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Summary record of the 3385th meeting

Topic:
<multiple topics>

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115. Mr. PARK said that the words “principal treaty” also appeared in the last footnote to the paragraph, which would need to be amended accordingly.

On that understanding, paragraph (3), as amended, was adopted.

Paragraph (4)

116. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that, in the first sentence, the words “separate instrument” be changed to “separate treaty”. Furthermore, the last sentence should be reworded to read: “By way of providing further guidance, reference is made to two examples of such ‘means or arrangements’, namely provisional application agreed by means of a resolution adopted by an international organization or at an intergovernmental conference.”

117. Mr. MURPHY proposed that the phrase “adopted by an international organization” be changed to “adopted at an international organization”, to render the idea of States coming together to reach an agreement, rather than a decision being taken by an organization. He further proposed that the first and second footnotes to the paragraph be merged and that the reference in the following footnote to the resolution establishing the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization be deleted, since it was not a good example of provisional application of a treaty.

118. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he could endorse Mr. Murphy’s first two proposals but not his last one. He had already discussed the last footnote to the paragraph with Mr. Murphy and the text had been amended to make clear that it concerned a resolution, adopted by a meeting of signatory States, whose purpose was to establish the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization. It was not a resolution relating to provisional application *per se*, since the Treaty contained no provisional application clause. However, he wished to retain the reference to the resolution as a case *sui generis* that illustrated how, in fact, and as a result of certain decisions, parts of the Treaty were provisionally applied—a position supported by recent literature. Moreover, the Treaty was likely to continue to be provisionally applied indefinitely, since all the requirements for its entry into force were unlikely to be met.

119. Sir Michael WOOD said that he was not in favour of Mr. Murphy’s proposal that the phrase “adopted by an international organization” be changed to “adopted at an international organization”. The former was in line with the language used for other topics and covered the substantive point that there must be an agreement among States to provisional application by means of a resolution adopted. However, he was in favour of the proposal to delete the reference in the last footnote to the paragraph to the resolution relating to the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization. It would merely confuse matters to suggest that the work done by the Preparatory Commission constituted provisional application in the sense of article 25 of the 1969 Vienna Convention and the project. Nevertheless, at some juncture, it might be useful to explain that it was an exceptional situation, but

that preparatory work for the entry into force of a treaty did not amount to provisional application.

120. The CHAIRPERSON said that he too was concerned about Mr. Murphy’s proposal, but suggested that “by or at an international organization” might be a solution. Likewise, he was concerned about referring to the establishment of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization in the last footnote to the paragraph as the first example of provisional application, when not all members of the Commission were in agreement. He suggested that it might be sufficient to refer to the article by Andrew Michie⁴²⁵ on the provisional application of arms treaties mentioned in the footnote.

121. Mr. MURPHY said that Michie’s article clearly stated that the Comprehensive Nuclear-Test-Ban Treaty was not an example of the provisional application of treaties and, in that connection, had noted that during the negotiations on the Treaty, the Government of Austria had made a proposal for a provisional application mechanism that had been rejected. Thus, while the source might well support the proposition that bilateral arms treaties had been provisionally applied, it was not relevant in the context under consideration.

122. Following further comments by Mr. MURPHY, the CHAIRPERSON and Sir Michael WOOD, the CHAIRPERSON suggested that discussion on paragraph (4) and its related footnotes be left in abeyance to allow for informal consultations.

It was so decided.

123. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that informal consultations on the matter were indeed necessary. Furthermore, he wished to underline that the information furnished by Mr. Murphy was incomplete. References by the same author that supported the opposite view could be found.

The meeting rose at 6.05 p.m.

3385th MEETING

Wednesday, 2 August 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencía-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

⁴²⁵ A. Michie, “The provisional application of arms control treaties”, *Journal of Conflict and Security Law*, vol. 10, No. 3 (2005), pp. 345–377.

Protection of the environment in relation to armed conflicts (*concluded*)* (A/CN.4/703, Part II, sect. D)

[Agenda item 4]

REPORT OF THE WORKING GROUP

1. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group) said that the Working Group had been established at the 3375th meeting of the Commission with the primary objective of making recommendations to the plenary on how to proceed with the topic.

2. The Working Group had held two meetings, on 26 and 27 July 2017, at which it had had before it the draft commentaries prepared by the former Special Rapporteur with regard to draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee in 2016, and taken note of by the Commission also in 2016. The Working Group wished to express its deep appreciation to the former Special Rapporteur, Ms. Marie Jacobsen, for her outstanding contribution to the topic.

3. In its consideration of the way forward, the Working Group had stressed the importance of the topic. It had noted, in particular, the continuing interest of States and of bodies such as the United Nations Environment Programme and ICRC. In that connection, the Working Group had noted that substantial work had already been done on the topic and had underlined the need for its completion, maintaining and building upon the work achieved thus far. The Working Group had underscored the need to maintain momentum on work on the topic.

