

Provisional

For participants only

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Sixty-eighth session (second part)

Provisional summary record of the 3325th meeting

Held at the Palais des Nations, Geneva, on Thursday, 21 July 2016, at 10 a.m.

Contents

Crimes against humanity (*continued*)

Report of the Drafting Committee

Provisional application of treaties (*continued*)

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Present:

Chairman: Mr. Comissário Afonso

Members: Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Gómez-Robledo
Mr. Hassouna
Mr. Hmoud
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. Singh
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10 a.m.

Crimes against humanity (agenda item 9) (*continued*) (A/CN.4/690)

Report of the Drafting Committee (A/CN.4/L.873/Add.1)

Mr. Šturma (Chairman of the Drafting Committee) introduced the sixth report of the Drafting Committee at the sixty-eighth session of the Commission, on crimes against humanity, as contained in document A/CN.4/L.873/Add.1, which reproduced the text, as provisionally adopted by the Drafting Committee, of an additional paragraph, namely paragraph 7, to be inserted at the end of draft article 5.

He recalled that he had introduced an earlier report of the Drafting Committee on the topic during the first part of the session on 9 June 2016. That report contained six draft articles provisionally adopted by the Drafting Committee at the current session, including draft article 5. It had been suggested during the plenary debate that the Special Rapporteur should draft a concept paper on the issue of criminal responsibility of legal persons, for use by the Drafting Committee when addressing the six draft articles proposed by the Special Rapporteur in his second report. However, due to a lack of time, the Drafting Committee had not been able to consider the issue. The Commission had subsequently decided to allocate a further meeting to the Drafting Committee to consider the question of the liability of legal persons.

A provision on that question had not been included in draft article 5 as initially proposed in the Special Rapporteur's second report. However, the question of the liability of legal persons in the context of crimes against humanity had generated much discussion during the plenary debate. At that time, there had been a divergence of views in the Commission as to the advisability of providing for such liability in the draft articles. It was in the light of that debate that the Special Rapporteur had been requested to draft the concept paper. The paper, which had subsequently been presented to the Drafting Committee, had explored various options to deal with the issue, with a view to taking account of the different points of view expressed in the plenary debate, including: to make no mention of the matter in the draft articles; to insert a "without prejudice" clause, which would be elaborated on in the commentaries; or to develop an entire draft article, potentially modelled on article 26 of the United Nations Convention against Corruption.

The Drafting Committee had also had before it a proposal by the Special Rapporteur for a new paragraph 7 in draft article 5, which represented a possible *via media* between the various approaches identified in the concept paper. The formulation of the proposed paragraph 7 was based on the wording of article 3 (4) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, to which 173 States were currently parties. The paragraph also reflected the core aspects of the corresponding article in the Convention against Corruption and would be supplemented by an explanation in the commentary that the liability identified in the paragraph was without prejudice to the criminal liability of natural persons provided for elsewhere in the draft article.

The same divergent opinions that had been voiced in the plenary discussions had been maintained in the Drafting Committee. The key issues of contention had been whether and, if so, how the liability of legal persons should be reflected in the draft articles. Various drafting options and formulations had been explored, including with the aim of rendering the language of the Special Rapporteur's proposed provision more flexible or, conversely, more strict. Ultimately, a key consideration for the Committee had been that the proposed provision was based on language, accepted by a large part of the international community of States, which had been intentionally drafted flexibly. However, it had not been possible

to reconcile the differences of opinion, and paragraph 7, in the formulation proposed by the Special Rapporteur, had been adopted provisionally following an indicative vote.

The opening clause of the proposed paragraph, “Subject to the provisions of its national law”, was intended to accord to the State considerable discretion as to the measures that would be adopted; the obligation was “subject to” the State’s existing approach to liability of legal persons for criminal offences under its national law. Such flexibility was further supplemented by an indication that a State would only be obligated to take measures where it deemed it appropriate to do so in the context of the offences referred to in draft article 5.

The phrase “shall take measures” was intended to signal a clear obligation for States to address the liability of legal persons in the context of crimes against humanity. At the same time, the language of paragraph 7 provided States with considerable flexibility to shape those measures in accordance with its national law. It acknowledged and accommodated the diversity of approaches adopted in national legal systems, including with respect to the definition of legal persons and the possible measures that could be taken against legal persons.

