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Provisional summary record of the 3415th meeting
Held at Headquarters, New York, on Thursday, 31 May 2018, at 10 a.m.

Contents

18-08724 (E)

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

The Chair invited the Commission to resume its consideration of the third report on peremptory norms of general international law (*jus cogens*) (A/CN.4/714 and A/CN.4/714/Corr.1).

Mr. Saboia commended the Special Rapporteur on his excellent report, dealing with the legal effects and consequences of norms of *jus cogens*, probably the most challenging aspect of his topic. His text was clear, concise and dense and most of the proposals contained therein merited support. In addressing the dearth of practice on the consequences of *jus cogens*, the Special Rapporteur noted that "while courts and tribunals have referred to *jus cogens*, even identifying norms that qualify as *jus cogens*, instances of identifying concrete legal consequences are few". He proposed, rightly, that the Commission should deal with the issue according to established practice by conducting a thorough analysis of State practice in all its forms, judicial practice, literature and any other relevant material.

Stressing the close relationship between the consequences of a norm and its identification as a norm of *jus cogens*, such that the consequences gave the norm its peremptoriness, the Special Rapporteur warned against taking a doctrinal or excessively theoretical approach to the issue. Given the nature of *jus cogens* as norms that protected fundamental values of the international community as a whole, the consequences of those norms should not be assessed through a predetermined doctrinal approach. Rather, what should be evaluated was the extent to which *jus cogens* norms protected those values. After considering a broad range of methodological possibilities for the study of the consequences of *jus cogens*, the Special Rapporteur took a pragmatic approach by focusing on the consequences of *jus cogens* norms in areas where they had more often been identified, including treaty law, State responsibility, individual criminal responsibility, customary international law and binding resolutions of international organizations, including resolutions of the Security Council.

While the invalidity of treaties on account of conflict with *jus cogens* was the most widely accepted and least disputed of the effects of *jus cogens*, in his report, the Special Rapporteur still explored all the different forms of invalidity set forth in the relevant articles of the 1969 Vienna Convention on the Law of Treaties, in particular articles 53 and 64, which dealt with two categories of treaties: new treaties that conflicted with an existing peremptory norm of general international law, and existing treaties that became invalid following the emergence of a new *jus cogens* norm. The Special Rapporteur had rightly concluded that, according to article 71 (1) of the Vienna Convention, a new treaty conflicting with a *jus cogens* norm was wholly invalid, and no severability was possible. For a treaty which became invalid on account of the emergence of a new peremptory rule of international law (*jus cogens*), the applicable rules were articles 64 and 71 (2) (b) of the Convention. As the treaty remained valid until the emergence of the new rule, acts performed before that situation arose remained unaffected. The same was true for rights and obligations assumed prior to the invalidity, as far as they did not themselves conflict with a rule of *jus cogens*. In that case also, there might be provisions in the treaty which, not being in conflict with *jus cogens*, might continue to operate if they fulfilled the conditions for severability, were not themselves in conflict with a *jus cogens* norm, and their continued operation would not be manifestly unjust.

In paragraph 40 of the report, the Special Rapporteur provided a concise summary of the different effects and procedures applicable to situations of conflict of treaties with norms of *jus cogens*. The Special Rapporteur also stated in the report that, whether or not articles 65 and 66 of the Vienna Convention, which governed the procedure for invalidating treaties and provided for the peaceful settlement of disputes in accordance with Article 33 of the Charter of the United Nations, including the judicial settlement of disputes, had become customary norms of international law, it seemed convenient to reproduce their content in the draft conclusions. While the Special Rapporteur made a logically convincing argument in paragraph 48 of the report that the process provided for in article 66 of the Vienna Convention did not alter or condition the *ab initio* nullity of a new treaty conflicting with a peremptory rule of general international law (*jus cogens*), it was likely that, in practice, disputes would involve the question of whether or not there was a conflict between a treaty and a norm of *jus cogens*. On the other hand, a judicial decision establishing that there was such a conflict was merely declaratory in nature.

Without going into the complex issues related to the judicial procedures for dispute settlement dealt with in paragraphs 45 to 54 of the report, he endorsed the Special Rapporteur's suggestion in paragraph 54 that it should be stated in a draft conclusion that any dispute concerning whether a treaty conflicted with a peremptory norm of international law (*jus cogens*)

should be submitted to the International Court of Justice.