4. To that end, the Working Group had considered it most appropriate to recommend to the Commission the appointment of a new Special Rapporteur for the topic, preferably at the current session, to assist it in the successful completion of its work on the topic.

5. Moreover, the Working Group had noted that, in addition to aspects of the draft principles, such as terminology and the overall structure of the text, as well as the completion of the draft commentaries, there were other areas that could be further addressed. In that regard, references had been made to complementarity with other relevant branches of international law, such as international environmental law, protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors and overall application of the draft principles to armed conflicts of a non-international character.

6. He was grateful to all the members of the Commission who had participated in the Working Group for the enriching discussions that had taken place.

7. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Chairperson of the Working Group.

It was so decided.

* Resumed from the 3375th meeting.

8. The CHAIRPERSON said that the Bureau intended to follow up on the Working Group's proposal to appoint a new Special Rapporteur on the topic. He therefore requested, on behalf of the Bureau, that consultations take place as soon as possible so that the Commission could be in a position to take a decision on the basis of a recommendation by the Bureau before the end of the current session. He invited members to approach him or any other member of the Bureau to share their views on that important matter.

Draft report of the International Law Commission on the work of its sixty-ninth session (*continued*)

CHAPTER V. *Provisional application of treaties (continued)* (A/CN.4/L.901 and Add.1–2)

9. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.901/Add.1. He recalled that, at the previous meeting, paragraphs (1) and (2) of the general commentary had been left in abeyance. He invited the Special Rapporteur to present any developments in that regard.

C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission (*continued*)

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-NINTH SESSION (*continued*)

General commentary (concluded)

Paragraphs (1) and (2) (*concluded*)

10. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed, on the basis of all the comments and proposals received from Commission members, that paragraph (1) be deleted and that paragraph (2), which would thus become paragraph (1), be amended in line with comments made at the previous meeting to read:

“The purpose of the draft guidelines is to provide assistance to States, international organizations and others concerning the law and practice on the provisional application of treaties. They may encounter difficulties concerning, *inter alia*, the form of the agreement to provisionally apply a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effects. The objective of the draft guidelines is to direct States, international organizations and others to answers that are consistent with existing rules or to the solutions that seem most appropriate for contemporary practice.”

11. He further proposed the addition of a footnote at the end of the first sentence of that paragraph to read: “As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries.” That wording, which reflected language used in a footnote adopted by the Commission the previous year in the context of the topic “Identification of customary international law”, should resolve the problems raised at the previous meeting with regard to paragraph (1).

12. The CHAIRPERSON said he took it that the Commission wished to adopt the new paragraph (1), as

proposed by the Special Rapporteur, on the understanding that the previous paragraph (1) would be deleted.

It was so decided.

The general commentary, as amended, was adopted.

Commentary to draft guideline 4 (Form) (concluded)

Paragraph (4) (concluded)

13. The CHAIRPERSON recalled that paragraph (4) of the commentary to draft guideline 4 had been deferred pending some redrafting. He invited the Special Rapporteur to introduce the proposed new text.

14. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed that, to reflect the comments made by Commission members at the previous meeting, the paragraph be recast to read:

“Subparagraph (b) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through ‘other means or arrangements’, which broadens the range of possibilities for reaching agreement on provisional application. The Commission viewed such an additional reference as confirmation of the inherently flexible nature of provisional application. By way of providing further guidance, reference is made to two examples of such ‘means or arrangements’, namely provisional application agreed by means of a resolution adopted within an international organization or at an intergovernmental conference.”

15. He further proposed that the first two footnotes to the paragraph, which, with the addition of a new footnote in paragraph (1), would have been renumbered, be merged into a single footnote with their order reversed, as proposed by a member of the Commission who had cited the need to follow the Commission’s standard editorial practice.

16. As to the last footnote to the paragraph, whose numbering remained unchanged, he proposed, following consultations with Commission members, that the second, third and fourth sentences be deleted and replaced, at the end of the footnote, with amended text relating to the establishment of the Preparatory Commission of the Comprehensive Nuclear-Test-Ban Treaty Organization that would include a reference to an as yet unpublished article by Y. Fukui, followed by a hyperlink to an online advance version.

17. Mr. MURPHY, referring to that footnote, said that, to avoid including the long hyperlink to the article by Y. Fukui, the Commission should use the formula “[vol. not published yet]”, as had been done elsewhere in the footnote.

It was so decided.

18. Mr. PARK, noting that, in the revised proposal for paragraph (4), the phrase “resolution adopted within an international organization” was used instead of “resolution adopted by an international organization”, asked whether the text of draft guideline 4 (b) itself should not also be changed accordingly.

19. Mr. MURASE said that, having read the article by Y. Fukui, he was not convinced of its relevance, as the author appeared to refer to provisional operation rather than provisional application.

