Chapter VIII

PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*)

A. Introduction

142. At its sixty-seventh session (2015), the Commission decided to include the topic "*Jus cogens*" in its programme of work and appointed Mr. Dire D. Tladi as Special Rapporteur for the topic.[779] 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.

143. At its sixty-eighth session (2016), the Commission had before it the first report of the Special Rapporteur,[780] which addressed conceptual issues and raised a number of methodological questions, including whether the Commission should, as part of the consideration of the topic, provide an illustrative list of norms that qualify as *jus cogens*. The report further traced the historical and theoretical foundations of *jus cogens*.

B. Consideration of the topic at the present session

144. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/706), which sought to set out the criteria for the identification of peremptory norms (*jus cogens*), taking the Vienna Convention on the Law of Treaties of 1969 (hereinafter the "1969 Vienna Convention") as a point of departure in developing the criteria. On the basis of his analysis, the Special Rapporteur proposed six draft conclusions in his second report.[781] The Special Rapporteur further proposed that the Commission change the name of the topic from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)".

145. The Commission considered the second report at its 3368th to 3370th, and 3372nd to 3374th meetings, held from 3 to 5 and from 11 to 13 July 2017.

146. At its 3374th meeting, on 13 July 2017, the Commission referred draft conclusions 4 to 9,[782] as contained in the Special Rapporteur's second report, to the Drafting Committee. At the same meeting, the Commission decided to change the title of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".

147. At its 3382nd meeting, on 26 July 2017, the Chairperson of the Drafting Committee presented an interim

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[779] At its 3257th meeting, on 27 May 2015 (*Yearbook … 2015*, vol. II (Part Two), 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 on the work of that session (*Yearbook … 2014*, vol. II (Part Two), para. 266 and pp. 170–178).

[780] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693.

[781] Draft conclusion 4 (Criteria for *jus cogens*); draft conclusion 5 (*Jus cogens* norms as norms of general international law); draft conclusion 6 (Acceptance and recognition as a criterion for the identification of *jus cogens*); draft conclusion 7 (International community of States as a whole); draft conclusion 8 (Acceptance and recognition); and draft conclusion 9 (Evidence of acceptance and recognition).

[782] The text of draft conclusions 4 to 9, as proposed by the Special Rapporteur in his second report, reads as follows:

"*Draft conclusion 4. Criteria for* jus cogens

"To identify a norm as one of *jus cogens*, it is necessary to show that the norm in question meets two criteria:

"(*a*) It must be a norm of general international law; and

"(*b*) It must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.

"*Draft conclusion 5.* Jus cogens *norms as norms of general international law*

"1. A norm of general international law is one which has a general scope of application.

"2. Customary international law is the most common basis for the formation of *jus cogens* norms of international law.

"3. General principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law.

"4. A treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law.

"*Draft conclusion 6. Acceptance and recognition as a criterion for the identification of* jus cogens

"1. A norm of general international law is identified as a *jus cogens* norm when it is accepted and recognized as a norm from which no derogation is permitted.

"2. The requirement that a norm be accepted and recognized as one from which no derogation is permitted requires an assessment of the opinion of the international community of States as a whole.

"*Draft conclusion 7. International community of States as a whole*

"1. It is the acceptance and recognition of the community of States as a whole that is relevant in the identification of norms of *jus cogens*. Consequently, it is the attitude of States that is relevant.

"2. While the attitudes of actors other than States may be relevant in assessing the acceptance and recognition of the international community of States as a whole, these cannot, in and of themselves, constitute acceptance and recognition by the international community of States as a whole. The attitudes of other actors may be relevant in providing context and assessing the attitudes of States.

"3. Acceptance and recognition by a large majority of States is sufficient for the identification of a norm as a norm of *jus cogens*. Acceptance and recognition by all States is not required.

"*Draft conclusion 8. Acceptance and recognition*

"1. The requirement for acceptance and recognition as a criterion for *jus cogens* is distinct from acceptance as law for the purposes of identification of customary international law. It is similarly distinct from the requirement of recognition for the purposes of general principles of law within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice.

