Summary record of the 25th meeting – A/C. 6/73/SR.25

Agenda item 82

A/C.6/73/SR.25
United Nations – General Assembly – Seventy Third Session – Official Record – Original: English – Distribution date 19 November 2018

Sixth Committee

Summary record of the 25th meeting
Held at Headquarters, New York, on Friday, 26 October 2018, at 10 a.m.

Chair: Ms. Ponce (Vice-Chair) (Philippines)
later: Mr. Biang (Gabon)

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In the absence of Mr. Biang (Gabon), Ms. Ponce (Philippines), Vice-Chair, took the Chair.

The meeting was called to order at 10.10 a.m.

Agenda item 82: Report of the International Law Commission on the work of its seventieth session (*continued*) (A/73/10)

1 **The Chair** invited the Committee to continue its consideration of chapters VI, VII and VIII of the report of the International Law Commission on the work of its seventieth session (A/73/10).

2 **Mr. Tichy** (Austria), referring to the topic "Protection of the atmosphere" and the draft guidelines adopted on first reading, said that paragraph 1 of draft guideline 12 stated the obvious, namely that disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation were to be settled by peaceful means. The reference in paragraph 2 of the draft guideline, to the fact-intensive character of disputes was misleading, since all major disputes were likely to involve a huge quantity of facts that judges, and not technical and scientific experts, would have to consider. What made technical and scientific expertise necessary was not the quantity of facts in a dispute, but rather their special and complex nature.

3 The draft guidelines on the topic "Provisional application of treaties" adopted on first reading, would provide a valuable tool for States and international organizations in their treaty-making practice. However, their current formulation very closely resembled that of the text provisionally adopted at the sixty-ninth session of the Commission; suggestions made by members of the Sixth Committee had been taken up only cautiously, if at all.

4 Draft guideline 9 (Termination and suspension of provisional application) restated the provision of article 25 of both the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations that provisional application could be terminated as a result of a treaty's entry into force or of notification by a State or an international organization that it no longer intended to become a party to the treaty. Although that approach was commendable, it would also have been useful for the draft guideline to include a provision regarding additional forms of termination and/or suspension. The Commission appeared to have considered addressing such cases, including unilateral termination of provisional application. Such situations could well arise: for instance, States and international organizations might have to terminate or suspend the provisional application of treaties as a result of internal democratic decision-making procedures or for other legal or political reasons, while leaving open the possibility of becoming a party in the future. It would have been useful to include some additional provisions to that effect in the draft guidelines.

5 His delegation noted with regret that there had not been sufficient time to discuss and formulate in detail the draft model clauses proposed by the Special Rapporteur. It hoped that the Commission would discuss them in detail in future.

6 Turning to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/714 and A/CN.4/714/Corr.1), he noted that draft conclusion 11 (Severability of treaty provisions in conflict with a peremptory norm of general international law (*jus cogens*)) stipulated that a treaty which, at its conclusion, was in conflict with *jus cogens* was invalid in whole. That provision was based on article 44, paragraph 5, of the 1969 Vienna Convention. Although such adherence to the non-separability regime for treaties that were contrary to *jus cogens* had a deterrent effect, his delegation wondered whether it was the optimal approach. It might be more useful to take a nuanced approach to sanction only provisions that violated *jus cogens*, but not invalidate the entire treaty. Such a solution would be consistent with the *favor contractus* principle.

7 The specific reference to Security Council resolutions contained in draft conclusion 17 (Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations) had elicited debate and criticism within the Commission. His delegation believed that the phrase "binding resolutions of international organizations" referred to international organizations in general, and was thus sufficiently broad to

apply to all international organizations and their organs, including the Security Council, without referring explicitly to any of them. As a strong supporter of the rule of law, including in the context of the United Nations, his delegation agreed with the underlying idea of the draft conclusion, because Security Council resolutions might in some cases lead to a conflict with *jus cogens*. In that context, he wished to draw attention to the conclusion in the final report of the Austrian Initiative 2004–2008 on the United Nations Security Council and the rule of law contained in document A/63/69-S/2008/270 that the Security Council did not operate free of legal constraint and that its powers were exercised subject to the Charter of the United Nations and norms of *jus cogens*.

8 Draft conclusion 22, paragraph 1, rightly provided that States had a duty to exercise jurisdiction over offences prohibited by *jus cogens* where the offences were committed by their nationals or on their territory. Paragraph 2, however, might be misleading: it indicated that paragraph 1 did not preclude the establishment of jurisdiction on any other ground as permitted under the State's national law. It thus appeared to permit the exercise of universal jurisdiction to prosecute crimes prohibited by *jus cogens* solely on the basis of national law. However, any exercise of universal jurisdiction must take place within the framework of international law. It was essential for the draft conclusions to reflect that point. His delegation trusted that the Commission would address the issue more thoroughly when it examined the topic "Universal criminal jurisdiction".

