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Held at the Palais des Nations, Geneva, on Friday, 22 April 2022, at 11 a.m.

Contents

Present:

Chair:	Sir Michael Wood (First Vice-Chair)
Members:	Mr. Argüello Gómez
	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. Nguyen said that the Special Rapporteur's fifth report on peremptory norms of general international law (*jus cogens*) (A/CN.4/747) provided an excellent summary of States' comments as well as a succinct and comprehensive response to them. Although some States had questioned whether there was sufficient State practice for the formulation of draft conclusions, the explanation provided by the Special Rapporteur and the effort he had made to document State practice, however sparse, in each draft conclusion, had proven that the Commission's work was firmly underpinned by existing State practice. State practice in relation to the peremptory norms of general international law might be thin compared with practice in respect of other issues of international law, but it was not insufficient for the present purposes.

Peremptory norms of general international law were not static and it was not always easy to establish the boundary between codification and progressive development of international law. However, the aim of the Commission's work on the topic was to provide guidance for the identification of *jus cogens* norms and the legal consequences of their application. Some States had enquired as to whether the form of the Commission's output had differing implications for States and, specifically, whether it created binding or non-binding obligations. While the form that draft articles should take was expressly specified in the Statute of the International Law Commission, there were no formal guiding criteria for the other forms, which were used in a flexible manner. Nonetheless, in draft conclusions, the Commission should limit itself to the codification of international law and should not stray into progressive development; pursuant to the Statute, the codification of international law meant "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". The task of "codification" did not include reformulation, as the Special Rapporteur implied in paragraph 28, and it might therefore be advisable to clarify in the commentaries where the boundaries between progressive development and codification lay and to refrain from creating new law in such an important area.

To avoid future confusion regarding the implications of differing forms of output, he would encourage the Commission to take a decision during the current session on the formal criteria that should guide the choice of output. The non-paper on that subject circulated by Mr. Jalloh in 2019 would provide a useful starting point for the discussion. In any event, whatever their form or particular nomenclature, draft conclusions, draft guidelines and draft principles were not binding instruments. Their function was to provide authoritative guidance for identifying norms and their legal consequences in the process of the codification and progressive development of international law.

Turning to specific draft conclusions, he said that he strongly supported the Special Rapporteur's recommendation that draft conclusion 3 should be placed immediately after draft conclusion 1, with the current draft conclusion 2 becoming the new draft conclusion 3. That order was more logical and would enhance clarity. The change would also prevent draft conclusion 3 from being mistakenly interpreted as introducing a requirement for a norm to reflect and protect fundamental values of the international community as an additional criteria for the identification of *jus cogens*.

The description of peremptory norms of general international law that constituted draft conclusion 3 would be more logical, in his view, if reordered so that their hierarchically superior nature and universal applicability were referred to first, before their role in protecting fundamental values of the international community. However, he respected the Special Rapporteur's decision not to change the text adopted on first reading. He did, on the other hand, see a need to clarify whether peremptory norms had a role in safeguarding all or just some of the fundamental values of the international community. At the present time, peremptory norms existed in some, but not all, fields of international law. He suggested that, for greater precision, either the word "certain" should be inserted before the phrase

"fundamental values of the international community" or the phrase should be reworked to read "values accepted and recognized by the international community"; alternatively, more extensive explanations could be provided in the commentary.

That suggestion was based on three arguments. Firstly, as a legal concept, the term "fundamental values of the international community" did not give rise to any singular or even uniform interpretation. France, for example, had stated that the concept was "subject to various interpretations and controversies". Secondly, the list of peremptory norms included in the annex to draft conclusion 23 had attracted conflicting opinions. Thirdly, in their statements in the Sixth Committee some States had made specific efforts to use other more precise terms in preference to "fundamental values". Mexico, for instance, had spoken of "the most precious legal values of the community of States", while Portugal had referred to "certain fundamental values of international law". The same caution could be found in jurisprudence: in the *Arancibia Clavel* case, the Supreme Court of Argentina had stated that the purpose of *jus cogens* was to "protect States from agreements concluded against some values and general interests of the international community of States as a whole". For those reasons, it would be advisable to clarify in the commentary what was meant by "fundamental values of the international community" so as to ensure that all truly fundamental values of the international community were reflected.

