Chapter XI

PROVISIONAL APPLICATION OF TREATIES

A. Introduction

244. At its sixty-fourth session (2012), the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez Robledo as Special Rapporteur for the topic.[397] At the same session, the Commission took note of an oral report, presented by the Special Rapporteur, on the informal consultations held on the topic under his chairmanship. The General Assembly subsequently, in resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work.

245. At its sixty-fifth session (2013), the Commission had before it the first report of the Special Rapporteur,[398] which sought to establish, in general terms, the principal legal issues that arose in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The Commission also had before it a memorandum by the Secretariat,[399] which traced the negotiating history of article 25 of the 1969 Vienna Convention, both within the Commission and at the United Nations Conference on the Law of Treaties, 1968–1969, and included a brief analysis of some of the substantive issues raised during its consideration.

246. At its sixty-sixth session (2014), the Commission considered the second report of the Special Rapporteur,[400] which sought to provide a substantive analysis of the legal effects of the provisional application of treaties.

B. Consideration of the topic at the present session

247. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/687), which continued the analysis of State practice and considered the relationship of provisional application to other provisions of the 1969 Vienna Convention, as well as the question of provisional application with regard to international organizations. The report included proposals for six draft guidelines on provisional application.[401]

248. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the 1986 Vienna Convention.

249. The Commission considered the third report at its 3269th to 3270th and 3277th to 3279th meetings, held on 14, 15, 23, 24 and 28 July 2015.

250. At its 3279th meeting, on 28 July 2015, the Commission referred draft guidelines 1 to 6 to the Drafting Committee.

251. At its 3284th meeting, on 4 August 2015, the Chairperson of the Drafting Committee presented an interim oral report on draft guidelines 1 to 3, as provisionally adopted by the Drafting Committee at the sixty-seventh session. The report was presented for information only at this stage, and is available, together with the draft guidelines, on the Commission's website.[402]

1. Introduction by the Special Rapporteur of the third report

252. In introducing his third report, the Special Rapporteur recalled the work carried out by the Commission at previous sessions and the content and purpose of his first two reports. In particular, he recalled his assessment that,

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[397] At its 3132nd meeting, on 22 May 2012 (see *Yearbook … 2012*, vol. II (Part Two), p. 85, para. 267). The topic had been included in the Commission's long-term programme of work at its sixty-third session (2011), in accordance with the proposal contained in annex III to the report of the Commission on its work at that session (*Yearbook … 2011*, vol. II (Part Two), paras. 365–367, and annex III, pp. 198–201).

[398] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664.

[399] *Ibid*., document A/CN.4/658.

[400] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675.

[401] The text proposed by the Special Rapporteur read as follows:

"*Draft guideline 1*

"States and international organizations may provisionally apply a treaty, or parts thereof, when the treaty itself so provides, or when they have in some other manner so agreed, provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application.

"*Draft guideline 2*

"The agreement for the provisional application of a treaty, or parts thereof, may be derived from the terms of the treaty, or may be established by means of a separate agreement, or by other means such as a resolution adopted by an international conference, or by any other arrangement between the States or international organizations.

"*Draft guideline 3*

"A treaty may be provisionally applied as from the time of signature, ratification, accession or acceptance, or as from any other time agreed by the States or international organizations, having regard to the terms of the treaty or the terms agreed by the negotiating States or negotiating international organizations.

"*Draft guideline 4*

"The provisional application of a treaty has legal effects.

"*Draft guideline 5*

"The obligations deriving from the provisional application of a treaty, or parts thereof, continue to apply until: (*a*) the treaty enters into force; or (*b*) the provisional application is terminated pursuant to article 25, paragraph 2, of the Vienna Convention on the Law of Treaties or the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, as appropriate.

"*Draft guideline 6*

"The breach of an obligation deriving from the provisional application of a treaty, or parts thereof, engages the international responsibility of the State or international organization."

