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Summary record of the 3187th meeting

Topic:
<multiple topics>

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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.

Protection of persons in the event of disasters (*concluded*)* (A/CN.4/657, sect. B, A/CN.4/662, A/CN.4/L.815)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)**

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the Drafting Committee's report concerning the topic "Protection of persons in the event of disasters" contained in document A/CN.4/L.815.

2. Mr. TLADI (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted two meetings to the consideration of draft articles 5 *ter* and 16, which it had provisionally adopted.

Draft article 5 ter. *Cooperation for disaster risk reduction*

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

Draft article 16. Duty to reduce the risk of disasters

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

3. Draft article 5 *ter* on cooperation for disaster risk reduction sought to extend the scope *ratione temporis* of draft article 5 (Duty to cooperate) to pre-disaster cooperation.

4. Draft article 16, which set forth the duty to reduce the risks of disasters, comprised two paragraphs: the first dealt with the fundamental duty of reducing disaster risks by taking certain measures; the second listed the measures.

5. The Drafting Committee had chosen the formulation "each State" rather than "States" in the first paragraph to show that, whereas in the draft articles relating to disaster response a distinction was drawn between the affected State, or States, and other States, the obligation to cooperate in the pre-disaster phase applied to all States without exception. The verb "shall" signified the existence of a legal obligation not only of conduct but also of result. The Drafting Committee had decided to focus on reducing the risk of harm caused by a disaster rather than on preventing disasters themselves, which was more in line with the international community's current views, as evidenced in several major pronouncements such as the Hyogo Declaration 2005.[155] The Committee had also opted for the term "necessary and appropriate measures", which encompassed all the views expressed by members and reflected the notion of due diligence. The word "including" had been added in order to indicate that, although preference should be given to legislation and regulations, other measures, including those of an administrative nature, could be taken. The definite article before "necessary" showed that the draft article referred to not just any general measures but to specific and concrete measures.

6. In the second paragraph, the Drafting Committee had added the word "include" in order to indicate that the three preventive measures mentioned did not rule out other forms of action to reduce the risk of disasters.

7. The CHAIRPERSON invited the Commission members to adopt the Drafting Committee's report contained in document A/CN.4/L.815.

Draft article 5 *ter* (*Cooperation for disaster risk reduction*)

8. Mr. KITTICHAISAREE asked if the expression "*de nature à*" in the French version conveyed the meaning of "intended to".

9. Mr. CAFLISCH proposed that "*de nature à*" should be replaced with "*destinées à*".

The proposal was adopted.

Draft article 5 ter*, as amended in the French version, was adopted.*

Draft article 16 (*Duty to reduce the risk of disasters*)

Draft article 16 was adopted.

Document A/CN.4/L.815, as a whole, was adopted.

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*)

10. The CHAIRPERSON invited the Commission members to pursue their consideration of the Special Rapporteur's first report on the provisional application of treaties (A/CN.4/664).

11. Mr. MURPHY said that, in its guidelines, the Commission could confirm the legally binding nature of a State's agreement provisionally to apply a treaty in whole or in part.

12. He and many other members had expressed that view during the informal consultations held the previous year and that had also been the position adopted by the Commission in its 1966 draft articles on the law of treaties.[156] As the Special Rapporteur had stated in paragraph 43 of his report, a State's expression of its intention was the source of the resulting inter-State obligation. It went without saying that, once an intention had been expressed, the source of the obligation became an international agreement on the provisional application of the treaty and the rule of *pacta sunt servanda*.

* Resumed from the 3180th meeting.

** Resumed from the 3162nd meeting.

[155] Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. I, resolution 1.

[156] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*

13. The report did not answer the question of whether some parts of a treaty were excluded from the scope of the obligation flowing from provisional application because, in order to be effective, they presupposed the treaty's entry into force, or of whether it was necessary implicitly to recognize that those parts were also covered by the obligation in question.

14. In its guidelines, the Commission could also deal with the issue of the impact on State responsibility of a violation of an obligation stemming from provisional application, even if that rarely arose in practice. It could further examine the question of the termination of provisional application and, in order to supplement the provisions of article 25, paragraph 2, of the 1969 Vienna Convention, it could make it clear that provisional application also ended when the State became a party to the treaty.

15. The Special Rapporteur had suggested that a State might remain bound by an obligation flowing from the actual contents of a treaty provision, even when provisional application had ceased. He personally considered that this could not be the case when the rule laid down in that provision had passed into customary international law.