In the section of the report dealing with the effects of peremptory norms of general international law (*jus cogens*) on treaty interpretation, the Special Rapporteur turned to the relevant rules set forth in articles 31 and 32 of the Vienna Convention to address the question of how to avoid an excessively stringent application of the rule of nullity that would produce a so-called draconian effect on treaties and negatively affect another fundamental norm of customary international law, namely *pacta sunt servanda*. In the view of the Special Rapporteur, the norm contained in article 31 (3) (c), to the effect that account should be taken of "any relevant rules of international law applicable in the relations between the parties", in the interpretation of a treaty, was of particular interest in the event of conflict between a treaty and a norm of *jus cogens*. The case law described in paragraphs 59 to 68 of the report led convincingly to a conclusion already stated in previous outputs of the Commission, namely that peremptory norms of general international law generated strong interpretative principles which would resolve all or most apparent conflicts.

The conclusion in paragraph 68 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*) was a helpful mode of interpretation but one that, if stretched, could lead to unforeseen results. In the examples cited by the Special Rapporteur, the Security Council, the International Court of Justice and the Grand Chamber of the European Court of Justice, while avoiding an outcome that would result in nullity of a treaty or a provision, had asked the parties to conduct themselves in a manner that was not in conflict with *jus cogens* norms. That seemed to imply that there was founded reason to believe that such a norm had been breached, in some cases seriously. The solution found in the above-mentioned courts or the Security Council had been pragmatic and aimed to preserve the existing treaties while applying pressure to ensure conformity with the law. Applying the law in a concrete case was the task of the courts, and the rules of interpretation were there basically to help the interpreter. While he did not disagree with the Special Rapporteur's conclusion, he was reluctant to have the Commission issue it as a recommendation. While it was true that the Commission was tasked with the progressive development of international law and its codification, such a statement could be seen as undermining the peremptory nature of *jus cogens*.

He agreed with the Special Rapporteur's analysis of the effect of *jus cogens* on reservations and with draft conclusion 13. Paragraph 2 of the draft conclusion was of relevance for human rights treaties, which often expressed peremptory norms of international law (*jus cogens*). Such treaties were often ratified with extensive and general reservations which aimed to modify or restrict the application of human rights protections. To the extent that such reservations collided with *jus cogens*, they should be considered invalid.

The Special Rapporteur's comprehensive analysis of the consequences of peremptory norms of general international law (*jus cogens*) for the operation of the norms on State responsibility and of the particular consequences of serious breaches of *jus cogens* norms was clear and persuasive. That analysis, which served as the basis for draft conclusions 19, 20 and 21, was richly documented with international case law, just as was his analysis of the relationship between *jus cogens* norms and *erga omnes* obligations, which led to the conclusion reflected in draft conclusion 18, namely, that peremptory norms of international law (*jus cogens*) established obligations *erga omnes*, the breach of which concerned all States.

Other effects of *jus cogens* that could be considered included the effects on individual criminal responsibility in international criminal law; the jurisdiction of international courts; customary international law and Security Council resolutions. In his report, the Special Rapporteur discussed in detail the legal bases and State and judicial practice that could be invoked to establish that States had a legal duty under international law to establish jurisdiction over *jus cogens* crimes, citing several conventions and court decisions in support of that conclusion, which was expressed in draft conclusion 22.

In dealing with the effect of *jus cogens* on individual criminal responsibility, the Special Rapporteur examined the relationship between the obligation to prosecute *jus cogens* crimes and immunity, in paragraphs 121 to 132 of the report. Even though the Special Rapporteur, invoking the previous debates on the topic of immunity of State officials from foreign criminal jurisdiction, affirmed modestly that he "will merely point out salient features that could assist … in addressing the question of the legal consequences of *jus cogens* norms on immunities", his treatment of the subject inevitably had an impact on the topic of immunity. The Special Rapporteur argued, in paragraph 124 of the report, that decisions of international courts and tribunals related to civil processes provided the basis for the argument according to which there was no conflict between immunity *ratione materiae* and acts in

violation of *jus cogens* because the former was procedural and the latter was substantive. He also noted that all evidence relied upon by the court as State practice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* had also concerned immunity from civil jurisdiction, before concluding that "it is practice related to criminal responsibility that must form the basis of any international rule relating to exceptions to immunity on account of *jus cogens* crimes".

The Special Rapporteur cited several cases in paragraph 125 of the report to demonstrate that there was abundant practice of loss of immunity from criminal responsibility on account of the gravity of the crimes, without shying away from citing cases that went in the opposite direction, as he did in paragraphs 127 and 128 of the report. With regard to the cases dealt with in paragraph 128, the Special Rapporteur stressed that the courts based their decision on the perhaps questionable assumption that the officials in question benefited from immunity *ratione personae*. He supported draft conclusion 23, which emanated from the Special Rapporteur's view that the balance of authorities supported the non-application of immunity *ratione materiae* for criminal proceedings.

