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Summary record of the 26th meeting – A/C. 6/73/SR.26

Agenda item 82

A/C.6/73/SR.26

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Sixth Committee

Summary record of the 26th meeting

Held at Headquarters, New York, on Friday, 26 October 2018, at 3 p.m.

Chair: Ms. Ponce (Vice-Chair) (Philippines)

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

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

The meeting was called to order at 3.10 p.m.

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

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

2 **Mr. Alabrune** (France) said that his delegation welcomed the adoption on first reading of the draft guidelines on protection of the atmosphere. In its current work on the topic, the Commission should take account of the existence of a draft Global Pact for the Environment, whose objective was to propose a single universal framework in order to prevent a fragmentation of international law on the environment. The draft guidelines could contribute to that effort.

3 Questions persisted about the legal value of the text which, although formulated in the form of guidelines, made several references to obligations of States. In paragraph (5) of the commentary to draft guideline 10, it was stated that "the term 'obligations' [...] does not refer to new obligations for States, but rather refers to existing obligations that States already have under international law". In his delegation's view, that should be the case not only for draft guideline 10, but for all the draft guidelines. That point should

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be clarified by the Commission. The faint references to international practice, in particular in the commentaries to draft guidelines 10 and 12, made it difficult to identify a "trend" in international law on the topic, to use the Special Rapporteur's formulation.

4 In relation to the topic "Provisional application of treaties" and the Commission's decision to adopt on first reading the "Guide to Provisional Application of Treaties", he said that in its report (A/73/10), the Commission proposed that the question of whether model clauses could be added to the text be considered during second reading only. However, the idea of having two readings before the adoption of the Commission's projects was to give Member States an opportunity to express their views on the entire draft text adopted on first reading. The decision to send the question of the model clauses directly to the second-reading stage deprived States of that opportunity and prevented the Commission from preparing a text that satisfied the expectations and observations of States. Such an approach was regrettable, especially since the Commission was under no obligation to complete the first reading in 2018.

5 It was also regrettable that international practice in the provisional application of treaties had not been taken sufficiently into account, even though the draft guidelines were presented as a useful guide for States. To cite one example, the reference to the application mutatis mutandis of the Vienna Convention on the Law of Treaties in connection with reservations (draft guideline 7) and termination and suspension of provisional application (draft guideline 9, paragraph 3) did not "guide" States, which after all was the announced purpose of the draft guidelines. Indeed, in his oral presentation, the Chair of the Drafting Committee had indicated that the draft guidelines had been adopted without an in-depth consideration of practice. It was up to the Commission to decide how it could give States an opportunity to respond in due time, before the final adoption of the draft guidelines, to the new elements that it wanted to see included and which had not been debated during the first reading.

6 Turning to the topic of peremptory norms of general international law (*jus cogens*), he noted that in the three years since the topic was included in the programme of work, none of the draft conclusions provisionally adopted by the Drafting Committee had been referred to the Commission in plenary. The draft conclusions had been made public through the interim reports of the Chair of the Drafting Committee which had been placed on the Commission's website. Those brief texts had not been the subject of any debate in plenary, and the Commission had not included them in its annual reports. Moreover, no draft commentaries to the draft conclusions had been submitted for consideration by the Commission in plenary or to the Member States. Yet, the commentaries to the draft conclusions were essential for assessing the scope of the proposed texts. The result was that States had been deprived of the possibility of following the Commission's work and had been prevented from making comments in due time in the Sixth Committee.

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7 Interaction and dialogue between the Commission and Member States were fundamental to the quality and legitimacy of the Commission's work. If the Commission found that it did not have sufficient time to consider the various topics, it would be preferable to take the time needed, even if it meant prolonging its work, so that it was able to submit conclusions and commentaries to States, in particular when the topic had been the subject of major disagreements and its consideration had been heavily criticized in both the Commission and the Sixth Committee.

8 The authority of the Commission's work was based on its method of work methods, which involved an accurate and thorough analysis of international practice in all its forms and manifestations. However, for the Commission's work on *jus cogens*, the Special Rapporteur tended to base his proposals primarily on doctrinal references rather than on international practice. As practice on the topic was limited, it was all the more important to proceed cautiously, given the major uncertainties and differences of opinion surrounding the concept of *jus cogens*. The comments made by Member States during the Sixth Committee's consideration of the Commission's report had so far only been partially taken into account, and even then, only in a very limited manner. As the draft conclusions had not yet been adopted in plenary, there was still time to make amends, especially since the draft conclusions were presented as mere recommendations and thus would not be the subject of subsequent multilateral negotiations.

9 With regard to the draft conclusions presented in 2018, it should be borne in mind that, in line with the approach used during the negotiation of the Vienna Convention on the Law of Treaties, *jus cogens* was a legal concept which governed both the conditions for a norm to acquire peremptory status and the effects of that norm as a result of its being peremptory. The Special Rapporteur's approach, as reflected in his reports and proposed draft conclusions, was based on a theoretical conception of *jus cogens* as a manifestation of a superior natural order that superseded State sovereignty.

10 In that connection, his delegation endorsed the Drafting Committee's decision to provide procedural guarantees in respect of challenges to the validity or the applicability of any international obligation, regardless of its formal source (draft conclusion 14). Thus, as many members of the Commission had stressed, it was unacceptable to remove, in the name of an absolutist understanding of *jus cogens*, the invocation of that concept from the procedural obligations based on good faith available under ordinary law. Such a reorientation of the Commission's work was welcome insofar as it reflected the solution adopted in article 65 of the Vienna Convention. Nonetheless, the Commission should limit itself to that solution without seeking, in a non-binding instrument, to go beyond the current obligations of States under customary law in dispute settlement.

11 The draft conclusions provisionally adopted by the Drafting Committee made the identification of peremptory norms dependent on acceptance and recognition by a "very large majority of States" (draft conclusion 7). However, with that formulation, it was impossible to clearly set out situations

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where the international community of States as a whole could be said to have accepted a norm as peremptory.

12 With regard to forms of evidence of acceptance and recognition by the international community of States, the Special Rapporteur took a minimalist approach in the text by merely stating that evidence might take a wide range of forms, without indicating the level of evidence required. Forms of evidence included public statements made on behalf of States, official publications, diplomatic correspondence, national laws and regulations, treaty provisions, decisions of national courts and resolutions of international organizations and intergovernmental conferences. Based on that proposition, a resolution attributable to a universal organization or a collective decision taken at a major conference that was adopted by a "very large majority of States" (in the sense of draft conclusion 7) might constitute evidence of a peremptory norm (in the sense of draft conclusion 8). In his delegation's view, the identification of a peremptory norm should be subject to a particularly stringent evidence regime and not a majority-based regime.

13 In relation to draft conclusion 9 and subsidiary means for identifying peremptory norms of international law, the reference to the International Court of Justice was appropriate, given the Court's special status as the principal judicial organ of the United Nations. However, putting the decisions of international courts and tribunals on a par with the work of expert bodies or the "teachings of the most highly qualified publicists" raised serious questions. Such a proposition was not supported by any practice.

14 On draft conclusion 15, the assertion in paragraph 1 that "a customary international law rule does not arise if it conflicts with a peremptory norm of general international law (*jus cogens*)" appeared to be contradictory. It was difficult to understand how there could be a general practice accepted as law which at the same time conflicted with a norm which the international community of States regarded as non-derogable. More generally, it was hard to imagine how a norm of *jus cogens* could not be customary at the same time.

15 **Mr. Špaček** (Slovakia) said that his delegation continued to have a number of concerns about the general approach to the topic "Protection of the atmosphere". In the draft guidelines on the topic adopted by the Commission on first reading, it was unfortunate that the Special Rapporteur and the Commission had treated draft guideline 10 (Implementation), draft guideline 11 (Compliance) and draft guideline 12 (Dispute settlement) in such an abstract manner, stating obvious and often basic general rules or principles of international law that were not specific to the protection of the atmosphere.

16 The choice of forms of national implementation of international obligations was a sovereign right of States. Accordingly, there was no added value in restating various options for the realization of that right, as proposed in draft guideline 10. Similarly, on compliance, draft guideline 11, paragraph 1, was a mere restatement of the *pacta sunt servanda* principle. Paragraph 2 was somewhat useful, as it built on examples of best practices in compliance drawn from existing treaty regimes.