16. The Commission could also draw up guidelines on the issue of whether the rules set forth in article 25 of the 1969 Vienna Convention had come to reflect customary international law. He would tend to reply in the affirmative. It would be interesting to obtain States' views on that matter by sending them a questionnaire which should focus more generally on State practice and how States interpreted it.

17. As for the relevance of national law to the consideration of the topic, although several members had been concerned about the Special Rapporteur's wish to "encourage" States to use the provisional application of treaties, since in their view doing so might bypass national parliaments, that concern, albeit understandable, was undue. It was not up to the Commission to encourage States to do anything at all, but to strive to identify their practice and to formulate the rules governing it. When States undertook to apply a treaty provisionally, their decision was carefully considered and, generally taken in consultation with the parliamentary authorities. When studying the international legal effects of provisional application, the Commission therefore had no reason to attach too much importance to internal law. The only question worth addressing in that context was the situation where a treaty clause providing for provisional application referred to internal law, such as article 45, paragraph (1), of the Energy Charter Treaty.

18. Mr. CANDIOTI agreed with Mr. Murphy that the Commission must endeavour primarily to study the regime established by article 25 of the 1969 Vienna Convention and any gaps in it, and to answer the questions it raised. The relationship between national and international law should not, however, be completely ignored. At some point, the Commission would have to investigate the relationship between the provisional application of treaties and constitutional procedures for their ratification.

19. Ms. ESCOBAR HERNÁNDEZ said that the provisional application of treaties clearly deserved to be studied, mainly because States had frequent recourse to it and because it posed not inconsiderable practical problems owing to the general nature of article 25 of the 1969 Vienna Convention. As for the legal nature of the provisional application of treaties, some members had been of the opinion that it constituted an exception to the general rules of the law of treaties. She, on the contrary, believed that provisional application, far from being a substitute for ratification, was in reality part of the general law of treaties and reflected well-established, but widely diverging, international practice. Provisional application was one of the tools which States had fashioned in order to fulfil their treaty obligations and, in that respect, it was an additional means of exercising their decision-making authority. For that reason, it was neither an exception nor a systemic anomaly that should be discarded.

20. The Commission should neither encourage the use of provisional application nor give it a greater role to play, for such action only lay within the sovereign power of States. The Commission's simple, but no less important task was to clarify the notion of provisional application, identify its main aspects and scope and determine what repercussions it might have on the international responsibility of a State.

21. Provisional application was an institution of international law which the Commission ought to analyse, but when doing so it had to be cautious about how much importance to attach to internal law. Provisional application was to some extent related to internal rules, especially those governing the distribution of authority between branches of government and, in some cases, it could result in parliament not being able to express an opinion on the obligations stemming from some international treaties, even if the constitution allowed it to take the final decision on whether to accede to a treaty. Since such matters were inherent to relations between a State's institutions, it was not incumbent upon the Commission to express an opinion on a real-life situation which could take many different forms. That did not mean that internal law could be ignored, or that the Commission should encourage States to adopt conduct that did not comply with the law. On the contrary, it must take account of the fact that the provisional application of treaties was authorized by international law and that it was frequently governed both by the latter and by national legal rules. If a conflict arose between national and international legal rules, it had to be resolved in accordance with the criteria laid down in the 1969 Vienna Convention. It was not therefore up to the Commission to say which would be the most or least appropriate way of ensuring that a State's expression of its wish to be bound by a treaty through the provisional application thereof was tailored to that State's own system of distributing powers. The statement that provisional application was more or less democratic would prompt an ideological debate that was better to avoid as far as possible.

22. Duly defining the scope of the topic under consideration was of paramount importance. First, provisional application had to be clearly delimited and differentiated from other, very similar practices, such as provisional

entry into force, or from other categories of temporary agreements such as those which defined transitional arrangements applying at specific times or to specified sectors. Mr. Petrič had referred to the Permanent Statute of the Free Territory of Trieste,[157] and Mr. Murphy had mentioned the Maritime Boundary Agreement between the United States of America and Cuba.[158] Attention should also be drawn to the "provisional arrangements" for which the United Nations Convention on the Law of the Sea made provision. It might be wise for the Special Rapporteur to draw a distinction between such provisional agreements and the provisional application of a treaty *stricto sensu*. Second, it would be interesting to examine to what extent provisional application might have different effects on the parties to a treaty depending on whether it was a bilateral or a multilateral treaty, whether provisional applications could produce particular effects only between certain parties to a treaty, or whether provisional application could be used unilaterally by one State. Third, the Commission should also investigate the effects of the unilateral termination of provisional application, especially when provisional application had produced objective effects which were likely to last after that termination, or when the treaty concerned had created rights or the expectation of rights on the part of individuals. Lastly, it would be useful to deal with provisional application in the practice of international organizations. In conclusion, the topic under consideration was of immense importance in international legal practice and gave rise to a number of questions which the Commission could help to answer.

