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## **PROVISIONAL APPLICATION OF TREATIES**

### **Statement of the Chair of the Drafting Committee**

**Mr. Charles Chernor Jalloh**

**31 May 2018**

It is with great pleasure that I introduce the fourth report of the Drafting Committee for the present session of the Commission, which deals with the topic “provisional application of treaties”.

The report, which is to be found in document A/CN.4/L.910 and was circulated to members by the Secretariat yesterday, contains the texts and titles of the entire set of draft guidelines, adopted by the Drafting Committee on first reading. The Committee adopted in final form the draft guidelines which had been provisionally adopted by the Commission, at prior sessions, as well as several new draft guidelines considered at this year’s session, which have collectively been entitled the “Guide to Provisional Application of Treaties”.

Before addressing the details of the report, I wish to pay tribute to the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, who once again demonstrated a constructive and innovative approach, which facilitated the work of the Drafting Committee. I also thank other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

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Mr. Chair,

Over the course of four meetings, held from 22 to 24 May 2018, the Drafting Committee proceeded in three phases. First, it considered and adopted several new draft guidelines on the basis of the Special Rapporteur's proposals for draft guidelines 5 *bis* and 8 *bis*, which the Plenary referred to it on 22 May 2018.

Following the adoption of those new draft guidelines, in a second phase, the Drafting Committee undertook a *toilettage* of the entire set of draft guidelines. If you recall, Mr. Chair, the Commission provisionally adopted 11 draft guidelines last year. At the present session, the Commission decided to refer those draft guidelines back to the Drafting Committee for the sole purpose, time permitting, of preparing a consolidated first reading text of the draft guidelines. During this process, some of the draft guidelines previously adopted by the Commission, on a provisional basis, were slightly adjusted, and some were re-ordered to introduce greater coherence into the draft guidelines. As a consequence, the draft guidelines have been renumbered to reflect the new sequence. For purposes of my statement today, I will be referring to the new numbers, as reflected in the report of the Drafting Committee.

Since the Commission already adopted most of the draft guidelines at last year's session, I would recommend that the Plenary only need to take action on those draft guidelines which have been amended this year, namely draft guidelines 6, 10, 11 and 12, as well as the new draft guidelines worked out by the Drafting Committee this year.\*

Before turning to the draft guidelines, I would like to note that the Drafting Committee, in a third phase, considered the draft model clauses proposed by the Special Rapporteur in his Fifth Report (i.e. document A/CN.4/718), which were also referred to it on 22 May 2018. Due to time constraints, however, the Drafting Committee was not able to conclude its consideration of the eight draft model clauses concerning the time frame for the provisional application of a treaty (commencement and termination) and the scope of provisional application (the treaty as a whole and only part of a treaty). Instead, the Drafting Committee accepted a suggestion by the Special Rapporteur that a reference be included in the commentaries to the possibility of including, during

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\* The numbers in square brackets indicate the numbers of the draft guidelines proposed by the Special Rapporteur, to the extent that they are different.

the second reading, a set of draft model clauses, based on a revised proposal that the Special Rapporteur would make at an appropriate time, taking into account the comments and suggestions made both during the plenary debate and in the Drafting Committee.

My statement today will focus only on the modifications made to draft guidelines previously provisionally adopted by the Commission, as well as on the new provisions adopted for the first time this year. I will conclude by explaining the choice of the title for the text of the draft guidelines. I refer members to the statement of the Chair of the Drafting Committee at last year's session, Mr. Rajput, for an explanation of those draft guidelines adopted in 2017 which were not modified this year.

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### **Draft guideline 6 [7]**

Mr. Chair,

Turning now to the report of the Drafting Committee in document A/CN.4/L.910, no changes were made to draft guidelines 1 to 5 [6], as adopted last year. Draft guideline 6 [7], on the “[l]egal effect of provisional application”, however, has been modified. The Drafting Committee decided to replace the phrase “the same legal effects”, found in last year's version, by “a legally binding obligation to apply the treaty or a part thereof”. A further suggestion to also delete the phrase “as if the treaty were in force” did not find support among a majority of the members of the Drafting Committee. The change in formulation was introduced to address concerns expressed in the Plenary, and comments made 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 on the Law of Treaties only apply when the treaty is in force, and not during its provisional application. The new reference to “a legally binding obligation to apply the treaty or a part thereof” is designed to add more precision in the depiction of the legal effect of provisional application.

The term “[e]ffects” was modified to the singular “[e]ffect” in the title of draft guideline 6 [7] to align the title with the reference to “legal effect” in new draft guideline 7 [5 *bis*] on

reservations. Therefore, the revised title of draft guideline 6 [7] is now “[I]legal effect of provisional application” as opposed to the previous formulation “[I]legal effects of provisional application.”

