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Held at the Palais des Nations, Geneva, on Monday, 25 July 2016 at 3 p.m.

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Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

Provisional application of treaties (agenda item 5) (*continued*) (A/CN.4/699 and Add.1)

The Chairman invited the members of the Commission to resume their consideration of the fourth report on the provisional application of treaties contained in document A/CN.4/699 and Add.1.

Mr. Forteau said that he largely endorsed the comments made by many earlier speakers, in particular Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte and Sir Michael Wood, with regard to the methodology followed by the Special Rapporteur and the difficulties which it was causing.

As had been noted several times previously, the Special Rapporteur's role was not confined to studying subjects in which States had expressed an interest during debates in the Sixth Committee; it was first and foremost to provide an up-to-date account of practice, case law and writings in respect of each element of the topic. The first essential step was to take stock of the pertinent material — primarily treaty practice in the current case — because an inductive approach was, by definition, essential when codifying international law.

In that connection, it was regrettable that, after four years of work on the subject, the Commission was still lacking a detailed survey of treaty practice in relation to provisional application. Those examples that had been given were concerned exclusively with the practice of international organizations. The upshot was that the Commission's work on the topic had reached a dead end, especially in the Drafting Committee, because it was impossible to formulate texts that faithfully reflected practice without knowing exactly what that practice was. In 2014, he had emphasized the need for the Commission to gather relevant practice and had pointed out that, rather than waiting for States to provide information on their practice, the Special Rapporteur should seek it out. Three examples would serve to illustrate the serious problems caused by the absence of a preliminary, systematic survey of relevant treaty practice.

First, in paragraph 118 of his report the Special Rapporteur referred to the "diversity of provisional application clauses"; in paragraph 129 he said that "States use a very wide variety of formulas to agree to provisional application of treaties" and in paragraph 132 he even went so far as to say that that practice was "anarchic". In those circumstances, blindly stumbling on with the topic entailed a risk that the Commission would codify rules which gave an imperfect or distorted image of current practice.

Secondly, consideration of the few elements of practice provided by the Special Rapporteur in his fourth report demonstrated the need to consider that practice in more detail before any conclusions could be drawn. As Mr. Kolodkin had explained, the precedent of the 1978 Vienna Convention on Succession of States in respect of Treaties revealed that the Commission should proceed with caution. That precedent, to which section II.D of the report was devoted, showed that different solutions could apply depending on the nature of the treaty. In that regard, it would have been helpful if, in that section of his report, the Special Rapporteur had presented the origins of the solutions identified in the 1978 Vienna Convention by scrutinizing the Commission's work and the *travaux préparatoires* leading to the Convention, in order to gauge the size of the problems which lay ahead and to see whether it might be necessary to adopt rules with variable geometry in light of the nature of the treaties (bilateral, multilateral, reciprocal, non-reciprocal, standard-setting or an agreement establishing an international organization or an arbitral tribunal). One example which sprang to mind in that context was the provisional application of the arbitration agreement in 2005 in the *Iron Rhine Arbitration*. That was not,

however the direction in which the Drafting Committee was heading, but perhaps it was on the wrong track.

Thirdly, the Special Rapporteur asserted in several places in his report that there was no practice on various aspects of his topic, which had led some members to take note of the absence of such practice. He shared the concerns expressed in that regard by, in particular, Mr. Kolodkin and Mr. Murphy, who had considered that it was questionable to say that there was no evidence of practice concerning the questions dealt with in chapter II of the report without first undertaking in-depth research into those questions. In fact, there seemed to be a certain amount of practice in that area. He would confine himself to two examples.

When he discussed the possibility of invoking article 60 of the 1969 Vienna Convention in order to terminate or suspend the provisional application of a treaty the Special Rapporteur did not mention any kind of practice, although there was at least one example which could have been quoted. In 1977, the Legal Bureau of the Canadian Department of External Affairs had rendered an opinion in which it had found that, assuming that the Reciprocal Fisheries Agreement between the Government of Canada and the Government of the United States of 1977 — the Interim Agreement — was being applied provisionally and that there had been a material breach of the Agreement by the United States, Canada would be entitled to invoke the breach as a ground for terminating the treaty or suspending its application under article 60 of the 1969 Vienna Convention. In 1978, the International Court of Justice had found in its judgment in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* that the provisional application of the Interim Agreement resulted from the tacit acquiescence of the parties and that it had been suspended. That example showed that there was at least one case involving the suspension of the provisional application of an agreement in which article 60 of the Convention had been invoked.

The second set of examples concerned reservations to treaties. He had been astonished to read, in paragraph 26 of the report, that the Commission's Guide to Practice on Reservations to Treaties was silent about the possibility of formulating reservations in the context of the provisional application of a treaty and, in paragraph 34 of the report, that there was an absence of proof of any type of practice in that regard. In fact, the commentary to Guideline 2.2.2 made express provision for that possibility, from which it could be inferred that such a reservation was intended to produce legal effects on the provisional application of the treaty, notwithstanding some lingering doubts on that point because, in 1951, in its advisory opinion on *Reservations to the Convention on Genocide*, which had been quoted in the commentary to Guideline 2.6.11, the International Court of Justice had said:

> "Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification or they would become effective on ratification.
>
> Until this ratification is made, the objection of a signatory State can therefore not have an immediate legal effect in regard to the reserving State. It would merely express and proclaim the eventual attitude of the signatory State when it becomes a party to the Convention."

