Chapter IX

JUS COGENS

A. Introduction

97. At its sixty-seventh session (2015), the Commission decided to include the topic "*Jus cogens*" in its programme of work and appointed Mr. Dire Tladi as Special Rapporteur for the topic.[1256] The General Assembly subsequently, in its resolution 70/236 of 23 December 2015, took note of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

98. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/693), which sought to set out the Special Rapporteur's general approach to the topic and, on that basis, to obtain the views of the Commission on its preferred approach, and to provide a general overview of conceptual issues relating to *jus cogens* (peremptory norms of international law).

99. The Commission considered the first report at its 3314th to 3317th, and 3322nd and 3323rd meetings, from 4 to 8 and 18 to 19 July 2016.

100. At its 3323rd meeting, on 19 July 2016, the Commission referred draft conclusions 1 and 3, as contained in the Special Rapporteur's first report, to the Drafting Committee.

101. At its 3342nd meeting, on 9 August 2016, the Chairperson of the Drafting Committee presented an interim report of the Drafting Committee on "*Jus cogens*", containing the draft conclusions it had provisionally adopted at the sixty-eighth session. The report was presented for information only and is available from the Commission's website.[1257]

1. Introduction by the Special Rapporteur of the first report

102. The Special Rapporteur indicated that his first report addressed mainly conceptual issues relating to peremptory norms (*jus cogens*), including their nature and definition. The report also traced the historical evolution of *jus cogens* and the acceptance in international law of the elements central to the concept of *jus cogens*. It further raised a number of methodological issues on which members of the Commission were invited to comment. Paragraphs 6 to 11 of the report reviewed the debates in the Sixth Committee in 2014 and 2015. It was recalled that most States had expressed support for the Commission's topic. In those debates, Member States had raised several themes.

103. One such theme concerned the question of whether the Commission should draft an illustrative list of norms that have already acquired the status of *jus cogens*. Some States supported the idea. A number of other States, however, had raised serious questions. The view of the Special Rapporteur was that the Commission should not base its decision as to whether to provide an illustrative list on the possibility that some might interpret it as a *numerus clausus*. Nonetheless, he expressed the concern that seeking to provide an illustrative list could substantially change the nature of the topic, blurring the fundamentally process-oriented/methodological nature of the topic by shifting the focus towards the legal status of particular primary rules. In his view, the Commission might consider dispensing with the inclusion of an illustrative list. At the same time, the Commission could consider other ways to provide guidance to States and practitioners on norms which, at present, meet the requirements for *jus cogens*, without necessarily providing an illustrative list.

104. Another theme raised by Member States concerned methodology and in particular the materials on which the Commission would base its work and conclusions. In the view of the Special Rapporteur, the Commission should undertake a thorough analysis of the rich variety of practice, which included both State and judicial practice. In addition, scholarly writings on the topic, while not dispositive, could also assist in analysing primary sources.

105. The Special Rapporteur proceeded to provide an overview of the discussion in paragraphs 18 to 41 of his report on the historical antecedents of *jus cogens*, both prior to and during the twentieth century. He observed that the position in international law of fundamental rules, at the time of the Second World War, could be summarized as follows: the literature, going back to the seventeenth century, recognized the existence of norms that States could not contract out of. There might have been disagreement about the basis for this proposition, but the proposition itself was not seriously questioned in the literature. Practice supporting the proposition, however, was scant. The little practice that could be found concerned peremptory treaty rules and not rules of general international law.

106. It was also recalled that the Commission itself had been instrumental in the development, acceptance and

[1256] At its 3257th meeting, on 27 May 2015 (*Yearbook … 2015*, vol. II (Part Two), p. 85, para. 286). The topic had been included in the long-term programme of work of the Commission during its sixty-sixth session (2014), on the basis of the proposal contained in the annex to the report of the Commission (*Yearbook … 2014*, vol. II (Part Two), p. 170).