The second sentence dealt with the question of the possible measures to be taken. It provided that: “Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.” Once again, the formulation, which was the same as that found in the Optional Protocol, was designed to allow maximum flexibility with a view to accommodating different legal traditions, hence the reference to “legal principles of the State”. The provision acknowledged the diversity of solutions adopted within national legal systems, and left it for each State to choose from among three options to secure the liability of legal persons, namely criminal, civil or administrative. All of those matters would be further developed in the corresponding commentary.

In conclusion, he expressed the hope that the plenary Commission would be in a position to adopt draft paragraph 7 to draft article 5, as presented.

Mr. Peter said that he would like to congratulate the Special Rapporteur on the flexibility he had shown. He had supported the drafting of the new paragraph, which could be applied to military contractors, who were becoming increasingly active in armed conflict.

The Chairman said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 5, paragraph 7, as contained in document A/CN.4/L.873/Add.1.

It was so decided.

Mr. Kittichaisaree said that he wished to place on record his position concerning two points. Firstly, he wished to underline that his understanding of the wording “each State shall” in paragraph 7 of draft article 5 meant that implementation of the article was subject to the provisions of national law. Secondly, as he had pointed out during the deliberations of the Drafting Committee, the international legal instruments cited in support of the new paragraph mainly concerned the prosecution of legal persons, as those legal persons were the main conduits or channels for the commission of the crimes; hence the *raison d’être* of the international legal instruments in question, such as the International Convention for the Suppression of the Financing of Terrorism, the Convention against Corruption and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. According to him, paragraph 7 went, to a certain extent, beyond current State practice. However, he had no objection to it, since it might open up the way towards the prosecution of legal persons for crimes against humanity. In that respect, he noted that the reaction of States in the Sixth Committee would

be of crucial importance for the Commission to take into account during the second reading of draft article 5, paragraph 7.

The Chairman said it was his understanding that the Special Rapporteur would prepare the relevant commentary for inclusion in the report of the Commission to the General Assembly on the work of its sixty-eighth session.

Provisional application of treaties (agenda item 5) (*continued*) (A/CN.4/699)

Mr. Murase said that he wished to thank the Special Rapporteur for his fourth report on the provisional application of treaties (A/CN.4/699). As the Special Rapporteur had noted, the objective of chapter II of the report was to respond to issues raised in the Sixth Committee; therefore, the analysis contained therein was not necessarily intended to provide a basis for the formulation of new draft guidelines. However, the chapter did not sufficiently clarify the relationship of provisional application to the other provisions of the 1969 Vienna Convention on the Law of Treaties. The lack of clarity in the analysis might stem partly from the inconsistent use of terminology, such as the interchangeable use of the phrases “provisional application” and “a treaty that was provisionally applied”, which could give rise to misleading conclusions.

In section A, it seemed that the Special Rapporteur was discussing not a reservation to a treaty but rather a reservation to an agreement to apply a treaty provisionally. Although a State might agree to exclude or modify the legal effect of the provisional application of a treaty or unilaterally declare that it would provisionally apply a treaty with certain exclusions or modifications, that did not constitute a reservation to a treaty, as defined in article 2 (1) (d) of the Vienna Convention, since a reservation was, by definition, made to the treaty itself. The section should perhaps instead have addressed whether a reservation to a treaty could exclude or modify the legal effect of a treaty during its provisional application as well as after its entry into force.

Section B seemed to be the only section of the report directly relevant to the draft guideline proposed at the current session. The Commission should be cautious in drawing general conclusions or implications from the *Yukos Universal Limited (Isle of Man) v. the Russian Federation* case, which concerned the interpretation of article 45 of the Energy Charter Treaty, since it should be concerned rather with establishing general guidelines on treaty law in the context of invalidity of treaties. The Special Rapporteur’s statement in paragraph 64 of the report, in respect of the *Yukos* case, that “the difference of approaches between an arbitral tribunal and a national court may mean that each assigns different weights to the interests of the investors, on the one hand, and State sovereignty, on the other” was thus overly simplistic. Moreover, the decision of the district court in the Netherlands in the case was not final — a notice of appeal had recently been issued — and similar proceedings were taking place in other countries, so it would be premature to take it as a basis on which to discuss the implications of the issue.