9 Draft conclusion 23, paragraph 2, provided that immunity *ratione materiae* would not apply to any offence prohibited by *jus cogens*. His delegation would consider any such provision problematic, particularly because the issue was currently being examined by the Commission under the topic "Immunity of State officials from foreign criminal jurisdiction". In order to avoid inconsistency or duplication, discussion of the issue should be confined to the latter topic, so long as it was under consideration. Lastly, he hoped that the Special Rapporteur would endeavour to establish an illustrative list of *jus cogens* norms.

10 **Mr. Xu** Hong (China) said that an observer at the previous meeting of the Committee had made several references to the so-called award granted in the *South China Sea Arbitration* case. China strongly objected to such references. The so-called award had been issued *ultra vires* and was based on obvious errors of fact and law. It had no legal status whatsoever and constituted a reckless disruption of the rule of law at the international level. It was clearly highly inappropriate to cite such an unjust, unlawful and invalid award in the Committee.

11 The topic "Protection of the atmosphere" involved highly complex and sensitive political, legal and scientific issues. In examining the topic, the Commission must comply with the 2013 understanding, base itself on general international practice and existing law, and fully respect the efforts of the international community under existing mechanisms and outcomes of relevant political and legal negotiations.

doi: 10.5553/AJ/2352068X2018004001016

12 The draft guidelines on the topic adopted on first reading rightly reaffirmed such basic principles as international cooperation and the peaceful settlement of disputes. However, some of their specific provisions were open to question. With regard to draft guideline 3 (Obligation to protect the atmosphere), explicit legal obligations on States to protect the atmosphere had yet to materialize, and the relevant practice and rules were still being developed. The aim of draft guideline 4 (Environmental impact assessment) was to have the rule cited in certain treaties and cases regarding environmental impact assessments being required for activities that could have a significant transboundary impact applied directly to protection of the atmosphere. However, the rule had a specific context and scope of application; it had not become a universally agreed principle of international law for the protection of the atmosphere. Draft guideline 9, paragraph 3, brought the concept of countries in special situations, as defined in the context of climate change, into the discourse regarding the protection of the atmosphere. His delegation could not see sufficient justification for doing so.

13 Referring to the topic "Provisional application of treaties", he said that the scope of legally binding obligations conferred on the parties by the provisional application of a treaty should be defined cautiously, with due respect for the genuine intentions of the parties. The agreed conditions and procedures for provisional application should be interpreted rigorously, in order to avoid unduly expanding the scope of obligations placed on the parties. That issue should be clarified in the commentaries to the draft guidelines on the topic adopted on first reading. It was questionable whether draft guideline 7 (Reservations) and draft guideline 9 (Termination and suspension of provisional application) had practical value; it seemed no State would ever need those provisions.

14 The Commission should be extremely cautious in its consideration of the topic "Peremptory norms of general international law (*jus cogens*)". *Jus cogens* was uniquely important and distinct from the norms of general international law. The determination of the elements, criteria and consequences of *jus cogens* must be based on the relevant provisions of the Vienna Convention on the Law of Treaties and supported by adequate State practice. The focus should be on codifying existing law (*lex lata*) rather than developing new laws (*lex ferenda*).

15 Referring to the draft conclusions on the topic proposed by the Special Rapporteur, he said that his delegation did not agree with draft conclusion 17, which stated that binding resolutions of the Security Council did not establish binding obligations if they conflicted with *jus cogens*. The Security Council was at the centre of the collective security system established after World War II. Its resolutions were adopted in accordance with the provisions of Charter of the United Nations following strict procedural requirements, and must be consistent with the purposes and principles of the Charter. The content and scope of *jus cogens* were still far from clear. The invocation of that principle to challenge or avoid implementing a Security Council resolution

would undermine the collective security system. His delegation proposed, therefore, that the issue not be included in the draft conclusions.

16 Draft conclusion 23, paragraph 2, stated that immunity *ratione materiae* should not apply to any offence prohibited by a norm of *jus cogens*. In the absence of clarity regarding the content and scope of *jus cogens* norms or the concept of an offence prohibited by *jus cogens*, that provision had proved highly controversial within the Commission. That had led the Special Rapporteur to propose that draft conclusions 22 and 23 be replaced with a single clause to read: "[t]he present draft conclusions are without prejudice to the consequences of specific/individual/particular peremptory norms of general international law (*jus cogens*)". His delegation supported the deletion of draft conclusion 23 and looked forward to further clarification regarding the specific meaning of the new clause. In its judgments, the International Court of Justice had repeatedly emphasized that immunities were a procedural matter. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the Court had pointed out that *jus cogens* and jurisdiction were two separate issues. *Jus cogens* as a substantive rule therefore should not prejudice the rule regarding immunity of officials.