[1257] http://legal.un.org/ilc.

mainstreaming of *jus cogens* in international law, and that much of the recent practice, both judicial and State practice, had been inspired by the work of the Commission. From the time that Sir Hersch Lauterpacht introduced a provision on the invalidity of a treaty if its performance would involve an "act which is illegal under international law",[1258] to the inclusion of the term "*jus cogens*" in the respective reports of Sir Gerald Fitzmaurice[1259] and Sir Humphrey Waldock,[1260] members of the Commission had not questioned the basic proposition. There were questions about the drafting as well as the theoretical basis of the proposition of invalidity on the grounds of *jus cogens*, but not about the proposition itself, nor its status in international law.

107. Yet, what had not been foreseen was the acceptance of the proposition by States. Reference was made to the overview provided in paragraph 33 of the report on the position taken by States, and, in particular, the conclusion that "it [was] safe to say that almost all States expressed support" for the concept of *jus cogens*. At the same time, some States had raised important concerns about the drafting of the relevant provisions of the Vienna Convention on the Law of Treaties (1969 Vienna Convention). In particular, it was recalled that, at the United Nations Conference on the Law of Treaties, some States had expressed the concern that, without clearer guidelines as to what norms constituted *jus cogens*, the text was likely to be abused in order to call into question validly concluded treaties. The solution found, at the time, was article 66 of the 1969 Vienna Convention, which established an important role for the International Court of Justice in relation to the invocation of *jus cogens* to invalidate a treaty. The important point, however, was that, contrary to widespread assumption, States did not question the idea of *jus cogens*, nor did they question its status as part of international law as it stood at the time.

108. The Special Rapporteur observed further that, subsequent to the adoption of the 1969 Vienna Convention, States had consistently invoked *jus cogens* in diplomatic and other communication. Moreover, judicial invocation of *jus cogens* had also increased, including through explicit recognition by the International Court of Justice (see para. 46 of the report), as well as by other international courts and tribunals and by regional and national courts.

109. Reference was further made to paragraphs 42–72 of the report, in which the Special Rapporteur provided an overview of the theoretical debate concerning the nature of *jus cogens*, as found in the literature and judicial practice. No attempt was made at resolving the debate. At the same time, in his view, any attempt to distil the criteria for *jus cogens* needed to be based on an appreciation of its theoretical underpinnings.

110. The Special Rapporteur proposed three draft conclusions:[1261] the first dealt with the scope of the entire set of draft conclusions; the second sought to draw a distinction between *jus cogens* and other rules of international law that may be modified, abrogated or derogated from by the agreement of States, namely rules of a *jus dispositivum* character; the third sought to describe the general character of *jus cogens*. He observed that the reference, in the second paragraph of the third draft conclusion, to the character of *jus cogens* as being designed to protect the fundamental values of the international community, and their nature as hierarchically superior and universally applicable norms, was supported by practice and was widely accepted in the literature.

111. The Special Rapporteur further reiterated his view that draft conclusions were the most appropriate outcome for the topic. With regard to the future programme of work, he envisaged that the Commission would consider the criteria for *jus cogens*, in 2017; their consequences, in 2018; and any remaining miscellaneous issues, in 2019.

2. Summary of the debate

112. In welcoming the first report of the Special Rapporteur, members made reference to the wide support, among Member States, for consideration of the topic, as expressed in the Sixth Committee. At the same time, the Special Rapporteur was encouraged to keep in mind the differences in understanding expressed by Member States and, accordingly, to approach the topic with caution. It was also stated that the Commission should, from the outset, avoid an outcome that could result in, or be interpreted as, a deviation from the 1969 Vienna Convention. Several members pointed to the historical significance of the study being undertaken by the Commission. It was stressed that the scope of the topic extends beyond the law of treaties and includes areas of international law such as responsibility of States for internationally wrongful acts.

113. Members expressed support for the Special Rapporteur's recommendations on the methodology to be pursued. Agreement was expressed with his view that, in

[1258] First report on the law of treaties by H. Lauterpacht, Special Rapporteur, *Yearbook ... 1953*, vol. II, document A/CN.4/63, draft article 15.

