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Held at the Palais des Nations, Geneva, on Wednesday, 30 July 2014, at 10 a.m.

Contents

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Present:

Chairman:	Mr. Gevorgian
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Laraba
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Korontzis	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Provisional application of treaties (agenda item 8) (*continued*) (A/CN.4/675)

The Chairman invited the Commission to resume its consideration of the second report on the provisional application of treaties (A/CN.4/675).

Mr. El-Murtadi emphasized the importance of the provisional application of treaties as a practical way of ensuring legal security. States had accorded considerable importance to the effects of provisional application in discussions within the Sixth Committee; it had been generally accepted that consenting to application obliged a State to abide by the rights and obligations contained in a treaty as if it had come into force. However, some difficulties in the application of treaties remained to be overcome. The *travaux préparatoire*s for the Vienna Convention on the Law of Treaties provided little insight into article 25 thereof or its intended application. The provisional application of treaties varied from one State to another and could only be in conformity with each State's own legislation; however, a comparative study of domestic law would be too time-consuming and have no practical advantage for States. In its judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*), the International Court of Justice had ruled that provisions of the Constitution of Bahrain had been violated by State practice.

He endorsed the Special Rapporteur's intended focus on the legal effects that the provisional application of treaties had at international level. It was important to understand the practice of different States. The Commission had hoped to receive more responses to its enquiries in that regard, and more information would be required before the Special Rapporteur could reach conclusions on the subject.

It was possible that the nature of the issue and discrepancies in the principles that States followed accounted for the lack of coherent practice. In Libya, as in other countries, the simple fact of signing and ratifying a treaty was often sufficient for it to apply provisionally, without a need for specific provisions to that effect.

Other factors affecting the issue of provisional application included customary international law for States that were not party to the Vienna Convention, the relationship between article 25 and other articles of the Vienna Convention, and the differences between bilateral and multilateral treaties.

Mr. Forteau said that the deductive approach taken by the Special Rapporteur in his second report had some advantages but also gave rise to certain doubts concerning the nature of the conclusions drawn that required further clarification. Indeed, it was not clear whether the conclusion contained in the second report were hypotheses, presumptions, preliminary conclusions or final conclusions. Moreover, they needed to be substantiated by relevant practice. Future reports should pursue a more inductive approach. That was true in at least four respects.

First, in his view, article 25 of the Vienna Convention did not allow for a treaty to be applied provisionally on the basis of a unilateral declaration by a State. The State might consider itself bound, and could be bound as a matter of international law, but such a unilateral commitment did not fall within the provisional application of treaties. However, article 25 did require an agreement between negotiating States. Secondly, he expressed doubt concerning the conclusion, drawn in paragraph 82 of the report, and based on the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations adopted by the Commission in 2006, that provisional application could not be revoked arbitrarily: on the contrary, the letter of article 25 of the Vienna Convention accorded States the unconditional right to end provisional application. The principles applicable to unilateral declarations did not therefore seem to apply in the specific context

of the provisional application of treaties. Thirdly, paragraphs 60 to 64 of the report, concerning the opposability *ratione personae* of treaties applied provisionally, were somewhat confusing.

Fourthly, he refuted the Special Rapporteur's assertion that article 70 of the Vienna Convention would apply as such to the cessation of the provisional application of a treaty and that therefore performance obligations under provisional application would produce legal effects after a treaty ceased to be applied provisionally. While there were certainly some points of convergence between the law of treaties in force and the law of treaties applied provisionally, they were not identical. The law of treaties in force might apply to the provisional application of treaties *mutatis mutandis*, but that needed to be confirmed by assessing the relevant practice. The very essence of the topic was to identify whether and to what extent it resulted from State practice that the regime of treaties in force (including article 70 of the Vienna Convention) applied to treaties applied provisionally.

Analysing relevant State practice was crucial to the topic and should be a particular focus for the Special Rapporteur's work. That included close scrutiny of domestic practice: despite the fact that States could not invoke domestic law to circumvent international commitments, much could be learned from examining the status of provisional application in domestic legislation. Domestic case law should likewise be taken into consideration for the evidence of State practice and *opinio juris* that it could reveal; the practice of depositary States and international State practice should also be examined closely. Only a detailed study of relevant practice would enable the Commission to identify the regime for the provisional application of treaties. Rather than waiting for States to provide information on their practice, the Special Rapporteur should seek it out.