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17 In draft guideline 12, the Commission was simply restating the principle of the peaceful settlement of disputes. With regard to paragraph 2, which referred to due consideration being given to the use of technical and scientific experts in settling disputes, it was usually up to the court hearing a dispute to request or use such expertise. Since the addressees of the draft guidelines were States, the relevance of paragraph 2 was unclear. Moreover, in disputes of a fact-intensive and science-dependent nature, due consideration should be given not to experts but to the relevant expertise. That seemed to be a drafting problem. His delegation saw the potential value of the draft guidelines as model clauses or model provisions for future agreements on the topic, and not as a set of stand-alone guidelines with normative content. That point should be taken into consideration during the debate on the final outcome of the topic.

18 Turning to the topic "Provisional application of treaties", he said that his delegation noted with appreciation the adoption on first reading of the set of 12 draft guidelines with commentaries thereto, as well as the Commission's decision to transmit the draft guidelines to Governments and international organizations for comments and observations. The formulation of the title for the proposed final outcome of the topic, namely "Guide to Provisional Application of Treaties", properly reflected its intended nature and purpose. Upon its completion, the Guide would serve as a useful tool for States and facilitate harmonization of State practice.

19 In his delegation's view, it was not necessary to define the scope of the draft guidelines. Reiterating the comments his delegation had made in 2018, he suggested that draft guidelines 1 and 2 should be merged. There was also overlap between draft guidelines 3 and 4, which both dealt with means of agreeing to the provisional application of a treaty. It should be made clear in draft guideline 4 (b) that the consent of a State to provisional application must be explicit, meaning that all other forms, means or arrangements for provisional application, including resolutions of international organizations, must involve the express consent of the State.

20 His delegation understood draft guideline 9 (Termination and suspension of provisional application) to contain two forms of termination: through the treaty's entry into force and through notification of a State of its intention not to become a party to the treaty. Given its recent experience with notification of the intention not to become a party as a form of termination of provisional application, Slovakia believed that draft guideline 9 should also address the temporal aspect of notification. The question was whether it could be up to the notifying State to determine unilaterally when provisional application terminated. Moreover, the intention of a State to terminate the provisional application of a treaty did not always have to coincide with notification by that State of its intention not to become a party to the treaty, as draft guideline 9, paragraph 2, presupposed.

21 With regard to the topic "Peremptory norms of general international law (*jus cogens*)", he said that the subject matter encompassed a number of complex and difficult issues which required a cautious approach and in-depth analy-

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sis. Slovakia noted with concern that several of the draft conclusions on the topic proposed by the Special Rapporteur were based merely on doctrinal opinions rather than State practice. Although the practice of States in respect of peremptory norms might not be sufficiently developed or easily ascertained, that should not lead the Commission to abandon its usual working method.

22 As the draft conclusions remained in the Drafting Committee, his delegation reserved the right to comment on individual provisions until when the entire set of draft conclusions and commentaries were submitted to the Commission. In the interests of an efficient and meaningful interaction between States and the Commission, his delegation hoped that States would have the opportunity to comment at all stages of the process and not only at the end of the first reading.

23 His delegation was open-minded about the elaboration of an illustrative list of peremptory norms and its future inclusion in the outcome of the topic. If such a list was not included in the text itself, it might be useful to mention it in the commentaries to the individual draft conclusions.

24 **Mr. Eick** (Germany) said that protecting the atmosphere by preventing the introduction of harmful substances into it was crucial for sustaining life on Earth, human health and welfare, and ecosystems. His delegation therefore underscored the highly topical nature of the Commission's work on the topic "Protection of the atmosphere", and was pleased that the draft guidelines adopted by the Commission on first reading were in line with the 2013 understanding regarding the scope of work on the topic. It looked forward to a successful outcome of that important project.

25 Turning to the topic "Provisional application of treaties", he said his delegation was pleased that the Special Rapporteur had proposed two additional draft guidelines concerning relevant aspects of international law in his fifth report (A/CN.4/718) that took into account States' prior comments and observations and did not restrict the flexibility inherent in the mechanism for the provisional application of treaties.

26 Reservations played an important role in the conclusion of multilateral treaties. Given that the provisional application of treaties produced legal effects, the parties to a treaty should also be afforded the opportunity to formulate reservations when agreeing to provisionally apply a treaty. It would be helpful to have the Commission's guidance on that issue after the second reading. It would, for example, be interesting to learn whether reservations could also play a role in limiting the scope of provisional application due to internal laws of States, as referred to in draft guideline 12.

27 Part V, section 3, of the Vienna Convention on the Law of Treaties provided States with flexible means to react to developments in the application of a treaty and to the conduct of other parties, in particular in the event of breaches and in the context of multilateral treaties. Germany welcomed the approach to also grant such flexibility in the case of provisional application. In that context, it would be useful for further clarification to be provided in second reading on the relationship between the currently available means of

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termination (draft guideline 9, paragraphs 1 and 2) and the new opportunities, especially with regard to multilateral treaties, created by the reference in draft guideline 9, paragraph 3, to part V, section 3, of the Vienna Convention.

28 On the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur, he said with respect to draft conclusion 14 that his delegation agreed that the consequences of invoking a conflict with a *jus cogens* norm were far-reaching and could not automatically flow from the mere claim that such a conflict existed. Germany was therefore in favour of including a draft conclusion on the procedure for invocation.

29 His delegation reiterated a point made in its statement in 2017: it was not necessary for the Commission to undertake the enormously difficult task of adopting a list of norms that had acquired *jus cogens* status. Even if such a list was only illustrative, it might lead to wrong conclusions being drawn and risked establishing a status quo that might impede the evolution of *jus cogens* in the future.

30 In respect of the procedure followed by the Commission in its work, there were a number of disadvantages to leaving the draft conclusions pending in the Drafting Committee until the entire set had been concluded on first reading. States would not have the opportunity to comment on the Commission's position until the first reading of the entire project. That departure from regular practice also made it more difficult for States to follow and comment on the Commission's work. Germany agreed with the concerns voiced by some Commission members in that regard and was in favour of retaining the usual procedure.

31 Germany also agreed with the concerns expressed by several members of the Commission with regard to draft conclusions 22 and 23: in their current form, they would deviate from the scope of the topic, which was to be limited to secondary rules of international law and on the general effect of all rules of *jus cogens*. It would be unwise to address the effects of a specific subset of rules of *jus cogens* at the current stage – a fact that the Special Rapporteur had himself acknowledged in his concluding remarks. Furthermore, not least for reasons of procedural efficiency, it would not be wise to repeat the type of controversial discussion that had taken place in respect of exceptions to immunity *ratione materiae* under another topic that was still under consideration. Against that backdrop, his delegation supported the proposal by the Special Rapporteur to replace the two draft conclusions with a single "without prejudice" clause.

32 **Mr. Nakayama** (Japan) said that the topic "Protection of the atmosphere" was important for finding common legal principles arising from existing treaties related to the environment. The Commission and the Special Rapporteur should be commended for successfully completing the first reading of the draft guidelines on the topic. During the second reading, however, the Commission should reconsider and update the fourth preambular paragraph of the draft guidelines, which stated that "the protection of the atmosphere

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from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole", to reflect the concept of "a common concern of humankind" referred to in the 2015 Paris Agreement.

33 Draft guideline 1 (b), in which atmospheric pollution was defined as "the introduction or release … into the atmosphere of substances …", should be reconsidered in light of the formulation "substances or energy" used in the definition of the same concept in both the 1979 Convention on Long-range Transboundary Air Pollution and the 1982 United Nations Convention on the Law of the Sea.

34 His delegation welcomed the fact that the Commission and the Special Rapporteur had adhered to the 2013 understanding for the consideration of the topic during first reading. It wondered, however, whether it was necessary to reproduce part of that understanding in the eighth preambular paragraph. During second reading, the Commission should consider deleting the eighth preambular paragraph and the references to the understanding in draft guideline 2 (Scope of the guidelines), paragraphs 2 and 3.

35 Turning to the topic "Peremptory norms of general international law (*jus cogens*)", he said his delegation supported the Special Rapporteur's approach of treating article 53 of the Vienna Convention on the Law of Treaties as the basis for the criteria for the identification of *jus cogens* and his reliance on State practice and the decisions of international courts and tribunals to give content and meaning to the article.

