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International Law Commission

Seventy-third session (second part)

Provisional summary record of the 3598th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 26 July 2022, at 10 a.m.

Contents

Present:

Chair:	Mr. Tladi
later:	Sir Michael Wood (First Vice-Chair)
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Programme, procedures and working methods of the Commission and its documentation (agenda item 8) (*continued*)

Report of the Planning Group

Sir Michael Wood (Chair of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.966), said that the Group had held three meetings. It had had before it the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-sixth session, prepared by the Secretariat (A/CN.4/746); General Assembly resolution 76/111 of 9 December 2021 on the report of the International Law Commission on the work of its seventy-second session; General Assembly resolution 76/117 of 9 December 2021 on the rule of law at the national and international levels; and section 8, Legal affairs, of the proposed programme budget for 2023 (A/77/6 (Sect. 8)), subprogramme 3, Progressive development and codification of international law.

The Group had reconstituted the Working Group on the long-term programme of work, chaired by Mr. Hmoud, which had recommended the inclusion of the topic "Non-legally binding international agreements" in the Commission's long-term programme of work.

The Planning Group had also reconstituted the Working Group on methods of work, chaired by Mr. Hassouna. Over the current quinquennium the Working Group had received working papers on a variety of aspects of the Commission's methods of work; however, owing to lack of time, the Group had been unable to complete its work. It was hoped that the Working Group would be reconstituted in the next quinquennium.

The Planning Group had addressed questions concerning the rule of law at the national and international levels; honoraria; documentation and publications; websites; and the United Nations Audiovisual Library of International Law. It recommended that the Commission should request the secretariat to begin exploring the logistics and other arrangements for the possible convening of the first part of a session of the Commission in New York in the next quinquennium. It had also discussed visas and related matters in the light of members' experiences in arranging their travel to the Commission's sessions. A short passage on that subject would be included in the draft report on the work of the current session.

In 2021, the Commission had requested the General Assembly to consider the possibility of establishing a trust fund to assist Special Rapporteurs. In paragraph 34 of resolution 76/111 of 9 December 2021, the General Assembly had sought additional information on that request. The Planning Group had provided the information, including draft terms of reference for the trust fund. That information would also be included in the Commission's draft report.

The Planning Group recommended that the Commission should convene its seventy-fourth session in Geneva from 24 April to 2 June and from 3 July to 4 August 2023.

The Chair said he took it that the Commission wished to take note of the oral report of the Planning Group.

It was so decided.

Sir Michael Wood, First Vice-Chair, took the Chair.

Draft report of the Commission on the work of its seventy-third session (*continued*)

*Chapter IV. Peremptory norms of general international law (*jus cogens*)* (*continued*) (A/CN.4/L.960 and A/CN.4/L.960/Add.1)

The Chair invited the Commission to resume its consideration of chapter IV of its draft report, as contained in document A/CN.4/L.960/Add.1, beginning with paragraph (2) of the commentary to draft conclusion 16 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).

*Commentary to draft conclusion 16 (Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)) (continued)*

Paragraph (2) (continued)

Mr. Ouazzani Chahdi said that, in the penultimate sentence of the paragraph, the French translation of the phrase "but for the rule set forth in this draft conclusion" should be redrafted to ensure that it would be easily understood by readers.

The Chair, speaking as a member of the Commission, suggested that in the fifth sentence of paragraph (2), footnote marker 177 should be placed immediately after the words "Security Council". Footnote marker 180, which appeared at the end of paragraph (4), should be placed immediately after the words "Charter of the United Nations" in the fifth sentence of paragraph (2). At the end of that sentence, the phrase "admitting a State to become a member of the Organization" should be amended to read "admitting a State to membership in the Organization". In addition, both instances of the word "draft" should be deleted from the second sentence of paragraph (2).

Mr. Huang said that he was grateful to the Special Rapporteur for his flexibility and willingness to achieve consensus. While he himself was not completely satisfied with the outcome, a minimum consensus had been reached, and he was able to support the changes outlined by the Chair. Compromise was the essence of diplomacy and the Commission's finest tradition.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Reinisch said that, in the last sentence of paragraph (3), the words "the peremptory norm" should be amended to read "a peremptory norm".

