

Document:-  
**A/CN.4/3188**

**Summary record of the 3188th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
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provisional application of a treaty and many European treaties contained provisions governing that mechanism.

37. Mr. WISNUMURTI said that the topic under consideration was important because its study would enable the Commission to clarify the legal consequences of the provisional application of treaties, in the absence of uniform regulations in that area, without losing sight of the fact that, as the Special Rapporteur had stated, in paragraph 21 of his report, “the content and scope of the provisional application of a treaty will depend largely on the terms in which such application is envisioned in the treaty” concerned.

38. The question of legal effects was of fundamental importance and required further elaboration in subsequent reports. The Special Rapporteur’s references to them in various places in the report (paras. 23, 25 and 36–52) did little to shed light on the matter. He rightly noted that the provisional application of treaties had “consequences that arise both within the State and at the international level” (para. 37). The Commission would have to pay particular attention to the relationship between that mechanism and constitutional law requirements for the entry into force of a treaty. As stated in paragraph 35, a conflict could arise between international law and the constitutional law of the parties to a treaty. Of course, it was presumed that steps would be taken to avert that risk before agreement was reached on provisional application but, for the sake of legal certainty, any guidelines for States would have to include an indication of how to avoid that difficult situation. Due attention should therefore be paid to internal law without embarking on a comparative study of constitutional law and the provisional application of treaties.

39. The Commission might be able to draw on article 25 of the Vienna Convention when drafting guidelines on the provisional application of treaties for States. Since the terminology of that article should therefore be followed, it would be unwise to speak of “provisional entry into force”. In order to decide on the content of those practical guidelines, it would be necessary to identify and take into consideration certain relevant factors, such as the terms on which provisional application had been agreed, arrangements for its termination (by a unilateral or multilateral act or through the entry into force of the treaty), the relationship between provisional application in international law and constitutional requirements in internal law and the principles contained in provisions other than article 25, especially those mentioned in articles 26 and 27, as well as the principle of consent to be bound by a treaty.

40. The conclusions set out in paragraph 53 of the report, which had prompted a number of comments from members, were more akin to reference points for further work and were all relevant, save (a) and (f). It was premature to decide what form should be taken by the work, but it had to be made clear right from the very start that the purpose was not to encourage the use of provisional application, as the Special Rapporteur seemed to suggest in paragraph 54. That procedure had to remain an interim solution pending the entry into force of the treaty, and the Commission must simply help States to make use of it without interfering with their sovereign right to decide what was best for them.

41. Mr. SABOIA wished to emphasize the influence of constitutional law and national political systems on the topic under consideration. The Commission’s statute required it to take account of various legal systems throughout the world and the opportunity for doing so had certainly arrived. The example of Brazil was interesting in that respect: it had been able to ratify the 1969 Vienna Convention only with a reservation to article 25, *inter alia*, because a number of members of Congress had taken the view that that article encroached on their constitutional role, even though it created no obligation to accept provisional application. The General Agreement on Tariffs and Trade, which Congress had authorized the Executive to apply provisionally back in 1948, was virtually the only example. Depending on the political system, parliamentary approval could be more or less easy to obtain. Moreover, even if provisional application might be a legitimate tool for expediting the achievement of the goals of an international instrument, it must not deprive the representatives of the people and civil society of holding an appropriate debate on the implications of the treaty concerned. Ratification remained necessary, even if the procedure ought to be speeded up, and it could be secured if there was political will and pressure from civil society, as had been the case of the Rome Statute of the International Criminal Court, which had been ratified by Brazil two years after its adoption.

42. The Commission could therefore usefully clarify certain issues connected with the regime of the provisional application of treaties, in particular that of how that application became effective between the parties, what its legal effects were and its relationship with the provisions of the Vienna Convention and the rules on State responsibility. It would also be necessary to study the thornier issues of the termination of provisional application, and the retention of provisional application by a State after the entry into force of the treaty. As for the outcome of the work, as other members had said, it must be explanatory and practical, but neutral; it should neither encourage nor discourage the provisional application of treaties, and it should also avoid making future practice in that area a source of an obligatory acceptance of clauses related to that procedure.

