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Summary record of the 3186th meeting

Topic:
<multiple topics>

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of treaties and, thus, the legal consequences of a violation of the obligations created by provisional application could only be determined on a case-by-case basis.

30. In conclusion, he stressed the need to encourage the ratification of treaties rather than their provisional application.

31. Mr. KITTICHAISAREE congratulated the Special Rapporteur on his first report and welcomed the memorandum by the Secretariat on the negotiating history of article 25 of the 1969 Vienna Convention.

32. The Special Rapporteur should have provided more detailed explanations on the potential conflict between international law and constitutional law in relation to provisional application of treaties (para. 35 of the report). The statement in paragraph 44 that "in principle, domestic law does not constitute a barrier to provisional application" was contradicted when one took the example of the Constitution of Thailand, which stipulated that a number of internal formalities had to be carried out prior to the conclusion of certain types of treaties, thus posing an obstacle to their provisional application. The concerns raised by some States at the United Nations Conference on the Law of Treaties with regard to respect for their domestic law were still valid today. The guidelines or model clauses that the Special Rapporteur would like the Commission to develop would not be used by States until that conflict was resolved. In that regard, it would be a good idea, as proposed in subparagraph 53 (*c*) of the report, to conduct an in-depth analysis of the relevant State practice and to suggest solutions to the conflict.

33. With respect to the legal effects of the provisional application of treaties, mentioned in subparagraph 53 (*f*) of the report, it would be appropriate to differentiate between the provisional entry into force of a treaty and its provisional application; to draw a distinction between provisional application of a treaty and provisional or interim agreements; to see whether the legal effects of the provisional application of treaties were based on the nature of the collateral agreement between the parties; and to explore the legal relationship between parties that had accepted the provisional application of a treaty or part thereof and third parties.

34. Mr. PETRIČ said that the new topic was both problematic and broad in scope. Provisional application of treaties in itself was a useful procedure when used as an exception. No rules could be derived from it, as that would be contrary to certain fundamental values of the contemporary democratic world. The Commission's objective should therefore be to gain a better understanding of the procedure and to elucidate it, possibly in the form of conclusions with commentaries, but certainly not to promote the practice.

35. There were two important elements at the centre of the topic: the impact of the provisional application of treaties on legal certainty and the relationship of provisional application with domestic constitutional systems. Provisional application of treaties was often used as a means of avoiding war, as had been the case with the Trieste conflict, provisionally regulated in 1954 by a Memorandum of Understanding that had been applied until the Treaty of Osimo was adopted in 1975.[145] However, it was conceivable that, without that treaty, the provisional arrangement, which dealt only with boundary issues and not with sovereignty, could have continued to be applied until 1991, at which point Italy, in the face of the breakup of Yugoslavia, could have imposed its unilateral vision of sovereignty over Zone B of the territory. The provisional application of treaties was thus closely linked to legal certainty. It also overlapped with constitutional law, as had already been mentioned by other members. The case of Thailand had been cited, but in Slovenia, too, provisional application of a treaty raised issues of constitutional compliance.

36. Turning his attention to the content of the Special Rapporteur's first report, he said that while the analysis of practice could certainly be brief initially, in its later work, the Commission would have to rely much more on practice than on the literature. In particular, it would have to address the practice of the European Union, given the complexity of applying treaties in 28 States, and look at the work of the Council of Europe. Although the distinction between "provisional application" and "provisional entry into force" was important, it was particularly important not to deal with provisional application that was not provided for in the treaty itself or in a subsequent agreement, and to always bear in mind, as stated by the Special Rapporteur, that it was a "transitory mechanism". The purposes of provisional application of treaties listed in paragraphs 25 to 35 of the report were appropriate, with the possible exception of giving greater flexibility to the treaty regime (paras. 28–30). The question arose whether it was right that the provisional application of a treaty enabled constitutional rules to be sidestepped or the treaty to be modified without following the necessary procedure. Caution would need to be exercised on that point. Paragraphs 36 to 52, on the legal regime of provisional application, were also apposite, if only because, contrary to what was stated by the Special Rapporteur in paragraph 44, the issue of domestic law would have to be taken into consideration.

The meeting rose at 1 p.m.

3186th MEETING

Thursday, 25 July 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, 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. Peter, Mr. Petrič, Mr. Saboia,

[145] Treaty between Italy and Yugoslavia on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947, signed at Osimo, Ancona, on 10 November 1975 (United Nations, *Treaty Series*, vol. 1466, No. 24848, p. 25).

Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Formation and evidence of customary international law (*concluded*) (A/CN.4/657, sect. E, A/CN.4/659, A/CN.4/663)

[Agenda item 8]

First report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his first report on formation and evidence of customary international law (A/CN.4/663).

2. Sir Michael WOOD (Special Rapporteur) said that he was grateful to the many colleagues who had taken part in the debate, which had been rich and of very high quality. The debate had been further enriched by coinciding with the Gilberto Amado Memorial Lecture, delivered by Professor Paulo Borba Casella on the subject of *opinio juris*, and by the helpful memorandum by the Secretariat (A/CN.4/659).

3. There seemed to be support among Commission members for the basic approach suggested in his report. While some agreed with his proposed timetable, others doubted the feasibility of concluding work on the topic by 2016. It was not his intention to rush ahead with undue speed: 2016 should be seen as a target, not an absolute deadline.

4. Mr. Murase had again argued that the approach to the identification of customary international law depended on the intended audience. That implied, however, that different persons, addressing different audiences, could with equal validity come to different views. Mr. Murase had also said that each State had its own judicial tradition in identifying customary international law. That, too, seemed to be a denial of the existence of any system of international law. Yet one theme in the report that virtually all speakers had supported was the unity of international law. Mr. Murphy, for example, had drawn attention to the statement in paragraph 1 of the conclusions reached by the Study Group on fragmentation of international law[146] that international law was a system, not a random collection of norms.

5. Mr. Forteau had advocated addressing the nature of the rules governing the identification of rules of customary international law, which were sometimes called "rules of recognition" or "rules about rules". Mr. Murase had been right to question the use of the term "secondary rules" and the reference, in the first footnote to paragraph 22 of the report, to the articles on responsibility of States for internationally wrongful acts.[147] The Commission was not concerned with secondary rules, in the sense that the rules on State responsibility or on the law of treaties were secondary.

6. Turning to the relationship of the Commission's work to that of the International Law Association, which had adopted the London statement of 2000,[148] he said he hoped that the Commission's product would attract more attention. The fact that the Commission worked in close contact with States and that its product was submitted to the General Assembly gave it a particular quality and standing. There was also now much more material for the Commission to examine, as well as lessons to be drawn from the way the London statement itself had been received.

7. In writing future reports, he would bear in mind the point made by Mr. Gómez Robledo concerning the hierarchical relationship between customary international law and an inconsistent treaty, which was a complex matter. He had taken due note of Mr. Gómez Robledo's question about the reference to acts of courtesy and comity in paragraph 37 of the report. With regard to Mr. Peter's comments on the lack of references to writers and cases from Africa, he recalled that the collection of materials on the topic was a collective responsibility, and not one to be assumed solely by the Special Rapporteur.

8. As requested by Mr. Park, he wished to clarify his position on whether there were different approaches to the formation and evidence of customary international law in different fields of international law. He would do so subject to two caveats, however: first, that a more definitive answer would be given following further research; and second, that what mattered was not his own position but that of the Commission. His feeling coincided with that of Mr. Tladi: that the notion of a single approach, while correct, ought not to be assumed. He agreed with Mr. Huang that the criteria on the formation and evidence of customary international law should be unified, and should not differ depending on different branches of international law or intended audiences. He shared Mr. Park's view that it would not be appropriate for the Commission to admit, or accept favourably, fragmentation in the formation of customary international law. He also agreed with him and other speakers that the Commission should not distinguish between fields of law as such, which were not in any case objectively separable from one another. At the same time, the nature of the available and relevant evidence for identifying a rule of customary international law might vary, depending on the rule or asserted rule under inquiry.

9. It had not been his intention to place undue emphasis on Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice; however, it was the most widely accepted treaty provision on the matter, and one that was binding on 193 States. He was grateful to Mr. Hmoud for recalling that the binding nature of customary international law had preceded the adoption of the Statute of the Permanent Court of International Justice, and to Mr. Gómez Robledo for drawing attention to certain

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[146] *Yearbook … 2006*, vol. II (Part Two), pp. 177 *et seq.*, para. 251.

[147] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 40, art. 4, para. (1). The articles on responsibility of States for internationally wrongful acts adopted by the Commission are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

[148] "London statement of principles applicable to the formation of general customary international law" (with commentary), adopted in resolution 16/2000 (Formation of general customary international law) on 29 July 2000 by the International Law Association; see *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 39.

limitations in Article 38: it was not an exhaustive list of sources and had been drafted at a time when States were seen as the only actors in international law.

