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Held at the Palais des Nations, Geneva, on Thursday, 21 April 2022, at 11 a.m.

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

* Reissued for technical reasons on 22 July 2022.

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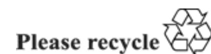

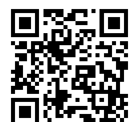

Present:

Chair:	Sir Michael Wood (First Vice-Chair)
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	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. 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. Grossman Guiloff said that the Special Rapporteur was to be commended for his outstanding work on the topic and for his fifth report (A/CN.4/747). In its second reading of the draft conclusions on peremptory norms of general international law (*jus cogens*), the Commission should pay special attention to the comments made by States. While 113 States had made comments either directly or as part of a group of States, only 23 had made written submissions and, in total, only 52 had commented on the full set of draft conclusions. The Commission thus continued to face structural issues in terms of States' participation, which could not simply be attributed to a lack of interest, but rather revealed the need for capacity-building to ensure that the views of the international community of States as a whole were taken into account. As had already been stressed in the debate on the fifth report thus far, a simple majority of States was not enough, whether on that topic or any other. While he agreed that the Commission should not be engaged merely in an exercise of counting States, the particular nature of a second reading must be recognized. In his opinion, States provided important arguments grounded in State practice, legal theory and doctrine.

In accordance with the conception of *jus cogens* in articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, peremptory norms of general international law required the exclusion of certain behaviour and the satisfaction of the notion of stability. That was achieved through the requirement that commonly shared values should be agreed upon by the international community as a whole and through the implementation of procedural requirements when there was a claim that those values had been breached. One important issue was whether and to what extent the Vienna Convention codified or had become part of customary international law. Not all of its requirements had achieved the status of customary international law. Unfortunately, there was also limited State practice in that regard. The international community had nonetheless recognized the need for balance, the importance of the concept of *pacta sunt servanda* and the normative enforcement of commonly shared values. Based on that recognition, it could be persuasively argued that some obligations of a procedural nature could be established, involving at a minimum good faith negotiation. In that respect, it was important to take into account the reasoning of the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, when it had upheld the parties' assertion that "articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith".

A recurring comment by Israel, Malaysia, the Netherlands, Turkey and the United States of America was that the draft conclusions were not based on sufficient State practice and instead relied too heavily on scholarship. He agreed with the Special Rapporteur, however, that most, if not all, of the draft conclusions were based on sufficient State practice, as evidenced by the examples mentioned in the commentaries. Taken together, those examples provided valuable material that constituted persuasive evidence in support of the Special Rapporteur's conclusions in the fifth report.

Concerning the possible existence of regional *jus cogens*, he agreed with the Special Rapporteur that it could be argued that the notion was not currently supported by sufficient State practice. However, as the issue of regional *jus cogens* was not within the scope of the current topic, there was no justification for making a statement to the effect that regional *jus cogens* did not exist. Given that a thorough study on the subject had not been carried out, such a statement would lack any depth and would not satisfy the minimum requirements that the Commission set for its work.

While the definition of peremptory norms under article 53 of the 1969 Vienna Convention seemed to exclude regional *jus cogens*, it did not necessarily exclude the conception of a different category of peremptory rules, since that was a matter governed by

customary international law. Obviously, a norm of regional *jus cogens* created by customary international law could not be incompatible with universal *jus cogens*.

In the Commission's previous discussion of the issue, various members had shown openness to the proposition that certain norms could enjoy a special status within a particular region. Although such regional norms did not have a universal hierarchical relationship *vis-à-vis* other norms, the special status that they enjoyed could be the starting point for the development of regional *jus cogens* norms. In that sense, if a group of States – not necessarily located in the same region – considered that a given norm enshrined special values that needed to be protected, they could have compelling reasons to vest it with special effects, which could go beyond mere treaty obligations. For Latin American States, an example could be the prohibition on reinstating the death penalty or on increasing the requirements for conduct to constitute enforced disappearance. 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.

He supported the inclusion of a non-exhaustive list of *jus cogens* norms in the draft conclusions and agreed with the Special Rapporteur that most States seemed to share that view. Some States, including Bulgaria, the Republic of Korea and Uzbekistan, had recommended that the Commission should proceed with caution, while others had advocated expansion of the list; for example, Portugal had expressed support for the inclusion of a reference to peremptory environmental norms. Additionally, a number of States had suggested that the principles of the Charter of the United Nations should be included in the list. To address the comments made by certain States, including China, India, Israel, the Russian Federation, the United States and Uzbekistan, the commentaries could be expanded to provide further justification for the norms in the list.

Specifically with regard to the prohibition of torture, the Special Rapporteur could enrich the analysis in the commentary by including references to treaty body decisions or reports of special procedure mandate holders, together with the conduct of States in response to them. In that respect, it was important to include a reference to the 2014 report (A/HRC/25/60) of the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Juan Méndez, in which he had 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". Reference could also be made to general comment No. 2 of the Committee against Torture, which stated that article 2 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provided 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." That general comment also stated 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".