In the same section, the Special Rapporteur considered the relevance of article 46 of the Vienna Convention and its provision that a State could invalidate its consent to be bound by a treaty if that consent was a manifest violation of a rule of its internal law of fundamental importance. However, he had not addressed two important questions, namely whether consent to be bound by a treaty included consent to apply a treaty provisionally or how article 46 could be reconciled with the fact that a State often agreed to the provisional application of a treaty only to the extent that its internal law permitted.

In his analysis in section C, the Special Rapporteur provided little analysis of the circumstances under which a violation of a treaty that was provisionally applied amounted to a “material breach” in the sense of article 60 of the Vienna Convention. In that regard, article 60 (3) of the Convention provided for circumstances under which a material breach

of a treaty occurred after its entry into force. The Special Rapporteur should have asked whether a material breach of treaty that was provisionally applied could occur under the same circumstances as provided for in that provision. More fundamentally, he did not distinguish between the termination of a treaty as such and the termination of the provisional application of a treaty. The reference to termination in article 60 of the Vienna Convention concerned, of course, the former, while the latter would be included in the reference in the same provision to the “suspension of the operation of a treaty”. As a result, he had failed to address the matter of whether a material breach of a treaty that was provisionally applied entitled parties to invoke the breach as a ground not only for suspending the provisional application of the treaty but also for terminating the treaty itself.

In respect of section D, he recalled that article 73 of the Vienna Convention stated that its provisions would not prejudice any question that might arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States. In his opinion, the scope of that provision extended to a treaty that was provisionally applied. Moreover, drafting guidelines on those issues would go beyond the scope of the present project.

Chapter III of the report provided a summary of the practice of international organizations in relation to provisional application of treaties. However, as the Special Rapporteur discussed two very different types of practice, it was unclear what conclusions he was seeking to draw from his analysis. In section A, the Special Rapporteur considered the registration and depositary functions of the United Nations, a subject of doubtful relevance to the present topic. On the other hand, sections B to F, in which the Special Rapporteur referred to practice related to treaties to which regional organizations were parties, were highly relevant. However, the only discernible conclusion was that provisional application was important in treaties involving regional organizations. His own view, stated at the previous session, was that States and international organizations should not be covered in the same set of guidelines. More extensive comparative analysis needed to be conducted on the provisional application of treaties involving only States and those involving international or regional organizations.

As to draft guideline 10, which appeared to follow the structure of article 27 of the Vienna Convention, he regretted the fact that no basis had been provided for it in the Special Rapporteur’s fourth report. In his third report, the Special Rapporteur had addressed the relationship of provisional application to article 27, but had not indicated any practice to support his view that, once a treaty was being provisionally applied, internal law might not be invoked as justification for failure to comply with the obligations deriving from provisional application. His concern, therefore, was the relationship of the draft guideline to article 27. As had been discussed at the previous session, States occasionally limited the legal effect of provisional application of a treaty in accordance with their internal law. Applying article 27 to provisional application *mutatis mutandis* might contradict such State practice. More careful analysis of the relationship between provisional application and internal law was required before a draft guideline was formulated on the matter.

Regarding future work on the topic, he would welcome an explanation from the Special Rapporteur as to how the proposed model clauses on provisional application would fit in with the draft guidelines.

In conclusion, he agreed to the referral of draft guideline 10 to the Drafting Committee, on the understanding that the latter would address his concerns.

Mr. Nolte said that he wished to thank the Special Rapporteur for his rich report, which provided a meticulous account of the topic. The fact that the Special Rapporteur had taken up proposals made by Member States was to be welcomed, but the Commission also

needed to integrate all the various aspects of the topic, whether they had been raised by Member States or not, into a cohesive framework.

Regarding the section of the report dealing with reservations, he agreed with the statement in paragraph 36 that “nothing would prevent the State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty”. However, he would even go one step further and say that a State that had formulated a reservation could be presumed to intend that the reservation should apply not only when the treaty entered into force but also to its provisional application. It would be helpful for States if the Commission were to spell out such a presumption, as a matter of guidance.