[1259] Third report on the law of treaties by G. G. Fitzmaurice, Special Rapporteur, *Yearbook … 1958*, vol. II, document A/CN.4/115, draft article 17.

[1260] Second report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1963*, vol. II, document A/CN.4/156 and Add.1–3, draft article 13.

[1261] The text of the draft conclusions, as proposed by the Special Rapporteur in his first report, reads as follows:

"Draft conclusion 1. *Scope*

"The present draft conclusions concern the way in which *jus cogens* rules are to be identified, and the legal consequences flowing from them.

"Draft conclusion 2. *Modification, derogation and abrogation of rules of international law*

"1. Rules of international law may be modified, derogated from or abrogated by agreement of States to which the rule is applicable unless such modification, derogation or abrogation is prohibited by the rule in question (*jus dispositivum*). The modification, derogation and abrogation can take place through treaty, customary international law or other agreement.

"2. An exception to the rule set forth in paragraph 1 is peremptory norms of general international law, which may only be modified, derogated from or abrogated by rules having the same character.

"Draft conclusion 3. *General nature of* jus cogens *norms*

"1. Peremptory norms of international law (*jus cogens*) are those norms of general international law accepted and recognized by the international community of States as a whole as those from which no modification, derogation or abrogation is permitted.

"2. Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable."

principle, the study should be based on both State and judicial practice and supplemented by scholarly writings. The fact that the International Court of Justice and other international and regional courts and tribunals had referred to the concept in a number of cases was cited in support of the assertion that the existence of *jus cogens* was no longer seriously contested. The view was expressed that as the existence of *jus cogens* was well established, the task at hand was to determine the right balance between ordinary rules of international law, which could be modified by regular procedures, and certain foundational rules, which could not be so modified. At the same time, some members cautioned that the Commission should avoid purporting to create new peremptory norms and stated that the Commission should proceed from the assumption that peremptory norms, by their nature, were exceptions. It was also suggested that a distinction be drawn between reviewing the pronouncements of international courts and tribunals in the determination of the existence of *jus cogens* and the practice of States, which gave the norms in question their peremptory character.

114. The view was expressed that the theoretical basis of *jus cogens* was not necessarily to be found in any one particular school of thought (naturalist or positivist), nor was it necessarily based on consent. Instead, its obligatory force was based on a general practice of States—undertaken as a matter of law—which considered the norms in question to be non-derogable (even if they could be replaced by other norms of the same character). In terms of a further view, it was important for the Commission to adhere as closely as possible to the agreed language of the 1969 Vienna Convention. In that connection, several members were of the view that articles 53 and 64 of the 1969 Vienna Convention offered a satisfactory legal basis by emphasizing the acceptance and recognition of a norm by the international community of States. A further view was that such recognition should be extended to that of other entities, such as international and non-governmental organizations and international society more broadly. It was also suggested that if the Special Rapporteur were to undertake further study of the theoretical aspects of *jus cogens*, he could look at the link between the concept of *jus cogens* and that of transnational public policy. According to another view, the Commission should not refrain from taking a position on some of the theoretical issues, as doing so would help guide it, for example in developing an illustrative list of norms.

115. It was suggested that, on the basis of the discussion in the Special Rapporteur's report, the following elements of *jus cogens* could be identified: derogation from a peremptory norm was impermissible; the rule or rules in question formed part of general international law; a peremptory norm was recognized as such by the international community; it was universally applicable; the fact of non-derogability was a consequence of its peremptory status; *jus cogens* norms were hierarchically superior to other rules of international law; *jus cogens* norms had as their purpose the protection of international public order (*ordre public*). It was observed that *jus cogens* norms are essentially norms of customary international law with a special form of *opinio juris*, that is, the conviction of the existence of a legal right or obligation of a peremptory character. Accordingly, such a norm consists of a general practice accepted as peremptory law. In other words, a general practice accompanied by *opinio juris cogens*. It was also pointed out that treaties might be at the origin of or reflect norms of *jus cogens*, and that peremptory norms might also be based on general principles of law, which deserve further study. At the same time, the Special Rapporteur was called upon to undertake an in-depth study of the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention.