In the case of *Suleymane Guengueng et al. v. Senegal* (CAT/C/36/D/181/2001), the Committee against Torture had also recognized the peremptory character of the prohibition of torture, stating that Senegal had classified torture in its Criminal Code as an international crime arising from *jus cogens*, pursuant to article 4 of the Convention. Additionally, in its concluding observations on the second periodic report of Namibia (CAT/C/NAM/CO/2), the Committee had reminded the State party that the absolute prohibition of torture was a recognized norm of *jus cogens* and that article 2 (2) of the Convention made clear that no exceptional circumstances whatsoever could be invoked as a justification of torture.

In its general comment No. 20, the Human Rights Committee had stated that article 7 of the International Covenant on Civil and Political Rights, concerning the prohibition of torture, allowed of no limitation. It had also reaffirmed on various occasions that treaty reservations offending peremptory norms of international law, including the prohibition of torture, were incompatible with the object and purpose of the Covenant. Even in situations of public emergency, such as those referred to in article 4 of the Covenant, no derogation from article 7 was allowed.

The commentaries should also include more references to all aspects of the principle of non-discrimination, which was of particular importance. In its draft articles on prevention and punishment of crimes against humanity, the Commission had already expanded the concept of gender established in the Rome Statute of the International Criminal Court. That also had clear implications in terms of the prohibition of discrimination. The principle of non-discrimination had been consistently and frequently considered a peremptory norm by different organs, in international instruments and in State practice. In a 2003 advisory opinion on the rights of undocumented migrants, for instance, the Inter-American Court of Human Rights had stated that "the principle of equality before the law and non-discrimination" could be considered "peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals".

The right to due process was also an integral part of the notion of *jus cogens*. The commentary should make clear that the fact that the prohibition of discrimination and the scope and applicability of due process were not included in the non-exhaustive list should in no way be seen as an indication of their lessened importance. That proposition had been supported by Austria, Colombia, Portugal, Slovenia and South Africa, which had requested the Commission to add norms to the list or further specify its criteria for the inclusion of certain norms, given that a number of norms recognized by the Commission to be of a peremptory nature were not on the current list. The norm concerning the use of force deserved special consideration in the light of current events, such as the Russian invasion of Ukraine.

Turning to the specific draft conclusions on which the Special Rapporteur had proposed modifications based on comments made by States, he said that he supported the text of draft conclusion 3. It seemed to him that it did not establish a new requirement for *jus cogens* but simply recognized that *jus cogens* norms reflected and protected fundamental values. Nevertheless, in light of some of the comments made by other members and some States, the definition of those values should be addressed in the commentary. He had no objection to the proposed modifications to draft conclusion 5, although he agreed with the Special Rapporteur that they were unnecessary and would require clarification in the commentary. He agreed with the proposal to amend the wording of draft conclusion 6 to bring it into line with the language of the 1969 Vienna Convention, on the understanding that the draft conclusion applied only to universal *jus cogens*.

With respect to draft conclusion 7, he saw merit in adding a qualitative component to paragraph 2 by adding the word "representative". However, the commentary should clarify that the word "representative" meant that there was a true claim to reflect the views of the international community of States as a whole. The quantitative and qualitative requirements would not be satisfied if the views of a minority group of States were simply disregarded. He was not convinced that paragraph 3 of draft conclusion 7 should be moved to draft conclusion 9 because the acceptance and recognition of a norm by the international community of States as a whole could not simply be considered a subsidiary means for determining *jus cogens*. If paragraph 3 had referred only to the positions of other actors in their own right, it might have been seen as referring to a subsidiary source, but that was not the case.

He agreed with the Special Rapporteur's recommendation not to modify the text of draft conclusion 8, on the understanding that the matter would be addressed carefully in the commentary. Regarding draft conclusion 9, the Special Rapporteur's argument that expert bodies created by States played a leading role in determining the peremptory status of particular norms was a persuasive one. The work of expert bodies not established by States could be regarded as "teachings" if they met the necessary conditions, but they did not have the same normative value as the work of expert bodies established by States.

He had serious concerns about the proposed amendment to draft conclusion 14 involving the addition of the word "would", which in his view would create ambiguity and would weaken the content of the draft conclusion. He proposed that paragraph 1 should begin: "A rule of customary international law does not come into existence if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*)." That wording was closer to the language used in the Vienna Convention.

A *jus cogens* norm was hierarchically superior to a rule of customary international law and nullified acts and treaties that contravened it. As had been noted by dissenting judges of the European Court of Human Rights in the case of *Al-Adsani v. the United Kingdom*: “the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.” It was thus clear that customary international law and *jus cogens* were two distinct sources of law. International law did not dictate that, in order for a State to be held to recognize a rule as customary international law, it must be in perfect conformity with that rule at all times. However, if a State consistently objected as a customary rule was emerging, it might, by becoming a persistent objector, prevent the rule from becoming binding upon it, although other States would still be bound. On the other hand, a State could not be a persistent objector to a *jus cogens* norm. Once a *jus cogens* norm had been established and recognized, it became absolutely binding on all States whether they had persistently objected or not.