17 His delegation was concerned about the current procedure being followed by the Commission, whereby the draft conclusions would not be submitted to the plenary for review following their adoption by the Drafting Committee, or even included in the report of the Commission on its work, until the conclusion of the first reading of the entire set of draft conclusions and commentaries thereto before being submitted to the General Assembly. That course of action differed from the procedure the Commission followed for most of the other topics and would make it difficult for Member States to fully express their views on such an important topic. His delegation hoped that the Commission would find an appropriate solution to the problem.

18 With regard to the topic "Protection of the environment in relation to armed conflicts", his delegation's longstanding view was that international and non-international armed conflicts were different in nature, and that rules governing the former could not be applied automatically to the latter, unless warranted by State practice. However, the inclination to make such a leap remained in the draft principles and commentaries provisionally adopted by the Commission. He hoped that the Commission would consider the question in greater detail.

19 Turning to the topic "Succession of States in respect of State responsibility", he said that the second report of the Special Rapporteur and the discussions of the Commission had confirmed that there was a paucity of relevant State practice, and that what little practice existed was in specific, complex and varied political and historical contexts. It would therefore be difficult to codify a general rule in that field. The Commission might wish to consider whether it should continue working on the topic, or instead confine itself to formulating some essential draft guidelines.

20 When the topic "Immunity of State officials from foreign criminal jurisdiction" had been discussed at the previous session of the Committee, many

doi: 10.5553/AJ/2352068X2018004001016

delegates had objected to the provision on the non-applicability of immunity *ratione materiae* contained in draft article 7 provisionally adopted by the Commission at its sixty-ninth session. His delegation encouraged the Commission to take those views seriously and accordingly re-examine draft article 7 and the commentary thereto.

21 At its seventieth session, the Commission had held preliminary discussions on the sixth report of the Special Rapporteur (A/CN.4/722). On the question of when a forum State should begin to consider the immunity of foreign officials, the Special Rapporteur appeared to believe that if the forum State simply initiated an investigation without taking binding measures against a foreign official, imposing obligations on that person or impeding the proper performance of their functions, there would be no immunity implications and the issue of immunity would therefore not come into the equation at that stage. However, the immunity of State officials was not merely a requirement aimed at safeguarding the performance of their functions: it also arose from the basic principle of *par in parem non habet imperium* ("an equal has no power over an equal"). Accordingly, even if legal proceedings against a foreign official had no binding force, imposed no obligations and had no impact on the performance of his or her functions, they still had the potential to violate the immunity of the official and, by extension, to infringe the sovereignty of the State in question. The question of immunity ought therefore to be taken into consideration at that point.

22 With regard to the question of which authority in the forum State had the right to decide whether to grant or reject immunity, his delegation believed that once the judicial process had begun, courts did play an important part in the final decision. However, given the diversity of political and legal systems and, in particular, the fact that immunity had implications for State-to-State relations and foreign affairs, the executive branches of States often had a considerable, even decisive say. More importantly, States' respect for immunity often reflected their approach to their international rights and obligations as a whole. The question of which State authority had the competence to make a final decision was an internal matter that belonged outside the purview of international law. His delegation therefore was not in favour of developing a set of uniform criteria to address that issue.

23 It was his understanding that the question of procedural safeguards in respect of immunity of officials would be addressed in the next report of the Special Rapporteur. His delegation believed that the term "procedural safeguards" should be taken to mean those safeguards that were directly linked with immunity and were intended to protect officials from abusive litigation. Procedural safeguards relating to criminal cases were not directly relevant to the topic. Moreover, no procedural safeguards could compensate for the flaw in the provision on exceptions to immunity *ratione materiae* contained in draft article 7. The only way to address that flaw was to re-examine draft article 7 and formulate an appropriate conclusion supported by general State practice and *opinio juris*.

24 **Mr. Tiriticco** (Italy) said that the risk posed by the long-range transboundary effects of polluting and degrading substances made it important for the Commission to work on the topic "Protection of the atmosphere". His delegation commended the Special Rapporteur and the Commission on the progress made. It appreciated the Special Rapporteur's attention to avoiding interference with ongoing political negotiations on environmental protection. The fact that the Commission was tackling such a fundamental problem was positive in itself.

