the criminal responsibility of President Putin were ultimately considered by the relevant courts, issues of *jus cogens* would be fully taken into account.

It was somewhat disappointing that the Special Rapporteur was proposing so few changes to the text adopted on first reading. Although changes could be made at the second-reading stage only to address issues raised in the comments and observations received from States, there were many additional changes that could be made to improve the text. The topic required careful consideration, given its extreme importance, and he hoped that the Commission would decide to continue its work on it during the next quinquennium. Such a decision would not be without precedent, since, for the topic of State responsibility, the second-reading stage had lasted from 1997 to 2001.

In his view, there were several reasons why the topic needed to be re-examined. First, although the lack of relevant State practice had been noted by the Commission and by States, the current situation in Ukraine offered a perfect example of State practice on *jus cogens* violations and should therefore be recognized, perhaps in the commentaries, despite the fact that the events in question had taken place after the first reading. Second, while there were two different types of *jus cogens*, namely that employed in the context of the law of treaties and that employed in the context of State responsibility, the current text was based exclusively on the former; the validity of that approach needed to be re-examined. The reluctance of some States to accept draft conclusions 3 and 4 might be at least in part related to that fundamental point. Third, the Special Rapporteur had employed the concepts of hierarchical superiority, general international law and the fundamental values of the international community of States in a circular manner, which had led to a tautological definition of *jus cogens*, as noted in the comments and observations received from Governments. Fourth, draft conclusion 17 betrayed a serious misunderstanding of the relationship between *erga omnes* obligations and *jus cogens* obligations. The former gave rise to the latter and not vice versa. The comments received from France, Japan and Switzerland seemed to reflect that concern.

If the Commission wished to conclude its consideration of the topic at the current session, he would not stand in the way, but he would suggest that draft conclusion 23 and the annex to the draft conclusions should be deleted. While he personally was in favour of an illustrative list, provided that each candidate for inclusion was carefully examined, the majority of States that had submitted written comments had suggested that draft conclusion 23 and the annex should be deleted. Even Switzerland, which had noted the usefulness of the non-exhaustive list, had suggested that the list should be reformulated on the basis of State practice. If the Commission decided to delete draft conclusion 23 and the annex, the consideration of the topic could perhaps be concluded at the current session. However, if the Special Rapporteur shared his view that such a list was necessary, another 10 or 20 years could be needed to finalize it.

In preparing the list, the Commission was dealing with the primary rules of *jus cogens*. Unlike the secondary rules, which were abstract or general, the content of each of the primary rules needed to be defined precisely and its scope of application clearly delineated. He had doubts about the methodology and criteria used to select the norms included in the illustrative list. It was perhaps naivety on his part, but his initial reaction had been to question why

respect for State sovereignty was not at the top of the list of *jus cogens* norms, since sovereignty, or sovereign equality, was the most fundamental norm in international law. Was not respect for international law or *pacta sunt servanda* supposed to be the basic norm, or *Grundnorm*, of international law and therefore a *jus cogens* norm?

The Special Rapporteur's selection was based on the Commission's previous work. He was not sure whether the references, which were sometimes only passing references in the commentaries to the relevant instruments, were good enough criteria. In that connection, he found it regrettable that the fifth report did not refer to the illustrative list included in the text of draft article 19 of the draft articles on State responsibility provisionally adopted by the Commission in 1976. In accordance with that list, an international crime could result from a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

He wished to reiterate the concern that he had expressed in 2019 regarding the prohibition of aggression. Although he was in favour of including that norm as the first example, the Commission should exercise great caution. The definition of aggression set out in General Assembly resolution 3314 (XXIX) added nothing substantive to that set out in Article 2 (4) of the Charter of the United Nations. The various acts listed in article 3 of the definition were seemingly covered by and were in line with those listed in Article 2 (4) of the Charter. In other words, the resolution did not define aggression as such. Further, the definition of the crime of aggression adopted at the 2010 Review Conference of the Rome Statute of the International Criminal Court merely recited General Assembly resolution 3314 (XXIX). A good deal of work would therefore be needed to substantiate the content of aggression.

A further problem was the possibility of conflicts among *jus cogens* norms. For example, supposing that the right to self-determination was a *jus cogens* norm, was it permissible to use force, which was otherwise prohibited, to achieve its objective? Which *jus cogens* norm should prevail? General Assembly resolution 3314 (XXIX) provided that nothing in the definition of aggression "could in any way prejudice the right to self-determination". The question of conflicting *jus cogens* norms might become a serious problem, as an increasing number of *jus cogens* norms were being proposed in various forums. There was a general tendency towards an expansion of the concept, particularly in the area of human rights law. A lack of coordination among such norms might ultimately weaken international law.

He proposed that the Commission should continue its work on the topic during the next quinquennium. If that proposal was not accepted, he proposed that draft conclusion 23 and the annex to the draft conclusions should be deleted. In any event, he also proposed that the Commission should establish a working group to consider how to proceed with the topic.

Mr. Park said he hoped that, during the debate, the Commission would give due consideration to the comments received from States regarding the need to delete certain draft conclusions that were not based on relevant State practice and to provide more specific examples for others, and that those comments would be reflected in the text adopted on second reading.