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### **Draft guideline 7 [5 bis]**

Mr. Chair,

Draft guideline 7 [5 bis] is a new provision added this year. It concerns the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty.

The Drafting Committee discussed the draft guideline on the basis of a revised proposal by the Special Rapporteur, which sought to reflect the comments and concerns expressed in the Plenary. The revised proposal tracked more closely Article 19 of the Vienna Convention on the Law of Treaties, and addressed the concerns that had been raised about structuring the provision as a “without prejudice” clause, as well as the reference to States and international organizations having a “right” to formulate reservations.

During the discussion, different views were expressed as to the appropriateness of including a provision on reservations in the draft guidelines. There was a view in the Drafting Committee that further study of the practice of States and international organizations needed to be undertaken, in particular in light of the pertinent provisions of Part II, Section 2, of the Vienna Convention on the Law of Treaties, and the Guide to Practice on Reservations to Treaties, adopted by the Commission in 2011. Such study could be supplemented by comments solicited from States and international organizations, so as to decide whether or not to include a draft guideline on reservations on second reading. Several options were considered with a view to merely preserving the possibility of having a provision on reservations in the draft guidelines, including adding a reference in the commentary, inserting placeholder text in the draft guidelines, or maintaining the Special Rapporteur’s approach of including a “without prejudice” clause. Nonetheless, the prevailing view in the Drafting Committee favoured the more affirmative confirmation that a State or international organization may, in principle, formulate reservations when agreeing to provisionally apply a treaty or part thereof. The Drafting Committee, accordingly, decided to adopt

a modified version of the revised proposal by the Special Rapporteur for draft guideline 5 *bis* and to place it after draft guideline 6. The new draft guideline 7 [5 *bis*] is divided into two paragraphs, covering the position of States and international organizations, respectively, in line with the approach taken throughout the draft guidelines.

Paragraph 1 commences with the phrase “[i]n accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*”. This phrase is meant to invite further examination and discussion of the rules of the Vienna Convention on the Law of Treaties applicable to reservations in case of provisional application. The phrase was placed at the beginning of the paragraph to clearly indicate that the relevant rules of the Vienna Convention on the Law of Treaties being referred to are those that qualify the formulation of reservations, and not those that relate to the provisional application of certain provisions of the respective treaty.

The remaining phrase “a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty” is based on Articles 2, paragraph 1 (d), and 19 of the Vienna Convention on the Law of Treaties. The reference to the legal effect “produced by the provisional application” was included to underline the intrinsic link between draft guideline 6 [7] on “[l]egal effect of provisional application” and draft guideline 7 [5 *bis*]. The formulation is meant to be more neutral on the question as to whether reservations exclude or modify the legal effect arising from the provisional application of the treaty, or that of the agreement between the parties to provisionally apply the treaty as such.

The Drafting Committee agreed that the commentary would clarify that the Commission was only at an initial stage of considering the question of reservations, in relation to provisional application of treaties, owing to the relative lack of practice on the matter and the fact that reservations in the case of provisional application were not addressed in the 2011 Guide to Practice on Reservations to Treaties. The issue of reservations will 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*]. Furthermore, the commentary to the provision will emphasize the divergent views expressed in the Commission as to whether a draft guideline on reservations in the context of provisional application of treaties or part thereof was necessary and appropriate.

As indicated earlier, paragraph 2 provides for the formulation of reservations by international organizations to parallel the situation of States contemplated by paragraph 1. Paragraph 2 replicates paragraph 1, with the necessary modifications. The opening phrase “[i]n accordance with the relevant rules of international law”, is to be understood broadly to include primarily the rules of the law of treaties, but also those pertaining to the law of the international responsibility of international organizations.

The title of draft guideline 7 [5 *bis*] is “[r]eservations”, which is drawn from the title of Part II, Section 2, of the Vienna Convention on the Law of Treaties. While the draft guideline singles out the formulation of reservations for express mention, the title reflects the fact that the scope of the draft guideline is intended to be broader to cover the possible applicability *mutatis mutandis* of other relevant rules laid down in the Vienna Convention on the Law of Treaties.

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No change was made to draft guideline 8, concerning responsibility for breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied, which was adopted last year as draft guideline 7. As indicated earlier, as no amendments were made, I will not say anything further about this draft guideline since the rationale behind it was already explained in the report by the Chair of last year’s Drafting Committee.

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## **Draft guideline 9**

Mr. Chair,

Draft guideline 9 addresses the termination and suspension of provisional application. The provision expands on that adopted last year, as then draft guideline 8, on “[t]ermination upon notification of intention not to become a party”, through the inclusion of two new paragraphs covering additional scenarios. As will be discussed shortly, the additional paragraphs arose following the Drafting Committee’s consideration of a revised proposal for draft guideline 8 *bis*, as well as a new proposal for a draft guideline 8 *ter* dealing with termination upon entry into force, both made by the Special Rapporteur. For reasons of maintaining the overall economy of the draft guidelines, the Drafting Committee decided to address the various methods of termination in a

single draft guideline. The order of the paragraphs is intended to track that in Article 25 of the Vienna Convention on the Law of Treaties. Accordingly, the three paragraphs constitute a cascade from the most frequent to the least frequent scenario of termination of provisional application.