With regard to the complex discussion around the relationship between Security Council resolutions or decisions and *jus cogens* norms, it was worth recalling that Article 24 of the Charter of the United Nations provided that "the Security Council shall act in accordance with the Purposes and Principles of the United Nations", most of which contained norms of *jus cogens*. While the powers granted to the Council were laid down in Chapters VI, VII, VIII and XII of the Charter, those powers had since expanded significantly. While that expansion was necessary, or at least unavoidable, it also created dilemmas both for jurists and for States, as they had sometimes been used to legitimize actions whose compatibility with *jus cogens* was questionable.

The formulation proposed by the Special Rapporteur was appropriate in that it made it possible to uphold the important principle of the need for Security Council resolutions to be in line with *jus cogens* norms. The Special Rapporteur also reconciled that principle with reality by recommending that those resolutions should be interpreted, to the extent possible, in a manner consistent with *jus cogens* norms. His doubts concerning draft conclusion 17, which he nevertheless could live with, had to do with the questionable methodology of grouping resolutions of international organizations in general, which were rarely mandatory, with resolutions or decisions adopted by the Security Council, whose power to adopt mandatory decisions was its major feature. With regard to the relationship between peremptory norms of general international law and Security Council resolutions, one alternative could be to have a "without prejudice" clause.

Turning to the relationship between peremptory norms of general international law (*jus cogens*) and customary international law, he expressed support for draft conclusion 15 and its paragraph 3, which stated that "[s]ince peremptory norms of general international law (*jus cogens*) bind all subjects of international law, the persistent objector rule is not applicable." In closing, he recommended that all the draft conclusions should be sent to the Drafting Committee.

Mr. Nguyen thanked the Special Rapporteur for his report, in which he had effectively elucidated most questions concerning the consequences and legal effects of *jus cogens*, which was considered the most challenging part of the study. The Special Rapporteur's approach was neither narrow nor broad, drawing upon traditional methods and texts of the Commission to identify the consequences and legal effects of *jus cogens* and avoid unnecessary debate. He supported the Special Rapporteur's approach, but believed that it should be broader and should include more State practice on *jus cogens* whenever possible, as the practice provided was rather thin. Taken together, articles 53, 64 and 71 of the Vienna Convention dealt with three scenarios for the invalidity of treaties that conflicted with peremptory norms of general international law. In the first case, if a treaty was in conflict with a *jus cogens* norm in existence at the time of its conclusion, the treaty was void. In the second case, an existing treaty was rendered void if it conflicted with a new *jus cogens* norm that emerged or a *jus cogens* norm that modified an existing *jus cogens* norm.

In the first case, the treaty was void *ab initio*. Article 53 of the Vienna Convention, which emphasized the preventive character of the international law system to States negotiating a future treaty, which were in an active position in that they could assess the extent of the treaty they were concluding. They must act in a manner that rendered the provisions of the future treaty consistent with existing norms of *jus cogens*. Draft conclusion 3 adopted by the Drafting Committee at the sixty-ninth session had assigned to *jus cogens* norms the function of protecting and reflecting the fundamental values of the international community. States generally agreed that *jus cogens* norms reflected the fundamental values of the international community. As such, *jus cogens* norms must bind all States, without exception, and all States must act in good faith to avoid any derogation from the obligation to protect those

fundamental values. States had the obligation to ensure that any treaty was, at the time of signature or conclusion, consistent with existing peremptory norms of general international law. Article 53 pertained to a conflict between an existing *jus cogens* norm and the entire treaty, not to a provision thereof.

In the second case, an existing treaty was void because of specific circumstances beyond the control of the contracting States, which were in an inactive position in that they negotiated the treaty before the emergence of a *jus cogens* norm. They must subsequently revise the treaty, in whole or in part, to conform to the newly emerged *jus cogens* norm. The legal nature of each option was the same, the hierarchical status of *jus cogens* determining the content and scope of invalidity of the treaty. The sole point of differentiation in terms of *jus cogens* was that, in the one instance, the *jus cogens* norm was identified for the first time, emerging and modifying the existing norm upon which the treaty was built. Under article 53, *jus cogens* norms were evolutive, as they could be modified and replaced by a newly emerged norm. However, such modification had generated controversy regarding the non-derogatory and hierarchical character of *jus cogens* norms.