20. Mr. VÁZQUEZ-BERMÚDEZ said that the language of paragraph (4) should match that of draft guideline 4 (b), rather than the other way around. The Commission should thus use the phrase “by an international organization”, at least for the time being. The matter could be taken up again on second reading.

21. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that he would be happy to accept the proposals made by Mr. Murphy and Mr. Vázquez-Bermúdez. He believed that the article by Y. Fukui should, however, be cited, as the author did refer to provisional application.

22. Mr. MURPHY said that, if the Commission decided to reproduce the language of draft guideline 4 (b) in paragraph (4), it should do so in full in order to capture that language faithfully.

23. The CHAIRPERSON, supported by Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) and Mr. JALLOH, said that it was unnecessary to reproduce the language of draft guideline 4 (b) in its entirety. The debate within the Commission over the choice between the phrases “within an international organization” and “by an international organization” had centred on whether the Commission should remain faithful to the language of draft guideline 4 only insofar as it was cited in paragraph (4).

24. Sir Michael WOOD said that, for the sake of clarity, it would be helpful to reproduce the language of draft guideline 4 (b) in full, especially as doing so would ease the transition between paragraph (4) and the proposed new paragraph (5) of the commentary.

25. Mr. VALENCIA-OSPINA said that, if the language of draft guideline 4 (b) was reproduced in full, the reference to “two examples” in paragraph (4) would need to be changed to “four examples”.

26. Sir Michael WOOD, supported by Mr. MURPHY, said that even if the full text of draft guideline 4 (b) was reproduced, the Commission would still be citing two examples, the first being resolutions adopted in various ways and the second being declarations.

27. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that he had no objection to reproducing the language of draft guideline 4 (b) in full. In his view, the reference to “two examples” should be maintained.

On that understanding, paragraph (4), as amended, was adopted.

New paragraph (5)

28. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed the insertion of a new paragraph (5), which would read:

“Alike, while the practice is still quite exceptional, the Commission was of the view that it was useful to include a reference to the possibility that a State or an international organization could make a declaration to the effect of provisionally applying a treaty or a part of a treaty, in cases where the treaty remains silent or when it is not otherwise agreed. However, the declaration must be unequivocally accepted by the other States or international organizations concerned, as opposed to mere non-objection or tacit acquiescence which might create uncertainty. While most of existing practice is reflected in acceptance expressed in written form, the guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is express. The Commission avoided the use of the word ‘unilateral’ in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States.”

29. He also proposed that, after the word “exceptional”, a footnote be added referring to, among other things, certain paragraphs of his second and third reports⁴²⁶ on the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

30. Mr. MURPHY said that, in the first sentence, the word “Alike” should be deleted, and that the paragraph should begin “While the practice ...”.

31. Mr. PARK said that the second sentence of the proposed new paragraph (5) was worded too strongly, particularly as it was based on only one precedent, involving the Syrian Arab Republic, which meant that the Commission risked engaging solely in the progressive development of international law. As currently worded, the paragraph failed to distinguish between the various scenarios that could arise under multilateral conventions and bilateral agreements, for example. His proposal would be to replace the words “must be unequivocally accepted” with “should be accepted”.

32. The CHAIRPERSON, speaking as a member of the Commission, said that, while he agreed with Mr. Park’s concern, he would prefer to replace the word “unequivocally”, which set too high a threshold, with “sufficiently clearly”, which would render the example involving the Syrian Arab Republic more fitting.

33. Sir Michael WOOD proposed that the word “unequivocally” be replaced with “clearly” and that, further on in the same sentence, the words “or tacit acquiescence which might create uncertainty” should be deleted.

34. The CHAIRPERSON suggested replacing, in the third sentence, the word “express” with “clear” in order to avoid any unnecessary ambiguity. With regard to Sir Michael’s proposed deletion in the second sentence, he was of the view that acquiescence was different to non-objection, and that the reference to it should therefore be retained. It would be sufficient simply to delete the word “tacit”.

⁴²⁶ *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675 (second report); and *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687 (third report).

35. Mr. JALLOH said that he was happy with the second sentence as it stood. The Commission should, in any case, avoid watering it down, which would be the effect of the deletion proposed by Sir Michael. The third sentence would be more elegant if it were recast as two sentences to read: “Most existing practice is reflected in acceptance expressed in written form. The guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is express.”

36. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that he had chosen the word “unequivocally” based on his interpretation of the discussion in the Drafting Committee, which was that a higher threshold was needed for the acceptance by other States or international organizations of a State’s declaration that it was provisionally applying a treaty or a part of a treaty. At the same time, he was not in favour of making the requirements imposed on States more stringent in that regard and could thus agree to replacing the word “unequivocally” with “clearly”. While he acknowledged that the word “tacit” in the second sentence was perhaps redundant, he preferred to retain the word “acquiescence”. As to the remainder of the paragraph, he agreed with Mr. Jalloh’s drafting suggestions for the third sentence and Mr. Murphy’s proposal, in the first sentence, to delete the word “Alike”.