Furthermore, contrary to what was stated in paragraphs 91 to 95 of the report, it could not be said that the existing regime concerning the responsibility of States for internationally wrongful acts applied wholesale to the provisional application of treaties. Article 13 of the articles on responsibility of States for internationally wrongful acts explicitly referred to international obligations "in force" at the time that an act occurred; but a treaty being applied provisionally was not formally in force. Nor could common law apply automatically: modifications would be needed and the treaty must be interpreted such as to ensure that its provisional application was meaningful. Such questions should be explored in detail.

Finally it must be stressed that during the Commission's discussions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, reservations had been expressed over the fact that, in the draft conclusions adopted (see draft conclusion 9), the concept of "agreement" was used in a broader sense than in the Vienna Convention, rather than in the strict legal sense of an agreement that created rights and obligations or was legally opposable to its parties. In line with a recent award made by the Permanent Court of Arbitration in the *Matter of the Bay of Bengal maritime boundary arbitration between the People's Republic of Bangladesh and the Republic of India*, only "authentic agreements" were considered "agreements" in the sense of article 31 of the Vienna Convention. In paragraph 35 of his report, the Special Rapporteur referred to negotiating States that "agree" to apply a treaty provisionally, in accordance with the Vienna Convention, but the exact meaning of the term "agree" in that context must be determined. As a fundamental issue relating to the regime applicable to agreements that were not treaties, the matter should be considered in depth.

Ms. Escobar Hernández, noting that the legal consequences of the provisional application of treaties were probably of most interest to States, endorsed the approach taken by the Special Rapporteur to break the topic down into four main areas: the source of obligations; rights and obligations created by provisional application; and the termination of

obligations. It would be useful to make that structure even more explicit in any conclusions or recommendations that might be drafted.

The provisional application of treaties, provided for in the Vienna Convention and regulated by international law, established a link between States; that link had legal effects. The aim of provisional application was not to replace the entry into force of a treaty but to anticipate it. As such, the effects of provisional application could not be considered distinct from the effects of the treaty once in force, nor analysed differently. Provisional application could not substantively alter the content of a treaty. It could not be used by those who had not taken part in its negotiation, nor could it give rise to a legal regime separate from that provided for in the treaty itself. It simply meant that all or some of a treaty's provisions would apply sooner, but their effects remained the same, both domestically and internationally. She doubted whether the domestic and international obligations arising from the provisional application of a treaty could be separated, as suggested in the report. Although drawing a distinction between them might shed light on States' motivation for applying a treaty provisionally, it was irrelevant to analysing the obligations themselves.

The identification of four types of situations in which a treaty might be applied provisionally was undeniably useful in explaining how provisional application might come about, but less so in identifying its effects, which would not depend on the form in which States expressed their will to apply a treaty provisionally. She questioned some of the statements made in the report concerning the nature of that will: paragraphs 35 (d), 36, 38 and 54, in particular, reflected a tendency to regard provisional application as the result of a State's unilateral declaration. Although the report seemed to restrict such effects to situations in which a treaty contained no obligation concerning its provisional application, she did not share that conclusion. Rather, provisional application should be seen as a specific aspect of the law of treaties based on the consent or agreement of States or international organizations, which could be deduced from article 25 of the Vienna Convention. The two options provided in that article — a specific treaty provision or another form of agreement between negotiating States — both relied on consent between parties; neither could therefore be viewed as a unilateral act *stricto sensu*. Even an individual declaration by a State indicating that it would (or would not) apply a treaty not yet in force would be based on the relevant agreed provision of the treaty in question. The examples used in the report to support the view that provisional application could be a unilateral act were not convincing.

Practice suggested that provisional application of a treaty need be neither uniform nor universal. The Special Rapporteur seemed to accept the possibility of a "multilayer" model, as did she; however, the matter should be considered in terms of both the distinction between bilateral and multilateral treaties and the different legal effects that might arise between States that accepted — implicitly or explicitly — or rejected the provisional application of a particular treaty.

With regard to international responsibility, she agreed that violation of a treaty being applied provisionally gave rise to international responsibility in the same or a similar manner as for a treaty in force; however, as the issue was of significant importance, it would be useful for the Special Rapporteur to consider it in more detail in a future report.