The profound analysis of the relationship between pre-existing and emerging *jus cogens* norms and their consequences on the validity of treaties was welcome. Noting that the words “is void” were used in article 53 of the Vienna Convention, while the words “becomes void” were used in article 64, he argued that the use of the words “becomes void” did not necessarily mean that the nullification of the treaty was automatic. “Becomes” seemed to imply that the treaty would be void at some point in the future, while “is” suggested immediacy. The difference in wording between those two articles might have been on purpose. The modification would be a two-step process: the rule of law replacing the old *jus cogens* norm would first be elevated to *jus cogens* status, then the hierarchical status of the norms would be changed. The first part of article 53 established the hierarchical order between the norms. The second part of the article set out the basic characteristic of *jus cogens*, namely, non-derogation. In the first option, the first part of article 53 had applied automatically, while in the second option, the second part of article 53 prevailed. The absence of cases of modification of *jus cogens* norms in practice could be explained by the fact that the authors of the Vienna Convention had conceived the modification process only as a safety valve in ensuring the non-derogability of norms of general international law or preventing any attempt to change them.

He therefore endorsed the Special Rapporteur’s proposals as to the invalidity of a treaty in cases of conflict with existing *jus cogens* norms and the non-retroactivity of emerging *jus cogens* norms. The Commission had consistently taken that position in its texts, particularly in its 1966 draft articles on the law of treaties. The principle of the non-use of force was a clear example in State practice. That principle had been elevated to *jus cogens* status with the adoption of the Charter of the United Nations, thereby rendering any treaty on territorial acquisition by force concluded after 1945 invalid. However, the emergence of that peremptory norm did not reverse the effects of treaties that had entered into force before 1945. The provisions of such treaties pertaining to territorial boundaries should remain valid even when other provisions of the treaties conflicted with newly emerging norms of *jus cogens*.

The effects of treaties in existence before the emergence of a new *jus cogens* norm should be considered in relation to articles 53, 64 and 71 and other articles of the Vienna Convention. Some provisions of existing treaties might conflict with the new *jus cogens* norm, but others might remain valid. Under article 71 (2) (b) of the Convention, any rights, obligations or legal situations of the parties created before the emergence of a new *jus cogens* norm might be maintained only to the extent that their maintenance was not in conflict with the new norm. In that regard, it was worth pondering whether a provision on the establishment of a boundary that did not conflict with existing *jus cogens* norms would be void if the mode of territorial acquisition leading to the establishment of the boundary conflicted with those norms. To some extent, the emergence of a new norm of *jus cogens* could even be considered a fundamental change of circumstances at the time of conclusion of a treaty, a development not foreseeable by the parties. However, under article 62 (2) (b), such ground might not be invoked to invalidate a treaty establishing a territorial boundary. Therefore, while supporting the severability of the effects of existing treaty provisions in cases of a new *jus cogens* norm, he would welcome further analysis by the Special Rapporteur of the link between the emergence of new *jus cogens* norms and a fundamental change of circumstances.

With regard to the effects of a *jus cogens* norm on reservations to treaties, the position of the Commission was enshrined in guideline 4.4.3 of its Guide to Practice on Reservations to Treaties. Draft conclusion 13 contained a warning for parties intending to derogate from *jus cogens* norms by making reservations, indicating that if a norm was peremptory, any

reservation that undermined its non-derogatory and hierarchical character would be invalid. He supported the Special Rapporteur's suggestion to retain the first part of paragraph 1 of guideline 4.4.3 in paragraph 1 of draft conclusion 13, which read: "A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply". However, he would welcome an explanation for the omission in draft conclusion 13 of the second part of that guideline, which read: "as such between the reserving State or organization and other States or international organizations". The effect of reservations should be established between the State formulating a reservation and other parties accepting the reservation.

He would be interested in the Special Rapporteur's analysis of the effects of peremptory norms of general international law (*jus cogens*) on the responsibility of international organizations. Article 26 of the Commission's articles on the responsibility of international organizations stipulated that: "Nothing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law." Its structure and wording resembled those of article 26 of the articles on responsibility of States for internationally wrongful acts. Accordingly, any action attributable to an international organization under international law for breaching an obligation arising under a *jus cogens* norm must entail its responsibility. Consequently, the summary of the discussion presented in paragraph 102 of the Special Rapporteur's report should cover both States and international organizations.

Turning to the effects of *jus cogens* on customary rules, he pointed out that the universal, hierarchical and non-derogatory character of *jus cogens* left no room for persistent objection. Non-derogation did not permit objections; universal application required the acceptance and recognition of the new *jus cogens* by all members of the international community, captured in the draft conclusions as "a very large majority" of States, an expression which should be clarified as three quarters of States, for example. The superiority of *jus cogens* norms was not subject to change and *jus cogens* norms were binding on all. However, the number and representativeness of persistent objectors could prolong the process of formation of new *jus cogens* norms and influence the international community's acceptance and recognition of such norms. Persistent objections might not work if the objectors were a small number of States concentrated in one continent or region. Persistent objection could not change the substance of newly emerged *jus cogens* norms, but it could affect the process and time of identification of such norms.