Furthermore, it must be noted that customary international law was reversible, in the sense that a sufficient level of State practice and *opinio juris* could support the recognition of a counter-norm that was the opposite of the prior rule of customary law. In contrast, a *jus cogens* norm could not be unwound simply by virtue of widespread disrespect of the norm by a large number of States. Once the *jus cogens* norm was entrenched, it would remain, regardless of State practice.

He agreed with the proposed modifications, including the addition of paragraph 6, to draft conclusion 22, entitled “Recommended procedure”.

In conclusion, he said that he supported the referral of all the draft conclusions to the Drafting Committee.

Mr. Saboia said that the Special Rapporteur’s excellent fifth report, together with the written observations submitted by States and the comments made in the Sixth Committee, provided the Commission with a solid basis for completing the second reading of the draft conclusions. Several States had drawn attention to the lack or insufficiency of State practice and had used that argument either to question the project as a whole or to raise points regarding specific draft conclusions. The Commission had been aware of the scarcity of State practice on *jus cogens* since it had started its work on the topic. The same difficulty had arisen in relation to other complex topics, which the Commission had nevertheless dealt with successfully. The Special Rapporteur had argued, with good reason, that some States seemed to hold too narrow a view of State practice and to regard it as comprising only State acts that constituted a breach. As the Special Rapporteur had indicated, the report contained sufficient examples of State practice in the form of statements made at official meetings, decisions of national courts and treaty practice as reflected, in particular, in the 1969 Vienna Convention. On the other hand, if the Commission were to carry out a survey of State conduct in connection with breaches of *jus cogens* norms, it would find abundant examples of State practice.

Some States appeared to have failed to recognize the important role played by international courts and tribunals, particularly the International Court of Justice, whose jurisprudence on the legal aspects of acts of States that might conflict with norms of *jus cogens* shed light on State practice.

States had also raised issues about the nature of the draft conclusions, with some pointing to a perceived lack of clarity and precision in the nomenclature that the Commission had used to refer to some of its outcomes. They had asked for a better definition of the legal value of the draft conclusions, including an indication of whether they amounted to codification or progressive development of international law. Most States, however, had understood the character of the provisions. The Special Rapporteur put forward a good formulation in paragraph 29 of the report, in which he stated that the draft conclusions “should be seen as restatements of the law intended to guide those that are called upon to identify norms of *jus cogens* and to apply the consequences of such norms”.

As the Special Rapporteur had pointed out, draft conclusion 3 had been well received by the great majority of States but had been strongly opposed by some others. Norms of *jus cogens* belonged to a very particular category of legal provisions. They could not be derogated from except by another norm of the same nature and were hierarchically superior to other norms of international law. Consequently, they must consist of a limited number of rules that formed the core of the international legal system, whose values they reflected and protected. It was crucial for those features to be captured in a provision such as draft conclusion 3. The reference to “fundamental values of the international community” was also essential. The suggestion to place draft conclusion 3 directly after draft conclusion 1 deserved consideration.

Draft conclusion 7 (2) had given rise to a discussion about the quantitative and qualitative thresholds for the acceptance and recognition of *jus cogens* norms by the international community of States as a whole. Regarding the qualitative threshold, the proposed insertion of the word “representative” would express the generally accepted idea that a very large but also representative group of States was required. There appeared to be a convergence of views in favour of maintaining the phrase “very large majority of States” and adding the words “and representative”. He supported the retention of draft conclusion 7 (3) and the suggestion by Italy, which the Special Rapporteur considered useful, to replace the words “other actors” with “other subjects and actors” to cover, in particular, the position of international organizations.

With regard to draft conclusion 9, the debate had focused mainly on paragraph 2, in particular on whether expert bodies established by States or international organizations should be considered as subsidiary means for the determination of *jus cogens*. Some views had been expressed in favour of including expert bodies other than those established by States and international organizations. He agreed with the Special Rapporteur that the draft conclusion should be maintained as adopted on first reading.

Concerning draft conclusion 14, opinion had been divided mostly in relation to paragraphs 1 and 2, and to the form of those provisions rather than their substance. The amendments proposed by the Special Rapporteur would improve the text. Paragraph 3 had been met with opposition from only a few States. He personally supported draft conclusion 14, including paragraph 3.

