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For participants only

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International Law Commission

Seventy-third session (second part)

Provisional summary record of the 3599th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 26 July 2022, at 3 p.m.

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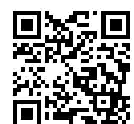

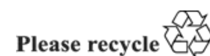

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Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

The meeting was called to order at 3.05 p.m.

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 the portion of chapter IV of the draft report contained in document A/CN.4/L.960/Add.1, beginning with the paragraphs of the commentaries to draft conclusion 2 and draft conclusion 17 that had been left in abeyance.

*Commentary to draft conclusion 2 (Nature of peremptory norms of general international law (*jus cogens*))* (*continued*)

Paragraph (4) (*continued*)

The Chair said that it was not necessary to supplement paragraph (4) with a reference to the recent judgment of the International Court of Justice on the preliminary objections raised by Myanmar in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, as had been proposed, since references to that judgment would be inserted elsewhere in the commentaries.

Paragraph (4) was adopted.

*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*))* (*continued*)

Paragraph (5) (*continued*)

Mr. Tladi (Special Rapporteur) said that, at the previous meeting, the Commission had agreed in principle that the words "The formulation of legal interest in the protection of the right connected to the obligation" at the beginning of the third sentence should be replaced with "That formulation"; that a reference to paragraph 107 of the recent judgment of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* should be inserted at the beginning of the footnote associated with the fourth sentence and that the words "See also" should be inserted before the second reference in that footnote; and that the words "legal interest in their prevention" in the sixth sentence should be replaced with "legal interest of States in the prevention".

In the light of the informal consultations that had since taken place, he was proposing that, as suggested by Mr. Forteau, the words "including obligations *erga omnes partes*" should be inserted, enclosed in parentheses, at the end of the first sentence.

Mr. Forteau said it was odd that *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* was the first case cited in the footnote associated with the fourth sentence, since *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* was the only case mentioned in the sentence itself. He therefore proposed that, in that sentence, the words "which has been subsequently reiterated" should be inserted after "the *Barcelona Traction* case".

Mr. Murphy said that it would be more logical if the two cases cited in the footnote appeared in the same order in which they were mentioned in the paragraph.

Paragraph (5), as amended, was adopted with a minor editorial change to the English text.

Paragraph (7) (*continued*)

Mr. Tladi (Special Rapporteur) said he was proposing that, as suggested by Mr. Murphy at the previous meeting, the words "has found support in" in the first sentence should

be replaced with "is consistent with"; that, in the second sentence, the words "party to the Convention on the Prevention and Punishment of the Crime of Genocide" should be inserted after "that a State"; and that, in the same sentence, the word "*partes*" should be inserted after "*erga omnes*".

In the light of the discussion at the previous meeting, he was also proposing that a new sentence should be added, after the third, to read: "The Court subsequently confirmed that the Gambia had standing to invoke the responsibility of Myanmar for violations of obligations under the Convention." A footnote would be added to direct readers to paragraph 114 of the Court's judgment on preliminary objections. He was further proposing that a reference to the same judgment should be added to the footnote currently associated with the first sentence.

Mr. Murphy said that, at the previous meeting, he had also suggested that the words "the principle" in the current fourth sentence should be replaced with "the conclusion", since the third sentence included the words "the Court concluded". In view of the Special Rapporteur's proposal that a new sentence should be added after the third, he wondered whether "this approach" might not be a more suitable replacement. The word "principle" might create confusion with the notion of legal principles. In the footnote associated with the third sentence, it was unclear to what "*ibid.*" referred.

The Chair said that, in the footnote in question, "*ibid.*" was presumably a reference to the order of the International Court of Justice on the request for the indication of provisional measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. A more complete reference should be provided to avoid confusion with the Court's recent judgment in the same case.

Mr. Jalloh said that he supported the Special Rapporteur's proposals. To ensure that the Special Rapporteur's newly proposed sentence mirrored the language of the Court's recent judgment more closely, the words "violations of obligations" should be replaced with "the alleged breaches of its obligations". He saw no reason to replace the word "principle".

Mr. Tladi (Special Rapporteur) said that, in his view, "principle" was the most appropriate word in that context.

Paragraph (7), as amended, was adopted with a minor editorial change.