While she agreed that, in studying aspects of international law, the Commission should focus on the international legal system, and that it was not the Commission's task to undertake a comparative study of domestic law relevant to the topic, a descriptive analysis of various national practices could prove interesting and add value to the Commission's work, enabling it to give States specific examples of how provisional application operated in practice. Moreover, domestic law formed part of State practice. To that end, it might be necessary to ask States again to provide the Commission with relevant information.

Mr. Park said that he concurred with the Special Rapporteur's proposal to base the Commission's consideration of the topic on two premises: that the legal effects of the provisional application of a treaty were not the same as the treaty's entry into force, and that, despite its temporary nature, the provisional application of a treaty produced legal effects. Those premises were well illustrated by the decision on jurisdiction of an arbitral tribunal of the International Centre for Settlement of Investment Disputes in the proceedings between *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*.

If it was accepted that provisional application produced legal effects, then the question arose as to which of the provisions of the Vienna Convention that applied following the entry into force of a treaty were applicable, *mutatis mutandis*, to its provisional application. Articles 45, 54, 60 and 70, of the Convention, seemed to apply to provisional application only to the extent that doing so was acceptable or reasonable.

When considering the possible legal effects of provisional application, the Commission had to reconcile the objective of enhancing the legitimacy and legal certainty of provisional application with that of responding appropriately to potential concerns of States that there might be a lesser incentive to ratify a treaty when it was recognized that provisional application produced legal effects.

Although the Special Rapporteur indicated in paragraph 18 that he did not intend to carry out a comparative study of domestic law requirements for the provisional application of treaties, it was worth noting that, in practice, the provisional application of treaties was always in conformity with domestic law – in particular constitutional law. It was therefore important for the Commission to study the provisions of the Vienna Convention that related to domestic law, such as article 46, and it should devote at least one clause in a future guideline to the relationship between domestic law and the provisional application of treaties.

The provisional application of a treaty resulted from an agreement between negotiating States if provided for in the treaty itself, by means of a separate agreement or if the negotiating States "in some other manner so agreed". That formulation presented negotiating States with a broad range of options, which could include an implicit agreement or a unilateral declaration by a State. It was necessary to consider carefully whether the mere fact of making a unilateral declaration could, of itself, result in a provisional application, since, on the one hand, article 25 of the Vienna Convention did not expressly refer to unilateral declarations, and on the other, such authorization risked compromising the legal certainty of the law of treaties.

In his view, a unilateral declaration to apply a treaty provisionally produced its effects only in the case where the negotiating parties had explicitly provided for that mechanism in the text of the treaty. The obligations arising from provisional application were thus derived, not from the unilateral declaration itself but from the agreement between the States concerned. That view was reflected in the opinion of Professor W. Michael Reisman of 28 June 2006 before a tribunal of the Permanent Court of Arbitration concerning arbitral jurisdiction under the Energy Charter Treaty with respect to the Russian Federation in *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, of which he read out an excerpt, and was consistent with article 27 of the Vienna Convention.

Article 25, paragraph 2, of the Vienna Convention, which concerned the termination of the provisional application of a treaty, applied to multilateral treaties and, *mutatis mutandis*, to bilateral treaties. It allowed States a certain amount of discretion with regard to termination primarily because it might be impossible for a State to ratify a treaty despite having applied it provisionally, and termination should be possible on those grounds. However, even if the Commission allowed for the possibility or the need to unilaterally terminate the provisional application of a treaty, the *pacta sunt servanda* principle

continued to apply and served as a deterrent to the abuse of such termination. Moreover, the *ex nunc* effects of the termination of a treaty, which were set out in article 70, of the Vienna Convention, were generally recognized as the codification of a rule of customary international law. Although, in practice, the obligations arising from the provisional application of a treaty were less definitive in nature than those resulting from its entry into force, he agreed with the Special Rapporteur that article 70, as a rule of international customary law, must be applied by analogy to the provisional application of treaties. That said, there could be cases in which certain obligations continued to be binding, as stipulated in article 70, paragraph (1) (b), of the Vienna Convention, in order to protect the interests or the confidentiality of a third party, as well as to protect legal certainty.

