British Institute of International and Comparative Law

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DECIPHERING INTERIM OBLIGATIONS UNDER ARTICLES 18 AND 25 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

AGNES VIKTORIA RYDBERG

School of Law, University of Sheffield, Sheffield, UK
Email: a.v.rydberg@sheffield.ac.uk

Abstract Under the law of treaties, two mechanisms currently seek to bridge the gap between the conclusion and entry into force of treaties. These are found in Article 18 (the obligation not to defeat the object and purpose of a pending treaty) and Article 25 (provisional application of treaties) of the Vienna Convention on the Law of Treaties. This article considers the nexus and relationship between these provisions and clarifies two aspects of their interaction. First, the article assesses how Articles 18 and 25 interact in their practical application and whether Article 25 can inform the content and interpretation of Article 18. Second, the article explores how the termination of a provisionally applied treaty under Article 25(2) affects the applicability of Article 18(a).

Keywords: public international law, law of treaties, interim obligations, provisional application, Vienna Convention on the Law of Treaties, Article 18 VCLT, Article 25 VCLT, pending treaties.

I. INTRODUCTION

In today's global legal order, treaties exert significant influence over the development of international law. They are essential to the management of international relations and occupy a central position in international dispute settlement. In other words, they are essential to the international community at large. Although the treaties binding on States emanate from their own will,[1] a State's decision to become a party to a treaty often involves a number of complex compromises.[2] By concluding and joining treaties, States must come to terms on matters which may be (geo)politically sensitive and financially draining. It is therefore unsurprising that the conclusion and entry into force of treaties can be a lengthy undertaking. A telling example is the long-drawn-out process of the codification of the law of the sea, which started in 1973 and led to the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) in

[1] *SS Lotus* (*France v Turkey*) PCIJ Rep Series A No 10, 8.
[2] EW Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1988) 59(1) BYIL 75, 77–8.

https://doi.org/10.1017/S0020589324000289 Published online by Cambridge University Press

1982.[3] The UNCLOS did not enter into force until 12 years later, in 1994. Another example is the Comprehensive Nuclear-Test-Ban Treaty (CTBT) which was adopted in 1996,[4] but despite now having 183 contracting or signatory States is yet to enter into force, some 28 years later.[5]

This gap between the conclusion and entry into force of a treaty may compromise its integrity and intended future influence. Under the law of treaties, there are two mechanisms which (can) impose certain interim obligations on States in relation to pending and inoperative treaties; one optional, one mandatory. The mandatory obligation in Article 18 of the Vienna Convention on the Law of Treaties (VCLT) imposes a duty on States having signed or consented to be bound by a treaty to refrain from conduct which would defeat the object and purpose of the treaty pending its entry into force.[6] Article 18 is a rule of customary international law and thus applies to all States irrespective of their status in relation to the VCLT.[7] The optional obligation—laid down in Article 25 of the VCLT—follows from States' choice to apply the treaty or parts thereof on a provisional basis, pending its entry into force.

By imposing obligations on States under pending treaties, both Articles 18 and 25 of the VCLT bridge the gap between the conclusion and entry into force of treaties.[8] At the same time, the two provisions are of a fundamentally different nature and calibre: Article 18 prescribes conduct in relation to the object and purpose of a pending treaty as a whole, whereas Article 25 concerns implementation of some or all provisions of a pending treaty. This difference has led some scholars to ignore the possible connection between Articles 18 and 25 of the VCLT.[9] This article assumes a different starting point

[3] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

[4] Comprehensive Nuclear-Test-Ban Treaty (adopted 10 September 1996; not yet in force) (CTBT).

[5] It is doubtful whether the number of contracting States required for the CTBT's entry into force will ever be acquired.

[6] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[7] Except for persistent objectors. On the customary status of art 18, see H Lauterpacht, Special Rapporteur, 'Report of the Law of Treaties', UNYBILC, vol II (1953) UN Doc AICN.4/Ser.A/1953/Add.1, 110; GG Fitzmaurice, Special Rapporteur, 'Report on the Law of Treaties', UNYBILC, vol II (1956) UN Doc AICN.4/SER.A/1956/Add.1, 122; JS Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma' (1991) 25 GeoWashJIntlL&Econ 71, 77; O Dörr, 'Article 18' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 221; CA Bradley, 'Treaty Signature' in DB Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 213; P Palchetti, 'Article 18 of the 1969 Vienna Convention' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 25; L Boisson de Chazournes, A-M La Rosa and MM Mbengue, 'Article 18' in O Corten and P Klein (eds), *Les Conventions de Vienne sur le droit des traités* (Bruylant 2006) vol I, 594; D Kritsiotis, 'The Object and Purpose of a Treaty's Object and Purpose' in M Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 269–71.

[8] A Quast Mertsch, 'Provisional Application of Treaties and the Internal Logic of the 1969 Vienna Convention' in Bowman and Kritsiotis ibid 306.

[9] See, eg, JM Gómez-Robledo, Special Rapporteur, 'Sixth Report on the Provisional Application of Treaties' (9 June 2014) UN Doc A/CN.4/675, para 14; and United Nations (UN), 'Official Records of the General Assembly, Sixty-Seventh Session, Supplement No 10 (A/67/10)' (2012) UN Doc A/67/10, para 147; C Brölmann and G den Dekker, 'Treaties, Provisional Application' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP

https://doi.org/10.1017/S0020589324000289 Published online by Cambridge University Press

and argues that the application of one provision can affect the application of the other and that the distinction between the two is not always clear-cut. For this purpose, the article untangles the nexus between Articles 18 and 25 of the VCLT and clarifies two aspects of their interaction.

First, the article assesses how Articles 18 and 25 of the VCLT interact in their practical application and whether Article 25 can inform the content of Article 18 in representative areas of international law, particularly in relation to arms control treaties.[10] Second, the article explores what effect the termination of a provisionally applied treaty under Article 25(2) of the VCLT has on the applicability of Article 18(a) of the VCLT, analysing relevant practice in this regard.[11] Clarifying the precise nexus between Articles 18 and 25 of the VCLT has a clear practical benefit: States ought to know by what specific obligations they are bound in relation to pending treaties. To this end, the article raises crucial questions regarding the clarity and efficacy of Articles 18 and 25 of the VCLT in practice. While these provisions may serve distinct purposes, their practical implementation, and the legal responsibilities they entail, are intricately connected and must be carefully considered within the context of treaty law in order to prevent uncertainties concerning the extent of obligations incumbent on States in relation to pending treaties.

For example, Russia signed the Energy Charter Treaty (ECT)[12] on 17 December 1994 and applied it provisionally. However, the Russian Federation subsequently notified the depository of its intention not to become a Party to the ECT. As a result, provisional application ended with effect from 19 October 2009. Almost a decade later, on 17 April 2018, the Russian Federation also declared that it no longer wanted to be considered a signatory State to the ECT. This raised the question whether Russia, after having terminated provisional application, was still bound by the interim obligation under Article 18(a) to refrain from acts which would defeat the object and purpose of the ECT until it officially withdrew its signature on 17 April 2018.

Sections II and III of this article outline the regimes of Article 18 and Article 25, respectively. Section IV then addresses the interaction of Articles 18 and 25 of the VCLT in their practical application by examining the following questions: (A) whether Articles 18 and 25 of the VCLT are mutually exclusive so that only one

2022) para 24. Other views in scholarship sometimes allude to the relationship between the two provisions; see, for instance, D Azzaria, 'Provisional Application of Treaties' in Hollis (n 7) 242.

[10] As noted by A Michie, 'The Provisional Application of Arms Control Treaties' (2005) 10(3) JC&SL 345, 352: '[i]n arms control treaties, the interim period between signature and entry into force is one of particular sensitivity. The signatory states may have made important concessions during arduous negotiations to arrive at an acceptable compromise. They will usually wish to ensure that nothing undermines the treaty before its entry into force and will keenly observe each other's conduct, which may have an important influence over whether or not they decide to ratify the treaty'.