Paragraph (8) (*continued*)

Mr. Tladi (Special Rapporteur) said that, at the previous meeting, it had been agreed in principle that the words "third States are entitled" in the third sentence should be replaced with "any State other than an injured State is entitled". In addition, he was proposing that, in the light of a suggestion made by Mr. Forteau, the current fifth sentence should be deleted and its content incorporated into a new fourth sentence, to read: "Such a State may claim 'cessation of the internationally wrongful act, and assurances and guarantees of non-repetition'." The footnote associated with the current fifth sentence would be retained and the corresponding footnote marker placed at the end of the new fourth sentence. He was also proposing that, to distinguish the invocation of responsibility by an injured State from the invocation of responsibility by a State other than an injured State, the words "In contrast" should be inserted at the beginning of the last sentence. He was further proposing that, in order to mirror the language of the Commission's articles on responsibility of States for internationally wrongful acts more closely, the words "claim reparations 'in the interest of the injured State or of the beneficiaries of the obligation breached'" in the same sentence should be replaced with "claim 'performance of the obligation of reparation … in the interest of the injured State or of the beneficiaries of the obligation breached", including the ellipsis.

Mr. Forteau, referring to the new fourth sentence proposed by the Special Rapporteur, said that, as both an injured State and a State other than an injured State could claim cessation of an internationally wrongful act, the words "Such a State" should be replaced with "These States".

The Chair, speaking as a member of the Commission, said that, as far as he understood, the paragraph under consideration concerned the invocation of responsibility by a State other than an injured State. For greater clarity, it might be preferable to replace the

words “Such a State” at the beginning of the new fourth sentence with “A State other than an injured State”.

Mr. Murphy said that he supported the Chair’s suggestion. The footnote associated with the sentence included a reference to article 48 of the Commission’s articles on State responsibility, which specifically concerned invocation of responsibility by a State other than an injured State.

Paragraph (8), as amended, was adopted with minor editorial changes.

Paragraphs (9) and (10) (*continued*)

Mr. Tladi (Special Rapporteur) said that, in the light of the debate at the previous meeting, he had concluded that it would not be possible to reconcile the opposing views of members within the time available. He was therefore proposing that paragraph (9) should be replaced with a “without prejudice” clause, to read:

> While draft conclusion 17 provides for the entitlement of States to invoke the responsibility of other States, it is without prejudice to the rules of international law concerning the invocation of the responsibility of other actors. Draft conclusion 17 is also without prejudice to the entitlement of international organizations to invoke the responsibility of States or other international organizations.

There were no footnotes associated with the new text. If the Commission agreed to replace paragraph (9) with a “without prejudice” clause, paragraph (10) should be deleted.

At the previous meeting, Mr. Petrič had expressed concern regarding the possible implications of the words “another actor” in the original text of paragraph (9). While the phrase “other actors” was used in the first sentence of his proposed new text, the context was a discussion of the invocation of responsibility by States.

Mr. Jalloh said that, while it was regrettable that the issues discussed at the previous meeting would not be reflected in the commentary, he was prepared to accept the Special Rapporteur’s proposal as a way of allowing the Commission to move forward.

Mr. Petrič said that he supported the Special Rapporteur’s proposal.

Mr. Grossman Guiloff said that the Special Rapporteur’s proposal put the Commission in a position to adopt the paragraph by consensus.

Mr. Murphy, supported by **Mr. Jalloh**, said that it would be useful to retain the first of the footnotes associated with paragraph (10), in which reference was made to the Commission’s previous work. The corresponding footnote marker should be placed at the end of the new text of paragraph (9).

Paragraph (9), as amended, was adopted.

The Chair said he took it that the Commission wished to delete paragraph (10).

It was so decided.

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

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy said that, at the end of the last sentence, the words “can now be said to be recognized under international law” should be replaced with “is now recognized under international law”, the formulation used in the first-reading text (A/74/10).

In the first-reading text, that sentence had been immediately followed by a discussion of the judgment of the United Kingdom House of Lords in *A, Amnesty International*

(intervening) and Commonwealth Lawyers Association (intervening) v. Secretary of State for the Home Department, the advisory opinions of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, and the judgment of the Inter-American Court of Human Rights in the *Case of La Cantuta v. Peru*. The discussion of those judgments and advisory opinions had since been moved to paragraphs (5), (6) and (7) of the commentary to draft conclusion 19, but should be returned to paragraph (2).