*After the statements made by Mr. Schmidt, the Director of the International Law Seminar, and Ms. López-Ruiz Montes, the representative of the participants in the Seminar, the Chairperson congratulated the participants and declared the Seminar closed.*

*The meeting rose at 1 p.m.*

### 3188th MEETING

*Tuesday, 30 July 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree,

Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

**Provisional application of treaties (concluded)**  
(A/CN.4/657, sect. D, A/CN.4/658, A/CN.4/664)

[Agenda item 7]

**FIRST REPORT OF THE SPECIAL RAPPOREUR (concluded)**

1. Mr. NOLTE said that the Commission was faced with a division of opinions over a key issue. While some members held that the provisional application of treaties should not be encouraged, because it entailed the risk that domestic constitutional procedures might be circumvented, others maintained that States were under no obligation to accept the provisional application of treaties and were free to make sure that their constitutional procedures were respected. In his view, both positions expressed important points, and they were not mutually incompatible.

2. The second position presupposed that it was clear to all what was meant by “provisional application”. The first position reflected doubts as to whether such clarity existed. He himself shared those doubts: to those who were not international legal experts, the term was ambiguous enough to be regarded as not implying a legally binding effect. He also had the impression that the provisional application of treaties might offer governments a means of suggesting to their parliaments that there was some third category of agreement, somewhere between a binding treaty and a less formal undertaking, which did not require treatment according to normal constitutional standards.

3. If the Commission were to conclude that provisional application always entailed a legally binding treaty obligation, that would mean that most States which required parliamentary approval in order to undertake such an obligation would have to follow normal constitutional procedures in order to obtain approval. In that case, it was unclear what advantage was offered by provisional application. If, on the other hand, the Commission concluded that provisional application did not produce a legally binding commitment, then the goal of bringing the treaty into operation speedily might be achieved, but at the expense of the protection offered to the parties by the binding character of treaties. By spelling out the meaning and legal effects of provisional application, the Commission could help to ensure that States did not accept what they thought was something less than a binding treaty, only to discover, belatedly, that they were bound by a real treaty.

4. Such clarification might come with a price, however. Fewer States might be prepared to have recourse to provisional application if it denoted a binding treaty obligation. In that case, it would no longer fulfil its primary function of enabling States parties to embark upon cooperation under a treaty even before its entry into force made it fully binding. That function would have to

be fulfilled by means of treaty clauses in which the parties undertook to do their best to apply the treaty within the constraints imposed by their constitutions or domestic legislation.

5. Mr. PARK said that in order to determine the general direction of the Commission’s work on the topic, it was necessary to study the background to the formulation of article 25 of the 1969 Vienna Convention and to analyse current State practice in the provisional application of treaties. The purpose of work on the topic should be the drafting of guidelines in order to ensure that the provisional application of treaties served to promote legal certainty in international relations.

6. The fact that the terms “provisional application” and “provisional entry into force” were often used interchangeably in legal writings and State practice could introduce ambiguity into treaty regimes. The Commission should therefore issue a guideline advising States to use one of those terms in preference to the other. It should not encourage States to have more frequent recourse to provisional application, however, because it was a legal mechanism that was not yet fully formed and its legal effects were not always clear.

7. A number of questions raised by article 25 needed to be considered: for example, the question of when provisional application began and ended. Since article 25, paragraph 2, enabled a State to terminate the provisional application of a treaty whenever it wished, by unilateral notification, other States were vulnerable to arbitrary abuse by that State of the provisional application regime. As for the legal effect of provisional application, he subscribed to the view that during such application, a State was legally bound, under the principle of *pacta sunt servanda*, and that failure by a State to abide by a provisionally applied treaty entailed its responsibility for an internationally wrongful act. Bilateral and multilateral treaties should be dealt with separately, since that distinction might affect assessments of whether all the parties had consented to the provisional application of a treaty or to the termination of provisional application.

8. A potential conflict between domestic legislation and the provisional application of a treaty could sometimes be resolved, or avoided, at the national or international level. In the absence of a constitutional provision concerning provisional application, a government could seek parliamentary approval of such application. Alternatively, an international treaty could incorporate a special clause requiring States to apply the treaty provisionally in accordance with their national or internal laws. Problems arose, however, when there was neither a national procedure nor a treaty clause permitting provisional application. That was why the Commission should draw up guidelines that would obviate any conflict in those circumstances.

