Document:-
A/CN.4/3279

Summary record of the 3279th meeting

Topic:
<multiple topics>

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equate the notion of "expression of consent to be bound" with that of "entry into force", which was incorrect according to the law of treaties.

64. Pursuant to article 25 of the 1969 Vienna Convention, a treaty was provisionally applied pending its entry into force, meaning, necessarily, prior to its entry into force. The provisional application of a treaty that had already entered into force was a case that fell outside the scope of article 25 and therefore outside that of the current topic, as circumscribed by the Special Rapporteur and approved by the Commission.

65. His second comment was that certain Commission members, himself included, had stressed that it would be useful for the Commission, as part of its work on the topic, to examine the provisions of States' internal law that related to the provisional application of treaties. The Special Rapporteur had made an effort to incorporate that suggestion by examining the *Yukos Universal Limited (Isle of Man) v. the Russian Federation* case and attempting to reflect its conclusions in draft guideline 1. However, he had failed to address article 46 of the 1969 Vienna Convention. It was imperative to decide whether that article applied to provisional application. Although article 46, which was entitled "Provisions of internal law regarding competence to conclude treaties", excluded in paragraph 1 the possibility for a State to invoke its internal law as invalidating its consent to be bound, it also included the clause "unless that violation was manifest and concerned a rule of its internal law of fundamental importance". The fundamental rules referred to were usually constitutional rules concerning the conclusion of treaties. Whereas the *Yukos Universal Limited (Isle of Man) v. the Russian Federation* case did not deal precisely with treaty-making powers, in the case of *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice had dealt directly with the question of the constitutional limits on the treaty-making powers of Heads of State. A guideline on that issue would therefore be useful. He was not advocating that it should apply to the entire national legal system—just the fundamental rules of internal law relating to treaty-making powers.

66. His third comment related to paragraph 60 of the third report, where the Special Rapporteur stated that the binding nature of a treaty was determined exclusively by international law and that, whatever the provisions of the internal law of a State party to a treaty, they would have no effect on the international obligations of the State. It was unclear whether that meant that, irrespective of the fact that the provisions of internal law concerning the State party's consent to be bound were known to the other party or parties and had not been met, international obligations nevertheless arose from the treaty. That question showed that the provisions of internal law concerning the conclusion of treaties were at the heart of the topic. If all the Commission said was that the provisional application of a treaty could be performed subject to the explicit agreement of the parties and created obligations for States, and that the violation of those obligations could engage the State's international responsibility, it was not adding anything new to existing international law. The formulation of guidelines on the provisional application of treaties was useful only to the extent that it helped States to identify the moment from which, and subject to which conditions, provisional application created international obligations for the parties. That objective could be reached only if the Commission clarified the issue of the provisions of internal law regarding the conclusion of treaties.

67. Turning to the draft guidelines, he noted that draft guideline 6 did not seem to be based on a prior analysis of the law of treaties or of State practice. Even if its purpose was simply to recall a general rule of international law, it would have been better to mention the provisions of the law of treaties and the international case law that underpinned that rule, even if it meant simply referring to the draft articles on the responsibility of States for internationally wrongful acts. He hoped that the Special Rapporteur would deal with that lacuna in the commentary to draft guideline 6. In conclusion, he supported the referral of all six guidelines to the Drafting Committee.

The meeting rose at 1.05 p.m.

3279th MEETING

Tuesday, 28 July 2015, at 10.20 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Organization of the work of the session (*continued*)

[Agenda item 1]

1. The CHAIRPERSON drew the attention of the members of the Commission to the revised programme of work for the last two weeks of the session that had just been distributed.

2. Ms. ESCOBAR HERNÁNDEZ, referring to the programme for the morning of 29 July, said she had understood that following the Commission's consideration of the report of the Drafting Committee on customary international law in plenary session, the remaining time would be devoted entirely to the work of the Drafting Committee on immunity of State officials from foreign criminal jurisdiction; however, it was planned that some of the time remaining would also be devoted to the work of the Drafting Committee on the provisional application of treaties.

3. Mr. GÓMEZ ROBLEDO, speaking as Special Rapporteur on the provisional application of treaties, said that

he had no problem with holding a meeting of only the Drafting Committee on immunity of State officials on Wednesday, 29 July provided that, if necessary, the whole of the afternoon of 30 July could be set aside for the Drafting Committee on the provisional application of treaties, which would mean not holding the informal consultations on *jus cogens*.