25 Referring to the draft guidelines on the topic adopted on first reading, he said that draft guideline 10 (Implementation) was an essential completion of draft guideline 3, which established that States had the obligation to protect the atmosphere by preventing, reducing or controlling atmospheric pollution and atmospheric degradation, but did not specify the means to implement that obligation. His delegation took a favourable view of the discretionary approach to implementation: States were free to choose which protective actions to take in their own domestic legal orders. The Special Rapporteur's approach to dispute settlement was also positive. In accordance with the requirements of distributive justice, cooperative compliance mechanisms were preferable to punitive or enforcement-based ones. Scientific knowledge had an important part to play in the protection of the atmosphere, and there was indeed a need to consider the science-dependent and fact-intensive character of environmental disputes. Any initiatives to foster dialogue with scientific experts were therefore to be welcomed.

26 His delegation agreed with the position set out in draft guideline 11 (Compliance) and, in particular, the wording of paragraph 2, which was similar to that set out in other provisions regarding compliance and implementation review mechanisms. In paragraph 2, the Commission had, albeit indirectly, addressed the disparities among States by calling for facilitative procedures to assist States that were willing but unable to comply with their international obligations. His delegation also noted the reference to common but differentiated responsibilities, which was found in several international environmental instruments. It also stressed that the enforcement procedures referred to in paragraph 2 (b) should be distinguished from any invocation of international responsibility of States. Accordingly, his delegation welcomed paragraph (5) of the commentary to the draft guideline.

27 It would be preferable for a provision to be added to draft guideline 12, paragraph 1, stating that there should be no interference with existing dispute resolution provisions in treaty regimes. His delegation agreed with the content of paragraph 2: the role of technical and scientific expertise should be duly considered in settling disputes involving the atmosphere. Given the often fact-intensive and science-dependent nature of most international disputes regarding atmospheric pollution, technical and scientific expertise had a valuable role to play.

28 In addressing the topic "Peremptory norms of general international law (*jus cogens*)", the Special Rapporteur and the Commission had admirably sought to strike a balance between theoretical intricacy and practicality. Some of the

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draft conclusions proposed by the Special Rapporteur appeared not to have been deemed entirely persuasive but had been provisionally adopted by the Drafting Committee in an apparent effort to move the topic forward. The work done thus far, and the approach adopted by the Special Rapporteur might, in the future, allow the Commission to work toward delivering a product that would constitute a reference point. Nonetheless, given the theoretical dimension of the topic, it would be difficult to develop fruitful draft conclusions at the current stage. The Commission might wish to consider conducting a broader study on the topic, which would admittedly have a less practical character. Alternatively, it could opt for a narrower approach and, through a step-by-step drafting process to be appropriately discussed with Member States, consider specific aspects of the possible application of the notion of *jus cogens* to treaty law. In any event, the work carried out thus far, in a relatively short time, was remarkable and commendable.

29 In her sixth report, the Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction" took a balanced approach to the questions addressed thus far, namely the timing of the consideration of immunity, the acts of the authorities of the forum State that might be affected by immunity, and the identification of the organ that was competent to decide whether immunity applied. With regard to the issues to be addressed in the seventh report, his delegation would be particularly interested in the analysis of cooperation between States and international criminal courts and the possible impact of that cooperation on immunity from foreign criminal jurisdiction.

30 His delegation supported the text of draft article 7 provisionally adopted by the Commission at its sixty-ninth session, which provided that immunity *ratione materiae* did not apply in respect of only certain specific crimes under international law. The so-called territorial tort exception, which the Special Rapporteur had originally proposed, was not sufficiently established in State practice.

31 **Ms. Hioureas** (Cyprus), addressing the topic "Peremptory norms of general international law (*jus cogens*)", in relation to the law of treaties, said that treaties should be interpreted in a manner consistent with peremptory norms. Indeed, many States including Cyprus had invoked *jus cogens* even before the adoption of the Commission's draft articles on the law of treaties or the 1969 Vienna Convention on the Law of Treaties. In the light of articles 53 and 64 of the Convention, which addressed the invalidating effect of *jus cogens*, it would be useful, for the purposes of current work on the topic, to explore further the question of who determined whether a treaty conflicted with that norm and the possible legal consequences of such conflict. As a general point, her delegation fully agreed that the Commission should avoid any outcome that could result in, or be interpreted as, a deviation from the Convention.

