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Mr. Chairman,

Moving to the second cluster of items discussed in the report of the International Law Commission, Brazil would like to make some remarks regarding the topics contained in Chapters VII and VIII of the Commission's report, namely: (i) provisional application of treaties and (ii) peremptory norms of general international law.

Let me start by the topic "peremptory norms of general international law (*jus cogens*)". First of all, we take this opportunity to commend Special Rapporteur Dire Tladi for the quality of his research and for reflecting practice in a manner consistent with the Vienna Convention on the Law of Treaties. Brazil considers that the debate on consequences and legal effects of identifying a norm as *jus cogens* is central to the Commission's work under this topic. I wish to make three comments regarding the draft conclusions examined this session.

The first comment is on Draft Conclusion 17, which deals with the consequences of *jus cogens* for binding resolutions of international organizations. Brazil considers it critically important to retain in the text an explicit reference to Security Council decisions. Given the hierarchy of international obligations created by Article 103 of the UN Charter, the ILC should not shy away from recognizing that the Security Council is also bound by *jus cogens* norms.

Second, regarding Draft Conclusion 20, which relates to the duty to cooperate, Brazil considers that narrowing the scope of this obligation to "serious" breaches of peremptory norms goes against the notion of *jus cogens* itself. While we see that the Commission sought inspiration from the commentaries to the articles on the responsibility of States for internationally wrongful acts, it should be stressed that *every* breach of *jus cogens* is - by definition - a serious one.

Third, on issues of criminal jurisdiction and immunities – discussed in Draft Conclusions 22 and 23 – we note that the Commission referred them to the Drafting Committee on the understanding that they would be dealt with by means of a "without prejudice" clause. While we understood the initial thrust of his proposal, we appreciate the Special Rapporteur's flexibility given the needs to maintain consistency in the work of the Commission under different topics.

Regarding future work under this topic, we encourage the Special Rapporteur to find a creative way of elaborating a illustrative list of *jus cogens* norms while respecting the understanding that the ILC should be dealing with process and method rather than discussing the content of the peremptory norms themselves.

Mr. Chairman,

I now turn to the topic "provisional application of treaties". As a general commentary, Brazil finds commendable that the guidelines frequently refer to "agreement" between states relating to the provisional application of a treaty. The Commission's heavy reliance on "agreements" is advisable, since the intention of states cannot be inferred or assumed in the domain of provisional application of treaties. On the contrary, states have to formally, explicitly, and in a written form, agree on the provisional application of a treaty. In the same vein, Brazil finds commendable that Guideline 3 adopts the term "may", thus reinforcing the idea that the provisional application of a treaty happens in a completely voluntary basis by the states concerned.

We also perceive a tension between the guidelines and the Vienna Convention on the Law of Treaties, which emerges clearly in some parts of the study. On guideline 6, paragraph (5) of the commentaries contains an important element to understand the Commissions' method on this topic, by stating that the existence of legally binding obligations resulting from the provisional application of a treaty does not imply that provisional application has the same legal effect as entry into force. Although the Guidelines attempt to apply several aspects of the law of treaties to the idea of provisional application, this commentary makes clear that there are areas not touched by the regime of the Vienna Convention on the Law of Treaties, given that provisional application does not equate to being in force.

A good example of this tension is the usage of the term "mutatis mutandis" in Guidelines 7(1) and 9(3), used in order to specify or isolate the domain of the provisional application from the general rationale of the Vienna Convention on the Law of Treaties. We see a risk in this methodology, because it stimulates legal uncertainty by not establishing the limits and the extent to which the Vienna Convention of the Law of Treaties rules will be applicable to different aspects of the provisional application of treaties.

Turning now to more specific aspects of the report, on guideline 4, which refers to the form of agreement, neither the guideline itself nor its commentaries are clear on the number of parties that shall agree to the provisional application of a treaty through a resolution adopted by an international organization or by an intergovernmental conference. Will all states parties be bound by a decision of an international organization or of an intergovernmental conference that allows the provisional application of a treaty – even if the resolution was not unanimous?

On guideline 7, related to reservations, the commentaries recognize that there is a substantive lack of practice in relation to provisional application of treaties. Moreover, as the report correctly states, bilateral treaties "constitute the vast majority of treaties that historically have been provisionally applied". Since the Guide to Practice on Reservations to Treaties approved in 2011 by the Commission

recognizes that there are not, properly speaking, reservations to bilateral treaties, we wonder about the need for a specific Guideline on reservations in relation to the provisional application of a treaty. A specific guideline on this matter might cause confusion, adding legal uncertainty in the domain of provisional application of treaties.

Finally, as we have mentioned on our commentaries about “jus cogens”, here as well we consider it important to maintain consistency in the work of the Commission under different topics. Hence, we believe that Guideline 8 should reflect, as far as possible, the notions contained in the ILC articles on state responsibility, particularly the elements detailed in articles 1 and 2 of the articles.

Thank you, Mr. Chairman.