The character of *jus cogens* also determined its hierarchical status with regard to the obligations assumed by States under binding resolutions of the Security Council and other treaties. In the event of a conflict of norms, the obligation of States Members of the United Nations to comply with Security Council resolutions should prevail over their obligations under any other international instruments. However, binding obligations derived from Security Council resolutions should be invalid if they ran counter to *jus cogens* norms. The Commission should also address the question of the effects of *jus cogens* on resolutions adopted by the General Assembly when assuming the role of maintaining peace and security in the event that the Security Council became paralyzed.

Turning to draft conclusion 10, he said that paragraph 1 reproduced the wording of article 53 of the Vienna Convention, except for the addition of the second sentence, which read: "Such a treaty does not create any rights or obligations". That sentence flowed from the first sentence, which read: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*)". A treaty that, at the stage of conclusion, conflicted with a norm of *jus cogens* did not have binding force, and the preventive character of *jus cogens* obliged States to act in good faith in order to avoid any conflict with existing *jus cogens* norms. The reasons for the addition of the second sentence of the paragraph should be clarified in the commentary.

In paragraph 2, the second sentence read: "Parties to such a treaty are released from any further obligation to perform in terms of the treaty". The phrase "in terms of the treaty" could be changed to "under the treaty", to cover all situations. Paragraph 3 indicated how to interpret the invalidity of an existing treaty in case of conflict with a new *jus cogens* norm. For greater clarity, the sentence could be adjusted to read: "To evaluate the invalidity of the treaty in conflict with a peremptory norm of general international law, a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*)."

The wording of paragraph 1 of draft conclusion 11 should be consistent with that of paragraph 1 of draft conclusion 10. He therefore proposed that the phrase "a treaty which, at its conclusion" should be replaced with "a treaty which, at the time of its conclusion", a formulation that was comparable to the phrase "at the time of the treaty's conclusion" used in paragraph 1 of

draft conclusion 12. In his view, the idea that a treaty under the scope of paragraph 1 was invalid as a whole must be absolute. The words "may be", however, did not reflect that and should be changed to "is" or "shall be". Additionally, to emphasize the totality of the treaty's invalidity, the words "severed or separated" should be modified to "severed or separated from the rest of the treaty", or to "severed or separated from the state of being invalid".

With respect to draft conclusion 12, the expression "in reliance of" must be changed to "in reliance on". However, given that an act in reliance on something meant that whatever was relied upon generated the act, "in reliance on" was too broad to describe the relationship between a treaty and an act allowed by the treaty. He therefore proposed the alternative wording "any act performed as a result of the implementation of the treaty". Draft conclusion 14 set forth the recommended procedure regarding the settlement of disputes involving conflict between a treaty and a peremptory norm of general international law (*jus cogens*). Under that chapeau, other amicable procedures should be suggested as options before the matter could be referred to the International Court of Justice. Additionally, consequences of invalidity should be included in the scope of disputes to be submitted to the International Court of Justice, in addition to the identification of the possibility of a treaty conflicting with a peremptory norm of general international law (*jus cogens*).

While the phrase "consequences of peremptory norms of general international law (*jus cogens*) for ..." was used in draft conclusions 15 and 17, in draft conclusion 16, the phrase "consequences of peremptory norms of general international law (*jus cogens*) on ..." was used instead. The word "on" should be changed to "for" for precision and consistency. Regarding Draft conclusion 22, the preposition "on" should be changed to "in", because the territory mentioned in that specific context referred to an area within which an act was committed, not merely a surface. In closing, he supported sending the draft conclusions to the Drafting Committee for further review and improvement.

Provisional application of treaties (agenda item 3) (*continued*)

Report of the Drafting Committee (A/CN.4/L.910)

Mr. Jalloh (Chair of the Drafting Committee) said that he was pleased to introduce the fourth report of the Drafting Committee for the current session, which dealt with the topic of provisional application of treaties. He introduced the titles and texts of the draft guidelines on the provisional application of treaties adopted by the Drafting Committee on first reading, as contained in document A/CN.4/L.910. He wished to pay tribute to the Special Rapporteur, whose constructive and innovative approach had facilitated the Committee's work. He also thanked the members of the Committee for their active participation, and the Secretariat for its invaluable assistance.