23. Mr. HMOUD said that the provisional application regime had been implemented inconsistently, in part because article 25 of the 1969 Vienna Convention was rather ambiguous and some areas, which its wording had left open, were not clearly understood. While the Commission could explain current practice, provide guidance regarding ambiguous areas and, if necessary, suggest rules to supplement the existing regime, it should neither encourage nor discourage that practice. The history and brevity of article 25 of the Convention showed that its authors intended the regime to have limited scope and consequences. A parallel regime outside the scope of parties' relations should not therefore be created, but neither should a common practice be restricted.

24. It was clear from the history of article 25 that, from the outset, there had been some confusion about the distinction between a treaty's provisional application and its provisional entry into force. It would therefore be useful to explain the relationship between those terms and any doctrinal differences. Practice prior to the 1969 Vienna Convention might shed light on areas of the provisional application regime still in need of clarification. It would also be necessary to examine the content of provisional application, especially when a treaty did not indicate whether a State could choose to apply its provisions in whole or in part, or did not specify the relationship between the various provisions relating to provisional application, the rules on interpretation laid down in the 1969 Vienna Convention and the means of interpreting the articles on provisional application in the Vienna regime.

25. The Commission should also clarify the temporal scope of provisional application, namely when it started and ceased to take effect *vis-à-vis* the States concerned. Practice had shown that, when treaties did not provide otherwise, provisional application could continue indefinitely, which raised the issue of the various legal effects of the parallel application of treaties once they had entered into force. The Commission should also clarify the meaning of the term "pending its entry into force" and the prospect of indefinite provisional application, including in cases where a State had no intention of becoming a party to a treaty. It should likewise deal with the question of the legal consequences of provisional application and its termination by identifying the scope of legal obligations and indicating whether they were identical for the State party and the State which was applying the treaty provisionally. It should also investigate the question of retroactivity and the change in status of those obligations when the State which was provisionally applying a treaty became a party to it.

26. Unlike some other members, he considered that it would be unwise to dwell on the question of the legal consequences of breaches under the provisional application regime, because the key issue was to ascertain whether provisional application created legal obligations and, if necessary, to identify the scope of those obligations. As far as the principle of *pacta sunt servanda* was concerned, it would still be necessary to determine whether there was any rule of customary law allowing a State to invoke its internal law as justification for the non-performance of obligations stemming from the provisional application of a treaty, and whether the principles of general international law permitted exceptions to that rule. As for the expression of intention to apply a treaty provisionally, it would be necessary to ascertain whether article 46 encompassed the provisional application regime, even if a State had not yet become a party to the treaty and, if that was not the case, what other rule of general international law might apply to that situation. It would be inadvisable to deal with article 18 of the 1969 Vienna Convention within the scope of the topic under consideration and it would be preferable to defer until a later stage any decision on the form to be given to the outcome of the Commission's work.

27. Mr. GEVORGIAN said that, on the whole, he endorsed the main ideas expressed by the Special Rapporteur in his report. As stated in paragraph 1 thereof, any study of the provisional application of treaties had to begin with article 25 of the 1969 Vienna Convention which, contrary to the opinion of the legal writers referred to in paragraph 18, was drafted concisely and precisely. The term "provisional entry into force" meant nothing other than the parties' intention to apply the substantive provisions of a treaty as soon as possible without waiting for the completion of domestic procedures—in other words to apply the treaty provisionally in accordance with article 25 of the 1969 Vienna Convention. However, those notions should plainly not be used interchangeably, because the term "provisional entry into force" had been virtually rejected by the authors of the Convention who had opted for the expression "provisional application", which reflected the aforementioned intention of States, without either mixing up the various rules on the operation of a treaty, or treating those on its entry into force separately. Any further discussion of that matter was therefore pointless.

[157] See the 3185th meeting above, para. 35.

[158] See the 3186th meeting above, para. 71.

28. In paragraphs 25 to 35 of his report, the Special Rapporteur explained why provisional application was necessary. He personally agreed with the views expressed in paragraph 25. Since it was generally impossible to know the reasons why the parties had decided to apply a treaty provisionally, because negotiations were held *in camera*, the list of factors in those paragraphs was valuable. Generally speaking, however, flexibility was not a reason for, but a characteristic of provisional application and of the law of treaties in general. He concurred with other members that it would be unwise to engage in detailed theoretical studies of the conformity of the provisional application of international treaties with the provisions of a State's constitution or other national laws. As Mr. Šturma had shown, States' national laws dealt with the provisional application of treaties in a great variety of ways.