32 It should also be recognized, however, that the scope of the topic extended beyond the law of treaties and included such areas of international law as the responsibility of States for internationally wrongful acts. As was made clear

in articles 40 and 41 of the articles on responsibility of States for internationally wrongful acts, a breach of a peremptory norm, such as the prohibition of the threat or use of force, was deemed serious and entailed State responsibility. Consequently, States had an obligation to cooperate in order to bring to an immediate end any serious violation. They also had an obligation not to recognize the results stemming from such unlawful conduct and to refrain from aiding or assisting the State engaged in wrongdoing. Moreover, under articles 30 and 31 of the articles on responsibility of States for internationally wrongful acts, the State responsible for the internationally wrongful act was under an obligation to cease that act, offer appropriate assurances of non-repetition, and make full reparation for the injury caused by its behaviour.

33 Her delegation supported the suggestion that the Commission should draft an illustrative list of norms that had already acquired the status of *jus cogens*. The proposal was feasible, as the number of *jus cogens* norms to consider was relatively limited. Such a list would be useful given that, according to article 53 of the Vienna Convention, peremptory norms existed only if they were accepted and recognized by the international community of States.

34 **Mr. Elshenawy** (Egypt), referring to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/714 and A/CN.4/714/Corr.1), said that the phrase "as far as possible" should be removed from paragraph 3 of draft conclusion 10 (Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)). That change would avoid opening the door for exceptions in the event that a treaty was to be interpreted in a manner inconsistent with or contrary to *jus cogens*. In that regard, it was important to respect the rules of interpretation set forth in the 1969 Vienna Convention on the Law of Treaties and customary international law.

35 To his delegation, draft conclusion 11, paragraph 1, must mean only one thing: a treaty was invalid if, at its conclusion, it was in conflict with a peremptory norm of general international law (*jus cogens*), and no part of the treaty could be severed or separated. Paragraphs 1 and 2 should be re-drafted in order to clarify that there should be no exception to that rule. Treaties were drafted in a balanced manner and their provisions were generally interconnected. When a new *jus cogens* norm emerged that was in conflict with a provision of a treaty, it would be preferable for the treaty to be reviewed as a whole. In paragraphs 2 (b) and (c), two conditions had been introduced in order for the exception to apply, namely that the provisions that were in conflict with a peremptory norm of *jus cogens* should not constitute an essential basis of the consent to the treaty, and that continued performance of the remainder of the treaty would not be unjust. However, it was not clear when those conditions would apply, or who would have the power to make that assessment. In any event, those provisions would open the door for exceptions to *jus cogens* norms, something that would not be acceptable to his delegation.

36 The phrase "to the extent possible" should be removed from paragraph 2 of draft conclusion 17 (Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations), as it opened the door for the possibility that resolutions of international organizations, particularly those of the Security Council, could be interpreted in a manner inconsistent with or contrary to *jus cogens* norms. Paragraph 2 should state that resolutions that conflicted with a *jus cogens* norm were not merely non-binding; they were void, and none of their legal effects could be recognized.

37 In paragraph 2 of draft conclusion 20 (Duty to cooperate), it should be explained how a serious breach of *jus cogens* differed from other breaches, and how that distinction added value to the consideration of such a sensitive issue. However, his delegation believed that the threshold for the application of the duty to cooperate should be low: that duty should extend to any breach, and not only to serious ones.

38 Draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*) conflicted with the established rules regarding the immunities granted to States, Governments, ministers for foreign affairs and senior officials under international law and custom. It also confused the issue of prohibition with that of prosecution. His delegation therefore believed that the draft conclusion should be removed in its entirety.

39 His delegation supported the remainder of the draft conclusions.

40 **Ms. Schmitz** (Brazil) said that the Special Rapporteur for the topic "Peremptory norms of general international law (*jus cogens*)" was to be commended for the quality of his research and for proposing draft conclusions that reflected State practice in a manner consistent with the Vienna Convention on the Law of Treaties. It was, however, critically important to retain in the text of draft conclusion 17 an explicit reference to decisions of the Security Council. In view of the hierarchy of international obligations established in Article 103 of the Charter of the United Nations, the Commission should not shy away from recognizing that the Security Council was also bound by *jus cogens* norms. In draft conclusion 20, the scope of the duty to cooperate was limited to serious breaches of peremptory norms; but such a provision went against the very notion of *jus cogens*. While the Commission had clearly sought inspiration from the commentaries to the articles on the responsibility of States for internationally wrongful acts, it should be stressed that every breach of *jus cogens* was, by definition, serious.

41 Her delegation noted that draft conclusion 22 (Duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law (*jus cogens*)) and draft conclusion 23 (Irrelevance of official position and non-applicability of immunity *ratione materiae*) had been referred to the Drafting Committee on the understanding that they would be dealt with by means of a "without prejudice" clause. Her delegation supported the Special Rapporteur's initial proposal but understood his flexibility in view of the need to maintain consistency in the work of the Commission across topics. It would be useful to find a creative way of elaborating an illustrative list of *jus*

cogens norms while respecting the understanding that the Commission should be discussing process and method, as opposed to the content of the peremptory norms.