"2. The requirement for acceptance and recognition as a criterion for *jus cogens* means that evidence should be provided that, in addition to being accepted as law, the norm in question is accepted by States as one which cannot be derogated from.

report of the Drafting Committee on "Peremptory norms of general international law (*jus cogens*)", containing the draft conclusions that it had provisionally adopted at the sixty-ninth session. The report was presented for information only, and is available from the website of the Commission.[783]

1. Introduction by the Special Rapporteur of the second report

148. The Special Rapporteur indicated that his second report consisted of three substantive sections: a section on the previous consideration of the topic (paras. 4–30), a section on the criteria for *jus cogens* (paras. 31–89) and a section including proposals (paras. 90–91).

149. In the section of the report on the previous consideration of the topic, the Special Rapporteur pointed out that the three States that had initially criticized the topic had maintained their criticism, while the vast majority of the States that had spoken on the topic had continued to express support.[784] He further underlined that there was general agreement on the need to change the name of the topic. He also recalled that, although the Commission had decided not to refer draft conclusion 2, as proposed in his first report,[785] to the Drafting Committee, he intended to reintroduce the proposal in a future report. He also observed that the greatest division, in both the Commission and the Sixth Committee, concerned draft conclusion 3, in particular paragraph 2, which set forth three basic characteristics of norms of *jus cogens*, namely that such norms protect the fundamental values of the international community, are hierarchically superior to other norms and are universally applicable.

150. The Special Rapporteur further recalled his intention to consider whether an illustrative list of *jus cogens* norms should be developed, underlining that he would make a firm proposal in that regard in a future report on miscellaneous issues and inviting members of the Commission to convey their views on the matter.

151. Paragraphs 31 to 89 of the report addressed the criteria for the identification of *jus cogens*, taking article 53 of the 1969 Vienna Convention as the basis for those criteria, consistent with the views expressed by States, as well as State practice, decisions of international courts and tribunals, scholarly writings, and the past consideration of *jus cogens* in terms of article 53 of the 1969 Vienna Convention by the Commission itself, while not limiting the scope of the topic to treaty law.

152. In that regard, the Special Rapporteur underlined that article 53 contained two cumulative criteria, namely that the norm in question must be a norm of general international law, and that it must be accepted and recognized as one from which no derogation is permitted. While the Special Rapporteur had identified several other ways to approach the definition, he was of the view that this two-criterion approach should be retained. It was thus captured in proposed draft conclusion 4, where paragraph (*a*) reproduced the first criterion and paragraph (*b*) reproduced the second.

153. The report then proceeded to assess the content of the first criterion, which was addressed in proposed draft conclusion 5 on "*Jus cogens* norms as norms of general international law". The Special Rapporteur indicated that he did not consider it necessary to have a specific draft conclusion detailing the relationship between customary international law and *jus cogens*. He noted that paragraph 2 of the proposed draft conclusion was sufficient in that regard. He further observed that the role of customary international law for the identification of *jus cogens* was fairly well settled, while the possibility of relying on other sources of international law was less so. He noted that authority could be found for the view that general principles of law could form the basis of *jus cogens*. That was evident, not only in practice, but also in the drafting history of article 50 of the draft articles on the law of treaties,[786] as well as in the fact that article 53 of the 1969 Vienna Convention clearly included general principles of law. In the light of the limited practice available, the Special Rapporteur had nonetheless deemed it desirable to include such general principles of law as a basis for *jus cogens*, albeit in less absolute terms than for customary international law.

154. Turning to treaties, the Special Rapporteur recalled that, while it was generally accepted that treaties did not, themselves, constitute rules of general international law, a treaty rule could reflect a rule of general international law.

155. The Special Rapporteur then observed that the second criterion, namely that the norm in question "must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted", addressed in draft conclusions 6 to 9, contained several elements: the first concerned the principal requirement of acceptance and recognition; the second was concerned with who or what was doing the recognizing and accepting; and the third concerned what was being accepted and recognized.

"*Draft conclusion 9. Evidence of acceptance and recognition*

"1. Evidence of acceptance and recognition that a norm of general international law is a norm of *jus cogens* can be reflected in a variety of materials and can take various forms.