Notwithstanding, in the absence of an express agreement between the parties to a treaty, it was not always certain which obligations fell into the category described in article 70, paragraph (1) (b). Given that uncertainty, the conferral of a wide amount of discretion with regard to unilateral termination would jeopardize legal certainty in the area of the provisional application of treaties. Consequently, it was desirable to limit, as far as possible, the right to unilaterally terminate the provisional application provided for in article 25, paragraph 2, of the Vienna Convention. For example, that right might be recognized solely in the event of the non-ratification of a treaty by a State. Such a solution would be consistent with article 26 and the principles relating to the validity of treaties based on their interpretation.

A breach of a treaty that was applied provisionally could entail the international responsibility of the State, as indicated in article 73 of the Vienna Convention. In such cases, the injured State had at least two possible means of recourse: it could invoke either the international responsibility of the offending State or else the rules for terminating the provisional application of a treaty that were set out in article 25, paragraph 2, of the Convention.

Mr. Hassouna said that the Special Rapporteur should elaborate on the relationship between provisional application and entry into force, since some States saw those two procedures as separate and governed by distinct legal regimes, while others saw them as legally indistinguishable. In view of the fact that during the discussion in the Sixth Committee many States had indicated that recourse to provisional application should be subject to the relevant provisions of domestic law, the Special Rapporteur should clarify the situations in which domestic law was either relevant or irrelevant. Doing so did not require a comparative study of States' domestic legislation on the provisional application of treaties, nor was it the Commission's role to undertake such a study. Rather, its role was to identify the practice of States in the area of international law, and domestic law was relevant in that matter only to the extent that it involved the application of international law concepts, rights, obligations or procedures.

Since it was a well-accepted proposition that the provisional application of treaties produced binding legal effects, the Special Rapporteur should focus his efforts in future reports on situations of uncertainty surrounding those legal effects. The two conditions set out in article 25 of the Vienna Convention could be interpreted as meaning that when a State made a unilateral decision to provisionally apply a treaty, and when such application was not provided for in the treaty itself, the other States parties had to agree to its unilateral undertaking. Yet the excerpt concerning unilateral declarations from the judgment of the International Court of Justice in the *Nuclear Tests (Australia v. France)* case, which was reproduced in paragraph 37 of the report, indicated that no subsequent acceptance of the unilateral declaration by other States was required. If that interpretation applied to a unilateral declaration of the provisional application of a treaty, then the Special Rapporteur should clarify how it could be reconciled with the two possibilities envisaged in article 25

of the Vienna Convention. Similarly, the relationship or distinction between a unilateral undertaking and a provisional application of a treaty should also be clarified.

It was not clear from the report when States could terminate or revoke provisional application agreements without consequences and when such action might incur State responsibility. The Special Rapporteur pointed out that unilateral declarations of provisional application could not be revoked arbitrarily. It would thus be appropriate to explain in the commentary the standard test for arbitrariness and the circumstances that might give rise to assertions of arbitrary revocation.

Paragraph 70 of the report stated that the regime resulting from the termination of provisional application must be, *mutatis mutandis*, the same as that resulting from the termination of a treaty. However, it was not clear whether the regime in question was that of domestic or international law. Paragraph 75 of the report, which referred to the practice of Mexico, seemed to suggest that what was meant was the domestic law regime. Since it was not self-evident, the answer to that question should be clearly explained in the commentary.

The question concerning the duration of the provisional application of a treaty was an important one. Did the fact that a State had provisionally applied a treaty and was not subsequently in a position to ratify it imply the treaty's *de facto* termination? Or did its provisional application extend indefinitely? Likewise, did the fact that a treaty could not be denounced or terminated mean that its provisional application could not be terminated either? Such questions required clarification by the Special Rapporteur.

The remaining unanswered questions that had been set out by the Special Rapporteur in his first report and that should be addressed in future reports included: the issue of flexibility in relation to provisional application; the procedural requirements for provisional application; the relationship of provisional application to other provisions of the Vienna Convention; and the nature and drafting of treaties for which guidelines or model clauses on provisional application would apply.

The Commission should renew its request to States to provide it with information on their practice relating to the provisional application of treaties. In the meantime, the Special Rapporteur could independently research cases from international courts and arbitral bodies that had adjudicated disputes on the provisional application of treaties, consult the work of academic writers and obtain relevant information from the bilateral relations maintained by legal advisers and other officials of his Government with their counterparts in other States.