37. The CHAIRPERSON asked whether the Special Rapporteur agreed, in the penultimate sentence, to replace the word “express” with the word “clear”.

38. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that he was not opposed to that amendment if that was what the majority of Commission members preferred.

39. Mr. MURPHY said that he would prefer to retain the word “express” because it best reflected the general understanding that had been reached among the members of the Drafting Committee.

40. The CHAIRPERSON said that his concern was that if the word “express” was retained it would not cover the case of the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, which was referred to in the footnote, since he was not sure that all States had expressly agreed to such provisional application.

41. Sir Michael WOOD, supported by the CHAIRPERSON and Mr. JALLOH, proposed that, in the penultimate sentence, the word “express” be replaced with the words “expressed clearly”.

42. Mr. OUZZANI CHAHDI proposed that, in the penultimate sentence of the French text, the word *expresse* should be replaced with the word *explicite*, which was clearer and afforded more flexibility.

It was so decided.

43. Sir Michael WOOD said that, in the second sentence, the phrase “or tacit acquiescence which might create uncertainty” was unnecessary and confusing, given that acquiescence was a well-known form of agreement. Thus, maintaining the technical term “acquiescence”

would slightly undermine the notion that acquiescence, if it was clear, could indeed express agreement.

44. Mr. VÁZQUEZ-BERMÚDEZ proposed that the phrase “or tacit acquiescence which might create uncertainty” be deleted and that a full stop be placed after the word “non-objection”.

45. Mr. CISSÉ proposed that, in order to reconcile the various viewpoints expressed, in the second sentence, the word “unequivocally” should be replaced with the words “clearly and expressly” [*clairement et expressément*]. The word “tacit” should be deleted on the reasoning that acquiescence was inherently tacit.

46. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that, in the example of provisional application set forth in the proposed footnote, the failure by any States parties to register an objection to the provisional application of the Convention by the Syrian Arab Republic had been interpreted by the Secretary-General of the United Nations, as the depositary of the Convention, as those States parties’ acceptance of such provisional application. For that reason, ending the second sentence with the words “non-objection” was sufficient.

47. The CHAIRPERSON said he took it that the Commission wished to adopt the following version of the proposed new paragraph (5):

“While the practice is still quite exceptional, the Commission was of the view that it was useful to include a reference to the possibility that a State or an international organization could make a declaration to the effect of provisionally applying a treaty or part of a treaty in cases where the treaty remains silent or when it is not otherwise agreed. However, the declaration must be clearly accepted by the other States or international organizations concerned, as opposed to mere non-objection. Most existing practice is reflected in acceptance expressed in written form. The draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is expressed clearly. The Commission avoided the use of the word ‘unilateral’ in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States.”

It was so decided.

New paragraph (5) was adopted.

The commentary to draft guideline 4, as amended, was adopted.

Commentary to draft guideline 5 [6] (Commencement of provisional application)*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

48. Mr. TLADI proposed the deletion of the word “both”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

49. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed that, in the second sentence, the words “both the general entry into force of the treaty itself and” be deleted.

50. Mr. PARK said that, in his view, the text that the Special Rapporteur proposed to delete was necessary and should be maintained.

51. The CHAIRPERSON said that he was concerned that the proposed deletion would introduce an ambiguity, in the sense that a treaty could enter into force for a State as an international obligation and also in domestic law on the basis of an autonomous decision by domestic legislators to apply the treaty, even if it had not yet entered into force at the international level. He therefore proposed that, in the second sentence, the words “as an obligation of international law” be inserted after the third instance of the expression “entry into force” and before the words “for that particular State”.

52. Mr. MURPHY said that, as he understood it, provisional application operated only up to the point where the treaty entered into force for those States that had been provisionally applying it as between themselves, irrespective of whether it had entered into force for the other signatories. The Chairperson’s proposal would, in fact, introduce a new concept that did not reflect the approach taken by the Commission to the issue in other parts of the commentary. Ultimately, the issue raised by the Chairperson’s proposal was a rather tangential one; he himself would prefer that the text remain as currently drafted.

53. The CHAIRPERSON said that it was not his intention to introduce a new issue; rather, he was seeking to ensure that it was clear to the reader that the subject matter of the paragraph remained within the realm of international law and the obligations thereunder.

54. Mr. PARK recalled that, in the Drafting Committee, reference had been made to two types of entry into force: objective and subjective. That distinction seemed to be implied in the final sentence, which contained the expression “the general reference to ‘entry into force’”.

55. Mr. ŠTURMA said that he would be in favour of retaining the current formulation since it was clear from both the text of the draft guidelines and the commentaries that the Commission was dealing with the provisional application of treaties as a matter of international law.