"2. The following materials may provide evidence of acceptance and recognition that a norm of general international law has risen to the level of *jus cogens*: treaties, resolutions adopted by international organizations, public statements on behalf of States, official publications, governmental legal opinions, diplomatic correspondence and decisions of national courts.

"3. Judgments and decisions of international courts and tribunals may also serve as evidence of acceptance and recognition for the purposes of identifying a norm as a *jus cogens* norm of international law.

"4. Other materials, such as the work of the International Law Commission, the work of expert bodies and scholarly writings, may provide a secondary means of identifying norms of international law from which no derogation is permitted. Such materials may also assist in assessing the weight of the primary materials."

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

[784] See the Special Rapporteur's second report (A/CN.4/706), paras. 10 and 12.

[785] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693.

[786] The draft articles and the commentaries thereto, as adopted by the Commission at its eighteenth session, are reproduced in *Yearbook … 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 177 *et seq.*

156. Considering that draft conclusion 6 set out the general context of the second criterion, the Special Rapporteur explained that the draft conclusion had a dual purpose: on the one hand, it stated that a determination that a norm was one of general international law was insufficient for its status as *jus cogens*, and, on the other hand, it laid down that what was relevant for the second criterion was the acceptance and recognition of the international community of States as a whole.

157. The Special Rapporteur noted that draft conclusion 7 concerned the question of whose acceptance and recognition was at issue, underlining that both the drafting history of article 53 of the 1969 Vienna Convention and the practice of States were of particular interest in that regard. He further stressed that, while the central role of States, as a community, was emphasized in paragraph 2, the phrase "international community of States as a whole" was meant to indicate that it was the views of States, taken together, that ought to be considered, rather than their individual attitudes. Paragraph 2 of draft conclusion 7 also sought to capture the fine balance struck when the Commission had previously recognized the central role of States while not denying the potential influence that other entities might have in the identification of law.

158. Draft conclusion 8 addressed the content of the acceptance and recognition by the international community as a whole. The view of the Special Rapporteur was that, for a norm to qualify as *jus cogens*, it was insufficient to be only accepted and recognized as having a particular quality, namely that it is one that may not be derogated from (*opinio juris cogentis*); as was the case with customary international law, it was equally important to provide evidence of that acceptance and recognition.

159. The purpose of draft conclusion 9 was accordingly to address the nature of materials that might be offered as evidence. The Special Rapporteur recalled that, while for the most part, such materials were in practice similar to those often advanced as evidence of acceptance of law for customary international law, they were different in content.

160. Consistent with the debate in the Commission during its sixty-eighth session, the Special Rapporteur had proposed, in paragraph 90 of his report, that the name of the topic be changed from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)". However, he subsequently noted that that his suggestion would not satisfy the requirement for consistency with article 53 of the 1969 Vienna Convention. He accordingly revised his proposal, so that the title of the topic would be changed to "Peremptory norms of general international law (*jus cogens*)".

161. Regarding the future programme of work, the Special Rapporteur envisaged that, in 2018, the Commission would consider, potentially in two reports, the effects or consequences of *jus cogens* in general terms, as well as in treaty law and other areas of international law. The fourth report, to be issued in 2019, would address any remaining miscellaneous issues, as well as proposals on an illustrative list of *jus cogens* norms.

2. Summary of the debate

(a) *General comments*

162. Overall, members welcomed the second report of the Special Rapporteur. The fact that the report maintained a balance between "flexibility of identification" and "the consensual nature of international law" was underlined. While most members emphasized the need to bring clarity to a difficult and complex concept, some recalled the scepticism surrounding the topic of *jus cogens* expressed by Member States.

163. While general agreement with the Special Rapporteur was expressed for taking article 53 of the 1969 Vienna Convention as the starting point for identifying the criteria of *jus cogens*, it was recalled that the concept of *jus cogens* may not cover all aspects to be considered by the Commission. It was pointed out that the topic was centuries older than the 1969 Vienna Convention, as the Special Rapporteur himself had confirmed in his first report. It was also pointed out that the Commission should critically reassess whether it wanted to base the criteria for the determination as to which norms have attained peremptory status in international law solely on article 53 of the 1969 Vienna Convention, as that would mean adopting a firmly consent-based understanding of *jus cogens*, while one of the purposes of *jus cogens* was precisely to set limits to what States could consent to or dispose of. It was also observed that *jus cogens* norms extended, beyond treaty law, to non-conventional instruments and other fields of law, such as the law on responsibility of States for internationally wrongful acts.