Contrary to the Special Rapporteur's suggestion in paragraph 27 of his report, practice did exist in the provisional application phase. The declarations made by Italy, Japan, the Republic of Korea and the United States when notifying their provisional application of the Wheat Trade Convention could be regarded as genuine reservations seeking to exclude certain effects of the treaty. Another interesting example was that of the 1962 International Coffee Agreement, to which the United States had filed a notification of

provisional application accompanied by a reservation which did not appear to have given rise to any objections. While care would naturally have to be taken in drawing any conclusions from that example, it might indicate that, even when a treaty prohibited reservations, that prohibition would not bar the formulation of reservations to its provisional application; however, more thorough research was essential in order to determine what rules would apply under international law to that kind of situation. Furthermore, it would seem that the Union of Soviet Socialist Republics had formulated a reservation, to which the United Kingdom had objected, to the provisional application of the International Natural Rubber Agreement. The same situation had occurred with respect to the 1980 International Cocoa Agreement. Similarly, France and Germany seemed to have entered reservations to the provisional application of the 1986 International Coffee Agreement. In another example, the European Community had filed a declaration when notifying its provisional application of the 1994 International Tropical Timber Agreement which was ostensibly an interpretative declaration but which, in fact, might be deemed a reservation. The same might be said of the declarations filed by New Zealand and Switzerland when ratifying and accepting the provisional application of the 2013 Arms Trade Treaty.

In short, practice seemed to exist in the areas studied by the Special Rapporteur, and it was vital, in order for progress to be made, that such practice should be collected and presented in a systematic manner. In the past, for example, the secretariat had compiled a study on pertinent practice before the Commission had embarked on the codification of a topic. Of course, the Commission's role was not to codify the whole of treaty-based practice with regard to the provisional application of treaties, but rather to identify residual rules which came into play when a treaty or agreement that allowed provisional application was silent on a given question. For that reason, it might be wise to adopt a general conclusion stating that: "These draft conclusions apply unless the treaty provides otherwise, or it has been otherwise agreed". [*Les présents projets de conclusions s'appliquent à moins que le traité n'en dispose autrement ou qu'il n'en soit autrement convenu.*] The inclusion of such a general clause would avoid having to repeat that clarification in each and every draft conclusion.

The description of the practice of the United Nations as a depositary of treaties had been most useful. However, he disagreed with the Special Rapporteur's view that that practice showed that a treaty could be applied provisionally by just one party. He personally considered that the passages of the *Treaty Handbook* cited in paragraphs 137 and 141 of the report indicated that a State could file a unilateral declaration of provisional application if the treaty in question provided for that possibility. In other words, it constituted practice under article 25 of the 1969 Vienna Convention, but not practice transcending it.

He was reluctant to send draft guideline 10 to the Drafting Committee, as he was unsure that the Committee had enough material on practice and case law to decide on its content. It would have been advisable for the Special Rapporteur first to peruse the expert opinions submitted in the case concerning *Yukos Universal Limited (Isle of Man) v. the Russian Federation* and the corresponding legal writings, in order to clarify the impact of internal law on obligations deriving from the provisional application of a treaty. It seemed surprising to opt for less strict rules on the provisional application of treaties than on their ratification and it was hard to see why it would not be possible for article 46 of the 1969 Vienna Convention to be applied mutatis mutandis to a decision to implement a treaty provisionally.

At first sight, the idea of model clauses seemed to be a good one, if somewhat premature. Priority must, however, be given to conducting an orderly survey of the pertinent practice, perhaps with the assistance of the secretariat, before adopting any draft conclusions on the topic.

Mr. Kamto said that it might be appropriate for the Commission to address the fundamental question of whether the bulk of the legal regime deriving from the 1969 Vienna Convention on the Law of Treaties was in fact relevant to treaties that were being applied provisionally. If it was, rules stemming from practice would then be residual rules regulating practical questions which States normally sorted out between themselves and which were not necessarily dealt with in the Vienna Convention. Many of the cases quoted shed no light on which of the provisions of the Vienna Convention were pertinent to treaties that were being applied provisionally.

Mr. Candioti said that the Commission must decide what its aims were, what outcome it wished to achieve, what direction it wished to take on the topic and whether it wanted to draft conclusions or guidelines. Guidelines indicated the way forward, whereas conclusions were rather academic and might express recommendations, rules or hopes.

Ms. Escobar Hernández said that she wished to thank the Special Rapporteur for his interesting fourth report, which constituted a good basis for the Commission's debate on the topic at the current session. In particular, she commended the efforts of the Special Rapporteur in obtaining information on the practice of international and regional organizations in the area of provisional application via direct contacts. Nevertheless, the selective nature of the study presented in chapter III of his fourth report and the limited number of organizations referred to deserved comment. The exclusion of organizations such as the African Union was puzzling. Analysing the practice of a greater number of organizations would give a wider, more representative view of the topic and might reveal new aspects.

It was also noteworthy that the Special Rapporteur dealt differently with the practice of each organization examined, covering three very distinct issues: the depositary and registration functions of an organization with respect to treaties containing provisional application clauses or being applied provisionally; cases in which provisional application clauses had been included in treaties drawn up within an international organization or under the auspices thereof; and the use of provisional application by international organizations in exercise of their own competence to conclude treaties. Although the three levels of analysis were of interest, the approaches cited were not comparable and general conclusions could not therefore be drawn regarding the place that provisional application occupied in the treaty practice of international organizations. However, bearing in mind the importance of provisional application for international organizations, it would be very useful if the Special Rapporteur could add to his study of their practice in his next report, particularly with regard to the third aspect mentioned; that would allow the Commission to consider the possibility of drafting a specific guideline on the matter, which would doubtless enhance the final outcome of its work.

That said, the study of the practice of the United Nations was of particular interest, inasmuch as it helped to clarify general concepts of relevance to the topic which could be taken into account by the Commission in relation to the adoption of guidelines. However, she was not in favour of the Commission making the recommendation referred to in paragraph 149 of the report regarding the revision of regulations on registration. Such recommendation was beyond the scope of the topic and, in any event, would require a more comprehensive analysis of practice.

With regard to the relationship between provisional application and other aspects of the law of treaties governed by the 1969 Vienna Convention on the Law of Treaties, the Special Rapporteur focused in particular on reservations, invalidity, termination or suspension under article 60 of the Convention and the various circumstances covered by article 73 thereof. In general, she shared his approach to the problem of reservations. If the result of a declaration on provisional application was that the treaty produced effects equivalent to those resulting from its entry into force, it seemed reasonable that a State

would not be more obligated by provisional application than if the treaty were actually in force. As such, there were neither logical nor systemic reasons why a State could not make a reservation to a treaty, if the treaty so provided, in respect of provisional application. A separate issue, and one which prompted several questions, was the manner in which such a reservation might be expressed and its nature and effect. Was such a reservation equivalent to a reservation made at the time of signing, albeit with different effects? Did it need to be confirmed when consent was given? What would happen to the effects arising from provisional application subject to a reservation if that reservation was not confirmed at the point of giving consent? Could the limitations unilaterally set by a State in determining the scope of provisional application of a treaty be understood as a special form of reservation? All those questions were of particular practical interest and it would be useful to explore practice in that area in future reports.