[11] The article does not examine all aspects of provisional application, such as the legal nature of provisionally applied treaties, the difference between provisional entry into force and provisional application of treaties, the forms of agreement on provisional application, and reservations to provisionally applied treaties as these have been thoroughly analysed elsewhere; see, for instance, A Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Brill 2012).

[12] Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95.

https://doi.org/10.1017/S0020589324000289 Published online by Cambridge University Press

provision applies in relation to a provisionally applied treaty; and (B) what role Article 25 can play in informing the content of Article 18. Section V examines whether terminating the provisional application of a treaty also ends the interim obligation under Article 18(a) of the VCLT. Section VI concludes.

II. OBLIGATION NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY PENDING ITS ENTRY INTO FORCE

Article 18 of the VCLT encapsulates the rule of the law of treaties which is commonly known as 'the interim obligation',[13] stipulating that:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

The principle underlying Article 18 is that 'fundamental fairness requires a State to refrain from undermining an agreement'.[14] Therefore, although treaties generally do not have any legal effect prior to their entry into force,[15] Article 18 entails certain effects for States that have signed a treaty or expressed their consent to be bound by stressing that such States 'have placed certain limitations upon their freedom of action'.[16] Furthermore, Article 18 sets a high threshold in establishing a breach (referring to 'defeating' the object and purpose),[17] and does not require a State to comply with the substantive provisions of a pending treaty.[18] Article 18 must accordingly not be confused with situations in which signatory States or States having expressed their consent to be bound by a treaty not yet in force are obliged to respect

[13] For further analysis of the provision, see P Gragl and M Fitzmaurice, 'The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties' (2019) 68 ICLQ 699.

[14] RF Turner, 'Legal Implications of Deferring Ratification of SALT' (1981) 21 VaJIntlL 747, 777. See also SB Crandall, *Treaties: Their Making and Enforcement* (2nd edn, John Byrne & Company 1916) 343; JL Brierly, Special Rapporteur, 'Commentary to Draft Article 3, Second Report: Revised Articles of the Draft Convention', UNYBILC, vol II (1951) UN Doc A/CN.4/SER.A/1951/Add.1; M Rogoff, 'The International Legal Obligations of Signatories to an Unratified Treaty' (1980) 32 MeLRev 263, 267–8, 284.

[15] With the exception of the treaty's final clauses and treaties which are applied on a provisional basis; see T Hassan, 'Good Faith in Treaty Formation' (1981) 21(3) VaJIntlL 443; Gragl and Fitzmaurice (n 13) 702.

[16] A McNair, *Law of Treaties* (OUP 1961) 199. See further, R Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing 2016) 115; W Morvay, 'The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force: Commentaries on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties' (1967) 27 ZaoRV 451.

[17] Palchetti (n 7) 29.

[18] Rogoff (n 14) 267–8; ME Villiger, *1969 Commentary on the Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 248; Bradley (n 7) 208.

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certain provisions of the relevant treaty,[19] or even the object and purpose of certain treaty provisions.[20]

The precise threshold of 'defeat' is not clear.[21] The word is not used elsewhere in the VCLT and Article 18 does not contain any criteria in this regard. The International Law Commission (ILC), when drafting the VCLT, provided only a few non-exhaustive examples of conduct defeating the object and purpose of a pending treaty. For instance, Special Rapporteur Lauterpacht referred to the following example: if one State, having undertaken a duty to cede certain territory to another State, in the time interval between signature and ratification alienated all public property of the State which would have passed to the recipient State under the rules of State succession, the ceding State would have violated the interim obligation.[22]

When the Harvard Research Group drafted its convention on the law of treaties in 1935, it also mentioned some examples,[23] including, inter alia, situations where a treaty contains an undertaking on the part of a signatory that it will not fortify a particular place on its frontier or that it will demilitarise a designated zone in that region. If, while ratification is still pending, it proceeds to erect the forbidden fortifications or to increase its armaments within the zone referred to it would be considered to have defeated the object and purpose of the pending treaty. Another reference was given to treaties which bind one signatory to cede a portion of its public domain to another; during the interval between signature and ratification the former cedes a part of the territory promised to another State. Examples from case law involving direct violations of Article 18 of the VCLT are rare,[24] and the provision continues to embody a somewhat enigmatic rule of the law of treaties.

III. PROVISIONAL APPLICATION OF TREATIES

The only means to give full effect to some or all provisions of a pending treaty is through its provisional application. Provisional application allows for immediate responses to the needs that the treaty seeks to address and can 'guarantee that sensitive compromises which have been reached in treaty negotiations will not be endangered in the period between signature and entry into force'.[25] Reasons to apply a treaty provisionally

[19] For instance, as would be the case if a treaty or part of a treaty is applied provisionally under art 25 of the VCLT. See, in this regard, A Michie, 'The Provisional Application of Treaties in South African Law and Practice' (2005) 30(1) SAfrYIL 1, 6; ILC, 'Second Report on the Provisional Application of Treaties by JM Gómez-Robledo, Special Rapporteur' (9 June 2014) UN Doc A/CN.4/675, para 65.

[20] J Klabbers, 'How to Defeat the Object and Purpose of a Treaty: Toward Manifest Intent' (2001) 34 VandJTransnatlL 283. For an opposite view on art 18, see Dörr (n 7) 256. See also I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 43; Rogoff (n 14) 271; PV McDade, 'The Interim Obligation Between Signature and Ratification of a Treaty' (1985) 32 NILR 5, 11.

[21] See further, A Rydberg, *The Duty to Safeguard the Object and Purpose of Pending Treaties: A Closer Examination of Article 18 VCLT* (Brill 2023) Ch 4.

[22] Lauterpacht (n 7) 110.

[23] See Harvard Draft Convention on the Law of Treaties: 'Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Law of Treaties' (1935) 29 AJILSupp 653, 781–2.

[24] Perhaps the most on-point case being *Opel Austria* as decided by the Court of Justice of the European Union; see Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR 11–39.

[25] H Krieger, 'Article 25' in Dörr and Schmalenbach (n 7) 442–3.

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include urgency,[26] flexibility,[27] precaution[28] and transition to imminent entry into force.[29] Provisional application is regulated by Article 25 of the VCLT, which stipulates that:

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>   (a) the treaty itself so provides; or
>   (b) the negotiating States have in some other manner so agreed.
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Provisional application is commonly used when a signatory State needs to submit the treaty to a constitutional ratification process, to bridge the gap in the time period between the conclusion and entry into force of the treaty.[30] Thus, provisional application bypasses political (or administrative) bars to its entry into force.[31] That said, as pointed out by Juan Manuel Gómez-Robledo, ILC Special Rapporteur on the subject, provisional application is a mechanism that allows States to give legal effect to a treaty by applying its provisions to certain acts, events and situations before it has entered into force, but should not be used as a means of evading normal constitutional procedures.[32]

[26] Urgency has arisen, for example, in treaties relating to the cessation of hostilities and the event of natural disasters. Examples of treaties including express provisions on their provisional application are: the Convention on Early Notification of a Nuclear Accident (adopted 26 September 1986, entered into force 27 October 1986) 1439 UNTS 275; and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (adopted 26 September 1986, entered into force 26 February 1987) Director General of the International Atomic Energy Agency.

[27] See JM Gómez-Robledo, Special Rapporteur, 'First Report on the Provisional Application of Treaties' (3 June 2013) UN Doc A/CN.4/664, para 25, para 29.

[28] As examples of this, Krieger mentions the 1990 Treaty on Conventional Armed Forces in Europe, the 1992 Treaty on Conventional Armed Forces in Europe and the 1993 Treaty between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms (START II), Krieger (n 25) 409.