36 The Special Rapporteur had made progress in the consideration of the topic in 2018, but only five draft conclusions had been provisionally adopted in the Drafting Committee, even though 13 draft conclusions had been proposed in the third report. It was doubtful whether the Commission had enough time to discuss that important topic carefully. Japan welcomed the Special Rapporteur's suggestion to prepare commentaries in 2019 and hoped that the Commission would discuss them cautiously and in depth.

37 An illustrative list of *jus cogens* norms could be quite useful in practice if it included the grounds and evidence based on which the Commission considered that they had acquired *jus cogens* status. However, care should be taken in the preparation of the list to avoid any misperception that the listed norms had been given a special legal status distinct from that of other norms that might also be identified as *jus cogens* but were not listed. It was important to make it clear that the list was illustrative, not exhaustive, and did not prejudice the legal status of norms not included therein.

38 **Mr. Svetličič** (Slovenia) said that the topic "Provisional application of treaties" was of great practical interest to States and international organizations, and the end result should be aimed at assisting them in their treaty practice by providing comprehensive guidance on both the concept and practical aspects of provisional application.

39 With regard to the draft guidelines on the topic adopted on first reading, he reiterated that the issue of the source of provisional application and its binding effect had still not been sufficiently clarified. In the commentary to draft guideline 6 (Legal effect of provisional application), the Commission stated

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that the binding legal effect derived from the agreement to provisionally apply the treaty, but it did not explain why that agreement should be considered as binding. If the treaty provided for consent to be bound to be expressed by ratification, his delegation wondered whether that implied that there was double consent in cases where provisional application was agreed to. That conceptualization of the agreement to provisionally apply the treaty was essential and had an impact on its other aspects. The Commission could provide added value on that point, since the binding effect had already been determined during the *travaux préparatoires* on article 25 of the Vienna Convention, whereas its source had not. Since the issue of agreement as a necessary precondition for provisional application was important, it should be reflected in the text of draft guideline 6, for example by stating at the beginning that "the agreement to provisionally apply a treaty…produces a legally binding obligation". That was also in accordance with the end of draft guideline 6, where agreement was implied in the wording "unless…otherwise agreed".

40 The conceptual underpinning of provisional application as based on agreement was relevant, for example, for unilateral declarations. In such a case, the agreement to provisionally apply the treaty should also exist if that agreement was the basis for consent to provisional application. However, agreement did not necessarily need to be explicit. Reiterating the point made in previous statements, he said that the regulation of provisional application in the Vienna Convention on Succession of States in respect of Treaties could be relevant. Articles 27 and 28 thereof provided that a treaty applied provisionally between States if they expressly so agreed or if by reason of their conduct they were to be considered as having so agreed. That would mean that an implied agreement existed. Slovenia saw no reason why that could not also apply in the case of article 25 of the Vienna Convention on the Law of Treaties, especially since it had been acknowledged during the *travaux préparatoires* of the Convention on Succession of States that provisional application under that Convention was based on article 25 of the Convention on the Law of Treaties.

41 **Mr. Mandveer** (Estonia), referring to the topic "Protection of the atmosphere", said that the development of guidelines on that subject was an important task, as it allowed for several important obligations to be combined in one document. Estonia welcomed the adoption of the set of draft guidelines adopted on first reading and the commentaries thereto. Concerning draft guideline 10, paragraph 2, it supported the idea that States should endeavour to give effect to the recommendations contained in the draft guidelines, for example through political declarations, since the cooperation of all States was of utmost importance.

42 It also expressed strong support for the inclusion of draft guideline 11, paragraph 2 (a), which concerned compliance with international obligations and the provision of assistance to States with limited capabilities. Recognition of the specific challenges that States might face, in particular the developing and least developed countries, needed to be taken into account in the draft

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guidelines. Assistance to States was an essential tool for improving compliance with international obligations.

43 Estonia also endorsed the inclusion of guideline 12 (Dispute settlement), as it had always supported the peaceful settlement of disputes. It stressed the need to have the reference to the scientific and technical aspect of environmental disputes in the draft guidelines and to make use of scientific and technical experts in the dispute settlement process.

44 Turning to the topic "Provisional application of treaties" and the draft guidelines adopted on first reading, he said that Estonia agreed with the content of draft guideline 3 and the understanding that it was intended to be read together with draft guideline 4. However, the current wording of the two draft guidelines was repetitive; either they should be merged or draft guideline 4 should be reworded to remove the reference to the form of agreement to provisional application where the treaty so provided. His delegation endorsed the inclusion of draft model clauses to reflect best practices with regard to the provisional application of treaties; they should be formulated for a wide range of situations that might arise.

45 Concerning the topic "Peremptory norms of general international law (*jus cogens*)", he said that his delegation acknowledged the need for clarity about the concept of *jus cogens*. As the outcome of the work on the topic had far-reaching implications for the international community, it was important to identify *jus cogens* norms on the basis of consensus. Regarding the draft conclusions proposed by the Special Rapporteur, Estonia welcomed the requirement in draft conclusion 10, paragraph 3, that a provision in a treaty should, as far as possible, be interpreted in a way that rendered it consistent with a peremptory norm of general international law (*jus cogens*). It supported the proposal to broaden the scope of draft conclusion 11 to cover acts of international organizations that created obligations for States.

46 Estonia endorsed the obligation that parties to a treaty had to eliminate the consequences of any act performed in reliance of the provision of the treaty which was in conflict with a peremptory norm of general international law (*jus cogens*), contained in draft conclusion 12, paragraph 1. However, since the wording of that paragraph deviated from that of article 71 of the Vienna Convention on the Law of Treaties, the Commission should clarify the need for the different wording.

47 The question of a dispute settlement procedure (draft conclusion 14) called for further analysis in the Commission, since there were regulatory differences between Article 33 of the Charter of the United Nations and article 66 (a) of the Vienna Convention. Moreover, the draft conclusion and the commentary seemed to contradict each other.

48 Draft conclusion 15 did not reflect the issue of the consequences of *jus cogens* for customary international law in its full complexity. His delegation endorsed the amendment suggested in the commentary to indicate that the elements required for the development of customary international law – State practice and *opinio juris* – could not give rise to a norm not in accordance with *jus cogens*. Draft conclusions 18 and 19 required more elaborate

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analysis. Draft conclusion 20, on the duty to cooperate in the case of a serious breach, did not specify what a serious breach was.

49 **Mr. Lefeber** (Netherlands), commenting on the topic "Provisional application of treaties", said that a guide would be an appropriate outcome of the Commission's work, in that it would give guidance to States on how to use the instrument of provisional application – if they chose – and inform them of the legal consequences thereof, without imposing a particular course of action that might prejudice the flexibility of the instrument. An analysis of State practice in the light of article 25 of the Vienna Convention should be the starting point for the study. It would be useful to explore the relationship between article 25 and other provisions of the Convention for the purposes of clarification and delimitation. For example, consideration could be given to the relevance and effects of reservations formulated upon signature for the provisional application of a treaty or termination of provisional application of a treaty other than through the application of article 25. However, any conclusions must be supported by State practice.

50 Turning to the guidelines adopted on first reading, he said that the reference in draft guideline 9, paragraph 3, to the application, mutatis mutandis, of the relevant rules on termination and suspension in the Vienna Convention was a "without prejudice" clause. While acknowledging the lack of relevant State practice and the flexibility inherent in the formulation of article 25, paragraph 2, of the Vienna Convention, the Commission apparently considered it useful to address a number of possible scenarios not otherwise covered by the draft guidelines. While his delegation agreed that scenarios could occur in practice that did not easily fall within the scope of article 25, it was important not to blur the conceptual distinction between the rules applicable to termination of treaties that had entered into force and those that were applied on a provisional basis.

51 On the topic "Peremptory norms of general international law (*jus cogens*)", he said that the Netherlands shared the concern voiced by other States with respect to the lack of clarity about the concept of *jus cogens* and, in particular, its identification and application. His delegation hoped that the Commission would continue to evaluate its progress on the topic and not hesitate to return to topics discussed earlier in the light of later conclusions.

52 With respect to the draft conclusions proposed by the Special Rapporteur, his Government suggested that the title of draft conclusion 12 be renamed to read "Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law". The results of such invalidity related not only to the consequences of acts performed or legal situations created by the parties through the execution of the treaty, but also to the obligation of the parties to further perform the treaty. In line with article 70, paragraph 1 (a), of the Vienna Convention, a separate paragraph should be added that would state that in the case of the invalidity of a treaty, the parties were released from any obligation further to perform the treaty.