As to draft conclusion 16, the bone of contention was whether the provision should be understood to apply to mandatory resolutions and decisions of the Security Council. In its discussion of the text adopted on first reading, the Commission had answered that question in the affirmative. The draft conclusion itself contained no mention of the Security Council. In paragraph (4) of the commentary, it was explained that the matter deserved special attention in view of its sensitive nature and in the light of Article 103 of the Charter of the United Nations. In the Commission’s report on the work of its seventy-first session (A/74/10), which contained the commentaries to the draft conclusions, footnotes 857 and 858 provided additional references and information. It was clear from the examples given in footnote 858 that, in the Sixth Committee, there had been widespread support for, and some opposition to, the solution contained in the first-reading text. There seemed to be sufficiently solid reasons to retain the decision made by the Commission on first reading.

Regarding draft conclusion 19, while some States had disputed the customary status of the provision, the commentary contained abundant references to case law and jurisprudence of the International Court of Justice, as quoted in footnotes 879 to 900. Serious breaches of *jus cogens* could not be dissociated from serious violations of the Charter of the United Nations, particularly when they required action to maintain or restore international peace and security. Serious breaches were most often related to gross violations of human rights. The shortcomings of the system of collective security put in place by the Charter lurked under the surface of the debate surrounding draft conclusion 19. The well-intended suggestion by Japan that serious breaches of *jus cogens* could entail an obligation to refrain from the exercise of a veto showed the frustration that most States felt in respect of the Security Council.

He was in favour of draft conclusion 23 and the draft annex, and recommended the referral of the draft conclusions to the Drafting Committee.

Mr. Hmoud, thanking the Special Rapporteur for his fifth report on the topic, said that a second reading was generally not the time to reconsider substantive issues, unless doing so was absolutely necessary in the light of developments in international law, such as a new judgment of the International Court of Justice. Otherwise, changes to the text should be made only to improve it in response to States' comments, without affecting the substance of the product. In the report, the Special Rapporteur had demonstrated flexibility regarding the content of the draft conclusions. He personally remained of the view that certain aspects of the topic were still open and would benefit from the Commission's input. In any event, he would support the adoption of the draft conclusions on second reading on the basis of the text proposed in the fifth report. The final product would contribute significantly to the implementation of the *jus cogens* regime in international law. Thanks to the leadership shown by the Special Rapporteur, the topic would reach a successful conclusion with the adoption of the draft text and the commentaries thereto. Considering the ambiguous nature of the *jus cogens* regime, commentaries would play an even more prominent role than they did under other topics in contextualizing the Commission's output. They would also provide an understanding of the extent of the practice underpinning the draft conclusions; in other words, they would indicate whether the latter were based on existing rules or progressive development, and whether the doctrinal aspects warranted the proposal of *lex ferenda*. The Special Rapporteur had consistently supported a cautious approach to the topic, and the fact that several draft conclusions were proposed as progressive development meant that the commentaries must provide a solid basis for them, including in terms of doctrine.

As was noted in paragraph 7 of the report, 113 States had expressed views on the topic, whether orally in the Sixth Committee or through written observations. However, it was also clear from the report that only a small group of States had actively commented on all the draft conclusions. It was to be hoped that the adoption of the draft conclusions on second reading would lead to a more comprehensive understanding of the content of the *jus cogens* regime. Nevertheless, silence from States concerning the rules underlying certain draft conclusions should not be interpreted as either acquiescence or reservation. In his view, it meant that those States did not have a position on the matter, perhaps because they were unsure of the content of a draft conclusion, its legal basis or its consequences. It was therefore important for the draft conclusions proposed as progressive development to be flexible, so that they could be developed on the basis of State practice.

Several States had raised the issue of insufficient practice underlying certain draft conclusions. While he agreed that the Commission should nevertheless propose the provisions in question, more emphasis should be placed in the commentaries on examples of practice that purported to produce legal effects. Statements could indeed be a form of practice, but the Commission should be wary of treating oral or written statements as such. Indeed, statements could be political, rather than legal, in nature, or might reflect a belief or understanding, not practice *per se*. Decisions of international courts and tribunals could be evidence of the existence of a *jus cogens* rule or of acceptance and recognition by the international community of States as a whole. He did not consider reliance on such decisions to be a departure from the cautious approach to the topic.

While he agreed with the statement in paragraph 29 of the report that the draft conclusions should be seen as restatements of the law to guide practitioners on the identification of norms of *jus cogens*, he did not agree with the view, expressed in paragraph 28, that they had a function of reformulation, which could give the erroneous impression that they were intended to amend existing law.

Among the aspects of the *jus cogens* regime that remained open for debate was the question of how, or under which conditions, a *jus cogens* norm could be modified by the emergence of a subsequent norm of general international law having the same character, including in situations where the subsequent norm nullified the existing one. In his opinion, such a subsequent norm could never emerge, since it would obviously be in conflict with the existing norm. He therefore supported the proposal to change the title of the draft conclusions to "Draft conclusions on identification and legal consequences of peremptory norms".