[402] Available from http://legal.un.org/ilc.

subject to the specific characteristics of the treaty in question, the rights and obligations of a State which had consented to provisionally apply a treaty were the same as the rights and obligations that stemmed from the treaty itself as if it were in force; and that a violation of an obligation stemming from the provisional application of a treaty engaged the responsibility of the State.

253. Approximately 20 Member States had provided comments on their practice. While he noted that the practice of States was not uniform, the Special Rapporteur continued to be of the opinion that it was not necessary to carry out a comparative study of internal laws. He noted that the number of treaties that provided for provisional application and had been applied provisionally was relatively high.

254. His third report focused on two major issues: first, the relationship with other provisions of the 1969 Vienna Convention, and, second, the provisional application of treaties with regard to the practice of international organizations. As regards the former, his analysis, which had not been intended to be exhaustive, focused on articles 11 (Means of expressing consent to be bound by a treaty), 18 (Obligation not to defeat the object and purpose of a treaty), 24 (Entry into force), 26 (*Pacta sunt servanda*) and 27 (Internal law and observance of treaties). Those provisions had been chosen because they enjoyed a natural and close relationship with provisional application. As regards the provisional application of treaties between States and international organizations, or among international organizations, the Special Rapporteur observed that the Secretariat's memorandum had clearly indicated that States considered the formulation adopted in the 1969 Vienna Convention valid. Nonetheless, the Special Rapporteur reiterated his view that an analysis of whether article 25 of the 1969 Vienna Convention reflected customary international law would not affect the general approach to the topic.

255. Chapter IV of his report focused on several aspects: (*a*) international organizations or international regimes created through the provisional application of treaties; (*b*) the provisional application of treaties negotiated within international organizations, or at diplomatic conferences convened under the auspices of international organizations; and (*c*) the provisional application of treaties to which international organizations were parties. As regards the creation of international organizations or international regimes, the Special Rapporteur clarified that he was referring to those international bodies created by treaties, and which played a significant role in the application of the treaty, even though they were not designed to become fully fledged international organizations. As regards the provisional application of treaties negotiated within international organizations, or at diplomatic conferences convened under the auspices of international organizations, the Special Rapporteur referred, in particular, to the establishment of the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO). Despite the fact that the Treaty was not in force, CTBTO in its transitional form had been operating for nearly 20 years. The Special Rapporteur also referred to more than 50 treaties negotiated under the auspices of the Economic Community of West African States, a significant number of which made provision for the provisional application of treaties. He submitted for the consideration of the Commission the possibility of studying the practice of the provisional application of treaties in the context of regional international organizations.

256. In his view, the task before the Commission was to develop a series of guidelines for States wishing to resort to the provisional application of treaties, and he proposed that the Commission could also consider within those guidelines the preparation of model clauses to guide negotiating States. He noted that the six draft guidelines on the provisional application of treaties were the outcome of the consideration of the three reports, each of which had to be read in the light of the other two. The starting point for their drafting was article 25 of both the 1969 and 1986 Vienna conventions.

2. Summary of the debate

(a) *General remarks*

257. The view was generally expressed that internal laws and practice on the way in which States enter into treaties, whether or not provisionally, differed considerably, and that any attempt at categorization, even if possible, was unlikely to be pertinent for the purpose of identifying relevant rules under international law. Caution was also advised with regard to classifying States depending on whether their internal law accepted the provisional application of treaties and, if so, to what extent. It was pointed out that, in some national legal systems, the possibility of provisionally applying treaties was the subject of ongoing dispute.

258. Others were of the view that internal rules could not be ignored. There was value in analysing the different internal laws and practices concerning the processes applied prior to consenting to provisional application, which could provide greater insights into how States viewed the nature of provisional application as a legal phenomenon. It could, for example, be worth assessing whether States, in their practice, appeared to interpret article 25 in a manner that suggested that, as a matter of international law, it could only be resorted to by a State where its internal law so provided. It was also suggested that the Commission must first take a position on the applicability of article 46 of the 1969 Vienna Convention (Provisions of internal law regarding competence to conclude treaties) to the provisional application of treaties. It was observed that the interplay between internal law and international law could take two different forms. First, provisions of internal law could address the procedure or conditions for the expression of the consent of a State to apply a treaty provisionally. Second, the relevant provisions of a given treaty that allowed for provisional application sometimes referred also to internal substantive law.