Mr. Jalloh said that, in the first sentence of the paragraph, the words "of the present commentary" should be inserted after the words "paragraph (2)" to make the reference clearer.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Tladi (Special Rapporteur) said that the third sentence of paragraph (4) should be amended to read: "Obligations arising under the Charter of the United Nations, however, require additional consideration since, pursuant to Article 103, such obligations prevail in the event of conflict over other rules of international law." A new sentence should be inserted immediately after it, which would read: "If a resolution, decision or other act of the United Nations does not create obligations under international law due to a conflict with a peremptory norm of general international law (*jus cogens*), then no obligations arise that implicate Article 103."

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Forteau said that, in the third sentence of paragraph (5), the word "renunciation" in the phrase "renunciation of obligations" should be replaced with a more appropriate term.

Mr. Tladi (Special Rapporteur) said that the word "renunciation" could be replaced with the word "repudiation". In the fourth sentence, the word "unambiguously" should be deleted.

Paragraph (5), as amended, was adopted.

Mr. Jalloh said that he wished to highlight the fact that he had shown flexibility in the adoption of the commentary to draft conclusion 16. Informal consultations had enabled the Commission to make progress in its plenary meetings. He hoped that the members would exercise restraint during the consideration of the remainder of the text.

The Chair said that all the members were displaying restraint and collegiality.

*Commentary to draft conclusion 17 (Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations* erga omnes*))*

Paragraph (1)

Mr. Park said that the decision of the Federal Constitutional Court of Germany that was referred to in the last sentence of the paragraph was an order rather than a judgment. It was unclear whether an order, which did not constitute a final decision, was a sufficiently robust source of evidence for the purposes of the paragraph.

Mr. Tladi (Special Rapporteur) said that the Commission regularly cited orders of, *inter alia*, the International Court of Justice.

Mr. Rajput said that there was indeed a distinction between the value of an order, which was provisional, and that of a judgment, which was final.

The Chair noted that the text simply referred to what the Federal Constitutional Court had stated without indicating what authority that statement had.

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Murphy said that the last sentence of paragraph (3) should be redrafted to read: "The International Tribunal for the Law of the Sea determined that the obligations of States parties relating to preservation of the environment of the high seas and the deep seabed under the 1982 United Nations Convention on the Law of the Sea had an *erga omnes* character."

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Tladi (Special Rapporteur) said that, in the third sentence of paragraph (4), the word "including" should be inserted before the words "those obligations".

The Chair said that, in the same sentence, the word "draft" should be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Tladi (Special Rapporteur) said that, in the sixth sentence of paragraph (5), the words "of States" should be inserted after the words "legal interest", and the words "their prevention" should be amended to read "the prevention".

In addition, a reference to the judgment that had been handed down by the International Court of Justice on 22 July 2022 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* should be inserted at the beginning of footnote 204, accompanied by the text of paragraph 107 of the judgment.

Mr. Grossman Guiloff said that, in the sixth sentence of paragraph (5), the word "covered" in the phrase "prevention of acts covered by" should be replaced with the word "prohibited".

Mr. Murphy said that, in the third sentence, the phrase "The formulation of legal interest in the protection of the right connected to the obligation" should be replaced with the simpler wording "That legal interest". In the same sentence, the word "used" should be replaced with the word "acknowledged".

Ms. Oral said that, given that *erga omnes* obligations did not always relate to prohibition, it might be preferable to replace the word "covered", in the sixth sentence, with the word "protected" rather than the word "prohibited".

Mr. Forteau said he could confirm that the reference to paragraph 107 of the recent International Court of Justice judgment was pertinent. However, reference should also be made to paragraphs 108 and 109 as they contained some useful clarifications, specifying, notably, that, in the case of obligations *erga omnes*, diplomatic protection did not apply.

Mr. Tladi (Special Rapporteur) said that the purpose of the third sentence was to emphasize that the particular formulation mentioned in the previous sentence had also been used in other cases. An amendment to state that "legal interest has also been acknowledged", as proposed by Mr. Murphy, would change the meaning somewhat. He therefore preferred to retain the original wording. Referring to paragraph 107 of the judgment in *The Gambia v. Myanmar*, he drew attention to the second part of the second sentence, which read "they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case". As it was the notion of "compliance" that was of particular importance in the context of paragraph (5), he preferred not to refer to paragraphs 108 and 109 in the same footnote so as not to detract from that focus. He would be proposing additions that captured the essence of paragraph 108 for inclusion in subsequent paragraphs. He tended to agree with Ms. Oral that the word "covered" was preferable to "prohibited" in the sixth sentence.