With regard to draft conclusion 3, the Special Rapporteur had reopened the issue of "regional *jus cogens*" in paragraph 55 of the report, explaining that he would not be averse to deleting the reference to that issue in paragraph (7) of the commentary to draft conclusion 1 (A/74/10). In his view, however, to do so would be a mistake. As he had already said in the debate on the Special Rapporteur's first report on the topic in 2016, although a peremptory norm of general international law was defined in article 53 of the 1969 Vienna Convention on the Law of Treaties as "a norm accepted and recognized by the international community of States as a whole", it would be wrong, at the initial stage of the work, to dismiss the possibility of regional *jus cogens*. In 2017, the Commission had decided to change the title of the topic from "*jus cogens*" to "peremptory norms of general international law (*jus cogens*)", thereby excluding the issue of regional *jus cogens* from its scope. Consequently, it was unnecessary and would be illogical to declare that the Commission did not recognize the notion of regional *jus cogens*. Austria had indicated that the Commission should leave open

the question of whether regional peremptory norms existed, and Spain was of the understanding that "regional *jus cogens*" fell outside the material scope of the draft conclusions. He proposed that the Commission should simply explain in the commentary that regional *jus cogens* fell outside the scope of the topic.

With regard to the reference to the "fundamental values of the international community" in the same draft conclusion, he shared the view of many other members that the provision did not create an additional criterion for the identification of *jus cogens*. However, to address the concerns raised by States in that regard, it might be better to place that draft conclusion immediately after draft conclusion 1. While some States had indicated a preference for the expression "international community of States as a whole", the Special Rapporteur had opted for "international community", explaining in paragraph 54 of the report that the latter expression had a different meaning. However, its meaning was explained neither in the commentary nor in the statement given by the Chair of the Drafting Committee in 2017. In view of the comments and observations received from States, it would be better, for the sake of consistency, to use the expression "international community of States as a whole" throughout the draft conclusions, namely in draft conclusions 2, 4, 6 (2) and 7. Furthermore, the expression "international community as a whole", which appeared in draft conclusion 17 (1), could be replaced with "international community of States as a whole".

In response to suggestions received from several States, the Special Rapporteur was proposing that the words "basis" and "bases" in draft conclusion 5 should be replaced with "source" and "sources", respectively. As was well known, the question of the sources of international law was a complex one. It was explained in paragraph (3) of the commentary to the draft conclusion that the use of the words "basis" and "bases" had been intended to capture the range of ways in which various sources of international law could give rise to the emergence of a peremptory norm of general international law. He could agree that customary international law or treaties, which were sources of international law, formed the basis of *jus cogens*. However, it seemed rather clumsy to explain that customary international law, which was a source of international law, was also a source of *jus cogens*.

As noted in the statement given by the Chair of the Drafting Committee in 2017, some members had expressed a preference for the word "source" instead of "basis" for the formation of *jus cogens* norms of international law. Nonetheless, the Drafting Committee had adopted the word "basis", out of the concern that "source" was a term used in Article 38 (1) (*c*) of the Statute of the International Court of Justice, where no reference was made to peremptory norms of general international law. He would prefer to maintain the word "basis", since he did not wish to reopen the debate on the concept of sources. If the Commission nevertheless decided to use the word "source", the Special Rapporteur might need to clarify the hierarchical relationship between general principles of law and other sources of international law in situations in which general principles of law were claimed to be a source of *jus cogens*. In addition, some States had requested the Commission to provide examples of practice supporting the notion that general principles of law could form the basis of *jus cogens*. No specific examples were provided in paragraph (9) of the commentary to the draft conclusion, but the Special Rapporteur had confirmed that he would make the intended point more explicit. As it would not be easy to find specific examples in which general principles of law had formed the basis of *jus cogens*, he proposed that the Commission should mention clearly in the commentary that draft conclusion 5 (2) was part of the progressive development of international law.

Concerning draft conclusion 6, he supported the Special Rapporteur's proposal for the insertion of the words "by the international community of States as a whole" in paragraph 2, as it would further clarify the meaning of the provision.

With regard to draft conclusion 7, it would be preferable to replace the expression "a very large majority" with "an overwhelming and representative majority", as had been suggested by Poland. The insertion of the word "representative" would be particularly useful. Although the United States of America had suggested that paragraph 2 could be deleted, he considered that it gave additional value to paragraph 1 and should therefore be retained. The suggestion that paragraph 3 should be moved to draft conclusion 9 seemed questionable.

In relation to draft conclusion 8, he agreed with the recommendation of some States that, for the sake of clarity, the words “conduct of States in connection with” should be inserted before “resolutions adopted by an international organization or at an intergovernmental conference” in paragraph 2. In 2018, the Chair of the Drafting Committee had noted that the reference to “resolutions” was intended to include “conduct in connection with resolutions”, which was the language used in conclusion 10 (2) of the conclusions on identification of customary international law. In addition, as noted by Estonia, it was important to analyse the possible effects of the draft conclusions not only on States but also on international organizations. It would be preferable to provide clarification on that point in the relevant part of the commentaries.

Although the Special Rapporteur had considered reverting to the formulation that had originally been proposed for draft conclusion 13 (2), he preferred the current drafting.