53 The procedure proposed in draft conclusion 14 for the settlement of disputes involving a conflict between a treaty and *jus cogens* resembled the pro-

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cedure set out in article 66 of the Vienna Convention. However, contrary to article 65, the draft conclusions did not contain procedural rules regarding the invocation of the invalidity of a treaty. Under the Vienna Convention, a party invoking the invalidity of a treaty was under an obligation to notify the other parties to the treaty, who might then raise objections to the invocation of invalidity. Only in those cases in which no objections had been raised within three months after the notification could the party that had invoked the invalidity give effect to it. The lack of such procedural rules in draft conclusion 14 might suggest that a State could unilaterally consider that a treaty was void because it violated a norm of *jus cogens* and could decide that it was no longer bound by the treaty.

54 Draft conclusion 14 allowed other forms of dispute settlement through the submission of the dispute to the International Court of Justice, or to arbitration if both parties agreed. What was lacking, however, was a procedure that preceded such steps and determined the legal position of the State invoking the invalidity of the treaty from the moment of invocation. That omission might create the impression that there was a difference between the procedures set out in the Vienna Convention and those in the draft conclusions with respect to the invocation of invalidity of a treaty, including invalidity because of a conflict between a treaty and *jus cogens*. His delegation therefore suggested that a procedural paragraph be added to draft conclusion 14 to reflect the general rules contained in articles 65 and 67 of the Vienna Convention.

55 The same comment applied to draft conclusions 15 to 17. The inclusion of procedural aspects relating to the invocation of invalidity in the draft conclusions concerning other sources of law and obligations appeared to be equally relevant. At the very least, a study should be considered of realistic procedural rules for ascertaining claims to invalidity of sources of law and obligations other than treaties.

56 Draft conclusion 18 required further clarification. As had been noted in the debates in the Commission, not all *erga omnes* obligations were related to *jus cogens* norms. That should be clarified either in the draft conclusion itself or in the commentary. As to draft conclusion 19, his delegation questioned whether the complete absence of any circumstance precluding wrongfulness with respect to an act not in conformity with an obligation arising under a *jus cogens* norm was legally sound. At least in theory, situations of distress might be envisaged in which a State must choose between two *jus cogens* obligations when respect of both was impossible in the given circumstances.

57 Concerning the order of the draft conclusions, draft conclusion 21 was closely connected with draft conclusion 18 and should thus follow immediately after draft conclusion 18. With respect to the content of draft conclusion 21, his delegation suggested the addition of a subparagraph stating that the obligation of non-recognition should not disadvantage the affected population and did not extend to the recognition of acts, such as the registration of births, deaths and marriages, the effects of which could be ignored only to the detriment of the affected population. That was in line with the advisory

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opinion of the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

58 The Netherlands reiterated its position that it was not in favour of including a list of *jus cogens* norms. The authoritative nature of a list, illustrative or otherwise, would in all likelihood prevent the emergence of State practice and *opinio juris* in support of other norms. If the inclusion of a list was nevertheless considered necessary, a reference should be made to the commentaries to articles 26 and 40 of the articles on responsibility of States for internationally wrongful acts, which included tentative and non-limitative lists of *jus cogens* norms.

59 **Mr. Jiménez Piernas** (Spain), referring to the topic "Protection of the atmosphere" and the draft guidelines adopted on first reading, said that in Spanish, the titles of draft guideline 10 (*Aplicación* [Implementation]) and draft guideline 11 (*Cumplimiento* [Compliance]) could be synonymous, depending on the context. In the case at hand, there was no risk of confusion, but for the sake of clarity, and in the light of the commentary to draft guideline 10, his delegation recommended that the titles be modified to read "National implementation" and "International compliance", respectively.

60 With regard to the words used to indicate the nature of recommendations, his delegation wished to point out that the draft guidelines contained both obligations that existed under international law and recommendations set out in the draft guidelines. In paragraph (4) of the commentary to draft guideline 10, it was explained that the discretionary nature of the recommendation in the draft guideline was explained by the use of the word "may". In the Spanish text, however, the wording used was "*deber* + infinitive" [must + infinitive], which indicated an obligation. In draft guideline 9, the imperative nature of the task was somewhat attenuated by the phrase "*en la medida de lo posible*" [to the extent possible] or by the words "*deben procurar*" [should endeavour to], which referred to an obligation of conduct, not an obligation of result. In draft guidelines 5, 6 and 7 and in draft guideline 12, paragraph 2, the recommendation was worded as though it were an obligation. The Commission should try to find another wording.

61 Draft guideline 10, paragraph 1, referred to national implementation of obligations under international law. Such obligations were, as stated in the commentary, those included in draft guidelines 3, 4 and 8. With regard to draft guideline 8, the Commission stated that "[e]ven the obligation to cooperate sometimes requires national implementation". The same could apply to the facilitative procedures that might be used in the framework of a treaty to achieve compliance (draft guideline 11, paragraph 2 (a)). His delegation therefore suggested that the commentary as to the scope of draft guideline 10, paragraph 1, also extend to draft guideline 11, if deemed appropriate, with a clarification regarding paragraph 2 (a) similar to the one provided in draft guideline 8.

62 International organizations were explicitly mentioned in the framework of international cooperation and implicitly with regard to the process of identi-

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fication, interpretation and application of the relevant rules of international law. Unlike the Guide to Provisional Application of Treaties, which referred to both States and organizations, the draft guidelines on protection of the atmosphere focused on States. However, in the commentary to draft guideline 10, it was noted that "the term 'national implementation' also applies to obligations of regional organizations such as the European Union". The wording of that sentence was unclear. Regional organizations such as the European Union might assume obligations under international law, and the national implementation of such obligations might take the form of measures adopted by the organization itself (European Union regulations) or adopted by its member States (national rules implementing European Union directives). It was not clear what the Commission was referring to in mentioning those organizations; the sentence should be rephrased.

63 His delegation agreed with the inclusion of draft guideline 12, in which the Commission reaffirmed the principle of the peaceful settlement of disputes and stressed that technical and scientific experts might be used in the settlement of disputes between States. The recommendation to use technical and scientific experts helped to resolve the debate that had taken place in the Drafting Committee concerning the relevance of including a draft guideline on dispute settlement.

64 As for the formulation of that recommendation, the draft guideline simply stated that "due consideration should be given" and in the commentary to the draft guideline, the Commission merely stated that the principles *jura novit curia* (the court knows the law) and *non ultra petita* (not beyond the parties' request) might be relevant in the context of judicial or arbitral processes of settling disputes relating to protection of the atmosphere. Due to the increasing scientific and technical complexity of the field, the line between "law" and "fact" was often imprecise. In his fifth report (A/CN.4/711), the Special Rapporteur addressed the issue and stated that *jura novit curia* put a limit on the restriction imposed by *non ultra petita*. However, the Special Rapporteur's reports and the draft guidelines served different purposes. The Commission had decided not to go further, and given the importance, complexity and topicality of the issue, his delegation believed that that was the right decision at the current time; the issue could perhaps be further developed in the commentary during the second reading.

65 With regard to the topic "Provisional application of treaties" and the draft guidelines adopted on first reading, he said that on the basis of draft guideline 7 (Reservations) and bearing in mind draft guideline 5 (Commencement of provisional application), it could be concluded that reservations that produced an effect during provisional application could be formulated in two different instances, which might or might not coincide in time.

66 One such instance was when the State or international organization expressed its consent to be bound by the treaty. A reservation formulated in that instance would produce an effect when the treaty entered into force for the author of the reservation. However, his delegation took the view that the reservation would also produce an effect for the author during provisional

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application, because according to draft guideline 6, provisional application produced the obligation to apply the treaty or a part thereof "as if the treaty were in force".

67 Although it was stated in the commentary to draft guideline 6 that "[p]rovisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties", it was possible to formulate reservations to provisional application, and such reservations would be governed by the rules of the law of treaties relating to reservations. Therefore, there did not seem to be any reason to rule out the possibility that reservations that would produce an effect when the treaty entered into force might also produce an effect during provisional application. Nonetheless, that was a possibility, not an imposition. Draft guideline 6 stipulated that provisional application produced the obligation to implement the treaty or a part thereof as if the treaty were in force, "unless the treaty provides otherwise or it is otherwise agreed". That caveat served as the underpinning for draft guideline 7, but it was not developed further in the draft guideline.