4. Mr. KITTICHAISAREE said that it hardly seemed realistic for the Drafting Committee on the provisional application of treaties to complete its consideration of the six draft guidelines in the time allocated, and wished to know the Special Rapporteur's view on the matter.

5. Mr. GÓMEZ ROBLEDO said that the Drafting Committee was better placed than him to speak on the matter. If, during the plenary meeting, the Commission agreed to refer the six draft guidelines to the Drafting Committee, he intended to submit to the Committee a revised version of the guidelines taking into account the comments made during the plenary meeting, not with a view to concluding their consideration during the current session, but to make as much progress with the work as possible.

6. Mr. TLADI said that he endorsed Mr. Gómez Robledo's remarks and, as Special Rapporteur on the topic of *jus cogens*, agreed not to hold informal consultations, but instead to talk to members of the Commission individually about the topic.

7. Mr. HASSOUNA thanked the Bureau for its efforts to revise the programme of work taking into account the different work under way or to be done. Priority should be accorded to the work of the Drafting Committee on immunity of State officials from foreign criminal jurisdiction and the Drafting Committee on the provisional application of treaties. However, since the informal consultations on *jus cogens* and on crimes against humanity were important, he proposed that if they could not take place owing to time constraints, members of the Commission should submit their written comments to the Special Rapporteurs so as to assist them in drafting their next report.

8. The CHAIRPERSON said that he would talk to the Special Rapporteurs concerned to decide how to organize the consultations. He invited the members of the Commission to adopt the revised programme of work, on the understanding that it would be applied with flexibility, taking into account the remarks made during the current meeting.

The revised programme of work was adopted.

Provisional application of treaties (*continued*) (A/CN.4/678, Part II, sect. G, A/CN.4/676, A/CN.4/687)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

9. The CHAIRPERSON invited the members of the Commission to continue their consideration of the third report on the provisional application of treaties (A/CN.4/687).

10. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for his excellent third report, which was based on extensive research. Its analysis of whether article 25 of the 1969 and 1986 Vienna Conventions could be considered as a rule of customary international law on the basis of the practice of States, international organizations and *opinio juris* was very pertinent. Also welcome was the fact that the Special Rapporteur considered together the provisional application of treaties between States, between States and international organizations or between organizations. The appropriateness of such an approach was borne out by the Guide to Practice on Reservations to Treaties,[313] which made reference to the 1969 and 1986 Vienna Conventions. Since, as the third report showed, there was practice relating to the provisional application of treaties agreed by States and international organizations, such practice should be addressed under the topic.

11. The compilation of treaties containing provisions on the provisional application of treaties prepared by the Secretariat, which was annexed to the third report, was very useful, and it would be interesting to know what conclusions the Special Rapporteur would draw from their consideration in a future report. The Special Rapporteur's analysis of the relationship of provisional application to certain provisions of the 1969 Vienna Convention was also very informative and should cover other provisions, such as those relating to reservations to treaties, which the Special Rapporteur had indicated that he would examine in a future report.

12. With regard to the relationship of provisional application to article 11 of the 1969 Vienna Convention, after categorically stating that the concept of consent to be bound by a treaty should be distinguished from provisional application and providing an interesting analysis of article 7 of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 on that subject, the Special Rapporteur suggested that the means of expressing consent to be bound by a treaty, as provided in article 11 of the 1969 Vienna Convention, might also be used to agree to its provisional application. Although it was an interesting hypothesis, it could give rise to confusion. Rather, article 7 of the aforementioned Agreement seemed to mean it could be agreed in a treaty that the expression of consent to the provisional application of a treaty was implicit in the expression of consent to be bound by the treaty, unless it provided otherwise.

13. On the other hand, the Special Rapporteur's opinion on whether consent to apply a treaty provisionally was legally binding in the same way as an international agreement, as argued by Mr. Murphy, was not clear. If, for example, consent to the provisional application of a treaty or some of its provisions was established by means of a separate agreement, exclusively through signature or by an exchange of notes, without an opt-in/opt-out clause, the question arose as to whether that separate agreement was

[313] General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Three) and corrigenda 1–2, pp. 23 *et seq*.

legally binding and had the weight of a treaty, or whether it could take the form of an arrangement that did not have the weight of an international treaty and was therefore not necessarily binding. What was important was that it was recorded by some means that the negotiating States had agreed to the provisional application of the treaty.