His goal in making that proposal was to preserve the core explanation regarding the obligation to cooperate laid out in the first-reading text. In that text, paragraph (2) set out an explanation of the obligation and then used very specific jurisprudence to tease out the explanation further. That was how the Commission had been able to find common ground on first reading. The question of what would happen to paragraphs (3) and (4) subsequent to his proposed restructuring should be addressed separately.

Mr. Jalloh said that he supported the proposal to replace the more tentative formulation "can now be said to be recognized under international law" with the stronger wording used in the first-reading text. However, he did not support the proposal to restore paragraph (2) of the first-reading text, because of the collateral consequences that such restructuring could have on the other paragraphs of the commentary. He would like to know the reasons behind the changes that the Special Rapporteur had made to the first-reading text.

Mr. Hmoud said that he would oppose any change to the commentary to draft conclusion 19 that would result in the removal of the references to Israeli settlements that appeared in paragraph (4) and the corresponding footnotes.

Ms. Oral said that she fully agreed with the comments made by Mr. Jalloh. She could not accept a return to the version of paragraph (2) contained in the first-reading text if it involved the deletion of subsequent paragraphs in the commentary or the references contained in those paragraphs. Clearly, circumstances had changed since the first-reading text had been drafted.

Mr. Tladi (Special Rapporteur) said that he supported Mr. Murphy's proposal to replace "can now be said to be recognized" with "is now recognized". He had separated the text that had appeared as paragraph (2) in the first-reading text into multiple paragraphs because of its length: combining what were now paragraphs (2), (5), (6) and (7), as proposed by Mr. Murphy, would result in a paragraph approximately one page in length. Moreover, that proposal might have consequences for paragraphs (3) and (4). He suggested that the Commission should proceed to adopt the commentary paragraph by paragraph and then revisit the order of the paragraphs.

Mr. Murphy said that he could not agree to adopting paragraph (2) on that basis. When the Commission had adopted the text of the paragraph on first reading, it had considered that it was very important to immediately follow the assertion that the obligation to cooperate was now recognized under international law with an indication that the United Kingdom House of Lords had referred explicitly to that obligation in the case he had cited. What the Commission had done in the first-reading text was to indicate why, in its view, that obligation existed, by providing very specific references to very specific types of authorities. The structure of the argument would be destroyed if the paragraph did not continue with the references given in the first-reading text. He could not accept that paragraph (2) would end without the references to those authorities as the basis for the proposition.

The claim that the Commission was making in draft conclusion 19 was a very significant one. Given that there were States who had said that the draft conclusion should contain the word "should" rather than "shall", the Commission should provide evidence of cases where States had considered themselves obligated to cooperate on the basis of *jus cogens* norms.

If the paragraph was restored to the version that appeared in the first-reading text, it would not be exceptionally long; there were other paragraphs of equal length in the commentaries. Nor would his proposal have any collateral consequences for paragraphs (3) and (4).

Mr. Huang said that he too found the formulation "can now be said to be recognized under international law" problematic. In light of the comments made by Mr. Murphy, the Commission should set aside paragraph (2) and hold informal consultations on it.

Mr. Jalloh said it was important to note that States had been divided in their reactions to the first-reading text. Some States, such as Japan, had asked the Commission to clarify the legal consequences of the serious breaches referred to in draft conclusion 19 and to identify examples of recent developments and relevant practice. However, for every comment in favour of the text, there was a comment against it. The Special Rapporteur appeared to be trying to find a middle ground that would be acceptable to the Commission as a whole.

Mr. Park said that, like Mr. Murphy, he thought that, logically, paragraphs (5), (6) and (7) should follow paragraph (2).

Mr. Tladi (Special Rapporteur) said that it would perhaps be preferable to put the paragraphs in that order, but he would be reluctant to combine them into a single paragraph because of how long it would be. He did not believe there were any paragraphs of such length in the commentaries.

The Chair said he took it that the Commission wished to postpone further discussion of paragraph (2) until it was in a position to discuss the order of the paragraphs of the commentary to draft conclusion 19.

It was so decided.

Paragraph (3)

Mr. Huang said that paragraph (3) should be deleted, as it had introduced controversial issues that had led to the politicization of the discussion. The Commission should retain the text of the commentary as adopted on first reading.