68 The other possible instance when a reservation could be formulated was when the provisional application of a treaty or a part thereof was agreed upon. In that instance, draft guideline 7 called for the formulation of a reservation "purporting to exclude or modify the legal effect produced by the provisional application". It followed that, unless the treaty provided otherwise, or it was otherwise agreed, reservations formulated upon agreeing to provisional application did not produce an effect for the author of the reservation when the treaty entered into force. That conclusion was especially relevant when the provisional application was agreed after the expression of consent to be bound by the treaty; otherwise, reservations to provisional application could be used as a means of incorporating "late reservations" to the application of the treaty.

69 Draft guideline 7 and the commentary thereto provided a response to important questions raised in 2016 when the Special Rapporteur had analysed the problems surrounding reservations. However, certain questions had yet to be clarified, such as what happened in the case of reservations formulated upon the signing of a treaty and which, pursuant to article 23, paragraph 3, of the Vienna Convention on the Law of Treaties, must be confirmed by the author when expressing its consent to be bound by the treaty. When agreeing to provisional application, if nothing was stated to that effect and provisional application began after the signature but before confirmation, the question was whether those reservations produced an effect during the provisional application.

70 The two paragraphs in draft guideline 7, one referring to States and the other to international organizations, were identical; the only difference between them was the legal framework referred to: the Vienna Convention on the Law of Treaties and the relevant rules of international law, respectively. They could have been addressed jointly, as in draft guidelines 2 and 9, with the legal framework being referred to as: "the Vienna Convention on the Law of Treaties and other rules of international law". In addition to being

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more streamlined, that formulation was more appropriate, bearing in mind that some States were not parties to the Vienna Convention.

71 His delegation endorsed the new version of draft guideline 9 (Termination and suspension of provisional application), for a number of reasons. First, it modified elements of the 2017 version on which his delegation had made comments. At the time it had expressed its disagreement with the reasoning that had led the Commission to rule out the explicit inclusion of termination of provisional application as a result of the entry into force of a treaty, and with the statement that provisional application was not subject to the rules of the law of treaties on termination and suspension.

72 Second, a reference to the rules of international law on the termination and suspension of treaties opened up a new possibility that could be extremely useful, namely termination or suspension of provisional application exclusively when it was in relation to another subject of international law. Third, the inclusion of the causes of termination and suspension of provisional application in a single draft guideline contributed to greater clarity.

73 His delegation reiterated its request for a reference to "mixed agreements" which the European Union and its member States concluded with one or more States or international organizations. For the European Union, the entry into force of a mixed agreement entailed the obligation to apply only those provisions falling under its authority; and provisional application, logically, could not go beyond that. In his delegation's view, that possibility was included in the Guide to Provisional Application of Treaties, with its reference to the provisional application of only a part of a treaty, not to the treaty as a whole.

74 It was not necessary for the Commission to address the bilateral or multilateral nature of those mixed agreements; the issue had been addressed in 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), and by the European Union itself in its statement to the Sixth Committee in 2017. But insofar as both the European Union and its member States gave, in the international arena, their consent to be bound by a treaty, the reference made to the rules of that international organization, albeit appropriate, was insufficient.

75 Lastly, the practice of mixed agreements should be included in the commentaries to a guide purporting to offer insight into the law and practice on provisional application of treaties. A reference to that practice could be included in paragraph (4) of the commentary to draft guideline 3, on the provisional application of a part of a treaty.

76 **Mr. Sharma** (India), referring first to the topic "Peremptory norms of general international law (*jus cogens*)" and the draft conclusions proposed by the Special Rapporteur, said that draft conclusion 14 recommended that any dispute concerning whether a treaty conflicted with a *jus cogens* norm should be submitted to the International Court of Justice, subject to the jurisdictional rules of the Court. Nonetheless, it should also be possible to analyse

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the issue in the light of the concerns that had been raised by some members during the negotiations on article 66 of the Vienna Convention on the Law of Treaties, which provided for other means of dispute settlement beyond referral to the Court.

77 Draft conclusion 17, which stated that binding resolutions of international organizations, including Security Council resolutions, were invalid if they conflicted with a *jus cogens* norm, should be analysed to determine its impact on actions taken under Chapter VII of the Charter of the United Nations and on the application of Article 103 of the Charter. That would provide greater clarity on the question of whether a Charter obligation overrode an obligation that constituted a *jus cogens* norm. His delegation was in favour of work continuing on the topic, but the Commission should have an in-depth debate on the draft conclusions, given the sensitive nature of the subject matter.

78 Turning to the topic "Protection of the atmosphere" and the draft guidelines adopted on first reading, he said that his delegation welcomed the suggestion of cooperative compliance mechanisms, on the understanding that the draft guidelines, when finally adopted, would be available as material to be used based on the suitability of conditions and the willingness of States, and not to be implemented as treaty provisions. In his delegation's view, the obligations under international law referred to in the draft guidelines would mean for a State those obligations agreed in an international instrument to which the State was a party. Thus, the draft guidelines did not create binding international law. Similarly, the reference to disputes should also be understood as being those that might arise under the international instrument to which the States concerned were parties. Such an international instrument would have provisions on a dispute settlement procedure. In sum, the draft guidelines should serve as a reminder that States must comply with their obligations to protect the atmosphere in accordance with the procedure envisaged in the relevant international instrument.

79 Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", he said India preferred to examine immunity as a concept, without linking it to questions of immunity referred to the International Criminal Court. His delegation did not approve of the method used in provisionally adopting draft article 7, namely by a vote. For the final adoption, the views of all members of the Commission must be taken into account in order to achieve a consensus.

80 **Mr. Kingston** (Ireland) said that his delegation welcomed the adoption on first reading of the full set of draft guidelines and commentaries thereto on the topic "Provisional application of treaties". It endorsed the decision of the Drafting Committee to amend draft guideline 6 and replace the phrase "the same legal effects" with "a legally binding obligation to apply the treaty or a part thereof". The clarification in paragraph (5) of the commentary that that new formulation did not imply that provisional application had the same legal effect as entry into force was a useful addition.

81 In relation to draft guideline 7 (Reservations), Ireland took note of the divergent views of Commission members on whether it was necessary to include a

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provision on reservations in the context of provisional application of treaties. It also noted that no case in which a treaty had provided for the formulation of reservations in relation to provisional application or in which a State had formulated reservations to a treaty that was being applied provisionally had been identified. That being the case and given that the Commission was only at an initial state of considering the question of reservations in that context, his delegation was of the view that further study of the practice of States and international organizations should be undertaken and referred to in the commentary, if draft guideline 7 was to be adopted.

82 The development of model clauses provided useful assistance in cases in which provisional application was considered appropriate. However, there was a need for flexibility in the provisional application of treaties, a tool that was available to a wide variety of institutional and legal systems. The tendency of States and international organizations to tailor their treaty relations through provisional application had been noted in the memorandum by the Secretariat (A/CN.4/707). In particular, the Secretariat had pointed out that that flexibility revealed itself with regard to the terminology used and the type of agreement on and conditions for provisional application. If the model clauses proposed by the Special Rapporteur were adopted, it should be stated in the commentaries that they were provided merely as a useful guide for parties seeking to avail themselves of provisional application.

83 **Mr. Metelitsa** (Belarus) said, with regard to the topic "Peremptory norms of general international law (*jus cogens*)", that State practice was the sole source of international law. The practice of international organizations and international legal bodies could only help in identifying State practice for the purpose of establishing international peremptory norms. Human rights bodies and national courts were not appropriate sources for identifying peremptory norms of international law, as those bodies applied but national law.

84 Addressing the draft conclusions on the topic proposed by the Special Rapporteur, he said that in draft conclusion 5, the sources of *jus cogens* norms were not clearly formulated. Bearing in mind the nature of *jus cogens*, such norms must be part of general international law. In that connection, an international treaty could either reflect an existing *jus cogens* norm or contain norms capable of rising to the level of *jus cogens* after their acceptance as such by all States. Both scenarios should be reflected in draft conclusion 5. The text needed to be improved in the Drafting Committee.

