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International Law Commission

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Provisional summary record of the 3568th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 26 April 2022, at 11 a.m.

Contents

Present:

Chair:	Sir Michael Wood (First Vice-Chair)
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	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 11.05 a.m.

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

Ms. Galvão Teles said that a great deal had changed since the Commission had last met in person in 2019. The world had gone through an unprecedented pandemic, new reports of the Intergovernmental Panel on Climate Change had highlighted an urgent need to tackle the climate crisis, and a conflict that violated the most fundamental principles of international law was causing immense human suffering that must be stopped. The Commission could not ignore those circumstances, which made its role as relevant as ever. In its current and future work, it must strive to provide the international community with a strong legal framework for meeting the challenges before it.

She wished to thank the Special Rapporteur for his fifth report (A/CN.4/747) and the oral introduction thereof. By addressing the comments and observations of States on what was already a satisfactory first-reading text, the report provided a solid basis for the second reading. It was regrettable, however, that only 23 States had submitted written observations on that text. In that regard, she supported the Special Rapporteur's proposal to give equal weight to the comments that 52 States had made during the Sixth Committee debate on the text, in the interests of achieving a more representative and inclusive appraisal of the Commission's proposals. The Commission and the Sixth Committee should continue their dialogue on how to encourage participation by a greater number of States with regard to the topics on the Commission's agenda.

Concerning the draft conclusions, she remained of the firm belief that draft conclusion 3 should be adopted as it stood. It was particularly important to preserve the link with fundamental values. What characterized *jus cogens* was neither its formal source in international law nor the idea that it derived from a special or superior source, but precisely the fact that it reflected and protected values recognized by the international community as fundamental and non-derogable. Accordingly, the two foundational features of *jus cogens* were the very limited number of norms that qualified as *jus cogens* and the non-derogable nature of those norms.

The link between *jus cogens* and fundamental values had been taken into account or alluded to not only in academic writings but also by international courts and tribunals. In its 2015 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the International Court of Justice had implicitly acknowledged that *jus cogens* norms "confirm and endorse the most elementary principles of morality" and "protect essential humanitarian values". In *The Prosecutor v. Anto Furundžija*, the International Tribunal for the Former Yugoslavia had explicitly stated that the *jus cogens* nature of a certain norm had made it "one of the most fundamental standards of the international community". That passage from the Tribunal judgment had been quoted by the European Court of Human Rights in *Al-Adsani v. the United Kingdom*. Furthermore, in *Goiburú et al. v. Paraguay*, the Inter-American Court of Human Rights had held that violations of *jus cogens* "harm essential values and rights of the international community". There was also sufficient evidence to indicate that, in its previous work on the topics "Law of treaties" and "Responsibility of States for internationally wrongful acts", the Commission had recognized the connection between *jus cogens* and fundamental values of the international community. In the commentary to the draft articles on the law of treaties, it had emphasized the particular nature of *jus cogens* norms and their fundamental character in international law. In paragraph (7) of the commentary to article 12 of the articles on responsibility of States for internationally wrongful acts, it had stated that *jus cogens* pertained to the "vital interests of the international community as a whole".

Of the States that had commented on draft conclusion 3, the vast majority had supported it and only six had voiced strong concerns. Their main concern was that the provision did not mirror the language of the 1969 Vienna Convention on the Law of Treaties and that it could create an additional standard for qualifying norms as *jus cogens*. However, draft conclusion 3 concerned the nature of *jus cogens* norms, not the method or techniques

for identifying them. To make that clearer and alleviate the concerns of States and some Commission members, she agreed that the draft conclusion should be placed directly after draft conclusion 1, as recommended by the Special Rapporteur in paragraph 62 of his report. Moreover, the commentary could be expanded to emphasize that the reference to fundamental values was not an additional criterion for peremptory norms but a characteristic and an objective of *jus cogens*. The commentary could also clarify the notion of fundamental values of the international community. The indication in draft conclusion 3 that *jus cogens* norms reflected and protected the fundamental values of the international community was a welcome addition to the concept of *jus cogens* contained in article 53 of the Vienna Convention. Fifty years after the initial adoption of the concept in an international legal instrument, the Commission, in an effort to further clarify and develop it, had rightly, in the first-reading text, highlighted its most fundamental and distinctive feature, namely that *jus cogens* norms were non-derogable and hierarchically superior to other rules of international law because they reflected and aimed to protect the most fundamental values of the international community at a given moment in time.

She was fully in favour of retaining draft conclusion 21, "Recommended procedure", as amended by the Special Rapporteur, and of moving it to Part Four (General provisions). Most members of the Commission who had already made statements had agreed to the provision with the proposed amendments or had not expressed any concern over it. She agreed that the inclusion of dispute settlement procedures in draft conclusions could be appropriate because dispute settlement was an integral component of international legal norms, and there was a need to address compliance with such norms and the consequences of violations. Although the draft conclusions did not generate binding legal obligations for States with regard to the suggested dispute settlement procedures, the issue of the draft conclusion's relationship with the 1969 Vienna Convention was sufficiently addressed in the new paragraph proposed by the Special Rapporteur and in the commentary. Moreover, the fact that draft conclusion 21 was without prejudice to the Statute of the International Court of Justice and did not create new grounds for the Court's jurisdiction was clarified and could be further explained in the commentary. The "without prejudice" nature of the recommended procedure was emphasized in paragraph 5 and further strengthened by new paragraph 6 of the draft conclusion.