116. Members expressed different views concerning the possibility of developing an illustrative list of norms that had acquired the status of *jus cogens*. Reference was made in the debate to the fact that the concept of *jus cogens* was recognized in the constitutions of several States. That made the possibility of developing an indicative list of such norms, as recognized by international law, particularly significant. According to such views, the usefulness of work on the topic would be diminished were the Commission not to develop an indicative list, or if it were to limit itself to providing mere examples. The view was also expressed that consideration of the topic should not be limited to methodological considerations. It was stated that a global society required global norms, and that the Commission could contribute to the identification of such norms through, *inter alia*, the preparation of a list of peremptory norms, even if it was only indicative. It was observed that, unlike when the 1969 Vienna Convention had been adopted, a variety of legal materials existed on which to draw in order to develop a list of such norms. Furthermore, by contrast with work on the topic "Identification of customary international law", where drawing up of a list of customary rules would not have been feasible, the relatively limited number of *jus cogens* norms made it possible to envisage such a list. It was thought that the Commission could also take into account the examples identified in its previous work, including on responsibility of States for internationally wrongful acts,[1262] the fragmentation of international law,[1263] the responsibility of international organizations[1264] and reservations to treaties.[1265] It was also recalled that the Commission had developed an illustrative list in the context of its work on the effects of armed conflicts on treaties.[1266] In considering drawing up such a list, some members also pointed out that the Commission could look at the judgments and decisions of international courts and tribunals, at the global and regional levels.

117. Support was further expressed for the possibility of dealing with the matter through a discussion of illustrative examples in the commentary, or in an annex, although the view was also expressed that there was little difference between those options and drawing up an illustrative list. It was also suggested that the Commission postpone a decision on the matter until a later stage.

[1262] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[1263] See *Yearbook … 2006*, vol. II (Part Two), pp. 176–184, paras. 241–251; see also the report of the Commission's Study Group on the topic (A/CN.4/L.682 and Corr.1 [and Add.1]), available from the Commission's website, documents of the fifty-eighth session (the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)).

[1264] See *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88.

[1265] *Ibid.*, pp. 26 *et seq.*, paras. 75–76; for the commentary to the draft guidelines, see *ibid.*, vol. II (Part Three).

[1266] *Ibid.*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101.

118. Several other members were of the view that it was not advisable to seek to develop such a list, nor even to provide illustrative examples in the commentary, as that would necessarily require the Commission to take a position on the status of the rules in question. There was also concern that attempting to produce such a list might involve considerable additional work and detailed analysis of substantive areas of law and lead to fruitless disputes about the inclusion or non-inclusion of norms. Concern was likewise expressed that establishing a list, even if only illustrative, would result in equally important rules of international law being given an inferior status.

119. Several members also expressed doubts as to the existence of regional *jus cogens*. It was maintained that such a possibility, by definition, contradicted the universal applicability of *jus cogens*. Furthermore, such a possibility raised questions as to their legal effects in relation, for example, to States outside the region in question, as well as the relationship between universal and regional *jus cogens*. Another concern expressed was that if the notion of regional *jus cogens* were recognized, there would, in principle, be no bar to also recognizing subregional norms, which could further undermine the concept, and potentially lead to the fragmentation of international law.

120. However, other members pointed out that some references to regional *jus cogens* with respect to certain norms had been made, for example, by the Inter-American Commission on Human Rights. Reference was also made to the possibility that regional rules of *jus cogens* existed in Europe. Accordingly, the possibility of other forms of peremptory norms, such as regional norms, deserved further study and should not *a priori* be excluded. It was also suggested that, while there might be no reason, in principle, to limit the concept to rules of universal applicability, the Commission could decide simply to limit the scope of its study to only *jus cogens* of universal applicability.

