

Report on the 70th session (2018) of the International Law Commission

**56th Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)
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**by Mr. Pavel Šturma
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Madam Chair,

Members of the Committee of Legal Advisers on Public International Law,

Ladies and Gentlemen,

It is a great honour and a privilege for me to address the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI) in my capacity as the Vice-Chair of the International Law Commission. I would like to thank the CAHDI for this opportunity to present the work of the Commission at its seventieth session, which just ended in August.

During this session, the Commission had the honour to receive the Chair of the CAHDI, as well as its Secretary, for a traditional exchange of views. This highlighted the important contribution of the CAHDI to the development of international law, as well as to the work of the Commission and of the Sixth Committee of the General Assembly. I am therefore extremely honoured to follow this tradition by continuing the substantive dialogue between our two institutions.

This was a landmark year for the International Law Commission, which celebrated its seventieth anniversary with events organized in New York and Geneva under the overarching theme “70 years of the International Law Commission — Drawing a balance for the future”. In New York, the Commission convened a solemn half-day meeting, which was followed by a half-day conversation with representatives of the Sixth Committee of the General Assembly. The event in Geneva consisted of a solemn meeting and a meeting with legal advisers from States and other international law experts, focusing on various aspects of the work of the Commission in the progressive development of international law and its codification. The commemorative events in New York and Geneva were enriched by a large number of side events, in which the members of the Commission and representatives of States, international organizations and academic institutions participated.

This celebration provided an opportunity to reflect on the achievements and prospects of the Commission since its first session in 1949. Its function, as we all know, is to assist the General

Assembly in the implementation of Article 13, paragraph 1, of the Charter of the United Nations by initiating studies and making recommendations to encourage the progressive development of international law and its codification.

Historically, it was considered that the ultimate goal of each topic considered by the Commission should be a multilateral treaty enshrining the results of its work. The most recent experience, however, has shown that the Commission may also fulfil its mandate by other means. Indeed, some of the most authoritative and frequently relied upon instruments arising from the work of the Commission are today in the form of texts that have not, so far, become multilateral treaties or were never intended to be. The Guide to Practice on Reservations to Treaties, for instance, is a significant example of the real impact of the output of the Commission and of its usefulness for institutions such as the CAHDI, which examine reservations and declarations subject to objection, thereby monitoring the States' adherence to rules of international law in the field of treaty law.

I should stress that the variety of forms of codification does not imply that the Commission is not intending to contribute to the adoption of new multilateral treaties. In recent years, it has recommended to the General Assembly the adoption of conventions on the basis of its draft articles. This was the case recently for the topic "Protection of Persons in the Event of Disasters", which will be considered by the General Assembly this Fall, and it may be the case in relation to the topic Crimes against humanity that will be considered next year in second reading.

Madam Chair,

The 70th session of the Commission was especially intense and productive: the Commission concluded the second reading of two topics by adopting two full sets of draft conclusions and commentaries thereto, as well as its work on two other topics on first reading. It also continued its consideration of four other topics.

The topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**" is the first topic concluded on second reading at this session, with the adoption of a set of 13 draft conclusions, and commentaries thereto. This was the culmination of ten years of work of the Commission since its decision to include the topic "Treaties over time" in its programme of work in 2008 under the guidance of Mr. Georg Nolte. The purpose of these draft conclusions, which are based on the 1969 Vienna Convention on the

Law of Treaties, is to facilitate the work of those who are called on to interpret treaties, States, international organizations, and courts and tribunals at the international and national levels.

At this session, the Commission re-examined the texts adopted in 2016 on first reading in light of the comments and observations made by States. The draft conclusions were subsequently amended, although not significantly, by the Drafting Committee before the Commission could adopt them on second reading together with the corresponding commentaries.

At the conclusion of its work, the Commission paid tribute to the Special Rapporteur, Mr. Georg Nolte, for his outstanding contribution, and recommended that the General Assembly take note in a resolution of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, annex the draft conclusions to the resolution, and ensure their widest dissemination; and commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to interpret treaties.

Madam Chair,

The topic “**Identification of customary international law**” is the second topic concluded on second reading at this session. Work on this topic began in 2012 when the Commission decided to include it in its programme of work and appointed Sir Michael Wood as Special Rapporteur.

As in the case of the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, the purpose of this topic is not to set forth rules aiming at the conclusion of a new convention. These draft conclusions rather concern the methodology for identifying rules of customary international law. Their purpose is to offer practical guidance on how the existence of rules of customary international law, and their content, are to be determined, and to assist non-specialist in such endeavour. As a recent example, I would like to note the judgment of the Court of Appeal of England and Wales in the case *Freedom and Justice Party v. Secretary of State for Foreign and Commonwealth Affairs*. In this case, the Court relied extensively on the work of the Commission on this topic for identifying a specific rule of customary international law relating to immunities of members of a special mission.

In addition to the comments by Governments and the fifth report by the Special Rapporteur, the Commission had before it an updated bibliography on the topic, as well as a memorandum

by the Secretariat on the ways and means for making the evidence of customary international law more readily available. I would like to thank the Secretariat of the CAHDI for providing information to the Secretariat of the Commission. Indeed, as you may see, the memorandum highlights the great importance of the work of the CAHDI with respect to the availability of evidence of customary international law.

On the basis of comments and observations by Governments, the Commission adopted, on second reading, a set of 16 draft conclusions on identification of customary international law, with commentaries thereto. Here too, the second reading text is not very far from that adopted in 2016, although the commentaries have been refined to reflect the useful observations made since then.