He had no difficulties in accepting the modification proposed by the Special Rapporteur to draft conclusion 14 (1).

While decisions or acts of the Security Council could not be excluded from the scope of draft conclusion 16, it was important to prevent the unilateral invocation of *jus cogens* as a way of undermining the authority of the Security Council. He fully agreed with the Special Rapporteur’s recommendation that it should be made explicit, in the commentary, that the provision was not intended to permit unilateral invocation to avoid obligations under Security Council resolutions.

He fully agreed with those States that had explained that draft conclusions 17, 18 and 19 also applied to international organizations. The relevant commentaries should be reformulated to clarify the role of international organizations in that regard. Draft conclusion 19 had given rise to diverse comments, but he was not sure that it would be useful to reopen the debate in order to discuss how to modify the text. In his view, it would be sufficient to introduce modifications to the commentary.

With regard to draft conclusion 21, on procedural requirements, after reading the comments and observations received from States, he was convinced that no procedural clause of that kind was needed. If the Commission nevertheless wished to retain such a clause, it might be sufficient to retain only paragraph 5 and to amend the title to read “Recommended procedure”. It might also be preferable to move the provision to Part Four, on general provisions.

Mr. Jalloh said that the Special Rapporteur’s fifth report was well researched and well written. It could perhaps have struck a softer tone but it was certainly based on a careful analysis of relevant State practice and provided the Commission with a sound basis for its debate. He agreed with most of the points made by the Special Rapporteur but would like to make three general observations.

Firstly, given the negative comments made by some colleagues, he considered it worth highlighting that States were generally appreciative of the Commission’s work on the topic. France, for example, had acknowledged that international law was faced with issues of coherence and articulation, including in respect of *jus cogens*, which might affect its clarity and intelligibility; it had also stressed the Commission’s leadership role in clarifying and consolidating the concept with a view to ensuring greater legal certainty for all actors. Those sentiments had been echoed by other States, including Australia, Cyprus, Czechia, Colombia and Japan. Commending the Commission’s work, South Africa had reiterated the importance of the topic, given “the many challenges posed to the upholding of the rule of law internationally”. That point was especially relevant in the light of recent developments in Ukraine and underscored the importance of addressing the obligations of all States and other actors in respect of *jus cogens* violations. South Africa had concluded that the Commission’s draft conclusions on *jus cogens* were well balanced and well supported by practice.

His second observation concerned methodology, which was discussed in chapter II of the report. Overall, he endorsed the Special Rapporteur’s approach, including the fact that equal weight had been accorded to the views of all States, and that, given the unique nature of the topic, all had been treated as specially affected States. He also concurred with the Special Rapporteur’s view of the function of the Commission’s assessment of States’

comments at the second-reading stage. Indeed, the Commission's approach at the second-reading stage had typically been to maintain the text and decisions adopted on first reading, amending them only where there were compelling reasons to do so. Thus, as the Special Rapporteur had stressed, before embarking on any amendments to the draft conclusions, the Commission should carry out both qualitative and quantitative assessments to determine whether a particular view had not yet been considered or was the result of a new perspective or new information that the Commission had not considered on first reading. Moreover, since a first-reading text often reflected a delicately negotiated compromise, and a package of negotiated texts with commentary often facilitated consensus, reopening compromise text might upset the delicate balance achieved within the Commission. It might also give rise to a risk of protracted debate, which, given the time constraints imposed by the hybrid meeting format, was something the Commission might wish to avoid.

His third observation concerned States' participation in the Commission's work. The views of all Governments were indispensable to that work, and yet, of the 28 written comments received from States on the topic of *jus cogens*, 18 had been submitted by Western European countries, 4 by Eastern European countries, 3 by countries of the Asia-Pacific region, 2 by Latin American countries, and only 1 by an African country. The relatively small number of responses received from some regions of the world was not unusual; there had been a similar paucity of input from several regions on other topics considered by the Commission, and members were well aware of the factors that inhibited greater State input. In that context, he wished to thank the delegations of developing countries of the Global South that had commented on the topic in the Sixth Committee. Furthermore, as a modest first step towards addressing the issue, he wished to propose that, in its 2022 report, the Commission should offer to engage in informal dialogue with the Sixth Committee on the question of how to enhance State input in its work. The dialogue might also provide an opportunity for frequently participating States to share their experience of approaches that had proved effective in facilitating their input.

The Special Rapporteur was proposing relatively few changes to the text, in line with the Commission's usual practice at the second-reading stage. The changes proposed affected only 5 of the 23 draft conclusions adopted in 2019. In general, he supported the amendments proposed, although he agreed that, as noted by the Special Rapporteur and other colleagues, many of the comments made by States might be better addressed through relevant and possibly extensive updates to the commentary.