10. In paragraph 64 of the report, his intention had been to note what certain commentators had said about the practice of the International Court of Justice, not to suggest that the Court had used two distinct approaches in its reasoning. Similarly, in paragraph 62, he had meant to refer to two different ways of drafting parts of a judgment, not to two different methods for determining whether a rule of customary international law existed. Judge Tomka had made that very point.

11. With regard to terminology, he noted that one obstacle to predictability and good reason in relation to customary international law was precisely the obscurity of some of the arguments advanced. Although, in keeping with Mr. Forteau's warning, he did not intend to seek to impose a unique and exclusive terminology, he concurred with Mr. Candioti and Mr. El-Murtadi Suleiman Gouider that one of the merits of the Commission's work in many fields had been to introduce a degree of terminological uniformity, and to do so in the six official languages of the United Nations. That represented a valuable contribution to the establishment of the common language between States that international law aspired to be.

12. Clearly, as Mr. Huang had pointed out, the Commission needed to strike a balance between certainty and flexibility. Mr. Hmoud had put it very well: even if the Commission merely described the current state of the law through its adoption of a set of conclusions, those conclusions would definitely advance the rule of law, contribute to a clearer understanding of what constituted customary international law and what did not, and assist in avoiding disputes and in reaching a degree of legal certainty that might otherwise be attained only through judicial pronouncements.

13. Useful suggestions had been made for the two draft conclusions contained in the first report, which he would take into account when revising them. He would have to review draft conclusion 2, subparagraph (*a*), as the Commission proceeded with the topic, and he would consider the suggestions made on the addition of terms such as "general principles of law".

14. He would incorporate a large number of the specific points made by members in his subsequent reports. Speakers had pointed to the need to examine the following subjects: the officials whose words and conduct should count as State practice; the arguments used by States in cases before the International Court of Justice; the role of international organizations in relation to State practice and *opinio juris*; the role of United Nations resolutions; the practice of the Security Council; the practice of regional organizations; the work of constitutional courts; and the potential role *de lege ferenda* of soft law.

15. Speakers had noted the absence of digests of the practice of many States. As a first step it might be helpful to draw up a comprehensive list of existing digests and publications in the field, and he would welcome assistance in that regard.

16. He had drawn some useful conclusions from the debate that he would take into account in subsequent reports. They included the fact that there was general support for the "two elements" approach, which required an assessment of both State practice and *opinio juris*. At the same time, it had been recognized that the two elements might sometimes be closely "entangled", and that the relative weight to be given to each might vary.

17. There had been general agreement that the primary materials for seeking guidance on the topic were likely to be the approach of States and other international actors and the approach of international courts and tribunals, first among them the International Court of Justice, including, as Mr. Saboia had recalled, its advisory opinions. There had also been general agreement that the outcome of the work should be of an essentially practical nature, aimed in particular at those who were not necessarily specialists in international law, and that it should be a set of conclusions, with commentaries, that were not overly prescriptive. Commission members had further agreed on the need to deal with the relationship between customary international law and other sources of international law, in particular treaties and general principles of law. Particular interest had been expressed in the relationship between customary international law and general principles of law, perhaps as distinct from general principles of international law. There also appeared to be a widespread interest in looking into regional customary international law, and he would give thought to Mr. Caflisch's strictures about so-called "bilateral custom".

18. The great majority of speakers considered that the Commission should not deal in detail with *jus cogens* as part of the present topic. A number of speakers considered that it should be the subject of a separate topic, noting that a proposal to that effect was, in fact, currently under consideration within the Working Group on the long-term programme of work.

19. It had been agreed to renew the call to States to provide information on their approach to the identification of customary international law. A deadline of 31 January 2014 should be set, on the understanding that the information needed to be received in good time if it was to be of any use. Although comprehensive information would be ideal, the provision by States of even one or two good examples of their approach would be appreciated.

20. With regard to the title of the topic, there had been general agreement that the Commission should consider only the formal, not material, sources of international law. The discussion had turned on two points of terminology: the term "evidence" had been seen as somewhat ambiguous, and there had been a debate about whether the topic should include the word "formation". His view was that both issues would resolve themselves as the work proceeded. In any event, there had been general agreement that the aim of the topic was to offer guidance to those called upon to apply rules of customary international law and that, in order to determine whether such rules existed, it was necessary to consider both the requirements for their formation and the types of evidence or proof that established the fulfilment of those requirements.