He found the heading “Invalidity of treaties” somewhat confusing, as the section concerned did not so much address that subject as the different aspects of the relationship between a treaty and the internal law of a State. On a more substantive point, paragraph 43 of the report should not ask to what extent the regime set out in article 25 of the 1969 Vienna Convention constituted a sort of subterfuge for failing to comply with the requirements of the internal law of each State. Article 25 was not a subterfuge but rather a way offered by the Convention for States to reconcile respect of their internal legal order and the possible need to adapt their domestic law, on the one hand, with the procedure for being bound by a treaty and beginning their cooperation under the treaty before it could enter into force. It was of course true that States could not invoke domestic law against their obligations under a treaty; however, that was precisely why they usually gave very careful consideration to the extent of their commitment to provisionally apply a treaty.

It was therefore true, but also somewhat misleading, when paragraph 49 of the report emphasized that a very different phenomenon occurred when the treaty expressly referred to the internal law of the negotiating States and subjected the provisional application of the treaty to the condition that it would not constitute a violation of internal law. It was true that, if the treaty itself limited the scope of the provisional application of a treaty to the extent that it did not result in a violation of internal law, the question of invocation of domestic law did not arise. However, paragraph 49 was misleading because in such a case the question was no longer one of validity or invalidity of a treaty, or of primacy of treaty law or internal law, but one of treaty interpretation.

More precisely, the question of interpretation related to what the treaty said regarding the scope and content of the obligations it established and whether it limited those obligations so that they did not go beyond what was permitted by the internal law of the negotiating States. It was quite clear why States might have a very legitimate interest in limiting the scope of provisional application, pending the final entry into force of the treaty; negotiators clearly needed to ensure that their respective States would be able, under their domestic law, to apply the treaty provisionally. Thus, a clause limiting the scope of provisional application to the extent permitted by internal law had nothing to do with the situation contemplated in article 46 of the Vienna Convention, namely the invocation of internal law against an existing treaty obligation.

The Special Rapporteur elaborated on that question by referring to the example of article 45 of the Energy Charter Treaty, which had been interpreted in different ways, in the *Yukos* case, by an arbitral tribunal, on the one hand, and a Netherlands court, on the other. The Commission should be extremely cautious about drawing any general conclusions from that case, or endorsing one or other of the decisions because, as the intricate but conflicting reasoning of the arbitral tribunal and the Netherlands court had shown, the question of provisional application in that case was complicated by the unusual interplay between two different rules on provisional application contained in the aforementioned article of the Treaty. For that reason, it could not simply be said, as the report did in paragraph 54, that article 45 (2) (a) of the Treaty “would seem to suggest that, if a signatory State does not

submit such a declaration, it is accepting the real possibility of applying the treaty provisionally, as provided for in article 45, paragraph 1". The Netherlands court had provided a very detailed explanation of why article 45 (1) and (2) operated independently of each other. That explanation would have to be studied by the Commission if it wished to adopt a position on the legal issues which had arisen in that case. He did not fully agree with the Special Rapporteur's statement in paragraph 65 of the report that it would be premature to draw any conclusions from the decision by an internal tribunal — the Netherlands court — since the parties affected could appeal the decision. In fact, the Commission regularly quoted or assessed decisions by internal courts which were under appeal, not for their authority as a final resolution of the case, but for the quality of their arguments. In that particular case, the Netherlands court had put forward some weighty arguments, relying on the fact that article 45 (1) of the Treaty referred not only to the Constitution, but also to other "laws or regulations" of the contracting States as limiting the scope of the provisional application of the Treaty. Neither the arbitral tribunal nor the Netherlands court had been of the opinion that the State concerned could determine whether provisional application would be consistent with its internal law, as paragraph 53 of the report seemed to suggest.

While it was unnecessary and inappropriate to adopt a position on the question of the interplay between article 45 (1) and (2) of the Energy Charter Treaty, the Commission should make the general point that it was permissible for parties to the Treaty to limit its provisional application by invoking their internal law.

He therefore thought that proposed draft guideline 10 should address the most important concern, namely that of the numerous cases where a treaty clause establishing the obligation provisionally to apply the treaty was itself limited in some way by the domestic law of a signatory State.

Chapter III of the report on the practice of international organizations in relation to provisional application of treaties was a mine of information, but he was unsure whether it could be used as the basis for any draft guidelines. The same could be said of paragraphs 88 to 101 on State succession.

Sir Michael Wood, after thanking the Special Rapporteur for his fourth report, said that the Commission could play a useful role in clarifying law and practice in respect of the provisional application of treaties, which was an important aspect of the law of treaties and of considerable practical significance.