In draft conclusion 5, in response to comments from several States, the Special Rapporteur was proposing that the words "basis" and "bases" should be replaced with "source" and "sources", respectively. He had serious doubts about that proposal. As he understood it, the purpose of draft conclusion 5 was to explain the first criterion that must be fulfilled in order for a legal norm to be considered to have the character of *jus cogens* under draft conclusion 4 (a), namely, that the norm in question was "a norm of general international law". As the International Court of Justice had explained in *North Sea Continental Shelf* (*Federal Republic of Germany/Netherlands*), a norm of general international law was a norm that had "equal force for all members of the international community". Thus, under draft conclusion 5 (1), customary international law, which was comprised of State practice supported by the requisite *opinio juris*, would be the most common basis for a *jus cogens* norm; custom was the most obvious manifestation of general international law, after all, and that factor explained the higher status that it enjoyed in draft conclusion 5. States had generally concurred with the text of draft conclusion 5 and the accompanying commentary; no State had claimed that customary law could not serve as a basis for *jus cogens*, and some had maintained that only customary law could provide that basis. Those circumstances, coupled with the excellent explanation provided in the current commentary to draft conclusion 5 and the comment on the sources of *jus cogens* norms contained in paragraph 69 of the report, were at the root of his doubts about the proposal to replace "basis" with "source".

He recalled that the use of "source", as opposed to "basis", had been a subject of contention in discussions of the Drafting Committee in 2017 and that the Committee had settled on "bases" instead of "sources" only after a rather lengthy debate. It had concluded that, in international law, the term "sources" evoked a specific meaning and could thus

introduce a confusion that was better avoided. The term also immediately called to mind the content of the Statute of the International Court of Justice, which, in Article 38, did not mention *jus cogens* as a source of international law. Furthermore, the use of the term "sources" also brought with it certain difficulties. It had opened up a rich vein of legal scholarship that drew a distinction between "formal" and "material" sources, but those fine distinctions had failed to resolve the persistent ambiguities in discussions of the sources of international law. The Commission should beware of introducing such complexities to an already complex topic when *jus cogens* norms enjoyed a higher status than other rules of general international law. Nonetheless, he firmly believed that valid State concerns should be carefully taken into account. For that reason, instead of adopting the amendments proposed by the Special Rapporteur, he would be in favour of introducing relevant clarifications to the commentary to draft conclusion 5.

Draft conclusion 5 also identified treaty provisions and general principles of law as possible bases for *jus cogens* norms. Several States, including Australia and Germany, had expressed doubts on that point. He believed that, as explained in the accompanying commentary, both treaty provisions and widely accepted general principles of law could serve as evidence of the existence of a *jus cogens* norm, provided that the norm derived from the treaty provision or the general principle of law was reflective of a norm of general international law. Perhaps the best example of such a sacrosanct treaty provision was the prohibition of the use of force contained in Article 2 (4) of the Charter of the United Nations. In fact, the Commission had confirmed that the "law of the Charter concerning the prohibition of the use of force" constituted "a conspicuous example of a rule of international law having the character of *jus cogens*" as far back as 1966, in its commentary to draft article 50 of the law of treaties, and that view was supported by decisions of international courts and tribunals. For all those reasons, he welcomed the Special Rapporteur's proposal that the issue should be further clarified in the commentary to draft conclusion 5. However, he would not oppose the amendment of the draft conclusion if that was the wish of a majority of members.

With regard to draft conclusion 6, which addressed the second criteria that must be fulfilled in order to identify a *jus cogens* norm, clarifying the elements of the "acceptance and recognition" requirement and affirming the non-derogability of such norms, he noted that the United States of America and the United Kingdom had made two thoughtful but separate proposals. The Special Rapporteur appeared to have concerns about the United States proposal but not about the proposal from the United Kingdom. He believed that the United States proposal, which was to incorporate language from the commentary adopted on first reading into the text of paragraph 1, would add clarity and therefore merited consideration. The Special Rapporteur, however, suggested that the proposal "might affect the balance of the draft conclusion", without expanding on the point. Confusingly, the Special Rapporteur also stated that he was "not opposed" to the proposal "since it clearly distinguishes *opinio juris* from 'acceptance and recognition', as understood in the draft conclusion". The Special Rapporteur had, in fairness, acknowledged the issue and explained the reasons in his introductory statement at the previous meeting, and, in the light of those explanatory comments, while he remained attracted to the United States proposal, he would keep an open mind and await further input on the question.

He was not against the proposal made by the United Kingdom, which the Special Rapporteur had endorsed and which likewise seemed to enhance the clarity of the text. The amendment it proposed would also align the language used in draft conclusion 6 with the phrase "international community of States as a whole" used in draft conclusion 4 (2) and draft conclusion 7. Such alignment, however, was a drafting matter that should more properly be taken up by the Drafting Committee.

With regard to draft conclusion 7, further discussion might be necessary. The meaning of the phrase "international community of States as a whole" had already been extensively debated by the Commission and had been extensively addressed by States in their comments. As stated in paragraph 2 of the draft conclusion and further fleshed out in the commentary adopted on first reading, the Commission had taken the view that the phrase equated to a "very large majority of States". However, bearing in mind the comments of several States, and the Commission's previously established position that the assessment must necessarily be qualitative as well as quantitative, he was in favour of the insertion, as proposed by the

Special Rapporteur on the basis of a suggestion from Singapore, of the words “and representative” after the words “very large” in paragraph 2.