164. Agreement was expressed with the Special Rapporteur's proposition that customary international law is the most common basis for the formation of *jus cogens* norms, while divergent opinions were conveyed with the view of the Special Rapporteur that treaty rules should not as such be considered as a source or basis for *jus cogens* norms. It was also noted that a norm should have developed to a sufficient degree in all three sources of law, i.e., custom, treaties and general principles of law, for it to constitute a norm of *jus cogens*.

165. While most members agreed with the Special Rapporteur that the modification element referred to in article 53 of the 1969 Vienna Convention could not be a criterion, some expressed disagreement in that regard. The view was also expressed that the first sentence of article 53 ought to be inserted as a criterion.

166. Several members supported the Special Rapporteur's suggested criteria for the identification of *jus cogens*. Some members considered that the characteristics set out in paragraph 2 of draft conclusion 3 (fundamental values, hierarchical superiority and universal application) were obvious and basic elements, and called for them to be part of the identification criteria. It was stated that it was necessary to give the character of *jus cogens* as protecting fundamental values a place among the criteria for identification. In contrast, a view was expressed that such characteristics could be discussed in the commentary. The absence of concrete examples as to the formation and identification of *jus cogens* in the report was also noted.

However, other members expressed satisfaction with the amount of identified practice to support the conclusions of the Special Rapporteur.

167. Many members shared the views of the Special Rapporteur on the significance of fundamental values, noting, for example, that *jus cogens* was a "way of upholding 'fundamental values of the international community'" and that those values were ones that could never be compromised; that *jus cogens* flows from the constitutional basis of the international community that has "basic and common values"; that a *jus cogens* norm's peremptoriness derives from its acceptance as reflecting fundamental values; or that the views of the Special Rapporteur were consistent with the position previously taken by the Commission in its work on the law of treaties, State responsibility and fragmentation of international law.

168. Other members expressed the view that the meaning of "fundamental values" needed to be clarified, and that the concept had not yet been positively accepted by mainstream domestic and international courts and tribunals without opposing views. It was also observed that international law was grounded in a multiplicity of value systems and that there were, in principle, no uniform values in the international community. Some members called for a definition of fundamental values in international law and cautioned against the Special Rapporteur using the terms "protecting" and "reflecting" the fundamental values of international law interchangeably. In particular, the view was expressed that it was preferable to use both "protecting" and "reflecting" when referring to fundamental values.

169. Support was expressed for the inclusion of the link between fundamental values and *jus cogens* as the unique feature of *jus cogens* norms within international law.

170. Most members supported the Special Rapporteur's approach in relation to general international law as the first criterion. Some members questioned the absence of a definition of the concept "general international law" in his report. The view was put forward that the reference to hierarchical superiority of *jus cogens* norms was more of a consequence than a characteristic of a norm of *jus cogens* and that the question of hierarchy raised important questions about the "effects of hierarchy" on sources of international law, such as general principles and customary international law. It was also observed that the first criterion was only a precondition for the existence of *jus cogens* and that, as such, it did not need to reflect all the characteristics of *jus cogens*.

171. Other members further recalled that there was no unanimity in doctrine on the concept. The view was also expressed that referring to the study on fragmentation of international law[787] was insufficient, as that study did not take a position on a definition of general international law. Furthermore, the question was raised as to whether norms of specialized regimes, including international humanitarian law rules, could be considered to form part of *jus cogens*.

172. As for the bases of *jus cogens*, several members agreed that customary international law was the most common basis. The view was expressed that international norms could include those emanating from treaties, as well as from sources other than those listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, for example, resolutions of international organizations. Some concern was raised about the Special Rapporteur drawing distinctions between general international law and *lex specialis*, which was considered to potentially contribute to general international law.