Ms. Jacobsson said that she supported the Special Rapporteur's proposal to exclude from the topic the legal effects of the provisional application of treaties at the domestic level and the conclusion that the provisional application of treaties created a legal relationship and therefore produced legal effects. She also shared his view that a comparative analysis of domestic law was not necessary. In view of his contention that the entry into force of a treaty fell under a different legal regime than its provisional application, it would be helpful if, in a future report, he could elaborate on the difference between the two, which was not always obvious. Similarly, the distinction between a unilateral act of a State and the provisional application of a treaty required further consideration, since a unilateral act of a State could not create any rights for that State beyond what was accepted by other States, but it might create obligations; while the provisional application of a treaty could entail the conferral of rights on the State that had decided to apply a treaty provisionally.

In paragraph 35 of his report, the Special Rapporteur identified four types of situations relating to provisional application that were covered by article 25 of the Vienna Convention on the Law of Treaties. An interesting example of the fourth type of situation, namely, when a treaty said absolutely nothing about provisional application, was that of the

declaration made by the Syrian Arab Republic upon accession to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. That example, described in paragraphs 66 to 68 of the report, raised a number of questions that might be addressed in the Commission's future deliberations on the topic.

A State could avail itself of the international law mechanism of the provisional application of a treaty under article 25 if provisional application was provided for in the treaty itself or if the States that had negotiated the Convention had in some other manner so agreed. Since a commitment to dismantle weapons of mass destruction was incompatible with provisional arrangements, it was easy to understand why the Chemical Weapons Convention did not contain any such provision and why there were no indications that the negotiating parties had agreed in some other manner to allow for such arrangements. Nevertheless, given the declaration made by the Syrian Arab Republic in its note of accession that it would apply the Convention provisionally for one month prior to its entry into force for that State, the Secretary-General of the United Nations, in his capacity as depositary of the treaty, had informed all the other parties to the Convention of that declaration. As the implementing body of the Chemical Weapons Convention, the Organisation for the Prohibition of Chemical Weapons, by means of its Executive Council, had accepted the declaration of the Syrian Arab Republic. It had done so based on the extraordinary nature of the situation and the fact that no State party had declared its opposition after having been notified of it by the depositary, although the Council had also specified that its decision was not intended to create a precedent. An indirect consensus among all States parties had thus been found to exist. And although the prerogative of interpretation belonged to the parties to a treaty, not to an organ established by the treaty, unless expressly provided therein, it sometimes fell to such an organ to take a stance on a particular treaty provision without any guidance from the States parties as a whole. However, she wondered whether such a prerogative extended to the interpretation and application of article 25 of the Vienna Convention and whether, in availing itself of that prerogative, the Executive Council had spoken on behalf of all the States parties to the Convention.

The procedure for accepting the provisional application of the Convention by the Syrian Arab Republic raised a number of interesting legal questions. One question was whether the Syrian declaration and its implementation should be treated as a provisional application of a treaty under the Vienna Convention or else as a unilateral act of State in which the Syrian Arab Republic unilaterally imposed obligations on itself that were intended to have *erga omnes* effect. In the light of the Commission's previous work on unilateral acts of States, the declaration appeared to meet all the criteria for being considered a unilateral act. Other questions were whether silence or acquiescence on the part of States parties was ever to be construed as meeting the "in some other manner so agreed" criterion of article 25; how the distinction between negotiating States and States parties should be determined and applied; and whether the Syrian Arab Republic could have withdrawn its legal undertaking to apply the treaty provisionally without any legal consequences.

Admittedly, the case of the Syrian Arab Republic and its accession to the Chemical Weapons Convention was a rather unusual one involving high political stakes, the threat of the use of force, a previous history of chemical weapons use and serious violations of international law. It had also involved two major international organizations: the United Nations Organization and the Organisation for the Prohibition of Chemical Weapons – each with its own mandate, internal structure and role to play.

With regard to the legal consequences of the breach of a treaty applied provisionally, she supported the Special Rapporteur's conclusion, in paragraph 95, that he would not go

into further detail on the responsibility regime but would merely reiterate the applicability of the existing legal regime. At the same time, she proposed that that point should be made in an explicit reference to be included in the eventual outcome of the Commission's work on the topic. She would welcome additional analysis concerning other potential legal consequences of the breach of a treaty applied provisionally to which the Special Rapporteur had alluded in paragraphs 86 to 90.