[29] Art 7 of the Agreement relating to the implementation of Part XI of UNCLOS (n 3) is an example of this. The provisional application provided for in this clause was included out of a desire to ensure, in light of the imminent entry into force of UNCLOS (the necessary instruments of ratification having already been received), that the Agreement's interpretation of Part XI would be effective prior to its entry into force; see Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 16 November 1994) 1836 UNTS 3; R Lefeber, 'Treaties, Provisional Application' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2011) 5, para 2.

[30] Krieger (n 25) 441. See also Quast Mertsch (n 8) 305–7.

[31] Krieger ibid; A Michie, 'Provisional Application of Non-proliferation Treaties' in DH Joyner and M Roscini (eds), *Non-Proliferation Law as a Special Regime: A Contribution to Fragmentation Theory in International Law* (CUP 2012) 56; R Lefeber, 'The Provisional Application of Treaties' in J Klabbers and R Lefeber (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierday* (Martinus Nijhoff 1998) 81.

[32] First Report on the Provisional Application of Treaties (n 27) para 25; Second Report on the Provisional Application of Treaties (n 19) para 15.

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As per the language of Article 25, either part of or a treaty as a whole may be applied provisionally. It is generally left to States to decide how the treaty will be applied provisionally.[33] It can, for instance, be agreed in the treaty itself, included in a protocol or annex,[34] or by separate agreement.[35] States tend to have at least signed the treaty subject to provisional application.[36] Provisional application is also possible where a State has ratified a treaty, whether in force or not, and even in circumstances where a State has acceded to a treaty in force but pending the entry into force of the treaty with respect to the acceding State.[37]

IV. INTERACTION OF ARTICLES 18 AND 25 OF THE VCLT IN THEIR PRACTICAL APPLICATION

Both Articles 18 and 25 of the VCLT serve to guarantee that sensitive compromises reached in the course of treaty negotiations will not be impaired in the period between signature and entry into force.[38] However, there is a general view that the provisional application of treaties is a more efficient mechanism for safeguarding the integrity of the treaty and the effort of the negotiating parties than the interim obligation.[39] This view is supported by the fact that under international law, a provisionally applied treaty is binding and enforceable,[40] it falls under the principle *pacta sunt servanda*,[41] and a State will normally incur international responsibility if it violates any of the obligations under the treaty, or part of the treaty, that is applied provisionally.[42]

In contrast, Article 18, by giving expression to a good-faith obligation, was at first conceived as a moral rather than legal duty under international law, meaning that no responsibility would follow in case of breach.[43] Today, Article 18 is considered to

[33] Second Report on the Provisional Application of Treaties ibid, para 15.

[34] See, eg, the Treaty on Conventional Armed Forces in Europe (n 28).

[35] eg the Protocol of Provisional Application of the General Agreement on Tariffs and Trade (signed 30 October 1947) 55 UNTS 308; and Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (n 29).

[36] Michie (n 31) 58. [37] Krieger (n 25) 451. [38] ibid 443. [39] ibid.

[40] See *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009) para 388. Guideline 6 of the ILC Guidelines on the Provisional Application of Treaties stipulates that '[t]he provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty otherwise provides or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.' See Draft Guidelines and Draft Annex constituting the Guide to Provisional Application of Treaties, with commentaries thereto, adopted by the International Law Commission at its Seventy-Second Session, in 2021, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (26 April–4 June and 5 July–6 August 2021) UN Doc A/76/10, 62. The report, which also contains commentaries to the draft guidelines, appears in the *Yearbook of the International Law Commission* (2021) vol II, Part Two.

[41] T Ishikawa, 'Provisional Application of Treaties at the Crossroads between International and Domestic Law' (2016) 31(2) ICSID Rev/FILJ 270, 274.

[42] Quast Mertsch (n 11); Krieger (n 25) 443–5. ILC Guideline 8 provides that '[t]he breach of an obligation arising under a treaty or a part of a treaty that is applied provisionally entails international responsibility in accordance with the applicable rules of international law'. See ILC Guidelines (n 40) 63.

[43] Brierly (n 14).

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constitute a legal duty,[44] but because Article 18 is phrased in vague and aspirational language,[45] its invocation in dispute settlement is rare.[46] In situations where the application of Article 18 of the VCLT has been considered, courts and tribunals have never decided a case by strictly implementing and enforcing the interim obligation. Article 18 of the VCLT itself has never been regarded as having been violated. Thus, in the context of non-proliferation treaties, it has been argued that:

> [i]mportant as the interim obligation under Article 18 may be, it cannot satisfy all normative requirements prior to the entry into force of a treaty. Given the sensitive character of non-proliferation treaties and the signatories' need to safeguard their respective positions in the intervening period, provisional application offers several additional advantages. In addition to facilitating the implementation of urgent measures, the provisional application of a treaty or part of a treaty may provide a more effective guarantee that limits or restrictions will not be evaded or undermined before the treaty takes effect.[47]

Thus, while both Articles 18 and 25 involve the establishment of interim obligations in the period between the conclusion of the treaty and its definitive entry into force, the provisions, in theory, pursue fundamentally distinct agendas. Article 18 is a minimum safeguard aimed at protecting the integrity of a pending treaty as a whole. Article 25 offers the possibility to create more specific obligations by applying individual provisions of a pending treaty. However, the relationship and nexus between Articles 18 and 25 of the VCLT require further investigation. The remaining part of this section examines the following unsettled issues in turn: (A) whether Articles 18 and 25 of the VCLT are mutually exclusive in their application, thus precluding the application of Article 18 in relation to a provisionally applied treaty;[48] and (B) what role Article 25 can play in informing the content of Article 18.

A. Sphere of Application: Mutually Exclusive?

The purpose of Article 18 of the VCLT is to provide a minimum safeguard aimed at protecting the integrity and future relevance of pending treaties. As soon as the treaty enters into force, its provisions create legally binding obligations for States parties and thus Article 18 of the VCLT is no longer needed and ceases to apply. But how does Article 18 apply in relation to provisionally applied treaties, ie treaties which are not formally in force but are applied *as if they were in force*? This question was not discussed by the ILC in drafting Article 18 of the VCLT and is particularly important in relation to treaties where some, but not all, provisions are applied on a provisional basis. In the case of breach of the provisionally applied provisions, can a State rely on Article 25 to invoke responsibility for the breach of the individual provisions, whilst simultaneously relying on Article 18 in relation to the object and purpose of the pending treaty? Or does the application of Article 25 forestall the application of Article 18 in its entirety because a provisionally applied treaty is applied as if it were in force (meaning that there is no need for the purpose of Article 18)?

[44] Lauterpacht (n 7) 108; Fitzmaurice (n 7) 104, 113; H Waldock, 'First Report on the Law of Treaties', UNYBILC, vol II (1962) UN Doc A/CN.4/SER.A/1962/Add.1, 27, 46.

[45] For instance, through the use of the word 'would'.

[46] Rydberg (n 21).

[47] Michie (n 31) 65.

[48] It is usually the case for a majority of non-proliferation treaties that only part of the relevant treaty is applied provisionally; see ibid 84–6.