21. Although quite a number of members supported the current title, it had been agreed to recommend that it should be changed to "Identification of customary international law", "*La détermination du droit international coutumier*" and "*La identificación del derecho internacional consuetudinario*" in English, French and Spanish, respectively; Commission members had provided the corresponding translations in Arabic, Chinese and Russian. The recommendation to amend the title was on the understanding that matters relating to the formative elements and evidence or proof of customary international law remained within the scope of the topic.

22. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to change the title of the present topic to the formulations proposed by the Special Rapporteur in English, French and Spanish, respectively, with the corresponding amendments to be made in Arabic, Chinese and Russian, and to approve the other conclusions and recommendations contained in the first report.

It was so decided.

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

[Agenda item 7]

First report of the Special Rapporteur (*continued*)

23. The CHAIRPERSON invited the Commission to continue its consideration of the first report of the Special Rapporteur on the provisional application of treaties (A/CN.4/664).

24. Mr. FORTEAU said that, while the memorandum by the Secretariat on the topic (A/CN.4/658) had helped to clarify the difference between the provisional application and the provisional entry into force of treaties, many other difficulties still remained.

25. To begin with, the Special Rapporteur could have included in his report information on the existing case law on the subject. Doing so would have given members an initial impression of how plentiful or consistent it was and whether it could be used as a basis from which to draw useful conclusions.

26. Certain passages of the report, for example, paragraph 22 on treaty practice, were not adequately supported by concrete examples, which made it difficult to understand the scope or value of the information they contained. He trusted, however, that in future reports, the Special Rapporteur would document his arguments in greater detail. He would also be grateful if the Special Rapporteur could provide clarification on the six issues summarized in paragraph 53 of his report.

27. He disagreed with the goal described in paragraph 54 as being to create incentives for greater use of the mechanism of the provisional application of treaties. The Commission's task was not to create incentives, or to remove incentives, for that matter, but rather to identify the rules governing the provisional application of treaties with a view to ensuring greater legal certainty when resorting to that mechanism.

28. For the same reason, he disagreed with Mr. Murase's view that the Commission should encourage the ratification of treaties rather than their provisional application. The decision to ratify a treaty or not was a matter to be left to the discretion of each State. States were free to prefer provisional application over ratification, and the Commission had no business interfering in that political decision.

29. Nor did he share the views of Mr. Petrič, who maintained that the provisional application of treaties must be regarded as an exception that was at variance with fundamental values. In his own view, the situation was much simpler: the provisional application of treaties was a practice governed by international law, and the Commission should study it without either imposing value judgments or questioning its legitimacy.

30. The Special Rapporteur seemed to have doubts about whether the purpose of the topic was solely to take stock of the existing treaty practice of States, or to identify the rules of customary international law that existed with regard to the provisional application of treaties. He seemed to doubt the very existence of a set of such rules when he noted, in paragraph 17 of his report, that article 25 of the 1969 Vienna Convention sets "the minimum standard on the matter" and, in paragraph 21, that there was a "lack of uniform regulations on the matter". In his own view, the very existence of article 25 was sufficient to establish the fact that general rules on the provisional application of treaties existed. Thus, one of the Commission's priority tasks was to survey the practice concerning the application of article 25, with the aim of identifying which general rules on the subject had gained acceptance. In attending to that task, the Commission should isolate the subsidiary rules and correlate the rest with the regime set up in each treaty for recourse to provisional application. *Lex specialis* would no doubt be ubiquitous, but that did not preclude the identification of applicable general rules, however few they might be.

31. The Special Rapporteur appeared to be prejudging responses to certain fundamental issues. For example, he stated in paragraph 23, subparagraph (*a*), of his report that the intention to provisionally apply a treaty must be expressed unequivocally. Such a criterion had to be substantiated and then debated by the Commission; it could not be regarded as established at so early a stage in the work.

32. The Special Rapporteur seemed to consider that the acceptance of the provisional application of a treaty by a State necessarily led to the treaty being binding on that State. He himself supported that conclusion, which appeared to follow clearly from the *travaux préparatoires* of the 1969 Vienna Convention reviewed in paragraphs 74 to 79 of the memorandum by the Secretariat. Once again, however, the Commission should avoid conveying the impression that it operated merely on the basis of assumptions. The 2011 syllabus[149] indicated that there were four differing viewpoints on the legal effects

[149] *Yearbook … 2011*, vol. II (Part Two), annex III, para. 4.

of provisional application, each of which should be compared with practice and case law before reaching a final conclusion. Account also had to be taken of the fact that the legal effects of provisional application could be established independently in each treaty.