Lastly, she supported the Special Rapporteur's plan to address in future reports the provisional application of treaties by international organizations, since agreements between the European Union and third States could serve as interesting examples of legally acceptable solutions to the provisional application of treaties between two parties.

Mr. Candioti said that he agreed with the Special Rapporteur's approach of focusing on the legal effects of the provisional application of treaties. He also agreed that a clear distinction should be made between the provisional entry into force of a treaty and the provisional application of that treaty.

He further agreed that, at least at the present stage, the Commission should deal with the topic solely from an international law perspective and not consider questions relating to the domestic law of States. However, such questions could not be ignored. He shared Mr. Park's views on the matter, in particular with regard to the relevance of articles 27 and 49 of the Vienna Convention. However, the Commission must seek primarily to clarify the scope, modalities and effects of provisional application within the framework of the international law of treaties in order, among other things, to contribute to a better understanding of the implications for States of any decision to apply a treaty provisionally.

Other aspects of the topic which had given rise to comment in the Sixth Committee included the ways in which consent might be expressed to provisional application. As the 1969 and 1986 Vienna Conventions dealt with treaties concluded in written form, a joint notification or declaration of provisional application should be recorded in one or more written instruments and made known to the other States entitled to become parties to the treaty. A written agreement provided the authors themselves with greater certainty and transparency and allowed other actual or potential parties to the treaty to become aware of the situation created.

He endorsed the distinction drawn by the Special Rapporteur between, on the one hand, an agreement on provisional application concluded between two or more States that had approved or signed a treaty and, on the other, a unilateral notification of provisional application by one such State. In his view, article 25 of the 1969 Vienna Convention envisaged only the scenario of a provisional application arising from an agreement, either provided for in the treaty itself or resulting from a subsequent decision of two or more negotiating States. He did not consider that such an agreement should be described as a parallel agreement. It was an agreement that should remain within the treaty regime in question, as was the case with agreements that arose as a result of the formulation and acceptance of reservations to the provisions of the treaty. In any event, the feasibility of a provisional application, if it was not expressly authorized under the treaty, would depend on the characteristics and content of the treaty concerned and would have to be compatible with that treaty's object and purpose.

The Special Rapporteur's thoughts on the eventuality of a unilateral declaration of provisional application should be assessed in the light of the Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. Nonetheless, the effects of a unilateral declaration might be more limited than, and in any event different from, those arising from an agreement between one or more negotiating States.

Accordingly, the two scenarios should be treated separately. First, all the aspects of the provisional application of a treaty agreed by two or more negotiating States should be clarified. Then, the effects of provisional application decided unilaterally should be considered. It would also be necessary to analyse the consequences of the distinction set forth in article 25 of the Vienna Conventions between the provisional application of a treaty and provisional application of part of a treaty.

On the other hand, he saw no *prima facie* obstacles to the project dealing with the provisional application of treaties between States and international organizations or between international organizations, in accordance with article 25 of the 1986 Vienna Convention, which was substantially identical to article 25 of the 1969 Convention.

He agreed on the need to gather more information on the attitude and practice of States and, possibly, international organizations. It would perhaps be useful to prepare a questionnaire on State practice focusing on specific points of interest.

A further matter was the question of the final form of the Commission's work on the topic. The Special Rapporteur appeared to favour the drafting of conclusions, recommendations or guidelines. However, in the 2011 syllabus prepared by Mr. Gaja, which had given rise to the topic, the possibility had been mentioned of preparing draft articles to develop and supplement article 25 of the Vienna Convention. It had been further suggested that model clauses should be drafted to provide guidance to States wishing to apply a treaty provisionally. In his view, the Special Rapporteur should keep all options open as to the final form of the Commission's work and consider the possibility of reflecting the conclusions of his third report in draft articles.

Mr. Vázquez-Bermúdez said that the Commission, through its work on the topic, could make a valuable contribution to a better understanding of the provisional application of treaties and to the clarification of a number of issues, including the ways in which negotiating States or international organizations agreed to apply treaties provisionally, the scope of provisional application and the legal nature of the rights and obligations arising from provisional application.