The Committee had held four meetings from 22 to 24 May 2018, during which it had started by adopting new draft guidelines 5 bis and 8 bis proposed by the Special Rapporteur in his fifth report (A/CN.4/718). The Committee had then undertaken the *toilettage* of the entire set of draft guidelines, including the 11 provisionally adopted by the Commission at its sixty-ninth session. At the current session, the Commission had decided to refer those draft guidelines back to the Drafting Committee for the sole purpose of preparing a consolidated first-reading text. During that process, some of the draft guidelines provisionally adopted by the Commission at earlier sessions had been slightly adjusted or re-ordered to enhance the coherence of the text. As a result, the draft guidelines had been renumbered to reflect the new sequence. For the purposes of the current statement, he would be referring to the new numbers, as reflected in the report of the Committee, with the numbers in square brackets indicating the numbers proposed by the Special Rapporteur, to the extent that they were different. He recommended that the Commission should take action on only the draft guidelines that were new or to which amendments had been made at the current session, since it had already adopted most of the draft guidelines at the sixty-ninth session.

The Committee had also begun to consider the eight draft model clauses proposed by the Special Rapporteur in his fifth report but, owing to time constraints, had not been able to conclude that exercise. It had instead accepted a suggestion by the Special Rapporteur that a reference should be made in the commentaries to the possibility of including, in the second-reading text, a set of draft model clauses, based on a revised text that the Special Rapporteur would propose at an appropriate time. The Special Rapporteur's proposal would take into consideration the comments and suggestions that had been made by the plenary and the Committee.

The Committee had made no changes to draft guidelines 1 to 5 [6] as adopted at the sixty-ninth session. In draft guideline 6 [7] (Legal effect of provisional application), the phrase "the same legal effects" had been replaced with the phrase "a legally binding obligation to apply the treaty or a part thereof".

The change had been made to address concerns expressed in the plenary and by Member States that the phrase "the same legal effects" was too broad and potentially misleading since, by their nature, certain provisions of the Vienna Convention applied only when a treaty was in force. The amendment was intended to more precisely depict the legal effect of provisional application. A suggestion to delete the phrase "as if the treaty were in force" had not been supported by the majority of the members of the Committee. In the title of the draft guideline, the word "effects" had been replaced with the singular "effect", to align it with the reference to "legal effect" in the new draft guideline 7 [5 bis], such that the new title of the draft guideline read: "Legal effect of provisional application".

Draft guideline 7 [5 bis] concerned the formulation of reservations by a State or an international organization intended to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty. It had its origins in draft guideline 5 bis as proposed in the Special Rapporteur's fifth report. However, the Committee had worked on the basis of a revised proposal by the Special Rapporteur, who had sought to take into account the concerns expressed in the plenary by bringing the text more in line with article 19 of the Vienna Convention. To that end, he had removed the reference to the "right" of States and international organizations to formulate reservations and reformulated the provision so that it no longer took the form of a "without prejudice" clause.

Different views had been expressed within the Committee with regard to the appropriateness of including a provision on reservations in the draft guidelines. There had been a view that further study of the practice of States and international organizations should be undertaken, in particular with regard to the relevant provisions of part II, section 2, of the Vienna Convention and the Commission's Guide to Practice on Reservations to Treaties. The question of whether or not to include a draft guideline on reservations at the second-reading stage should be decided on the basis of the examination of those texts and comments solicited from States and international organizations. The Committee had considered a number of proposals that would have simply preserved the possibility of having a provision on reservations, such as the addition of a reference to that possibility in the commentary, the insertion of a placeholder text in the draft guidelines, or the retention of the "without prejudice" clause. However, the prevailing view in the Committee had been in favour of a more affirmative confirmation that a State or international organization might, in principle, formulate reservations when agreeing to provisionally apply a treaty or a part thereof. Accordingly, the Committee had decided to adopt a modified version of the Special Rapporteur's revised proposal for draft guideline 5 bis and to place it after draft guideline 6.

Draft guideline 7 [5 bis] comprised two paragraphs dealing separately with States and international organizations, in line with the approach taken in the rest of the draft guidelines. The opening phrase of paragraph 1, "In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*," was meant to invite further examination and discussion of the rules of the Vienna Convention applicable to reservations in the case of provisional application. The phrase had been placed at the beginning of the paragraph to clearly indicate that the relevant rules of the Convention were those that qualified the formulation of reservations rather than those relating to the provisional application of certain provisions of the treaty. The rest of paragraph 1 was based on articles 2 (1) (d) and 19 of the Convention. The reference to the legal effect "produced by the provisional application" had been included to underline the intrinsic link between draft guidelines 6 [7] and draft guideline 7 [5 bis]. The formulation was intended to be neutral on the question of whether reservations excluded or modified the legal effects arising from the provisional application of a treaty or that of the agreement to provisionally apply the treaty as such. The Committee had agreed that it would be clarified in the commentary that the Commission was at an early stage of considering the question of reservations in the context of provisional application, owing to the relatively dearth of practice in that area and the fact that reservations in relation to provisional application were not addressed in the Guide to Practice on Reservations to Treaties. The issue of reservations would be revisited during the second reading of the draft guidelines, on the basis of further research and the reactions of States and international organizations to draft guideline 7 [5 bis]. Moreover, the divergent views expressed within the Commission with regard to the necessity and appropriateness of including a draft guideline on reservations in the text would be highlighted in the commentary.