9. Mr. VÁZQUEZ-BERMÚDEZ said that even though some Latin American States had entered reservations to article 25 of the Vienna Convention, article 330 of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, permitted its provisional application subject to compliance with the requisite domestic procedures

in each country. In Peru and the member States of the European Union, the agreement had been provisionally applied since 1 March 2013, pending the completion of ratification procedures by all the States, whereas in Colombia, parliamentary approval was necessary for its provisional application. There was, however, no difference between the legal effects of the provisional application of the agreement and the legal effects of its final entry into force.

10. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that, before summing up the debate, he wished to explain that the last sentence of paragraph 35 of his report (A/CN.4/664) was not intended to describe a case where, as the penultimate sentence indicated, provisional application might be a subterfuge for evading the domestic legal requirements for the approval of a treaty. The case cited was one example among many where provisional application served to speed up the implementation of a treaty.

11. With regard to sources, he had taken note of the recommendation that he should look into State practice during the negotiation, implementation, interpretation and termination of a treaty that was subject to provisional application. He would also take due account of the case law and the opinions that would be expressed by States in the Sixth Committee at the upcoming session of the General Assembly. States might be requested to provide information on their practice, particularly with respect to bilateral treaties, and to explain how and when they used provisional application, when they deemed such application to be terminated and what they viewed as its legal effects. An indicative list of State practice could then be drawn up on the basis of that information.

12. It was true that it was not the Commission's task to encourage or discourage provisional application of treaties by States. His use of the word "incentives" in paragraph 54 of the report had apparently given the impression that he wanted the Commission to actively promote the practice. However, the objective was simply to clarify the relevant legal regime by studying State practice and case law, as was the Commission's standard practice. His working hypothesis was that provisional application was a transitional regime that could, but did not always, lead to the entry into force of a treaty.

13. The Commission's discussion of terminology had led to an exploration of the distinction between provisional application and entry into force. The term used in article 25 of the 1969 Vienna Convention was "provisional application", however, and it was on that term and its meaning that the Commission's work must focus.

14. A number of members had raised the issue of whether provisional application constituted a rule of customary international law. Irrespective of whether it did, provisional application was a reality in inter-State relations. Determining that it was, or was not, a customary rule could be useful in situations involving two or more States that were not parties to the Vienna Convention and where no treaty provision was applicable.

15. Several members had mentioned the relationship between provisional application and the internal law and, in particular, the constitutional law of States, which was

undoubtedly a complex issue. He fully shared the view that it was not necessary to conduct an exhaustive study of internal or constitutional law in each State as part of the current project. Some internal legislation could nevertheless be taken into account to shed light on the position taken by States and to ensure that they were aware of the implications that recourse to provisional application could have for their internal law. He agreed with those who had recalled that article 27 of the Vienna Convention should guide the Commission's work in that area. Of course, it would also be necessary to take account of the situation that could arise from the scenario referred to in article 46 of that Convention, as pointed out by one speaker. By alleviating the uncertainty surrounding provisional application of treaties, the Commission's work might even embolden States to address provisional application in their internal law.

16. With regard to the analysis of the legal effects of provisional application, he agreed with several speakers that the Commission should find out how the rules on provisional application related to other rules in the Vienna Convention and whether a *lex specialis* regime or the general regime of the Convention regulated provisional application. In future reports, he would examine the effect of the Vienna Convention on provisional application in areas such as the expression of consent, reservations, relations with third States, interpretation, amendment, termination and invalidation. The temporal aspect of provisional application would also need to be studied. Normally, provisional application ended with the entry into force of a treaty, although in some cases it could continue indefinitely, as was the case with the Arms Trade Treaty. Consideration would also be given to the scenario mentioned by two speakers in which provisional application generated rights for individuals. He agreed that a distinction should be made between bilateral and multilateral treaties.

17. It was true that there was no need to analyse the relationship of provisional application to the regime of State responsibility. Provisional application was unquestionably governed by the principle of *pacta sunt servanda* and clearly any breach of an obligation arising from the provisional application of a treaty would bring into play the rules on responsibility of States for internationally wrongful acts.

18. He had taken note of the interest expressed by a number of speakers in addressing the treatment of provisional application in treaties concluded between States and international organizations or between international organizations.