With regard to draft conclusion 7 (2), he noted that both the Special Rapporteur and the States that had commented on it took the view that the notion of "a very large majority" should be considered to have a qualitative as well as a quantitative element. However, the addition, as proposed by the Special Rapporteur, of the words "and representative" after "very large" was no guarantee of acceptance and recognition by the international community as a whole. The requirement for representation "across regions, legal systems and cultures" needed to be emphasized in the draft conclusion, and not in the commentary. Referring to "a very large majority" could help to prevent the persistent objections of a handful of States from hindering the emergence of new peremptory norms. Referring to "a very large and representative majority", on the other hand, might make it possible to overlook the acceptance and recognition of States whose limited resources precluded their participation in the process. Moreover, that language might not adequately reflect situations in which a *jus cogens* norm, such as the prohibition of slavery, was adopted without objection or doubt within the international community. The Special Rapporteur noted correctly that the question of whether "a very large majority" existed was indeed not solely about numbers, and should be assessed on a case-by-case basis. For those reasons, he suggested that the commentary should clarify what was to be understood by a majority that was "representative" of geographical regions, legal systems, cultures, civilisations, development levels or any other criteria. It would also be helpful to clarify that "a very large majority" did not exclude situations of universal or near-universal acceptance and recognition.

Turning to draft conclusion 23, he noted that the content and location of the non-exhaustive list of peremptory norms included in the annex had attracted a range of views, and that, while most States supported its inclusion, a not insignificant number were opposed. In his opinion, some of the concerns raised by States merited serious consideration and a concise study of the current status as *jus cogens* of norms referred to as such by the Commission in the past might be warranted. The inclusion of the non-exhaustive list could lead to controversy over what should and should not be included: the Commission would thus need to explain more clearly its methodology and justification for selecting the eight norms listed but excluding the principles of international law reflected in Article 2 of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Furthermore, opinions differed as to whether some of the norms listed actually met the criteria for the identification of *jus cogens* set forth in the draft conclusions. The Commission should proceed with caution if it wished to avoid jeopardizing the adoption of the entire topic.

A possible solution would be to change the title of draft conclusion 23 to "Recommended non-exhaustive list based on previous work of the Commission", or something along those lines. That would draw a link to the Commission's position on peremptory norms as set forth in various outcomes of its work, including in its articles on

responsibility of States for internationally wrongful acts and its study on fragmentation of international law. However, those outcomes did not provide confirmation of whether certain rules were or were not peremptory norms of general international law (*jus cogens*). In any case, such confirmation was beyond the scope of the current report, which was focused rather on the methodology for identifying peremptory norms and the legal consequences of the application of those norms.

The task of identifying norms that had the status of *jus cogens* could be included in the Commission's long-term programme of work. That task would entail checking the applicability of the new criteria for the identification of *jus cogens* proposed in the present report both to norms referred to in the Commission's previous work and to newly emerging norms. International law was not static, and new questions and concerns had been raised about some of the norms referred to in the previous work of the Commission. Israel, for example, had questioned whether the basic rules of international humanitarian law met the standards codified in article 53 of the Vienna Convention on the Law of Treaties. However, it was for the international community of States as a whole to accept and recognize norms recommended by the Commission from its codification of State practice as *jus cogens*. The candidates for recognition as peremptory norms of international law that might be considered for future study included the prohibition of the use of force and the protection of the environment.

As an additional advantage, providing a list of recommendations would allow the list to be included in the operative text, as opposed to the commentary, to reflect the current status of codification and progressive development of peremptory norms of general international law. The main concern raised by States with regard to the list was whether the norms included therein were accepted and recognized as peremptory by the international community of States as a whole, not whether the list was located in the draft conclusions, an annex or the commentaries. The inclusion of a list would have no impact on the acceptance and recognition of peremptory norms, either currently or in the future. It would simply reflect the Commission's work on the topic over the past 50 years and recommend a number of candidate norms for evaluation under the criteria set forth for their identification as peremptory norms.

He was satisfied with the explanations provided by the Special Rapporteur in respect of the other draft conclusions and was in favour of sending them all to the Drafting Committee.

Mr. Reinisch said that he wished to congratulate the Special Rapporteur on a report that addressed States' comments and observations in a structured, detailed and comprehensive fashion and provided a clear indication of his preferences as to how the Commission should proceed. The Special Rapporteur had specifically invited the members of the Commission to express their views on the suggestion by Italy that the title of the draft conclusions should be reformulated as "Draft conclusions on identification and legal consequences of peremptory norms", or something along those lines. In that connection, he wished to note that while he was open to the possible change, such a reformulation would involve a certain amount of duplication in respect of the content of draft conclusion 1, which defined the scope of the conclusions.