85 With regard to draft conclusion 7, the idea that the acceptance and recognition of a large majority of States was sufficient for the identification of *jus cogens* norms would lead to situations where States would be bound by norms in respect of which they had consistently formulated reservations. Security Council resolutions or decisions of international courts, for example, were also obligatory for States, but they were generally based on existing norms of international law with which States had already agreed. Acceptance and recognition by a large majority of States as the basis for the identification of *jus cogens*, as set forth in the draft conclusion, was therefore clearly

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insufficient. Thus, there must be clearer and incontrovertible criteria for identifying such peremptory norms.

86 The idea in draft conclusion 9 that judgments and decisions of international courts and tribunals might also serve as evidence of acceptance and recognition for the identification of a *jus cogens* norm required further clarification, since those judgments and decisions did not constitute State practice. They needed to be accepted and recognized by all States before they could become *jus cogens* norms. In draft conclusion 10, paragraph 2, the word "void" should be replaced with "invalid", as new peremptory norms did not lead to the voiding of an international treaty, but to its invalidity. Thus, the parties to the treaty were not required to eliminate the consequences arising out of the application of the treaty before the emergence of the new peremptory norm.

87 In draft conclusion 11, paragraph 1, and draft conclusion 12, paragraph 1, the opposite was true: "invalid" should be replaced with "void", because a treaty in conflict with an existing peremptory norm did not produce any legal consequences. Draft conclusion 11, paragraph 2 (c), was unclear and should be clarified. Draft conclusion 13, paragraph 1, should specify that reservations to the provisions of a treaty reflecting a peremptory norm were not permitted. His delegation was not convinced that draft conclusion 14, which dealt with dispute settlement, was necessary, especially the provision about the parties submitting the dispute to arbitration. It failed to see how a few arbiters appointed by two States could determine what was a peremptory norm.

88 On draft conclusion 15, it could be inferred from the current wording of paragraph 1 that a norm established through a practice accepted as a legal obligation did not arise if it conflicted with a norm which all States considered inviolable. The result was that a State could take an action which it could consider as fulfilling and at the same time violating that obligation. As that was a contradiction in terms, it would be more accurate to say that State practice that was in conflict with a peremptory norm did not establish a norm of general international law.

89 Draft conclusion 17, paragraph 1, was not only illogical, since it stated that binding resolutions did not establish binding obligations, but also ran counter to the Preamble and Articles 25 and 103 of the Charter of the United Nations, which were considered peremptory norms. The idea was not to specify the type of resolutions that the Security Council should formulate, but to point out that Member States should implement them in accordance with peremptory norms of international law.

90 Draft conclusions 22 and 23 should be deleted. First of all, international criminal law was not the only branch of law with peremptory norms. Secondly, violation of peremptory norms of international law entailed international legal, and not criminal, responsibility. Thirdly, universal jurisdiction had been established for only three types of crimes: genocide, war crimes and crimes against humanity. Clearly, peremptory norms were not limited to those three. Fourthly, the Commission was already considering the topics of immunity of State officials from foreign criminal jurisdiction and crimes

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against humanity. There was no reason to duplicate that effort, especially in a document that should be more closely linked to the results of work already concluded on two related topics, namely identification of customary international law and subsequent agreements and subsequent practice in relation to the interpretation of treaties. Instead of draft conclusions 22 and 23, his delegation proposed that a more general rule be formulated on the international legal responsibility of States for violations of peremptory norms of international law. The Commission should also consider inserting a draft conclusion dealing with the relationship between the general principles of international law and *jus cogens*.

91 Turning to the topic "Protection of the atmosphere", he said that the full text of his delegation's comments could be found on the PaperSmart portal. In the draft guidelines on the topic adopted on first reading, the definition of "atmospheric pollution" in draft guideline 1 (b) should also reflect the fact that not only anthropogenic, but also natural factors, such as animal emissions, plants and wildfires, could be important sources of atmospheric pollution; it was inaccurate to refer only to substances released by humans.

92 In draft guideline 2, paragraph 3, the Commission should either list the names of all dual-impact substances or not include any and leave the issue to the discretion of States, especially as there were differences of opinion about some of those substances, such as black carbon. In draft guideline 3, the Commission should leave it up to States to apply their national laws in cases where they contained higher standards than those set by international law. In draft guideline 9, paragraph 1, the focus should not be on the avoidance of conflicts but on the development of norms of international law.

93 Lastly, on the topic "Provisional application of treaties", it should be indicated in draft guideline 12 of the Guide to Provisional Application of Treaties that States and international organizations which limited provisional application of treaties in their internal law must specify which provisions of a treaty would not apply before the treaty's entry into force.

94 **Ms. Yvard** (Thailand), speaking on the topic "Provisional application of treaties", said that her delegation welcomed the adoption on first reading of the Guide to Provisional Application of Treaties, which would help to clarify the scope of application of article 25 of the Vienna Convention on the Law of Treaties, in particular the questions regarding the availability of provisional application to international organizations and the legal effects of the provisional application of a treaty or a part thereof. Thailand was a country with a dualist system. Therefore, the application of a treaty, or the provisional application of a treaty or a part of a treaty would not form part of Thai law unless appropriate domestic legislation was adopted to that end.

95 Her delegation welcomed the approach to the termination and suspension of provisional application in draft guideline 9. Since the provisional application of a treaty would produce the same legal effect as if the treaty were in force, it was only logical that the relevant rules governing the termination and suspension of the operation of treaties as set forth in the Vienna Convention

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apply mutatis mutandis to the provisional application of a treaty or a part of a treaty.

96 On the topic "Peremptory norms of general international law (*jus cogens*)", she said that the threshold for the identification of *jus cogens* needed to be higher and more precise than simply "a large majority of States", which was lower than what the expression "as a whole" would require. The establishment of an illustrative list of *jus cogens* might actually hinder the development of *jus cogens*, which might and should evolve over time. Her delegation looked forward to the proposals by the Special Rapporteur on that issue in his next report. Lastly, her delegation was of the view that acceptance of the existence of regional *jus cogens* norms would contradict and undermine the notion of *jus cogens* being norms "accepted and recognized by the international community as a whole". Regional *jus cogens* therefore would not be possible under international law.

97 **Ms. Hallum** (New Zealand) said with regard to the topic of protection of the atmosphere that her delegation supported the idea that the rules of international law relating to the protection of the atmosphere and other relevant rules of international law should, to the extent possible, be identified, interpreted and applied in a coherent manner. In that connection, in the draft guidelines on the topic adopted on first reading, the emphasis in draft guideline 11 on States complying with the rules and procedures in the relevant agreements to which they were parties was helpful. Her delegation also endorsed the emphasis placed in draft guideline 12 on the settlement of disputes by peaceful means. However, issues relating to implementation, compliance and dispute settlement should rest primarily within the ambit of the relevant international legal regime.

98 Her delegation had welcomed the inclusion of the topic "Peremptory norms of general international law (*jus cogens*)" in the Commission's programme of work, and it considered the analysis of the consequences and legal effects of peremptory norms to be an important step toward developing proposals for an illustrative list; it would also be interested to learn whether the Commission intended to attempt to articulate the content of the *jus cogens* norms included in such a list.

99 As with the Commission's work on the identification of customary international law, the topic might have real practical value for States, including for domestic courts. However, given the nature of *jus cogens* norms and their place in the hierarchy of sources of international law, the lack of State practice in the area and the serious consequences flowing from either breach of or conflict with a peremptory norm, the Commission should continue to take a cautious and balanced approach to its work on the subject. In its discussions on the topic at its seventieth session, the Commission had covered a wide range of important and highly complex issues which required a more in-depth consideration by States than had been possible in the time available since the publication of the report on its work of the session.

100 On the draft conclusions proposed by the Special Rapporteur, her delegation welcomed the analysis in draft conclusions 10 to 13 of the intersection

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between international law related to peremptory norms and the relevant provisions of the Vienna Convention on the Law of Treaties. The Vienna Convention was the appropriate starting point for considering the effect of peremptory norms on States' treaty-based obligations. It would also be helpful for the draft conclusions to follow the formulations in the articles on responsibility of States for internationally wrongful acts, where appropriate. Her delegation also noted the Special Rapporteur's view that a provision in a treaty should, as far as possible, be interpreted in a way that rendered it consistent with a peremptory norm, as well as the proposal to formulate a single draft conclusion on interpretation that would be applicable to all sources of international law.