42 In the draft guidelines on the topic "Provisional application of treaties" adopted on first reading, the Commission frequently referred to agreements between States relating to the provisional application of a treaty. That approach was commendable, as the intention of States with regard to provisional application could not be inferred or assumed. States needed to agree formally, explicitly and in writing that a treaty would apply provisionally. The word "may" in draft guideline 3 (General rule) was apt, because it reinforced the idea that the concerned States' agreement was completely voluntary.

43 Draft guideline 4 (Form of agreement) and the commentary thereto did not clarify the number of parties that needed to agree to the provisional application of a treaty through a resolution adopted by an international organization or by an intergovernmental conference. It was unclear whether a decision of an international organization or intergovernmental conference allowing the provisional application of a treaty would be binding on all States parties, even if that decision had not been unanimous.

44 In some places, there appeared to be a tension between the draft guidelines and the Vienna Convention on the Law of Treaties. According to paragraph (5) of the commentary to draft guideline 6, the formulation that provisional application produced a legally binding obligation to apply the treaty or part thereof as if the treaty were in force did not imply that provisional application had the same legal effect as entry into force. Although in the draft guidelines the Commission attempted to apply several aspects of the law of treaties to the idea of provisional application, that provision showed clearly that the draft guidelines also addressed areas that were not covered by the Vienna Convention. For instance, the term "mutatis mutandis" had been used in paragraph 1 of draft guideline 7 (Reservations) and in paragraph 3 of draft guideline 9 (Termination and suspension of provisional application) in order to separate the provisional application regime from the general rationale of the Vienna Convention. That approach was risky: it encouraged legal uncertainty, because it failed to establish the extent to which the rules set out in the Vienna Convention would apply to various aspects of the provisional application of treaties.

45 In paragraph (2) of the commentary to draft guideline 7, it was recognized that there was a relative lack of practice in relation to provisional application of treaties. Moreover, as was correctly stated in paragraph (3) of the commentary to draft guideline 3, bilateral treaties constituted the vast majority of treaties that historically had been provisionally applied. Since it was acknowledged in the 2011 Guide to Practice on Reservations to Treaties that, strictly speaking, there were no reservations to bilateral treaties, a specific guideline on reservations in relation to the provisional application of treaties could cause confusion and legal uncertainty.

doi: 10.5553/AJ/2352068X2018004001016

46 Lastly, in order to maintain consistency across the work of the Commission, draft guideline 8 (Responsibility for breach) should reflect, as far as possible, the concepts set out in the articles on responsibility of States for internationally wrongful acts, particularly articles 1 and 2.

47 *Mr. Biang (Gabon) took the Chair*.

48 **Mr. Mik** (Poland), addressing the topic of protection of the atmosphere, said that his delegation took note of the adoption by the Commission on first reading of 12 draft guidelines and commentaries thereto, including the three new draft guidelines 10, 11 and 12, on implementation, compliance and dispute settlement, respectively.

49 Draft guideline 10 did not sufficiently articulate the view that, under international law, States had broad discretion as to the means of fulfilling their international obligations, in accordance with their preferences. Draft guideline 11 raised significant concerns, as there was some inconsistency between the text and its title. It was clear from the first paragraph and the commentary that the principle referred to was that of the fulfilment of obligations in good faith, irrespective of their source in international law. However, in paragraphs 1 and 2, the term "compliance" was used only in respect of treaty obligations and thus limited the scope of the draft guideline more than was intended. Furthermore, it was surprising that the words "abide with" were used rather than "fulfil", which was the word used in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

50 On the topic "Provisional application of treaties" and in reference to the draft guidelines adopted on first reading, he said that some reasonable period of notice as to when termination of provisional application would take effect needed to be introduced in draft guideline 9, paragraph 2, for the sake of the stability and predictability of treaty relations. Draft guideline 6 was also in need of a provision equivalent to article 70 of the Vienna Convention, to the effect that provisional application did not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

51 Turning to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur, he said that, in draft conclusion 8, the forms of evidence of acceptance of a norm of general international law as a peremptory norm and the forms of *opinio juris* required for the emergence of customary norms were treated as being equal; that was potentially misleading. Given that the Commission was seeking to specify the contours, content and effects of *jus cogens*, it was questionable whether that provision was necessary. There was, in any case, no need for draft conclusion 14, on dispute settlement, since, as recently confirmed by the International Court of Justice in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, States were free to choose the appropriate procedure for the resolution of their disputes.