He wished to make some specific remarks on the draft conclusions. There had been much debate within the Commission and among States about draft conclusion 3. He had already expressed his views on the provision when it had first been proposed by the Special

Rapporteur. The draft conclusion was descriptive, not normative, and would assist practitioners in understanding the characteristics of *jus cogens*. Nevertheless, the commentary should make clear that the draft conclusion was not intended to establish other conditions or criteria for identification. While the elements of hierarchical superiority and universal applicability might be read as overlapping with the criteria of non-derogability and generality, he did not see merit in moving the draft conclusion to the commentaries. In any event, the protection of fundamental values was an important characteristic that should be highlighted in the draft conclusions or the commentaries thereto.

A related matter was that of so-called regional *jus cogens*. He agreed with the Special Rapporteur that the concept was not part of general international law. It did not exist, and the Commission should not endorse any suggestion that the concept had merit, whether in regional practice or doctrine. He also agreed with the Special Rapporteur that reference should be made, in draft conclusion 3, to the "values of the international community", which was a separate matter from the requirement of acceptance and recognition by the international community of States as a whole, as provided for in the 1969 Vienna Convention.

Concerning draft conclusion 5, while he did not feel strongly about the matter, his preference would be to retain the words "basis" and "bases", for the reasons explained by the Special Rapporteur in paragraph 69 of the report. As to the content of the draft conclusion, practice supported the argument that customary international law was the basis for *jus cogens*. While there was no existing norm of *jus cogens* based on treaty provisions or general principles of law, article 53 of the Vienna Convention defined *jus cogens* as a peremptory norm of general, rather than customary, international law. It would therefore be inconsistent with the Vienna Convention to exclude the possibility that a *jus cogens* norm could develop from a treaty rule or a general principle of law. He suggested that draft conclusion 5 (2) should state that the draft conclusion was without prejudice to that possibility, and that paragraph 1 should be redrafted to read: "Peremptory norms of general international law (*jus cogens*) are based on customary international law."

He agreed that draft conclusion 6 (1) could be deleted. Paragraph 2 should be retained as it stood or reformulated as suggested by the United States.

With regard to draft conclusion 7, there had been considerable debate about the threshold for acceptance and recognition by the international community of States as a whole. While it was difficult to quantify that threshold, the Commission had, on first reading, opted for the phrase "a very large majority" and the clarification that acceptance and recognition by all States was not required. The intention had been to create a threshold lower than universality but higher than a simple or even absolute majority. He would prefer to retain the qualification "a very large majority" and to add the element of representativeness that some States had mentioned in their comments. It should be explained, in the commentary, that representativeness involved assessing the positions of States in the various regions and with different legal and cultural traditions. However, the focus on the collective opinion of States did not mean that some States could speak on behalf of others. All States should be able to contribute to collective acceptance and recognition. That said, if a small minority chose not to do so, that should not prevent collective acceptance or recognition from developing. Silence should be treated with caution and not as evidence of implicit acceptance or recognition. It should be dealt with on a case-by-case basis in determining whether States that were silent were part of the "very large and representative majority".

Concerning draft conclusion 8, he agreed that what was relevant was evidence derived from the conduct of States that reflected their position on acceptance and recognition. However, that was not confined to conduct associated with resolutions adopted by an international organization or at an international conference. The same applied to conduct related to treaty provisions. Reservations and interpretative declarations could provide evidence of a lack of acceptance or recognition. In short, the commentary should deal with the issue. There was no need to amend the text of the draft conclusion itself. Regarding decisions of national courts, he agreed that, for the decisions of lower courts to be taken into account, they should be relevant. That matter could also be dealt with in the commentary.

The wording of draft conclusion 9 was based on Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, although the latter dealt with the determination

of rules of law, not the peremptory character of *jus cogens*. In his view, the issue was whether decisions of international courts and tribunals could serve as evidence of the existence of a *jus cogens* norm, not that such decisions were a subsidiary means for determining the peremptory character of norms of general international law. He was also concerned that the use of the term "subsidiary means" in paragraph 1 could undermine the pronouncements of the International Court of Justice on the existence of certain peremptory norms. He suggested that the draft conclusion should be reformulated to emphasize the evidentiary value of such decisions, while indicating that the works of expert bodies and teachings could also serve as evidence.

With regard to draft conclusion 11, he was in favour of applying one standard both for concluded treaties that conflicted with existing *jus cogens* norms and for treaties that became void owing to the emergence of a new *jus cogens* norm. Given that articles 53 and 64 of the Vienna Convention were absolute in providing for the voidance of treaties in the two cases, the separability of treaty provisions in either case would not be consistent with those articles. While he understood the arguments put forward in respect of article 44 of the Vienna Convention, that article could not be read in such a way as to justify separability in cases involving an emerging norm.

On the matter of rules of customary international law that conflicted with *jus cogens*, considering that, in practice, only customary international law provided a basis for *jus cogens*, the development of a new *jus cogens* norm that modified or nullified an existing one would be impossible under draft conclusion 14.