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Examples from both treaty practice and judicial decisions suggest that Articles 18 and 25 of the VCLT are not mutually exclusive in their sphere of application but can apply simultaneously to a pending treaty. The Canadian Legal Affairs Bureau made a statement to that effect in relation to the pending 1977 Reciprocal Fisheries Agreement concluded between Canada and the United States (US).[49] While the Parties appeared to have acted as though the Agreement was being applied provisionally, there had been no formal action confirming this, leaving doubt as to whether provisional application had been agreed. However, a Canadian memorandum stated that irrespective of whether there was an implied agreement as to the provisional application of the Agreement, a State which had signed a treaty was in any event obliged to refrain from acts which would defeat the object and purpose of the treaty.[50] This statement implied that Article 18 would apply regardless of whether or not a pending treaty had been provisionally applied under Article 25 of the VCLT.[51]

In 2010, the European Union (EU) and the US agreed to apply the Agreement between the EU and the US on the Processing and Transfer of Financial Messaging Data (TFTP Interim Agreement) on a provisional basis.[52] Opposing certain procedural and substantive aspects of the agreement, the European Parliament requested a two-week suspension of its provisional application as the Parliament had not yet voted on the text of the agreement.[53] In response, the Council of the EU stated in a letter that: '[a]s a result of the signature of the TFTP Interim Agreement the Contracting Parties are obliged to refrain from acts that would defeat the object and purpose of the Agreement. It is therefore impossible to suspend the provisional application …'[54] It is doubtful whether the mere suspension of the provisional application of treaties would amount to defeating the object and purpose of that treaty, because in practice that would mean that States could never terminate the provisional application of a treaty without simultaneously thwarting its object and purpose, which seems to fall short of the threshold envisaged by Article 18 of the VCLT. That said, it can be inferred from the Council's reasoning that Article 18 would apply to a treaty which is being applied on a provisional basis under Article 25 of the VCLT.[55]

[49] MD Copithorne, 'Canadian Practice in International Law' (1978) 16 ACDI 359, 366–7. The Legal Affairs Bureau is part of the Canadian Department of Justice, which has the mandate to support the dual roles of the Minister of Justice and the Attorney General of Canada. The Treaty Law Division of the Department of Foreign Affairs and International Trade is part of the Legal Affairs Bureau.

[50] ibid. For the original analysis, see Quast Mertsch (n 8) 316.

[51] Advanced by Quast Mertsch ibid 316.

[52] Agreement between the EU and the US on the Processing and Transfer of Financial Messaging Data from the EU to the US for Purposes of the Terrorist Finance Tracking Program [2010] OJ L8/11.

[53] Letter from the President of the European Parliament to the President-in-Office of the Council of the European Union, 21 January 2010.

[54] Letter from the President-in-Office of the Council of the European Union to the President of the European Parliament PE 438.722/CPG/REP.

[55] Guidance can also be inferred from the International Court of Justice (ICJ) in the *Military and Paramilitary Activities in and against Nicaragua* case, where the Court found that the US had an obligation both to perform the specific stipulations of the treaty and simultaneously refrain from conduct which would defeat the object and purpose of the same treaty (which was in force); see *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (Judgment) [1986] ICJ Rep 14, 138.

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A further interesting example pertains to the Chemical Weapons Convention (CWC).[56] Article VIII of the CWC established the Organisation for the Prohibition of Chemical Weapons (OPCW). The negotiating States decided to establish a Preparatory Commission,[57] comprising all signatory States, to undertake the necessary groundwork prior to the entry into force of the CWC. This was to facilitate its entry into force, generate trust in the system, guarantee compliance once in force, and to realise the verification regime established by the treaty. It has been argued that:

> [h]ad the Preparatory Commission not been set up, the various preparatory tasks entrusted to it would of necessity have been performed by the OPCW itself. Viewed from this perspective, the conclusion is inescapable that the Text establishing the Commission amounted to an implied agreement on the provisional application of parts of the CWC dealing with certain functions and responsibilities of the future OPCW.[58]

It inevitably meant that all signatories to the CWC were under complementary obligations during the interim period between signature and entry into force. The first obligation was to refrain from acts which would defeat the object and purpose of the CWC. It has been argued that '[t]his obligation … requires states actually to observe most of the basic prohibitions of conduct contained in article I, paragraph I, of the convention, including the obligations not to develop, produce, otherwise acquire, transfer or use chemical weapons'.[59] The States signatories were also under a second interim obligation to carry out the preparations foreseen in the Text establishing the Commission, which in many instances amounted to the provisional application of certain provisions of the CWC.[60]

Accordingly, Article 18 of the VCLT does not form a *lex generalis* regime *vis-à-vis* Article 25 of the VCLT, but a State which applies a treaty on a provisional basis is under the dual obligation: (a) to perform the provisions that are subject to provisional application; and (b) to refrain from conduct which would defeat the object and purpose of the treaty.[61] It is not plausible that a State would be able to apply part of the treaty, or the whole of a treaty, provisionally, yet not be obliged, in good faith, not to defeat the object and purpose of the treaty as a whole. A State can therefore rely on both Articles 18 and 25 of the VCLT in establishing responsibility for breach. Naturally, it might be more pertinent to apply Article 18 of the VCLT to a provisionally applied treaty when only part of the treaty is subject to provisional application. If a treaty is subject to provisional application in its entirety, the treaty is applied as though it is in force, and a State is accordingly obliged to perform the treaty in good faith.[62] If a State breaches any of the provisions of the pending treaty, responsibility would be established on the basis of the breached treaty. It would thus be likely to be superfluous to also establish a breach of Article 18 of the VCLT in relation to

[56] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992, entered into force 29 April 1997) 1975 UNTS 45 (CWC).

[57] Resolution Establishing the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons, Paris, 13 January 1993; see Michie (n 10) 365.

[58] ibid 366.

[59] ibid. See also J Klabbers, 'Strange Bedfellows: The "Interim Obligation" and the 1993 Chemical Weapons Convention' in EPJ Myjer (ed), *Issues of Arms Control Law and the Chemical Weapons Convention: Obligations Inter Se and Supervisory Mechanisms* (Kluwer 2001) 12.

[60] Michie (n 10) 366.

[61] Klabbers (n 59) 14.

[62] VCLT (n 6) art 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

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the breached treaty (should the threshold of defeating the object and purpose of the treaty be met).

In other words, the application of Article 18 to provisionally applied treaties and the ensuing dual obligation to perform the provisions subject to provisional application and to refrain from conduct which would defeat the object and purpose of the treaty is a special case. Normally, when a pending treaty is not subject to provisional application, Article 18 creates a minimum safeguard: the treaty is not yet in force and a State has no responsibility to comply with the individual provisions. Thus, in the case of conduct defeating the object and purpose of the pending treaty, responsibility would be established based on a breach of Article 18 of the VCLT only, but the wrongdoing State does not breach the pending treaty itself. In contrast, in relation to provisionally applied treaties, responsibility could be established both on the basis of Article 18 of the VCLT and the individual treaty provisions subject to provisional application.

To exemplify, when the US was still a signatory to the Rome Statute of the International Criminal Court,[63] it sought to conclude several bilateral non-surrender agreements with other States signatories or parties to the Rome Statute, called 'Article 98 Agreements'. These agreements prevented States from surrendering or transferring any requested US national to the International Criminal Court (ICC) for any purpose, including being tried for committing crimes within the jurisdiction of the ICC.[64] Because the ICC is not competent to try individuals *in absentia*, Article 98 agreements thus thwarted the ICC in its principal tasks of ending impunity for grave crimes and effectively prosecuting perpetrators of serious crimes through means of enhanced international cooperation.[65]

Before it 'unsigned' the Rome Statute, the US was in breach of Article 18 of the VCLT for defeating the object and purpose of the treaty. If the US had also applied the Rome Statute on a provisional basis, its conduct could simultaneously have given rise to a violation of individual provisions of the Rome Statute, such as Article 86, which contains an obligation to cooperate fully with the ICC in its investigation and prosecution of crimes and to comply with requests for surrender. In the latter circumstance, responsibility would be established on two grounds: (a) on the basis of Article 18 of the VCLT; and (b) on the basis of individual treaty provisions subject to provisional application.

B. Role of Article 25 of the VCLT in Informing the Content of Article 18 of the VCLT

As both Articles 18 and 25 of the VCLT can apply in relation to provisionally applied treaties, this poses the question of whether the breach of a provisionally applied treaty can inform the assessment of whether a State has also breached Article 18 of the VCLT. For instance, in the context of arms control treaties, the provisions subject to provisional

[63] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 91.

[64] U.S. Department of State, 'U.S. Signs 100th Article 98 Agreement' (Press Statement, 3 May 2005) <https://2001-2009.state.gov/r/pa/prs/ps/2005/45573.htm>.