14. In that connection, he endorsed Mr. McRae's reasoning, namely that the agreement, whether expressed in the treaty itself or agreed in some other manner, in many cases might only allow for the possibility of States regarding the treaty as legally binding insofar as they accepted to apply it provisionally, in which case, it would be the notification by those States of their acceptance of provisional application that should be regarded as legally binding, and not their agreement. In those circumstances, the legally binding nature of the provisionally applied treaty would depend on the notification by a State of its acceptance to be legally bound by the obligation to provisionally accept the treaty in question. In any event, a more detailed analysis of the matter was required. State practice and case law seemed to indicate that the provisional application of a treaty produced the same effects as a treaty in force which was legally binding, but such a conclusion needed to be better substantiated.

15. The Special Rapporteur's analysis of article 24 of the 1969 Vienna Convention on the entry into force of a treaty required some clarifications. First, the Special Rapporteur asserted that the provisional application of a treaty presumed that the treaty was not in force. Several members of the Commission had challenged that assertion, which was in fact incorrect, since a multilateral treaty could enter into force for certain States, in accordance with its provisions, but not for others, which, if agreed by the negotiating States, could apply it provisionally.

16. Furthermore, as provided by several of the multilateral treaties cited in the annex to the third report, a State could apply a treaty that was already in force. To cite but one of the many examples given in the annex, article 56, paragraph 1, of the International Cocoa Agreement, 2010 stated: "A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the Depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 57 or, if it is already in force, at a specified date."

17. According to the provision, found in similar terms in other agreements cited in the annex, a treaty already in force could be applied not only with respect to the parties to the treaty, in other words, the States for which the treaty had entered into force, but also with respect to States for which it had not yet entered into force, but which agreed to apply it provisionally. Treaty relations could thus be established and exist between States parties, between States parties and States that applied the treaty provisionally, and between States that applied the treaty provisionally. If the rights and obligations that flowed from the provisional application of a treaty had a different legal status, it would cause major confusion in such treaty relations.

18. Certain provisions of the agreements cited in the annex to the third report expressly provided that a State which provisionally applied the agreement was considered a party thereto. For example, according to article 38 of the Agreement establishing the Union of Banana Exporting Countries: "A country which has recourse to this procedure shall have all the rights and duties which final ratification would give it." It should therefore be explained that the treaty was not in force for the State which applied or might apply it provisionally. Once the treaty entered into force for that State, its provisional application automatically ceased and the treaty applied with respect to that State as a State party.

19. In chapter II, section D, of the third report, the Special Rapporteur examined the relationship between provisional application and article 26 of the 1969 Vienna Convention, which laid down the principle of *pacta sunt servanda* and, building on the analysis started in his second report,[314] stated: "The principle that 'obligations must be observed' (*pacta sunt servanda*) extends also to provisionally applied treaties. In that respect the legal consequences of the provisional application of a treaty are the same as the legal consequences of its entry into force." Although on the whole he endorsed that analysis, he considered that it should be more detailed as it was central to the topic, particularly given that article 26 of the 1969 Vienna Convention limited the application of the principle of *pacta sunt servanda* to treaties in force.

20. Perhaps a broader analysis of the principle might be appropriate, and not only one from the standpoint of the 1969 Vienna Convention, but with reference, for example, to General Assembly resolution 2625 (XXV) of 24 October 1970 entitled "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations", which provided that "[a]ll States shall comply in good faith with their obligations under the generally recognized principles and rules of international law" and that "[e]very State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law". The 1969 Vienna Convention itself referred to customary international law in its preamble, which stated that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention".

21. The Special Rapporteur conducted a rigorous analysis of the principle laid down in article 27 of the 1969 Vienna Convention, on internal law and observance of treaties, according to which "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". It should be noted that article 27 referred to "a party", in other words, a State for which the treaty was in force. However, the Special Rapporteur mentioned internal law in the second part of draft guideline 1, which was not really the right place, given that the first guideline was supposed to set forth the general rule on the provisional application of treaties.