The Chair, speaking as a member of the Commission, pointed out that the word "covered" was also used in the second sentence. Since he agreed that the third sentence was somewhat hard to read, he wondered whether Mr. Murphy's concerns could be met if the start of the sentence was amended to read "That formulation of legal interest … has also been acknowledged".

Mr. Grossman Guiloff said that acts that States were required to prevent were acts that were prohibited, not "covered", by *erga omnes* obligations and that footnote 206, which referred to States' common interest in ensuring that acts of genocide were prevented, supported that observation. However, he would defer to the Special Rapporteur.

Mr. Tladi (Special Rapporteur), conceding that the third sentence, as currently formulated, was somewhat difficult to follow, said that part of the problem lay in the use of the word "acknowledged" and that it was important to retain the word "used". As an alternative, he suggested that the wording should read "The term 'legal interest' has also been used". That formulation was easy to follow and accurate.

Mr. Jalloh said that he supported that reformulation; he, too, found the use of the word "acknowledged" problematic.

Mr. Forteau suggested that the words "including obligations *erga omnes partes*" should be added at the end of the first sentence, since many of the examples given in the paragraph concerned obligations of that nature.

Mr. Jalloh said that, while one or two of the examples given were indeed obligations *erga omnes partes*, the addition would be an unnecessary complication. The paragraph concerned obligations *erga omnes*, and thus already covered obligations *erga omnes partes* by implication.

Mr. Murphy said that he was in favour of the addition, which would make it clear that some of the examples given involved obligations *erga omnes partes*, and thus that the Commission recognized that there were differing aspects of obligations *erga omnes*, without detracting from the overall point.

Mr. Tladi (Special Rapporteur) said that he could accept the addition but would like to point out that paragraph (7) expressly acknowledged that a number of the examples given concerned obligations *erga omnes partes*.

Mr. Jalloh noted that it was also expressly recognized in footnotes 198, 203 and 204 that the obligations in question were obligations *erga omnes partes*. Furthermore, as noted by the Special Rapporteur, the penultimate sentence of paragraph (7) clarified that the

principle of *erga omnes partes* "applies equally to *erga omnes* obligations generally". Why, therefore, was the addition needed?

The Chair, speaking as a member of the Commission, said that, while perhaps not necessary, the addition might provide a useful clarification.

Mr. Forteau said that he considered the addition essential. Its purpose was to make it clear from the outset that the Commission's observations regarding obligations *erga omnes* applied also to obligations *erga omnes partes*. That clarification was important because the text of draft conclusion 17 referred only to obligations *erga omnes*; thus, without an initial explanation, the subsequent examples of obligations *erga omnes partes* might give rise to confusion.

Mr. Cissé said that he was also in favour of the addition and that, since the Special Rapporteur was likewise in favour, the Commission should proceed to adopt the paragraph.

Mr. Zagaynov said that he found Mr. Forteau's arguments persuasive. He agreed that the clarification would be useful and saw no problem with its inclusion.

Mr. Petrič said that, while he agreed that the addition was unnecessary, it could potentially be useful for some readers. He urged Mr. Jalloh to accept the proposal so that the discussion could move forward.

Mr. Murphy said that, while he understood the points raised by Mr. Jalloh, he believed that the addition would strengthen the overall position set forth by clarifying that the paragraph related to all such obligations, including those arising in a treaty context.

He would appreciate an explanation of the rationale behind the Special Rapporteur's suggested reformulation of the beginning of the third sentence. The idea behind his own proposal had been simply to refer back to the second sentence as a means of introducing the jurisprudence cited subsequently, but it appeared that the Special Rapporteur might have a different idea in mind.

Mr. Tladi (Special Rapporteur) said he recognized that his proposal excluded the element of protection and that the link back to the second sentence could be clearer. On that basis, he proposed a further alternative for the start of the third sentence, which would read "This formulation has also been used". In the absence of agreement regarding the addition proposed by Mr. Forteau, he suggested that the Commission should postpone the discussion of paragraph (5) to a subsequent meeting.