Ms. Lehto said that paragraph (3) contained information that was very pertinent to paragraph 1 of draft conclusion 19. Both the condemnation and the demands for cessation of the relevant breaches contained in the General Assembly resolutions mentioned in paragraph (3) were relevant to paragraph 1. The reference at the end of paragraph (3) to particular action taken was also very pertinent. Moreover, many States would expect the Commission to shed light on the term "lawful means" used in paragraph 1 of the draft conclusion. Although there might be a need to reformulate some parts of paragraph (3), the current draft provided a good basis for discussing any necessary changes.

Mr. Jalloh said that the extensive footnote to the first sentence of the paragraph, as contained in an informal paper circulated to members of the Commission, included a series of relevant references – taken from all around the world and not limited to certain specific situations – which showed that the General Assembly had a long history of taking decisions that spoke to the essence of conclusion 19. It was clear that some of the examples contained in the Commission's non-exhaustive list of peremptory norms of general international law (*jus cogens*) were contemplated in the General Assembly resolutions included in the footnote. In his view, as a legal matter, the resolutions supported the propositions contained in paragraph (3). He would not support the deletion of the references to them. The proposed text was balanced, and he supported it.

In view of the argument that the resolutions did not specifically speak to the duty to cooperate or were not linked to peremptory norms, and given the difficulty of finding specific examples that did so, the Commission might like to consider including a reference to a 27 February 2022 press release issued by the German Federal Foreign Office regarding a meeting of the foreign ministers of the Group of Seven at which the ministers had agreed that there had been a breach of peremptory norms of international law.

Mr. Grossman Guiloff said that one example of State cooperation to bring to an end the consequences of serious breaches of peremptory norms of general international law which could possibly be mentioned in paragraph (3) was resolution CP/RES. 1195 (2374/22) of the Permanent Council of the Organization of American States, "Suspension of the status of the Russian Federation as a permanent observer of the Organization of American States". Another area where a duty of such State cooperation existed was the provision of asylum or

a safe haven to persons fleeing war. He also drew attention to the statement made on 5 July 2022 by the United Nations High Commissioner for Human Rights in which she had urged the international community to help support the actors working with survivors of sexual violence, ill-treatment and torture in the midst of the conflict in Ukraine.

Mr. Forteau said that paragraph (3) should be limited to the facts. To that end, he suggested that the first sentence should read: "There are numerous examples of the General Assembly taking action which illustrate a duty to cooperate to bring to an end what it characterized as grave breaches of international law." In the third sentence, he suggested the deletion of the words "of peremptory norms" after "other breaches". And in the final sentence of that paragraph, he suggested inserting the phrase "for what they characterized as" between the words "accountability mechanism" and "serious breaches". By reformulating the paragraph in that way, the Commission would simply be describing what States did, without inferring that it was practice directly related to peremptory norms.

Mr. Murphy said he agreed that the Commission should be responsive to the comments of States. However, Mr. Jalloh seemed to think that Japan had called for the type of information contained in paragraphs (3) and (4), whereas in fact Japan had said: "It is doubtful whether some cases cited in the commentary support draft conclusion 19. For example, in the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice stated that all Member States are under an obligation to cooperate with the United Nations in order to complete decolonization, without referring to *jus cogens.*" Japan had also pointed out that the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* did not contain an explicit reference to *jus cogens.* It had then continued: "If the Commission considers that these obligations to cooperate and of non-recognition derive from *jus cogens* in general, and not from particular norms of international law, Japan invites the Commission to provide further evidence for such an understanding." He failed to see how those words could be interpreted to mean that Japan thought that the Commission had done a great job with its first-reading text and wanted more of the same. It was not a solution to double down and to cite a number of other examples where neither *jus cogens* nor a duty to cooperate were mentioned. Of course, the General Assembly had taken action on many occasions and had condemned certain acts, but not all of them appeared to be breaches of *jus cogens.* For example, the General Assembly had condemned human cloning, which did not necessarily violate *jus cogens.*

The problem with paragraphs (3) and (4) was that they did not support the thesis that there was a duty to cooperate to bring to an end circumstances created by serious breaches of peremptory norms of general international law (*jus cogens*), because the examples given said nothing about *jus cogens.* That was probably why some States were raising objections to the text. His other concern, particularly with regard to paragraphs (3) and (4), was that it was fine to refer to examples of practice when they were apt, but it was not a good idea to provide extensive commentary on contemporary events, because the commentary should be a careful analysis of the law which would still be relevant in the future. If the Commission were to reassemble the first-reading commentary in paragraph (2) to absorb the contents of paragraphs (2), (5), (6) and (7), it would need to reconsider the first sentence of paragraph (8), which appeared to be an effort to respond to the concerns expressed by countries such as Japan. In that sentence, the Commission acknowledged that, although the advisory opinions cited there did not expressly refer to *jus cogens,* they were of relevance to the topic at hand. Perhaps a second sentence, along the lines of Mr. Forteau's proposal, could be added to that paragraph, together with a footnote similar to the proposed footnote circulated informally by the Special Rapporteur. His own suggestion was to include wording such as: "The General Assembly has at times condemned actions and called for cooperation in situations that appeared to transgress peremptory norms of international law."