19. While various members had suggested that it was too early to define what form the outcome of the Commission's work should take, in his view, the most logical approach would be to draft a series of guidelines, including commentaries, to assist States when negotiating, implementing, interpreting and terminating the provisional application of a treaty. The purpose would be to provide tools to facilitate recourse to provisional application by the executive and possibly other branches of government. He would endeavour to include some guidelines and commentaries in his next report.

20. As one speaker had pointed out, the Commission should take into account the possible cost of eliminating the ambiguities surrounding provisional application. He agreed that there was a risk of affecting the flexibility of provisional application, and it would therefore be necessary to avoid being too prescriptive.

21. The future programme of work could focus on the following issues: a brief review of State practice; the relationship between the rules on provisional application and other rules in the 1969 Vienna Convention; the legal regime under article 25 of the Convention; the legal effects of provisional application; and the regime of provisional application in the light of the 1986 Vienna Convention.

**Programme, procedures and working methods of the Commission and its documentation (A/CN.4/657,<sup>160</sup> sect. I, A/CN.4/L.830<sup>161</sup>)**

[Agenda item 11]

REPORT OF THE PLANNING GROUP

22. Mr. ŠTURMA (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.830), said that the Group had held three meetings to consider section I (Other decisions and conclusions of the Commission) of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session (A/CN.4/657); General Assembly resolution 67/92 of 14 December 2012, on the report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions,<sup>162</sup> in particular paragraphs 23 to 28; General Assembly resolution 67/1 of 24 September 2012 containing the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels; and General Assembly resolution 67/97 of 14 December 2012 on the rule of law at the national and international levels.

23. At the Commission's current session, the Working Group on the long-term programme of work had been reconstituted. Based on a proposal by Mr. Murphy, the Working Group had recommended, and the Planning Group had endorsed, the inclusion of the topic "Crimes against humanity" in the Commission's long-term programme of work. The syllabus of the topic would be annexed to the Commission's report to the General Assembly.

24. As in the past, the Planning Group had prepared a section on the rule of law at the national and international levels in response to the request of the General Assembly in resolution 67/97. For the first time, specific language had been added to the section on documentation and publications to highlight the importance attached to the continued issuance of the Commission's publications and to recommend that the General Assembly take the necessary action.

25. The Planning Group also recommended that the sixty-sixth session of the Commission should be held in

Geneva from 5 May to 6 June and from 7 July to 8 August 2014. The recommendations of the Planning Group would be incorporated, with the necessary adjustments, in the final chapter of the Commission's report on the work of its sixty-fifth session.

26. Mr. PETRIČ said that, although the topic of protection of the atmosphere had been discussed a number of times, to date those discussions had not been mentioned in the Commission's reports or summary records. He wished to know whether they would be covered in the report on the current session.

27. Mr. CANDIOTI, endorsing those remarks, pointed out that many States in the Sixth Committee had shown interest in the topic of protection of the atmosphere. He wished to make a formal proposal for the inclusion of the topic in the Commission's agenda for its sixty-sixth session. In addition, he proposed that chapter II of the Commission's annual report, which contained a summary of the work of the Commission at its sixty-fifth session, contain a paragraph to indicate that informal consultations had been held on the topic and to describe the results of those consultations.

28. The CHAIRPERSON said that the Commission was to hold informal consultations the following day precisely in order to discuss the protection of the atmosphere, a topic that had been pending for some time. He would announce the results of those consultations at the plenary meeting immediately following them.

29. Mr. CANDIOTI, supported by Mr. PETRIČ, emphasized the importance of maintaining transparency in the Commission's work and, in particular, of keeping the Sixth Committee and the General Assembly fully informed of its activities, including all the topics it discussed.

30. Following editorial proposals and drafting suggestions by Mr. FORTEAU, Ms. ESCOBAR HERNÁNDEZ, Mr. EL-MURTADI SULEIMAN GOUIDER, Sir Michael WOOD, Mr. HMOUD and Ms. JACOBSSON, the CHAIRPERSON said he took it that the Commission wished to adopt the recommendations of the Planning Group contained in document A/CN.4/L.830.

*It was so decided.*

31. The CHAIRPERSON said he took it that the Commission wished to incorporate the topic "Crimes against humanity" in its long-term programme of work and to annex the syllabus of the new topic to its report on the work of its sixty-fifth session.