The Chair said he took it that the Commission wished to defer the adoption of paragraph (5), as proposed by the Special Rapporteur.

It was so decided.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Tladi (Special Rapporteur) proposed that a new sentence should be added at the end of footnote 208, which would read: "In the preliminary objections phase, the Court used the term 'special interest'." That sentence would be followed by a reference to paragraph 108 of the judgment in *The Gambia v. Myanmar*.

Mr. Forteau said that the third sentence of paragraph (7) needed to be updated to reflect the judgment. Specifically, since the Court had definitively concluded, as indicated in paragraphs 108 and 114 of the judgment, that the Gambia had standing to bring the case, the words "*prima facie*" should be deleted. He suggested that footnote 208 should also include a reference to paragraph 114, which summarized the Court's conclusion that the Gambia had standing.

Mr. Murphy said that, in the first sentence, the words "has found support" should be replaced with "is consistent with", since the current formulation could be taken to mean that the rule contained in paragraph 2 of draft conclusion 17 had been cited in judicial decisions.

In the second sentence, the reference to "a State" should be replaced with "a State party to the Convention on the Prevention and Punishment of the Crime of Genocide" and the reference to "obligations *erga omnes*" should be replaced with "obligations *erga omnes partes*", since the word "*partes*" was included in the text quoted. In the fourth sentence, which began with the words "While the case concerned", the word "principle" should be replaced with "conclusion", given that the previous sentence stated that the Court had "concluded" that the Gambia had *prima facie* standing.

Ms. Oral proposed that, as an alternative to Mr. Murphy's proposal, the words "has found support" should be replaced with "is supported by"; in her view, the formulation "is consistent with" was too weak.

Mr. Valencia-Ospina said that if, as it appeared to him, the third sentence of paragraph (7) was referring to the Court's ruling on the request for provisional measures in *The Gambia v. Myanmar*, the term "*prima facie*" was entirely correct and should be retained. It was important to distinguish between that ruling and the more recent ruling on preliminary objections.

Mr. Tladi (Special Rapporteur) said he was well aware of that point but had been hoping that the distinction could be made in the footnote rather than in the main text. He was sure, however, that, in consultation with his colleagues, he would be able to arrive at an appropriate solution.

The Chair suggested that the Special Rapporteur, with input from the other Commission members participating in the discussion on that complex issue, should draft a revised version of paragraph (7) that could be presented for discussion at the next plenary meeting.

It was so decided.

Paragraph (8)

Mr. Tladi (Special Rapporteur) drew attention to a drafting change proposed by Mr. Forteau, which he had accepted: in the last phrase of the third sentence, the words "third States are entitled" had been replaced with "any State other than an injured State is entitled".

Mr. Murphy said that, in both the fourth and the final sentence, "reparations" should be replaced with the singular form of the word, which was more usual in English. He found the last two sentences problematic, as each of them appeared to state that there was only one possible claim that "a State other than an injured State" could make, so that the two sentences contradicted each other. Accordingly, he suggested that the two sentences should be combined to capture the idea that there were in fact two types of claims that could be made. After the words "may only claim" in what was currently the penultimate sentence, a colon should be inserted, followed by the words "first, 'cessation of the internationally wrongful act, and assurances and guarantees of non-repetition'; and second, reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached' and not for its own benefit".

Mr. Rajput said that Mr. Murphy was proposing radical changes to the final two sentences of the paragraph. The use of the words "first" and "second" would indicate that there were only two routes available to States other than the injured State. He did not think that the Commission could draw such a conclusion at the current stage. For example, such States might also be entitled to claim an apology for breaches of peremptory norms. The wording of the final two sentences of the paragraph as originally proposed by the Special Rapporteur was more appropriate, since it accommodated various circumstances, and should be retained.

Mr. Murphy said that he was surprised to hear that Mr. Rajput viewed his proposal as a radical change; it was merely a way of capturing the intended meaning of the Special Rapporteur's original wording. The penultimate and final sentences each appeared to claim that a State other than an injured State could do "only" one thing, yet they listed two different things. In fact, such States could do both of the things described. The purpose of his proposed amendment was to make that clear.

