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Summary record of the 3234th meeting

Topic:
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of public international law, but of the constitutional law of one of the signatories to the dispute, which the Special Rapporteur mentioned in paragraph 29 of his second report. The Special Rapporteur was wrong to rely on the statement of the Permanent Court of International Justice quoted in paragraph 18 of his report, because the laws that were “merely facts”²⁸⁷ were not devoid of effects under international law. Moreover, article 27 of the 1969 Vienna Convention, stating that a party might not invoke the provisions of its internal law as justification for failure to perform a treaty, was without prejudice to article 46 thereof, which attributed direct effects under international law to certain provisions of a State’s internal law. In view of the findings of the International Court of Justice in paragraph 265 of its 2002 judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, the Commission should determine what constituted a rule of internal law of fundamental importance for the signing of a treaty and what constituted the proper manner of publicizing it.

30. In France and almost all of the French-speaking countries, while the power to conclude treaties lay with the executive branch of Government, some categories of treaties had to be ratified by Parliament. In those countries, a treaty could be applied provisionally only if it pertained to a matter falling within the exclusive jurisdiction of the executive, or if the Parliament had given its prior authorization. The Special Rapporteur should look into those aspects in order to formulate draft conclusions, guidelines or articles on the conditions governing the validity of provisional application clauses.

31. Although article 25 of the 1969 Vienna Convention specified that provisional application stemmed from an agreement between the parties or the negotiating States, there was no formal prohibition on a State making a unilateral declaration regarding provisional application outside that rule. The issue that would then arise would be the effects which that declaration would produce, especially when the treaty was silent on the matter of provisional application. With reference to paragraph 60 of the report, it would be interesting to know whether, by means of a unilateral declaration of commitment to apply a treaty provisionally, a State could create obligations for other States before the entry into force of that treaty, when those States had not signed the provisional application clause.

32. A distinction should be drawn between the provisional application of bilateral and multilateral treaties. As far as the latter was concerned, provisional application gave rise to a variety of situations with regard to States that had taken part in all or some of the negotiations, States that had participated in negotiations and those that had not, and States that had decided to apply the treaty provisionally and States that had acceded to a treaty already in force. In accordance with article 19 of the 1969 Vienna Convention, a reservation could be formulated when a treaty was signed, in other words during its provisional application. That was another aspect that the Special Rapporteur should explore.

33. Mr. KITTICHAISAREE said that, since the provisional application of a treaty would depend, *inter alia*, on the provisions of domestic law and the particular circumstances of each State, the identification of State practice, as reflected in domestic laws, would be instructive.

34. It was unclear how the Special Rapporteur had arrived at the conclusion, in paragraph 14 of his second report, that provisional application had legal effects beyond the obligation not to defeat the object and purpose of the treaty in question, as set out in article 18 of the 1969 Vienna Convention. The Special Rapporteur alluded to reservations in paragraph 25; however, it would be useful to determine whether the rules on reservations contained in articles 19 to 23 of the Convention covered provisionally applied treaties as well. The Special Rapporteur might find it helpful to look at the practice of States that considered the provisional application of treaties to be merely a “gentlemen’s agreement” without legal effects. As to paragraphs 48 and 49, he should have explained why States attending the United Nations Conference on the Law of Treaties had opted for the term “provisional application” rather than “provisionally enter into force”. In paragraphs 60 to 68 of his second report, the Special Rapporteur drew a distinction between the obligations resulting from provisional application that produced effects exclusively in the domestic sphere and those that produced effects at the international level. Nevertheless, it would be interesting to know why he had not considered the possibility of drawing a distinction between the rights created at the domestic level by the provisional application of treaties and those created at the international level earlier in the report. It was also unclear why the Special Rapporteur had presumed that article 70 of the 1969 Vienna Convention applied *mutatis mutandis* to the regime resulting from the termination of provisional application.

35. He looked forward to receiving answers on those matters in the Special Rapporteur’s next report.

The meeting rose at 4.20 p.m.

3234th MEETING

Thursday, 31 July 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Cafisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, 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.

²⁸⁷ See *Certain German Interests in Polish Upper Silesia*, p. 19.

Provisional application of treaties (concluded)
(A/CN.4/666, Part II, sect. E, A/CN.4/675)

[Agenda item 8]

SECOND REPORT OF THE
 SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur on the provisional application of treaties to summarize the debate on his second report (A/CN.4/675).

2. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that the richness of the debates had confirmed the relevance of the topic. The Commission could provide considerable assistance to States by clarifying the scope of the legal effects produced by the provisional application of treaties. In order to do so, the Commission should, as pointed out by Sir Michael Wood, take a clear position that, subject to anything specific in the treaty, the rights and obligations of a State that had agreed to apply a treaty or part thereof provisionally were the same as if the treaty were in force. As most members appeared to agree, it followed that a breach of an obligation arising from the provisional application of a treaty entailed the international responsibility of the State. Mr. Forteau, referring to article 13 of the articles on responsibility of States for internationally wrongful acts,²⁸⁸ had recalled that there was no breach of an obligation unless the State was “bound by the obligation in question at the time the act occurs”, the objective of that provision being to codify non-retroactivity for the purpose of international responsibility. It was therefore the obligation that must be in force, and it would be, by virtue of the provisional application of the treaty, even if the treaty itself had not entered into force. Similarly, as pointed out by Mr. Šturma, citing article 12 of the same articles, a breach of an international obligation engaged the responsibility of the State “regardless of its origin or character”. The term “origin” referred to all possible sources of international obligations, in other words all methods of creating legal obligations permitted under international law. In summary, clauses providing for the provisional application of a treaty produced legal effects and created obligations for a State, which would be internationally responsible if it failed to comply with them.

3. On the subject of methodology, he wished to point out that he had sought to list the various situations in which States had recourse to provisional application, but that the list was not intended to be exhaustive. His aim was to ensure that the issue, which had been somewhat neglected in the *travaux préparatoires* for the 1969 Vienna Convention and on which there was little in practice, doctrine and case law, was handled systematically. However, he would follow an inductive rather than a deductive approach, as recommended by Mr. Forteau and Sir Michael. Several members had stressed the relationship between article 25 of the 1969 Vienna Convention and other articles of that treaty, particularly between the provisional application of a treaty and the formulation of reservations. That issue

would be examined in the third report. Another important point that had aroused considerable interest was provisional application through a unilateral act.

4. He acknowledged that a State could only unilaterally decide to provisionally apply a treaty in full or in part if the treaty in question provided for that possibility or if the States that had participated in negotiating the treaty had in some other manner so agreed, as noted in paragraph 33 of the second report. That said, even if the States that had negotiated the treaty had provided for the possibility of provisional application, legal obligations and effects arose only from the time when the provisional application clause had been negotiated and not when the State unilaterally decided to provisionally apply the treaty—except in cases involving two or more States. He referred to that time lag in his second report; it was therefore clear that provisional application must have been provided for by the negotiators or otherwise agreed in order for States to be able to unilaterally decide to provisionally apply a treaty.

5. However, situations that did not meet those strict criteria could arise in practice, one example being the accession of the Syrian Arab Republic to the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction. Of course, that case was an exception, as had rightly been pointed out by Ms. Jacobsson, but there was nothing to indicate that it would not happen again in the future, or that other similarly exceptional cases would not arise. Accordingly, a State that had not signed a treaty could decide to apply it provisionally even though the text contained no provision to that effect. Should the States parties to the treaty prevent that State from doing so? Should the depositary prevent such situations or intervene when they arose? In that regard, the analysis of unilateral declarations contained in the report was relevant. The Commission should recognize that exceptional situations could arise and that, in such cases, a lack of opposition and the agreement of the States parties to the provisionally applied treaty should be given considerable weight. For that reason, although the particular case of the Syrian Arab Republic had not been reflected in a draft guideline, the debate on the question of unilateral declarations was worthwhile. The Commission should also bear in mind that most multilateral treaties supported universality, and that States parties to such treaties generally looked favourably on their provisional application by States that were not parties to the treaty, because this reinforced the treaty. In any case, the Commission could consider the issue of the importance of consent in the context of such “agreement of the parties” or, as had been proposed by Mr. Forteau, the practice of depositaries.