22. It was also necessary to analyse the other hypothesis, namely, where the treaty itself provided that States

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

could apply it provisionally, as long as it was compatible with their internal law. A case in point was article 59 of the International Natural Rubber Agreement, 1987, cited in the annex to the third report, which provided that a State could notify the depositary that it would fully apply the Agreement provisionally, but that notwithstanding that provision, a Government could provide in its notification of provisional application that it would apply the Agreement only within the limitations of its constitutional and/or legislative procedures, which would not prevent it from meeting all its financial obligations. The fact that internal law could limit the provisional application of a treaty in conformity with the provisions of the treaty itself was one of the arguments invoked by the Russian Federation in the *Yukos Universal Limited (Isle of Man) v. the Russian Federation* case. That aspect of internal law should be analysed in greater depth in future reports.

23. He welcomed the fact that the Special Rapporteur had given the draft guidelines the title "Preliminary proposals for guidelines on provisional application", because, as currently worded, they looked more like general norms rather than detailed guidelines providing guidance to States and international organizations on their practice. Of course, guidelines could set forth legal principles, as with, for example, the Guide to Practice on Reservations to Treaties, but the Special Rapporteur might wish to consider preparing draft conclusions instead, as had been done for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

24. In conclusion, he supported the referral of the draft guidelines to the Drafting Committee and welcomed the news that the Special Rapporteur would revise them taking into account the comments made during the plenary session. In particular, he hoped that account would be taken of the need to expand draft guideline 4 on the legal effects of provisional application to make it clear that such effects were binding. He approved the future workplan proposed by the Special Rapporteur.

25. Mr. HASSOUNA thanked the Special Rapporteur for his excellent third report and said that he would only make some general comments on the debate on the provisional application of treaties. Everyone agreed on the importance of the topic under consideration, which dealt with a practice that was increasingly applied in relations among States; moreover, it should be noted that States had expressed the same view in their statements in the Sixth Committee as well as in their written comments. In the informal consultations conducted by the Special Rapporteur during his recent visit to the United Nations Headquarters in New York, State representatives had also underscored the importance of the topic, and strongly supported the work undertaken. As for the African continent, although practice was not uniform, the member States of ECOWAS had increasingly resorted to the provisional application of treaties. Furthermore, the challenges of the ratification and implementation of treaties in Africa—an issue which was closely related to the provisional application of treaties—would be on the agenda of the African Forum to be held in Cairo, in October 2015. In his statement, Mr. Kamto had given the example of the serious crisis that had recently arisen between two African countries as a result of the delay in the ratification procedure of a treaty by one country—an example that illustrated well the importance and timeliness of the topic.

26. Second, the overall objective of the work on the topic was to enhance the understanding of the mechanism of the provisional application of treaties and to provide the necessary legal certainty to States that resorted to it. Indeed, the provisional application of treaties had become widespread for various reasons, such as precaution, urgency and flexibility. He considered that the current report, certain aspects of which had prompted constructive criticism, clearly contributed towards achieving that objective.

27. Third, with regard to the substantive issues raised in the third report, he agreed that some basic clarifications were required regarding draft guideline 4, on the legal effects of the provisional application of treaties, as it was too vague and much too concise. Although it was generally accepted that the provisional application of a treaty had binding legal effects, as confirmed by the International Court of Justice, relevant arbitral bodies and the previous work of the Commission, efforts should be focused on situations that were not clear-cut, where there was some doubt about the existence of such effects. Some clarifications were also required regarding the role of internal law in the provisional application of treaties, dealt with in draft guideline 1, where mention might be made of the cases in which the rules of internal law were relevant or irrelevant. However, it did not seem necessary to conduct a comparative study of domestic laws relating to the provisional application of treaties. The role of the Commission was to identify the practice of States with regard to international law; internal law was relevant only insofar as it referred to the concepts, rights, obligations or procedures of international law. As to the question of which articles of the 1969 Vienna Convention and of the 1986 Vienna Convention were to be addressed under the topic, he considered that all articles that were relevant to the provisional application of treaties should be covered. Although, in their current form, the draft guidelines dealt with the provisional application of treaties both by States and international organizations, it would be more appropriate to deal with the two situations separately. Lastly, for the sake of clarity, he suggested that each draft guideline be given a title.