33. The relationship between internal and international law in the provisional application of treaties was one of the fundamental issues, and the Special Rapporteur should explain how he intended to deal with it. Article 46 of the 1969 Vienna Convention covered the "defective ratification" of the entry into force, not the provisional application, of a treaty. The task before the Commission was to determine the extent to which the rules laid down in article 46 should be extended, *mutatis mutandis*, to the provisional application of treaties.

34. There were two possible approaches to that task. The first, a restrictive approach, was to consider that a State that had undertaken an international commitment to provisionally apply a treaty was ultimately not bound by that commitment when it emerged that its internal law prohibited it from agreeing to provisional application. The second approach, more liberal, was to consider that the State was not bound by that commitment only in the extreme case when its consent had been expressed in manifest violation of a rule of its internal law of fundamental importance. The question of the legal effect of internal law on an international commitment to provisionally apply a treaty merited in-depth consideration. It had been extensively debated in the cases involving the Russian Federation that had been settled by the Permanent Court of Arbitration in 2009.[150]

35. For the Commission's purposes, study of the matter must be set in the correct legal framework, namely the perspective of international law. The Commission should seek only to determine the extent to which international law transformed respect for internal law into a restriction on the provisional application of a treaty. International law did not prohibit a State from entering into an international commitment in violation of a provision of its internal law. The flexibility of international law in that respect was reflected in article 25, paragraph 1 (*b*), of the 1969 Vienna Convention. Accordingly, resort to the provisional application of treaties was prohibited only if it entailed serious breaches of national law. It was unfortunate that certain discrepancies between domestic and international law were permitted under that system, but it was up to States to ensure consistency between the two, or to stipulate in their treaties that provisional application was possible solely in conformity with domestic law.

36. Other subjects not mentioned by the Special Rapporteur but which should be considered were the rules on reservations in the event of the provisional application of a treaty; the rules applying to substantive and final clauses; the exact scope of article 24, paragraph 4, compared with article 25, of the 1969 Vienna Convention; and interpretative difficulties due to provisional application.

37. It would be premature to express an opinion on the final form to be taken by the Commission's work on the topic.

38. Mr. CAFLISCH drew a distinction between the coming into force of a treaty, governed in principle by article 24 of the 1969 Vienna Convention, and its provisional application, covered by article 25 of that Convention. The Commission's mandate was limited to the latter.

39. Once all the provisions of a treaty had become applicable, it would bind all States which had given their consent to be bound by it. That did not necessarily mean that a party would become responsible for failure to observe the terms of the treaty, for those terms, although they had entered into force, might not be applicable. Thus, the 1949 Geneva Conventions for the protection of war victims and the appended Protocols might be in force for many States, yet they would become applicable only in the event of a *casus belli*. In addition, under article 24, paragraph 4, of the 1969 Vienna Convention, some of the treaty's provisions would have become applicable even prior to its entry into force; and the same could be true for other provisions and even all of them if the treaty so provided or if the negotiating States had so agreed by other means.

40. The subject was primarily one of international law but involved constitutional aspects. Provisional application was a device to overcome the slowness of parliamentary processes. It thus could collide with domestic provisions on treaty-making. That raised the question of whether article 46 relating to the domestic law governing the conclusion of treaties also applied, *mutatis mutandis*, to provisional application. It would be useful, therefore, to look at some domestic treaty-making rules, even though a complete examination appeared impossible.

41. Regarding the legal regime of provisional application, he said that in paragraphs 36 to 40 of his report, the Special Rapporteur wondered about the effects of such application on the issue of State responsibility. He agreed with the Special Rapporteur's tentative conclusion (para. 37) that, as in the case of any other agreement between States, an agreement on provisional application would be effective on the international level. Provisional application ended, he himself thought, (*a*) with the coming into force of the treaty (article 25, paragraph 1, of the 1969 Vienna Convention) or (*b*) for a State having so notified the other States provisionally applying it, by declaring that it did not intend to become a party to the treaty (article 25, paragraph 2). The question then arising was whether a State having made such a notification in order to shed its provisional treaty obligation could subsequently change its stance by informing the other States that it had changed its view and now wished to become a party to the treaty after all.