6. The provisional application of treaties raised issues of domestic law and, clearly, issues of international law. The debates at the current and previous sessions had shown that members generally agreed that the Commission should refrain from doing a comparative analysis of States’ domestic legislation. He agreed with Mr. Murphy that the provisional application of the Arms Trade Treaty gave rise to international obligations for the States concerned, in accordance with article 23 of the Treaty. He had simply wished to indicate in paragraph 58 of the second report that, given that national authorities had to

²⁸⁸ General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

fulfil the obligations provided for under articles 6 and 7 in the domestic sphere, the specific consequences of the provisional application of that Treaty were primarily domestic. Other members had argued that the provisions of article 46, paragraph 1, of the 1969 Vienna Convention should not be overlooked; Mr. Kamto had stressed that the relationship between that article and article 27 of the Convention should be taken into account, and that the aspects of domestic law that had an impact at the international level should not be discarded at the outset. It was that very relationship that was addressed in paragraph 19 of the second report, and the aspects of domestic law relating to provisional application would be considered if they had an impact at the international level.

7. Lastly, with regard to future work on the topic, it was clear from the debate that it was necessary to examine the regime applicable to treaties concluded between States and international organizations and treaties concluded between international organizations, as well as the articles of the 1969 Vienna Convention of relevance to the provisional applications of treaties—not only those concerning termination of provisional application. For instance, Mr. Kamto had said that consideration should be given to the provisions of article 24, paragraph 4, which were applicable from the time of the adoption of the text and thus before any action related to provisional application. In conclusion, he said that he would endeavour to promptly prepare draft guidelines or conclusions, as recommended by some members.

Programme, procedures and working methods of the Commission and its documentation (concluded)*

[Agenda item 12]

REPORT OF THE PLANNING GROUP

8. Mr. MURASE (Chairperson of the Planning Group) said that the Group, which had held three meetings, had had before it section I (entitled “Other decisions and conclusions of the Commission”) of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session (A/CN.4/666); General Assembly resolution 68/112 of 16 December 2013 on the report of the International Law Commission on the work of its sixty-fifth session; General Assembly resolution 68/116 of 16 December 2013 on the rule of law at the national and international levels; and the part of the proposed strategic framework for the period 2016–2017²⁸⁹ covering “Programme 6: Legal affairs”. The Working Group on the long-term programme of work, which had been reconstituted for the current session, had recommended including the topic of *jus cogens* in the long-term programme of work on the basis of the proposal prepared by Mr. Tladi. The Planning Group had endorsed that recommendation and had also recommended that the Commission request the Secretariat to draw up a list of possible topics together with brief explanatory notes on the basis of the general scheme of topics established in 1996.²⁹⁰ The Commission

might wish to examine the list, on the understanding that extensive syllabuses on the list of topics prepared by the Secretariat would be developed only once the Working Group on the long-term programme of work had drawn up a final list of topics, possibly in 2016. In the meantime, the Working Group would continue to consider any topics that the members might propose.

9. At the request of the General Assembly,²⁹¹ the Planning Group had drafted a chapter on the rule of law at the national and international levels. Lastly, he recommended that the sixty-seventh session of the Commission be held in Geneva from 4 May to 5 June and 6 July to 7 August 2015 and that the Commission examine several topics during the first part of the session, particularly the identification of customary international law and protection of the atmosphere.

10. Mr. KAMTO said that the Commission might wish to consider organizing a seminar on its work in 2017 to mark its seventieth anniversary.

11. After a discussion in which Mr. HASSOUNA, Mr. NIEHAUS, Mr. MURPHY, Mr. CANDIOTI, Mr. KAMTO, Mr. VALENCIA-OSPINA, Mr. PETRIČ, Mr. KITTICHAISAREE, Mr. AL-MARRI, Sir Michael WOOD and Ms. JACOBSSON took part, the CHAIRPERSON said he took it that the Commission wished to indicate in its annual report that some members would like part of the session to take place in New York. He also took it that the Commission wished to adopt the recommendations of the Planning Group for the inclusion of the topic of *jus cogens* in the long-term programme of work, to request the Secretariat to draw up a list of topics for consideration, and to take note of the report of the Planning Group (A/CN.4/L.849).

It was so decided.

The meeting rose at 11.25 a.m.

3235th MEETING

Monday, 4 August 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, 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.

* Resumed from the 3227th meeting.

²⁸⁹ A/69/6 (Prog. 6).

²⁹⁰ *Yearbook ... 1996*, vol. II (Part Two), annex II, pp. 133–136.

²⁹¹ See General Assembly resolution 68/116 of 16 December 2013, para. 17.