Given the added clarity that the above change would provide, it seemed unnecessary to substitute the phrase “a very large majority” with the phrase “overwhelming majority”. The phrase “international community of States as a whole”, as used in paragraph 1, made sufficiently clear that there was a collective dimension to the acceptance and recognition requirement and that, as amply explained in the commentary and acknowledged in many comments from States, acceptance must be across regions, legal systems and cultures. Nonetheless, there could be merit in noting the latter more qualitative requirements in the body of the draft conclusion, as Mr. Nguyen had proposed.

He agreed with the Special Rapporteur that paragraph 3 of draft conclusion 7 should be retained, although, like the Special Rapporteur, he could see some merit in moving the paragraph to draft conclusion 9, as one delegation had suggested. However, moving the paragraph would necessitate consequent amendments to align its content with the current content of draft conclusion 9. More fundamentally, perhaps, draft conclusion 9 addressed the issue of subsidiary means in a manner similar to both Article 38 (1) (*d*) of the Statute of the International Court of Justice and the Commission’s conclusions on identification of customary international law adopted in 2018 – both of which, of course, had been important sources of inspiration for draft conclusion 9, as was explained in the commentary. The difference was that the text of draft conclusion 7 (3) was more concerned with the element of acceptance and recognition by the international community of States as a whole than with the element of subsidiary means for the determination of a *jus cogens* norm. For those reasons, he believed that paragraph 3 should remain in draft conclusion 7.

With regard to draft conclusion 14, which had understandably generated numerous suggestions owing to the complicated interaction between custom and *jus cogens*, he believed that further discussion and clarification – including through relevant and, if necessary, extensive updates to the commentary – were warranted regarding what happened when a rule of customary law conflicted with an existing *jus cogens* norm. He fully supported the Special Rapporteur’s proposal that the concern expressed by France should be addressed by replacing the words “if it conflicts with” in paragraph 1 with the phrase “if it would come into conflict with”. In passing, he wondered whether the comments concerning the use of the terms “null” and “void” that had been made by France and the United States might also warrant further consideration by the Commission.

In draft conclusion 21, which was one of the most important and innovative of the draft conclusions, the Commission advanced certain procedural safeguards deemed necessary in the context of potential inter-State claims of invalidity or termination of a rule alleged to violate *jus cogens*. The draft conclusion proposed a procedure for determining whether a *jus cogens* norm had been breached and addressing the consequences of serious breaches that had given rise to serious concerns for a number of States. The Commission should therefore make every effort to clarify any ambiguities raised by draft conclusion 21, which admittedly constituted a proposal for the progressive development of international law. He believed that the extensive recommendations set out by the Special Rapporteur in paragraph 209 of the report would address the main concerns and he therefore supported the proposed amendments to the text of paragraphs 1 to 4 of draft conclusion 21 and the introduction of a new paragraph 6. He also supported the proposed change of title and the suggestion that the draft conclusion should be moved from Part Three of the draft conclusions to Part Four. Any minor drafting issues that might arise as a result could be taken up in the Drafting Committee

Before concluding his statement, he would like to briefly mention four additional topics that, out of respect for the time limit on interventions, he was unable to address during the meeting. The four topics were: draft conclusion 19 on the particular consequences of serious breaches of *jus cogens*; the proposal from Italy concerning a possible retitling of the draft conclusions, on which the Special Rapporteur had invited members to comment; the Special Rapporteur’s proposal for the Commission’s recommendation to the General Assembly, which he supported subject to possible textual adjustments; and the question of whether or not to retain the current non-exhaustive list of *jus cogens* norms included in the annex to draft conclusion 23. With regard to the last point, he largely agreed with Mr.

Murase's comments on the content of the list. All four topics were covered in detail in a longer version of his statement that had been circulated to members, who he trusted would give them due consideration, as they were just as important as the topics he had just addressed. Overall, despite the doubts he had shared on some issues, he largely supported the textual proposals made by the Special Rapporteur and was in favour of sending the draft conclusions to the Drafting Committee.

Mr. Murphy said that he agreed with much of the analysis contained in the Special Rapporteur's fifth report and that his remarks would therefore focus principally on areas of concern and possible improvements. Overall, the Special Rapporteur had addressed the comments received from States in a very systematic manner and the organization of the report was clear and coherent. However, he agreed with Mr. Jalloh that the report could have a struck a softer tone. He also had two comments on methodology that he hoped the Commission would bear in mind when finalizing the draft conclusions and commentary.

His first observation was that, while the report maintained that a "qualitative analysis" was warranted at the second-reading stage rather than a simple indication of the number of States that had expressed a concern, the analysis provided thereafter often took the opposite approach, emphasizing numbers rather than the merits of a particular State's concern. When introducing the report at the previous meeting, the Special Rapporteur had also repeatedly invoked numbers. Ultimately, the central issue should be whether, as a matter of substantive law or, potentially, legal policy, the State or States in question were expressing a reasonable and credible concern that the Commission was in a position to address through an appropriate adjustment to the draft conclusions or commentaries. If that was the case, the Commission must endeavour to address their concerns.