He wished to reiterate his support for the content of draft conclusion 16. He agreed with the Special Rapporteur that the commentary should clarify that a State could not unilaterally refuse to comply with its legal obligations under a Security Council resolution.

He agreed that draft conclusion 21 should be reformulated to make it recommendatory. However, in cases not involving a multilateral treaty, it would be difficult to notify all States concerned, and it was not the function of the Secretary-General of the United Nations to do so. Among the issues that should be considered by the Drafting Committee were how to determine which States had participated in the formation of a customary rule or general principle of law in conflict with *jus cogens* and whether those that had not should also be treated as States concerned that could raise objections.

As to draft conclusion 23, he continued to support the non-exhaustive list for the reasons that he had mentioned in his comments on the Special Rapporteur's fourth report (A/CN.4/SR.3460). It was an indicative list whose value was determined by States in their practice. In closing, he said that he appreciated the Special Rapporteur's immense contribution to the topic over the years. He recommended that all the draft conclusions should be referred to the Drafting Committee.

Mr. Rajput said that he appreciated the Special Rapporteur's fifth report and oral introduction thereof. In his remarks, he would focus only on certain critical points, on the understanding that his silence on other matters should not be interpreted as acceptance.

Seen from a theoretical perspective, draft conclusion 3 provided an important description of the nature of peremptory norms of general international law. For some, it simply stated the obvious. The apparently benign description masked a divergence of views over which elements appropriately described *jus cogens*, and the impact of the description on the overall output was lost. He found apt the observation of the United Kingdom that draft conclusion 3 "complicates and obscures the Commission's otherwise clear statements of the definition and criteria for identifying norms of *jus cogens* set out in draft conclusions 2 and 4, and should therefore be omitted from the draft conclusions".

He did not find the practice of a "headcount" for determining the level of support for the draft conclusions healthy, especially since it was assumed that silence amounted to agreement with the Special Rapporteur's proposals. The problem with that approach was that subtle points made by States were lost. The reasoning followed by States should underpin the analysis of the Commission's work. It was therefore important to accommodate the views expressed by States in a spirit of cooperation and collaboration. The problems with the headcount approach were particularly evident in the case of draft conclusion 3. Slovenia, for

example, supported the "notion" contained in the draft conclusion, but also argued that the provision would cause confusion. While most States had been silent or evasive, South Africa had ostensibly been one of the few to express explicit support for draft conclusion 3. However, it had also stated that "the commentaries can be strengthened to indicate more clearly the relationship between criteria and the characteristics", the thinking being that the characteristics – or elements, as the Special Rapporteur had described them in his oral introduction – in draft conclusion 3 were related to the criteria specified in draft conclusion 4. In other words, the "elements" were a requirement additional to the "criteria" identified in Part Two, and specifically in draft conclusion 4. Other States, including Denmark on behalf of the Nordic countries, Germany, the Russian Federation, the United Kingdom and the United States, had been vocal in pointing out the confusion created by the inclusion of draft conclusion 3. Even those States that supported the notions contained in the draft conclusion, such as Poland and Switzerland, circumscribed their agreement to the elements set out in article 53 of the 1969 Vienna Convention. Moreover, he was not sure that even those States that had expressed "overwhelming support" for draft conclusion 3 agreed with the Special Rapporteur that the Vienna Convention was just a starting point for the topic and not a "cage". According to Japan, if the Commission wished to depart from the Vienna Convention, it should give reasons for doing so. Such reasons should be grounded in State practice. Otherwise, the Commission would in effect be amending article 53. Interestingly, the Special Rapporteur treated the Vienna Convention as a "cage" for the purposes of draft conclusion 3 but as gospel in the context of draft conclusion 12, a contradiction that he personally found worrying.

In the report, the Special Rapporteur argued in favour of retaining draft conclusion 3 in addition to draft conclusion 4, as the former contained "elements", while the latter contained "criteria". In the *Oxford English Dictionary*, "element" was defined as "a necessary or typical part of something", whereas "criterion" was "a standard or principle by which something is judged". Thus, elements and criteria were two different requirements, both of which had to be satisfied. In other words, to qualify as *jus cogens*, a norm had to meet the strict requirements in draft conclusion 3 and those contained in draft conclusion 4. Austria had pointed out some of the problems with the element of hierarchical superiority in draft conclusion 3. Moreover, the very first sentence in paragraph (1) of the commentary to draft conclusion 3 referred to those elements as "essential characteristics". Thus, anyone called upon to interpret a rule would say that draft conclusion 3, which reflected "essential characteristics" of *jus cogens* norms, was more important than draft conclusion 4, which merely set out criteria for their identification.