States had expressed keen interest in the topic. They had highlighted the fact that provisional application produced a series of legal effects requiring clarification and had suggested that the Commission should analyse the ways in which consent could be expressed to the provisional application of a treaty. Accordingly, the Commission needed to conduct as comprehensive an analysis as possible of the various aspects of provisional application, in particular those features that distinguished it from other legal concepts. In that regard, it was important to differentiate between provisional application and provisional or interim agreements. Provisional application should also be distinguished from treaty-related agreements creating committees to prepare the mechanisms provided for under the treaty in question, such as the Preparatory Committee on the Establishment of an International Criminal Court.

As provisional application was a practice to which States had frequent recourse, it was essential that its legal nature and effects should be clarified. As Mr. Forteau had pointed out, it was also important to elucidate the legal nature of agreements providing for provisional application in order to determine the norms that were applicable and the regime of provisional application thus established.

Likewise, States and international organizations should have a clear idea as to the different clauses on provisional application that could be included in treaties or parallel agreements. Some of the most complex of those clauses could create various provisional application regimes, according to the actions of States in applying the provisions contained therein. Depending on the clause in question, provisional application could represent either an obligation or merely an option for negotiating States or organizations.

It should be noted that provisional application could coexist with a reservation to a treaty, if the reservation were made at the time of signature, for example, and the treaty applied provisionally from the time of signature or adoption of the treaty.

It might be appropriate to take account of domestic legislation, insofar as that legislation determined recourse to provisional application. Practice varied greatly in that regard: in some States, provisional application was limited to treaties dealing with specific matters, such as trade; in others, provisional application was not permitted; and in yet others, recourse was had to provisional application even in the absence of specific legislation in that connection.

As to the source of obligations, the Special Rapporteur's identification of at least four types of situations in which provisional application could result from an agreement was helpful. With regard to the last of the situations mentioned, namely that of a treaty that said absolutely nothing about provisional application, he said that it should be analysed in the light of the requirement set out in article 25, paragraph 1, of the 1969 Vienna Convention that the negotiating States must have agreed to apply a treaty provisionally. That analysis was called for in view of the Special Rapporteur's assertion that, in certain cases, the decision of a State to apply a treaty provisionally was an autonomous unilateral act, governed only by the intentions of the State in question.

He agreed with the Special Rapporteur that provisional application had legal effects that gave rise to rights and obligations in international law. He pointed out that such effects did not depend on the manner in which provisional application had been agreed; furthermore, the violation of obligations resulting from provisional application engaged the international responsibility of the State or international organization in question. It was therefore important that that issue should be reflected in the final product.

Sir Michael Wood said that he would like to begin by making four general comments. First, like many other speakers, he agreed with the Special Rapporteur's main conclusion that provisional application had legal effects, a conclusion that was supported by recent case law and State practice. The Commission should take a clear position that, subject to anything specific in the treaty, the rights and obligations of a State which had agreed to apply a treaty or part thereof provisionally were the same as if the treaty were in force.

Second, it was doubtful how much assistance could be derived for the topic from the Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. Acceptance by a State of the provisional application of a treaty or part thereof did not, in his view, normally fall to be analysed as a unilateral declaration within the scope of the Guiding Principles. Rather, like an instrument of ratification or accession, or the lodging of a reservation or an objection to a reservation, it was a treaty action that was governed by the law of treaties. However, a possible exception was the provisional application of the Chemical Weapons Convention by the Syrian Arab Republic, which might constitute a case of a unilateral declaration accepting obligations under a treaty.

Third, he did not really understand the distinction the Special Rapporteur sometimes seemed to make between the provisional application of a treaty internally within the State and its provisional application internationally. In his view, the topic was concerned only with the provisional application of treaties as a matter of international law. Although provisional application might have effects in the domestic legal system and might need to be given effect in domestic law, it was not the Commission's concern.

Fourth, the report appeared in places to overlook the distinction between the material source of the obligation to apply the treaty provisionally and the source of the rights and obligations that were provisionally applied. The obligation to apply a treaty provisionally

might be triggered by a unilateral act. Nevertheless, the source of the rights and obligations provisionally applied remained the treaty itself. However, at times the report explicitly referred to the source of the rights and obligations provisionally applied as being a unilateral act.