His second observation on methodology was that the report pushed back on comments from a rather significant number of States to the effect that there was insufficient practice to support the draft conclusions, stating that it would "become evident" in the course of the report that there was "enough practice" and that the commentaries were "replete with examples of evidence of State practice". While practice might be considered "enough" in some cases, depending on the eye of the beholder, the reality was that, for several of the draft conclusions, there was no, or virtually no, practice to support them. In fact, even the report acknowledged that "there was no practice" to support the text of draft conclusion 5 (2). There was also no practice to support the text of draft conclusion 21, on procedural requirements; it was not possible to invoke articles 65 and 66 of the Vienna Convention on the Law of Treaties in that regard since the text of draft conclusion 21 differed from those articles – which, furthermore, addressed only the termination, suspension or invalidity of treaties. The practice supporting draft conclusion 19 was also quite thin; the commentary leant principally on two advisory opinions issued by the International Court of Justice in which the words "*jus cogens*" were nowhere to be found.

The report defended the lack of State practice in part by stating that the Commission did not always cite State practice in other projects. However, while that statement might be true, it did not answer the concerns about lack of practice. Rather than insisting that there was copious practice to support the draft conclusions, the Commission would do better to acknowledge that practice in the area was sparse and that much of its output on the matter was thus conjecture and not an exercise in codification. A statement to that effect in an introductory commentary would likely reassure States that the Commission understood the situation.

Turning to specific aspects of the draft conclusions, he recalled that the Special Rapporteur had invited views on whether the title should be changed to "Draft conclusions on identification and legal consequences of peremptory norms". Like Mr. Forteau, he saw great merit in a title along those lines, as it would focus attention on the actual scope of the topic and steer readers away from thinking that the draft conclusions substantively set forth and explained the norms themselves. He noted in that connection that, when studying treaties as a source of international law, the Commission had not produced "draft articles on treaties" but "draft articles on the law of treaties", and, when studying customary international law, it had not produced "draft conclusions on customary international law" but "draft conclusions on identification of customary international law".

Noting that several States regarded draft conclusion 3 as unhelpful in that it was unsupported in practice and created additional requirements for the identification of *jus cogens*, despite the Commission's attempts in the commentary to establish otherwise, he said that, in the light of those reactions, he would be in favour of deleting the draft conclusion and merging the associated commentary with the commentary for draft conclusion 2. The reactions of States suggested that, irrespective of what the Commission might state in the commentary, there was a real risk of draft conclusion 3 being perceived as establishing new conditions for *jus cogens* that made their identification still harder.

The Commission's inability to explain persuasively the distinction between draft conclusion 3 and draft conclusion 2 probably stemmed from the difficulty of separating the nature of something from the definition of that thing; many considered the two concepts to be closely intertwined. For example, the nature of a human being as a sentient mammal possessing opposable thumbs was not so different from the basic definition of a human being. In short, if retained in its current form, draft conclusion 3 might be misconstrued as establishing a requirement to prove not just that States accepted and recognized a norm of *jus cogens* but also that the norm in question reflected undefined "fundamental values", and, furthermore, that those values must be held by unspecified participants in an indeterminate "international community" that potentially included transnational corporations, non-governmental organizations of various persuasions and who knew what other entities.

Some States had also expressed concern about the omission of the words "of States as a whole" after the words "international community" in draft conclusion 3. Like Mr. Park, he believed that, if draft conclusion 3 was retained, those words should be included. The Special Rapporteur maintained that draft conclusion 3 was making a distinction between the values of a broader, undefined "community" and the norms arising from those values, and that only the latter needed to be accepted and recognized by the "international community of States as a whole". Presumably, however, the "fundamental values" at issue in draft conclusion 3 would need to be held by the international community "as a whole", since *jus cogens* neither reflected nor protected fundamental values that existed solely within a given regional, religious or cultural system. Aboriginal whaling, for example, was a fundamental value of certain indigenous communities around the world but was not a value reflected in or protected by *jus cogens*. Excluding the words "as a whole" in draft conclusion 3 while maintaining them in other draft conclusions suggested that certain narrower community values were at stake. Furthermore, the only fundamental values reflected in and protected by *jus cogens* were those that States had accepted and recognized as worthy of protection. In other words, stating that the peremptory norms of draft conclusion 2 were distinct from the fundamental values of draft conclusion 3 did not work, because what draft conclusion 3 was saying was that those peremptory norms reflected and protected the fundamental values to which it referred. The two draft conclusions were inescapably intertwined, and, in his view, simply reversing their order would not solve the problem.

With regard to draft conclusion 5, he supported the deletion of the words "most common" in paragraph 1: if he had understood correctly, the Special Rapporteur also supported that deletion but had chosen not to make the proposal himself. Conversely, the Special Rapporteur was apparently not persuaded by the reasons for changing "basis" and "bases" to "source" and "sources", respectively, but nevertheless proposed to make those changes. He did not support the proposed text. Perhaps the Drafting Committee could employ the phrase "is the basis" in paragraph 1 and "may reflect" in paragraph 2, in the light of the reasoning underlying the Special Rapporteur's fifth report.