173. Divergent views were expressed with regard to the role of general principles of law. While many members accepted that general principles could form the basis for *jus cogens*, others recalled the lack of common understanding of the general principles of law[788] that had led members of the Commission to set general principles of law aside at the time of the drafting of article 53 of the 1969 Vienna Convention, and noted that the Commission should accordingly refrain from referring to general principles in its consideration of *jus cogens*. Some members further questioned whether State practice supported the status of general principles of law as the basis for *jus cogens* and called for examples thereof. The view was also expressed that, while general principles of law could become a *jus cogens* norm, not all general principles of law had the status of *jus cogens*.

174. Among the reasons stated by some members in opposition to the inclusion of general principles of law was the fact that those principles were, by definition, domestic law principles. In that regard, it was observed that once such domestic law principles were recognized as general principles within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, they ceased to be merely domestic law principles. It was further noted that general principles of law are a source of international law.

175. While some members considered that *jus cogens* norms existed independently of State will and determination, and were part of natural law, and encouraged the Special Rapporteur to develop further analyses of the nature of *jus cogens*, others expressed agreement with the approach of the Special Rapporteur in not engaging in the debate on the distinction between the "natural law" and "positive law" origin of the concept and supported the approach that it should be addressed as reflected in State and judicial practice and academic literature.

176. Some members endorsed the two-step approach relied upon by the Special Rapporteur to prove the existence of a norm of general international law, i.e., a process by which a "normal" rule of customary international law would be elevated to a *jus cogens* norm under general

[787] Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.682 and Corr.1 and Add.1), draft conclusions of the work of the Study Group, conclusion 20, "Application of custom and general principles of law". The report is available from the Commission's website, documents of the fifty-eighth session, and the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One).

[788] *Yearbook ... 1963*, vol. I, 684th meeting, 21 May 1963, para. 51.

international law, and some others saw it as a useful analytical tool. Several members pointed out, however, that the formation of *jus cogens* did not have to take these two steps in practice. It was stated that, in certain cases, the formation of *jus cogens* did not take two distinct steps, even if such steps were sometimes clearly distinguishable. The view was also expressed that other criteria should be taken into consideration; for example, that the norm in question should be one of general international law, that it should be non-derogable and that it could be modified only by a subsequent norm.

177. As to the second criterion, several members expressed disagreement with the view of the Special Rapporteur that non-derogability was not a criterion of identification of *jus cogens* but a consequence of its existence. They recalled that the concept of non-derogability determined which rules fell within the category of *jus cogens*, and that it was not merely a consequence, as per article 53 of the 1969 Vienna Convention. The view was also expressed that a norm consistently violated *de facto* by a significant number of States would not attain *jus cogens* status, even if those States claimed otherwise.

178. With regard to the jurisprudence of courts and tribunals, while it was stressed that the judicial practice of the International Court of Justice and other tribunals was appropriately documented by the Special Rapporteur, it was also noted that courts typically merely referred to *jus cogens* norms without elaborating on what they meant by "general international law", "hierarchical superiority", "fundamental values", "acceptance and recognition" and "international community as a whole". The view was expressed that international courts seemed to have stripped the concept of *jus cogens* of its determining element, i.e., its hierarchical superiority over all other norms. Another view was that it was incorrect to assert that decisions of courts and tribunals were evidence of *jus cogens*, as they existed as a subsidiary means for identifying norms of *jus cogens*.

179. Concern was expressed by several members in relation to the consideration of regional *jus cogens* and its universal applicability. Without a clear indication by the Special Rapporteur of his intention to study the possibility of non-universal *jus cogens*, it was suggested that no decision be taken at the present stage as to whether such norms were within the scope of the topic. The question was also raised as to whether "universal application" was meant to be understood as "all States" or "all subjects of international law". It was further opined that the assertion of universal application as reflected in draft conclusion 5, paragraph 1, was acceptable on the understanding that the question of the possibility of regional *jus cogens* would be addressed subsequently.

180. Recalling the Commission's previous attempts to develop an illustrative list of *jus cogens* norms, most members favoured the preparation of such a list in the context of the current study. Such a list could provide an annex, listing "candidates" for *jus cogens*. Conversely, the view was expressed that it would not be a wise idea for the Commission to undertake the task of providing an illustrative list, as it would take a disproportionately large amount of time to prepare. Instead, it was suggested that the Commission should agree on the methodology for the identification of *jus cogens* and the consequences.