She wished to add her voice to those, including the Special Rapporteur, who supported draft conclusion 23 and the draft annex, in line with the view she had expressed upon adoption of the first-reading text. The list contained in the annex was the result of a compromise reached during the first reading and presented *jus cogens* norms previously identified by the Commission. The added value of the Commission's work on the topic was to present the most comprehensive and consolidated version of its work on *jus cogens* to date. Not having a list of identifiable *jus cogens* norms would run counter to the whole object and purpose of that task, which was provided for in Article 13, paragraph 1 (*a*), of the Charter of the United Nations, concerning the progressive development and codification of international law. The nature of the list could perhaps be better addressed in the commentary. Some States and Commission members had raised the issue of the methodology used to identify the listed norms, which had developed and emerged in different historical contexts. The norms on the list were based on a great deal of past work and were solidly anchored in State practice, points that should be further clarified in the commentary.

While she did not feel strongly on either matter, she could support the proposals to change the title of the draft conclusions to better reflect their content and to replace the words "basis" and "bases" with "source" and "sources" in draft conclusion 5, as recommended by the Special Rapporteur. Views differed as to the exact purpose of the draft conclusion and to whether it concerned formal or material sources. On balance, she believed that it addressed the formal sources of *jus cogens*; that view was consistent with the Special Rapporteur's proposed amendments. She supported the referral of all the draft conclusions to the Drafting Committee, bearing in mind the comments made in the plenary.

Mr. Argüello Gómez said that, in September 2002, the Government of the United States of America had announced a national security strategy that authorized recourse to preventive wars. That had been the prelude to the 2003 invasion of Iraq, which had allegedly resulted in violations of several of the peremptory norms of international law that were

partially covered by the non-exhaustive list in the draft annex to the draft conclusions, and of several other peremptory norms enshrined in the Charter of the United Nations and related instruments such as the Five Principles of Peaceful Coexistence and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. At the Commission's fifty-fifth session, in 2003, an attempt had been made to speak out on the issue, in response to which Michael J. Matheson, a citizen of the United States serving on the Commission at the time, had written, in the *American Journal of International Law*, that "the Commission wisely avoided the temptation of taking actions that might be interpreted as commenting on current political events – specifically the conflict in Iraq. One hopes that the Commission will continue to approach its work in this careful and orderly way, avoiding any step that might politicize its deliberations to the detriment of its long-term credibility."

Turning to the report under consideration, he said that he wished to thank the Special Rapporteur for his excellent work on a topic so complicated and delicate that some States had reportedly not yet ratified the 1969 Vienna Convention because of its articles on *jus cogens*. It was generally accepted that the concept of peremptory norms of international law had originated at the same time as international law itself. The two putative fathers of international law, Francisco de Vitoria in 1539 and Hugo Grotius a century later, had asserted that there were rules that could not go against natural law. The legal positivism of the previous two centuries had caused a shift away from those notions of natural or moral law. It was for that reason that the statement in draft conclusion 3 that peremptory norms reflected and protected fundamental values had provoked some misgivings. The matter would be partly resolved if it was made clear that the "values" being referred to were not based on those early notions, but on the values embodied in the Charter of the United Nations, an instrument to which all of humanity was a party in one way or another. Its Preamble and opening articles contained the seed for all the values protected by currently accepted peremptory norms. In its work on the topic, the Commission should give due weight to the Charter and to the United Nations resolutions and principles that had been adopted by universal consensus and represented the "values of the international community". Accordingly, he proposed that draft conclusion 3 should state that peremptory norms "reflect and protect fundamental values of the international community, which find their principal expression in the Charter of the United Nations".

He agreed with the comments of Italy, Spain and the United States of America on draft conclusion 5, a provision he considered unnecessary. All peremptory norms were rules of customary law that had acquired a kind of added value. The rules contained in treaties and in general principles of law necessarily became customary rules before being viewed as peremptory norms.

He agreed with France and others that paragraph 2 *in fine* of draft conclusion 8 should be worded in the same way as conclusion 10 of the conclusions on identification of customary international law, which referred to the conduct of States "in connection with resolutions adopted by an international organization or at an intergovernmental conference". Draft conclusion 2 clearly stated that peremptory norms were those accepted and recognized by the "international community of States", with no reference to an "international organization" or "intergovernmental conference". The actions or conduct identified in draft conclusion 8 should all relate exclusively to the conduct of States.

If draft conclusion 8 was modified as suggested, a reference to resolutions adopted by an international organization or at an intergovernmental conference should be added to draft conclusion 9. Otherwise, such resolutions themselves – not the conduct of States in relation to them – would appear to be of no value in determining what constituted peremptory norms. It would be illogical for the "decisions of international courts and tribunals" and the "works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists" to serve as subsidiary means for determining the peremptory character of norms of general international law if the resolutions adopted by those organizations or at intergovernmental conferences could not. That addition could be made in a new paragraph that would read: "Resolutions adopted by an international organization or at an intergovernmental conference by a very large majority of States." As a last point on draft conclusion 9, he noted that equal value was given to decisions of the International Court

of Justice and decisions of other international courts and tribunals, including arbitral tribunals. The words "in particular" were, in his opinion, insufficient to distinguish the Court.