Turning to draft conclusion 3, he noted that the United States had pointed out that the phrase "hierarchically superior" could be viewed as tautological. Although he agreed that the term "superior" in itself implied some form of hierarchy, he would advise against the deletion of the term "hierarchically", since it emphasized, in unambiguous terms, the main idea expressed in the draft conclusion and clarified the superior nature of *jus cogens* norms *vis-à-vis* ordinary international law. With regard to the discussion of regional *jus cogens* in paragraph 55, although the Special Rapporteur appeared reluctant to acknowledge the concept, in his view, the Commission should not wholly exclude the possibility of norms of a peremptory character emerging at a regional level. However, that possibility did not fall within the scope of the topic under consideration, which clearly referred to general international law, as the Special Rapporteur rightly noted. To prevent any misunderstanding, he suggested that an additional sentence should be inserted in the relevant commentary to clarify that draft conclusion 3 addressed only peremptory norms of general international law

and was thus silent on the possible existence of peremptory norms of regional international law.

With regard to draft conclusion 6, in response to States' comments, the Special Rapporteur was recommending that the words "by the international community of States as a whole" should be inserted in paragraph 2, after "accepted and recognized". While understandable, he thought that addition would be redundant, particularly in view of draft conclusion 7, which made acceptance and recognition by the "international community of States as a whole" a prerequisite for the purposes of *jus cogens*. Furthermore, if the recommendation was accepted, it might be argued that paragraph 1 of the draft conclusion would serve little, if any, purpose. It would therefore be preferable to maintain both paragraphs in their current form.

The notion of the "international community of States as a whole", as used in draft conclusion 7, had already been widely discussed. The current draft, together with the clarification provided in the commentary, appeared to make sufficiently clear that acceptance and recognition by the "international community of States as a whole" required not simply a large majority in terms of numbers, but also a majority that was representative of different regions, legal systems and cultures. For that reason, he agreed with the Special Rapporteur's suggestion to add the words "and representative" after "very large" in paragraph 2 in order to qualify the quality of the majority required.

In respect of draft conclusion 11, he noted the Special Rapporteur's efforts to find a formulation in line with the rules contained in the Vienna Convention on the Law of Treaties, as well as his willingness to consider whether the possibility of separability should remain available only for peremptory norms that emerged after a treaty had been validly concluded (*jus cogens superveniens*). In the light of comments from many States, he saw merit in considering the possible separability of treaty provisions that conflicted with pre-existing *jus cogens* norms. Although the rationale underpinning the Vienna Convention, which was to deter the conclusion of treaties that contravened *jus cogens*, was laudable, practical considerations might preclude a strict rule of non-separability. In particular, distinguishing between pre-existing *jus cogens* and *jus cogens superveniens* added yet another layer of evidentiary issues to the process, in that a State claiming a conflict between a treaty provision and *jus cogens* might be required to prove at which specific moment in time the *jus cogens* norm had come into existence. That additional step seemed unwarranted, especially since it was conceivable that conflicts between a treaty provision and pre-existing *jus cogens* might not be readily apparent during treaty negotiations. He suggested that, in order to strike a balance between the sanctity of treaties and the sanctity of *jus cogens*, it might be better if separability was also available for pre-existing peremptory norms, under the conditions set forth in draft conclusion 11 (2). In that case, amendments to draft conclusion 10 might also be required.

He agreed with the Special Rapporteur that it would be preferable for the text of draft conclusion 13 to expressly mention the invalidity of any attempt to enter a reservation to a *jus cogens* norm expressed in a treaty, although he would not insist on such a formulation. In relation to draft conclusion 14, he agreed with the Special Rapporteur's recommendation that the first sentence of the first paragraph should be amended in order to prevent the potential misunderstanding against which certain States had warned in their comments in the Sixth Committee. The new wording suggested by the Special Rapporteur sufficiently clarified the point and was preferable to the original wording.