(b) *Specific comments on the draft conclusions*

(i) *General comments on the structure of the draft conclusions*

181. Various proposals to combine and streamline the draft conclusions proposed in the Special Rapporteur's second report were made, with a view to the proposals being taken up by the Drafting Committee.

(ii) *Draft conclusion 4*

182. While support was expressed for draft conclusion 4, the exclusion of fundamental values from the normative criteria for *jus cogens* was questioned, given their essential character. It was thus suggested that the concept be incorporated as a normative criterion, retaining the wording used in the commentaries to the articles on responsibility of States for internationally wrongful acts,[789] i.e., "vital interests of the international community" and "fundamental character" of peremptory norms, thus avoiding the term "fundamental values". It was also suggested that a link be established between draft conclusion 4 and the description of the elements in draft conclusions 5 to 8. It was further suggested that draft conclusion 4 should reflect the fact that the formation of *jus cogens* might not follow the suggested sequence reflected, either by adjusting the wording or by introducing an explanation in the commentaries. Noting that such an approach might result in a duplication of draft conclusion 3, paragraph 1, and might therefore not be really needed, another member suggested including the third criterion included in article 53 of the 1969 Vienna Convention in draft conclusion 4, either as subparagraph (*c*) or as part of subparagraph (*b*). It was also proposed, on the one hand, that the norm in question should be one of general international law, and, on the other hand, that four criteria should be taken into account, namely norms of general international law, acceptance and recognition by the international community, non-derogability and modification only by a subsequent norm. It was suggested that the last two criteria could be merged into one.

(iii) *Draft conclusion 5*

183. The view was expressed that the title of draft conclusion 5 could read "Source of general international law". While some members considered that draft conclusion 5 required substantiation and justification, others stressed that all three sources of law, i.e., custom, treaties and general principles of law, were equally important and should be treated equally. It was further suggested that paragraph 1 should clearly state that the relevant norms were binding upon all States, while doubt was expressed in relation to paragraph 3, considering that general principles of law were not, by nature, peremptory.

[789] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

(iv) *Draft conclusion 6*

184. In terms of another view, draft conclusion 6 could be deleted as it was essentially reiterating that there had to be acceptance and recognition by the international community as a whole.

(v) *Draft conclusion 7*

185. The use of the term "attitude" in draft conclusion 7, paragraph 1, was questioned. While support was conveyed for the approach taken in paragraph 3, another view was expressed that such an approach was unbalanced, as it required only a mild standard of agreement by States. A formula requiring the consent of virtually all, or most, States for *jus cogens* norms, such as "very large majority" or "substantially all States", was favoured by several members. In another view, it was suggested that paragraphs 1 and 2 of draft conclusion 7 be combined, or paragraph 2 be deleted, as *jus cogens* norms were universally applicable.

(vi) *Draft conclusion 8*

186. With a view to making draft conclusion 8 comprehensive, it was suggested that the phrase "the norm in question is accepted by States" in paragraph 2 be replaced by "the norm in question is accepted and recognized by the international community of States as a whole". The Special Rapporteur was also invited to consider the issue of acquiescence as a form of acceptance and recognition and to address the fact that draft conclusion 8, paragraph 2, did not shed light on the subject matter, as it repeated what was reflected in draft conclusions 3, 4 and 6.

(vii) *Draft conclusion 9*

187. The view was expressed that materials qualitatively different from those constituting evidence of customary international law were required to prove the elevation of such norms to the status of *jus cogens* norms in order to avoid "double or triple counting". Another view was put forward that national constitutions should be included as evidence and that language should be inserted to make it clear that the list in paragraph 2 was not exhaustive. It was also suggested that the fourth requirement identified by the International Court of Justice,[790] i.e., the regular denunciation of a behaviour within international and national forums, be included as a means of evidence. It was also proposed that it should be clarified, on the one hand, whether there was a qualitative difference between the materials listed and, on the other hand, that, in paragraph 2, resolutions should be adopted by States parties to the organizations to which reference was made, and that the word "unanimous" be added. Another view was to include a reference to the modification of *jus cogens*. It was further suggested that paragraph 2 be amended to read: "The following materials may provide evidence of the opinion of the international community of States as a whole with regard to the acceptance or recognition …"; paragraph 3 should be improved by saying that decisions of courts and tribunals "may serve as a subsidiary means for identifying a norm as *jus cogens*".

