Provisional

**For participants only**

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# International Law Commission

**Sixty-sixth session (second part)**

**Provisional summary record of the 3234th meeting**
Held at the Palais des Nations, Geneva, on Thursday, 31 July 2014, at 10 a.m.

## Contents





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***Present*:**

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| *Chairman*: | Mr. Gevorgian |
| *Members*: | Mr. Al-Marri |
| | Mr. Caflisch |
| | Mr. Candioti |
| | Mr. El-Murtadi |
| | Ms. Escobar Hernández |
| | Mr. Forteau |
| | Mr. Gómez-Robledo |
| | Mr. Hassouna |
| | Mr. Hmoud |
| | Ms. Jacobsson |
| | Mr. Kamto |
| | Mr. Kittichaisaree |
| | Mr. Laraba |
| | Mr. Murase |
| | Mr. Murphy |
| | Mr. Niehaus |
| | Mr. Nolte |
| | Mr. Park |
| | Mr. Peter |
| | Mr. Petrič |
| | Mr. Saboia |
| | Mr. Singh |
| | Mr. Šturma |
| | Mr. Tladi |
| | Mr. Valencia-Ospina |
| | Mr. Vázquez-Bermúdez |
| | Mr. Wisnumurti |
| | Sir Michael Wood |

***Secretariat*:**

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| Mr. Korontzis | Secretary to the Commission |

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

**Provisional application of treaties** (agenda item 8) (*continued*) (A/CN.4/675)

**The Chairman** invited the Special Rapporteur on the provisional application of treaties to summarize the debate on his second report.

**Mr. Gómez-Robledo** (Special Rapporteur) said that the richness of the debates had confirmed the relevance of the topic. The Commission could provide considerable assistance to States by clarifying the scope of the legal effects produced by the provisional application of treaties. In order to do so, the Commission should, as pointed out by Sir Michael Wood, take a clear position that, subject to anything specific in the treaty, the rights and obligations of a State that had agreed to apply a treaty or part thereof provisionally were the same as if the treaty were in force. As most members appeared to agree, it followed that a breach of an obligation arising from the provisional application of a treaty entailed the international responsibility of the State. Mr. Forteau, referring to article 13 of the draft articles on responsibility of States for internationally wrongful acts, had recalled that there was no breach of an obligation unless the State was "bound by the obligation in question at the time the act occurs", the objective of that provision being to codify non-retroactivity for the purpose of international responsibility. It was therefore the obligation that must be in force, and it would be, by virtue of the provisional application of the treaty, even if the treaty itself had not entered into force. Similarly, as pointed out by Mr. Šturma, citing article 12 of the same draft articles, a breach of an international obligation engaged the responsibility of the State "regardless of its origin or character". The term "origin" referred to all possible sources of international obligations, i.e. all methods of creating legal obligations permitted under international law. In summary, clauses providing for the provisional application of a treaty produced legal effects and created obligations for a State, which would be internationally responsible if it failed to comply with them.

On the subject of methodology, he wished to point out that he had sought to list the various situations in which States had recourse to provisional application, but that the list was not intended to be exhaustive. His aim was to ensure that the issue, which had been somewhat neglected in the *travaux préparatoires* for the Vienna Convention and on which there was little in practice, doctrine and case law, was handled systematically. However, he would follow an inductive rather than a deductive approach, as recommended by Mr. Forteau and Sir Michael Wood. Several members had stressed the relationship between article 25 of the Vienna Convention and other articles of that treaty, particularly between the provisional application of a treaty and the formulation of reservations. That issue would be examined in the third report. Another important point that had aroused considerable interest was provisional application through a unilateral act.

He acknowledged that a State could only unilaterally decide to provisionally apply a treaty in full or in part if the treaty in question provided for that possibility or if the States that had participated in negotiating the treaty had in some other manner so agreed, as noted in paragraph 33 of the report. That said, even if the States that had negotiated the treaty had provided for the possibility of provisional application, legal obligations and effects arose only from the time when the provisional application clause had been negotiated and not when the State unilaterally decided to provisionally apply the treaty – except in cases involving two or more States. He referred to that time-lag in the report; it was therefore clear that provisional application must have been provided for by the negotiators or otherwise agreed in order for States to be able to unilaterally decide to provisionally apply a treaty.