Paragraph 53 of the report and the Special Rapporteur's oral introduction had indicated that the contents of draft conclusion 3 were merely descriptive and that, for the purpose of identifying the peremptory character of a norm, only the criteria in draft conclusion 4 needed to be satisfied. If that was the case, then what purpose did draft conclusion 3 serve? Although he could see the emotive value of including such a description, doing so could destroy the value of the overall output by making the existence of a peremptory norm virtually impossible to establish. Mere cosmetic effect was insufficient justification for its inclusion, since every word contained in the draft conclusions would have implications and would need to be considered, in line with the elementary interpretive rule of avoiding *effet utile*.

A further problem with the elements identified in draft conclusion 3 was that there was no agreement on which elements should or should not be included. That was to be expected, since no description could ever be exhaustive. For example, if the goal of *jus cogens* was to "protect essential humanitarian values", as explained by the International Court of Justice in the *Genocide* cases, then the question arose as to why essential humanitarian values were not mentioned in draft conclusion 3. In paragraph 54 of the report, the Special Rapporteur drew a distinction between the values of the international community and those of the international community of States as a whole. That raised the question of how those two concepts differed and whether a *jus cogens* norm must reflect and protect both types of values or only one. A practitioner asked to interpret and apply the draft conclusions in a practical scenario would no doubt pose many other, more complex questions. During the negotiation of articles 53 and 64 of the 1969 Vienna Convention, the drafters had wisely decided not to include such descriptive language in the definition of *jus cogens*. He agreed

with the observation made by the United Kingdom that draft conclusion 3 was neither "necessary" nor "helpful" and should be deleted. At best, it could be included in a preamble, as Mr. Forteau had suggested at the 3564th meeting.

Concerning draft conclusion 7, he agreed, in principle, with the Special Rapporteur's proposal to indicate that the "very large majority" to which it referred must be "representative". However, he was unconvinced by some of the justifications and new arguments presented in paragraphs 88 and 91 of the report. It was difficult to fathom the Special Rapporteur's affirmation, in paragraph 88, that "the peremptory status of a norm does not, as such, establish 'legal obligations'. The legal obligations are established by the general norm on which the peremptory norm is based, e.g., customary international law." That did not address cases in which the contents of a peremptory norm differed from those of the customary norm on which it was based. If a peremptory norm was based on a treaty codifying a customary norm, its scope could differ from that of the customary norm or the treaty codifying that norm.

In paragraph 91, the Special Rapporteur indicated that the threshold for *jus cogens* was only qualitatively, and not quantitatively, higher than that for customary international law. That meant that only the quality, not the extent, of support was what mattered and that the number of States required to establish recognition of a peremptory norm was the same as that required to establish recognition of a rule of customary law. If that was the case, then the phrase "a very large majority" in draft conclusion 7 was redundant. Also, the level of support required for a customary norm would be lower, since the persistent objector rule applied to customary norms but not to peremptory norms. Thus, a peremptory norm needed to have higher levels of both qualitative and quantitative support than other norms, and that threshold could be achieved through its representative character.

The insertion of the words "and representative" after the words "very large" in paragraph 2 would narrow the majority required. However, the word "representative" was intended to introduce a further requirement: in addition to being very large, the majority must also be representative, meaning that the States comprising it must represent more than one region or legal system. That would be best reflected if the phrase "across regions, legal systems and cultures" was inserted after the words "majority of States", as proposed by Singapore.

In relation to the contentious reference to Security Council actions in the commentary to draft conclusion 16, he fully supported the Special Rapporteur's proposed way forward, as set out in paragraph 162 of the report. In practice, it was difficult to imagine that the Security Council could adopt a resolution that was contrary to a peremptory norm. That was not only because it was an ineffective body that rarely took action even in the types of situations it was meant to address, owing to the attribution of permanent membership to certain outdated Powers, but also because positive action on its part would require the involvement of non-permanent members as well, and it was unlikely that a resolution that was contrary to peremptory norms would be agreed to by all of them. A balance was necessary, since any entity addressed in a Chapter VII resolution would allege that the resolution was contrary to peremptory norms.

With regard to the Special Rapporteur's recommendation on draft conclusion 19, the scope of the provision should not be expanded by means of the commentary. He was not convinced by the argument that the Commission should go beyond what the International Court of Justice had stated about the effect of peremptory norms. The Commission needed to take a more nuanced view on that issue.

Draft conclusion 22, which was a "without prejudice" clause, did not serve much purpose except to preserve the commentary and its references to immunity, an issue that was not directly covered by the topic and was being considered separately by the Commission.

With regard to the non-exhaustive list set out in the annex to the draft conclusions, there was merit in the criticism by several States that the quick-fix approach of reproducing norms identified in the Commission's past work was not a desirable one. Some States had pointed out the incongruence inherent in the Commission's decision to provide a list without applying its own methodology for arriving at that list.

On the subject of the methodology used in the report, he wondered whether the Special Rapporteur might be willing to reconsider some of the conclusions he had drawn from the comments of States, especially those States he had referred to as "vociferous". In his own view, those States were simply making legitimate points about a matter that would have serious and far-reaching implications for them. Their criticism that the conclusions and work of the Commission were not based on sufficient State practice was an important one.