259. Some members of the Commission noted that, while article 25 of the 1969 Vienna Convention was the basis for the legal regime of provisional application of treaties, it did not answer all questions related to the provisional application of treaties. It was suggested that the Commission should provide guidance to States on such questions as: which States could agree on the provisional

application of treaties (negotiating States only or other States as well); whether an agreement on provisional application must be legally binding; and whether such an agreement could be tacit or implied. It was also noted that the Commission should provide guidance to States as to which other rules of international law, for example on responsibility and succession, applied to provisionally applied treaties.

260. It was generally agreed that the provisional application of treaties had legal effects and created rights and obligations. The Special Rapporteur was nonetheless called upon to further substantiate his conclusion that the legal effects of provisional application were the same as those after the entry into force of the treaty, and that such effects could not subsequently be called into question in view of the provisional nature of the treaty's application. What was not entirely clear was whether provisional application would produce the exact same effects as the entry into force of the treaty. Several possibilities were raised. One solution was to compare provisional application to the regime of the termination of treaties, under article 70 of the 1969 Vienna Convention. Another possibility was to refer to the provisions of the 1969 Vienna Convention on the consequences of the invalidity of treaties (art. 69), whereby acts performed in good faith were opposable to the parties to a treaty. A further view was that, while the legal effects of provisional application might be practically the same as those after entry into force of a treaty, provisional application was merely provisional, had legal effects only for those States that agreed to apply a treaty provisionally, and had such effects only for those parts of a treaty on which there was such agreement. Furthermore, it was suggested that the Special Rapporteur could also address the question of whether the termination and suspension processes for both regimes were identical.

261. Members endorsed the Special Rapporteur's assessment that the legal effects of a provisionally applied treaty were the same as those stemming from a treaty in force. It was maintained that a State could not hide behind the fact that a treaty was being applied provisionally to contend that it could not accept the validity of some of the effects produced by the obligation to provisionally apply that treaty. Accordingly, a provisionally applied treaty was subject to the *pacta sunt servanda* rule in article 26 of the 1969 Vienna Convention. Its breach would also trigger the operation of the applicable rules on international responsibility for wrongful acts, as in the case of the breach of a treaty in force. A further view was that the distinction between treaties in force and those being applied provisionally was less substantive and more procedural, with provisional application being simpler to commence and to terminate. Some members noted that article 27 of the 1969 Vienna Convention was also applicable to provisionally applied treaties.

262. As regards the example, cited in the report, of the provisional application of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction as a result of a unilateral declaration by the Syrian Arab Republic,[403] the view was expressed by some members that it did not concern provisional application *stricto sensu* under article 25 of the 1969 Vienna Convention, unless the Special Rapporteur considered that the agreement of the Parties had been evidenced by their silence or inaction in relation to Syria's unilateral declaration. If so, then further analysis of the phrase "have in some other manner so agreed", in article 25, was needed, with a view to determining whether acquiescence in the form of silence or inaction could represent agreement to the provisional application of the treaty. The view was also expressed that the Parties in question had tacitly consented to the provisional application of the treaty in view of the fact that the declaration of provisional application by the Syrian Arab Republic was notified by the depositary to the States parties and none objected to such decision.

263. As regards future work, it was proposed that the Special Rapporteur should focus on the legal regime and modalities for the termination and suspension of provisional application. For example, it would be interesting to know to what extent the provisional application of a treaty might be suspended or terminated by, for example, violations of the treaty by another party which was also applying it provisionally, or in situations where it was uncertain whether the treaty would enter into force. The view was expressed that the indefinite continuation of provisional application, particularly given that it allowed for a simplified means of termination, as provided in article 25, paragraph 2, could have undesirable consequences.