It was true that, as the Special Rapporteur had indicated, draft conclusions 10 to 12 were based on articles 44, 53, 64 and 71 of the 1969 Vienna Convention. However, the issue was not fidelity to the Convention, which, as stated by the Special Rapporteur himself, should not be a cage limiting the development of the draft conclusions. Rather, the main issue was the separability of treaty provisions that contradicted peremptory norms from those that did not. Draft conclusion 11 (1) was in keeping with article 44 of the Vienna Convention. However, the rule of non-separability had been criticized by several States. He was inclined to favour a more practical solution whereby treaty provisions that did not contravene peremptory norms could be acknowledged to have some validity. It should not be forgotten that a treaty that was void *ab initio* because it conflicted with a peremptory norm could continue to be implemented for a long time before its nullity was declared and took effect. Even the recommended procedure set out in draft conclusion 21 for invoking a ground for the invalidity of a treaty was not effective immediately, and it did not seem practical for a treaty to remain ineffective in the meantime. In fact, the Vienna Convention itself contained a special provision related to invalidity resulting from the infringement of a peremptory norm, namely article 71 (1). In his view, that provision could be understood as allowing some degree of separability of treaty provisions. Thus, the obligation to eliminate as far as possible the consequences of provisions that conflicted with a peremptory norm could be interpreted as leaving unaffected other provisions that were not in contradiction. Similarly, article 71 (1) established the legal obligation to bring mutual relations (the void treaty) into conformity with the peremptory norm, which could be understood as an obligation to continue implementing the provisions of the treaty that did not run counter to the norm. Those observations on article 71 (1) of the Vienna Convention were also perfectly applicable to draft conclusion 12 (1). His point was that texts could be interpreted in such a way as to allow the separation of treaty provisions that conflicted with a peremptory norm. The commentary to draft conclusion 12 could capture some of the ideas put forward by States and Commission members to mitigate the apparently absolute prohibition of separability.

Although draft conclusion 14 was inspired by article 53 of the Vienna Convention, it appeared to describe a legal impossibility. If a rule of customary international law that conflicted with a peremptory norm could not come into existence, it was impossible for a new peremptory norm to emerge from custom and invalidate an existing one. The only circumstance in which that might occur was if a universal treaty such as the Charter of the United Nations immediately imposed a new peremptory norm to replace an existing one. It made little sense to have a draft conclusion specifically addressing a situation that was very unlikely to arise.

Regarding draft conclusion 16, he agreed that a system should be established to prevent a party from unilaterally refusing to comply with the resolutions of, for example, the Security Council, which were so dear to certain States. The mechanism for invoking a ground for invalidity contemplated in draft conclusion 21 was a mere recommendation and would not solve the problem even if it were binding. In his view, legal disputes over the validity of resolutions of United Nations bodies should be settled by the Organization's principal judicial organ: the International Court of Justice. While it was true that, in the past, the Court had refrained from adjudicating on the same issues as the Security Council, its reasons for doing so had no legal basis, since the Charter of the United Nations conferred broad judicial powers on the Court, which had itself specified that, even when the Security Council was dealing or might deal with a matter, the Court could *pari passu* examine its legal aspects. That prerogative of the Court should be clearly recalled in the draft conclusions, which could even indicate that only the Court could invalidate the effects of a binding resolution adopted by a body such as the Security Council.

With regard to draft conclusion 23, he did not consider it appropriate or necessary to annex a partial list that did not even purport to be representative but was rather a list of norms whose distinguishing feature was that the Commission had referred to them in the past. As he had stated at the Commission's seventy-first session, in 2019, such a list, even a non-exhaustive one, could not fail to mention the Charter of the United Nations, the 1970 Declaration on Principles of Friendly Relations and Cooperation among States and the Five

Principles of Peaceful Coexistence. In paragraph (3) of the commentary to draft conclusion 1 (A/74/10, chap. V), it was stated that the draft conclusions did "not attempt to address the content of individual peremptory norms of general international law (*jus cogens*)". Annexing a list went beyond the announced purpose of the draft conclusions. The list was also somewhat surprising in that it accorded special value to the Commission's past determinations in respect of certain peremptory norms. The special value that such determinations ostensibly bestowed was not consistent with the subsidiary or even secondary value given, in draft conclusion 9, to "the works of expert bodies established by States or international organizations".

In closing, he said that he again wished to thank the Special Rapporteur for his great contribution to the development of what was a crucial topic for humanity. The work carried out to date had provided much food for thought. He was in favour of referring the draft conclusions and the draft annex to the Drafting Committee for fine-tuning.

Mr. Vázquez-Bermúdez said that he wished to thank the Special Rapporteur for his detailed fifth report, which responded in a clear and systematic manner to the comments and observations made by States and provided a solid basis for the adoption of the draft conclusions on second reading at the current session. In its work on the topic, the Commission could neither merely repeat rules such as those contained in the 1969 Vienna Convention nor adopt draft conclusions that were incompatible with them. The Vienna Convention rules on *jus cogens* were a starting point for the Commission's work, which should also be informed by other areas of international law, such as responsibility of States for internationally wrongful acts, in addition to State practice, relevant case law and doctrine.

The draft conclusions and commentaries thereto had generally been well received by States, some of which had nevertheless suggested changes. The Special Rapporteur had carefully analysed those suggestions on their merits and had also taken into account the majority opinions of States and the structure, meaning and scope of the draft conclusions in making his own recommendations for changes.

He agreed with other Commission members who had taken a position on the matter that the possible existence of regional *jus cogens* lay outside the scope of the topic. He wished to comment briefly on some of the draft conclusions that had elicited the most reactions from States and from other Commission members; as the Special Rapporteur had noted in the report, many of the observations made by States could be addressed in the commentaries.

