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# STATEMENT
## by the representative of the Russian Federation in the Sixth Committee of the 73rd Session of the UNGA on agenda item "Report of the International Law Commission" (Topics: "Provisional application of treaties" and "Peremptory norms of general international law")

26 October 2018

Madam Chairperson,

We welcome the fifth report of the Special reporter Mr.J.M.Gómez Robledo on the topic of "Provisional application of treaties" presented during the session of the Commission which studied among other things the issues of termination of provisionally applied treaty due to its violation and of reservations regarding the provisionally applied treaty. We would like to make two points in this connection.

The interest to the topic of provisional application of treaties which is becoming even more relevant from year to year is practical. At the same time the observe an obvious trend of more active attempts to include the language of provisional application into treaties.

The Russian legislation on treaties is based on the provisions of the Vienna Convention on the Law of Treaties and it allows for provisional application. The total number of treaties provisionally applied by the Russian Federation remains relatively unchanged - there are about one hundred of such treaties. We believe however that this concept is exclusive and should be used only when there is a real necessity to begin implementation of a treaty before its entry into force. The Legal Department of the Russian MFA is trying to maintain this policy. Nevertheless, we regularly confront practical issues of various nature.

For instance, let us take up the case when within the regional organization for economic integration there is a necessity to envisage the provisional application of treaty, whilst the legislation of one of the Member States of that organization does not allow a provisional application. The interests of integration require that the treaty begin to apply simultaneously by all Member States. What is the way out? Of course, it can be envisaged that the treaty becomes binding from the moment of express of the consent to be bound by a treaty with regard to the State which cannot provisionally apply the treaty. However, in this case some uncertainty arises on the legal nature of obligations of that State during the time of its consent to be bound by a treaty and its entry into force.

There is another issue. Under Article 25 of the Vienna Convention on the Law of Treaties (which was recorded in draft guideline 9) the provisional application of a treaty as a general rule is terminated if a State notifies other States who provisionally apply the treaty on its intent not to become a party to that treaty. Let us figure out the following situation: a State has expressed its consent to be bound by a provisionally applied treaty, but decided not to become a party to the treaty before its entry into force. Should that State revoke its consent to be bound by the treaty and simultaneously notify other States of its intent not to become a party to the treaty; or simply revoke its consent to be bound by the treaty; or simply notify other States of its intent not to become a party to the treaty?

Recently we witnessed another interesting incident. Russia terminated its provisional application of a multilateral treaty by notifying the depositary on its intent not to become a party to it. At the same time the depositary of the treaty is interpreting the situation in such a way that Russia terminated the provisional application of the treaty but remains bound by the obligations deriving from the signing of the treaty. On our part, we proceed from the understanding that the sending of notification of intention not to become a party to the treaty does not only terminate its provisional application but also lifts all obligations of the State deriving from its signature. Nevertheless, there is a subject for research on that issue as well.

The examples mentioned above prove that the topic of provisional application is inexhaustible. We strongly believe however that it would be indeed useful to study it on the basis of practical issues. On that note we intend to prepare the comments of the Russian Federation to the draft guidelines approved by the Commission and circulated by the Secretary-General among the Member States.

Let me turn now to the second comment. During the consideration of this topic in the Commission and its outcome we witnessed a trend to dissolve the difference between the provisional application of the treaties and their entry into force. It is implied that practically all the institutes of the law of treaties should be applied with regard to a provisionally applied treaty, including reservations and termination on the grounds envisaged for termination or suspension of the treaties. There is an impression that we want to make the provisional application of treaties the most convenient for their parties. We think that we need to treat this issue as careful as possible. The proliferation of the regime of provisional application of treaties and its convenience may substitute the entry of treaties into force by their provisional application, which would negatively affect the stability of the treaties and as a consequence the entire system of international law.

Madam Chairperson,

We would like to thank the Special Rapporteur Mr. D.Tladi for detailed and interesting third report on "**Peremptory norms of general international law *(jus cogens)***" which considered one of the most complex issues – the consequences of peremptory norms.

The Russian delegation shares the approach of the Commission that the Vienna Convention on the Law of Treaties constitutes the basis of its work on this topic. Therefore, we support draft conclusion 11, preliminary presented in the Annex to the report of the Chairman of the Drafting Committee where it was decided not to use the concept of "invalidity" of the treaty together with the "null and void" concept in favor of "null and void" concept, which, in our view, corresponds to the Vienna Convention on the Law of Treaties and contributes to the uniformity in the use of terms.

We believe that the issue of the consequences of peremptory norms of general international law is extremely important for interpretation of treaties. Therefore, the Russian delegation welcomes the intent of the Commission contained in the report of the Chairman of the Drafting committee regarding paragraph 3 of draft conclusion 10 to be made a separate draft conclusion in order to record the general rule of interpretation consistent with the peremptory norms of general international law. We also believe that the existing language should be properly amended in light of the relevant provisions of the Vienna Convention on the Law of Treaties that were mentioned by the Special Rapporteur in his report.

Nevertheless, we are not convinced that the scope of this topic implies the need to include in the draft conclusions the mechanism of dispute settlement that implies the address to the International Court of Justice (draft conclusion 14). It seems to us that this provision is inconsistent with the general non-normative form of draft conclusions.

We cannot support either the ideas of the Special Rapporteur regarding the interpretation of the Vienna Convention on the Law of Treaties under which the States who do not directly participate in the treaty cannot have the right to address the International Court of Justice. Therefore, we consider as unacceptable the proposal of the Special Rapporteur that any dispute regarding the contradiction of the treaty to the norm of *jus cogens* should be transmitted to the International Court of Justice implying any State, which is not a party to the treaty.

It seems to us that this proposal does not reflect the principle of *lex lata* and does not presume a certain prerequisite for *lex ferenda*.

The Russian delegation maintains a position that we must avoid any interpretation of the Vienna Convention different from the meaning contained therein.

Moreover, we must take into account the fact that the States have made several reservations regarding Article 66 of the Vienna Convention on the Law of Treaties, which has envisaged the procedure of judicial litigation.

We question the position of the Special Rapporteur regarding the persistent objector, which according to him is not applicable to the *jus cogens* norms (paragraph 3 of draft conclusion 15). As the Special Rapporteur recognizes, from the viewpoint of the doctrine, it is a question whether the *jus cogens* norm can emerge in case when a permanently objecting party is present.

Despite the fact that in his report the Special Rapporteur emphasized a particular role and importance of the UN Security Council resolutions and recognized the disparate of those resolutions with the resolutions of other international organizations, and thus formulated the language of draft conclusion 17 we believe that he actually stated the reverse conclusion. The current version of the abovementioned draft conclusion can be interpreted as allowing for refusal from execution of the UN Security Council resolutions.

Nevertheless, as it has been rightly put out by the Special Rapporteur, currently the discussions have been engaged on the issue of correspondence of the UN Security Council resolutions with, inter alia, *jus cogens* norms, albeit discussions are mostly theoretical and non-supported by any practice whatsoever. Nevertheless, the conclusions of the Commission that can lead to wrong interpretation may seriously harm the activity of the UN Security Council.

The Russian delegation is mostly concerned with draft conclusions 22 and 23.

We believe that the consideration of issues related to criminal responsibility and immunity of State officials is clearly outside the scope of the current topic and their inclusion in draft conclusions is at least unjustified since at present the immunity of state official is a subject to a separate research conducted in the framework of the Commission.

We do not believe that the parallel investigation of the comparable issues is correct from the viewpoint of methodology and the established procedure of the work of the Commission especially taking into account the absence of unanimity among the members of the Commission and among States on various aspects related to the immunity of the State officials.