Paragraph 2 concerned the formulation of reservations by international organizations, to parallel the situation of States contemplated in paragraph 1. It essentially replicated paragraph 1, with the necessary modifications. The opening phrase, "In accordance with the relevant rules of international law", was to be understood to include primarily rules of the law of treaties, but also rules pertaining to the law of the international responsibility of international organizations.

The title of the draft guideline, "Reservations", was drawn from the title of part II, section 2, of the Vienna Convention. While the draft guideline dealt specifically with the formulation of reservations, the broader title reflected the intention for its scope to cover the possible applicability *mutatis mutandis* of other relevant rules on reservations established in the Vienna Convention.

No changes had been made to draft guideline 8, which had been adopted at the sixty-ninth session as draft guideline 7.

Turning to draft guideline 9 (Termination and suspension of provisional application), he said that the draft guideline expanded on the version adopted at the sixty-ninth session as draft guideline 8, which had been entitled "Termination upon notification of intention not to become a party", through the inclusion of two new paragraphs that took into account additional termination and suspension scenarios. The new paragraphs had been introduced following the Committee's consideration of the Special Rapporteur's revised proposal for draft guideline 8 bis and his new proposal for a draft guideline 8 ter on termination upon entry into force. In the interest of conciseness, the Committee had decided to address the various forms of termination in a single draft guideline. The order of the paragraphs was intended to track that of article 25 of the Vienna Convention, cascading from the most frequent to the least frequent scenario of termination of provisional application.

Paragraph 1 concerned the termination of provisional application upon entry into force of a treaty. It provided that: "[t]he provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned." That form of termination was implicit in the phrase "pending its entry into force", used in article 25 (1) of the Vienna Convention and also in draft guidelines 3 and 5 [6]. The paragraph was based on the Special Rapporteur's proposal for draft guideline 8 ter. It would be acknowledged explicitly in the commentary that termination upon entry into force of a treaty was the most frequent way in which provisional application came to an end. The phrase "in the relations between the States or international organizations concerned" had been included to distinguish the objective entry into force of a treaty from its subjective entry into force for one or more parties to the treaty. That had been viewed as being particularly relevant in the relations between contracting parties to a multilateral treaty, as such a treaty might enter into force for some of the contracting parties while continuing to be applied provisionally by others.

No amendments had been made to paragraph 2 of the draft guideline, which concerned the scenario envisaged in article 25 (2) of the Vienna Convention, namely termination upon notification of intention not to become a party.

Paragraph 3 established that draft guideline 9 was without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section of the Vienna Convention or other relevant rules of international law. The origins of the paragraph lay in the Special Rapporteur's revised proposal for draft guideline 8 bis, which addressed the issue of termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach. The Committee had considered whether, despite an apparent lack of relevant practice, a provision covering termination and suspension in the event of material breach should be included in the draft guidelines. The majority of the members of the Committee had considered that the envisaged scenario was plausible and that a provision covering it would, on balance, be a useful addition to the draft guidelines. If the situation were to arise, it would most likely be in the context of a multilateral treaty.

The Committee had also recognized that notification of intention not to become a party to a treaty, the situation envisaged in draft guideline 8 adopted at the sixty-ninth session, was perhaps not the most frequently employed means of ceasing provisional application. For example, a State or international organization might wish to terminate provisional application but still intend to become a party to the treaty, or a State or international organization might seek to terminate or suspend provisional application as between itself and a State or international organization that had committed a material breach, while continuing to provisionally apply the treaty as between itself and the other contracting parties. Through the reference to part V, section 3, of the Vienna Convention, the draft guideline also contemplated the suspension of provisional application in response to a material breach, to take into account the possibility that the affected State or international organization might wish to resume provisional application of the treaty once the material breach had been adequately remedied.