The recognition in draft conclusion 3 that peremptory norms reflected and protected fundamental values of the international community accomplished three things: it lent legitimacy to the legal consequences of such norms; it justified the assertion that they were hierarchically superior to other rules of international law; and it provided a basis for peremptory norms without entering into a theoretical debate on natural law versus positive law. In turn, the recognition of such peremptory norms as hierarchically superior to other rules of international law reflected the definition set out in draft conclusion 2, under which such norms could be modified only by a subsequent norm of general international law having the same character.

Some States opposed the reference to "fundamental values" out of concern that it might be misinterpreted as a third criterion for identifying peremptory norms. Perhaps the specific function of draft conclusion 3 could be clarified in the commentary to avoid any confusion. In fact, the word "values" would not be precise enough to guarantee legal certainty if "values" were the basis for the identification of peremptory norms. However, that was not what draft conclusion 3 meant. At most, the unambiguous presence of the characteristics it set forth could "provide an indication of the peremptory status of a particular norm of general international law". The commentary to the draft conclusion should explain that any difficulty in demonstrating that a norm reflected and protected fundamental values of the international community did not pose an obstacle to its identification as a peremptory norm of general international law.

The requirement set out in draft conclusion 4 ensured that a consensus that a particular norm reflected and protected fundamental values of the international community was not sufficient to give it the status of a peremptory norm: the words "it is necessary to establish" meant that the two criteria enumerated in draft conclusion 4 must be shown, and could not

simply be assumed, to be present in relation to a particular norm. Most States supported the wording of draft conclusion 3, and there was international, regional and national case law demonstrating the link between fundamental values and the peremptory character of such norms. Examples of such case law had been included in the commentary to the draft conclusion.

The fact that a norm reflected and protected fundamental values of the international community was intrinsic to the legal nature of *jus cogens* norms and explained their peremptory character. Such norms did not protect the individual interests of a State or group of States but rather fundamental values shared by the international community. They therefore embodied rights and obligations considered by the international community to be of the highest importance.

Some States wished to insert the phrase "of States as a whole" after "the international community" in draft conclusion 3, on the grounds that the phrase appeared in draft conclusions 2, 4 and 7. However, the purpose of the phrase in those three draft conclusions was to stipulate that what was required was not acceptance and recognition by all States, but only by a very large majority. If those words were included in draft conclusion 3, they would imply that peremptory norms reflected and protected the fundamental values of only a "very large majority" of States, which would contradict the general and universal nature of peremptory norms.

The acceptance and recognition of peremptory norms of general international law were clearly the province of States. However, given that some peremptory norms were derived from international human rights law, the interests that such peremptory norms were intended to protect did not belong exclusively to States, since some were intended to protect individuals and groups from the conduct of the State. The word "protect" in draft conclusion 3 was therefore essential for conveying the different meaning of the term "international community" in that context. Accordingly, while it might be true that the norms defined in draft conclusion 2 were closely intertwined with the fundamental values referred to in draft conclusion 3, those values were not limited exclusively to the interests of States. Draft conclusion 3 did not, in fact, identify fundamental values of the international community as those accepted and recognized by States. There was a subtle difference between the concepts "international community" and "international community of States as a whole": the first encompassed the second and was broader in scope. That difference should be clarified in the commentary.

The other characteristic referred to in draft conclusion 3 was the status of peremptory norms as hierarchically superior to all other rules of international law. That characteristic was generally accepted and was supported by ample State practice, case law and doctrine, as well as by articles 53 and 64 of the 1969 Vienna Convention and the conclusions adopted in 2006 by the Commission's Study Group on fragmentation of international law.

With regard to draft conclusion 5, although the commentary to the provision cited practice demonstrating that customary international law was the most common basis for peremptory norms of general international law, none of that practice went so far as to show that it was the only basis or that treaty provisions and general principles of law were expressly ruled out as bases for peremptory norms. While five States had submitted written observations stating that there was no practice relating to general principles of law as a basis for peremptory norms, it was more accurate to say that there was scant practice, as acknowledged by the wording "may also serve as bases" in draft conclusion 5 (2). There was no obvious rationale for denying that general principles of law could serve as a basis for such norms, given that they had a "general scope of application with equal force for all members of the international community", as noted in paragraph (8) of the commentary to the draft conclusion. Of course, for a general principle of law to be elevated to the status of a peremptory norm of general international law, it must meet the requirements set forth in draft conclusion 6.

Inexorably binding the identification of peremptory norms to a single source of international law among those listed in Article 38, paragraph 1, of the Statute of the International Court of Justice would be an unduly restrictive approach. Moreover, article 53 of the 1969 Vienna Convention defined *jus cogens* as peremptory norms of general

international law, not peremptory norms of customary international law. Limiting the basis for peremptory norms to customary international law would thus be inconsistent with the Convention.

The expression “accepted and recognized” was particularly pertinent in relation to the sources that could serve as bases for peremptory norms. A review of the drafting history of the 1969 Vienna Convention showed that the words “recognized” and “accepted” in article 53 of the Convention had been derived from Article 38 of the Statute of the International Court of Justice, where the word “recognized” was used in relation to treaties and general principles of law, whereas the word “accepted” was used in relation to international custom.