[65] See also *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute*, joint legal opinion by J Crawford, P Sands and R Wilde, 16 June 2003, paras 53–55.

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application typically include the 'core provisions' of the pending treaty. Such 'core' provisions often give expression to the treaty's object and purpose. Does a State's violation of a treaty's core provisions *ipso facto* give rise to a violation of Article 18 of the VCLT? If so, the treaty provisions applied provisionally on the basis of Article 25 would inform the content and interpretation of Article 18 of the VCLT. International courts and tribunals have identified a treaty's object and purpose by considering introductory provisions which point to the treaty's principal theme and objective—such as Article 1 of the United Nations (UN) Charter—together with the terms of the treaty in their context, in particular its title and preamble.[66] Recourse may also be had to the preparatory work of the treaty, the circumstances of its conclusion, and subsequent practice of State parties.[67] In a similar vein, where only certain core provisions are subject to provisional application, these may shine a light on what may be considered the object and purpose of the treaty.

The Arms Trade Treaty is an interesting example demonstrating the link between provisional application and the object and purpose of a treaty. Article 23 stipulates that: 'Any State may at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State'.[68]

Article 7 on export and export assessment of weapons is, as Special Rapporteur Gómez-Robledo has noted, 'at the core of the Treaty, being directly linked with its object or purpose'.[69] Another example is found in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.[70] Article 1(1) of the Convention—equipping the treaty with its principal theme and objective—stipulates that States parties may never use anti-personnel mines; develop, produce, otherwise acquire, stockpile, retain or transfer anti-personnel mines; or assist, encourage or induce anyone to engage in any such prohibited activity. It is also referenced in Article 18 of the Convention which provides for the provisional application of part of the treaty, supporting the link between provisional application and the 'core' of a treaty, pointing to object and purpose: 'Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply

[66] See, eg, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226; *Dispute Concerning Article 9 of the OSPAR Convention (Ireland v United Kingdom of Great Britain and Northern Ireland)*, PCA Case No 200-03, Final Award (2 July 2003) paras 125–129; *Military and Paramilitary Activities in and against Nicaragua* (n 55) para 275; *Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*) (Judgment) [1994] ICJ Rep 6, para 55; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 179, para 109; *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15.

[67] Guideline 3.1.5.1, Guide to Practice on Reservations, adopted by the ILC at its Sixty-Third Session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, para 75. The report appears in *Yearbook of the International Law Commission* (2011) UN Doc A/CN.4/SER.A/2011/Add.1, vol II, Part Two.

[68] Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 269.

[69] See JM Gómez-Robledo, Special Rapporteur, 'Fourth Report on the Provisional Application of Treaties' (23 June 2016) UN Doc A/CN.4/699, para 84.

[70] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

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provisionally paragraph 1 of Article 1 of this Convention pending its entry into force'.[71]

Returning to the question above, would a violation of a provisionally applied provision like Article 7 of the Arms Trade Treaty or Article 1(1) of the Anti-Personnel Convention simultaneously violate Article 18 so that Article 25 would steer the application and content of Article 18 of the VCLT in relation to that specific treaty? Michie does not rule this out:

> a signatory's breach of an essential provision that it is applying provisionally [for example Article 1(1) of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction] … could conceivably upset the entire pact. … [A] breach of this kind *may* also involve a violation of the signatory's duty to refrain from acts which would defeat the object and purpose of the treaty before its entry into force.[72]

However, according to its explicit language, Article 18 does not restrict the identification of the object and purpose to individual treaty provisions. The object and purpose of a treaty thus cannot schematically be equated to 'core' or 'essential' parts of a treaty as it is a much broader, fluid and flexible notion which can encompass more than the core provisions of a treaty. At the same time, 'core' provisions are often linked to the accomplishment of the object or purpose of the treaty.[73] When this is the case, a violation of a core provision might be sufficiently severe to thwart the very *raison d'être* of the treaty. Thus, while not inevitable, a violation of a 'core provision' subject to provisional application may simultaneously entail a violation of the interim obligation under Article 18. The examples of Article 7 of the Arms Trade Treaty and Article 1(1) of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction are evidence of such potential. Article 25 can thus supplement or reinforce Article 18 and 'fulfill a purpose as a confidence-building measure promoting trust among signatory States',[74] but it does not interfere with the very application of Article 18 of the VCLT to the object and purpose of the treaty as a whole. It can inform the assessment of whether there has been a breach of Article 18, but it is clear that it cannot limit the scope of Article 18.

V. HOW THE TERMINATION OF A TREATY'S PROVISIONAL APPLICATION AFFECTS ARTICLE 18 OF THE VCLT

Under both Articles 18 and 25 of the VCLT, a State can terminate the provisional application of a treaty and its duty not to defeat the object and purpose of a pending treaty by declaring its intention not to become a party to the treaty.[75] This raises the following question: does a State, when terminating the provisional application of a

[71] ibid, art 18.

[72] Michie (n 10) 355–62 (emphasis added).

[73] See, eg, VCLT (n 6) art 60.

[74] Krieger (n 25) 443.

[75] The provisional application of a treaty would also terminate upon the treaty's entry into force with respect to a State previously having applied it provisionally. The treaty itself can also specify when and how provisional application would terminate, and the States in question can also agree on this between themselves, for instance through mutual agreement. Given the similar formulations in 'making the intention clear not to become a party' under arts 18 and 25 of the VCLT, this article only seeks to examine the broader consequences (sometimes unintended) of terminating provisional application by making the intention clear not to become a party to the treaty as any other way of terminating provisional application would have no effect on art 18 of the VCLT.

https://doi.org/10.1017/S0020589324000289 Published online by Cambridge University Press

treaty under Article 25(2) of the VCLT by making its intention clear not to become a party to the treaty, also terminate its obligations under Article 18(a) of the VCLT?

The main difference between the formulations in Articles 18 and 25 lies in the way in which the intention not to become a party ought to be communicated. Article 25 requires that the State terminating the provisional application must *notify* 'the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty'.[76] According to Article 18, the terminating State merely needs to make its 'intention clear' not to become a party to the treaty.[77] Is the 'notification of an intention not to become a party to the treaty' *ipso facto* tantamount to 'making an intention clear not to become party to the treaty'? The following Section V(A) elucidates how States can make their intention clear not to become a party to a pending treaty under Article 18(a) of the VCLT. Subsequently, Section V(B) examines how States must communicate their intention not to become a party under Article 25(2) of the VCLT. Section V(C) explores if and under what circumstances the latter communication also terminates the interim obligation under Article 18(a) of the VCLT.

A. Clear Intention Not to Become a Party Under Article 18(a) of the VCLT

Article 18 does not prescribe how a State should make its intention clear not to become a party to the signed treaty. The issue was not subject to much discussion during the drafting procedure, although the French delegation at the first Vienna Diplomatic Conference stated that the most obvious way for a State to make clear its intention not to become a party to the treaty was precisely by defeating its object and purpose.[78] However, such an approach was heavily criticised for being unworkable in practice, as it would render Article 18 of the VCLT superfluous.[79]

There is little uniform practice amongst States in this regard. The practice of the US—having a long history of signed but unratified treaties—illustrates this.[80] When the Reagan administration announced in 1987 that it had no intention of ratifying the First Additional Protocol to the Geneva Conventions, President Reagan sent a message to the Senate in which he stated that the Protocol was 'fundamentally and irreconcilably flawed', and therefore he would not submit it to the Senate.[81] The US employed more formal means in relation to the Rome Statute of the International Criminal Court. When, in 2002, it wanted to make its intention clear not to become a party to the Rome Statute

[76] VCLT (n 6) art 25(2). [77] ibid, art 18 (a).

[78] United Nations Conference on the Law of Treaties, First Session 26 March–24 May 1968, Nineteenth Meeting of the Committee of the Whole (extract from the *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*) UN Doc A/CONF.39/C.1/SR.19, Statement by the French Delegation, 100, para 45. [79] Dörr (n 7) 251.