Ms. Oral said that paragraph (3) was fairly neutral and factual; it was not a political statement. In the commentary to the articles on responsibility of States for internationally wrongful acts, the Commission had taken a much broader approach to the duty to cooperate in order to bring to an end serious breaches of an obligation arising under a peremptory norm of general international law and had been of the view that, because of the diversity of circumstances, such cooperation could take many forms and could be organized in the

framework of a competent international organization, including the United Nations. One form of cooperation could certainly be the adoption of resolutions that recognized the illegality of certain acts. However, it was unrealistic to demand that such resolutions must explicitly refer to the term *jus cogens* for them to be cited in the commentary; in the annex to the draft conclusions, the Commission had specifically recognized the prohibition of a number of acts as *jus cogens*. The General Assembly resolution in question demanded the cessation of various unlawful acts, thereby taking action which gave effect to the duty to cooperate. It would be counter to the whole spirit of the draft conclusions to adopt an overly restrictive approach. Perhaps paragraph (3) could be streamlined by placing some of its content in a footnote. Dwelling on the reference to Ukraine and the Russian Federation rather than on the breaches of international law addressed in the examples was to politicize the subject.

Mr. Saboia said that he disagreed with Ms. Oral: reference to the issues dealt with in paragraph (3) was not tantamount to the adoption of a political position. The International Law Commission was a legal body with a mandate to promote the progressive development and codification of international law, but it was also a subsidiary body of the General Assembly. Since paragraph (3) provided an example related to the topic under consideration, it should not be omitted from the Commission's analysis of it. However, as it was a sensitive issue, the Commission should be cautious; Mr. Forteau's proposal was therefore a step in the right direction. It might be a good idea to provide more examples, in chronological order, of cases where States had cooperated, through lawful measures, to bring to an end circumstances created by a serious breach of a peremptory norm of general international law. Some attention would then have to be given to defining what "lawful measures" meant. He personally understood the term to mean actions that were legal under the Charter of the United Nations. It was doubtful whether actions considered lawful by individual States, or groups of States, should be included in that category, as they did not enjoy multilateral acceptance.

Mr. Argüello Gómez said that, as far as commenting on contemporary events was concerned, back in 1984 it would have been interesting for him as the Agent of the Republic of Nicaragua in the case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* to have known the Commission's view of the invasion of Grenada in 1983. The order on the request for the indication of provisional measures issued by 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)* rested on *prima facie* jurisdiction which could be contested, not on a judgment of the merits of the case. The Court had refrained from mentioning the General Assembly resolution, yet the Commission had been so bold as to refer to it, despite the need for caution when referring to contemporary, as opposed to historical, events.

Mr. Grossman Guiloff said that the resolutions cited concerned breaches of the norms listed in the annex to the draft conclusions. Genocide was a violation of *jus cogens* even if it was not specifically referred to as such. However, the Commission did not have sufficient distance to engage in a political analysis of contemporary events. He agreed with Mr. Saboia's suggestion and saw merit in Mr. Forteau's proposal.

Mr. Huang said that he would like to appeal to colleagues to base their statements on facts. Mr. Jalloh had tried to find States' comments that supported his position and blithely ignored the opposition of many States to draft conclusion 19: the United States of America, for example, had been "strongly of the view that draft conclusion 19 must be deleted in its entirety". Paragraph (3) was a purely political statement, not legal analysis. The Commission must be clear about what constituted the key elements of *jus cogens*, serious breaches and "particular consequences". The bodies with authority to determine whether a serious breach of a *jus cogens* norm had occurred were, first, the Security Council, which, to date, had not made any such determination in the case in point; second, the International Court of Justice, which had not yet rendered a decision in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*; and, third, the International Criminal Court, which had opened, but not yet concluded, an investigation into the situation in Ukraine. The Court's conclusions and order regarding the provisional measures to be adopted, which it had issued on 16 March 2022, did not contain the words "aggression", "*jus cogens*" or "invasion", and referred only to "military

operations". There had therefore been no legal determination of any serious breach of *jus cogens.* In the absence of any such determination, how could the Commission include such a controversial reference to the situation in Ukraine in its commentary? The General Assembly resolutions cited had not been adopted unanimously and were not legally binding. The example chosen in paragraph (3) concerned a very recent and ongoing event and nobody knew what its exact nature was.