As noted in paragraph (3) of the commentary to draft conclusion 5, the words “basis” and “bases”, which he found preferable to “source” and “sources”, should be understood “flexibly and broadly” and were meant to “capture the range of ways that various sources of international law may give rise to the emergence of a peremptory norm of general international law”. It was also worth noting that the sources of international law referred to in Article 38 of the Statute of the International Court of Justice did not operate in silos, but interacted with one another. Thus, to exclude treaties and general principles of law from serving as bases for peremptory norms of general international law would risk creating an artificial division among the sources of international law. As noted in the second report on the topic “General principles of law” (A/CN.4/741): “There appears to be nothing preventing a norm from being both a general principle of law and a rule of customary international law at the same time.” Accordingly, the wording of draft conclusion 5 should be retained as it stood and any adjustments deemed appropriate should be made in the commentary.

In relation to draft conclusion 6, it was important to emphasize the rationale behind the use of the words “acceptance and recognition” in order to avoid potential misunderstandings. As noted in the commentary, the phrase did not mean that it was necessary to provide evidence showing first recognition and, separately, acceptance. In Article 38 of the Statute of the International Court of Justice the two words were used separately, each in relation to different sources of international law. The Special Rapporteur’s recommendation that the phrase “by the international community of States as a whole” should be inserted in paragraph 2, as proposed by the United Kingdom, might seem redundant, given that it was already contained in draft conclusions 2 and 4. However, for the sake of clarity and to maintain consistency with other draft conclusions, he would not oppose its insertion.

With regard to draft conclusion 7, some States had suggested that the phrase “a very large majority of States” should be replaced with an expression denoting a more stringent standard, such as “an overwhelming majority of States” or “virtually all States”. In his view, such expressions would set an excessively high threshold and have a quasi-emotional connotation. Alternatives implying that unanimity was required were also unsuitable since, as Slovenia had noted, such a requirement could prevent any norm from ever being characterized as peremptory because every State would effectively have veto power on the issue. He supported the Special Rapporteur’s proposal to modify the phrase to read “a very large and representative majority of States”, since that wording accurately described the notion of “international community as a whole”. That would clarify that acceptance and recognition should take place across regions, legal systems and cultures, as had been suggested by some States.

The commentary to draft conclusion 17 should maintain its emphasis on the fact that not all obligations *erga omnes* arose from peremptory norms of general international law. In fact, the Russian Federation had recommended that that proposition “should be examined more thoroughly and should be made explicitly clear in the draft conclusion itself”. That point was significant, considering that not one rule of international environmental law had yet been recognized, by the Commission at least, as having the status of a peremptory norm of general international law. The protection of the marine environment in areas beyond national jurisdiction illustrated the type of situation in which obligations *erga omnes* could apply independently of the existence of a peremptory norm of general international law.

The non-binding character of the procedure outlined in draft conclusion 21 had been clearly established by the Commission on first reading, but its wording could be understood as implying that it did have some binding effect. For that reason, he supported the Special

Rapporteur's proposal to rename the draft conclusion "Recommended procedure" and to amend its wording so as to highlight its non-binding character. He disagreed with the argument made by some States that the draft conclusion ought to be deleted because procedural requirements were unnecessary and inappropriate in an instrument that was not intended to become an international treaty. In his view, procedural requirements were important for ensuring compliance with international norms, irrespective of whether those norms were set forth in treaties or in some other type of instrument. Although draft conclusion 21 was not automatically binding, States that wished to follow its procedural recommendations could potentially find them helpful. Draft conclusion 21 should be retained in the draft conclusions with the Special Rapporteur's recommended modifications.

Regarding draft conclusion 23, the inclusion of a non-exhaustive list of peremptory norms of general international law would help to give tangible form to what had often been described as an overly theoretical topic. Given that the norms on the list had been recognized previously by the Commission as having the status of *jus cogens*, their exclusion could be perceived as a step backwards, especially since they already appeared in the annex to the draft conclusions adopted on first reading. Significantly, draft conclusion 23 also stated that the list was without prejudice to the existence or subsequent emergence of other peremptory norms of general international law. In their statements, other members had mentioned environmental protection and the prohibition of gender discrimination as possible additions to an updated list of *jus cogens* norms. The non-exhaustive list also had the advantage of illustrating the kind of norms that had obtained the status of peremptory norms of general international law, meaning those that reflected and protected fundamental values of the international community.

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

Mr. Ruda Santolaria, speaking via video link, said that he endorsed the Special Rapporteur's approach of taking account of both written and oral comments made by States, determining whether they warranted changes to the draft conclusions on second reading, and highlighting the draft conclusions' purpose of guiding those who were called upon to identify and apply norms of *jus cogens*, as described in paragraphs 8, 9 and 29 of the report, respectively. He was in general agreement with all the draft conclusions.

With regard to draft conclusion 3, he supported the Special Rapporteur's arguments in paragraphs 52–54 of the report, to the effect that the 1969 Vienna Convention constituted a starting point for the current topic; that draft conclusion 3 did not establish additional criteria for the identification of *jus cogens* norms; and that the values referred to in the draft conclusion were not solely those of States. He concurred with the view expressed by the Special Rapporteur and by France that regional *jus cogens* was "incompatible with the definition of *jus cogens*". He endorsed the comments of Peru, Spain and other States to the effect that peremptory norms of general international law reflected and protected fundamental values of the international community, were hierarchically superior to other rules of international law and were universally applicable. However, in order to dispel any concerns, he supported the Special Rapporteur's proposal to place draft conclusion 3 directly after draft conclusion 1, entitled "Scope".

With regard to draft conclusion 6, he endorsed the Special Rapporteur's recommendation that the phrase "by the international community of States as a whole" should be inserted after "accepted and recognized" in paragraph 2, as proposed by the United Kingdom.