In paragraph 2 of draft conclusion 6, he was in favour of inserting the phrase "by the international community of States as a whole", as proposed by the Special Rapporteur. Perhaps the reason why Italy and the United States of America had found the language of paragraph 1 confusing was that, as it stood, it said that acceptance and recognition concerned two components: first, there must be "acceptance and recognition" that there was a norm of general international law; and, secondly, there must be "acceptance and recognition" that the norm in question was peremptory. Paragraph 2 then went on to explain "acceptance and recognition" only in relation to the second component. If the Commission believed that there must be "acceptance and recognition" of both components, then paragraph 2 should address both of them. The alternative might be to have a paragraph 2 on the first component and a

paragraph 3 on the second. If, on the other hand, the Commission believed that, where a norm of general international law already existed, "acceptance and recognition" related only to whether it was peremptory in nature, paragraph 1 needed to be rewritten, perhaps by replacing the last phrase with "which is distinct from identifying a norm of general international law".

He appreciated the Special Rapporteur's willingness to delete or find alternative language for the phrase "a very large majority of States" in paragraph 2 of draft conclusion 7. Governments were probably concerned by the word "majority", which could signify no more than 51 per cent of States – hence the need for a qualifying adjective – and the existence of a sizeable minority of dissenting States, which gave rise to the need for a further qualifier, "representative". If the Special Rapporteur was seeking a qualitative rather than a quantitative standard, the word "majority" should be abandoned. One solution might be for the Drafting Committee to accept Singapore's suggestion that reference should be made to acceptance and recognition across regions, legal systems and cultures. Another possibility would be either to delete paragraph 2 altogether, or to start the first sentence with something along the lines of "widespread and representative acceptance and recognition by States is required for the identification of …".

In draft conclusion 8, the final phrase of paragraph 2, on resolutions by an international organization or intergovernmental conference, could be improved in order to respond to the concerns expressed by several States that the Commission's emphasis should be on the conduct of States in connection with the adoption of resolutions rather than on the resolution itself. In that draft conclusion, it would therefore be apt to echo the wording of paragraph 2 of conclusion 10 of the conclusions on identification of international customary law and to use the formulation "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". However, conclusion 12 of the conclusions on the identification of international customary law contained the important caveat that a resolution "may provide evidence" and also stated, in its first paragraph, that "a resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law". Such wording was absent in the draft conclusions on *jus cogens*. While the identification of a norm of *jus cogens* was not the same thing as the identification of a rule of customary international law, the key element of both was the practice of States in adopting the resolution and not the mere fact that a resolution had been adopted, perhaps only by a simple majority and in the face of strong opposition. It was to be hoped that the Special Rapporteur would consider amending draft conclusion 8 (2), because if it focused solely on the adoption of the resolution, the reader might well fail to pay attention to the State conduct behind it.

He agreed that the commentary to draft conclusion 16 should address States' concerns by making it clear that the conclusion was not intended to permit the unilateral invocation of *jus cogens* by a State to avoid obligations under Security Council resolutions. Another possibility would be to include the essence of some of the comments received from States in the commentary. He was also amenable to the changes which the Special Rapporteur had recommended in draft conclusion 21. In addition to those changes, paragraph 3 of that draft conclusion should be amended to make it plain that a State that invoked *jus cogens* could not proceed with a measure to which another State objected while dispute resolution procedures were being pursued.

Lastly, the Commission should consider deleting draft conclusion 23. One compelling argument for doing so was that the Commission provided a methodology for identifying *jus cogens*, but then simply presented a list of norms without itself actually applying that methodology. Another compelling argument was that, even with the caveat that the list was non-exhaustive, it might well have the effect of setting in stone the specific norms acknowledged to be *jus cogens*.

In conclusion, he was in favour of referring all the draft conclusions and the draft annex to the Drafting Committee, without prejudice to whether draft conclusion 23 and the draft annex were deleted.

Mr. Hassouna said it was unfortunate that the Commission lacked the time fully to discuss all the aspects of such an important subject, or indeed of other topics on its agenda.

The Commission should seriously consider reducing the number of topics it dealt with at any session in order to devote more time to a thorough analysis of each one.

In his fifth report, the Special Rapporteur had taken into account the comments and observations of Governments on the draft conclusions, giving equal weight to all of them. Accordingly, the Commission was in a position to consider State practice, jurisprudence, literature and other relevant sources, and to determine the weight that should be given to each. The fifth report demonstrated that there was sufficient practice to support the draft conclusions. In the commentaries, the Commission should explicitly state that the draft conclusions were not prescriptive and it should provide specific examples to illustrate how the draft conclusions would function. He agreed that the title of the draft conclusions should be changed to "Draft conclusions on identification and legal consequences of peremptory norms".

Draft conclusion 2 should reflect the fact that a peremptory norm must be accepted and recognized not only by many States but also by a representative range of them. That notion could be briefly clarified in the commentary to that draft conclusion and fully explained in the commentary to draft conclusion 7. The commentary to draft conclusion 2 should make it clear that "no derogation" meant no derogation in whole or in part.

It would be necessary to define the fundamental values referred to in draft conclusion 3, or else to spell out the process whereby judicial bodies could determine them. The notion of hierarchical superiority was important for the identification and legal consequences of *jus cogens*, as a conflict of norms was possible. The commentary should also explain what the difference was between the terms "international community" and "international community of States". While there was no support in State practice for the notion of regional *jus cogens* – which, in fact, would be contrary to the inherently universal nature of *jus cogens* – the commentary should make it plain that a common set of unifying and binding norms did exist in different regions of the world, but that they did not constitute regional *jus cogens*.