Draft conclusion 16 aptly extended the consequences of a *jus cogens* norm for other norms of international law to obligations stemming from resolutions of international organizations. He agreed that such resolutions included those of the United Nations Security Council and that an express mention of that fact should be included in the commentary. While noting the concern expressed by certain States in that connection, he believed that the view they expressed – namely, that it was "highly unlikely", if not "inconceivable", that such resolutions would be in conflict with *jus cogens* – strengthened rather than weakened the proposed draft conclusion: it was precisely because a resolution incompatible with a peremptory norm would not have binding effect that it was highly unlikely that such a resolution would be adopted in the first place. Similarly, maintaining in the draft conclusion that such resolutions would not create obligations under international law did not weaken the

authority of the Security Council, because the text made clear that even the Security Council was bound by *jus cogens* and thus operated on the fundamental rule-of-law assumption that even the highest United Nations body was not above the law. The Czech Republic had made a pertinent comment concerning the separability of elements of resolutions of international organizations but, in his view, that issue was already addressed in the text by the use of the phrase "if and to the extent that". The point could, however, be emphasized in the commentary. He supported the Special Rapporteur's proposal that the current text of draft conclusion 16 should be maintained and that the commentary should make clear that Security Council resolutions fell within its scope.

Draft conclusion 19 was of central importance. He concurred with the opinion expressed by a number of States that it might well be misguided to apply the consequences identified in the draft conclusion only in the event of serious breaches of *jus cogens*. On the contrary, any breach of a peremptory norm of international law should entail cooperation to bring it to an end, non-recognition of the situation created by such a breach as lawful, and non-assistance in maintaining that situation. While he sympathized with the Special Rapporteur's approach of not embarking on a controversial discussion on the extent to which countermeasures might be a lawful response to breaches of peremptory norms, it might be useful to explain in the commentary that draft conclusion 19 must not be construed as precluding countermeasures, or other consequences under the law on State responsibility, as envisaged in the "without prejudice" clause in paragraph 4 of the draft conclusion.

The Special Rapporteur had skilfully summarized the debate in the Sixth Committee and the Commission on draft conclusion 21, on procedural requirements. His suggestion that the draft conclusion should be placed in Part Four, on general provisions, and that its title should be changed to "Recommended procedure" would be a good way of emphasizing that it did not establish any obligation to submit a matter to the International Court of Justice or to any other dispute settlement mechanism. The new paragraph 6 which he proposed would provide useful clarification with regard to dispute settlement mechanisms applicable in relations between any parties to a dispute concerning peremptory norms.

It might be worthwhile to discuss in more detail the role of international organizations in the context of the recommended procedure set out in draft conclusion 21. In the light of the suggestion made by the Special Rapporteur in paragraph 209 of his fifth report to refer also to "other entities as may be appropriate", it might also be wise to discuss whether those other entities should be only passive recipients of notifications of an alleged *jus cogens* violation, or whether they should proactively inform or notify States and other entities of such violations. If new language was to be included on the subject, the commentary should cover the ways in which other entities could offer to submit a matter to the International Court of Justice under paragraph 4 of that draft conclusion.

The term "conclusions" was, in his view, the appropriate term for the text before the Commission. He recommended that all the draft conclusions should be referred to the Drafting Committee and hoped that the Commission would be in a position to adopt a full set of draft conclusions by the end of the current session.

Ms. Lehto said that the Commission's work on the topic had clarified the Commission's *acquis* on *jus cogens*. The draft conclusions would assist scholars and practitioners and offered a basis for the Commission's consideration of other aspects of *jus cogens* in the context of future topics. They were moderately well supported by State practice and would be a valuable contribution to its work on the sources of international law. She largely agreed with the amendments proposed by the Special Rapporteur in his fifth report and had no objection to changing the title to something along the lines of "Draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*)".

She welcomed the Special Rapporteur's intention to add a paragraph to the commentary to draft conclusion 1 on the applicability of the draft conclusions to international organizations. She was in favour of retaining draft conclusion 3, irrespective of whether it was located before or after draft conclusion 2, and saw no need to expand the definition of "fundamental values" beyond that provided in paragraphs (2) to (7) of the commentary (A/74/10). However, the text should refer to "fundamental values of the international

community", not to those of the "international community of States". To say that the only fundamental values protected by *jus cogens* were those which had been accepted and recognized by States seemed to conflate the peremptory norms for which acceptance and recognition was necessary with their underlying values.

She had no objection to adding a reference to "the international community of States as a whole" in draft conclusion 6 (2), although the alternative wording suggested by Mr. Hassouna would be rather less repetitive.

The reformulation of draft conclusion 7 to indicate that the majority of States that accepted and recognized the peremptory nature of a norm of general international law had to be very large and representative was welcome, since that majority had to be assessed both quantitatively and qualitatively. As paragraph (5) of the commentary to the draft conclusion made clear, what was important was that the non-derogability of a norm had to be accepted and recognized by States as a collective or community, rather than by a certain number of individual States. Moreover the commentary should also shed light on the role of other actors who might contribute to the elevation of certain norms of general international law to the category of peremptory norms.