It should be noted that the text adopted by the Committee was broader than the version proposed by the Special Rapporteur, as it was not per se limited to material breach. Rather, the provision took the form of a "without prejudice" clause intended to preserve the possibility that not only article 60 but also other

provisions of the Vienna Convention concerning termination and suspension might be applicable to a treaty that was being applied provisionally. He recalled that the Special Rapporteur had proposed draft guideline 8 bis in response to the comments of a number of Member States that had expressed particular interest in the rules on termination and suspension of a treaty stipulated in article 60. However, some members of the Commission and the Drafting Committee had questioned whether termination or suspension as a consequence of a material breach was the only, or even the most likely, scenario, or whether other grounds for termination set out in part V, section 3, of the Vienna Convention might also be envisaged. There had been some concern that focusing only on material breach could result in an unintended *a contrario* interpretation that other grounds for termination might not be available. In the draft guideline, the Committee had taken those concerns into account without attempting to definitively determine which of the grounds set out in the Vienna Convention might serve as additional bases for the termination of provisional application, or in what situations and to what extent they might do so.

The Committee had limited the scope of paragraph 3 to part V, section 3, of the Vienna Convention, because it had been concerned that a general reference to part V could give rise to legal uncertainty, since other provisions in part V, in particular the procedural provisions in section 4, were not applicable to States not parties to the Convention. Similarly, the specific reference to section 3 served to exclude the applicability of section 2. The question of invalidity had already been contemplated in draft guideline 11, which was based on article 46 of the Vienna Convention.

The reference to "other relevant rules of international law" in paragraph 3 extended the scope to the draft article to provisional application of treaties by international organizations. That was in keeping with the Committee's consistent decisions to opt for general references to "other" rules concerning international organizations, in contrast to the specific references to the Vienna Convention in provisions concerning States. The formulation had been changed because the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had not yet entered into force and should therefore not be referred to in the same way as the 1969 Vienna Convention. The draft guideline had also been given a new title, "Termination and suspension of provisional application", to more accurately reflect its content.

The title of draft guideline 10, which had been provisionally adopted at the sixty-ninth session as draft guideline 9, had been amended to read: "Internal law of States and rules of international organizations, and the observance of provisionally applied treaties", as compared to "Internal law of States or rules of international organizations and observance of provisionally applied treaties" in the previous draft guideline 9. The change had been made to avoid the use of the word "or", in part because of concerns expressed by some members about how the English text might be translated into French. However, the body of the draft guideline remained unchanged. To avoid any confusion, the provisions of the internal law of States and the rules of international organizations were addressed in separate paragraphs. Similar amendments had been made to the titles of draft guidelines 10 and 11, which had been renumbered 11 and 12, respectively, to align them with draft guideline 10. No substantive changes had been made to the bodies of those draft guidelines.

The Committee had adopted "Guide to Provisional Application of Treaties" as the title of the entire set of draft guidelines adopted on first reading. The Special Rapporteur had initially proposed the formulation "guide to practice" to the provisional application of treaties", since the overarching goal of the project had been to offer further guidance to States and international organizations on the application of article 25 of the 1969 and 1989 Vienna Conventions, without detracting from the flexibility inherent in the mechanism of provisional application. However, the Committee had noted that the draft guidelines had a narrower scope than the Guide to Practice on Reservations to Treaties and that while some of the draft guidelines were based on practice, others were of a more normative character. The Committee had decided to reflect those differences by omitting the reference to practice in the title of the text.

He concluded by recommending that the Commission should adopt draft guidelines 6 [7], 7 [5 bis], 9, 10, 11 and 12, and also the title "Guide to Provisional Application of Treaties" as the title of the text as a whole. He also recommended that the Commission should adopt the draft guidelines as a whole on first reading. There was no need to take action on draft guidelines 1 to 5 and 8 individually, as no changes had been made since their provisional adoption by the Commission at its sixty-ninth session.

The Chair invited the members of the Commission to adopt the titles and texts of draft guidelines 6 [7], 7 [5 bis], 9, 10, 11 and 12, and the title "Guide to Provisional Application of Treaties" for the entire set of draft guidelines, as adopted by the Drafting

Committee at the seventieth session of the Commission and contained in document A/CN.4/L.910.

Draft guidelines 6 [7], 7 [5 bis], 9, 10, 11 and 12

Draft guidelines 6 [7], 7 [5 bis], 9, 10, 11 and 12 were adopted.

Title

The title "Guide to Provisional Application of Treaties" was adopted.

The Chair said he took it that the Commission wished to adopt the report of the Drafting Committee on the provisional application of treaties, as contained in document A/CN.4/L.910, as a whole.

It was so decided.

The Chair said he took it that the Commission wished to take note of the recommendation of the Drafting Committee to include in the commentaries to the draft guidelines a reference to the possibility of adopting, at the second-reading stage, a set of draft model clauses based on a revised proposal to be submitted by the Special Rapporteur.

It was so decided.

The meeting rose at 11.35 a.m. to enable the enlarged Bureau to meet.