[80] CA Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution' (2007) 48 HarvIntlLJ 307, 309. These include: the International Covenant on Economic, Social, and Cultural Rights (signed in 1977); the American Convention on Human Rights (signed in 1977); the Convention on the Elimination of All Forms of Discrimination Against Women (signed in 1980); and the Convention on the Rights of the Child (signed in 1995). They also include important environmental treaties such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed in 1998) and the Rio Convention on Biological Diversity (signed in 1993). [81] Bradley ibid 311.

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(signed in 1999), it sent a formal note to the UN Secretary-General as the treaty depositary.[82] The letter stated that 'the United States does not intend to become a party to the treaty', and that '[a]ccordingly, the United States has no legal obligations arising from its signature'.[83] The same day, an Administration official stated that the Administration's actions were 'consistent with the Vienna Convention on the Law of Treaties' (presumably Article 18(a) of the VCLT).[84] Similarly, in July 2019 the Trump Administration sent a letter to the UN Secretary-General stating 'that the United States does not intend to become a party to the [Arms Trade Treaty]. Accordingly, the United States has no legal obligations arising from its signature on September 25, 2013'.[85]

Although the US notified its intention not to become a party to the Rome Statute and the Arms Trade Treaty in an adequately formal manner, there are inconsistencies in its practice in relation to other treaties. For instance, although the Bush Administration repeatedly expressed opposition to the Kyoto Protocol, it never sent a formal notice to the Secretary-General to renounce it,[86] and several commentators requested an action to this effect.[87] In response to such requests, the Under Secretary of State for Global Affairs, Paula Dobriansky, noted that 'President Bush and this administration have made clear on numerous occasions that the Kyoto Protocol is fatally flawed and that the United States will not participate in it'.[88] She also stated that '[w]e have gone to considerable lengths, internationally, over the past year to make our position with respect to the Kyoto Protocol clear and unambiguous'.[89] It is, however, not clear why the US did not opt for a more formal route to communicate this intention to the treaty depository.

Another interesting yet puzzling example is the US practice in relation to the CTBT, which the US was the first State to sign in 1996. When the US Senate refused to ratify the Treaty in 1999,[90] the US subsequently declared that it had no intention of becoming a party to the treaty. It did so by having the Secretary of State, Madeleine Albright, send a letter to several—but not all—signatory States, including to China and Russia.[91] However, in the letter, Albright also wrote that 'I want to assure you that the United States will continue to act in accordance with its obligations as a signatory under international law'.[92] Moreover, the US stayed a member of the Preparatory Commission, which sought to promote the entry into force, as well as the provisional application, of the CTBT.[93]

Although the US declared that it did not intend to ratify the treaty, it is questionable whether it also intended to terminate its obligations under Article 18(a), given that it

[82] See Letter from John R. Bolton, Under Secretary for Arms Control and International Security, to UN Secretary General Kofi Annan (U.S. Department of State, 6 May 2002) <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>. [83] ibid.

[84] M Grossman, Under Secretary for Political Affairs, 'Remarks to the Center for Strategic and International Studies' (U.S. Department of State, 6 May 2002) <https://2001-2009.state.gov/p/us/rm/9949.htm>.

[85] 'President Trump "Unsigns" Arms Trade Treaty After Requesting Its Return from the Senate' (2019) 113 AJIL 813, 816. [86] Bradley (n 80) 312. [87] ibid.

[88] Letter from Paula Dobriansky, Under Secretary for Global Affairs, U.S. Department of State, to Christopher C. Horner, Counsel, Cooler Heads Coalition (14 May 2002). [89] ibid.

[90] By 51 votes to 48.

[91] See M Asada, 'Article 18 (VCLT) Obligations and the CTBT' in T Dunworth and A Hood (eds), *Disarmament Law: Reviving the Field* (Routledge 2020).

[92] See Asada ibid; 'The Imperial Presidency' *Washington Times* (Washington, DC, 5 November 1999). [93] See Michie (n 10) 369–70.

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seemed to reaffirm its commitments as a signatory to the CTBT. Even if the intention not to ratify was also intended to extinguish its obligations under Article 18(a), it is doubtful whether the US expressed its intention in a sufficiently clear manner. By remaining a member of the Preparatory Commission, it appears that the US demonstrated its commitment to promoting the entry into force of the treaty, especially given the fact that the US is one of the listed States in Annex 2 to the Treaty.[94] By only sending a letter to some, but not all, contracting or signatory States, and also omitting to send a letter to the treaty depositary, it is doubtful that the other States were made aware of the intention of the US. Were the statements sufficiently clear and unambiguous to terminate the interim obligation of the US under Article 18(a) of the VCLT? A better approach would have been to notify all the other signatory and contracting States, or, at the very minimum, the treaty depositary, just as it did in relation to the Rome Statute and the Arms Trade Treaty.

Sending a formal note to the treaty depositary as a means of making an intention clear not to become a party to a treaty has been embraced by some other States. Sudan, having signed the Rome Statute of the International Criminal Court on 8 September 2000, wanted to make clear its intention not to become a party to the treaty and communicated a notification to the UN Secretary-General, as the treaty depositary, to this effect on 26 August 2008. Sudan wrote that 'Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000'.[95] Indeed, it appears that the preferable practice for a State to make its intention clear not to become a party to a treaty is to send a formal notification to the treaty depositary. It would then, in theory, be the duty of the depositary to communicate this notification to other contracting and signatory States,[96] and the interim obligation under Article 18(a) would cease to apply on the date of deposit of such notification, not on the date it was communicated to other States.[97]

A State may of course itself notify all other signatory or contracting States of its intention not to become a party to the treaty, although this might only be a practical option for treaties involving a limited number of States parties or signatories. A State can also make public declarations to this effect, as was done by President Putin when he declared that the Russian Federation would not become a party to the 1993 Treaty between the US and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms (START II).[98] According to a statement issued by the foreign ministry,

> the USA refused to ratify the START II Treaty … . Moreover, on June 13, 2002, the United States withdrew from the ABM [Anti-Ballistic Missile] Treaty, with the result that this international legal act, which served for three decades as the cornerstone of strategic

[94] Annex 2 to the CTBT (n 4) lists 44 States that must ratify the Treaty in order for it to enter into force, and the US is one of those States.

[95] Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations, vol 2533, No 45203 (2008) 266 <https://treaties.un.org/doc/Publication/UNTS/Volume%202533/v2533.pdf>.

[96] Under VCLT (n 6) arts 78 and 79, the duties of the depositary include communicating such relevant information to States parties and States entitled to become parties.

[97] See *Case Concerning Right of Passage over Indian Territory* (Preliminary Objections) (Judgment) [1957] ICJ Rep 125, 146; *Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) (Judgment) [1998] ICJ Rep 275, 293.

[98] For the original analysis, see Michie (n 10).

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> stability, has ceased to be in force. Taking into account the aforesaid actions of the USA … the Russian Federation notes the absence of any prerequisites for the entry of the START II Treaty into force, and does not consider itself bound any longer by the obligation under international law to refrain from any actions which could deprive this Treaty of its object and goal.[99]

Other means of making clear an intention not to become a party to the treaty are possible with one important caveat: such intention must be communicated with some degree of formality and through a sufficiently public channel. Since the State has, by signing the treaty, expressed its acceptance of the treaty in a formal manner, the State should likewise express its intention not to become a party to the treaty in a similar fashion.[100] The requirements of formality and publicity are necessary for matters of legal certainty, reliability, and predictability in international law.[101] Informal means, such as implied conduct, could satisfy the requirements of formality and publicity if the intention is demonstrated in an open, public and unambiguous manner. If the intention is not publicly given but is implied through conduct exclusively taking place on an internal level, it is doubtful whether other contracting or signatory States ought reasonably to be aware of this intention.[102] It is for this reason that merely acting in conflict with Article 18 and defeating the object and purpose of the pending treaty is not sufficient to indicate a clear intention not to become a party.