56. The CHAIRPERSON said that he wished to withdraw his proposal.

57. Sir Michael WOOD said that, in the second sentence, the phrase “for that particular State or international organization” did not reflect the fact that what was meant was entry into force as between pairs of parties to a treaty. He therefore proposed that the phrase be replaced with “between the States or international organizations concerned”, so as to mirror the wording of the draft guideline.

58. The CHAIRPERSON suggested that the simplest formulation in that context might be “between particular States or international organizations”.

* The numbers in square brackets refer to the numbering of draft guidelines in documents A/CN.4/L.901/Add.1 and Add.2 discussed at the present meeting.

59. Mr. JALLOH asked whether the Special Rapporteur would consider retaining the original language of the paragraph since the phrase “the entry into force of the treaty itself” appeared in quite a few places in the project, including in paragraph (5) of the commentary to draft guideline 3, which was cross-referenced in the footnote to paragraph (3). Doing so would not only address the concern expressed by the Chairperson, but would also avoid further difficulties in terms of consistency with prior provisions and commentaries.

60. He proposed that, for reasons of style, the final sentence be recast to read: “The Commission decided to retain the general reference to ‘entry into force’, as already indicated in the commentary to draft guideline 3.”

61. The CHAIRPERSON said that Mr. Jalloh’s first proposal would reopen the whole question of whether to reinstate the original text. There did not seem to be any objection, however, to the adoption of his second proposal for recasting the final sentence.

It was so decided.

62. Mr. VÁZQUEZ-BERMÚDEZ, supported by Mr. GÓMEZ ROBLEDÓ (Special Rapporteur), said that the best solution for replacing the phrase “for that particular State or international organization” in the second sentence seemed to be the wording used in the draft guideline itself, namely, “between the States or international organizations concerned”.

63. Mr. PARK proposed that, in the second sentence, the phrase “in this draft guideline 5” should be inserted between the words “whereby ‘entry into force’” and the word “refers”.

64. The CHAIRPERSON said that the first sentence of the paragraph already made it clear that what was being discussed was draft guideline 5.

65. Mr. MURPHY said that Mr. Park’s proposal in the second sentence gave the impression that draft guideline 5 was departing from draft guideline 3, when in fact the second sentence was indicating that it followed the formulation found in draft guideline 3.

66. The CHAIRPERSON said he took it that the Commission wished to reformulate the second sentence to read: “The reference to ‘pending its entry into force’ follows the formulation found in draft guideline 3, whereby ‘entry into force’ refers to the entry into force between the States or international organizations concerned.”

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

67. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed that the paragraph be amended to read:

“The concluding phrase ‘as the treaty provides or as are otherwise agreed’ confirms that the agreement to provisionally apply a treaty or a part of a treaty is based on a provision set forth in the treaty that is provisionally applied, on a separate treaty, whatever its particular designation, or on other means or arrangements that establish an agreement for provisional application, and is subject to the conditions and procedures established in such instruments.”

Paragraph (6), as amended, was adopted.

The commentary to draft guideline 5 [6], as a whole, as amended, was adopted.

Commentary to draft guideline 6 [7] (Legal effects of provisional application)

Paragraph (1)

68. Mr. MURPHY said that, in his view, draft guideline 6 was too broadly drafted. He therefore proposed the addition, at the end of the paragraph, of a sentence to read: “The view was expressed that the draft guideline is too broad and instead should provide that the agreement to provisionally apply a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof.”

69. The CHAIRPERSON, speaking as a member of the Commission, said that he was slightly concerned that the sentence proposed by Mr. Murphy seemed to imply that the draft guideline contradicted the position formulated in that sentence. He was unsure whether that was really what was intended in the draft guideline.

70. Mr. PARK said that it was his understanding that a new paragraph (5) to be proposed by the Special Rapporteur would reflect Mr. Murphy’s concern; accordingly, the proposed new sentence seemed redundant.

71. Mr. MURPHY said that, while some members held that draft guideline 6, as it stood, was in harmony with what was stated in the new proposed paragraph (5) of the commentary thereto, in his own opinion the draft guideline did not reflect what was said in paragraph (5). He was prepared to amend the sentence he had proposed by replacing “provide that” with “be written to state that” in order to signal that there might be a better way to formulate the draft guideline.

72. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to raise a related point which concerned paragraph (2). The third sentence of paragraph (2) indicated that the legal effect produced by provisional application derived from the treaty or instrument chosen by the States or international organizations concerned. As that was, however, a very ambiguous sentence, he proposed the insertion, in that sentence, of the phrase “the agreement to provisionally apply” before the words “the treaty”, as that would correspond more closely to what the Commission meant. The legal effect could not derive from a treaty which had not entered into force, but from the agreement to provisionally apply it. The amendment that he was proposing to paragraph (2) might obviate the need for the dissenting formulation proposed by Mr. Murphy.