52 Lastly, if the Commission accepted the inclusion of the reference to Security Council resolutions in the draft conclusions, a separate individual provision

should be devoted to them. It was noteworthy, however, that the sanction proposed by the Special Rapporteur in cases where the binding resolutions of international organizations conflicted with *jus cogens* was different from that provided in the Vienna Convention, in respect of treaties.

53 **Mr. Yee** (Singapore) said that his delegation continued to support the Commission's work on the topic "Protection of the atmosphere" and recognized the importance of international cooperation in that area, as reflected in the draft guidelines adopted on first reading, which it would be studying and commenting on in due course. It also continued to support the Commission's work on the provisional application of treaties, which was a tool of immense practical value in modern international life. More detailed comments on the draft guidelines adopted on first reading could be found in his delegation's statement available on the PaperSmart portal. The model clauses proposed by the Special Rapporteur to be included as an annex to the draft guidelines contained few examples involving Asian States; more could be done to represent the full diversity of State practice in that regard. For instance, the memorandum by the Secretariat reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto (A/CN.4/707) referred to article 20.5 of the Trans-Pacific Strategic Economic Partnership Agreement as an example of provisional application of part of a treaty that applied to only one party to the Agreement. The Commission might wish to consider similar examples at its seventy-first session.

54 His delegation also appreciated the efforts made by the Commission to clarify the intrinsically complex topic of peremptory norms of international law (*jus cogens*), but felt that it was difficult to consider the draft conclusions proposed by the Special Rapporteur meaningfully in the absence of commentaries thereto. It welcomed draft conclusions 10 to 13, which duly reflected and were consistent with the Vienna Convention. Draft conclusion 14, however, was perhaps unnecessary, as it overlapped significantly with the procedures already established under that Convention. Moreover, the inclusion of a "without prejudice" clause served to confuse rather than clarify matters, since it introduced a procedure that was different from those set out in the Convention. It was not appropriate in a set of draft conclusions, given that the provision concerned a recommended procedure and was not a reflection of the state of international law. His delegation nevertheless appreciated the work as a whole and looked forward to further reflecting on the draft conclusions.

55 **Mr. Arrocha Olabuenaga** (Mexico), addressing the topic "Protection of the atmosphere" and the draft guidelines adopted on first reading, said that the draft guideline on national implementation of obligations relating thereto was in line with the mechanisms generally used by States to discharge their obligations under international law. The Special Rapporteur had rightly highlighted the existence of various compliance systems under a number of international instruments to which Mexico was a party. The draft guideline on

doi: 10.5553/AJ/2352068X2018004001016

peaceful settlement of disputes must be interpreted in accordance with Article 33, paragraph 1, of the Charter. His delegation agreed that the use of technical and scientific experts would be helpful and desirable in view of the highly specific nature of evidentiary requirements under such mechanisms, but that such use should be considered on a case-by-case basis.

56 Turning to the topic "Provisional application of treaties", he said that the 12 draft guidelines adopted on first reading embodied a pragmatic approach and that they would lend themselves, through their specific content, to easy use and consultation by the legal experts of States and international organizations. His delegation welcomed the addition of a draft guideline on reservations and of a third paragraph in draft guideline 9 to cover the possibility of termination and suspension of provisional application through breach of an obligation. Those additions served to ensure that the relationship of article 25 of the Vienna Convention to the other provisions of the draft guidelines was comprehensively addressed. It was also noteworthy that the adjustments made to the commentaries, particularly the commentary to draft guideline 6, resolved some of the questions raised by a number of delegations regarding the difference between the scope of obligations under a provisionally applied treaty and that of obligations under a treaty in force. His delegation remained in favour of a set of model clauses on provisional application and supported their inclusion in an annex to the draft guidelines, in which it hoped that they would be incorporated on second reading; they would be useful to States in negotiating international treaties.

57 On the topic of peremptory norms of general international law (*jus cogens*), his delegation welcomed the fact that most of the draft conclusions proposed by the Special Rapporteur were based on provisions of instruments adopted by the Commission, in particular the Vienna Convention, the articles on State responsibility for internationally wrongful acts and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. It supported the inclusion of a draft conclusion on the consequences of *jus cogens* norms for the general principles of law, so as to embrace all sources of international law; it was also in favour of addressing the topic of countermeasures, understood as precluding responsibility, and their relationship to *jus cogens* norms, in accordance with article 41 of the articles on State responsibility for internationally wrongful acts. His delegation would be attentive to how that topic would be linked to the topic of general principles of law.