With regard to the word "unjust" in draft conclusion 11 (2) (c), she wished to point out that the articles on the effects of armed conflicts on treaties contained a similar provision on the separability of treaty provisions that was based on the Vienna Convention on the Law of Treaties, and that paragraph (3) of the commentary to article 11 explained that the relevant provision could be invoked if the separation would create a significant imbalance to the detriment of the other party or parties.

She was in favour of the suggested amendment to draft conclusion 14 in light of the explanation given by the Special Rapporteur in his introductory statement, but would prefer the simpler wording "if it would conflict" rather than "if it would come into conflict". As far as draft conclusion 16 was concerned, she supported the compromise solution proposed by the Special Rapporteur in paragraph 162 of the report. The Security Council should be mentioned explicitly in the commentary owing to its exceptionally broad and unspecified powers. In view of the widespread and sophisticated circumvention of United Nations sanctions, it would indeed be useful if the commentary made it clear that the draft conclusion was not intended to provide justification for unilateral avoidance and non-observance of obligations under Security Council resolutions.

With regard to draft conclusion 17, she welcomed the Special Rapporteur's intention to refer to the order of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, where the Court had held that the Gambia had *prima facie* standing to enforce the obligations *erga omnes partes* under that Convention and, for the first time, had recognized the standing of a State not specifically affected by an alleged violation of the Convention to submit a dispute to it.

She, like Mr. Reinisch, thought that it would be wise to remove the restrictive language from draft conclusion 19 so that all violations of peremptory norms were covered. She welcomed the Special Rapporteur's intention to add examples of practice to the commentary because, as it stood, it did not reflect the balance reached in the articles on responsibility of States for internationally wrongful acts or recent practice by States and international organizations. It was not difficult to find examples where States had reacted to violations of essential international norms by taking lawful measures, particularly when institutional responses were not available. Such measures might include the exercise of universal criminal jurisdiction, reliance on an express provision within a treaty regime or use of the possibilities provided by the Vienna Convention on the Law of Treaties in the case of breaches of treaty obligations. Some recent instances of such action had been the lead taken by Germany and Sweden to investigate war crimes and crimes against humanity committed in Syria and to prosecute the perpetrators; the case brought before the European Court of Human Rights by the Netherlands against Russia for the latter's role in the downing of a Malaysia Airlines plane over Ukraine in 2014; and the various steps taken by States and international organizations in response to the Russian invasion of Ukraine, which was a flagrant violation of the prohibition of aggression.

She was in favour of the amendments that had been proposed to draft conclusion 21, including the change in the title, and could see that the list in the annex to draft conclusion 23 might serve a practical purpose. She fully supported the final outcome proposed by the Special Rapporteur in chapter VI of the report, including the retention of the term "conclusions" for the text under consideration. She supported the referral of all the draft conclusions to the Drafting Committee.

Ms. Oral said that she agreed with the Special Rapporteur that the first-reading text should remain unchanged unless there was a compelling reason to alter it. She also agreed with the Special Rapporteur that there was sufficient State practice to support the draft conclusions. The Russian invasion of Ukraine, which was an unprovoked brutal attack by one State on the sovereignty, territorial integrity and political independence of another sovereign State in flagrant violation of well-established fundamental rules of international law and the Charter of the United Nations, highlighted the importance of the Commission's work on the topic under consideration.

Draft conclusion 3 placed *jus cogens* at the top of the hierarchy of the norms of general international law. That was important for understanding the function of the fundamental values of the international community. In that respect, she fully endorsed what had been said by Mr. Petrič at the previous meeting about retaining and recognizing fundamental norms in the Commission's work on peremptory norms. That certain acts were so offensive to the moral values shared by the international community as a whole that they "shock[ed] the conscience of mankind", as the Special Rapporteur put it in paragraph (13) of the commentary to that draft conclusion, was a matter of fact that reflected the fundamental importance of peremptory norms. The absence of an express reference to fundamental values in the Vienna Convention on the Law of Treaties did not preclude the Commission from including such a reference in its work because, as the Special Rapporteur stated in paragraph 52 of his report, the Vienna Convention was the starting point for the Commission's work on the topic, not a cage within which the Commission was trapped. The concern of some States that the phrase "reflect and protect fundamental values" could be construed as creating additional criteria not set forth in article 53 of the Vienna Convention could be addressed in the commentaries. Alternatively, placing draft conclusion 3 between draft conclusions 1 and 2 might dispel any confusion. Since only a handful of States had voiced concerns about draft conclusion 3, she would be opposed to deleting or amending it.