73. Mr. MURPHY, supported by Mr. GROSSMAN GUILOFF, said that, while he fully agreed with the thrust of the amendment to paragraph (2) proposed by the Chairperson, it did not eliminate the problem inherent in all the paragraphs of the commentary, namely that they referred to the legal effects of a treaty or a part of a treaty that was being provisionally applied. They therefore expressly put forward an incorrect idea which made the drafting of the guideline itself problematic.

74. The CHAIRPERSON, speaking as a member of the Commission, said the draft guideline itself could be properly interpreted provided that the commentary adduced convincing arguments.

75. Sir Michael WOOD said that he agreed with Mr. Murphy that the draft guideline was too broadly drafted. He therefore proposed that, in Mr. Murphy's proposed amendment, the words "too broad" be replaced with "too broadly drafted". The draft guideline itself could perhaps be reviewed on second reading.

76. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the Commission review the wording of the whole commentary to draft guideline 6 and then return to the exact wording of Mr. Murphy's proposed sentence and decide where to put it. In fact, it expressed a viewpoint that contrasted with the rest of the commentary, which had been thoroughly discussed in the Drafting Committee. For that reason, the sentence should start with the words "A view".

77. Mr. TLADI said that it would only be fair and in keeping with the Commission's practice for the very first paragraph of the commentary to reflect Mr. Murphy's concern regarding the manner in which the text of the draft guideline was drafted.

78. The CHAIRPERSON said that the additional sentence would read: "A view was expressed that the draft guideline is too broadly drafted and instead should be written to state that the agreement to provisionally apply a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof."

Paragraph (1), as amended, was adopted.

Paragraph (2)

79. The CHAIRPERSON, speaking as a member of the Commission, said that without the amendment to the third sentence that he had proposed, the commentary could be understood to mean that a treaty which had no legal force and was not binding produced a binding effect, whereas it was not in the interest of the Commission to make such a suggestion.

80. Mr. ŠTURMA said that, while the Chairperson was right in essence, that was not the intended meaning of the somewhat infelicitous wording of that paragraph. In his view, what was meant was that such legal effect might be derived from the provision on provisional application in the treaty itself or from another instrument or agreement.

The meeting was suspended from 11.40 a.m. to 12.10 p.m. to allow for consultations on the wording of paragraph (2).

81. The CHAIRPERSON said that, after consultations, a small group of members proposed that the third sentence be supplemented to read: "Such legal effect is derived from the agreement to provisionally apply the treaty by the States or the international organizations concerned, which may be expressed in the forms identified in draft guideline 4."

82. Mr. GROSSMAN GUILOFF asked whether the reference should be only to the treaty or also to part of the treaty.

83. The CHAIRPERSON said that the sentence did not suggest that the legal effect was derived from the whole treaty; it implied that it might be derived from some part of the treaty.

84. Sir Michael WOOD suggested that the beginning of the fourth sentence be adapted to read: "In cases in which that agreement ...".

Paragraph (2), as amended, was adopted.

85. Mr. SABOIA asked when the final version of that much-amended section of the report would be available on the Internet.

86. Mr. LLEWELLYN (Secretary to the Commission) replied that a composite advanced version of the report in English would be available on the Internet approximately two weeks after the end of the session.

Paragraph (3)

87. Mr. ŠTURMA pointed out that the reference in the footnote to the *Treaty Collection* should be to the *Treaty Series*.

Paragraph (3), as amended, was adopted.

Paragraph (4)

88. Sir Michael WOOD drew attention to the fact that, for the sake of consistency with paragraph (2), the words "or the instrument chosen" in the final sentence should be deleted.

Paragraph (4), as amended, was adopted.

New paragraph (5)

89. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed the insertion of a new paragraph (5), which would read:

"Nonetheless, an important distinction must be made. As a matter of principle, provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to the same rules of the law of treaties in situations such as termination or suspension of the operation of treaties provided for in section 3 of the 1969 Vienna Convention. Instead, article 25,

paragraph 2, allows for a very flexible way to terminate the provisional application of a treaty or a part of a treaty, without prejudice to the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied.”

90. Mr. MURPHY said that new paragraph (5) was helpful in addressing some of the points that he had raised in the Drafting Committee. It was his understanding that the reference in the third sentence to “section 3 of the 1969 Vienna Convention” should in fact refer to “part V, section 3 of the 1969 Vienna Convention”.

New paragraph (5), as amended, was adopted.

Paragraph (5)

91. Mr. MURPHY said that, in the third sentence, the word “affect” should perhaps be replaced with “modify” because, as he understood it, the paragraph addressed the question of whether provisional application of a treaty could have a consequence on the rights and obligations of the States concerned. Commission members would no doubt all agree that provisional application could not modify the rights and obligations of States, but, if he understood correctly, in its work on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission had been of the view that post-signature conduct by the States could have an effect on the interpretation of rights and obligations; if that was indeed the case, then “modify” might be the more appropriate word.