28. Fourth, concerning the final outcome of the work on the topic, in view of its practical importance and the urgent need for States to understand the implications of provisional application, it would be better to prepare draft guidelines or model clauses rather than draft conclusions.

29. Fifth, he was in favour of referring all the draft guidelines to the Drafting Committee at the current session. That would allow the Commission to continue to make headway and to produce concrete guidelines, as expected by States. During the plenary debate, several suggestions for improving the draft guidelines had been made; the Special Rapporteur could take them into account when redrafting the texts to be submitted to the Drafting Committee. He was confident that with its collective wisdom, the problems encountered would be resolved.

30. Sixth, it was important that during the current week, which was crucial to the work of the Commission, the Drafting Committee had enough time to complete its work, not only on the provisional application of treaties, but also on immunity of State officials from foreign criminal jurisdiction. He hoped that the Commission would have the time to hold informal consultations on the two other topics of crimes against humanity and *jus cogens*. Otherwise, members could always submit their views on the two working documents drawn up by the relevant Special Rapporteurs to help them draft their next reports.

31. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that first he wished to thank the members of the Commission for their very useful comments on his third report. In their statements, Mr. Caflisch and Mr. McRae had raised the very relevant question of whether the Commission should work within the confines of article 25 of the 1969 Vienna Convention. Although, in his view, that article should certainly be the starting point for the Commission's work, the Commission could go further, if it proved helpful in terms of the legal consequences of provisional application. Mr. Tladi had posed another interesting question, namely who would benefit from the provisional application of a treaty. By way of reply, he recalled what Mr. Nolte had said in his statement: that there were several possible interpretations of the concept of the provisional application of treaties. If one opted for a very literal interpretation then it would be more appropriate to refer to provisional application *de facto*, otherwise the assumption was that provisional application gave rise to legal effects, which gave the topic another dimension. In view of the foregoing, and to revert to Mr. Tladi's question, it seemed to him that if provisional application produced legal effects at the international level, its principal beneficiary was the treaty itself since its primary objective—to be applied—was thus realized, even though only entry into force could establish a solid legal regime. In that sense, all negotiating States were beneficiaries of provisional application, including indirectly and regardless of the ensuing rights and obligations.

32. Even though all members of the Commission recognized the usefulness of examining State practice relating to the provisional application of treaties, it did not seem appropriate to conduct a comparative analysis of relevant domestic legislation, since that would be complicated, risky and of little use, as Mr. Murphy had pointed out. That being said, and irrespective of the need to contact again those States that had not yet submitted comments on their practice, he would continue to compile the information available.

33. Some clarifications were required concerning a point made by several members of the Commission, including Ms. Escobar Hernández, Mr. Forteau, Mr. Kamto, Mr. Kittichaisaree, Mr. Murase, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Šturma and Mr. Tladi, namely the apparent contradiction between paragraphs 10 and 25 of his third report, where reference was made to domestic law. The States' comments on their practice regarding the provisional application of treaties had been particularly useful in clarifying certain basic points, such as why they resorted to the mechanism, the terms under which they agreed to do so, the ways of terminating provisional application and, above all, the legal effects attributed to a treaty or part of a treaty that had been provisionally applied. Nevertheless, he did not intend to conduct a comparative study of the relevant domestic laws and, although many States made reference to their domestic legislation in their comments, it was their international practice that was useful for the work on the topic. In paragraph 25 of the third report, he had attempted to categorize State practice, which was a particularly complex exercise, as borne out by the comments of Ms. Escobar Hernández, Mr. Forteau and Mr. Niehaus concerning the practice of Spain, France and Costa Rica. In any case, he had decided to add, at the end of draft guideline 1, the phrase "provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application" for two reasons. First, it was helpful to let the user know that the proposed guidelines were in no way intended to circumvent the provisions of internal law, above all, where a rule of fundamental importance was involved, such as in article 46 of the 1969 Vienna Convention; and second, it should be pointed out that, in several of the cases considered, it was the treaty itself that established such a limitation. His intention was thus to draw the attention of negotiating States to the treaty, as Mr. Nolte had suggested, even though, as Sir Michael had pointed out, perhaps States had no need to be thus alerted. That aspect could also be reflected in the commentary rather than in the draft guideline proper, unless the members of the Commission decided to opt for the wording proposed by Mr. Nolte. In any case, the Commission would have the opportunity to return to the matter if the proposed draft guidelines were referred to the Drafting Committee, as he hoped. In summary, once there was agreement to resort to provisional application, the latter was governed by international law.