The section of the report on invalidity focused exclusively on compatibility between provisional application and internal law, particularly from the point of view of rules of internal law that defined competence and procedures in the area of provisional application. The subject had already been partly covered the previous year. The Special Rapporteur had approached the matter using the example of the *Yukos* and *Ioannis Kardassopoulos v. Georgia* cases, which merited detailed analysis because they had given rise to many questions in practice. However, those cases involved looking at the validity of provisional application from a very specific angle, based on two concurrent points: the Energy Charter Treaty provided for automatic provisional application, and that provisional application could only be excluded if it was inconsistent with the constitution, laws or regulations of one of the signatory States, in which case that State must inform the rest of the signatories by means of the notification provided for in article 45 of the Treaty. Although that scenario was not the most common in practice, it was possible that it could be used as a model for other instruments, and, as such, it was worth examining.

However, that example of practice was insufficient as a basis for analysing the various scenarios that could occur in practice with regard to compatibility between the provisional application of a treaty and the rules of internal law concerning a decision to apply a treaty provisionally. In that respect, she did not consider that a decision on provisional application could be subjected to the rules on the validity of consent contained in the 1969 Vienna Convention, as that would render provisional application itself meaningless. Provisional application was often based on the expectation that the constitutional requirements in terms of giving State consent could be met. It could not, however, be interpreted as an acceptance that any declaration on provisional application was, in itself, in line with national rules on treaty ratification. On the contrary, it would be possible for provisional application to be established outside the internal rules governing its use and, as such, any such declaration of provisional application would be invalid from the point of view of internal law. However, their invalidity would have to be resolved by means of the procedures provided for in the national legal system and exclusively on the basis of incompatibility with rules of internal law. That did not, however, mean that such incompatibility between provisional application and internal law was of no relevance internationally, but the external effect would not necessarily be felt in all cases. On the contrary, only if there was an absolute contradiction between a decision to apply a treaty provisionally and a fundamental rule of internal law concerning competence to conclude treaties would it be necessary to examine the invalidity of a declaration on provisional application in terms of international law. However, such circumstances would, by definition, be very exceptional and would need to be considered case by case. It might be useful for the Commission's work if the Special Rapporteur could give more examples of practice in that area in future reports, if they were to be found.

With regard to the termination of a treaty on grounds of a serious breach, the Special Rapporteur again equated the effects of a treaty in force with those of a treaty being applied

provisionally, concluding that the content of article 60 of the 1969 Vienna Convention applied to provisional application. His analysis was thought-provoking, and she expressed support for the principle, which was based on the existence of a legal relationship among the parties to a given treaty. However, the conclusion set out in paragraph 87 of the report seemed somewhat contrived and difficult to demonstrate in practice, particularly because a State that considered itself to have been affected by a serious violation of a treaty being applied provisionally could relieve itself of the obligations set out therein by the simple expedient of invoking the termination mechanism provided for in article 25 of the 1969 Vienna Convention, which had the great advantage of not being subject to any substantive or procedural condition other than sending a simple formal communication. In practical terms, it was difficult to imagine that a State would prefer to use a much longer, more complicated and more unpredictable mechanism, such as trying to terminate the provisional application of a treaty under article 60 of the 1969 Vienna Convention, which did not operate automatically but was subject to the procedure for declaring the termination of a treaty set out in articles 65 to 68 thereof. Quite apart from the fact that a serious breach of a treaty being applied provisionally could give rise to international responsibility for the perpetrator of the unlawful act, whether the treaty ceased to apply or whether it continued to have an effect.

Close reading of the section beginning at paragraph 88 of the report showed that the Special Rapporteur only covered provisional application of treaties in the case of State succession, not the other eventualities covered by article 73 of the 1969 Vienna Convention. His analysis was based on the provisions of the 1978 Vienna Convention on Succession of States in respect of Treaties, and the interesting discussion in the report reflected very clearly the special nature of the regime that applied to provisional application in the event of succession, doubtless because of the specific characteristics of the phenomenon, particularly in the case of newly independent States. However, the report contained no reference to practice. It would be desirable to see a future report examine such practice, if any existed, as it could shed light on the Commission's work on the topic.

The Special Rapporteur had crafted draft guideline 10 on the basis of what was said in both his third and fourth reports on the subject of provisional application, invalidity and article 46 of the 1969 Vienna Convention. In that context, she expressed full support for the content of the draft guideline, although she shared the view expressed by other members of the Commission concerning the need for some redrafting so as to include an express reference to the circumstances in which provisional application of a treaty was subject to the conditions of internal law of States, either under the treaty itself or under the agreement establishing provisional application. In any event, she agreed that the draft guideline should be referred to the Drafting Committee.

Finally, with regard to the plan for future work, she welcomed the proposal made in paragraph 182 of the fourth report. Bearing in mind that the composition of the Commission would have changed by the time the Special Rapporteur submitted his next report, she suggested including a general overview of the topic for the benefit of new members.

Mr. Nolte, Vice-Chairman, took the Chair.

Mr. Šturma said that he wished to thank the Special Rapporteur for his well-documented fourth report on a topic that was of considerable importance in terms of both the theory and practice of international law. Generally speaking, he agreed with the fundamental approach taken by the Special Rapporteur, namely that the provisional application of treaties produced legal effects and was capable of creating certain rights and obligations under international law. It was therefore useful to explore the possible effects that other rules of the law of treaties might have, directly, *mutatis mutandis* or by analogy, on the regime of provisional application. However, the report provided only a cursory

analysis of selected rules of the 1969 Vienna Convention; the Commission should address the topic in more depth. Unlike Mr. Murphy, he did not see article 25 of that Convention as a self-contained regime, as it was too cursory for that purpose; rather, he agreed with Mr. Kamto that most issues were still covered by the other rules of the Convention, with the possible exception of article 25 (2) on the termination of provisional application.