Mr. Petrič said that, even at the height of the cold war, the Commission had succeeded in maintaining its integrity, pursuing its work and producing sets of draft articles on numerous important topics. It should continue to cleave to its objectives, examining issues with the required distance and impartiality and keeping in mind that the development of international law and the rule of law within the international community contributed to ensuring international peace and security. In his view, the key elements of draft conclusion 19 were paragraphs 1 and 2. The appeal to States to cooperate to bring to an end any serious breach of *jus cogens* and not to recognize situations created by such breaches as lawful should be clearly reflected in the commentaries, with the focus more on acts than on naming individual States. The list of examples proposed by the Special Rapporteur in the extensive footnote contained in the informal document circulated to members of the Commission represented a very balanced selection; whether its inclusion was ultimately necessary, however, was a matter for discussion. The same applied to the specific reference to events in Ukraine. That said, it should be clearly stated that States must cooperate to eliminate serious breaches of peremptory norms of international law, and the Commission had included the prohibition of aggression in its non-exhaustive list of those norms. Most States that had accepted the amendments regarding the crime of aggression to the Rome Statute of the International Criminal Court had criminalized the propagation of aggression. Draft conclusion 2 described *jus cogens* as reflecting and protecting fundamental values of the international community; the obligation to uphold those values and to cooperate in doing so was tantamount to a *jus cogens* norm in itself.

Ms. Galvão Teles, responding to the Special Rapporteur's request for suggestions on how to move forward, said that she would be amenable to amending paragraph (3) of the commentary to draft conclusion 19 as proposed by the Special Rapporteur in the informal document circulated to members; however, given the concerns expressed by others, it might be wise to structure the examples given around the non-exhaustive list of *jus cogens* norms annexed to the draft conclusions. A broad, representative selection of examples, presented in chronological order, would be objective, embodying the legalistic approach that should characterize the Commission's work. Careful consideration should be given to the division of material between the body of the text and the footnotes.

Mr. Ruda Santolaria said that he did not consider a lack of explicit mention of *jus cogens* in legal documents referring to a particular situation to be justification for not taking that situation as an example of a breach of a peremptory norm. That point was made in paragraph (8) of the commentary to draft conclusion 19, which the Commission had already adopted on first reading. He agreed with Mr. Forteau that the Commission should restrict itself to factual statements, with the body of the commentary focusing on types of conduct and specific examples being given in footnotes, supported by quotations from resolutions of the General Assembly, the Security Council and other United Nations bodies. In the interests of balance, regional decisions and decisions taken by groups of States should be avoided. He would also prefer to avoid references to the provision of military assistance. While the Commission could not predict how the future would unfold, it would be odd for significant current events not to be mentioned in the outcome of its work. Developments occurring between the first and second readings of the text should be taken into account.

Ms. Escobar Hernández, observing that the debate had ranged well beyond specific paragraphs to consider the very nature of the Commission, its work and its relationship to the political realities facing the world, said that, while she did not object to the spirit of paragraphs (3) and (4) and the accompanying footnotes, consideration could be given to presenting the information they contained in a different and potentially less controversial manner. She agreed that a situation could be used as an example of a breach of *jus cogens* even if it was not explicitly described as such in resolutions of United Nations bodies; adopting the contrary view would leave very few examples available to the Commission and

would constitute a very formalistic approach that would not sit easily with its work. In particular, it would contradict the Commission's own views on identifying breaches of *jus cogens* norms. The draft conclusions must be read as a whole and in conjunction with the commentaries thereto. Nor should an example be omitted merely on the grounds that it was recent and that it might prove divisive for the Commission or for States. While referring to the situation in Ukraine might be uncomfortable for some, the Commission would be judged harshly if it failed to mention a topical event of obvious relevance to the project at hand; however, by carefully rewording and restructuring the text, it could avoid giving the impression of placing any undue focus on a specific instance. A historical overview of types of conduct that breached *jus cogens*, presented chronologically and with footnotes citing resolutions of United Nations bodies, including the General Assembly's recent response to the Russian invasion of Ukraine and the subsequent war, would illustrate consistent practice in condemning breaches of peremptory norms and might enable progress to be made without the need to compromise on matters of principle, such as what constituted such a breach.