58 His delegation welcomed the clarification that draft conclusion 10 did not render ineffective the rules of interpretation codified in the Vienna Convention. In draft conclusion 13, it needed to be made clear that the mere fact that a treaty reflected a *jus cogens* norm did not mean that any reservation to the treaty would be null and void. In draft conclusion 14, his delegation supported the recommendation that possible conflicts between a treaty and a *jus cogens* norm be submitted to the International Court of Justice. In draft conclusion 16, it would be advisable to use the term "unilateral declaration", rather than "unilateral act", to reflect the wording of the Guiding Principles

applicable to unilateral declarations of States capable of creating legal obligations. Lastly, noting the suggestion to compile an illustrative list of *jus cogens* norms, he said that such a list would be very useful but should serve only to provide examples and not be exhaustive.

59 **Mr. Válek** (Czechia), addressing the topic "Protection of the atmosphere", said that the usefulness of adopting draft guidelines containing provisions frequently found in various treaties relating to the topic was questionable. Such provisions did not have any normative value of their own outside those treaties, nor did they have an autonomous life in international law. They were a corollary of substantive provisions of those instruments and could not operate in the absence of such provisions. Unlike the treaty instruments that served as their inspiration, the draft guidelines proposed by the Special Rapporteur rightly lacked substantive provisions, since the Commission did not possess the technical or scientific expertise needed to address the substantive problems of atmospheric degradation. The limits of the Commission's work on the topic were reflected in draft guideline 2, paragraphs 2 and 3.

60 It was stated in paragraph 1 of draft guideline 10 that national implementation of an international obligation might take the form of legislative, administrative, judicial or other action. Since that was simply a statement of a known fact, there was no reason to include that paragraph. Similarly, the statement in draft guideline 11, paragraph 1, that States were required to fulfil obligations under international law relating to the protection of the atmosphere in good faith was merely a repetition of what was already universally accepted for all international legal obligations. Paragraph 2 of that same draft guideline, in referring to facilitative and enforcement procedures available under relevant agreements, was again stating the obvious, namely, that such procedures could be used in accordance with those agreements. As for draft guideline 12, it seemed inappropriate to include a provision on dispute settlement in such draft guidelines. While technical or scientific experts had a role to play in certain situations, there was no need for them if the dispute concerned such issues as the validity of a treaty or the effects of a reservation.

61 Turning to the topic "Provisional application of treaties", he said that it was doubtful whether draft guideline 7 needed to be included in the draft guidelines adopted on first reading, since it might raise doubts about the integrity of the legal regime of reservations. As had been stressed at the time of elaborating the Guide to Practice on Reservations to Treaties, the regime of reservations was a single uniform regime applicable to all reservations, irrespective of the material content of a treaty provision in respect of which the reservation was formulated and irrespective also of whether such provision would or would not be provisionally applied. Inclusion of the words "mutatis mutandis" in paragraph 1 implied that the relevant provisions of the Vienna Convention were not directly applicable to reservations to treaty provisions that might be provisionally applied.

doi: 10.5553/AJ/2352068X2018004001016

62 His delegation could not agree with such an assumption, since the reservation could be formulated before the action triggering provisional application was taken, in which case the standard provisions concerning reservations would apply directly, not mutatis mutandis, to such reservation. The real issue was not the moment when the reservation was formulated, as suggested by both paragraphs 1 and 2 of the draft guideline, but rather, the span of the reservation, namely, the limitation of the duration of the reservation to the duration of the provisional application of the treaty. The question was thus whether some treaty provisions were excluded from provisional application or whether their content was modified during their provisional application. Draft guideline 7, by focusing on the moment of formulation of a reservation to a provision to be provisionally applied, did not properly capture that issue. Lastly, his delegation welcomed the introduction, in draft guideline 9, of a new paragraph 1 and agreed both with its content and with its prominent place, as it addressed the most common scenario of termination of provisional application.

63 On the topic of "Peremptory norms of general international law (*jus cogens*)", given that the Special Rapporteur's approach was based primarily on references to doctrine rather than to international practice, a deeper analysis of relevant international and national case law and State practice would be appreciated, particularly in respect of the methodology used to identify peremptory norms. Furthermore, since *jus cogens* was a dynamic concept, the focus should be not on which norms had already acquired a peremptory character but rather on the processes through which the peremptory character of the specific rule of international law could be ascertained. In conclusion, as some of the draft conclusions proposed by the Special Rapporteur overlapped with other topics that were being or had been considered by the Commission, the Commission should strive for a coherent and consistent approach in its work on all related topics.

Statement by the President of the International Court of Justice

(...)[1]

The meeting rose at 1 p.m.

1 For the purpose of this journal the Summary Record of this meeting has been reduced to only include Agenda item 82, paragraphs 1-63.