Thus, in terminating the interim obligation under Article 18(a) in a sufficiently clear and unambiguous manner in order to avoid the uncertainties associated with implicit conduct, good treaty practice suggests that a State should notify the other signatory and contracting States of its intention not to become a party to the treaty, either through the depositary or by communicating it to each relevant State. As will be seen in the next section, this renders the essence of the conditions for termination of Articles 18 and 25 close to analogous.

B. Communication of Intention Not to Become a Party Under Article 25(2) of the VCLT

The means of communicating the intention not to become a party under Article 25(2) of the VCLT varies slightly from that of Article 18(a) of the VCLT. As Article 25(2) provides, a State should 'notify all the other States between which the treaty is being applied provisionally' of its intention not to become a party to the treaty. Therefore, a State which may have signed or even consented to be bound by the treaty but does not apply it provisionally does not need to be notified. Accordingly, the wording of Article 25(2) of the VCLT seems to suggest a narrower circle of addressees than Article 18(a) of the VCLT, which requires the intention to be made clear to both

[99] Russian foreign ministry statement. On Legal Status of the Treaty between Russia and the USA on Further Reduction and Limitation of Strategic Offensive Arms (14 June 2002) 1221.

[100] Dörr (n 7) 251; *North Sea Continental Shelf Cases (Germany v Denmark/Germany v the Netherlands)* (Judgment) [1969] ICJ Rep 3, 219, 233–5, Dissenting Opinion of Judge Lachs.

[101] Dörr ibid 251; *North Sea Continental Shelf Cases* ibid.

[102] Only under certain very narrowly defined circumstances would implied conduct be sufficient to express such intention and it has to be stated in an open and unambiguous manner. One example might include, although it remains problematic as noted above, the practice of the US in relation to the Kyoto Protocol. However, this is only because of the open and public nature of certain statements and because the Bush administration repeatedly expressed opposition to the treaty with the view of making its position with respect to the Kyoto Protocol clear and unambiguous on the international stage.

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signatory and contracting States, irrespective of whether the treaty is in force, not in force or applied on a provisional basis.

However, the ILC's commentary to Guideline 9 on the Provisional Application of Treaties (capturing the gist of Article 25(2)) suggests a wider scope of addressees. It refers to notifying the intention not to become a party to the treaty to all 'other States … concerned'.[103] This comprises States between which a treaty is, or can be, provisionally applied, and all States that have expressed their consent to be bound to the treaty, irrespective of whether the treaty is in force or not.[104] To exemplify, if a treaty requires a State's signature to allow for provisional application, the commentary to Guideline 9 seems to require the notification of the intention not to become a party to be communicated to all signatory and contracting States. Thus, in some circumstances, Article 25(2) can provide for the same scope of addressees as Article 18(a) of the VCLT.

C. Impact of the Termination of a Provisionally Applied Treaty on Article 18(a) of the VCLT

Having examined how a State can terminate its obligations under Articles 18 and 25 of the VCLT in the two preceding sections, the question posed at the beginning of this section can now be addressed: does a valid notification of termination under Article 25(2) of the VCLT also end the applicability of Article 18(a) of the VCLT? In other words, does the expression of intention not to become a party under Article 25(2) also amount to an 'unsigning' of the treaty, or does it leave the signature intact? This is not addressed by the VCLT itself. Neither the *travaux préparatoires* [105] nor the ILC Guide on Provisional Application offer much guidance on the question. In his second report on the Provisional Application of Treaties, the Special Rapporteur merely stressed that nothing in the VCLT prevents a State from terminating the provisional application of a treaty by notifying its intention not to become a party and subsequently rejoining the treaty regime through ratification or accession. The Special Rapporteur did not specify whether the termination of provisional application also had the result of 'unsigning' the treaty under Article 18.[106]

Given the similar formulations of Article 18(a) and Article 25(2) of the VCLT, it would seem logical to presume that the termination of the provisional application

[103] ILC Guideline 9(2) reads as follows: 'Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty.' See ILC Guidelines (n 40) 63.

[104] ILC Guidelines ibid 94, para 6 of the commentary to Guideline 9. See also Azzaria (n 9) 253.

[105] According to the Chairman of the Drafting Committee at the First Session of the Vienna Conference of the Law of Treaties, the text of today's art 25(2) of the VCLT was, inter alia, based on an amendment by Belgium; see Seventy-Second Meeting of the Committee of the Whole (15 May 1968) UN Doc A/CONF.39/C.1/SR.72, 427, para 27. The Belgian delegate emphasised the fact that this formulation was based on the terms employed in today's art 18 of the VCLT; see United Nations Conference on the Law of Treaties, First Session 26 March–24 May 1968, Twenty-Sixth Meeting of the Committee of the Whole (extract from the *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*) UN Doc A/CONF.39/C.1/SR.26, Statement by the Belgian Delegation, 142, para 42.

[106] Second Report on the Provisional Application of Treaties (n 19) para 78.

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pursuant to Article 25(2) also includes 'unsigning' the treaty under Article 18(a) of the VCLT, mainly because both provisions are based on the same fact, ie the intention of the State in question 'not to become a party to the treaty'. This is, of course, unless the State terminating provisional application explicitly declares that the termination shall not have the effect of removing its obligations under Article 18(a) of the VCLT.

The following example demonstrates the possibility that terminating the provisional application of a treaty even by notification of an intention not to become a party does not necessarily amount to an 'unsigning' of the treaty. Swiss legislation (Article 7(b)(2) of the Government and Administration Organisation Act) protecting parliamentary competences in relation to the conclusion of treaties provides that the 'provisional application of an international treaty ends if the Federal Council fails to present the Federal Assembly with a draft of a federal decree on the treaty in question within six months'. Therefore, under Article 7(b)(s), Switzerland could find itself in a position of having to withdraw the provisional application of a treaty because the deadlines provided for in that provision cannot be met, even if it still wanted to become a party to the treaty eventually. In such situations, termination of provisional application need not be linked to 'unsigning' pursuant to Article 18(a) of the VCLT: as the decision on ratification has not actually been rejected, the signature of the treaty would not have to be 'withdrawn'.

In contrast, where provisional application of a treaty is terminated because the ratification of that treaty has been rejected by Parliament, the Federal Council would have to inform other States of the termination of the provisional application and also that Switzerland will not become a party to the treaty. There has been (at least) one case where the ratification of a bilateral treaty provisionally applied by Switzerland was rejected by Parliament. Because this rejection was the final decision not only on the provisional application, but on Switzerland ratifying the treaty, the Federal Council had to inform the other State that provisional application was terminated and, at the same time, that Switzerland was not able to become a party to the treaty. This particular scenario explicitly links the termination of provisional application and 'unsigning' pursuant to Article 18(a) of the VCLT. Thus, interpretation of the intent and circumstances are key to determining the precise effect of such a notification.

The practice of States regarding the ECT also sheds light on whether a notification of intention not to become a party also terminates the obligation under Article 18 of the VCLT. Article 45(3) of the ECT provides that provisional application may be terminated 'by written notification to the Depositary of its intention not to ratify, accept or approve this Amendment', with effect being given to the termination 60 days from the depository's receipt of the written notification. Both Australia and Russia signed the ECT and applied it provisionally until depositing their declaration of intention not to become a contracting party.[107] In its notification, Australia declared that it did not consider itself bound, provisionally or otherwise, by any provisions of the ECT upon the expiration of the notice period,[108] but it did not specify whether its intention was also to terminate the effect of Article 18(a) in relation to the ECT.

[107] Australia signed on 17 December 1994 and deposited its declaration on 15 October 2021. Russia signed on 17 December 1994 and deposited its declaration on 20 August 2009.