Mr. Jalloh, noting that the latest contributions to the debate appeared to suggest a possible way forward, emphasized that he had in no way intended to misrepresent the views of States in his earlier comments; if he had done so, in particular with regard to the request for clarity made by Japan, it had been inadvertent. With regard to General Assembly resolutions, referring to how the General Assembly had characterized events might allay the concerns expressed. He had no objections to the text of the proposed footnote circulated informally by the Special Rapporteur, which included examples from a number of regions of the world illustrating the consistent practice of the General Assembly in a wide range of areas.

When the Commission had drafted the 2001 articles on responsibility of States for internationally wrongful acts, it had not shied away from giving topical examples: reference had been made to the war between the Islamic Republic of Iran and Iraq; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*; the Security Council's reaction to the Iraqi invasion of Kuwait; and so on. It was regrettable that there seemed to be no appetite for pursuing a similar approach to the present topic. The commentaries to the 2001 articles also gave a broad historical overview, from the Manchurian crisis of 1931–1932 onwards. He suggested that the Commission should do likewise in the commentary to draft conclusion 19, taking each example on its merits to produce a balanced whole.

The Special Rapporteur was in a difficult position. The references proposed for inclusion so far should not be set aside wholesale, but some might be omitted in the interests of compromise.

Mr. Zagaynov, recalling that he had stated his principled position on the commentary to draft conclusion 19 at the previous meeting so as to avoid making the same comments repeatedly, said that his position remained unchanged; he continued to disagree with various aspects of the commentary to draft conclusion 19, including the paragraphs under discussion. He was grateful to those members who had made helpful suggestions with a view to resolving the issue. He continued to consider that the Commission should not discuss specific contemporary crises and therefore wished to distance himself from such discussions.

He indicated that not only paragraphs (3) and (4), but also other paragraphs of the commentary, in particular (10), (11) and (15), were equally problematic.

The Chair said that it was his intention to consider each paragraph in turn; however, he would give the Special Rapporteur the opportunity to suggest new text first, taking into account the views expressed so far.

Mr. Nguyen said that a similar debate would doubtless take place within the Sixth Committee. The examples given in the commentary were problematic; in the General Assembly, not all States had voted in favour of the resolutions cited. Moreover, as Mr. Murphy had pointed out, direct references to *jus cogens* were lacking. The Commission must be neutral. If paragraph (3) were to be retained as drafted, both the Russian and the Ukrainian perspectives should be reflected before citing the relevant resolution. The Commission

should exercise particular caution when referring to contemporary events. In 1979, when Viet Nam had sent troops to save the Cambodian people from genocide, the General Assembly had passed a resolution condemning the intervention and requesting the withdrawal of Vietnamese troops. Forty years later, the Extraordinary Chambers in the Courts of Cambodia and the United Nations had concluded that the Vietnamese action had been the right thing to do. He agreed with Mr. Forteau: the text should emphasize the duty of cooperation. Any controversial examples should be confined to footnotes, as others had suggested.

Mr. Park said that the fact that not all States accepted the existence of an obligation to cooperate to bring to an end serious breaches of peremptory norms was not necessarily an obstacle. In terms of how to move forward, Mr. Forteau's suggestion could prove a constructive starting point. As the Special Rapporteur had requested members' views on paragraphs (3) and (4), which were closely related, he suggested that the examples therein should be presented in chronological order. Numerous references could be given in footnotes, as in the informal document circulated by the Special Rapporteur. Events in Ukraine and Syria were a matter of historical record. If they were mentioned, any descriptive text must be well balanced.

Mr. Tladi (Special Rapporteur) said that he had taken note of the various suggestions made and would draft new text that he hoped would reflect them. He suggested that the Commission should continue to consider the rest of the commentary to draft conclusion 19 in the meantime. While Mr. Murphy's suggestion had some merit, he thought it worthwhile to adopt the paragraphs in question first, before deciding where to place them.

The Chair said he took it that the Commission agreed to the Special Rapporteur's suggestion.

It was so decided.

The meeting rose at 5.55 p.m.