With regard to reservations, he shared the view that they should be understood as reservations to certain provisions of a treaty itself, rather than as reservations to any agreement on provisional application. Although reservations, however they were termed, were infrequent in practice, they were possible in principle. It did not make sense for a State to have greater obligations under the provisional application of a treaty than it would when that treaty entered into force. However, there was another issue: declarations by which a State could exclude or limit the provisional application of a treaty. Such acts were not reservations within the meaning of the 1969 Vienna Convention, as they related only to an agreement on provisional application. They only made sense in the case of certain multilateral treaties, provisional application of which was based not on a separate agreement but on a provision of the treaty itself. It was not a matter of reservations but of interpretation of the scope of any agreement on provisional application.

The issue of the invalidity of treaties was a key problem that was reflected in draft guideline 10. However, the combination of the irrelevance of internal law as a justification for non-compliance with a treaty being applied provisionally and invalidity based on article 46 of the 1969 Vienna Convention was somewhat problematic and gave rise to confusion, as had been pointed out by several members of the Commission. According to his interpretation, the interplay between international law and internal law could take two or three different forms.

First, provisions of internal law might address only the procedure or conditions for a State to express its consent to apply a treaty provisionally, such as in a situation where a State expressed its consent to provisional application in violation or circumvention of its constitutional procedures. In that case, only article 46 of the 1969 Vienna Convention would apply. The criteria of article 46 were strict: consent to provisional application was invalidated only if a violation of internal law was manifest and concerned a rule of fundamental importance. If consent was invalidated, the treaty would not apply provisionally and there would be no legal rights or obligations arising as a result.

The second hypothesis concerned the case in which the relevant provisions of a given treaty referred not only to the procedure, but also to domestic laws and regulations, i.e., substantive law. One example was article 60 (2) of the 1995 International Natural Rubber Agreement, which stated that “a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures and its domestic laws and regulations.” To give full effect to that formulation, it must be assumed that a State might refer not only to its constitutional procedures in relation to consent to provisional application, but also to the content of its domestic laws. That also seemed to be the case of article 45 of the Energy Charter Treaty, which made the extensive discussion of the *Yukos* case irrelevant to the issue of article 46 of the 1969 Vienna Convention and the invalidity of treaties and agreements on provisional application. However, he fully agreed with Mr. Nolte and others that it was a matter of interpretation, specifically of article 45 of the Energy Charter Treaty, and of the scope and limits of provisional application. That hypothesis gave rise to complex issues concerning the legal effect of such consistency or limitation clauses in various treaties and of the notifications that might be required under certain clauses. In his view, article 45 of the Energy Charter Treaty was far from being the only case: there were other multilateral treaties that contained such clauses. The issue therefore deserved analysis and reflection, but in a separate guideline, which was unfortunately still missing.

Lastly, if there was no specific provision in a treaty itself or in an agreement providing for provisional application, then other rules of the 1969 Vienna Convention would apply. Under article 27 of the Convention, a State could not invoke its internal law to justify its failure to apply a treaty or part of a treaty provisionally if it had given valid consent to provisional application.

Terminating provisional application was different from terminating or suspending a treaty in force. It seemed that article 25 (2) of the 1969 Vienna Convention provided for a special, more flexible means of termination than part V, section 3, of that Convention. The procedure set out in article 25 (2) was also subject to an exception if the treaty in question provided otherwise or if the negotiating States had otherwise agreed, which gave States sufficient flexibility if they wished to establish a particular date, period of time or notice period for the termination of provisional application.

With regard to article 60 of the 1969 Vienna Convention, the report discussed whether a material breach of a treaty being applied provisionally could lead to the suspension or termination of a provisional application agreement by the affected State. Unlike other rules of the Convention concerning termination or suspension of treaties, the principle *inadimplenti non est adimplendum* might also be applicable to the termination of provisional application. The reason lay in the different ways in which articles 25 (2) and 60 operated. Termination under article 25 (2) ended any effect that the treaty had with respect both to the State making the notification and the States being notified, while, under article 60 (2) (b), a party specially affected by the breach could invoke it as grounds for suspending the provisional application of the treaty only in the relations between itself and the defaulting State. As that hypothesis made it possible for the treaty to continue to apply provisionally between the affected State and other States that had applied it faithfully, it might be advantageous in certain cases.

The issues covered in section II.D of the report were interesting, particularly with regard to the provisional application of treaties in the event of succession of States, but they required further careful analysis and should be reflected in future guidelines. In that context, he agreed with Mr. Petrič that it might be useful to distinguish between bilateral and multilateral treaties.

The report provided interesting information on the practice of international organizations in relation to the provisional application of treaties, but he did not see how the analysis thereof related to the content of draft guideline 10. Moreover, the extensive discussion of the *Treaty Handbook*, leading to the conclusion in paragraph 138 of the report that it was possible that third States might decide to apply the treaty unilaterally and provisionally, might contribute to confusion about the role of unilateral acts in relation to the provisional application of treaties. The text seemed to blur the distinction between an independent, unilateral act and an act related to a treaty. The *Handbook* referred to a unilateral undertaking by a State to apply a treaty provisionally, in accordance with the provisions of that treaty, meaning that the legal basis for the mutual rights and obligations of States arising from provisional application was the treaty itself or an agreement on its provisional application, not a unilateral act.

In conclusion, he recommended that draft guideline 10 should be referred to the Drafting Committee, where it might benefit from very considerable redrafting.

Mr. Hmoud said that he wished to thank the Special Rapporteur for his report, which contained extensive background material, analyses and conclusions that would help the Commission in its work on the topic. The debate within the Commission during the current session demonstrated that the report was stimulating a better understanding of the various aspects of the provisional application of treaties, in particular its relationship to the Vienna Convention on the Law of Treaties.