In relation to draft conclusion 7, he supported the Special Rapporteur's recommendation that the words "and representative" should be added to paragraph 2 so as to specify that, for the identification of a norm as *jus cogens*, acceptance and recognition by a very large and representative majority of States was required. That would address States' wish to clarify that *jus cogens* norms must be accepted and recognized across regions, legal systems and cultures around the world.

Draft conclusion 14 addressed the situation where a rule of customary international law conflicted with a norm of *jus cogens*. Importantly, paragraph 3 provided that the persistent objector rule did not apply to peremptory norms of general international law.

Similarly, draft conclusion 16 concerned cases where a resolution or other act of an international organization conflicted with a norm of *jus cogens*. He agreed with the Special Rapporteur's recommendation, in paragraph 162 of the report, that the commentary should explain that the provision was not intended to permit unilateral invocation in order to avoid obligations under Security Council resolutions.

In relation to draft conclusion 19, concerning serious breaches of peremptory norms, he shared the Special Rapporteur's view, set out in paragraph 184 of the report in response to a question posed by Poland, that all breaches of peremptory norms were serious.

Regarding draft conclusion 23 and the draft annex containing a non-exhaustive list of *jus cogens* norms, he found the Special Rapporteur's explanation of the Commission's approach in paragraph 217 of the report to be especially pertinent, because it indicated that the list of norms was without prejudice to other norms that the Commission might have referred to as having a peremptory character; the emergence of *jus cogens* norms in the future; and other norms that currently had the status of *jus cogens* but had not been referred to previously by the Commission. Nevertheless, in line with the suggestion made by France, it might be desirable to include an introductory commentary describing the Commission's earlier work.

He supported the view that the outcome of the Commission's work on the topic should take the form of "conclusions". As indicated by the Special Rapporteur, that was in keeping with the recent practice of the Commission on topics aimed at clarifying the rules of international law on particular aspects, in particular those relating to sources, such as the identification of customary international law and subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Mr. Ouazzani Chahdi said that the Special Rapporteur's excellent fifth report accurately reflected the comments made by States. As the Special Rapporteur had noted, the function of the Commission on second reading was not merely to adopt the views of States, but to assess whether, on the basis of the comments received, any modification of the draft conclusions was warranted. The main issue raised by States was that the draft conclusions relied more heavily on doctrine and theory than on practice. The Special Rapporteur had noted that the commentaries contained sufficient examples of practice, which was true, and that certain States had "a rather narrow view of practice". On the other hand, some States, such as Switzerland, had provided examples of the application of *jus cogens* in practice and jurisprudence. Indeed, Switzerland was the only State to have incorporated *jus cogens* into its Constitution. Articles 139, 193 and 194 of the federal Constitution of 1999 specifically provided that popular initiatives and constitutional revisions must comply with the mandatory provisions of international law. According to the practice of the Swiss federal authorities, "mandatory provisions of international law" were understood to refer to *jus cogens*, as defined in article 53 of the 1969 Vienna Convention. In its message of 20 November 1996 on a new federal Constitution, the Federal Council had addressed the rules that it considered to be peremptory norms of international law, which included the prohibition of the use of force between States and of torture, genocide and slavery.

States had also raised questions about the final form that the Commission's output on the topic would take. Spain had expressed uncertainty as to whether the text adopted by the Commission would be legally binding, while France, the United Kingdom and the United States had wondered whether the draft conclusions would be considered codification or progressive development of international law. He had no objection to the proposal by Italy to change the title of the text to "Draft conclusions on identification and legal consequences of peremptory norms", but if that change was accepted, the Special Rapporteur should provide an explanation in the commentary, taking into account the four elements identified in the syllabus for the topic (A/69/10, annex, para. 13).

With regard to the draft conclusions themselves, draft conclusion 3 had prompted an interesting debate on concepts such as "fundamental values", the "international community" and the "hierarchical superiority" of peremptory norms of general international law (*jus cogens*) and their universal application. In his view, all of those concepts should be maintained in the draft conclusion. The Special Rapporteur had clearly explained the relationship between certain fundamental values and peremptory norms of general

international law, citing jurisprudence of the International Court of Justice in matters relating to the Convention on the Prevention and Punishment of the Crime of Genocide, as well as domestic case law and doctrine. He agreed with the Special Rapporteur that "fundamental values" were not an additional criterion for the identification of *jus cogens*. He also agreed with the explanation provided in paragraph 54 of the report that the expression "the international community" in draft conclusion 3 referred to something different from "the international community of States as whole" in draft conclusion 2.

He did not believe that the expression "hierarchically superior" was redundant, as argued by the United States, since paragraphs (9) and (10) of the commentary to draft conclusion 3 included examples of international and national jurisprudence that referred to the hierarchical superiority of peremptory norms of general international law. Furthermore, the Study Group on fragmentation of international law had stated that "a rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, Article 53 of the 1969 Vienna Convention), that is, norms 'accepted and recognized by the international community of States as a whole from which no derogation is permitted'."

If the Commission agreed to replace the words "basis" and "bases" with "source" and "sources" in draft conclusion 5, it should elaborate, in the commentary, on the distinction made in paragraph 69 of the report between the sources of international law and the sources of a *jus cogens* norm. That amendment would also require an analysis of the hierarchical relationship between those sources, which could also be set out in the commentary.