While chapters II and III of the report contained interesting analysis and information, the Special Rapporteur did not indicate what he would like the Commission to do with them. They could not — with one possible exception — form the basis of a draft guideline. He wondered whether they had been presented simply in order to provide the Commission with background information, or whether they were intended as groundwork for a study and, if so, how such a study would be prepared. It was not easy to comment on those chapters without knowing what the Special Rapporteur's intention had been in drafting them.

The aim of chapter II seemed to be to ascertain which provisions of the 1969 Vienna Convention might be relevant to provisional application, if only by analogy. However, the Commission should be cautious about reaching conclusions by analogy. It would be better for that exercise to be accompanied by the provision of examples of State practice, where it existed. That said, he agreed with most of the Special Rapporteur's conclusions in chapter II and he shared Mr. Nolte's views on reservations. The paragraphs devoted to article 60 of the 1969 Vienna Convention and the definition of "material breach" in paragraph 3 (b) of that article had been particularly interesting. However, he largely endorsed what Mr. Murase had said with regard to the questions which should have been considered in that part of the report. On the other hand, he disagreed with the Special Rapporteur's conclusion

in paragraph 80 of the report that “a trivial violation of a provision that is considered essential may constitute a material breach for the purposes of article 60 of the 1969 Vienna Convention”, which seemed to be based on the text of article 60, on the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* and on a passage in a commentary to article 60 by Bruno Simma and Christian Tams. In that connection, he drew attention to the partial award made by the arbitral tribunal on 30 June 2016 in a territorial and maritime dispute between the Republic of Croatia and the Republic of Slovenia, in which the tribunal had considered the meaning of article 60 with some care. The tribunal had first observed that “Article 60, paragraph 3, subparagraph (b) does not refer to the intensity or the gravity of the breach, but instead requires that the provision breached be essential for the accomplishment of the treaty’s object and purpose”. It had then noted that “in international jurisprudence, very few decisions have undertaken a thorough analysis of Article 60, paragraph 3,” and had concluded that it resulted from the text of article 60 (3) (b) and from the jurisprudence established in the advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* and the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* that “a tribunal having to apply that provision must first determine the object and purpose of the treaty which has been breached. Termination of a treaty due to such a breach under Article 60, paragraph 1, is warranted only if the breach defeats the object and purpose of the treaty.”

He concurred with the Special Rapporteur and Mr. Murase that it would be premature to draw any conclusions with respect to article 46 of the 1969 Vienna Convention from the decisions of the arbitral tribunal and the Netherlands court in the *Yukos* case, but he fully endorsed the general point made by Mr. Nolte.

The paragraphs of the report on State succession were very interesting. Language from the 1978 Vienna Convention on Succession of States in respect of Treaties might assist the Drafting Committee, since its clauses on provisional application were more detailed than those of the 1969 and 1986 Vienna Conventions.

Turning to draft guideline 10, which was curiously entitled “Internal law and the observation of provisional application of all or part of a treaty”, he noted that no explanation had been given of the wording chosen for the guideline, which seemed to be connected in part with the discussion of article 46 in the fourth report and with references to internal law in earlier reports. It might also be linked to the discussion of article 27 of the 1969 Vienna Convention in the third report, where the Special Rapporteur asserted that that article “relates to the binding nature of a treaty, which is determined exclusively by international law, meaning that its execution by the parties cannot depend on, or be conditional to, their respective internal laws”. The Special Rapporteur seemed to have relied mainly on the 2009 interim award in the *Yukos* case, but of course, as Mr. Murase had explained, things had moved on since then.

The references to article 46 in the report and in the draft guideline seemed to imply that the provisions of internal law in question were those regarding competence to agree to apply a treaty provisionally. However, in paragraphs 49 to 63 of the fourth report, the Special Rapporteur discussed the situation where internal law might limit or otherwise define the international rights and obligations that flowed from provisional application in cases where the provisional application clause or the agreement itself so provided by referring to internal law, as the Energy Charter Treaty did. Although the pertinence or otherwise of internal law was often the most important and most contentious aspect of provisional application, draft guideline 10 seemed to be written as though internal law was always irrelevant. That or some other guideline, or at least the commentary, should make clear that that was not the case.