Concerning the question of whether to replace the words "base" and "bases" in draft conclusion 5 with "source" and "sources", which had been discussed in the Drafting Committee, she agreed with the comments made by Mr. Park, Mr. Murphy and Mr. Jalloh. While understandable, the concerns expressed by Austria, France, Italy, Slovenia and Spain in that regard did not provide a compelling reason for changing the wording of a text that had been carefully drafted.

She supported the Special Rapporteur's proposal that the words "by the international community of States as a whole" should be inserted in draft conclusion 6 (2); that wording was consistent with the original version of the provision as proposed in the Special Rapporteur's second report.

With regard to draft conclusion 7, she shared the concern expressed by Viet Nam that States with limited resources might be prevented from participating fully in the creation of peremptory norms and agreed with Singapore that a more qualitative approach was needed to reflect a level of acceptance and recognition "across regions, legal systems and cultures". Like other members of the Commission, she supported the Special Rapporteur's proposal for the insertion of the words "and representative" in paragraph 2, which would address many of the concerns raised by States. In that regard, paragraph (6) of the commentary to the draft conclusion should be retained. She preferred the words "very large" to "overwhelming". That said, she could see the attraction of Mr. Murphy's proposal that paragraph 2 should be deleted, thereby eliminating any quantifiable standard. In any case, it should be made clear in the commentary that the "international community of States as a whole" did not necessarily mean all States.

She agreed with the modification of draft conclusion 14 (1) proposed by the Special Rapporteur. She wondered whether replacing "does not" in the proposed text with "cannot"

would help to make it even clearer that a rule of customary international law could not come into existence, or be formed, if it would come into conflict with an existing *jus cogens* norm.

Further clarification should be provided in the commentary to address the valid points made by States regarding the question of how a peremptory norm that was inconsistent with customary international law could arise, since it would require a general practice accepted as law.

Concerning draft conclusion 16, the Drafting Committee had decided, as a compromise, that a reference to the Security Council should be included in the commentary. Many members of the Commission, herself included, would have preferred a reference to the Security Council in the provision itself. That compromise should not be undone without a clear mandate from States, which had not been forthcoming. Indeed, the views of States, like those of the members of the Commission, were mixed. She nevertheless understood the concern of some States, including Australia, Germany and France, that a reference of that kind could be used as a pretext for unilaterally disregarding a resolution of the Security Council. She therefore agreed with the Special Rapporteur that a clear way should be found, in the commentary, to make explicit that the provision was not intended to permit unilateral invocation to avoid obligations under Security Council resolutions. That point was also relevant in the context of draft conclusion 19.

She welcomed the overall support expressed by States for draft conclusion 17, which was an important element of the Commission's work on peremptory norms. However, the nature of the legal interest shared by States should be clarified for the purposes of defining the *erga omnes* character of peremptory norms of general international law. For example, in its order of 23 January 2020 in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, the International Court of Justice had noted that all States parties to that Convention had a common interest in ensuring that acts of genocide were prevented. In its judgment of 10 July 2012 in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the Court had noted that the States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had a common or shared legal interest in compliance with that instrument. Peremptory norms, on the other hand, constituted a general category, and the legal interest would be different in each specific case. That point could be discussed further in the Drafting Committee. Spain had also underlined that the Commission had a good opportunity to further clarify the relationship between peremptory norms and obligations *erga omnes*.

It was not surprising that draft conclusion 21 had elicited many comments from States. Although she had initially harboured some reservations regarding the procedure set out in the provision, she had supported the majority view in the Commission and the compromise that had been reached. She continued to support the provision and was in favour of modifying the title to read "Recommended procedure". The purpose of the procedure set out in the draft conclusion was to prevent States from taking unilateral action to avoid compliance with their obligations, which reflected the same concern expressed by States in relation to draft conclusion 16. The draft conclusion provided an important safeguard, notwithstanding the fact that it was voluntary and without prejudice to alternative methods of dispute resolution. She could see merit in placing it in Part Four, on general provisions, rather than in Part Three, on the legal consequences of peremptory norms of general international law (*jus cogens*).