101 Turning to the topic "Protection of the environment in relation to armed conflicts", she said that the law of occupation, an area that had been developed in the early twentieth century, should be considered in the contemporary context, and the linkages between it and international law relating to human rights and the environment should be addressed. Her delegation agreed that consultations with the United Nations Environment Programme and the International Committee of the Red Cross were important in that context and it noted the continuing importance of ensuring that that work was in line with international humanitarian law.

102 The three draft principles proposed by the Special Rapporteur in her first report (A/CN.4/720 and A/CN.4/720/Corr.1), on the general obligations of an Occupying Power, the sustainable use of natural resources, and due diligence, were soundly based on the relevant legal principles and were a helpful addition to the draft principles already developed under the topic.

103 New Zealand endorsed the Special Rapporteur's intention to address in her next report questions concerning protection of the environment in non-international armed conflicts, and responsibility and liability for environmental harm in relation to armed conflicts. It noted the Special Rapporteur's intention to replace the term "occupying State" with "Occupying Power" and to consider the extent to which the principles might have relevance to the administration of a territory, for example for United Nations missions, insofar as they entailed the exercise of functions and powers that were comparable to those of an occupying State under the law of armed conflict. In addition to the information requested on the issues listed in chapter III of the Commission's report (A/73/10), it would also be useful if the Commission could provide a few questions on each of the current topics on which it would appreciate comments from States.

104 **Ms. Orosan** (Romania) said with regard to the topic "Protection of the atmosphere" that her delegation supported work on the topic, as the atmosphere was a resource of common concern of humankind. As for the draft guidelines on the topic adopted on first reading, her delegation doubted whether the reference in draft guideline 10 to the different forms that national implementation of international obligations could take was useful. A more direct link with the specific nature of international obligations regarding protection of the atmosphere was necessary.

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105 With a view to promoting progressive development on the topic, Romania supported the use of compliance mechanisms, which were important to ensure that States acted in good faith, in line with their international obligations. Romania had used such mechanisms in the past and had been both a monitoring State and a monitored State in compliance review procedures. Thus, it could attest to the usefulness of such mechanisms in raising awareness of local and central authorities and of society as a whole of the need to adopt measures on the implementation of international legal obligations and on the appropriateness of the means adopted for their implementation.

106 Draft guideline 11 (Compliance) and the commentary thereto suggested the possibility of an alternative use of facilitative or enforcement procedures. Another viable option was that both procedures could be used subsequently: facilitative arrangements could be used first, and should non-compliance persist, an enforcement procedure should be envisaged.

107 With regard to the topic "Provisional application of treaties", her delegation welcomed the revised version of the commentaries to the draft guidelines adopted on first reading. While it acknowledged the flexible nature of provisional application, Romania believed that the objective of the guidelines was to provide further clarity to subjects of international law so that they could adjust their practice accordingly. Substantial progress had been made in the complex task of distinguishing between provisional application and entry into force. The additional explanations included in the commentaries to draft guidelines 6 and 9 were useful in that regard.

108 The source of the obligation for States or international organizations not taking part in treaty negotiations still needed to be further clarified, as did the situation of States that did not take part in the adoption of a decision by an international organization or intergovernmental conference or that voted against it. Clarity on the source of the obligation, and thus the moment as of when the *pacta sunt servanda* principle was relevant, was also needed in order to elucidate the circumstances surrounding the formulation of reservations. In that context, draft guideline 7 was a welcome addition. Her delegation endorsed the proposed model clauses, which reflected the practice of Romania in the area, and believed that they would be widely used in future treaties.

109 On the topic "Peremptory norms of general international law (*jus cogens*)", she said it would have been useful for the Sixth Committee to have had available for consideration draft conclusions and commentaries thereto that expressed the view of the Commission on the subject, bearing in mind that some important work had already been carried out on the topic. The Commission's consideration of the topic must be based on State practice, rather than on doctrinal approaches. That was the only way to move ahead with the codification and progressive development of international law. The Special Rapporteur should pay greater attention to existing international law and see to it that the Commission's work did not depart from the normative framework already in place. At the same time, consistency should be ensured with the other topics that had already been considered or were still under

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consideration by the Commission, in order to prevent fragmentation or conflicting statements.

110 **Mr. Colaço Pinto Machado** (Portugal) said that his delegation attached great importance to the topic "Protection of the atmosphere". Overall, the twelve draft guidelines submitted by the Commission reflected a balanced positive approach to the topic. In terms of legal analysis, it was imperative to address the problem from a "cause and effect" perspective. His delegation supported the provision in draft guideline 12 that disputes should be settled by peaceful means. As his delegation had stated in the past, the Commission's current work was an important opportunity to develop guidelines and promote mechanisms that could lead States to consider adopting common norms, standards and recommended practices to promote the protection of the atmosphere in the areas of trade and investment law, the law of the sea and human rights law.

111 The topic "Provisional application of treaties" was of considerable importance to Portugal, since the provisional application of a treaty was not compatible with its Constitution. Portugal welcomed the revised text of the draft guidelines adopted on first reading, as it addressed the majority of the concerns expressed in its previous statements. The text of both draft guideline 3 and the general commentary clearly reflected the voluntary nature of the provisional application mechanism. His delegation also appreciated that the Commission explained in paragraph (3) of its commentary to draft guideline 3 the reasons that had led it not to use the words "negotiating States" as used in article 25 of the Vienna Convention on the Law of Treaties.

112 Portugal also welcomed the changes in the text of draft guideline 6, as the new wording left less room for confusion and doubts. However, the words "legal effect" were still used in the text of the new draft guideline 7, reintroducing the uncertainty that had previously hovered over draft guideline 6. Although those words were taken from the definition of a reservation in the Vienna Convention, it would be preferable to use a less ambiguous formulation. The explanation given in paragraph (5) of the commentary to draft guideline 7 was not sufficient to justify the Commission's rationale for choosing that wording. In particular, the idea of a reservation to the "legal effect produced by the provisional application" seemed quite unlikely, as a State could obtain the same effect through the provisional application of parts of a treaty. Given the lack of relevant State practice, the Commission should consider the issue of reservations more carefully.

113 Even though draft guideline 12 had not been redrafted, the strengthening of the references to the voluntary nature of the provisional application of treaties had softened the idea that provisional application could be considered as a default rule or a general practice. In any case, the Commission might consider changing the location of that draft guideline, making it a new draft guideline 10, in order to give it more prominence. Portugal welcomed the model clauses presented by the Special Rapporteur, which would be an excellent addition to the text of the draft guidelines. It hoped that the Commis-

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sion would work on the model clauses so that they could become part of the Guide to Provisional Application of Treaties.

114 With regard to the topic "Peremptory norms of general international law (*jus cogens*)", he said that the Commission's work on the consequences and effects of *jus cogens* would help make existing international norms more understandable, maintain the stability of the international legal system and provide clarification on the basis for State compliance with peremptory norms of international law. In terms of methodology, the procedure adopted by the Commission would allow for a final and systematic revision of the draft conclusions proposed by the Special Rapporteur, if need be, at the end of the discussion. Nonetheless, his delegation would welcome having all reports and other relevant elements – including the comments by the Special Rapporteur and the Commission – made available in a consolidated and up-to-date form for States to provide their comments. Such a measure would greatly enhance transparency and make it easier for States to react to the Commission's work.

115 The Commission had struck a good balance between theory and practice in its work on the topic at its seventieth session. It had highlighted that States and international organizations had positive obligations with regard to peremptory norms of general international law. Assuring the ongoing implementation of treaties was essential for international legal certainty. The implementation of a treaty whose norms were invalid due to a conflict with a *jus cogens* norm should therefore be safeguarded when the essential basis of the treaty was not at stake, as set out in draft conclusion 11, paragraph 2. However, a more detailed explanation on the different legal consequences of the situations referred to in draft conclusion 11 should be provided.

116 Portugal would also welcome a clarification concerning draft conclusion 18, which addressed the relationship between *jus cogens* and *erga omnes* obligations. Even though all obligations arising from a *jus cogens* norm were *erga omnes* obligations, it could not be argued that all *erga omnes* obligations derived from *jus cogens*, or that the *erga omnes* nature of the obligation at stake derived solely from the fact that it had its origin in a *jus cogens* norm. On that point, his delegation shared the view of the members of the Commission who considered that the relationship between *jus cogens* and *erga omnes* obligations needed thorough consideration.