Paragraph 1 concerns the termination of provisional application upon entry into force. It provides that “[t]he provisional application of a treaty or a party of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.” Such form of termination of provisional application is implicit in the phrase “pending its entry into force” in paragraph 1 of Article 25 of the Vienna Convention on the Law of Treaties, as reflected in draft guidelines 3 and 5 [6]. It is based on the Special Rapporteur’s proposal for a new draft guideline 8 *ter*. The commentary will explicitly acknowledge that termination upon entry into force constitutes the most frequent way in which provisional application ends. The phrase “in the relations between the State or international organizations concerned” was included to distinguish the objective entry into force of the treaty from the subjective entry into force for one or more parties to the treaty. This was viewed as being particularly relevant in the relations between parties to a multilateral treaty, where the treaty might enter into force for a number of the parties but continue to be applied only provisionally by others.

Paragraph 2 of draft guideline 9 reflects the text of then draft guideline 8, as adopted by the Commission at last year’s session, without amendment. The provision deals with the scenario in paragraph 2 of Article 25, namely termination of provisional application through notification of intention not to become a party to the treaty unless the treaty otherwise provides or it is otherwise agreed.

Paragraph 3 confirms that draft guideline 9 is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in Part V, Section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension. The origins of the paragraph lie in a revised proposal by the Special Rapporteur for draft guideline 8 *bis* contained in the Fifth report addressing termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach. The Drafting Committee considered whether, despite an apparent lack of relevant practice, a provision covering termination and suspension in the case of a material breach should nonetheless be included in the draft guidelines. A majority within the Drafting Committee felt

that the envisaged scenario was plausible, and that such a provision was, on balance, a useful addition to the draft guidelines to cover possible scenarios relating to a material breach of a provisionally applied treaty. It was felt that this scenario, if it occurs in practice, would more likely arise in the multilateral instead of bilateral treaty context. It was recognized that the outcome envisaged in draft guideline 8 adopted last year, namely termination of provisional application by means of notification of intention not to become a party, was not necessarily the most frequently resorted to. For example, a State or international organization might only wish to terminate provisional application, but still intend to become a party to the treaty. A State or international organization might also only seek to terminate or suspend provisional application vis-à-vis the State or international organization that has committed the material breach, while still continuing to provisionally apply the treaty in relation to other parties. The possibility of “suspension” of provisional application, in response to a material breach, is also envisaged. The State or international organization affected by the material breach may wish to resume the provisional application of the treaty after the material breach has been adequately remedied.

It should be noted, however, that the text adopted by the Drafting Committee is broader than that proposed by the Special Rapporteur as it is not *per se* limited to material breach. Instead it is presented in the form of a “without prejudice” clause intended to preserve the possibility that not only Article 60 but also other provisions pertaining to termination and suspension in the Vienna Convention on the Law of Treaties might be applicable to a provisionally applied treaty. It should be recalled that the Special Rapporteur had proposed draft guideline 8 *bis* in response to the comments by a number of Member States which had expressed particular interest in the rules on termination and suspension of a treaty stipulated in Article 60. Nonetheless, while not opposing such possibility, some members of the Commission, both in Plenary and in the Drafting Committee, questioned whether the scenario of termination and suspension arising from a material breach was the only, or even the most likely, scenario, or whether other grounds for termination in Part V, Section 3, of the Vienna Convention on the Law of Treaties might also be envisaged. Indeed, the concern was expressed that focusing only on material breach could result in an unintended *a contrario* interpretation that other grounds for termination might not be available. At the same time, the provision does not aspire to definitively determine which grounds in Section 3 might serve as

an additional basis for the termination of provisional application, and in which scenarios and to what extent. Instead, the rules of the Vienna Convention are to be “applied *mutatis mutandis*” depending on the circumstances.

Furthermore, the Drafting Committee limited the scope of the provision to Section 3 of Part V of the Vienna Convention out of a concern that a general reference to Part V could give rise to legal uncertainty. For example, the Drafting Committee recognized that other provisions of Part V, in particular the procedural provisions in Section 4, are not applicable to States not parties to the Vienna Convention on the Law of Treaties.

Similarly, the specific reference to Section 3 serves to exclude the applicability of Section 2 of Part V of the Vienna Convention, on invalidity. The Drafting Committee recalled that the question of invalidity had already been contemplated in the context of draft guideline 11, which is based on Article 46 of the Vienna Convention on the Law of Treaties.