121. Several members emphasized the incompatibility of the notion of the persistent objector with *jus cogens* norms, which have by definition a universal peremptory character. In this regard, those members added it would be impossible to admit, for example, the existence of a persistent objector to the prohibition on the crime of genocide. According to another view, it was too early to take a decision on that point, as the Commission had not yet considered the meaning of the phrase "accepted and recognized by the community of States as a whole". It was also suggested that a distinction be drawn between an analysis of the source of *jus cogens* norms and the effect of their application, with the persistent objector being concerned more with the latter than the former.

122. General support was expressed for the proposal that the Commission focus on developing draft "conclusions" on the topic. At the same time, the view was expressed that it would have been preferable for the Commission to consider the type of outcome after analysing all the elements of peremptory norms.

123. As regards proposed draft conclusion 1, the view was expressed that it was not clear whether the process of "identification" was merely a matter of recognition or whether it included a normative exercise of determination of the existence and content of a norm. It was also suggested that the provision be recast more clearly in the form of a provision concerning scope and that it could be expanded to include the activities of non-State actors. It was further suggested that express mention be made not only of the criteria for the determination of *jus cogens*, but also its content.

124. Concerning draft conclusion 2, doubts were expressed about the necessity of drawing a comparison with *jus dispositivum*. Several members suggested that the matter could be dealt with in the commentary. Doubts were also expressed about the appropriateness of including a reference to the modification, derogation or abrogation of regular rules of international law. In addition, it was pointed out that it was confusing to treat *jus cogens* as hierarchically superior, on the one hand, and as an exception, on the other hand, to a standard rule. A doubt was also expressed as to the extent to which the proposed formulation suggested that parties to a treaty could bind themselves simply by proclaiming that a particular treaty rule could not be changed by mutual agreement. It was maintained that a rule did not acquire the character of *jus cogens* simply by the agreement of parties to a treaty.

125. Several members suggested that draft conclusion 3 be recast as a definition of *jus cogens*, and it was proposed that the provision track the formulation of article 53 of the 1969 Vienna Convention as closely as possible. Several members expressed support for the content of paragraph 2, while several others expressed doubts concerning its inclusion. It was maintained that there was no practice to support the inclusion of the elements listed in paragraph 2, which also seemed to depart from the definition provided in article 53 of the 1969 Vienna Convention. The view was expressed that the distinctive feature of *jus cogens* norms was less their hierarchical nature and more their special importance. The Commission was cautioned against the risk of inadvertently creating additional requirements for the recognition of *jus cogens*. The view was expressed that the notion of "hierarchical superiority" was unclear, and potentially misleading, partly because it blurred the distinction between the identification of *jus cogens* and the consequences of conflict with such norms. In terms of a further view, the reference to "hierarchy" required further elaboration of the particular kind of hierarchy produced by *jus cogens*, which was based on the nullity of treaties that contravened it, as opposed to other hierarchies in international law, such as that established by Article 103 of the Charter of the United Nations. According to a different view, the hierarchical superiority of peremptory norms was well established and had been recognized by the Commission itself in its work on the fragmentation of international law. It was further suggested that paragraph 2 could be made the subject of a separate draft conclusion.

126. Several members also expressed their disagreement with the necessity of referring to "the values of the international community", as the existence of *jus cogens* depended upon its acceptance and recognition as such by the international community of States as a whole and not on a subjective assessment of values. Another view was that the reference to "fundamental values" was too narrow if it only referred to those *jus cogens* norms of a humanitarian

character, to the exclusion of others, such as the prohibition on the use of force. Accordingly, it was proposed that the draft conclusion refer instead to "the most fundamental principles". A further view was expressed that the provision could, in fact, usefully supplement the 1969 Vienna Convention by clarifying the nature of *jus cogens* through the inclusion of a reference to the "fundamental values of the international community as a whole".

127. Notwithstanding the views expressed on whether it was possible for regional *jus cogens to exist*, support was expressed for the element of "universal applicability", which was listed in paragraph 2.

128. Other suggestions included developing a further draft conclusion on the definition of *jus cogens*. It was also recommended that there be more consistency in referring to either "norms" or "rules". A preference was expressed for using "norms", as had been done in the 1969 Vienna Convention. A further suggestion was to change the title of the topic to "*jus cogens* in international law", "peremptory norms" or "*jus cogens* in the international legal order". It was also suggested that the draft conclusions deal with the invalidating effect of *jus cogens*, including the question of who determines whether there is a conflict with *jus cogens*.