The Chair, speaking as a member of the Commission, said that Mr. Murphy's concern could perhaps be met by the deletion of the word "only" in the penultimate sentence, since there was no limitation on the ability of a State other than an injured State to claim cessation of an internationally wrongful act and assurances and guarantees of non-repetition. However, there was a limitation on the ability of such States to claim reparation, insofar as they could do so only in the interest of the injured State or of the beneficiaries of the obligation breached. Such an amendment would leave open the question of whether a State other than an injured State could claim an apology for a breach of peremptory norms, a matter on which he took no view.

Mr. Murphy said that he was open to such a solution. He wished to propose, however, that in addition to the deletion of the word "only" in the penultimate sentence, the word "only" in the final sentence should be placed after the word "reparation", for the sake of clarity.

Mr. Forteau said that the second half of the paragraph would be clearer if the penultimate sentence was placed immediately before the sentence that began "When invoking the responsibility of another State in its capacity as an injured State". With regard to the final sentence, under article 48, paragraph 2 (b), of the articles on responsibility of States for internationally wrongful acts, a State other than an injured State had the right to claim, from the responsible State, the performance of the obligation of reparation, but not the right to claim reparation. The final sentence should be redrafted to reflect that provision accurately.

Mr. Hmoud, supported by **Mr. Jalloh**, said he agreed that the final sentence of paragraph (8) should be reformulated so that it accurately reflected the content of article 48, paragraph 2 (b), of the articles on State responsibility.

Ms. Oral said that paragraph (13) of the commentary to article 48 indicated that States other than an injured State could not demand reparation in situations where an injured State could not do so. That was the point: the scope of what States other than an injured State could claim was limited. The current formulation of the final two sentences of paragraph (8), and the way in which the word "only" was used, was perhaps overly restrictive.

Mr. Grossman Guiloff said that, while he agreed that a reference to the "performance of the obligation of reparation" should be added, it was equally important to refer to reparation *per se*.

Mr. Ouazzani Chahdi said that, in order to make efficient use of time, paragraphs that presented serious drafting problems, such as paragraph (8), should be redrafted after informal consultations and resubmitted to the Commission for adoption once the problems raised had been resolved.

The Chair said he took it that the Commission wished to suspend its consideration of the paragraph to allow the Special Rapporteur time to reformulate the text in the light of the debate.

Paragraph (8) was left in abeyance.

Paragraph (9)

Mr. Grossman Guiloff said that the term "other relevant organizations", which appeared in the first sentence of the paragraph, was ambiguous. He wished to propose that the sentence should be amended to read: "The entitlement under the second paragraph of draft conclusion 17 to invoke the responsibility of States for breaches of peremptory norms applies also in respect to other subjects of international law, where appropriate." The word "actor", which appeared twice in the paragraph, should be replaced with the term "subject of international law".

Mr. Park said that he read paragraphs (9) and (10) together. While paragraph (10) was very clear, paragraph (9) was not. The scope of the topic under discussion, in his view, covered only States and international organizations. With that in mind, he wished to propose that the first sentence of the paragraph should be amended to read: "The entitlement under the second paragraph of draft conclusion 17 to invoke the responsibility of States for breaches

of peremptory norms applies also in respect to international organizations.” The term “another actor”, used in the third and fourth sentences, was ambiguous. In the third sentence, it should be replaced with the words “a State or another international organization”. In the fourth sentence, it should be replaced with the words “a State or an international organization”. Also in the fourth sentence, the words “an international organization” should be amended to read “another international organization”.

Mr. Petrič said that he strongly supported Mr. Park’s proposal. The Commission should avoid implying that actors other than States and international organizations could invoke responsibility for breaches of peremptory norms. If the Commission wished to address the question of the entitlements of other actors, it should do so elsewhere.

The Chair, speaking as a member of the Commission, said that, because the phrase “in respect to” was ambiguous in the first sentence of paragraph (9), it was unclear whether that sentence was intended to mean that “other relevant organizations” had an entitlement to invoke the responsibility of States for breaches of peremptory norms, or that the entitlement to invoke responsibility also applied to the responsibility of “other relevant organizations” for breaches of peremptory norms. More generally, he wondered whether there was any real need to retain the paragraph.