As for the future programme of work, he would be interested to hear what thoughts the Special Rapporteur might have on the output of the Commission that might emerge from the analysis of the relationship of provisional application to other provisions of the Vienna Convention(s). The suggestion that a recommendation might be made to the Sixth Committee that the Secretariat regulations and manuals on its functions as the registry and depositary of treaties should be revised could possibly be considered when the Commission had completed its work on the topic under consideration.

In conclusion, he would be happy to see draft guideline 10 referred to the Drafting Committee.

Mr. Park commended the Special Rapporteur on his fourth report and the useful addendum to it. He agreed that the scope of the topic should be expanded to encompass the practice of international organizations as well as that of States. However, care should be taken to ensure that, for the sake of clarity, the draft guidelines did not refer to States and international organizations in the same sentence.

With regard to the issue of reservations and provisional application, there were, as far as he knew, no actual instances of reservations being entered as from the time of agreement to the provisional application of a treaty. The question should therefore be addressed from a hypothetical perspective. In that regard, he concurred with the opinion expressed by the Special Rapporteur in paragraphs 33 and 36 of his fourth report.

Since the provisional application of a treaty, or part of a treaty, produced the same legal effects between the parties concerned as a treaty which had entered into force, there was no reason why article 19 of the 1969 Vienna Convention and the reservations regime codified in the Convention should not apply during provisional application. Consequently, he agreed with what was said on that subject in paragraph 23 of the report.

Once again, as the provisional application of a treaty, or part of a treaty, produced the same legal effects in respect of invalidity as a treaty which had entered into force, logically articles 27 and 46 of the 1969 Vienna Convention should also be pertinent in that case. Since a State had to meet very strict conditions in order to invoke article 46, the question which deserved some consideration was whether, when a treaty was being applied provisionally, article 46 (2) should be interpreted loosely in order to make it easier for a State to invoke that clause. That question should be examined in the light of State practice. He agreed that the draft guidelines should cover the rules established in the above-mentioned articles 27 and 46. Although he basically supported draft guideline 10 proposed by the Special Rapporteur, he suggested the following amendment to its text:

“A State that has consented to apply a treaty or a part of a treaty provisionally may not invoke the provisions of its internal law as justification for its failure to perform a treaty or a part of a treaty which is being applied provisionally. This rule is without prejudice to article 46 of the 1969 Vienna Convention.”

Since articles 47 to 53 of the 1969 Vienna Convention also came into play *mutatis mutandis* when a treaty was applied provisionally, it would be advisable to adopt a draft guideline on the Convention's general application *mutatis mutandis* in those circumstances.

It was necessary to discuss the termination or suspension of the provisional application of treaty as a consequence of a breach thereof, since article 25 of the 1969 Vienna Convention was silent on that matter. Suspension or termination could take the forms contemplated in article 60 of the Convention, but the difficulty in the context of provisional application lay in the notion of a material breach. When only part of a treaty was provisionally applied, both the defaulting State and the State invoking the breach must apply that part of the treaty. If the material breach concerned a part of the treaty that was not applied provisionally, then the situation would be regulated by article 18. It would also

be necessary to discuss whether the notion of a material breach should be applied more loosely when a treaty had not entered into force and was being applied provisionally, or whether it applied in the same way as it would if the treaty had already entered into force. As the 1969 Vienna Convention also covered many other forms of termination of the operation of a treaty in articles 54 to 64, it would be essential to consider whether not only article 60, but also articles 61 and 62, were of relevance to provisional application.

As issues of State succession were covered sufficiently in the 1978 Vienna Convention on Succession of States in respect of Treaties, the Commission did not need to discuss them in the context of the present topic.

With regard to the practice of international organizations and the work of the United Nations Secretariat, he observed that States used a wide variety of formulas to agree to the provisional application of treaties. As such, it was necessary either to adopt a new guideline, entitled "Use of terms", or to provide definitions in one of the existing guidelines. With respect to the word "unilateral", which appeared in the *Treaty Handbook* prepared by the Treaty Section of the United Nations Office of Legal Affairs and was emphasized in the report, he wondered whether that emphasis related to draft guideline 5. The *Treaty Handbook* was not based on State practice but was intended as a practical guide. Even if provisional application was a unilateral act by a State, the issue needed to be examined carefully and in depth because such unilateral acts were subject to various conditions.