(viii) *Title of the topic*

188. Support was expressed for changing the title of the topic. Suggestions included: "Peremptory norms (*jus cogens*)", "Peremptory norms of general international law (*jus cogens*)", "*Jus cogens* in the law of treaties", "*Jus cogens* in international law" and "*Jus cogens* in general international law".

(ix) *Future work*

189. While support was generally expressed for the Special Rapporteur's indication of the planned future work on the topic, it was suggested that the issues relating to State responsibility be addressed not only in the context of "effects" but also from the perspective of the whole categorization of *jus cogens*, including definition, criteria and content, as well as its consequences. The need to develop an integrated concept of *jus cogens* that covered both treaty law and State responsibility was also underlined.

3. Concluding remarks of the Special Rapporteur

190. The Special Rapporteur gave an overview of the comments and observations made during the debate. He further reiterated his preference that the draft conclusions remain in the Drafting Committee until a complete set had been adopted.

191. The Special Rapporteur commented on various issues raised during the debate, including the suggestion that the Commission ought to deal with domestic *jus cogens*—an issue which, in his view, should not be considered, because the Commission had decided to use article 53 of the 1969 Vienna Convention as the basis for its work; because of the need to consider practice from a broader regional spread, which led him to invite members to send him materials at their disposal; because of the need to diversify the sources of evidence; and because of the suggestion that he refer to the practice and traditions of various cultural groups.

192. As regarded the linkage between universal applicability and regional *jus cogens*, the Special Rapporteur reiterated his view that regional *jus cogens* was not possible in legal terms, for reasons he would address in a future report. For the time being, he was of the view that a possible outcome of that study could be a draft conclusion stating either that regional *jus cogens* norms were possible as an exception to the general rule; regional *jus cogens* norms were not possible under international law; simply indicating that the draft conclusions were "without prejudice" to the possibility of the existence of regional *jus cogens*; or having no provision at all. He further suggested addressing the question as to whether the reference to universal application meant "all States" or "all subjects of international law", in a future report.

193. On the issue of hierarchical superiority as seen through the jurisprudence of international courts and tribunals, the Special Rapporteur expressed the view that courts, especially the International Court of Justice,

[790] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at p. 457, para. 99.

sought to specifically exclude the hierarchy question by stating that the rules in question were not in a relationship of conflict, so that the issue of hierarchy did not arise at all. He also confirmed that he did not share the view that hierarchical superiority was more of a consequence than a characteristic.

194. The Special Rapporteur disagreed with the views expressed in relation to draft conclusion 3, paragraph 2, which had been referred to the Drafting Committee in 2016, that the provision seemed to suggest that characteristics of *jus cogens* should not be included unless they had a direct effect on the criteria and identification of *jus cogens*. He indicated that the draft conclusions were, by their nature, a mixture of normative and descriptive conclusions on the state of the law. He noted that he intended to explain in the commentary that such characteristics may be relevant in assessing the criteria for *jus cogens* norms of international law.

195. In relation to the view expressed by some members that article 53 of the 1969 Vienna Convention ought not to serve as the sole basis for the consideration of the topic, he recalled that the approach he had taken in his two reports, including on the criteria for *jus cogens*, was not one based entirely on consent. In his view, while the role of States was central to the topic, that did not mean that it was based entirely on the existence of consent.

196. The Special Rapporteur recalled that most members had agreed with the two-step approach, although some members had raised questions about it. He recalled that the two-step approach was not to be equated with double or triple counting: the first step was one of searching for the existence of law, most often customary international law. In the second step, the status of the rule or norm in question as law was not at issue. What was at issue was its peremptory character.

197. The Special Rapporteur did not agree with arguments advanced in favour of including modification as a criterion, recalling that judicial practice from both domestic and international courts had focused on the evidence of acceptance and recognition of non-derogability. He nonetheless accepted the suggestion, on the understanding that the derogation and modification elements would not be viewed as separate criteria, but rather as a composite part of the criterion.