92. The CHAIRPERSON said that it had been his intention to raise basically the same issue, but to make a different proposal, namely, to insert a footnote at the end of the third sentence, which would read: “However, the subsequent practice of one or more parties to a treaty may provide a means of interpretation of that treaty under articles 31 or 32 of the Vienna Convention on the Law of Treaties.” The footnote would also include a reference to the text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted on first reading.⁴²⁷ He was not in favour of replacing the word “affect” with “modify” because to do so would reduce the import of the sentence; the fact that subsequent practice might affect interpretation might be an effect that did not constitute a modification.

Paragraph (5), as supplemented with a footnote, was adopted as paragraph (6).

The commentary to draft guideline 6 [7], as amended, was adopted.

Commentary to draft guideline 7 [8] (Responsibility for breach)

Paragraph (1)

93. Mr. GROSSMAN GUILOFF proposed that, for the sake of readability, the final sentence be placed before the penultimate sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

94. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed the deletion of paragraph (2).

It was so decided.

Paragraph (3)

Paragraph (3) was adopted as paragraph (2).

Paragraph (4)

95. Ms. GALVÃO TELES proposed replacing, in the first sentence, the phrase “the draft articles on responsibility of States for internationally wrongful acts of 2001” with the phrase “the 2001 articles on the responsibility of States for internationally wrongful acts”, and the phrase “the draft articles on responsibility of international organizations of 2011” with the phrase “the 2011 draft articles on the responsibility of international organizations”.

Paragraph (4), as amended, was adopted as paragraph (3).

The commentary to draft guideline 7 [8], as amended, was adopted.

Commentary to draft guideline 8 [9] (Termination upon notification of intention not to become a party)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

96. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed that the references to “draft guideline 6” be replaced with “draft guideline 5”.

It was so decided.

97. Mr. GROSSMAN GUILOFF proposed that the opening phrase of the second sentence be recast to read “In accordance with draft guideline 5, provisional application continues ...”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

98. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed that the paragraph be reformulated to read:

“It was not feasible to reflect in a single formulation all the possible legal arrangements that might exist if the treaty has entered into force for the State or international organization provisionally applying a treaty or a part of a treaty, in relation to other States or international organizations provisionally applying the same treaty or a part thereof.”

99. Mr. JALLOH said that he would be interested to hear the Special Rapporteur’s reasoning behind paragraph (3), in particular how it related to paragraphs (2) and (4). He wondered whether, for the sake of clarity, it might be preferable to delete paragraph (3), to reformulate paragraph (4) and merge it with paragraph (2), since those paragraphs were closely related conceptually.

⁴²⁷ *Yearbook ... 2016*, vol. II (Part Two), pp. 84 *et seq.*, paras. 75–76.

100. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that he did not consider it appropriate at the current juncture for him to explain again the genesis of the draft guideline and the commentary thereto. In submitting the draft commentaries to the Working Group for its consideration, he had thought that it would have been possible to obviate the need for time-consuming discussions during the adoption process in plenary. He would not oppose the deletion of paragraph (3) if that would facilitate the adoption process, but the Commission would nevertheless at some point have to revisit the issues discussed therein.

101. Mr. JALLOH said that he shared the Special Rapporteur's concern that the Commission should not reopen issues previously discussed at the current stage. With that in mind, he saw no problem with maintaining paragraph (3) as it stood.

Paragraph (3) was adopted.

Paragraph (4)

102. Mr. JALLOH proposed that, for the sake of clarity, the words "the second instance mentioned above" in the first sentence be replaced with "the second instance mentioned in paragraph (1) of the commentary to the present draft guideline".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

103. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed that the first two sentences be recast to read:

"While the 1969 Vienna Convention and the 1986 Vienna Convention envisage such an alternative agreement only being concluded between the 'negotiating' States and, where applicable, international organizations, draft guideline 8 refers more generally to 'or it is otherwise agreed'. Such a formulation would continue to refer to the States or international organizations that had negotiated the treaty, but it may also include States and international organizations that were not involved in the negotiation of the treaty."

104. Mr. MURPHY said that the third sentence would be clearer if the words "such a restriction" were replaced with "the narrow language of the Vienna Conventions", if that was what was intended.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Paragraph (8) was adopted.

The commentary to draft guideline 8 [9], as amended, was adopted.

105. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter V contained in document A/CN.4/L.901/Add.2.

Commentary to draft guideline 9 [10] (Internal law of States or rules of international organizations and observance of provisionally applied treaties)

Paragraph (1)

106. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed that, in the second sentence, the words "it deals" be inserted after the word "specifically" and that the words "their rules" be replaced with "the rules of the organization". The final sentence should be reformulated to read: "The first paragraph concerns the rule applicable to States and the second the rule applicable to international organizations."

