Statement on behalf of The Kingdom of the Netherlands

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on

agenda Item 82

Report of the International Law Commission

Cluster II

-Check against delivery-

Cluster II - Chapter: VI (Protection of the atmosphere), VII (Provisional application of treaties) and VIII (Peremptory norms of general international law (jus cogens))

Chair,

1. Thank you for the overview you just provided of the work of the Commission for this cluster of topics. In what follows, I will present to you the comments and observations of my Government with respect to some of these topics.

Chapter VII (Provisional application of treaties)

2. With respect to the topic of 'Provisional Application of Treaties', my Government would like to extend its appreciation to the (1) Special Rapporteur for his fifth report, (2) to the Secretariat for its memorandum providing useful background information, and to (3) the Commission as a whole for adopting the text of the draft Guide to Provisional Application of Treaties and commentaries thereto on first reading.

3. We note the decision of the Commission to transmit these draft guidelines to Governments and international organisations for comments and observations to be submitted by 15 December 2019. We intend to make use of that opportunity to provide further comments. For now, we would like to make the following remarks.

4. As regards the proposed outcome of the work of the Commission on this topic, we consider that the form of a Guide on Provisional Application of Treaties is appropriate. As we have stated previously, the study should give guidance to States on how to use the instrument of provisional application - if they so choose - and, in such cases, should inform them of the legal consequences thereof, without imposing a particular course of action that might prejudice the flexibility of the instrument.

5. Similarly, we have held that an analysis of State practice in light of the language of Article 25 of the 1969 Vienna Convention on the Law of Treaties should be the point of departure for the present study. In this respect, exploring the relationship of that provision with other provisions of the Convention for the purposes of clarification and delimitation is useful.

6. One could think of the relevance and effects of reservations made upon signature for the provisional application of a treaty or termination of provisional application of a treaty other than by application of the provisions of Article 25 of the Convention. We would reiterate, however, our words of caution that any conclusions arrived at should first and foremost be supported by underlying State practice.

7. My government notes that the Commission has decided to include a guideline on reservations in the context of provisional application. This is justified, according to the Commission, because, as a matter of principle and despite a lack of practice on the matter, nothing prohibits the possibility of formulating reservations related to provisional application. The Commission is only at the initial stage of considering this question. We would therefore welcome further clarifications on how the Commission intends to proceed with this issue.

8. Finally, we note that draft guideline 9 includes a 'without-prejudice' clause in paragraph 3, referring to the application, *mutatis mutandis*, of the relevant rules on termination and suspension contained in the Convention. While acknowledging an apparent lack of relevant State practice and the flexibility inherent in the formulation of Article 25, paragraph 2, of the Convention, the Commission apparently considered it useful to address a number of possible scenarios not otherwise covered by the guidelines. While we agree that scenarios could occur in practice that are not easily brought within the scope of Article 25 of the Convention, we would once more express a word of caution: it is important not to blur the conceptual distinction between the rules applicable to termination of treaties that have entered into force and those that are applied on a provisional basis.

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

9. My government would like to thank the Commission for its work on this topic, and in particular the Special Rapporteur for his thoughtful third report. As the debates in the Commission have demonstrated, many elements of *jus cogens* remain contested, and this is also true for several aspects relating to the consequences of a violation of *jus cogens*. In this respect, the Kingdom of the Netherlands would share the concern also voiced by other States earlier with respect to the lack of clarity on the concept of *jus cogens* and, in particular, its identification and application.

10. The Kingdom of the Netherlands hopes that the Commission will continuously evaluate its progress on this topic and will not hesitate to return to topics earlier discussed in the light of later conclusions.As to the specific issues discussed by the Commission this year, we would like to make the following observations.

11. Draft Conclusion 12 addresses "The elimination of consequences of acts performed in reliance of invalid treaty". My government suggests to rename the draft conclusion into "Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law".

    The results of such invalidity do not only relate 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.

12. In line with article 70, paragraph 1 (a), of the 1969 Vienna Convention on the Law of Treaties, a separate paragraph should be added that would state that in case of the

invalidity of a treaty, the parties are released from any obligation further to perform their obligations under the treaty.

13. With respect to draft conclusion 14, the proposed procedure regarding the settlement of disputes involving a conflict between a treaty and *jus cogens* resembles the procedure contained in article 66 of the Convention. However, contrary to the article 65 of the Convention, the draft conclusions do not contain procedural rules regarding, amongst others, the invocation of the invalidity of a treaty. Under the Convention, a party invoking the invalidity of a treaty is under the obligation to notify the other parties to the treaty who may then raise objections against the invocation of invalidity. Only in those cases where no objections have been raised within three months after the notification, the party that has invoked the invalidity may effectuate it.

14. The lack of such procedural rules in draft conclusion 14 was also noted in the debates in the Commission. It may suggest that a State could unilaterally consider that a treaty is void, because it violates a norm of *jus cogens*, and apply legal consequences, namely that it is no longer bound by the treaty. Draft conclusion 14 allows other forms of dispute settlement through the submission of the dispute to the International Court of Justice, or to arbitration in case both parties would agree to this.

15. What is lacking, however, is a procedure that precedes such judicial steps, and that determines the legal position of the State invoking the invalidity vis-à-vis the treaty from the moment of such invocation. This omission may at least create the impression that there is a difference between the procedures provided for in the Convention, and those provided in the present draft conclusions with respect to the invocation of invalidity of a treaty, including invalidity because of a conflict between a treaty and *jus cogens*. For this reason, we would suggest that a procedural paragraph is added to draft conclusion 14. Such a procedural paragraph should reflect the general rules contained in articles 65 and 67 of the Convention.

16. As to Draft Conclusions 15 to 17, we would like to make the same comment.

Including procedural aspects relating to the invocation of invalidity in the draft conclusions concerning other sources of law and obligations appears to be equally relevant. At least a study into realistic procedural rules for ascertaining claims to invalidity of other sources of law and of obligations than treaties should be considered.

17. Draft conclusion 18 requires further clarification. As was also noted in the debates of the Commission, not all *erga omnes* obligations are related to *jus cogens* norms. This should be clarified either in the draft conclusion or in the commentaries.

18. As to draft conclusion 19, my Government would question 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 is legally sound. At least in theory, situations of distress may be envisaged in which a State must choose between respecting two *jus cogens* obligations the mutual respect of which is impossible in the given circumstances.

19. As to the order of the draft conclusions, draft conclusion 21 is intimately connected with draft conclusion 18. Therefore, my government would suggest that draft conclusion 21 should immediately follow draft conclusion 18.

With respect to the content of draft conclusion 21, we would suggest the addition of a subparagraph indicating that the obligation of non-recognition should not disadvantage the affected population and does not extend to the recognition of acts, such as "the registration of births, death and marriages, the effects of which can be ignored only to the detriment of" the affected population. This follows the ICJ's Namibia Advisory Opinion of 1970.

20. Regarding the future work of the Commission on this topic, the Kingdom of the Netherlands reiterates its position that it prefers not to include a list of *jus cogens* norms. The authoritative nature of a list, illustrative or otherwise, composed by the Commission would in all likelihood prevent the emergence of State practice and *opinio juris* in support of other norms. If the inclusion of a list is nevertheless considered necessary, my government would suggest a reference to the commentaries on articles 26 and 40 of the Articles on the Responsibility of States for Internationally Wrongful Acts, which include tentative and non-limitative lists of norms of *jus cogens.*

Thank you, Chair.