Regarding draft conclusion 6, he had no objection to the Special Rapporteur's recommendation that the phrase "by the international community of States as a whole" should be inserted in paragraph 2. As for draft conclusion 7, the phrase "a very large and representative majority of States", as proposed by the Special Rapporteur, reflected the purpose of the draft conclusion better than some of the other formulations proposed.

In draft conclusion 8 (2), he proposed that national constitutions should be added to the list of forms of evidence of acceptance and recognition that a norm of general international law was a peremptory norm (*jus cogens*). That might inspire other constituent assemblies to follow the example of the Swiss Constitution, to which he had just referred.

Regarding draft conclusion 13, he supported the proposal made in paragraph 135 of the report to expand, in the commentary, on the point made by the Netherlands to the effect that a reservation to a treaty provision that reflected a peremptory norm might affect the treaty rule, but did not affect the peremptory norm itself. As for draft conclusion 16, he supported the Special Rapporteur's recommendation that the commentary should specify that the provision was not intended to permit unilateral invocation to avoid obligations under Security Council resolutions. He also supported the proposed amendments to draft conclusion 21, including the proposal to rename the draft conclusion "Recommended procedure" and to place it under Part Four (General provisions).

Regarding draft conclusion 23, during the consideration of the Special Rapporteur's second report, at the Commission's sixty-ninth session, he had proposed that the non-exhaustive list of *jus cogens* norms should be placed in the commentary. He wondered why the provision of the Charter of the United Nations on the prohibition of the use of force had not been included in the list, particularly in the light of current events. After all, as was pointed out in paragraph (5) of the commentary to draft conclusion 23, the Commission had recognized in 1966 that that prohibition was "a conspicuous example of a rule in international law having the character of *jus cogens*". In any case, if the Commission agreed to retain the list, the choice of norms should be explained in the commentary, as requested by some States.

He wished to reiterate his request that the draft conclusions should be accompanied by a multilingual bibliography. In conclusion, he recommended that the draft conclusions should be referred to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that, given the wealth of comments that the Commission had received on the topic, the Special Rapporteur's own analysis and recommendations in his fifth report were inevitably concise, and perhaps too

concise in places. The Special Rapporteur also drew some unexpected conclusions, including from silence, even though silence sometimes simply reflected States' lack of capacity to respond to all of the Commission's work. Silence should not always be equated with agreement. The Commission needed to be responsive to what States actually said; otherwise, its output would lose much of its special value.

The Special Rapporteur had adopted quite a narrow view of the role of the Commission on second reading. In fact, the second reading gave the Commission an opportunity not only to review and take due account of the comments received from States, but also to reconsider points on which there had been disagreement among the members at the first-reading stage. Indeed, that was a necessary step for achieving a second-reading text that was acceptable to the Commission and to States. The overall objective on second reading was to present to the General Assembly an improved text that represented the greatest possible measure of agreement among the members of the Commission themselves.

Despite the many suggestions received from States and the important differences of opinion within the Commission during the first reading, the Special Rapporteur had recommended very few changes to the draft conclusions. Nonetheless, the draft conclusions were generally satisfactory, and much of the Commission's effort at the current session should be devoted to clarifying the commentaries, including, but not only, in the light of the comments received from States. That would be a major undertaking. He was thus pleased to note that the Special Rapporteur planned to ensure that there was ample opportunity to review the revised draft commentaries.

In his opinion, there were four crucial matters that needed to be resolved if the Commission was to be confident that its final product would be acceptable to States generally. Those four matters were: the ambiguous and potentially harmful role of draft conclusion 3; the commentary to draft conclusion 16 and what it said about binding decisions of the Security Council; the recommended procedure in draft conclusion 21; and the inclusion or not of draft conclusion 23 and the draft annex. Turning to the first matter, he said that, like several other members, he continued to believe that draft conclusion 3 served no useful purpose and, more seriously, might weaken the Commission's output by casting doubt on what the Commission meant by a peremptory norm of general international law (*jus cogens*). He did not find the arguments in support of the draft conclusion at all persuasive and shared the many doubts expressed by States. The inclusion of draft conclusion 3 was highly undesirable; its purpose was unclear and its ambiguous role was not properly clarified in the commentary adopted on first reading.

He was particularly concerned about two points. First, the expression "fundamental values of the international community" had no clear meaning in the current context and served merely to obfuscate matters. Second, he did not see what the statements about hierarchical superiority and universal applicability added to the notions already included in the definition of *jus cogens*; it seemed they had been included simply to say something – anything – to augment the definition in the 1969 Vienna Convention. The Special Rapporteur's suggestion that the purpose of draft conclusion 3 would be clearer if it was placed before draft conclusion 2 might help somewhat, since it would emphasize the descriptive, preambular nature of draft conclusion 3. The current placement, between the definition in draft conclusion 2 and the explanation of the definition in draft conclusions 4 to 9, was clearly wrong and suggested that draft conclusion 3 somehow qualified the definition of *jus cogens*, which was not the intention.

If draft conclusion 3 was retained, the Drafting Committee should review its wording. As currently drafted, the text contained three ideas that served different purposes and did not fit well together in a single sentence: the notions that peremptory norms of general international law (*jus cogens*) reflected and protected "fundamental values of the international community"; were "hierarchically superior to other rules of international law"; and were "universally applicable". The first of those elements seemed to state a purpose, or the purpose, of *jus cogens* norms, while the second and third seemed to describe their nature. The text might be clearer if it was divided into two sentences. The word "hierarchically" could be dropped, as it added nothing to "superior". Some reordering of the text might be beneficial. If draft conclusion 3 was retained, it would be helpful if the commentary contained a clear statement that the draft conclusion was not intended in any way to alter the definition

of peremptory norms of general international law found in draft conclusion 2 or to establish any additional criteria beyond those set out in draft conclusion 4.