However, situations that did not meet those strict criteria could arise in practice, one example being the accession of the Syrian Arab Republic to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons

and on Their Destruction. Of course that case was an exception, as had rightly been pointed out by Ms. Jacobsson, but there was nothing to indicate that it would not happen again in the future or that other similarly exceptional cases would not arise. Accordingly, a State that had not signed a treaty could decide to provisionally apply it even though the text contained no provision to that effect. Should the States parties to the treaty prevent that State from doing so? Should the depositary prevent such situations or intervene when they arose? In that regard, the analysis of unilateral declarations contained in the report was relevant. The Commission should recognize that exceptional situations could arise and that in such cases a lack of opposition and the agreement of the States parties to the provisionally applied treaty should be given considerable weight. For that reason, although the particular case of the Syrian Arab Republic had not been reflected in a draft guideline, the debate on the question of unilateral declarations was worthwhile. The Commission should also bear in mind that most multilateral treaties supported universality and that States parties to such treaties generally looked favourably on their provisional application by States that were not parties to the treaty, which reinforced the treaty. In any case, the Commission could consider the issue of the importance of consent in the context of such "agreement of the parties" or, as had been proposed by Mr. Forteau, the practice of depositaries.

The provisional application of treaties raised issues of domestic law and, clearly, issues of international law. The debates at the current and previous sessions had shown that members generally agreed that the Commission should refrain from doing a comparative analysis of States' domestic legislation. He agreed with Mr. Murphy that the provisional application of the Arms Trade Treaty gave rise to international obligations for the States concerned, in accordance with article 23 of the Treaty. He had simply wished to indicate in paragraph 58 of the report that, given that national authorities had to fulfil the obligations provided for under articles 6 and 7 in the domestic sphere, the specific consequences of the provisional application of that Treaty were primarily domestic. Other members had argued that the provisions of article 46, paragraph 1, of the Vienna Convention on the Law of Treaties should not be overlooked; Mr. Kamto had stressed that the relationship between that article and article 27 of the Convention should be taken into account and that the aspects of domestic law that had an impact at the international level should not be discarded at the outset. It was that very relationship that was addressed in paragraph 19 of the report, and the aspects of domestic law relating to provisional application would be considered if they had an impact at the international level.

Lastly, with regard to future work on the topic, it was clear from the debate that it was necessary to examine the regime applicable to treaties concluded between States and international organizations and treaties concluded between international organizations as well as the articles of the Vienna Convention of relevance to the provisional applications of treaties – not only those concerning termination of provisional application. For instance, Mr. Kamto had said that consideration should be given to the provisions of article 24, paragraph 4, which were applicable from the time of the adoption of the text and thus before any action related to provisional application. In conclusion, he said that he would endeavour to promptly prepare draft guidelines or conclusions, as recommended by some members.

**Programme, procedures and working methods of the Commission and its documentation** (agenda item 12) (*continued*)

*Report of the Planning Group* (A/CN.4/L.849)

**Mr. Murase** (Chairman of the Planning Group) said that the Group, which had held three meetings, had had before it Section I of the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-eighth session entitled "Other decisions and conclusions of the Commission"; General Assembly resolution

68/112 of 16 December 2013 on the Report of the International Law Commission on the work of its sixty-fifth session; General Assembly resolution 68/116 of 16 December 2013 on the rule of law at the national and international levels; and the part of the proposed strategic framework for the period 2016–2017 (A/69/6) covering "Programme 6: Legal affairs". The Working Group on the Long-Term Programme of Work, which had been reconstituted for the current session, had recommended including the topic of *jus cogens* in the long-term programme of work on the basis of the proposal prepared by Mr. Tladi. The Planning Group had endorsed that recommendation and also recommended that the Commission should request the secretariat to draw up a list of possible topics together with brief explanatory notes on the basis of the general scheme of topics established in 1996. The Commission might wish to examine the list, on the understanding that extensive syllabuses on the list of topics prepared by the secretariat would be developed only once the Working Group on the Long-Term Programme of Work had drawn up a final list of topics, possibly in 2016. In the meantime, the Working Group would continue to consider any topics that the members might propose.

At the request of the General Assembly, the Planning Group had drafted a chapter on the rule of law at the national and international levels. Lastly, he recommended that the sixty-seventh session of the Commission should be held in Geneva from 4 May to 5 June and 6 July to 7 August 2015 and that the Commission should examine several topics during the first part of the session, particularly the identification of customary international law and protection of the atmosphere.

**Mr. Kamto** said that the Commission might wish to consider organizing a seminar on its work in 2017 to mark its seventieth anniversary.

After a discussion in which **Mr. Hassouna**, **Mr. Niehaus**, **Mr. Murphy**, **Mr. Candioti**, **Mr. Kamto**, **Mr. Valencia-Ospina**, **Mr. Petrič**, **Mr. Kittichaisaree**, **Mr. Al-Marri**, **Sir Michael Wood** and **Ms. Jacobsson** took part, **the Chairman** said he took it that the Commission wished to indicate in its annual report that some members would like part of the session to take place in New York. He also took it that the Commission wished to adopt the recommendations of the Planning Group for the inclusion of the topic of *jus cogens* in the long-term programme of work, to request the secretariat to draw up a list of topics for consideration, and to take note of the report of the Planning Group.

*It was so decided.*

*The meeting rose at 11.25 a.m.*