Mr. Tladi (Special Rapporteur) said that, as indicated in the text of paragraph (9) itself, the implications of the statement made in the first sentence were twofold; both situations described by the Chair were covered. The Commission could decide to address only the second situation, namely States’ entitlement to invoke the responsibility of other actors. Generally speaking, paragraph (9) was intended as a response to the views expressed by States, some of which had taken a broad position on the question, while others had taken a rather narrow view. If the Commission decided that there was no need for the paragraph, it could be deleted.

Mr. Grossman Guiloff said that *jus cogens* norms also applied to subjects of international law other than States and international organizations, for example insurgent movements. The Commission could decide to refer only to States and international organizations in the commentaries; however, he wished to point out that the question of the responsibility of other subjects of international law was an important one.

Mr. Murphy said that paragraph 2 of draft conclusion 17 did not mention international organizations. It was therefore unusual for the commentary to state that the entitlement referred to in that paragraph also applied to international organizations. One possible solution would be to reformulate the paragraph as a “without prejudice” clause.

Mr. Rajput said it appeared to him that the purpose of paragraph (9) was to acknowledge that while the entitlement referred to in paragraph 2 of draft conclusion 17 was directed towards States, there was a possibility that other actors might also be responsible for breaches of peremptory norms. Those actors could include armed groups and terrorist organizations. Of course, the Commission could decide not to address that issue at all and thus leave the question open. Alternatively, it could address the issue in broad terms, without getting into the specifics. The problem with paragraph (9) in its current form was that it was too specific. He proposed that the text should be reformulated to read: “The second paragraph of draft conclusion 17 primarily applies to the entitlement to invoke responsibility of States for breaches of peremptory norms. However, it may also cover responsibility for breaches of peremptory norms by other actors, including international organizations.”

Mr. Tladi (Special Rapporteur), responding to Mr. Murphy’s point that draft conclusion 17 made no mention of international organizations, said he wished to remind members that paragraph (10) of the commentary to draft conclusion 1 indicated that while, in general, the draft conclusions applied to States, in certain instances, which would be made clear in the commentaries, they could apply to international organizations.

Mr. Jalloh said that he was in favour of retaining paragraph (9) and of addressing both the entitlement of other actors to invoke the responsibility of States for breaches of peremptory norms and the entitlement of States to invoke the responsibility of other actors for such breaches. In the context of the conflict in Sierra Leone, various questions related to the responsibility of non-State armed groups had come before the Special Court for Sierra

Leone. A paragraph touching upon that question, even lightly, could be useful for actors dealing with such matters. With that in mind, he supported the broad formulation proposed by Mr. Grossman Guiloff, namely "other subjects of international law, where appropriate". In the alternative, he could lend his support to Mr. Rajput's proposal.

Mr. Petrič said that he continued to support Mr. Park's proposal. The Commission should be disciplined in its approach to the commentaries, working within the limits set by the text of its draft conclusions. Paragraph (9) was a commentary to paragraph 2 of draft conclusion 17, which mentioned States only. While the Commission could clarify that the scope of paragraph 2 extended to subjects of international law that represented States, namely international organizations, it could not reasonably conclude that the scope of the paragraph also extended to other entities, such as armed groups. To claim that "other subjects" had an entitlement to invoke responsibility for breaches of peremptory norms would be to venture into *terra incognita*, since it was not at all clear what other subjects were concerned.

Mr. Saboia said he had initially been surprised that paragraph (9) referred to a matter that was not specifically covered in paragraph 2 of draft conclusion 17. However, he had been convinced by the Special Rapporteur's explanation with regard to paragraph (10) of the commentary to draft conclusion 1. While there were drafting issues in paragraph (9), it was important to clarify that international organizations could invoke the responsibility of other actors for breaches of peremptory norms. Moreover, the question of the responsibility of non-State actors for violations of *jus cogens* norms was a pertinent one. He wished to note that a whole series of provisions that dealt with the responsibility and the duties of non-State actors had been proposed in connection with the topic "Protection of the environment in relation to armed conflicts". Paragraph (9) should be reformulated with a view to resolving the drafting issues that had been raised, while retaining the central idea of the text as proposed.