42. He disagreed with the suggestion that the Commission should drop the topic in order to incite States to use normal treaty-making procedures. The Commission was not an institution for "moralizing" international law. Moreover, provisional application was a device expressly sanctioned by article 25 of the 1969 Vienna Convention. It was perfectly natural for the Commission to give guidance

[150] *Hulley Enterprises Limited (Cyprus) v. the Russian Federation*; *Yukos Universal Limited (Isle of Man) v. the Russian Federation*; and *Veteran Petroleum Limited v. the Russian Federation*.

to States on how to use the tool of provisional application and to advise them as to its legal consequences.

43. Mr. ŠTURMA said that the provisional application of a treaty could have positive or negative effects and had substantial constitutional implications. Interestingly enough, no definition of provisional application had been included in the 1969 Vienna Convention, and article 25 appeared to have been incorporated rather hastily, and in order to take account of existing State practice without establishing a precise legal regime. Nevertheless, provisional application was provisional solely from the temporal point of view: it created definite obligations. Even after the termination of provisional application, the effects of the rules applied provisionally were the same as those derived from the application of a treaty that was in force.

44. Domestic law, in particular constitutional law, could considerably limit the ability of governments to accept provisional application. The situation in various States varied, however. States could be divided into three groups, based on studies done by the Council of Europe among its members and observer States.

45. In the first and largest group, the organ with competence to conclude the treaty decided on its provisional application. The treaties involved were mainly those concluded and implemented by the executive branch without the participation of parliament. Countries that fell into the first group included Austria, Belgium, Finland, France, Italy, Poland, Slovenia and the United Kingdom.

46. The second group comprised States that allocated agreement to provisional application to the executive, even where the conclusion of a treaty required the consent of parliament. Provisional application was excluded only with respect to international treaties whose provisions would conflict with constitutional rules. Countries in that group included Croatia, the Czech Republic, Germany, Greece, Kazakhstan, the Russian Federation, Spain and Switzerland.

47. The third group included States that did not permit provisional application at all. Such was the case with certain Latin American countries, Cyprus and Portugal.

48. While that short survey did not claim to be exhaustive, it showed that provisional application of treaties, while being the exception in treaty practice, was nevertheless a relatively frequent one. He did not think that States should be encouraged to use the mechanism more often: they already did so on many occasions. As the report showed, its use was not limited to trade or other economic treaties but extended to instruments on a range of issues, including politically sensitive ones.

49. What the report lacked was a more detailed workplan, describing a process that should lead to the adoption of guidelines or conclusions. While it was important not to overregulate the institution of provisional application of treaties and to keep the flexibility of article 25 of the 1969 Vienna Convention, it was appropriate for the Commission to shed more light on the institution.

50. The most complicated problems arose when the obligation to provisionally apply a treaty was subject to consistency with internal laws. Accordingly, States should declare whether and to what extent they were not able to engage in provisional application of treaties. The precise formulation of such declarations might avoid serious problems, including responsibility for breach of treaty obligations.

51. Mr. HUANG said that, although the provisional application of treaties was a long-standing practice which had been generally accepted by the international community, the rules governing that practice were in need of clarification. The Commission could provide valuable guidance to States by simply shedding light on the conditions, effects and termination of provisional application.

52. As far as the methodology was concerned, the Commission's study of the topic should rest on an in-depth analysis of the wealth of international and domestic practice and decisions, including the findings in cases submitted to international arbitration. Article 25 of the 1969 Vienna Convention stipulated that a treaty could be applied provisionally pending its entry into force, but in practice, the time at which that application began varied widely. States' domestic practice regarding provisional application was also highly disparate. The Special Rapporteur's next report should therefore contain a thorough review of national and international practice.

53. The Commission should also investigate the legal effects of the provisional application of treaties, especially the rights and obligations deriving from such application, since article 25 of the 1969 Vienna Convention did not specify those effects and there was much uncertainty in that respect. Did a signatory State have rights and obligations derived from provisional application? Should those rights and obligations end immediately when a State unilaterally terminated provisional application? After the entry into force of a treaty, what residual rights and obligations still lay with States that had provisionally applied the treaty? Those issues warranted careful study.

54. Another aspect deserving consideration was the relationship between the provisional application of treaties and other rules established in the 1969 Vienna Convention. It was clear from the Convention that provisional application was a special treaty rule and differed from the general provisions in other articles. The regulation and clarification of the regime of provisional application would inevitably touch upon its relationship with articles 18, 26, 27 and 46 of the Convention. Since the latter had been one of the Commission's most important achievements, it fell to the Commission to provide an authoritative interpretation on those issues.