In draft conclusion 4, since the introductory phrase was unclear, it should be replaced with "To identify a peremptory norm of general international law, the following criteria have to be met". In draft conclusion 5, he agreed that the words "basis" and "bases" should be replaced with "source" and "sources", respectively. The commentary should explain the rationale behind that change and acknowledge that a treaty rule could reflect a norm of general international law that gave rise to a *jus cogens* norm. Although there were currently no treaty rules or general principles that served as a basis for *jus cogens*, that did not mean that the situation might not change one day. The commentary should provide some examples to explain why that change in wording had been made.

In draft conclusion 6, he was in favour of amending the wording of paragraph 1 to read: "'Acceptance and recognition', as a criterion of peremptory norms of general international law, concerns the question of whether the international community of States as a whole recognizes a rule of international law as having peremptory character." He supported the suggestion that the phrase "by the international community of States as a whole" should be inserted into paragraph 2 of that draft conclusion.

In draft conclusion 7, it would be advisable to amend paragraph 2 to bring out the fact that acceptance and recognition by a very large and representative majority of States was required and to explain in the commentary what was meant by "representative". He saw no need to delete paragraph 2 or to replace the phrase "a very large majority" with an "overwhelming majority". Nor did he see any reason to shift paragraph 3 to draft conclusion 9.

While the substance of both paragraphs of draft conclusion 8 was correct, it could be drafted more succinctly to read: "The forms of evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) include, but are not limited to, public statements …". He was against replacing the phrase "resolutions adopted by an international organization or at an intergovernmental conference" with "conduct of States in connection with resolutions adopted by an international organization or at an intergovernmental conference" on the grounds that conduct in connection with a resolution might be appropriate for the identification of customary international law, where practice was sought, but not for *jus cogens*, where what was crucial was the fact that States viewed a rule

as peremptory. The commentary could nevertheless explain why some States held that the conduct of States in that connection was important.

The commentary to draft conclusion 9 should mention the decisions of international courts and tribunals such as the Permanent Court of Arbitration, the International Tribunal for the Law of the Sea and the International Criminal Court and should clarify the reference to expert bodies in paragraph 2 of the draft conclusion. As both draft conclusion 10 and draft conclusion 11 concerned treaties conflicting with a peremptory norm of general international law, it might be helpful to merge them into a single draft conclusion. That could be done by making draft conclusion 11 a new paragraph of draft conclusion 10. With regard to draft conclusion 11, it was true that good international relations might well be disrupted if the whole of a treaty were rendered void because it conflicted with *jus cogens*. For that reason, separability might be called for in certain cases. In paragraph 2 (c), the word "unjust" should be replaced with a less subjective term.

As far as draft conclusion 13 was concerned, paragraph 1 should explain that a reservation to a treaty which conflicted with *jus cogens* would be invalid, since any such reservation would be contrary to the object and purpose of the treaty. Paragraph 2 should then spell out the consequences of any such reservation. It would be advisable for the commentary to draft conclusion 14 to elaborate on how a peremptory norm that was inconsistent with customary international law could possibly arise. He agreed with the proposed amendment of the first sentence of paragraph 1 to replace "if it conflicts" with "if it would come into conflict". He also supported the retention of the third paragraph regarding the persistent objector rule.

The wording of draft conclusion 16 should remain unchanged, while the commentary thereto should explicitly refer to Security Council resolutions and decisions. It should also clearly state that the provision was not intended to permit the unilateral invocation of a peremptory norm in order to avoid obligations under Security Council resolutions. That compromise would take account of the political sensitivity of the issue of the authority of Security Council resolutions, although, in his opinion, the Security Council was constrained by the provisions of the Charter of the United Nations. He recalled that in its advisory opinion on *Conditions of admission of a State to membership in the United Nations (Article 4 of the Charter)*, the International Court of Justice had held that: "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment."

The commentary to draft conclusion 17 should explain what was meant by "have a legal interest" and why "international community as a whole" had been used in preference to "international community of States as a whole". It should likewise deal with any recent developments in State practice in relation to the invocation of State responsibility referred to in paragraph 2. It would be wise for the commentary to draft conclusion 18 to refer to the relationship between the prohibition on the use of force and self-defence in the context of circumstances precluding wrongfulness. He welcomed the Special Rapporteur's readiness to make significant changes to the commentary to draft conclusion 19 to take account of States' comments, as he shared many of the doubts that they had expressed.

He supported the Special Rapporteur's decision to make significant amendments to draft conclusion 21 in order to demonstrate that it was not binding, that it did not imply the establishment of jurisdiction and that it did not affect the dispute settlement procedure under the Vienna Convention on the Law of Treaties. He was in favour of retaining draft conclusion 23 and its annex, since the list it contained would lend greater credibility to the concept of *jus cogens* and would provide a valuable guide to State conduct. In conclusion, he considered that the draft conclusions should be referred to the Drafting Committee.

The meeting rose at 1 p.m.