The reference to “or other relevant rules of international law” extends the scope of the provision to the provisional application of treaties by international organizations. As already referred to in the context of draft guideline 7 [5 *bis*], the Drafting Committee has consistently opted for a more general reference to “other” rules when dealing with international organizations, in contrast to the more specific reference to the Vienna Convention employed for States. Such variation in formulation arises from the fact that the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations has not yet entered into force, and accordingly should not be referred to in the same manner as its 1969 counterpart.

Lastly, on this draft guideline, the new title as was adopted by the Drafting Committee is “[t]ermination and suspension of provisional application” in order to more accurately reflect the contents of paragraphs 1 to 3.

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### **Draft guidelines 10, 11 and 12**

Mr. Chair,

I will now address changes made to the titles of draft guidelines 10, 11 and 12. The title of draft guideline 10, which was provisionally adopted last year as draft guideline 9, has been amended to read “[i]nternal law of States and rules of international organizations, and the observance of provisionally applied treaties”. The Drafting Committee sought to avoid using “or” as was contained in the title of previous draft guideline 9 by replacing “or” with “and” between “[i]nternal law of States” and “rules of international organizations”, and adding a comma before the phrase “and the observance of provisionally applied treaties”. Part of the reason for this was to reflect the concern of some members about how the English text might otherwise translate into French. On the other hand, and to put the matter beyond doubt, the text of the paragraphs of the provisionally adopted draft guidelines from last year remained unchanged and address, respectively, the provisions of internal law of States and rules of international organizations concerning competence to agree on the provisional application of treaties and agreement to provisional application with limitations deriving from internal law of States and rules of international organizations. As a consequence, with no substantive changes to the text of former draft guidelines 9, 10 and 11 that are now renumbered as draft guidelines 10, 11 and 12, the Drafting Committee needed to only further align the titles of draft guidelines 11 and 12 with the new title of draft guideline 10.

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## **Title**

Mr. Chair,

After completing its work on the draft guidelines, the Drafting Committee adopted the title of the entire set of draft guidelines on first reading as the “Guide to Provisional Application of Treaties”. The Special Rapporteur had initially proposed, in his Fifth report, the formulation “guide to practice” on the provisional application of treaties since the overarching goal of the project has been to offer further guidance to States and international organizations concerning the application of Article 25 of the 1969 and 1986 Vienna Conventions without taking away from the flexibility inherent in the mechanism of provisional application. However, the Drafting Committee noted that the draft guidelines had a less comprehensive scope than the “Guide to Practice on Reservations to Treaties” adopted

by the Commission in 2011, and that the text before it contained a greater mixture of draft guidelines based on practice, together with others of a more normative character. The Drafting Committee in the end decided to reflect such difference by omitting the reference to “practice” in the title.

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Mr. Chair,

This concludes my introduction of the fourth report of the Drafting Committee for the seventieth session. As was noted by way of introduction, since some of the draft guidelines were previously adopted by the Plenary during the sixty-ninth session, I would recommend that the Plenary only take action on those prior draft guidelines which have been amended, as well as the new draft guidelines and the title of the entire set worked out by the Drafting Committee this year. In other words, it is my recommendation that the Plenary focus specifically on adopting draft guidelines 6 [7], 7 [5 *bis*], 9, 10, 11 and 12, and the title “Guide to Provisional Application of Treaties”. No action would be necessary for those draft guidelines, adopted by the Commission last year, to which no changes were made, namely draft guidelines 1 to 5, and 8. I would also recommend that the Commission proceed to then adopt the entire set of draft guidelines on provisional application of treaties as a whole, on first reading.

Thank you, Mr. Chair.

## ANNEX

### **Provisional application of treaties**

#### **Texts and titles of the draft guidelines adopted by the Drafting Committee on first reading**

### **Guide to Provisional Application of Treaties**

#### **Draft guideline 1**

##### *Scope*

The present draft guidelines concern the provisional application of treaties.

#### **Draft guideline 2**

##### *Purpose*

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

#### **Draft guideline 3**

##### *General rule*

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

#### **Draft guideline 4**

##### *Form of agreement*

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

- (a) a separate treaty; or
- (b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

#### **Draft guideline 5 [6]**

##### *Commencement of provisional application*

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

## **Draft guideline 6 [7]**

### ***Legal effect of provisional application***

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

## **Draft guideline 7 [5 bis]**

### ***Reservations***

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

## **Draft guideline 8**

### ***Responsibility for breach***

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

## **Draft guideline 9**

### ***Termination and suspension of provisional application***

1. The 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.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

3. The present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in Part V, Section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

**Draft guideline 10*****Internal law of States and rules of international organizations, and the observance of provisionally applied treaties***

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.
2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

**Draft guideline 11*****Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties***

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

**Draft guideline 12*****Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations***

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

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