Turning to the question of the source of the rights and obligations arising under provisional application, he was not convinced of the usefulness in terms of legal analysis of the Special Rapporteur's categorization of the four types of situations under which article 25, paragraph 1, of the Vienna Convention might find practical application. After describing the situations, the report stated that the source of the obligations incurred as a result of provisional application might take the form of one or more unilateral declarations or the form of an agreement. That was somewhat confusing: he understood that it was not the source of the obligations incurred as a result of provisional application that might take a unilateral or bilateral form, but rather the expression of acceptance of those obligations that could take unilateral or bilateral form. It was his view that provisional application was always application of the treaty as such, and thus the rights and obligations under provisional application would always derive from the treaty itself.

In that context, the Commission should be cautious about having recourse to the law on unilateral declarations. In the case of provisional application, a unilateral declaration was merely a response to a standing offer contained in the treaty to conclude an agreement to provisionally apply the treaty. That was quite different from the case of unilateral declarations, such as the one by France in the *Nuclear Tests* case, where a State unilaterally assumed self-standing, autonomous and independent obligations.

That distinction was especially important when considering issues concerning the interpretation of the obligations assumed by provisional application, the enjoyment and opposability of rights potentially created under provisional application, and, in certain cases, the application of dispute settlement clauses. The way that each of those issues was to be addressed might differ significantly depending on whether the treaty itself was the source of the rights and obligations to be provisionally applied, or, instead, a unilateral declaration. As previously noted, he held the view that it was the treaty. Merely looking at the form of the instrument by which those obligations were assumed was not the right approach; what mattered was whether there was an underlying agreement to apply the treaty provisionally, not whether that agreement was potentially concluded in one or two steps.

With regard to the issue of rights under a provisionally applied treaty, covered in paragraphs 44 to 52 of the report, he questioned whether a treaty provisionally applied under the third or fourth types of situation described by the Special Rapporteur could give rise to rights for the State that provisionally applied it. The current analysis covered only situations where States agreed that a treaty might be applied provisionally from the time of its adoption or its signature; although there was no particular reason why that should not be the case where, for example, a treaty left open that possibility for States.

He then turned to the hypothetical example posed by the Special Rapporteur regarding the case of a State unilaterally declaring that it would provisionally apply the treaty without the treaty providing for that possibility and one of the negotiating States objecting. In his view, given the wording of article 25, paragraph 1 (b), of the Vienna Convention, which implied that the consent of all negotiating States was needed in such cases, the case should be understood not as one of provisional application but either as a typical unilateral assumption of international obligations or as an offer to apply the treaty provisionally that had been declined.

Section III D of the report, entitled "Termination of Obligations", appeared to cover two quite distinct matters at the same time, namely the right to terminate provisional

application and the legal consequences of such termination. In his opinion, those matters should be considered separately.

With regard to the legal effect of the termination of provisional application on the rights and obligations that had accrued prior to termination, the Special Rapporteur referred, by way of analogy, to article 70 of the Vienna Convention. While that seemed to make sense, it would be helpful if the Special Rapporteur could provide an authoritative reference in that regard.

The Special Rapporteur's treatment of the right to terminate provisional application seemed questionable. He neither understood nor was he aware of any authority for the proposition, in paragraph 81 of the report, that a State that had decided to terminate the provisional application of a treaty was subject to the requirement that it should explain to certain other States whether that decision had been taken for other reasons. Moreover, it was not clear what was meant by "other reasons".

He could see no basis for the assertion, in paragraph 82 of the report, that provisional application could not be revoked arbitrarily. It appeared to be based on a false analogy with principle 10 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. It seemed to him that it was the essence of provisional application that, subject to anything specific said in the treaty or that could be derived from the particular circumstances of the case, it could be terminated at will.

As to the future programme of work set out by the Special Rapporteur in his introductory speech, he said that he welcomed the latter's intention to collect and analyse as much State practice as possible for the next report and to explore further the question of international organizations. The Commission might also wish to consider whether the rules of customary international law on the provisional application of treaties were the same as those in the Vienna Conventions.

However, the Special Rapporteur should not feel inhibited in taking the work forward by the relative lack of information from States about their practice. While it would be very helpful to have such information directly from States, it was not essential, since there was a good deal of information in the public domain, and the issues of law involved were relatively clear. He encouraged the Special Rapporteur to propose draft texts in his next report.

The meeting rose at 1 p.m.