Under article 15 of its statute, the International Law Commission must rely on extensive State practice, precedent and doctrine when codifying international law. However, the process of progressive development did not demand the same rigour. Although there was no harm in drawing conclusions based on judicial decisions and doctrine, if State practice was not extensive or if it was minimal or lacking, the Commission should spell that out clearly.

The Special Rapporteur's assertion in paragraph 20 of the report that the majority of States did not share the view that the commentaries were not supported by practice gave the impression that the majority of States expressly supported the methodology of not relying on sufficient or extensive State practice. A look through their statements showed that most had remained silent on the matter. It was doubtful that silence should be treated as tacit acceptance. Nearly all of the States that were cited in paragraphs 20–22 as being supportive of the Commission's approach had referred only to the word "practice", and not to "State practice". Nor did their support for the methodology of adhering closely to the 1969 Vienna Convention necessarily imply that they endorsed the view that there was sufficient State practice. The Commission should be straightforward and transparent on that matter, stating that because there was insufficient State practice, it had relied primarily on judicial decisions and doctrine and was progressively developing the law.

States' demand for more examples of State practice was legitimate, since they would be dealing with the consequences of the Commission's work, not just when *jus cogens* norms were invoked for protecting a right, but also when they were used as an instrument for abuse. The draft conclusions offered no means of avoiding the abusive invocation of *jus cogens*, as they included no procedural safeguards of any kind, except a non-binding dispute resolution procedure. He shared the view expressed by Japan that every effort should be made to strike a balance between theory and reality and that the need to avoid the abusive invocation of *jus cogens* should be stressed.

In conclusion, he said that he supported the referral of all the draft conclusions to the Drafting Committee.

Mr. Petrič said that clarification of the concept of *jus cogens* was of crucial importance to the international legal system because it represented an attempt to solve the ever-present dilemma of whether international law was limited to what States concluded in treaties and carried out in practice or whether it included something more ambitious. While the Commission had made great progress on the topic, it was only at the initial stages of addressing that dilemma, which posed an enormous challenge for the future.

Given the critical state of current international relations, it was interesting to contemplate what had prompted the Commission, in its draft articles on the law of treaties, and then States, in the 1969 Vienna Convention, to introduce *jus cogens* into what had become one of the basic instruments of the international legal order. What was the origin of the awareness that international law was more than the result of the directly expressed will of States and that there were some basic values that should be protected by law and from which no derogation was permitted? That historic breakthrough had occurred during the same period in which Czechoslovakia had faced the aggression of several Warsaw Pact countries. Earlier treaties had in some cases rewarded acts of aggression; examples included the Munich Agreement of 1938 and the Molotov-Ribbentrop Pact of 1939. However, those treaties had subsequently become null and void. He wondered whether the aggression in Ukraine would end with such a treaty that rewarded the aggressor and whether any such treaty would be deemed to be in violation of *jus cogens* and therefore null and void. The outcome would depend on the extent to which the parties adhered to *jus cogens* norms, one of the most basic of which was that set out in Article 2, paragraph 4, of the Charter of the United Nations,

under which Members must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.

He endorsed the view that the Commission should retain draft conclusion 3. When defining *jus cogens*, the Commission should stress that it was a special kind of international law, precisely because it protected certain fundamental values on which human society and the international community were based. Behind, or underlying, each peremptory norm were particular fundamental values. Those values also constituted the pillars of the Commission's current project. In addition, he shared the Special Rapporteur's preference for not modifying the text of draft conclusion 3. It had been clear from the outset of the Commission's consideration of the topic that *jus cogens* norms reflected and protected fundamental values of the international community, and their peremptory character flowed from that fact.

With regard to draft conclusion 4, he, like the Special Rapporteur, was sympathetic to the view of Armenia that the criteria in draft conclusion 4 should be reformulated so as to be based on natural law rather than positive law. He strongly supported the two criteria set out in the draft conclusion for the identification of *jus cogens* and saw no need for greater specificity with regard to the phrase "the international community of States as a whole". The same applied *mutatis mutandis* to draft conclusion 7. Paragraph 2 of draft conclusion 7 was thus superfluous; acceptance and recognition by "the international community of States as a whole" was the standard to be met. The addition of the word "representative" was unnecessary, since the phrase "international community of States as a whole" encompassed both the required numerical and representational aspects.

In the past he had endorsed draft conclusion 23 and the annex to the draft conclusions, but after learning of the reactions of several States, he would no longer oppose their deletion. Serious methodological problems had been raised by States, and there was also a risk that the norms listed in the draft annex would be understood as being proclaimed by the Commission to be *jus cogens* norms. In the event that the draft annex was retained, consideration should be given to the remarks by several States that the list should be more comprehensive and that it should include the basic principles of the Charter of the United Nations, which unquestionably had been duly accepted and recognized.

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

The meeting rose at 1 p.m.