*It was so decided.*

**Protection of the environment in relation to armed conflicts**

[Agenda item 9]

ORAL REPORT OF THE SPECIAL RAPPOREUR

32. Ms. JACOBSSON (Special Rapporteur) said that consultations had been held on 6 June and 9 July 2013 on the basis of two informal papers she had circulated.

<sup>160</sup> Mimeographed; available from the Commission's website.

<sup>161</sup> *Idem*.

<sup>162</sup> *Yearbook ... 2011*, vol. II (Part Two), and *Yearbook ... 2012*, vol. II (Part Two).

The purpose had been to initiate an informal dialogue on a number of issues that could be of relevance to the consideration of the topic during the present quinquennium. The two informal papers were to be read together with the syllabus containing the initial proposal for the topic, as reproduced in the report of the Commission to the General Assembly on the work of its sixty-third session.<sup>163</sup> The issues discussed during the consultations included the scope, general direction of work and timetable. On the basis of the consultations, she had circulated an outline for future work on the topic, including the proposed focus of her first report.

33. She had proposed that the topic should be addressed from a temporal perspective, rather than from the perspective of various areas of international law. The temporal phases related to legal measures taken to protect the environment before, during and after an armed conflict (phases I, II and III). Such an approach would allow the Commission to identify concrete legal issues that arose in the different phases and would facilitate the development of concrete conclusions or guidelines.

34. She had further proposed that the focus of the topic be on phase I, obligations of relevance to a potential armed conflict, and phase III, post-conflict measures. Phase II, the phase during which the law of war applied, would be given less emphasis, as it should not be the Commission's task to modify the existing legal regimes. The work on phase II should also focus on non-international armed conflicts.

35. The original time frame envisaged in the syllabus had been five years, based on an approach to the topic that was different from the one she had just described. With respect to the final outcome, her preliminary view was that the topic was much better suited to the development of non-binding draft guidelines than to a draft convention.

36. During the informal consultations, the approach of addressing the topic in temporal phases had generally been welcomed. Several members of the Commission had emphasized that phase II, rules applicable during an armed conflict, was the most important, although others considered that either phase I or phase III, or both, were paramount. Her view was that although the work was divided into temporal phases, there could not be a strict dividing line between them, since that would be artificial, and it would not correspond to the way in which the legal rules relevant for the topic operated.

37. Several members had cautioned against taking up the question of weapons, whereas a few members thought that it should be addressed. In her opinion, it should not be the focus of the topic.

38. Some members considered it premature to decide on the final form of the work or to ask Member States to report on their practice. Consultations with other United Nations organs or international organizations involved in the protection of the environment were encouraged. She had also been encouraged to consult regional bodies, such as the African Union, the European Union, the League of Arab States and the Organization of American States.

39. She intended to present her first report to the Commission at its sixty-sixth session. She envisaged a three-year timetable for the Commission's work on the topic, with one report each year. The focus of the first report would be on phase I, obligations of relevance to a potential armed conflict. It would not address post-conflict measures *per se*, even if preparation for post-conflict measures might need to be implemented before an armed conflict had broken out. She also planned to identify the issues previously considered by the Commission that might be of relevance to the present topic. It would be valuable if the Commission could ask States to provide examples of instances in which international environmental law, including regional and bilateral treaties, had continued to apply in times of international or non-international armed conflict.

40. The second report would be on the law of armed conflict, including non-international armed conflict, and would contain an analysis of existing rules. The third report would focus on post-conflict measures, including reparation of damage, reconstruction, liability and compensation. Particular attention would be given to case law. All three reports would contain conclusions or draft guidelines for discussion by the Commission, and possible referral to the Drafting Committee. At the current stage, it was hard to predict whether it would be possible to conclude the topic within the current quinquennium.

41. She wished to draw attention to a discrepancy in the translation of the title of the topic into certain official languages. The title was "Protection of the environment in relation to armed conflicts", with the phrase "in relation to" reflecting the fact that the subject was not limited to the armed conflict phase and included two other temporal phases.

42. The CHAIRPERSON said he took it that the Commission wished to take note of the report presented orally by the Special Rapporteur on the topic of protection of the environment in relation to armed conflicts.

*It was so decided.*

*The meeting rose at 12.30 p.m.*

### 3189th MEETING

*Wednesday, 31 July 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

<sup>163</sup> *Yearbook ... 2011*, vol. II (Part Two), annex V.