264. It was also suggested that the Special Rapporteur could seek to identify the type of treaties, and provisions in treaties, which were often the subject of provisional application, and whether certain kinds of treaties addressed provisional application similarly. Likewise, the question of who the beneficiaries of provisional application were was considered worth discussing. It was also suggested that the Special Rapporteur could undertake an analysis of limitation clauses used to modulate the obligations being undertaken in order to comply with internal law, or conditioning provisional application on respect for internal law.

265. Some members supported the view that it was worth drafting model clauses, which could be of practical importance to States and international organizations in the context of the draft guidelines. However, the Special Rapporteur was cautioned by other members against developing model clauses on the provisional application of treaties, which could prove complex owing to the differences among national legal systems.

(b) *Relationship with other provisions of the 1969 Vienna Convention*

266. The report's treatment of the relationship between article 25 and the other provisions of the 1969 Vienna Convention was welcomed. It was pointed out that additional provisions of the 1969 Vienna Convention were also relevant. For example, article 60 was relevant, as the material breach of a provisionally applied treaty could, according to that view, lead to the suspension or termination of provisional application. The view was also expressed that it was doubtful whether

[403] See *Multilateral Treaties deposited with the Secretary-General* (available from: http://treaties.un.org), chap. XXVI.3.

article 60 would operate in the same manner in relation to a treaty being applied provisionally. With regard to the relationship with article 26, it was noted that the *pacta sunt servanda* rule could be used to explain the situation that might result from the unilateral termination of provisional application.

267. By another view, it was not necessary to extend the review of the relationship of article 25 to other rules of the law of treaties and also study its relationship with articles 19 and 46 of the 1969 Vienna Convention, as the focus was best placed on specifying the differences between a treaty being applied provisionally and one which was in force for a particular State.

(c) *Provisional application of a treaty with the participation of international organizations*

268. Some speakers expressed doubts as to the assertion that the 1986 Vienna Convention, in its entirety, reflected customary international law. It was noted, however, that it might be possible to assert that article 25 of the 1969 Vienna Convention, and perhaps article 25 of the 1986 Vienna Convention, reflected a rule of customary international law. However, further analysis into the matter, in a future report of the Special Rapporteur, would be necessary before any such conclusion could be reached.

269. It was observed that, even if a treaty was negotiated within an international organization, or at a diplomatic conference convened under the auspices of an international organization, the conclusion of the treaty was an act of the States concerned and not of the international organization.

270. It was further observed that the provisional application of treaties with the participation of international organizations was different. Such arrangements were more complicated, because they were often designed to ensure the greatest participation simultaneously of the members of the Organization and of the Organization itself. It was considered worth investigating whether international organizations had considered or were considering provisional application as being a useful mechanism and whether such a mechanism had been incorporated into their constituent rules.

271. It was also suggested that the Special Rapporteur look at other categories of treaties which might be subject to a special form of provisional application. For example, headquarters agreements were not typically permanent, but were often agreed for a specific conference or event to be held by the international organization in the State in question. By their nature they needed to be implemented immediately and therefore often provided for provisional application.

272. Some members noted that it would be appropriate to begin by examining questions related to the provisional application of treaties concluded by States and only afterwards to proceed to the consideration of provisional application of treaties with the participation of international organizations.

(d) *Comments on the draft guidelines*

273. In general, members supported the approach taken by the Special Rapporteur to prepare draft guidelines for the purpose of providing States and international organizations with a practical tool. Some members were, however, of the view that the draft guidelines proposed by the Special Rapporteur would be better presented as draft conclusions. Another general remark was that it would be better to separate the case of States from that of treaties with the participation of international organizations.