198. He recalled that most members, if not all, had expressed agreement with the proposed change of the title of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".

199. With regard to the various drafting suggestions made by members to the effect of streamlining the draft conclusions, he stressed that the purposes served by different provisions ought to be taken into account, and indicated that he was receptive to restructuring the draft conclusions in line with suggestions made during the debate in plenary.

200. The Special Rapporteur noted that, while most members expressed agreement with the general orientation of his approach to the first criterion, i.e., the concept of general international law, a number of issues had been raised on particular aspects, including as to whether international humanitarian law rules could not form part of *jus cogens*. In that connection, he confirmed that general international law was not to be distinguished from *lex specialis* and that, accordingly, international humanitarian law was not excluded from the possibility of producing *jus cogens* norms.

201. Commenting on the suggestion that norms of general international law were those that were binding on all States, he observed that the first criterion was only a precondition for the existence of *jus cogens* and that, as such, it did not need to reflect all the characteristics of *jus cogens*.

202. The Special Rapporteur then addressed the disagreement expressed by some members with the report's conclusion that treaties could not be part of general international law; he considered that the Commission should be cautious before concluding that treaties as such could be part of general international law, in particular because draft conclusion 5 did not categorically close the door on the arguments made by members. He further stated that the draft conclusion did not concern evidence. Instead, it was intended to provide some conclusions about sources of international law and their relationship to *jus cogens*, and underlined that resolutions and other materials did not qualify as such sources.

203. Turning to the suggestion that all three sources—customary international law, general principles of law and treaty law—ought to play an equal role with regard to the identification of *jus cogens* and that all three should exist at the same time for there to be a *jus cogens* norm, he underlined that the proposals did not correspond to practice and doctrine.

204. The Special Rapporteur further commented on observations made in connection with general principles of law, underlining that, for the purposes of *jus cogens*, it was sufficient only to note the possibility that general principles could form the basis of norms of *jus cogens*, and that it would not be appropriate to exclude that possibility. He also recalled that proposed draft conclusion 5 was sufficiently soft to connote that this was only a possibility and that the practice in that regard was minimal. The commentary, if the text was adopted, would also make that clear.

205. Commenting on draft conclusion 6, the Special Rapporteur noted that it had not been the subject of criticism, although several members had suggested that it could be integrated into other provisions, an approach he did not favour, as the draft conclusion served to introduce the second criterion. While the Special Rapporteur was not in favour of deleting it either, he would, in the event the Drafting Committee decided to do so, provide the structural orientation of the draft conclusions concerned with the identification of *jus cogens* in the commentary.

206. Issues that were raised in the context of draft conclusion 7 concerned the meaning of the phrase "as a whole". In that regard, the Special Rapporteur noted that, like some members, he was of the view that it sought to

inspire a sense of the collective. He also underlined that he did not agree with the views that the word "attitude" was inappropriate, or with the suggestion that practice, coupled with *opinio juris*, was required. He strongly supported, however, the proposal to use the word "conviction" and was amenable to restoring the term "very", which had been dropped from paragraph 3, although the phrase "a large majority" was not intended to signify a less than substantial majority.

207. With regard to draft conclusion 8, the Special Rapporteur invited the Drafting Committee to replace the phrase "accepted by States as one which cannot be derogated from" with "accepted and recognized by the international community of States as a whole as one from which no derogation is permitted". He disagreed with the comment that draft conclusion 8, paragraph 2, did not add much to the subject.

208. The Special Rapporteur further indicated that he agreed with the drafting suggestions made in relation to draft conclusion 9. He considered that national constitutions should be included as possible evidence, and that the Drafting Committee might consider inserting a reference to national legislation into paragraph 2.

209. While refraining from commenting on observations made in relation to the illustrative list of norms, the Special Rapporteur noted that the decision he would recommend would be based on the substance of the arguments made.

210. The Special Rapporteur reiterated his preference that the Drafting Committee finalize its work on all the proposals for draft conclusions that he intended to make during the first reading before transmitting them back to the plenary.