29. On the whole, he agreed with the Special Rapporteur's conclusions in paragraph 53 of the report. With regard to subparagraph (*a*), he considered that various formulas used by States indicated not that they were unfamiliar with the possibilities offered by that mechanism, but rather that they solved specific questions pragmatically. On the other hand, he fully endorsed subparagraphs (*e*) and (*f*). Mr. Murphy's proposal on that matter was interesting.

30. The provisional application of treaties was a fact of international life, which was, perhaps, not quite "proper" from a legal point of view, but which the Commission must not under any circumstances view as being good or bad. While the regime was generally deemed to be an exceptional or a transitory measure, which could not and must not replace the entry into force of a treaty, States would undoubtedly continue to have recourse to it. In any event, provisional application in good faith was better over the years than no treaty at all. He therefore completely concurred with Mr. Hmoud when he said that that institution should be neither encouraged nor discouraged and with the Special Rapporteur's view in paragraph 54 that it should not be overregulated.

31. Mr. CANDIOTI, referring to a comment made by Ms. Escobar Hernández with regard to a unilateral decision of a contracting party, pointed out that, in the context of article 25 of the 1969 Vienna Convention, at least two negotiating States had to agree to provisional application.

32. Ms. ESCOBAR HERNÁNDEZ said that she would tend to agree, but that some recent bilateral and multilateral treaties had provided that each State could indicate whether it was prepared to apply the treaty provisionally. That highly ambiguous formula left everything wide open, because it did not make it clear whether a unilateral declaration would produce its effects immediately, or whether it was necessary to wait for at least one other State to accept provisional application as well. It would therefore be advisable for the Special Rapporteur to investigate that question.

33. Mr. PETRIČ said that if one thing was clear with regard to article 25 of the Vienna Convention it was that it was ambiguous, precisely because a certain amount of "constructive" ambiguity was always useful. For years, States had used the provisional application of treaties and the institution seemed to be working well. As Mr. Hmoud had suggested, the Commission must therefore carefully study it before deciding what form should be taken by the outcome of its deliberations.

34. Ms. ESCOBAR HERNÁNDEZ said that article 25 of the Vienna Convention made it clear that consensus, in the shape of a specific clause or an additional agreement, was necessary when deciding whether a treaty could be applied provisionally. However that article was silent as to the actual effects that provisional application could produce, in particular whether they pertained exclusively to one State, or whether they must necessarily apply in relations between different States. For example, she did not believe that article 25 prohibited a State from unilaterally applying a treaty recognizing individual rights, but it was necessary to determine the scope of such a possibility.

35. Ms. JACOBSSON noted that some members had reproached the Special Rapporteur with wishing to encourage the provisional application of treaties, which would indeed be worrying. It was, however, difficult to detect such an intention in the first report. In his working paper in 2011, Mr. Gaja had concluded that it was first necessary to define what was meant by the provisional application of treaties.[159] The Special Rapporteur had merely widened the debate in order to determine the parameters for usefulness of the concept. In addition, at the previous session, he had already emphasized that States resorted to the provisional application of a treaty as a matter of exception, mainly for reasons of peace and security, or the stabilization of relations between States. From that it could be concluded that his chief aim was to study the legal aspects of the notion, albeit in the light of the practice and needs of States, which was entirely consistent with the Commission's mandate. Care would simply have to be taken to preserve the flexibility offered by article 25 of the 1969 Vienna Convention and not to attempt to overregulate the provisional application of treaties. As for the use of the latter to circumvent domestic, democratic procedures, it had to be assumed that the laws and constitutions of States provided for proper governance, including in cases where provisional application was resorted to. The Special Rapporteur should nevertheless examine what procedural requirements would mitigate the risk of failure to act in accordance with the constitution.

36. The Special Rapporteur should also clarify the difference between constitutional provisions authorizing the provisional application of treaties and those authorizing a State to become a party to agreements which were not treaties in the technical sense of the term, and he should explain at what point provisional application might become a custom. It would also be interesting to examine the borderline, from the point of view of legally binding effects, between the provisional application of treaties and other political commitments of States, such as memorandums of understanding, for that distinction was the very essence of the topic. Even if the Special Rapporteur had no wish to dwell on the practice of international organizations, it would be worth studying that of the European Union, especially as almost all of its 28 member States had a constitutional procedure in place that preceded the

[159] *Yearbook … 2011*, vol. II (Part Two), annex III, para. 2.

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,