274. Several drafting suggestions were made concerning draft guideline 1, with a view to bringing the provision more into line with article 25 of the 1969 Vienna Convention. For example, it was noted that the reference to internal law not prohibiting provisional application did not appear to be in accordance with article 25 and needed to be deleted, since it suggested that States could turn to their internal laws to escape an obligation to provisionally apply a treaty. It was also suggested that the draft guideline could be coupled with another on the scope of the draft guidelines.

275. Concerning draft guideline 2, it was proposed that the reference to a resolution by an international conference be clarified. The view was expressed that in many cases resolutions could not be equated with an agreement establishing provisional application. It was also suggested that reference be made to other forms of agreement, such as an exchange of letters or diplomatic notes. The view was also expressed that the provision could be clearer concerning the possibility of acquiescence by negotiating or contracting States to provisional application by a third State.

276. Regarding draft guideline 3, it was suggested, *inter alia*, that the provision could be simplified, and that reference be made to the fact that provisional application only occurred prior to the entry into force of the treaty for the relevant party. It was suggested that the elements of the means of expressing consent, and the temporal starting point of provisional application, could be separated into two draft guidelines.

277. It was suggested that the term "legal effects" in draft guideline 4 be clarified and the provision further developed, since it was the key provision of the draft guidelines. For example, consideration could be given to whether the obligations of provisional application extended to the whole treaty or only to select provisions. Another possibility was to indicate that the legal effect of provisional application of a treaty could continue after its termination. It was also suggested that the provision could be drafted taking into account the formulation of article 26 of the 1969 Vienna Convention, and that it could be specified that the provisional application of a treaty could not result in modification of the content of the treaty.

278. Concerning draft guideline 5, it was suggested that it be clarified that the effects of obligations arising from provisional application depended on what States had provided for when they agreed upon provisional application. Furthermore, it was necessary to take into account which entry into force of a treaty was being referred to,

i.e. the entry into force of the treaty itself or its entry into force for a particular State. It was observed that, when a multilateral treaty entered into force, provisional application terminated only for those States that had ratified or acceded to the treaty. Provisional application continued, however, for any State that had not yet ratified or acceded to the treaty, until such time as the treaty entered into force for that State. The view was also expressed that the draft guideline could recognize the possibility of setting specific terms for the termination of provisional application.

279. While some members expressed doubts as to the need to include draft guideline 6, others expressed support. It was pointed out that the draft guideline had omitted the question of whether the unilateral suspension or termination of provisional application, under the law of treaties, was wrongful under international law, thereby triggering the rules of international law on the responsibility of States for internationally wrongful acts.

3. Concluding remarks of the Special Rapporteur

280. The Special Rapporteur indicated that, in his opinion, article 25 of the 1969 Vienna Convention was the point of departure for the Commission's consideration of the topic. It could go beyond that article only to the extent that it proved useful to ascertain the legal consequences of provisional application. In his view, the primary beneficiary of provisional application was the treaty itself, since it was being applied despite not being in force. In addition, those negotiating States that could partake in its provisional application were also potential beneficiaries.

281. The Special Rapporteur observed that the preponderance of views within the Commission were not in favour of undertaking a comparative study of internal legislation applicable to provisional application. At the same time, he recalled that he continued to receive submissions from Member States regarding their practice, which invariably also included information about the prevailing position under their respective internal law. Nonetheless, this did not contradict his stated intention of not undertaking a comparative law analysis, as the primary focus was on the international practice of States. To remove any doubt, he could accept deleting the reference to internal law in draft guideline 1, and instead discussing the matter in the corresponding commentary.

282. The Special Rapporteur did not agree with the assertion that the provisional application of a treaty might also be terminated if it were uncertain that the treaty would enter into force, or if it had been applied provisionally for a prolonged period of time. In his view, it was not feasible to refer to termination of provisional application of the treaty solely on the basis of the unpredictability of its entry into force. Furthermore, article 25 imposed no such limitation on the termination of provisional application.

283. He indicated his intention to consider the question of the termination of provisional application and its legal regime in his next report, together with a study of other provisions in the 1969 Vienna Convention of relevance to provisional application, including articles 19, 46 and 60.