The Commission paid tribute to the Special Rapporteur, Sir Michael Wood, for his outstanding contribution and recommended that the General Assembly, *inter alia*, take note in a resolution of the draft conclusions on identification of customary international law, annex the draft conclusions to the resolution, and ensure their widest dissemination; commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify rules of customary international law; and follow up the suggestions in the Secretariat memorandum.

Madam Chair,

As I already mentioned, the Commission also concluded the first reading of two other topics, namely “Protection of the atmosphere” and “Provisional application of treaties”.

Let me now turn to the topic “**Protection of the atmosphere**”. It is acknowledged that both the human and natural environments can be adversely affected by certain changes in the condition of the atmosphere mainly caused by the introduction of harmful substances, causing transboundary air pollution, ozone depletion, as well as changes in the atmospheric conditions leading to climate change. In this topic, the Commission is seeking to assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere.

At the seventieth session, the Commission considered questions concerning implementation, compliance and dispute settlement and adopted three additional draft guidelines on those issues. It thus concluded its consideration of the topic on first reading with the adoption of a draft preamble and 12 draft guidelines, together with commentaries thereto.

Governments and international organizations are now being consulted for comments and observations, before the Commission considers those texts on second reading in 2020.

The Commission also concluded its first reading in the topic “**Provisional application of treaties**”, with the adoption of the draft Guide to Provisional Application of Treaties, which comprises a set of 12 draft guidelines with commentaries. The purpose of the Guide is to assist States, international organizations and other users concerning the law and practice on the provisional application of treaties by providing answers that are consistent with existing rules and most appropriate for contemporary practice.

The consideration of this topic was based on the fifth report of the Special Rapporteur which provided additional information on the practice of international organizations, and addressed the topics of termination or suspension of the provisional application of a treaty as a consequence of its breach, and formulation of reservations and amendments. It also included a bibliography on the topic. In addition, the Commission had before it the memorandum by the Secretariat reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.

The draft Guide to Provisional Application of Treaties was also transmitted to Governments and international organizations for comments and observations in view of its consideration on second reading in 2020.

Madam Chair,

As I mentioned earlier, the Commission also continued its work on four other topics.

With respect to the topic “**Peremptory norms of general international law (*jus cogens*)**”, the Commission discussed the consequences of peremptory norms of general international law (*jus cogens*) in general, for treaty law and for the law of State responsibility, as well as other effects of peremptory norms of general international law (*jus cogens*). The Commission decided to refer 14 additional draft conclusions to the Drafting Committee, which provisionally adopted only 7 additional draft conclusions for a lack of time.

The Commission also resumed its work on the topic “**Protection of the environment in relation to armed conflicts**”, under the able leadership of the new Special Rapporteur, Ms. Marja Lehto. The Commission discussed issues related to the protection of the environment in situations of occupation. The Drafting Committee provisionally adopted a new Part Four on

Principles applicable in situations of occupations. This Part comprises three draft principles relating respectively to the general obligation of an Occupying Power, to the sustainable use of natural resources and to due diligence. The Commission also adopted 9 draft principles on the basis of the work accomplished in 2016, as well as the corresponding commentaries.

As to the topic “**Succession of States in respect of State responsibility**”, for which I have the privilege to serve as Special Rapporteur, the Commission considered my second report, which addressed the legality of succession, the general rules on succession of States in respect of State responsibility, and certain special categories of State succession to the obligations arising from responsibility. Seven additional draft articles were referred to the Drafting Committee, which provisionally adopted two draft articles as well as an additional paragraph to a third draft article, this was again for a lack of time.

Finally, the Commission began its debate on the sixth report on “**Immunity of State officials from foreign criminal jurisdiction**”, which was devoted to addressing procedural aspects of immunity from foreign criminal jurisdiction. The debate on this report was partial since the report issued at the very end of the session and will resume at the next session.

Madam Chair,

Before I conclude, allow me to say a few words about our future work. As I just mentioned, the Commission concluded its work on the topics “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” and “Identification of customary international law”. The topic “Crimes against humanity” was not considered this year since States and international organizations are currently studying the texts adopted on first reading in 2017. On this basis, the Commission will consider the draft articles on crimes against humanity on second reading next year and should conclude its work at this session. I encourage States that have not yet done so to submit their comments and observations on the draft articles adopted on first reading to the UN Secretariat by 1 December 2018.

This year, the Commission has decided to include a new topic in its programme of work, namely the topic “General principles of law” and has appointed Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur. Over the years, the work of the Commission has contributed to analysis of the first two category of sources of international law enumerated in Article 38 of the Statute of the International Court of Justice, international conventions and international custom. The Commission considered that it would be useful and appropriate to turn to the third category of sources, general principles of law.

In addition, the Commission has included two new topics in its long-term programme of work, namely “Universal criminal jurisdiction” and “Sea-level rise in relation to international law”. The Commission considered that work on the two topics would constitute useful contributions to the progressive development of international law and its codification and would welcome the views of States on those topics.

Finally, I would like to inform you that the Commission has recommended the seventy-first session of the Commission would be held in Geneva from 29 April to 7 June and from 8 July to 9 August 2019.

Madam Chair,

Let me conclude my presentation by reiterating the importance that the Commission gives to its interaction with the CAHDI. The focus of the work of our respective institutions is similar to a large extent although we operate in different contexts. Experience has shown that we benefit greatly from each other’s work and from our regular interactions, and I would like to express my gratitude one more time for allowing me to address you today.

I thank you for your attention.