55. While article 25 of the 1969 Vienna Convention did not refer specifically to the relationship between provisional application and internal law, most treaties that allowed for provisional application made it conditional on compliance with internal law. During the negotiation of the Convention, some States had pointed out that since provisional application could be decided by the executive branch at the time of signature of the treaty, it might enable the executive to bypass the treaty approval authority of the legislative branch.

In practice, some treaties already made useful attempts to address such issues, for example by requiring that provisional application be approved by parliament or providing that it was only possible when a country had completed the ratification procedure yet the treaty itself had not entered into force. Relevant examples included the General Agreement on Tariffs and Trade and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which clearly stipulated that a State could declare that it would provisionally apply a treaty when it had completed the internal ratification process but the treaty had not yet entered into force. The key was to strike an appropriate balance between provisional application and internal law, ensuring the effects of provisional application as a rule of international law while leaving adequate space for States to choose to use provisional application in the light of their internal law.

56. Mr. HASSOUNA said that, although the report highlighted the need to distinguish between the terms "provisional application" and "provisional entry into force", the issue appeared to go beyond terminology, as their very meaning appeared disputed. Most strikingly, the 1969 Vienna Convention itself did not mention the "provisional entry into force" of treaties. The Commission could therefore make an important contribution by clarifying the legal implications of the two concepts.

57. It was generally assumed, as noted in paragraph 39 of the report, that the regime set out in article 25 of the 1969 Vienna Convention was based on the scenario of provisional application while the treaty was not yet in force. However, in the case of a multilateral treaty ratified by some States but not by others, the treaty was deemed to be in force, but only for the ratifying parties. There was obviously a need to clarify the perspective from which the status of a treaty was assessed. The Commission's analysis of State practice should therefore distinguish between the various types of treaties in order to provide a clearer picture of the possible scenarios involving provisional application.

58. He agreed that the provisional application of treaties could serve a useful purpose in specific instances of urgency or legal or political necessity. A further elaboration of the idea that some instances of provisional application were non-controversial could therefore be undertaken. Consideration of State practice, with particular reference to the domestic constitutional requirements of States, was also needed.

59. An analysis of the relationship between article 25 and article 24 would appear to be necessary for a comprehensive understanding of the topic. The international responsibility of States and the implications arising from article 25 of the 1986 Vienna Convention should also be addressed.

60. Given that many States had expressed concern that the provisional application of treaties could be used to avoid compliance with domestic requirements on treaty ratification, the possible effect of provisional application on the stability and security of treaty relations should be assessed.

61. The Special Rapporteur should provide a specific time frame for the consideration of the topic, but a decision on whether to adopt guidelines, model clauses or conclusions should be left to a later stage. The final purpose of the work should be to provide more clarity, uniformity and consistency, leaving it to States to resort to the practice of provisional application whenever a legitimate need to do so arose.

62. Sir Michael WOOD said that he did not share the view that provisional application was in some way exceptional or necessarily undemocratic, or that the Commission needed to consider constitutional or other internal laws in detail. He agreed that it was not for the Commission to actively encourage or discourage provisional application, but he hoped that the outcome of its work would make it clearer to States how to proceed where necessary. The Commission's main task would be to distil the learning and produce a practical guide to assist States and others in negotiating new clauses and in interpreting and applying existing ones. While the focus would be on article 25 of the 1969 Vienna Convention, the Commission should not ignore the 1986 Vienna Convention.

63. He did not entirely agree with the conclusions of Anneliese Quast Mertsch, one of whose works was cited in the last footnote to paragraph 18 of the report, that the legal effect of provisional application was contested in practice and that theoretical treatment had been scant.[151] The fact that she had made those assessments after a very thorough study, however, pointed to the utility of the Commission taking up the topic. There was no shortage of relevant practice, recent and important case law and writing on the topic.

64. The statement in paragraph 7 of the report that the terms "provisional entry into force" and "provisional application" referred to different legal concepts might be somewhat misleading. That certainly did not appear to have been the widespread view when the wording of article 25 had been changed from the former to the latter at the United Nations Conference on the Law of Treaties:[152] it seemed to have simply been a matter of choosing the most appropriate terminology, with the concept covered by the two terms being essentially the same, nor was there a clear distinction between the two in State practice or in writings on the subject.