[108] See communication by The Director of the Department of Legal Affairs, Government of Portugal (ECT Depositary) to the Secretary-General of the Energy Charter Conference Secretariat (6 December 2021) Ref 144696/2021.

https://doi.org/10.1017/S0020589324000289 Published online by Cambridge University Press

It is clear that neither Australia nor Russia is bound by the provisions of the ECT, provisionally or otherwise. However, the question remains whether Australia and Russia are bound by the interim obligation under Article 18(a) to refrain from acts which would defeat the object and purpose of the ECT. The most straightforward answer can perhaps be found in the fact that neither Australia nor Russia is listed as signatories to the ECT.[109] It therefore appears that the treaty depository treated termination of provisional application as equalling 'unsigning' of the ECT.

However, Australia and Russia are still listed as signatories to the 1991 Energy Charter, which provides the political foundation for the whole Energy Charter Process. The Charter—as a political declaration—is a concise expression of the principles that should underpin international energy cooperation, based on a shared interest in secure energy supply and sustainable economic development, and all signatories are Observers to the Energy Charter Conference.[110] What effect does the continued participation in the Charter process have in terms of blurring a State's 'clear' intention not to become a party to the ECT for the purposes of Article 18(a) of the VCLT? As noted above, when the US 'unsigned' the CTBT but simultaneously announced its commitment and continued membership of the CTBT Preparatory Commission, it muddied the waters and thus did not make it clear for the purposes of Article 18(a) that it intended not to become a party to the CTBT. Thus, hypothetically speaking, if Australia and Russia had stayed active members in the Charter process (which they did not), it would suggest that the notification of intention not to become a party under Article 25(2) did not also terminate the effect of Article 18(a) since their intentions cannot be deemed to have been made sufficiently clear.

There is, however, one important difference between the two States: on 17 April 2018, the Russian Federation officially confirmed to the depository its intention not to be considered as a signatory State to the ECT.[111] The depository would then have communicated this intention to other signatory and contracting States.[112] Thus, from the date of its indication of intention not to become a party, Russia had no obligation under Article 25(5) of the VCLT to comply with the ECT as applied provisionally,[113] and following its indication of intention not to be considered a signatory, Russia also had no obligation under Article 18(a) of the VCLT to refrain from conduct which would defeat the object and purpose of the ECT. However, it remains unclear what Russia's obligations in relation to the ECT were in the period between these two events in 2009 and 2018. If Russia had, for instance, continued to be involved in the

[109] See further, the 'Energy Charter Treaty' (International Energy Charter, 2019) <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>. This can be compared to the situations of Sudan and the US mentioned above, both having made their intentions clear not to become a party to the Rome Statute under art 18(a) of the VCLT. Although having made their intentions clear not to become ICC members, their respective signatures are still listed, albeit with a note on their notifications; see UN Treaty Collection, 'Rome Statute of the International Criminal Court' <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025774&clang=_en>.

[110] See also, I Mironova, 'Russia and the Energy Charter Treaty' (International Energy Charter, 7 August 2014) <https://www.energycharter.org/what-we-do/knowledge-centre/occasional-papers/russia-and-the-energy-charter-treaty/>.

[111] See 'Russian Federation' (International Energy Charter, 2019) <https://www.energycharter.org/who-we-are/members-observers/countries/russian-federation/>.

[112] In accordance with its duties under arts 78 and 79 of the VCLT.

[113] The exception being the investments made within the sunset clause.

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Charter process, it may not have made its intention not to become a party sufficiently clear with respect to Article 18(a) of the VCLT, meaning that it would still have been obliged not to defeat the object and purpose of the ECT in the interim period. What can be drawn from this scenario is that if a State wants to terminate (and avoid doubts concerning) the effect of Article 18(a) of the VCLT when terminating provisional application under Article 25(5) of the VCLT, it should make a clear statement or issue a notification to that effect.[114]

VI. CONCLUSION

Articles 18 and 25 of the VCLT resemble one another in several respects: they are of similar temporal scope; they seek to protect the integrity of pending treaties; and they aim to ensure that the relevant treaty can achieve its intended impact once in force. At the same time, Articles 18 and 25 of the VCLT are fundamentally different. The reason for this is straightforward: there would, of course, be no need for both provisions in the VCLT if they were identical, ie producing the same legal obligation and effect. That said, the two provisions do interact with one another in their spheres of application. The obligation arising from Article 25 of the VCLT can, in certain circumstances, affect the obligation arising from Article 18 of the VCLT. This article has untangled the nexus and relationship between them by examining two aspects of interaction, and in the process has lent clarity to the pre-entry-into-force treaty framework.

First, it demonstrated that Articles 18 and 25 apply concurrently in relation to pending treaties. Irrespective of whether a treaty is applied provisionally as a whole, or only in parts, a State is still obliged to respect the object and purpose of the treaty. Thus, a State which applies a treaty on a provisional basis is under dual and complementary obligations: (a) to perform the provisions that are subject to provisional application; and (b) to refrain from conduct which would defeat the object and purpose of the treaty. Article 18 might be of less relevance practically if a treaty as a whole is applied provisionally, as States are already under the more stringent duty to observe all provisions of the pending treaty, but until the treaty has formally entered into force, Article 18 continues to apply.

Furthermore, Article 25 of the VCLT can in certain circumstances play a role in reinforcing and informing the content of the interim obligation under Article 18 of the VCLT. If a State violates one or several of the treaty's core provisions being applied on a provisional basis which give expression to the treaty's very object and purpose, this will probably also give rise to questions of compliance with the interim obligation under Article 18 of the VCLT, given that the violation of such fundamental provisions is capable of frustrating the entire pact.

[114] Lastly, it should be mentioned that even if a State terminates the provisional application of a treaty, art 18(b) continues to apply if the State has expressed its consent to be bound by the treaty. Art 18(b) cannot be terminated by making an intention clear not to become a party to the treaty, but only under circumstances where the entry into force of the treaty is unduly delayed. Thus, if two or more States have ratified the CTBT and agreed on the provisional application of the treaty or parts thereof, they would still be obliged not to defeat the object and purpose of the CTBT pending its entry into force in the event a State notifies other relevant States of its intention not to become a party to the CTBT. A compelling argument can be made that the entry into force of the CTBT is not unduly delayed; see Rydberg (n 21) Ch 5.

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Second, the article has demonstrated that in terminating the provisional application of a treaty under Article 25(2) of the VCLT by notifying the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty, a State does not necessarily also terminate the application of Article 18(a) of the VCLT. Instead, the issue ultimately concerns the interpretation of the intent of the terminating State and whether the intent to terminate also the obligation under Article 18(a) of the VCLT was made sufficiently clear and unambiguous to the relevant States, which includes other contracting and signatory States in addition to the States between which a treaty is applied provisionally. Preferably, for reasons of legal certainty and transparency, a State should specify—when terminating provisional application—whether it also wishes to terminate the application of Article 18 of the VCLT. If a State terminates a provisionally applied treaty but simultaneously takes an active part in the treaty machinery and framework mechanisms, this may imply that the State has not terminated the interim obligation under Article 18(a) of the VCLT and thus remains bound by the obligation not to defeat the object and purpose of the pending treaty.

In conclusion, while the article has clarified the relationship between Articles 18 and 25 of the VCLT, it has also exposed potential weaknesses and ambiguities within the pre-entry-into-force treaty framework, raising questions about the clarity and effectiveness of these provisions in practice. Although Articles 18 and 25 of the VCLT may have their distinct roles, their effective application and the legal obligations they engender are closely intertwined and must be carefully considered within the context of treaty law in practice in order to avoid uncertainties as to the extent of obligations in relation to pending treaties by which one State may be bound.

ACKNOWLEDGEMENTS

The author would like to express sincere gratitude to Dr Pauline Martini, whose feedback and input were invaluable in the preparation of this article. The insightful comments and suggestions from the reviewers and editors greatly enhanced the quality of this work, and their contributions are deeply appreciated. Any errors or omissions in this article are solely the responsibility of the author.

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