Draft conclusion 23 had given rise to divergent views among States, as it had among the members of the Commission. She saw no reason to disturb the solid compromise that the Commission had reached after discussing the provision. The title and the language of the list were clear, as was the fact that it consisted of norms that the Commission had previously recognized as having the status of *jus cogens*. Like other members of the Commission, she had been concerned that supplying a list might prejudice the existence or subsequent emergence of other peremptory norms, but the first sentence of the draft conclusion made clear that it did not. As Mr. Murase had noted, in 1976, the Commission had been of the view that the preservation of the environment was a peremptory norm. Some now argued that the prohibition of the international crime of ecocide should be recognized as a peremptory norm.

She recommended the referral of all the draft conclusions to the Drafting Committee.

Mr. Šturma said that the Special Rapporteur had produced a concise, well-structured and readable fifth report on peremptory norms of general international law (*jus cogens*) and had worked tirelessly to bring the topic to the second-reading stage. The Special Rapporteur was to be commended for having refrained from proposing too many amendments; that fact, he believed, would enable the Commission to adopt a final set of draft conclusions at the current session.

Before turning to the draft conclusions themselves, he wished to comment on the title of the topic and address some questions of methodology. He agreed with the suggestion made by Italy that the title should be changed to something along the lines of "Draft conclusions on identification and legal consequences of peremptory norms", which would better reflect the nature of the topic. As for methodology, the topic was similar in nature to some of the other topics recently considered by the Commission, including "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". In its work on such topics, the Commission was engaged not so much in the codification and progressive development of international law, which were its traditional tasks, as in the interpretation and clarification of the existing rules of international law. That distinction should be borne in mind in the context of the topic at hand. The Commission was not codifying all or even some peremptory norms of international law and, with the possible exception of draft conclusion 21, was not proposing new rules in the manner of progressive development. In addition, the specific nature of the topic was relevant in view of the lack of State practice. As the Commission was not engaged in a classical exercise of codification, the limited availability of State practice should not be considered an obstacle. He agreed with the Special Rapporteur that there was a great deal of relevant practice, albeit not necessarily State practice. For the purposes of the identification and interpretation of peremptory norms as such, it seemed appropriate to rely on case law and doctrine.

It seemed that both States and members of the Commission were divided as to whether draft conclusion 3 was necessary or helpful. While some members, including Mr. Rajput, had expressed critical views during the plenary debate, his own view was closer to those of Mr. Petrič and Ms. Oral. He agreed with Mr. Rajput that the canons of interpretation required that every provision had its meaning, but the three characteristics of *jus cogens* norms, as set out in draft conclusion 3, were different from, though complementary to, the criteria for the identification of such norms, as set out in draft conclusion 4, the latter stemming directly from article 53 of the Vienna Convention on the Law of Treaties.

The first – and essential – characteristic of peremptory norms was the fact that they reflected and protected fundamental values of the international community. In his view, the reference to those values not only shed light on the origins and social functions of *jus cogens* norms but also facilitated their identification, making it possible to distinguish true peremptory norms, which had full legal effects in the law of treaties and beyond, from rules that were afforded priority through a mere legal technique. That characteristic might also distinguish true peremptory norms from certain general principles of law, such as the principles of good faith and *res judicata*, which were recognized as a possible basis for peremptory norms in draft conclusion 5 but did not themselves have a peremptory character. The comments submitted by the United States of America were relevant in that regard. The second characteristic of peremptory norms, namely their hierarchical superiority over other rules of international law, derived not only from the fact that they were defined as norms from which no derogation was permitted but also from the effects of *jus cogens*, in particular the fact that treaties and other rules conflicting with a peremptory norm were null and void. The third characteristic of *jus cogens* norms, which provided further useful guidance for their identification, was their universal applicability. That characteristic made it possible to exclude norms that were similar but not identical to peremptory norms of general international law. While he would not reopen the debate on regional *jus cogens*, he would recall that it was not only a theoretical issue but also a practical one. As other members of the Commission had noted, one State had recently been excluded from the Council of Europe, which meant that, regrettably, it was no longer bound by the Convention for the Protection of Human Rights and Fundamental Freedoms, an important instrument of European *ordre public*. Peremptory norms of general international law, however, remained universally applicable.

With regard to draft conclusion 5, he was not in favour of replacing the words “base” and “bases” with “source” and “sources”; he agreed with the Special Rapporteur’s explanation in that regard. Customary international law, for example, was not so much a “source” of peremptory norms as it was their underlying basis. That distinction seemed to be more important in the case of treaty provisions and general principles of law. He recalled, moreover, that the wording used in paragraph 2 was the result of a delicate compromise, which the use of the word “sources” might upset.