It was important to determine the direction of the project and to decide the extent to which issues not covered by article 25 of the Vienna Convention could be tackled, taking into account the divergent treaty practice and the relative flexibility of that article with regard to provisional application. The Special Rapporteur's reports produced thus far indicated that relevant national and international jurisprudence was limited. Nevertheless, the wealth of treaty practice that existed could shed light on the intentions of States *vis-à-vis* provisional application when concluding treaties. As established in the draft guidelines that had been adopted on a provisional basis by the Drafting Committee, guidance regarding the law and practice on the provisional application of treaties would be provided on the basis of article 25 of the Vienna Convention and other rules of international law. Given that other such rules could be derived from treaty practice, the Special Rapporteur's treatment of the topic should be less dependent on derivatives from and analogies with the Vienna rules. That was not to say that the Commission should not dwell on the relationship with other rules of the Vienna Convention. On the contrary, it should discuss that relationship, but should base its work on an analysis of the various relevant treaties and an interpretation of their provisions as they related to provisional application. Such an approach would enable the Special Rapporteur and the Commission to reach informed conclusions on matters such as the legal effects of provisional application, reservations in the context of provisional application, invalidity of consent and the termination and suspension of treaties. The rules of interpretation under the Vienna Convention could be applied to the interpretation of relevant treaty rules and to the practice of States and other actors in the implementation of treaties and their provisions on provisional application. The draft guidelines would then be based on that interpretation and an analysis of relevant practice, as opposed to merely a deductive comparison with other rules of the Vienna Convention that applied to a full treaty relationship.

He nevertheless cautioned against the inclusion of model clauses in the project and echoed the comments made in that regard by Mr. McRae. Such clauses would have to be accompanied by commentaries outlining the Commission's interpretation of them, which might not necessarily align with that of States. There was a wide variety of clauses to which the contracting parties to a treaty resorted in order to reflect their intention regarding its provisional application; it would be difficult and counterproductive to support certain interpretations of the various terms employed in such clauses. As indicated by treaty practice, contracting parties used a range of terminology to provide for provisional application that reflected the flexibility of that regime. An example in that regard was the International Agreement on Olive Oil and Table Olives, which was mentioned in paragraph 131 of the report. In paragraph 132, the Special Rapporteur expressed the view that the provisions of the Agreement added more confusion to a situation that was already anarchic and that the terms "provisional application", "provisional entry into force" and "definitive entry into force" coexisted in the same article, as if they were equivalent expressions. That example showed that there was a need for it to be studied, together with other examples of provisional application contained in various treaties, in order to determine the meaning attached to such terms and to draw conclusions accordingly.

The debates in the Sixth Committee had highlighted the need for the Commission to undertake a comparative study of the legal effects of provisional application and those of entry into force. While it was assumed that provisional application of a treaty by a State could produce binding legal effects, it could not be said that those effects were the same as those emanating from the performance by a State party of its obligations under a treaty. The Commission should study that question and the issue of the responsibility that arose from the non-implementation of treaty provisions by a State that had agreed to apply a treaty provisionally. He noted, in that regard, the definition of provisional application in the *Treaty Handbook*, in which a distinction was made between a treaty that had entered into force and one that had not. In both cases, however, provisional application was described as

a unilateral undertaking or act aimed at giving effect to treaty obligations. He wished to make two points in that respect. First, the Commission needed to study the difference between the possible legal effects of the provisional application of a treaty that had entered into force and those of one that had not. Secondly, a unilateral act of provisional application could not be said to produce the same legal effects as the performance by a State party of its treaty obligations. Moreover, the extent of any legal effects arising from such a unilateral act by a State should vary according to whether or not other States were reliant upon or affected by that act.

Another issue that had been raised in the debates in the Sixth Committee was the relationship between provisional application and the reservations, invalidity and termination and suspension regimes. Although the Special Rapporteur analysed the issue of reservations, he had decided not to produce a draft guideline on the matter. In paragraph 36 of the report, he concluded that, if a treaty was silent about the formulation of reservations, nothing would prevent a State, in principle, from effectively formulating reservations as from the time of its agreement to provisional application. However, that assertion ran counter to article 19 of the Vienna Convention, which clearly stipulated that the formulation of reservations by a State could take place when signing, ratifying, accepting, approving or acceding to a treaty, but not when agreeing to apply a treaty provisionally. When, in paragraph 37 of the report, the Special Rapporteur stated that his earlier assertion was contingent on whether the provisional application of treaties produced legal effects and whether the purpose of the reservations was to exclude the legal effects of certain provisions, he was confusing two different points. The first was the treaty relationship once the treaty had entered into force for the State formulating a reservation and the second was the formulation of a reservation regarding provisional application by that State. While the first proposition was inconsistent with article 19 of the Vienna Convention, the second might be possible, for example if, through provisional application, a State sought to prevent certain legal effects from applying to it in its relationship with other States. The Commission could produce a draft guideline on the second issue, but would need to discuss whether “reservation” was the most appropriate term for such an act. In any case, the reservations regime under the Vienna Convention could not be said to apply *mutatis mutandis* to provisional application.

A related issue that was not discussed in the report was that of declarations by States related to provisional application. Interpretative declarations were not dealt with in the Vienna Convention but were provided for in the Commission’s 2011 Guide to Practice on Reservations to Treaties. It would be plausible to examine the possibility of interpretative declarations being made by States that were applying a treaty provisionally. Another issue that could be discussed in future reports was that of declarations by States that did not wish to apply a treaty provisionally, when the treaty either provided for that possibility — as with the Energy Charter Treaty — or was silent on the matter. It was important to examine practice and jurisprudence relating to treaties that did not provide for that possibility and the effects of declarations by States that did not wish to apply a treaty provisionally. It would also be important to discuss the effects of declarations by States that agreed to apply a treaty provisionally provided that such application was subject to their internal laws. Declarations of that kind were not addressed by article 25 of the Vienna Convention or draft guideline 10 proposed by the Special Rapporteur; it was worth studying treaty practice in that respect. Declarations or reservations made when States expressed consent to be bound by a treaty that made the performance of their obligations thereunder subject to their internal law were considered null and void. Such conditionality with regard to the full application of a treaty in force for a State party would of course be excluded by the Vienna rules and by customary international law. However, it might not be appropriate to reach a similar conclusion concerning the effects of such declarations on provisional application, given that there were treaties and internal laws that made provisional application

conditional on its conformity with internal law. In his view, the Commission should study such declarations in the context of provisional application.