34. Regarding the termination of provisional application, Mr. Tladi had asked whether article 25, paragraph 2, of the 1969 Vienna Convention would cover the case of a treaty whose provisional application would be terminated because its entry into force was uncertain. One could even go further and ask whether the paragraph would produce its effects when the States concerned realized that entry into force was uncertain. He did not endorse that interpretation, not only because article 25, paragraph 2, clearly referred to the termination of the provisional application of a treaty with respect to one State only, but above all because it would render provisional application totally useless. A good example in that connection was the Comprehensive Nuclear-Test-Ban Treaty, which had been applied for around 20 years, although it had still not entered into force.

35. Mr. Murase had asked whether an analysis of treaties granting individual rights was really relevant. It should be explained that the intent was to consider the consequences of the termination of the provisional application of a treaty, under article 25, paragraph 2, of the 1969 Vienna Convention, on persons towards whom the State had assumed obligations. Perhaps that was not such an important matter after all, since most human rights treaties were already virtually universal, but it certainly concerned a specific category of treaties, which entailed obligations for a State *vis-à-vis* persons under its jurisdiction rather than mutual obligations between signatory States.

36. In his next report, he would deal with the broader issue of the termination of provisional application and the related legal regime, while continuing consideration of the relationship between provisional application and other relevant provisions of the 1969 Vienna Convention—in particular, articles 46 and 60, as suggested—while taking care, of course, not to reinvent the Convention. It would also be useful to study in greater depth the question of entry into force, and to determine whether article 25 of the 1969 and 1986 Vienna Conventions was customary in nature.

37. As far as the draft guidelines were concerned, it did not seem necessary at the present juncture to go back over the many pertinent comments and proposals that had been made, as the Drafting Committee would take them into account in its redrafting and they would also be reflected in future commentaries to the guidelines. Nonetheless, three points were worthy of note. First, almost all members of the Commission wished to draw a distinction between the question of the provisional application of treaties with respect to States and the question of the relations between international organizations or with States. Perhaps, as Mr. Park had proposed, a final draft guideline should be added recalling that all the guidelines relating to States applied *mutatis mutandis* to international organizations. Furthermore, as several members had said, it seemed appropriate to add a guideline defining the scope of application as well as a guideline covering situations where a unilateral declaration had been made. Lastly, as to the question of whether the Commission should draft a set of guidelines or conclusions, he recalled that the purpose of the topic had always been to provide States with something of very practical use. He would continue his work based on the current approach, although he did not exclude the possibility of proposing draft model clauses, as recommended by Mr. Hassouna and Mr. Petrič. Furthermore, he did not consider that the topic should be understood simply as an interpretation of article 25.

38. The CHAIRPERSON said he would take it that the members of the Commission wished to refer draft guidelines 1 to 6 on the provisional application of treaties to the Drafting Committee.

It was so decided.

The meeting rose at 11.20 a.m.

3280th MEETING

Wednesday, 29 July 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

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

Identification of customary international law (*concluded*)[*] (A/CN.4/678, Part II, sect. E, A/CN.4/682, A/CN.4/L.869)

[Agenda item 7]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. FORTEAU (Chairperson of the Drafting Committee) introduced the titles and texts of the draft conclusions on identification of customary international law, as provisionally adopted by the Drafting Committee during the sixty-sixth and sixty-seventh sessions of the Commission, and as contained in document A/CN.4/L.869, which read:

IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

PART ONE

INTRODUCTION

Draft conclusion 1. Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

PART TWO

BASIC APPROACH

Draft conclusion 2 [3]. Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Draft conclusion 3 [4]. Assessment of evidence for the two elements

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each element is to be separately ascertained. This requires an assessment of evidence for each element.

PART THREE

A GENERAL PRACTICE

Draft conclusion 4 [5]. Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Draft conclusion 5 [6]. Conduct of the State as State practice

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

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[*] Resumed from the 3254th meeting.