129. Support was expressed for the Special Rapporteur's indication of the planned future work on the topic. It was suggested that the Special Rapporteur also investigate the relationship between general principles of law and *jus cogens*. Other suggestions for future work included analysing: the phrase "accepted and recognized by the international community of States as a whole" and the extent to which such a concept was synonymous with consent; the relationship between *jus cogens* and *erga omnes* obligations; the extent to which non-derogation was a defining characteristic of *jus cogens*; the process by which a subsequent peremptory norm could replace a previous such norm; the relationship between the existence of fundamental values underlying *jus cogens* and the expression of their existence; the dispute settlement mechanism in article 66 of the 1969 Vienna Convention; and the question of how to regulate conflict between contradictory peremptory norms.

3. Concluding remarks of the Special Rapporteur

130. In responding to the debate, the Special Rapporteur addressed the comments on the theoretical basis for *jus cogens* and expressed his disagreement with those who were of the view that the matter was resolved by article 53 of the 1969 Vienna Convention. Nevertheless, he remained of the view that it was not necessary for the Commission to resolve the matter.

131. It was noted that there had been general agreement on the need to base the study mainly on the practice of States, judicial decisions and scholarly writings, as appropriate. In response to views expressed in the debate that some of the elements in his first report were not fully substantiated by State practice, or that the relative lack of such practice made it necessary to fall back on theoretical constructs, the Special Rapporteur recalled that there existed a significant amount of State and judicial practice.

132. Concerning the possibility of developing an illustrative list, the Special Rapporteur noted the differences of opinion within the Commission and acknowledged that the possibility of developing such a list sounded attractive. Nonetheless, he recalled his concern that it would detract from the methodological focus of the topic. However, he remained open to the possibility of an illustrative list, focusing on the most well-accepted peremptory norms.

133. On the question of regional *jus cogens*, the Special Rapporteur reiterated his intention to consider the matter in future reports. At the same time, while he did not believe that the notion of a regional *jus cogens* norm was well founded in international law, in his view the universal character of *jus cogens*, which was well established, did not *a priori* exclude the possibility of regional peremptory norms.

134. The Special Rapporteur further confirmed that he did not intend to overlook the implication of *jus cogens* in the context of the responsibility of States for internationally wrongful acts. As had been indicated in the syllabus, the topic was broader than the law of treaties. His intention had been to deal with such matters in later reports on the consequences of *jus cogens*. He did, however, express disagreement with the view that the nature and definition of *jus cogens* may be different depending on the area of international law.

135. With regard to future work, he had taken note of the views concerning the possibility of treaty-based *jus cogens*. He further confirmed his intention to consider the relationship between *jus cogens* norms and *erga omnes* obligations.

136. Concerning the proposed draft conclusions, the Special Rapporteur noted the various drafting suggestions made during the debate. He also accepted the criticism that draft conclusion 2 dealt with issues that were outside the scope of the topic. He explained that he had intended, by means of the draft proposal, to make the point that peremptory norms were, by their very nature, exceptional in relation to other rules of international law. Nonetheless, he accepted the view of the Commission that the proposed draft conclusion need not be referred to the Drafting Committee.

137. As regards draft conclusion 3, while he was open to the suggestions for improvement to paragraph 1, including aligning the formulation with that of article 53 of the 1969 Vienna Convention, he disagreed with those members of the Commission who had suggested that there existed no, or a limited, basis in the practice of States and in the pronouncements of courts and tribunals to support the inclusion of the elements of fundamental values, hierarchical superiority and universal applicability of *jus cogens*. In addition to the authorities cited in his first report, he provided additional authoritative references for the positions taken by States on *jus cogens*, primarily within the context of the United Nations, as well as the pronouncements of courts and tribunals.

138. He further expressed the view that there was merit in considering suggestions for modifying the title of the project and that this could be considered in a future report.