In the report, the Special Rapporteur discussed the invalidity of consent in relation to provisional application, rather than the invalidity of the treaty itself, and the relevance of the internal law of States to provisional application. The pertinent issue was whether and to what extent articles 27 and 46 of the Vienna Convention could be applied to the provisional application regime. In that regard, he tended to agree with the analysis of previous speakers, including their comments on the *Yukos* and *Kardassopoulos* cases. Several important issues needed to be dealt with in the context of the analysis contained in the report. The first was the treatment of express provisions in a treaty that made its provisional application subject to the internal law of a State. That was the issue in the *Yukos* and *Kardassopoulos* cases, which bore no relevance to articles 27 and 46 of the Vienna Convention, both of which dealt with the invocation of internal law in the absence of express treaty provisions, either to justify a failure to perform treaty obligations, as in the case of article 27, or to invalidate consent to be bound by a treaty, as in article 46. Consequently, draft guideline 10 or a separate draft guideline should provide for that possibility in the light of the *Yukos* and *Kardassopoulos* cases and of any treaty practice that existed concerning consistency with internal laws.

The second issue was the applicability of article 27 of the Vienna Convention *mutatis mutandis* to the provisional application regime. The article dealt with a party to a treaty invoking its internal law as justification for its failure to perform a treaty. Draft guideline 10 applied the same principle by analogy, providing that a State that had consented to undertake obligations by means of the provisional application of all or part of a treaty could not invoke its internal law as justification for non-compliance with such obligations. While that statement was plausible, it was not substantiated in the report or backed up by evidence of treaty practice. As mentioned previously, there were treaties, including the Energy Charter Treaty, that expressly made provisional application contingent on consistency with the internal laws of States. A treaty would not, however, contain a comparable provision making its full application conditional on the internal laws of States. If it did, one would question its legal effects and its very nature as a treaty or inter-State contractual relationship. Moreover, the fact that provisional application was a unilateral undertaking that a State could terminate at any time unless the treaty provided otherwise supported the idea that a distinction had to be drawn between the treatment of internal law under the provisional application regime, on the one hand, and under article 27, on the other. One possible reason for resorting to provisional application was that the State intended to apply the treaty once the requirements of its internal laws for entry into force had been met, including the requirement to ensure that the treaty obligations were consistent with such laws. To say that provisional application of relevant treaty obligations by that State implied that the obligations were consistent with its internal law, thus prohibiting the State from invoking that law, would render the process of giving consent to be bound by a treaty meaningless. In addition, the *Treaty Handbook* provided that, since provisional application was a unilateral act by the State, subject to its internal law, it could terminate the provisional application at any time. In short, he was of the view that there had to be differentiated treatment of the relevance of internal law to the provisional application regime and account had to be taken of whether or not provisional application produced legal effects upon which other States were reliant. Internal law was more pertinent to the expression of consent to provisional application than to the expression of consent to be bound by a treaty; the application of article 46 by analogy *mutatis mutandis* was not warranted.

He found the Special Rapporteur's discussion of the termination or suspension of the operation of a treaty as a consequence of its breach useful, but noted that no draft guideline was proposed regarding the relevance of a breach of a treaty obligation as a result of

provisional application. Nonetheless, he wished to make three comments. First, one could not speak of a breach or material breach of a treaty obligation in the context of provisional application, but rather of the non-performance of a treaty obligation. Secondly, the effects of a material breach under article 60 of the Vienna Convention in terms of the termination of a treaty were not applicable to a material failure to perform a treaty provisionally. After all, under the provisional application regime, there was no contractual treaty relationship. If a State became a party to a treaty and continued to apply it provisionally, however, article 60 would apply. Thirdly, it might be worth discussing the effects of a material failure by a State to perform a treaty provisionally and to distinguish between a treaty that had entered into force and one that had not. He hoped that the Commission could provide guidance in that regard.

Mr. Laraba said that he wished to thank the Special Rapporteur for his concise, high-quality report. He was also grateful to the Special Rapporteur for the attention that he devoted to the debates in the Commission and the Sixth Committee. That approach explained the pragmatism that characterized the report, a pragmatism that was, however, perhaps too pronounced and that posed certain problems. He would refer to those problems when commenting on the future work on the topic.

He wished to make two preliminary observations of a general nature. First, it should be noted that the views expressed by States in the Sixth Committee were reflected extensively in the report, to the point that they provided the basis of chapter II. Secondly, the Special Rapporteur proposed only one new draft guideline; however, the discussion of the issue of reservations could, and perhaps should, also have led to the formulation of a specific proposal.

The Special Rapporteur's treatment of reservations in relation to provisional application, which was contained in paragraphs 22 to 39 of the report, could be divided into three parts. In the first, he referred to article 19 of the Vienna Convention, without explaining why he had limited himself to that article. In the second, he raised the question of whether, given the lack of reference to the matter in either the Vienna Convention or the Guide to Practice on Reservations to Treaties, the formulation of reservations was compatible with the regime governing the provisional application of a treaty. In the third, he raised two questions in paragraph 35, to which he responded positively in paragraph 36, stating that nothing would prevent a State, in principle, from effectively formulating reservations as from the time of its agreement to provisional application. It was not until paragraph 38 that the Special Rapporteur referred briefly and implicitly to the other articles of the Vienna Convention on reservations by mentioning the possibility of objecting to a reservation formulated under the provisional application regime. In view of the analysis of the question undertaken in those paragraphs, the issue of reservations should have been the subject of a draft guideline.