Mr. Forteau said that, while he was not opposed to the inclusion of paragraph (9), he was concerned that the effort required to reformulate it would complicate and delay the Commission's work. The statement in the third sentence – "First, an international organization may invoke the responsibility of another actor for breaches of peremptory norms of general international law (*jus cogens*)" – was incorrect, as was paragraph (10). In that context, article 49 (3) of the 2011 articles on the responsibility of international organizations, which set limits on the situations in which international organizations could invoke responsibility, should be taken into account.

Mr. Park said that, in his view, it might be best to delete paragraph (9) altogether.

Mr. Zagaynov said that he was also uncomfortable with the broad statement concerning the invocation of State responsibility by international organizations. The Commission had not included a similar statement in either the articles on responsibility of States for internationally wrongful acts or the articles on the responsibility of international organizations. If such a serious pronouncement was to be retained, it should first be discussed properly. In any event, the Commission should exercise caution in that regard.

The Chair said he took it that the Commission wished to invite the Special Rapporteur to reformulate paragraphs (9) and (10), which were closely related, in the light of the debate and, if necessary, in consultation with other members. The Commission could then consider the revised versions of the two paragraphs at its next meeting.

It was so decided.

*Commentary to draft conclusion 18 (Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness)*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted with a minor drafting change.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Park said that, in his view, the beginning of the first sentence – "Draft conclusion 18 applies also to the invocation" – should be replaced with the formulation used in the version of the paragraph adopted on first reading: "Draft conclusion 18 is without prejudice to the invocation". In adopting that version, the Commission had already agreed on stylistic, procedural and substantive issues.

Mr. Murphy said that, if he recalled correctly, in adopting the first-reading text of that paragraph, the Commission had wished to acknowledge that, even though it was not addressed in draft conclusion 18, there might be an analogous scenario with respect to international organizations. He therefore supported Mr. Park's proposal to revert to the original wording of the first sentence.

Mr. Forteau said that one solution might simply be to delete the first sentence of paragraph (4).

Mr. Tladi (Special Rapporteur) said that he would be agreeable to Mr. Forteau's proposal.

Paragraph (4), as amended, was adopted.

*Commentary to draft conclusion 19 (Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*))*

Mr. Zagaynov said that international law was going through turbulent times; several Commission members had made observations to that effect at the current session. In the light of the current challenges, the role of the Commission, a unique body established to codify and progressively develop international law, was of particular importance. However, the Commission was not an operational entity tasked with addressing specific ongoing crises or conducting reviews of political and other positions related to them, as was clear from its mandate and long-standing practice.

The commentary to draft conclusion 19 had been significantly revised since the first reading. References to certain decisions of international organizations and individual States, as well as to statements by their representatives, the topic of which was not peremptory norms of international law, had been selectively added and their interpretation raised questions. Unfortunately, the commentary now went beyond legal analysis and appeared to be a politically oriented text. He therefore could not agree with the current text of the commentary to draft conclusion 19 and proposed that the Commission should revert to the version of the commentary adopted on first reading. His possible non-participation in the discussion of specific provisions should not be seen as a sign that he agreed with the text.

Mr. Huang said that the original commentary to draft conclusion 19 adopted on first reading had been generally acceptable. However, the Special Rapporteur had added many controversial new elements concerning the Russia-Ukraine conflict, strongly condemning one party to the conflict. The Ukraine crisis currently unfolding was probably the worst humanitarian tragedy since the Second World War and could have been avoided. He was aware that it was "politically correct" to discuss the crisis and was not opposed to members' expressing their personal views on the conflict. His own view was that dialogue and negotiation were the only way out of the crisis. However, he did not believe that the Commission, as a body of international legal scholars, should be taking a side. He therefore fully agreed with the views expressed by Mr. Zagaynov and called on the Special Rapporteur to revert to the first-reading version of the commentary.

The Commission should not add any fuel to the fire but instead should respect the sovereignty and territorial integrity of States and abide by the purposes and principles of the Charter of the United Nations. It should promote the concept of common, comprehensive, cooperative and sustainable security and call for respect for the reasonable security concerns

of all States. It should also support all diplomatic efforts for the peaceful resolution of the crisis and the constructive role played by the Security Council in that regard.