117 Portugal agreed with the idea expressed in draft conclusions 20 to 22 that States were not merely required to refrain from acting in a way that violated *jus cogens*, but had a duty to actively cooperate to disseminate and uphold those norms, which derived from the fundamental values of the international community. Portugal appreciated the Special Rapporteur's efforts to expand the discussion on *jus cogens* beyond treaty law and State responsibility, and it commended the Special Rapporteur on his decision to seek a more consensual formulation for draft conclusions 22 and 23 by introducing a "without prejudice" reference.

118 As Portugal had stated previously, an illustrative list would not impair the progressive development of *jus cogens*. However, it was likely that a debate

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on that question would be time-consuming and complex. If the Commission focused on identifying the criteria, consequences and effects of *jus cogens* norms, then it would have succeeded in its mission. Making *jus cogens* norms more identifiable to more States was possible, even without an illustrative list of norms.

119 Lastly, the Commission must proceed with caution in its debate on the identification of regional *jus cogens*. The integrity of peremptory norms of general international law as norms that were universally recognizable and applicable should not be jeopardized.

120 **Mr. Perera** (Sri Lanka) said that although island nations like Sri Lanka were particularly vulnerable to the impact of extreme weather, atmospheric pollution and climate change, the international community had made considerable progress in recognizing that the environment and its protection were the responsibility of all nations. His delegation was therefore pleased that the important topic of protection of the atmosphere, which involved complex issues of both science and law, was moving forward in the right direction. The topic could not properly be discussed or developed in isolation from the scientific community; his delegation therefore commended the Special Rapporteur on his initiatives and dialogues with scientists.

121 With regard to the draft guidelines adopted on first reading, Sri Lanka was of the view that the phrase "pressing concern of the international community as a whole" in the fourth preambular paragraph should be replaced with "common concern of humankind", in line with the wording used in the 2015 Paris Agreement. His delegation welcomed the fifth preambular paragraph, which reflected considerations of equity and the special situations and needs of developing countries addressed in several international instruments, including the United Nations Convention on the Law of the Sea, the 1992 United Nations Framework Convention on Climate Change and the 2015 Paris Agreement. That was consistent with the current trend of legal instruments dealing with the global commons.

122 In the definition of "atmospheric pollution" in draft guideline 1 (b), the reference to the release of "substances" should be expanded to the release of "substances and energy", as was the case in article 1, paragraph 4, of the United Nations Convention on the Law of the Sea and in the Convention on Long-range Transboundary Air Pollution.

123 Collective international efforts to define and correct the depredation of the Earth by humankind needed to be stepped up if the planet was to be saved for future generations. One of the most devastating impacts of atmospheric degradation for all States was sea-level rise due to global warming. His delegation called for a strengthening of the wording in the sixth preambular paragraph in order to reflect the urgent warnings from scientists about atmospheric degradation. Lastly, to avoid redundancy, the Commission should consider eliminating the references to the 2013 understanding in the eighth preambular paragraph and in draft guideline 2, paragraphs 2 and 3.

124 **Ms. Zamakhina** (Russian Federation), commenting on the topic "Provisional application of treaties", said that the subject was becoming increasingly topi-

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cal, and active attempts to insert provisional application provisions into international treaties were multiplying. The legislation of the Russian Federation on international treaties was based on the Vienna Convention on the Law of Treaties and allowed for the provisional application of treaties. The number of international treaties provisionally applied by the Russian Federation remained relatively unchanged: approximately 100. Provisional application was exceptional in nature and should only be used in cases where there was a pressing need to begin implementing an international treaty without awaiting its entry into force.

125 The Government of the Russian Federation made every effort to maintain that position, but practical questions constantly arose on a wide range of issues. One example would be a case in which the need arose within a regional economic integration organization to include a provision on provisional application in an international treaty but the legislation of one of the members of that organization did not allow for provisional application. That posed a problem, because the interests of integration required that the agreement be applied by all member States at the same time. It could of course be envisaged that, for those States which could not provisionally apply the treaty, the treaty would become obligatory from the moment that they expressed agreement to be bound by it. However, in that case there was a lack of clarity about the legal nature of the obligations of those States during the period between the expression of consent to be bound by the obligations under the treaty and its entry into force.

126 Another question also arose: in accordance with article 25 of the Vienna Convention, which was reflected in draft guideline 9, the provisional application of a treaty was terminated if a State informed other States provisionally applying the treaty of its intention not to become a party to it. The following situation could be imagined: a State expressed its consent to provisionally apply a treaty, but before its entry into force, the State decided not to become a party to the treaty. Her delegation wondered whether that State would in that case need to both withdraw its consent to be bound by the treaty and notify other States of its intention not to become a party to the treaty, or whether it would only need to either withdraw its consent to be bound by the treaty or simply inform the other States of its intention not to become a party to the treaty.

127 The Russian Federation had recently faced another interesting situation. It had terminated the provisional application of a multilateral international treaty, informing the treaty depositary of its intention not to become a party. However, in the opinion of the depositary, although the Russian Federation had terminated the provisional application of the treaty, it continued to be bound by the obligations stemming from its having signed the treaty. Her delegation was of the view that the notification of an intention not to become a party to a treaty not only terminated its provisional application but also released the State from the obligations stemming from its having signed the treaty. The above-mentioned examples showed the importance of the topic and the broad range of practical issues involved.

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128 As the topic was being considered in the Commission, there seemed to be a trend toward blurring the difference between the provisional application of treaties and their implementation. Provisional application of international treaties must be subject to all the requirements of treaty law, including those relating to adoption, reservations, termination and suspension. Her delegation had the impression that there was a dangerous attempt to make the provisional application of treaties as easy as possible for the parties; the issue must be approached with caution. The proliferation of provisional application treaties and the ease of use of such instruments could lead to the implementation of international treaties being replaced by the provisional application thereof, which would have an adverse impact on the stability of the treaty regime and on the entire international legal system.

129 With regard to the topic "Peremptory norms of general international law (*jus cogens*)", her delegation agreed with the Commission that the Vienna Convention on the Law of Treaties was the basis for work on the topic. It therefore endorsed draft conclusion 11, as presented in the report of the Chair of the Drafting Committee, where the word "invalid" had been replaced with "void"; in her delegation's view, that reflected the Vienna Convention and would harmonize the terminology between the two instruments. Her delegation welcomed the Commission's plan, set out in the report of the Drafting Committee, to make draft conclusion 10, paragraph 3, a separate draft conclusion, so as to strengthen the general rules of interpretation for peremptory norms of international law. However, it hoped that the existing text would be improved by taking into account all the relevant provisions of the Vienna Convention referred to in the Special Rapporteur's report.

130 At the same time, her delegation was not convinced that the scope of the topic should include a dispute settlement mechanism, as set forth in draft conclusion 14, which included referral to the International Court of Justice. That was not in line with the non-normative form of the draft conclusions. Dispute settlement should be interpreted strictly in line with the Vienna Convention. It was worth noting that States had made many reservations about article 66 of the Vienna Convention, which dealt with procedures for judicial settlement.

131 Concerning draft conclusion 15, paragraph 3, her delegation questioned the Special Rapporteur's assertion that the persistent objector rule was not applicable to *jus cogens* norms. As the Special Rapporteur had himself noted, the issue was whether a *jus cogens* norm could emerge if there was a persistent objector. Although in his report the Special Rapporteur had stressed the importance of Security Council resolutions and had acknowledged that they could not be placed on the same footing as the resolutions of other international organizations, he seemed to be saying the opposite in draft conclusion 17, at least in its current form, because it could be interpreted as allowing a State to refuse to implement a Security Council resolution. As the Special Rapporteur rightly stated, discussions were currently under way on the issue of Security Council resolutions, including in connection with *jus cogens* norms, but they were more theoretical in nature and were not based on any

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practice. Therefore, the draft conclusions could be misinterpreted, which would undermine the activities of the Security Council.

132 Her delegation was particularly concerned about draft conclusions 22 and 23, which dealt with criminal accountability and immunity of State officials, two issues that had nothing whatsoever to do with the topic under consideration. In particular, there was no justification for including the topic of immunity in the draft conclusions, since it was already being considered by the Commission. The Russian Federation was not convinced that the parallel consideration of similar issues was appropriate, or that it was in line with the procedures established for the Commission's work, especially given the lack of consensus within the Commission and among States on a number of aspects relating to topic of immunity.

The meeting rose at 6.05 p.m.

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