With regard to paragraphs 40 to 68 of the report, which concerned the invalidity of treaties, the Special Rapporteur began by listing the relevant articles of the Vienna Convention and by recalling that, in the Sixth Committee, several delegations had expressed an interest in the relationship that might exist between provisional application and the regime of invalidity of treaties, specifically article 46 of the 1969 Vienna Convention. In fact, even if States had not expressed such an interest, it would have been essential to examine that relationship, which had been touched upon by Mr. Gaja in the 2011 syllabus on the topic.

While he agreed with the majority of the comments made by other Commission members with regard to the Special Rapporteur's approach to the topic, he wished to make some brief remarks. First, the Special Rapporteur emphasized that the internal law of many States did not prohibit provisional application; however, the fact that a constitution did not prohibit, or remained silent on, provisional application did not mean that it allowed it. Such

a complex issue as that of internal laws of fundamental importance — to echo the language of article 46 of the Vienna Convention — that did not prohibit or remained silent on provisional application required more detailed study than that afforded to it in the report. Secondly, there was an important, if not striking, contrast between, on the one hand, the repeated requests by States to study and take into account internal law and, on the other, the view expressed by the Special Rapporteur in paragraph 18 of his second report on the topic, in which he had stated that an analysis of domestic law was not relevant to the study of the provisional application of treaties and that the endeavour would take longer than the time available. It was, for the time being, the only issue raised by States to which the Special Rapporteur had not responded favourably. Thirdly, it was somewhat paradoxical that, in his four reports on the topic, particularly his third and fourth reports, the Special Rapporteur devoted substantial attention to the internal laws of States, no doubt because they lay at the heart of articles 27 and 46 of the Vienna Convention and, by extension, of the topic. In paragraph 9 of his third report, the Special Rapporteur had pointed out that the question of whether to proceed with a comparative study of constitutional law had not been entirely resolved during the discussions in the Sixth Committee, but had not made any further comment or proposals in that regard. As a result, consideration of aspects of the topic relating to internal law remained pending. In the light of his comments and those of other Commission members, he supported the referral of draft guideline 10 to the Drafting Committee.

The content of paragraphs 69 to 87 of the report, which were devoted to article 60 of the Vienna Convention, was at times superfluous and at others repetitive, presenting information that had already been conveyed in the second report on the topic. The lack of reference to relevant practice had led to a fairly succinct discussion of article 60.

Regarding chapter III of the report, on the practice of international organizations in relation to the provisional application of treaties, he wished to make two preliminary remarks. First, the six organizations addressed in the chapter received very different and unequal coverage; the United Nations, for example, was discussed at far greater length than the other five organizations. Secondly, and more importantly, the title of the chapter in the French version of the report was indicative of the approach adopted by the Special Rapporteur: the adjective "*accumulée*", in particular, revealed that the Special Rapporteur had opted for a quantitative approach that was far from being the most appropriate. It would have been more interesting if the chapter had contained an in-depth comparative study of provisions on the provisional application of treaties in the practice of international organizations with a view to drawing conclusions of relevance to the topic.

As to the practice of the United Nations, the Special Rapporteur described in great detail the registration functions of the Organization and the depositary functions of the Secretary-General. While that discussion was of great interest in that regard, it was not, however, closely related to the provisional application of treaties.

In respect of the European Union, the Special Rapporteur underlined the importance of its constant practice in the provisional application of treaties, but also seemed to suggest that the Union adopted a broad interpretation of article 25 (2) of the Vienna Convention, covering situations other than those expressly provided for in that article. The exemplary nature of European Union practice might be questioned because of the uncertainty produced by the necessarily different ratification procedures in the member States, as mentioned in paragraph 159 of the report.

According to information gathered by the Special Rapporteur, out of a total of 59 treaties concluded under the auspices of the Economic Community of West African States, 48 provided for provisional application; the wording generally used in that regard was "enter into force provisionally" rather than "provisional application". The conclusion drawn

by the Special Rapporteur on the basis of that wording appeared too general and should perhaps have been explored in greater detail.

Regarding plans for future work, it would be helpful if the Special Rapporteur could clarify the relationship between the model clauses that he intended to propose and the draft guidelines. As to the proposal to deal with the provisional application of treaties that enshrined rights of individuals — an issue which had been considered in the second report in relation only to certain provisions of the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms — it would be advisable to undertake an in-depth study. Further thought should also be given to the place to be accorded in the topic to the internal law of States, a question that had been raised by several other members of the Commission.

In general, it would be useful to revisit some of the ideas originally raised in the 2011 syllabus and the Special Rapporteur's first report. In the syllabus, Mr. Gaja had at the outset focused on the meaning of provisional application, given the absence from the Vienna Convention of any definition thereof. He had considered that an analysis of State practice and case law should allow the Commission to establish a presumption concerning the meaning of provisional application of a treaty. He had in particular referred to the "preconditions" of provisional application and the question of the relevance of internal law. In his first report, the Special Rapporteur had stated that an analysis of the concept of the provisional application of treaties must begin with the distinction between "provisional application" and "provisional entry into force". In paragraphs 22 and 53 of that report, he had laid out a road map that now seemed to have been forgotten; at times, it appeared as if there was some uncertainty as to the aim of the reports, including as to which of the provisions of the Vienna Convention should form the basis of the study.

Thus, in introducing his third report, in 2015, the Special Rapporteur had said that the provisions considered therein — articles 11, 18, 24, 26 and 27 of the Vienna Convention — had been chosen because of their close relationship with provisional application. In his concluding remarks on the debate in 2015, he had indicated his intention to study, in his fourth report, articles 19, 46 and 60. In paragraph 6 of that report, the Special Rapporteur noted that, in the debates in the Sixth Committee, delegations had suggested that he should focus on issues relating to the reservations regime and the regime pertaining to suspension, invalidity and termination of a treaty; subsequently, in paragraph 17, he added the issue of succession of States to that list. While the efforts the Special Rapporteur had made to respond to the concerns of the Member States were to be commended, those concerns could not form the entire framework for the report and care should be taken to prevent what might appear to be a surreptitious reorientation of the topic.