While supporting the inclusion of model clauses regarding provisional application in the future programme of work on the topic, he expressed uncertainty about the eventual outcome of research concerning the provisional application of treaties that enshrined the rights of individuals. If the Special Rapporteur intended to cover the areas of taxation, investment and protection of human rights, the legal issues involved would become more complicated. To protect the rights of individuals, a State would certainly insist on a termination clause being fully applied by analogy with the termination of provisional application, which would give rise to a debate concerning the period of notice that might be required before provisional application could be terminated unilaterally. A relevant example was cited in the literature, concerning a dispute between Switzerland and another State concerning the termination of a bilateral taxation treaty that was being applied provisionally. Switzerland had maintained that the principle of good faith imposed an obligation on the other party to respect the six-month notice period for denunciation contained in the treaty, while the other State had argued that provisional application would cease immediately. Bearing in mind the differing views held by States, the issue should be approached with care.

Mr. Kolodkin said that he supported the Special Rapporteur's conclusion, set out in paragraph 46 of his fourth report but already contained in his third report, that article 27 of the 1969 Vienna Convention on the Law of Treaties applied to the provisional application of a treaty, as had been confirmed by the Constitutional Court of the Russian Federation and, in his view, in the *Yukos and Ioannis Kardassopoulos v. Georgia* cases, to which a significant part of the fourth report was dedicated. The *Yukos* case had not yet ended; he awaited further rulings with interest. It was not for the Commission to discuss whether the arbitral tribunal or the Netherlands court was in the right, but he drew attention to the fact that the latter had not invoked article 46 of the 1969 Vienna Convention in its ruling, indicating that it did not see it as part of the law applicable in that instance. Nor had the Russian Federation referred to article 46 in support of its arguments. In that regard, he took issue with the Special Rapporteur's statement in paragraph 56 of his fourth report concerning incompatibility between the provisions of a treaty applied provisionally and the constitution of a signatory State: in his view, the Netherlands court had not considered the relationship between the Energy Charter Treaty and the Russian Constitution, but that between the Treaty, particularly article 26 thereof, and Russian laws and regulations. That

was a vital aspect of the court's ruling. Even in its consideration of Russian constitutional law, particularly the separation of powers and the competence of the executive and legislative authorities in the sphere of treaties and dispute resolution, the Netherlands court had not turned to article 46 of the 1969 Vienna Convention. The issue of the validity of Russia's consent to the provisional application of the Treaty had not been examined.

In the present context, the rulings of the arbitral tribunal and the Netherlands court in the *Yukos* case were of interest not in terms of the applicability of article 46 to the provisional application of treaties, but rather in terms of whether the theory that article 27 of the 1969 Vienna Convention applied *mutatis mutandis* to treaties being applied provisionally should be supplemented by the conclusion that the obligations arising from treaties being applied provisionally could be restricted if so provided for in the treaty or an agreement on the provisional application thereof, or by the national legislation of the State applying a treaty provisionally. Draft guideline 10 reproduced article 27 *mutatis mutandis*, but the Special Rapporteur had not appended any additions, reservations or restrictions; however, States agreeing on the provisional application of a treaty could restrict the obligation to apply it such that it would involve only those provisions that were compatible with the internal law of the State in question. In the *Yukos* case, the arbitral tribunal had recognized that: "parties negotiating a treaty enjoy drafting freedom and could ... overcome the 'strong presumption of the separation of international from national law.' Indeed, parties to a treaty are free to agree to any particular regime. This would include a regime where each signatory could modulate (or eliminate) its obligation of provisional application based on consistency of each provision of the treaty in question with its domestic law." Article 45 of the Energy Treaty Charter was intended as a restriction or limitation clause. There existed, therefore, State practice and court decisions demonstrating that States could agree to restrict the obligations arising from a treaty being applied provisionally in line with the limits of internal law. A separate issue, also discussed in the arbitral tribunal's ruling in the *Yukos* case, was the importance of any such agreement being clearly and unambiguously expressed, although in practice States did not always achieve such clarity and unambiguity, nor was it always the intended outcome of negotiations.

