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73RD SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Sixth Committee

Agenda Item 82
Report of the International Law Commission
on the work of its sixty-ninth sessions
Cluster II

Chapter VII: Provisional application of treaties.

Chapter VIII : Peremptory norms of general international law (*jus cogens*)

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Chapter VII: Provisional application of treaties

Mr. Chairman,

Greece expresses its appreciation to the International Law Commission and its Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for the work accomplished during the present session in relation to the topic "Provisional application of treaties".

The adoption, on first reading, of an entire set of 12 guidelines, as the draft Guide to provisional application of treaties, as well as the text of the draft model clauses proposed by the Special Rapporteur, in his fifth report, regarding the commencement, termination and scope of provisional application, are a significant step towards bringing more clarity on the rules applicable to the matter.

We welcome the approach taken by the Commission in handling this important issue, as explained in the general commentary, which should in our view be read together with draft guideline 2. Given that the purpose of the draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, it is important that the Commission clarifies from the outset its intention to provide answers that are consistent with the existing rules, as enshrined in particular in article 25 of the Vienna Convention on the Law of Treaties, while also acknowledging the voluntary, flexible nature of provisional application and the need to take into account limitations deriving from the internal law of States.

We further consider that the inclusion, in an annex to the draft Guide to Provisional Application of Treaties, of draft model clauses reflecting best practice in this field will provide additional assistance to States when seeking to draft and negotiate treaties. We are, therefore, looking forward to the development of new model clauses, based on relevant practice of States and international organizations.

In addition, for such clauses to be more practical and user-friendly, it would in our view be appropriate to determine whether each of the draft model clauses proposed by the Special Rapporteur is relevant to bilateral or multilateral treaties only, or may apply to both.

Turning now to the legal effects of provisional application, we agree with the statement, in the commentary to draft guideline 6, that provisional application is not intended to give rise to the whole range of rights and obligations deriving from the consent of a State or an international organization to be bound by a treaty. However, the commentary does not sufficiently explain where lays the difference between provisional application and entry into force and should in our view be further elaborated in order to address a number of questions that may arise in practice, as for example whether the dispute settlement procedures provided by a treaty that is being provisionally applied would be operative before its entry into force, in the case of a difference between two States regarding the interpretation or application of a treaty provision.

Further comments would also be welcomed regarding the commentary to draft guideline 3, to the extent that it recognizes the possibility for a third State, completely unconnected to the treaty, to provisionally apply it after having agreed to do so with or more States concerned.

Moreover, given the lack of relevant State practice on the matter, we have some doubts as to the necessity and opportunity to include a draft guideline regarding the formulation of reservations in the case of provisional application.

From our point of view, reliance on practice is essential for reaching a successful outcome in this field, since the purpose of the draft Guide to Provisional Application of Treaties is not to set up new rules, but to clarify and explain the existing ones, in the light of the contemporary practice. One such example of practice-oriented and carefully balanced formulation is that found in draft guideline 12, which recognizes the right of States to agree to provisional application subject to limitations that derive from internal law and should in our view be mirrored in a corresponding draft model clause.

With these concluding remarks, we would like to thank the Commission and its Special Rapporteur for the adoption, on first reading, of the draft Guide to Provisional Application of Treaties and reiterate our support for this topic.

Chapter VIII : Peremptory norms of general international law (*jus cogens*)

Mr. Chairman,

On the topic of peremptory norms of general international law (*jus cogens*), allow me first of all to express our deep appreciation to the Special Rapporteur, Mr. Dire Tladic, for the high quality of his three reports. This year's report addresses in a pragmatic and holistic way, going beyond the law of treaties, the consequences and legal effects of *jus cogens*, and this despite the scarcity of relevant state practice. We wish also to extend our appreciation to the Drafting Committee for its ongoing consideration of the draft conclusions.

My delegation wishes to make the following additional observations on the draft conclusions proposed by the Special Rapporteur in his last report[1] :

Both draft conclusion 10 paragraph 3 regarding treaty law as proposed by the Special Rapporteur as well as draft conclusion 17 paragraph 2 regarding binding resolutions of international organizations, are based on the same principle of interpretation, i.e. that a norm of international law is to be interpreted, to the extent possible, so as not to conflict with a rule of *jus cogens*. It is our view that this important rule, which has found support in judicial pronouncements as well as in relation to cases before the UN Security Council and the UN General Assembly, also applies to the interpretation of rules of customary international law and we are in full agreement with the proposal made during the Commission's consideration of the topic, which was endorsed by the Special Rapporteur, to merge the above paras. into a single draft conclusion, applicable to all sources of international law.

Paragraph 2 of draft conclusion 10 together with draft conclusion 12, as proposed by the Special Rapporteur, reproduce most of the article 71 of the 1969 Vienna Convention on the Law of Treaties, with the exception of its paragraph (1)(b) which provides that States must bring their relations into conformity with the *jus cogens* rule. We are of the view that this positive obligation of States which arises in the case of a treaty which is void because it conflicts with a peremptory norm of international law, is an important one and we welcome its insertion in the text of draft conclusion 12 by the Drafting Committee.

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[1] It should be stressed that, unless otherwise stated, the present statement refers to draft conclusions 10-14 as provisionally adopted by the Drafting Committee.

Draft conclusion 14 on dispute settlement as redrafted by the Drafting Committee is, according also to the oral interim report of its Chair, dated 26 July 2018, of a recommendatory nature. However, it should be stressed that terms such as "is to" or "are to", are, in our view, at the crosssroads between soft and hard law formulations. In addition, paragraph 4 which prescribes, *inter alia,* that the invoking State "may not carry out the measure which it has proposed until the dispute is resolved" does not really fit, because of its blocking effect, into a non-binding context.

Moreover, draft conclusion 14, as currently formulated, might work only for interstate disputes although it intends to cover, according to page 9 of the above mentioned oral report of the Chair of the Drafting Committee, also cases where a State invokes a peremptory norm as a ground for the invalidity or termination of a binding resolution of an international organization. Dispute settlement provisions should vary in the latter case, as evidenced by the text of article 66 of the 1986 Vienna Convention which deviates substantially from the one of article 66 of the 1969 Vienna Convention.

Regarding draft conclusion 15, we believe that paragraph 1 should not apply in case the contrary customary international law rule is also a *jus cogens* rule.

On draft conclusion 17, there is no doubt that Security Council resolutions, as it is the case with any resolution adopted by an international organization, cannot conflict with a peremptory norm of international law. However, the wording of this conclusion and the respective commentary thereto should not create the impression that this pivotal organ of the United Nations is the prime suspect for putting aside *jus cogens* rules. This would be in keeping with the Security Council's long-lasting engagement in promoting world peace and security.

On the issue of the so-called regional *jus cogens* which has been raised during this year's debates, we firmly believe that such an idea runs contrary to the very notion of *jus cogens* which is universal by definition, as it reflects the fundamental values of the international community and, according to article 53 of the 1969 Vienna Convention on the Law of Treaties, is accepted and recognized as such by the international community of States *as a whole.*