Mr. Hassouna said that the overall purpose of the Commission in taking up the topic had been to enhance understanding of the provisional application mechanism and to provide legal certainty for States opting to resort to that mechanism. The Special Rapporteur's clear and analytical fourth report, which built on the significant progress that had already been achieved in that regard, shed light on the relationship of provisional application to the provisions of the 1969 Vienna Convention, as well as the practice of international organizations. The Special Rapporteur was to be commended on his sustained efforts to collect information on the practice of States and international organizations. However, despite an increase in the number of States providing such information, it was necessary to continue urging States to submit their comments with a view to facilitating the work of the Commission and its Special Rapporteur.

He agreed with other members that, as important as it was to respond to the concerns of Member States, the Commission should also develop its own approach, priorities and proposals. On the other hand, he did not share the view of those who claimed that much of the information in the report was irrelevant and of little value to the outcome of the topic; in

his opinion, it was useful in setting the context for the issues addressed and enabling them to be better understood. However, the Special Rapporteur should have relied on the wealth of information presented in the report and his detailed analysis thereof to draft specific proposals or guidelines. It was to be hoped that the Special Rapporteur would consider doing so either in future reports or during the examination of his proposals in the Drafting Committee.

With regard to the relationship of provisional application to other provisions of the 1969 Vienna Convention, paragraph 23 of the report mainly discussed article 19 of the Convention on the formulation of reservations. However, other relevant rules included in articles 20 to 23 of the Convention would merit future consideration in the context of a broader analysis. Referring to paragraphs 23 and 36 of the report, he said that, while he agreed that, as in the case of provisional application, the reservations regime would be determined, in the first place, by what the treaty stipulated and that nothing would prevent a State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty, it would have been useful if some specific examples of such situations had been provided. As to the conclusion drawn in paragraph 33, namely that a State might formulate reservations with respect to a treaty that would be applied provisionally if there were reasons to believe that its entry into force would be delayed "for an indefinite period of time", he questioned whether the delay had necessarily to be indefinite.

On the invalidity of treaties, the report reconfirmed the principle, already included in the third report, that, once a treaty was being applied provisionally, internal law could not be invoked as justification for failure to comply with the obligations deriving from its provisional application. However, the present report also referred to a more complex situation when the treaty itself 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. As mentioned in the report, such situation was well illustrated by the *Yukos* and *Kardassopoulos* cases, which analysed the provisional application of the Energy Charter Treaty. The analysis given in paragraphs 40 to 68 of the report should have included more examples of the practice of States with regard to their approach to the provisional application of treaties, in particular under their respective constitutions.

With regard to the termination or suspension of the operation of a treaty as a consequence of its breach, the report referred to the principle set forth in the 1969 Vienna Convention that termination by a State of its provisional application of a treaty took place if that State notified the other States between which the treaty was being applied provisionally of its intention not to become a party to the treaty. The report also referred to the principle that a treaty that was applied provisionally could be terminated as a consequence of its material breach. In his view, the Special Rapporteur should have developed those two principles using examples of State practice and considered formulating a new draft guideline on that basis. A further draft guideline could be formulated on the suspension of the provisional application of a treaty that would include a reference to the relationship between breaches of the provisionally applied treaty and its suspension, as well as to the total suspension of the treaty, its suspension with regard to only some other parties to a multilateral treaty and to the suspension of only certain provisions of the treaty being provisionally applied.

Regarding State succession, the report referred to the treatment of provisional application of treaties in cases of succession of States as contained in the 1978 Vienna Convention on Succession of States in respect of Treaties and further mentioned that the Commission had previously noted that the importance of provisional application in the context of State succession in respect of multilateral treaties was centred on cases involving

the establishment of newly independent States. However, the report should have complemented that description with specific examples of cases concerning bilateral and multilateral treaties, involving both newly independent and other States. The analysis could have concluded with the formulation of a new guideline on those different cases.

With regard to the practice of international organizations, the analysis presented in chapter III of the report was informative and relevant, since it complemented the analogous section in the third report. However, once again, that analysis should have been reflected in a concrete proposal or draft guideline; it was important that the practice of States and that of international organizations should be clearly differentiated and not included in the same guidelines. Concerning the role of the United Nations Secretariat with respect to the provisional application of treaties, specifically within the context of its registration functions and the depositary functions of the Secretary-General, he agreed that the 1946 regulations on registration should be revised and brought into line with the current state of practice.

Regarding the practice of regional international organizations, he confirmed that the member States of the Economic Community of West African States had increasingly resorted to the inclusion of a clause on provisional application in their treaties, although such practice was somewhat inconsistent. Furthermore, the main item on the agenda of a forum held by the African Union Commission on International Law in Cairo the previous year had been "Challenges of ratification and implementation of treaties in Africa", which was closely related to provisional application of treaties. It would have also been useful to include in the report information on the practice of the members of the African Union, the continent's main regional organization.

Draft guideline 10 seemed to have been inspired by article 27 of the Vienna Convention; however, it did not address cases in which the treaty being provisionally applied made explicit reference to the internal laws of States. The draft guideline should therefore be revised so as to indicate that a State could not invoke the provisions of its internal law as justification for non-compliance with its obligations under the provisional application of a treaty, unless the treaty itself expressly allowed a party to do so. Reference could also be made to the concern expressed by many States that such provisional application must be subject to their constitutional requirements. He would welcome an explanation from the Special Rapporteur of the general context of that draft guideline and its relation to the other proposed guidelines.

As to future work on the topic, the Special Rapporteur merely referred to his intention to deal with some pending topics not dealt with in the present report; a more detailed road map would have been welcome, as would an explanation of the nature, scope and formulation of the proposed model clauses.

In conclusion, he recommended that the proposed draft guideline should be referred to the Drafting Committee. He hoped that the Special Rapporteur would complement that draft guideline with other, related guidelines.

Mr. Forteau said that it would actually be very easy to find out about State practice with regard to provisional application of treaties, as information was made available online by treaty depositaries. As noted in the report, concerning the United Nations, for instance, from 1946 to 2015, 1,349 provisional application actions had been registered; much could no doubt be learned from examining those applications.

The meeting rose at 5.10 p.m. to enable the Drafting Committee on Protection of the environment in relation to armed conflicts to meet.