There were complex historical, political, economic, cultural and legal issues at play in the Ukraine crisis, with the fundamental cause rooted in the geopolitical games that had followed the end of the cold war. The States Members of the United Nations continued to take very different positions on the nature of the crisis. Indeed, a not inconsiderable number of States had abstained from voting on, or voted against, the relevant General Assembly resolutions. The Security Council, which had the legitimate mandate to decide whether aggression had occurred, had not issued such a verdict. The International Criminal Court and the International Court of Justice, before which proceedings were under way, had yet to make a final assessment of the nature of the Russia-Ukraine conflict under international law. It was not the Commission's role to do so.

The Commission should not support the arbitrary and ever-increasing imposition of unilateral sanctions, which did nothing to help resolve the conflict and only affected ordinary people on the ground and threatened energy and food security and the world economy. The majority of Asian, African and Latin American States had not joined in implementing the unilateral sanctions initiated by the United States of America and the West.

He did not understand the reasoning behind the Special Rapporteur's decision to include references to the Ukraine crisis in the second-reading text of the commentary. If the intention was to label the Russia-Ukraine conflict as a serious violation of peremptory norms of general international law and to call on the States Members of the United Nations to cooperate to bring the violations to an end by providing more weapons to Ukraine, for example, that would be a step too far. He therefore supported the deletion of all the references to the Russia-Ukraine conflict from the commentary.

Mr. Argüello Gómez said that the Commission's function was legal and not political and that it should be very careful to act accordingly. It was not standard practice for the Commission to quote from resolutions of the political organs of the United Nations to support its legal arguments. Furthermore, as proceedings relating to the crisis were under way before the International Court of Justice, the Commission should refrain from giving an opinion based on the decisions of the political organs of the United Nations. All references to such decisions in the commentaries should therefore be carefully reviewed and probably deleted.

Mr. Grossman Guiloff said it was clear that the Commission's role was not a political one and that it should be very careful not to advocate any particular position. However, there were many previous examples of commentaries in which the Commission had quoted from United Nations resolutions. The Commission could not simply state that such resolutions were beyond its purview. The commentary should certainly be formulated with care, but he did not think the references to General Assembly resolutions should be omitted. Perhaps it would be helpful to include in the text the voting results for the relevant resolutions. Omitting the references in question would in itself be a major political statement on the part of the Commission.

Ms. Oral said that it would be unacceptable for the Commission to delete any reference to what was a factual event that had been recognized in a General Assembly resolution supported by 141 States. An emergency special session of the General Assembly had been called because the Security Council had essentially been unable to exercise its functions properly. As a legal body established by the General Assembly, the Commission could not simply ignore its resolutions on the Russian invasion of Ukraine, which was a factual reality. For the Commission, as the principal body of international legal experts, to ignore the situation would in itself be an unfortunate political statement. The Commission could refer to the situation objectively and factually, without politicizing the issue, which she believed the Special Rapporteur had succeeded in doing in the commentary. She would strongly oppose any deletion of the references in question.

Mr. Murphy said that draft conclusion 19 (1) provided that "States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*)". The commentary should help to explain that statement. The text adopted on first reading had already been carefully negotiated and reflected a number of compromises. In his view, the problem with the

resolutions referred to in paragraphs (3) and (4) of the commentary was that they said nothing about *jus cogens*, much less the obligation of States to cooperate to bring to an end a violation of a *jus cogens* norm. He therefore did not see how those references supported the proposition in the draft conclusion. By contrast, paragraph (2) of the first-reading text included references to various decisions that specifically addressed cooperation to bring to an end violations of *jus cogens* norms. It would be deeply problematic if the claim being made was that, because of contemporary events, Governments were obligated under international law to take certain steps, including the provision of military assistance. He therefore believed that reverting to the first-reading text, with possible modifications, would be the safest way forward. He would make proposals to that effect in due course.

Ms. Lehto said that, in her view, the Special Rapporteur had produced a very good commentary that reflected the debate in the Commission and the draft conclusion that had been adopted. Before any discussion of certain parts of the commentary informally in smaller groups, all paragraphs should first be discussed by the plenary Commission. She did not believe that the issues referred to were political questions: the prohibition of aggression was one of the most incontestable examples of a peremptory norm. As for the ongoing proceedings before the International Court of Justice in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, the Court had already stated its view very clearly in its order on provisional measures.

The meeting rose at 1 p.m.