He suggested that a paragraph stating that States could agree to restrict the obligations arising from a treaty being applied provisionally in line with the limits of their internal law should be added to draft guideline 10 or set out in a separate draft guideline. In that respect, he agreed with what had already been said. He further suggested that draft guideline 10 should contain a provision to the effect that States should strive to draft limitation clauses clearly and unambiguously and that similar wording should be included in the commentary. He understood that the Special Rapporteur intended to prepare a model limitation clause. With those remarks, he expressed support for referring draft guideline 10 to the Drafting Committee.

The Special Rapporteur was not proposing to formulate a draft guideline on the issue of reservations and provisional application, observing that treaty provisions on provisional application made no mention of reservations. In paragraph 33 of his fourth report, he stated: "One conclusion that may be drawn from this analysis is that a State may formulate reservations with respect to a treaty that will be applied provisionally if that treaty expressly so permits and if there are reasons to believe that the entry into force will be delayed for an indefinite period of time." In paragraph 34, he went on to state: "in the absence of proof of any type of practice in this regard, it is unnecessary to make an analysis in the abstract, as has been suggested. As a corollary, no case has been identified in which a State has formulated reservations at the time of deciding to apply a treaty provisionally."

He drew attention to the declarations made by Italy, the United States and Japan regarding their provisional application of the 1986 Wheat Trade Convention, all of which referred to the Treaty being applied provisionally within the limitations of internal

legislation. Although the statements, which were very similar in essence, were couched as limitation clauses, they were also reservations. However, he was not aware that any of the States parties to the Convention had objected to those reservations, despite their general nature, which left other States applying the Convention to guess what effect they would have in practice. Although those reservations were few and applied only to a single instance of provisional application, and their significance was therefore limited, they were nonetheless of interest: they raised the possibility that it might be worth looking further for other such examples and they supported the Special Rapporteur's view, set out in paragraph 36 of his fourth report, that nothing would prevent the State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty. That view would hold true unless a treaty or agreement on the provisional application thereof provided otherwise. He again suggested that consideration should be given to formulating a draft guideline on reservations and the provisional application of treaties. The examples given and the lack of objections expressed indicated that limitation clauses could exist in various forms.

With regard to the succession of States, he expressed the view that the Commission had taken a more nuanced approach to provisional application in its work on the draft articles on succession of States in respect of treaties than in its work on the draft articles on the law of treaties. In particular, it had distinguished between the provisional application of bilateral and multilateral treaties, and also between the provisional application of restricted treaties and other treaties. Issues relating to the provisional application and termination of provisional application of a treaty were resolved depending on the nature of the multilateral treaty in question. The 1978 Vienna Convention mirrored that approach.

Such nuances were largely dictated by the fact that the situation involved succession and provisional application of treaties in respect of newly independent States. Perhaps the Commission should give further consideration to whether the details of provisional application depended on the nature of the treaty concerned. Did the nature or content of the treaty have any effect on agreeing to provisional application, on who should be party to such an agreement, or on who should give consent to provisional application? For example, if a multilateral treaty set out only mutual obligations, then it seemed that it would only be possible to apply it provisionally between a State that had only just begun the process of acceding to the treaty and individual parties. In that case, the consent of all parties to the treaty to its provisional application in respect of the acceding State would be needed. If the treaty included *erga omnes* obligations, would the consent of all parties be required for it to apply provisionally? Similarly, would the consent of all parties to a treaty establishing an international organization be required for it to apply provisionally in respect of a State acceding to it?

With regard to the termination of provisional application, the 1978 Vienna Convention was interesting for a number of reasons. Alongside "notice of its intention not to become a party", it contained the term "reasonable notice of termination". The 1969 Vienna Convention did not provide for the latter. It might be worth looking more closely at the provisions of the 1978 Vienna Convention on provisional application. The draft guidelines already agreed by the Drafting Committee were fairly general in nature, and the Commission's work on the topic might benefit from a more detailed approach.

Some treaties, including the Wheat Trade Convention, had provisions on provisional application that determined the status of a State applying the treaty provisionally as a party or provisional party to the treaty, but others were silent on the matter. Could there be said to be a general rule that a State provisionally applying a treaty that had come into force was a party to that treaty, or should each case be looked at individually? Given its significance in practice, the issue was one that the Special Rapporteur might wish to examine.

The meeting rose at 11.45 a.m. to enable the enlarged Bureau and the Drafting Committee on Protection of the environment in relation to armed conflicts to meet.