The second crucial matter concerned the commentary to draft conclusion 16 and the point made therein about the relationship between norms of *jus cogens* and binding decisions of the Security Council. The reactions of States to the commentary needed to be taken very seriously; they had raised important concerns about whether the Commission was cavalierly accepting the ability of a State or States to disregard a Security Council decision designed to address a threat to the peace, breach of the peace or act of aggression. Certain States had proposed that the text of the draft conclusion or the commentary should specify that Security Council resolutions were not within its scope. Unless the matter was adequately addressed in the commentary, there was a risk that the draft conclusions as a whole would be rejected by an important constituency, or at least that their influence would be severely reduced.

The issue was undoubtedly contested, sensitive and complex, but it was also largely theoretical. The interaction of norms of *jus cogens* and the central role of Article 103 of the Charter of the United Nations within the collective security system envisaged in the Charter did not necessarily admit of a simple answer, and there was little, if any, practice that might shed light on the issue. It ought to be possible to reflect that state of affairs accurately in the commentary in a way that was without prejudice to future developments in the practice of States and of the United Nations. A simpler alternative, in line with the suggestions made by some States, would be to state in the text of the draft conclusion or the commentary that it did not deal with questions relating to Security Council resolutions.

The third matter concerned draft conclusion 21. He agreed that it was important to retain such a provision, for the same reasons that a dispute settlement provision had been considered essential in order for States to accept the *jus cogens* provisions of the Vienna Convention. If *jus cogens* and its consequences were to be taken seriously, the need to avoid or minimize the potential harm of auto-determination remained as important as it had been in 1969, or even more so, since *jus cogens* was now being addressed in a much broader context. Without such a provision, the project risked encouraging instability across a whole range of rules of international law by enabling States to invoke a norm of *jus cogens* to avoid complying with or otherwise cast doubt on rules of international law, without being subject to any checks or control. The Special Rapporteur had suggested a number of amendments to address the serious concerns expressed by some States and Commission members. He agreed with the suggestion to move draft conclusion 21 to Part Four and to revert to the original title "Recommended procedure", which was similar to the title given to article 19 of the 2006 articles on diplomatic protection ("Recommended practice"). However, if the title of draft conclusion 21 was changed, it would be undesirable to begin paragraph 1 with the words "It is recommended that". Article 19 of the 2006 articles simply stated what a State "should" do.

While he understood the reasons for the drafting changes that the Special Rapporteur had suggested for paragraphs 1 to 4 of the draft conclusion, the Drafting Committee should try to find clearer language to take account of the concerns expressed by States. The suggestion to add a new paragraph 6 to what was already a rather clear paragraph 5 seemed unnecessary. The effect of the "recommended procedure" needed to be explained in the commentary, as had been done clearly in relation to article 19 of the 2006 articles. States should not be given the impression that the draft conclusion was unimportant and could safely be ignored. The commentary should signal that States could not confidently rely on auto-interpretation or auto-determination in the context of a claim relying on *jus cogens*. In cases where agreement was not reached, the State invoking *jus cogens* should be prepared to submit the question to an impartial third party. If it was not willing to do so, that in itself might indicate the weakness of the claim.

The fourth crucial matter concerned draft conclusion 23 and the draft annex. He remained opposed to their inclusion. The views of States were clearly very divided. To persist in including a list in the face of strong opposition and valid questioning might well reduce the acceptability of the final product overall, which would be both regrettable and unnecessary. There was no requirement to include such a list in a set of conclusions devoted to methodology. In the interest of promoting general agreement, he urged members to accept the deletion of the list, even if their own preference would be to include it. One of the points that emerged from the comments of a number of States was that the Commission risked being

accused of stating a methodology and then not following it. However much the Commission protested that it was not seeking in draft conclusion 23 and the annex to apply the methodology, but merely to restate what had already been stated, the charge would remain that the Commission did not practise what it preached. If it remained, it would cast a deep shadow over the whole project. The fact that the actual list, or its particular formulation, had been contested by States only added to the difficulties.

Other points that did not raise major issues of principle also needed to be addressed. He had no objection to changing the title of the draft conclusions, although he saw no need to do so. He did not agree that the words “basis” and “bases” should be changed to “source” and “sources” in draft conclusion 5, as he believed it would lead to confusion. In draft conclusion 7, he welcomed the proposed addition of the words “and representative” to qualify the phrase “a very large majority”, but he was not sure that it was a complete solution. In draft conclusion 9, he was not sure that the Commission should omit a reference to decisions of national courts. He was not in favour of amending draft conclusion 11 on separability, as he did not believe it was for the Commission to deviate from the Vienna Convention in that way. He was not entirely convinced by the Special Rapporteur’s suggestions in respect of draft conclusion 14. It would make sense to move draft conclusion 20, on interpretation, to the beginning of Part Three, to signal that a prime objective should be to resolve problems through interpretation. Finally, he agreed with the Special Rapporteur that, in essence, the Commission’s draft conclusions reflected existing law rather than *lex ferenda*.

In conclusion, he recommended that all the draft conclusions should be referred to the Drafting Committee. He looked forward to seeing the Special Rapporteur’s redrafted commentaries as soon as possible. He was confident that the Commission could successfully conclude its second reading by the end of the current session.

The meeting rose at 12.55 p.m.