65. He did not understand what was meant by the statement in paragraph 17 that article 25 "sets the minimum standard on the matter". In subsequent paragraphs, the Special Rapporteur seemed to imply that article 25 left certain central questions unanswered, including the legal effects of provisional application. However, it could be deduced from article 25, read in the light of its *travaux préparatoires*, that unless otherwise agreed by the parties, agreement to provisional application implied that the parties concerned were bound by the rights and

[151] A. Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012), p. 22.

[152] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), document A/CONF.39/14, pp. 143–145, paras. 224 (ii) (b), 227 (b) and 230.

obligations under the treaty in the same way as if it were in force.

66. He agreed with the Special Rapporteur that the content and scope of the provisional application of a treaty depended largely on the terms in which such application was envisioned. He did not see why it was necessary to enter into particular questions of State responsibility. If the provisional application of a treaty imported legal rights and obligations as between the States provisionally applying it, then the secondary rules of State responsibility should apply in the usual way if there was a breach.

67. He was not convinced that it was necessary to address the issues listed in paragraph 53, subparagraphs (*a*), (*b*), (*c*) and (*f*). The most important issue would be the legal effect of provisional application, a matter governed by the terms of the agreement to provisionally apply the treaty. The near consensus of opinion, in State practice, the case law and writings, seemed to be that the rights and obligations of a State that had agreed to provisionally apply a treaty were the same as if the treaty was in force.

68. Mr. MURPHY said that the fact that 24 States had spoken on the topic in the Sixth Committee demonstrated the level of interest in the provisional application of treaties. While the report covered many interesting points, it was difficult to identify the exact issues the Special Rapporteur intended to address, and the list in paragraph 53 did not provide a rigorous framework for the Commission's future work. In his view, the purpose of the project was essentially to provide greater clarity to the meaning of article 25 of the 1969 Vienna Convention through a careful analysis of its language and of State practice.

69. If the Special Rapporteur was to develop guidelines on the topic, an idea which he supported, a number of areas should be addressed, some of which were touched on in the report. The Commission should clarify terminology by defining what was meant in article 25 by "provisional application of treaties". While he tended to agree with the Special Rapporteur that "provisional application" and "provisional entry into force" were not synonymous, the Commission should be cautious about viewing them as wholly distinct legal concepts, given that they mostly aimed at the same legal outcome. In its work on the law of treaties in the 1960s, the Commission did not appear to have taken a conscious decision to exclude the practice of "provisional application" when referring to "provisional entry into force". Nor did the *travaux préparatoires* for the United Nations Conference on the Law of Treaties indicate that the replacement of the words "enter into force provisionally" with "provisional application" reflected a decision to only address one form of practice and not another. Both terms were used to capture the same practice whereby States decided in some situations to give legal effect to a treaty prior to ratification, while allowing themselves the option of not proceeding with ratification.

70. He agreed with the Special Rapporteur that, although the *Treaty Handbook*[153] referred to "provisional entry into force" and not to "provisional application", it appeared to view those two legal concepts as being essentially the same.

71. The Commission should indicate the ways in which a State might express consent to the provisional application of a treaty based on existing State practice, bearing in mind that it was the underlying treaty that established the specific rules. In doing so, the Commission would be neither encouraging nor discouraging States to engage in provisional application, any more than its work on the topic of reservations to treaties had encouraged or discouraged them to file reservations. A related issue was the question of whether, if a multilateral treaty negotiated by States was to be provisionally applied, the provisional application extended only to States that signed the treaty, to States that consented to the adoption of the treaty, or to all States that had negotiated the treaty. It was not clear what the Special Rapporteur meant by saying in paragraph 35 that the provisional application of the Maritime Boundary Agreement between the United States of America and Cuba[154] was a relevant example of "subterfuge aimed at evading … domestic legal requirements".

72. The Commission should acknowledge the legal consequences of agreeing to the provisional application of a treaty, including the fact that it was a legally binding obligation whose violation would trigger consequences under the law of State responsibility. The Commission should also indicate how such legal consequences differed from those arising under article 18 of the 1969 Vienna Convention.

73. It should clarify the manner in which provisional application of a treaty could be terminated. Lastly, it should address the question of whether the rules set forth in article 25 reflected customary international law that was binding even with respect to treaties not governed by the 1969 Vienna Convention.

The meeting rose at 1 p.m.

3187th MEETING

Friday, 26 July 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

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

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[153] United Nations publication, Sales No. E.12.V.1 (available from https://treaties.un.org, "Resources").

[154] Signed at Washington, D.C., on 16 December 1977, ILM, vol. 17 (1978), p. 110.