It was so decided.

107. Sir Michael WOOD proposed that, in the first sentence, the phrase "the internal laws of States" be replaced with "the internal law of States". That wording would reflect the title of the draft guideline and avoid the implication that only legislation was concerned. Any other occurrences of that phrase in the draft should be similarly amended.

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

108. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed that the second sentence be reformulated to read: "Therefore, it should be considered along with the contents of those articles and other applicable rules of international law."

109. Sir Michael WOOD, welcoming the proposal, said that the sentence might read better if the phrase "together with those articles" were used instead of "along with the contents of those articles".

Paragraph (2), as amended, was adopted.

Paragraph (3)

110. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) proposed that the paragraph read:

"Like the general rule in article 27, draft guideline 9 [10] states that the provisional application of a treaty or a part of a treaty is governed by international law. Thus, its execution by the parties cannot depend on, or be conditional by, their respective internal laws. Whatever the provisions of the internal law of a State or the internal rules of an international organization, they may not be invoked as a justification for failing to perform international obligations arising from the provisional application of a treaty or a part of a treaty. Likewise, such internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for their breach. As indicated in draft guideline 11 [12], however, the States and international organizations concerned may agree to limitations deriving from such internal law or rules as part of their agreement on provisional application."

111. Mr. MURPHY, referring to the first sentence, said that he did not think that the draft guideline actually stated that provisional application was governed by international law. He therefore proposed that the first and second sentences be reformulated and combined to read: “Like the general rule in article 27, draft guideline 9 [10] states that the provisional application of a treaty or a part of a treaty cannot depend on, or be conditioned on, their respective internal laws.”

112. Sir Michael WOOD proposed the deletion of the word “internal” before the words “rules of an international organization” in the third sentence.

113. Mr. JALLOH said that, in the third sentence, the word “failure” might be more suitable than “failing”.

114. The CHAIRPERSON said that, while he agreed with Mr. Murphy that draft guideline 9 did not explicitly state that the provisional application of a treaty or a part of a treaty was governed by international law, he considered that it implied that statement. He therefore suggested simply replacing the word “states” with “implies” in the first sentence, with the rest of the sentence to remain unchanged. In his view, it was important to state that provisional application was governed by international law.

115. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he agreed with the proposal to replace the word “states” with “implies” and otherwise leave the first sentence unaltered, as it contained an important statement. He could accept Mr. Jalloh’s proposal.

116. The CHAIRPERSON said that he himself had another proposal, namely, the insertion, in the second sentence, of the words “as a general rule” after the word “cannot”, since the current formulation was, in his view, too absolute. The proposed wording would serve as an implicit reference to the important exception dealt with in draft guideline 11 [12].

117. Sir Michael WOOD said that he did not think that the word “implies” was appropriate in the context of the first sentence. In his view, that sentence should be recast to read: “Like the general rule in article 27, draft guideline 9 [10] reflects the principle that the provisional application of a treaty or a part of a treaty is governed by international law.” At the end of the fourth sentence, the words “their breach” should be replaced with “the breach of such obligations”, which referred back to the international obligations arising from provisional application.

118. Mr. MURPHY proposed that the first sentence be split into two sentences. The first would read: “The provisional application of a treaty or a part of a treaty is governed by international law.” The second would read: “Like the general rule in article 27, draft guideline 9 [10] states that the provisional application of a treaty or a part of a treaty cannot as a general rule depend on, or be conditioned on, their respective internal laws.”

119. Ms. GALVÃO TELES, referring to Mr. Murphy’s proposed second sentence, said that the final phrase “their respective internal laws” should be replaced with “the internal law of the parties”.

120. Sir Michael WOOD proposed that the final phrase of that sentence read: “the internal law or rules of the parties”.

121. The CHAIRPERSON said that the Commission would continue its consideration of paragraph (3) at the next plenary meeting.

The meeting rose at 1 p.m.

3386th MEETING

Wednesday, 2 August 2017, at 3 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-ninth session (continued)

CHAPTER V. Provisional application of treaties (concluded) (A/CN.4/L.901 and Add.1-2)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V contained in document A/CN.4/L.901/Add.2.

C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission (concluded)

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-NINTH SESSION (concluded)

Commentary to draft guideline 9 [10] (Internal law of States or rules of international organizations and observance of provisionally applied treaties) (concluded)*

Paragraph (3) (concluded)

2. The CHAIRPERSON invited the Commission to consider the Special Rapporteur’s new version of paragraph (3), which had been circulated to members and read:

“The provisional application of a treaty or a part of a treaty is governed by international law. Like the general rule in article 27, draft guideline 9 [10] states

* The numbers in square brackets refer to the numbering of draft guidelines in document A/CN.4/L.901/Add.2 discussed at the present meeting.