He supported the proposed insertion of the words “by the international community of States as a whole” in draft conclusion 6.

With regard to draft conclusion 7 (2), he had no substantive objection to the qualification “very large and representative majority of States”. The proposed addition of the words “and representative” was helpful. However, it might be possible to delete the paragraph entirely, since it served only to explain that acceptance and recognition by the international community of States as a whole was needed; such an explanation could be provided in the commentaries instead.

Regarding draft conclusion 12, the separability of treaty provisions should also apply to the termination of a treaty on account of the emergence of a new peremptory norm of general international law.

He generally agreed with the idea behind draft conclusion 14 (1), as redrafted, but the wording would require careful discussion in the Drafting Committee.

Although he was in favour of the new title proposed for draft conclusion 21, “Recommended procedure”, and its proposed placement in Part Four, he continued to have doubts about the need for the provision. From a methodological perspective, it was different from the other draft conclusions. By proposing new rules of procedure, albeit in the form of a recommendation, it entered into the field of progressive development. Yet a draft conclusion did not seem to be the most appropriate form for such an exercise. At the very least, the different nature of draft conclusion 21 should be clearly explained in the commentaries. That said, it might be possible to retain only the “without prejudice” clause, in paragraph 5.

He would not comment on draft conclusion 23, including on the non-exhaustive list of peremptory norms, as he had already expressed his support for that provision at the first-reading stage.

He recommended referring all the draft conclusions to the Drafting Committee.

Mr. Cissé said that he did not agree with the members of the Commission who had suggested deleting draft conclusion 3 or placing it immediately before or after draft conclusion 9. Its current position was the most logical. However, the title of the draft conclusion, “General nature of peremptory norms of general international law (*jus cogens*)”, was problematic in view of the content of the provision. The general nature of *jus cogens* norms was the fact that they had or were intended to have a peremptory character. However, on reading the draft conclusion, it became clear that the provision was concerned not so much with defining the general nature of *jus cogens* norms as with setting out their content or scope of application, which was primarily a question of protecting fundamental values of the international community as a whole. He therefore suggested that the title of the provision should be reworked to make clear that it concerned the content or scope of application of *jus cogens* norms.

The two criteria for the identification of *jus cogens* norms set out in draft conclusion 4 seemed necessary and sufficient. He was not convinced that the protection of fundamental values, on the one hand, and the hierarchical superiority of *jus cogens* norms over other rules of international law, on the other, could be considered criteria for the identification of *jus cogens* norms, since the notions of hierarchical superiority and non-derogability were merely consequences that flowed from the acceptance and recognition of a norm. Lastly, it should be specified that the two criteria for the identification of *jus cogens* norms were cumulative and certainly not alternatives.

There seemed to be some overlap between draft conclusions 6 and 8. He wondered whether draft conclusion 6 could be incorporated into draft conclusion 8, since, in substance, the two provisions both dealt with the matter of evidence of the existence of a peremptory norm. The Commission would thereby avoid the duplication apparent in draft conclusion 6 (2).

Draft conclusion 7 (3) was somewhat superfluous, since, in substance, it contributed little to the understanding of the provision as a whole. To state that the positions of other actors might be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole was rather vague. Which "other actors" were meant? In any event, the task of assessing acceptance and recognition by the international community of States as a whole was a task for an international court or judge. He therefore suggested that paragraph 3 should be reworked to take account of the issue of regional *jus cogens*, which needed to be addressed, since each region had its cultural, sociological, political and legal specificities. Regions were part of the international community, and their ability to produce legal norms should not be downplayed. In that regard, he agreed with the Russian Federation, which had made the point that acceptance and recognition should "be across regions, legal system and cultures". Some members of the Commission had made similar points during the debate.

With regard to draft conclusion 23, members of the Commission and States in the Sixth Committee had focused on the question of whether or not a non-exhaustive list of *jus cogens* norms should be provided. As he had indicated on previous occasions, there was nothing controversial about the list itself, as it was non-exhaustive; other *jus cogens* norms could be added as they emerged in the international legal order. In that regard, the explanations provided by the Special Rapporteur in paragraph 217 of the report were sufficiently clear, and there was therefore no need to develop a specific methodology for the selection of examples. Moreover, the formulation of such a methodology would be a laborious task.

He recommended the referral of all the draft conclusions to the Drafting Committee.

The meeting rose at 12.35 p.m.