



SLOVENIA

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STATEMENT

BY

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under Agenda item 81

Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions: Reservations to Treaties, Chapter VI: Protection of persons in the event of disasters, Chapter VII: Formation and evidence of customary international law, Chapter VIII: Provisional application of treaties, and Chapter XII: Other decisions and conclusions of the Commission

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Mr Chairman,

At the outset, allow me to congratulate you on your election as Chairman of this year's Sixth Committee session. Let me also pay tribute to the Chairman of the 65th session of the International Law Commission, Mr Bernd H. Niehaus, and to other members of the Commission, particularly the Special Rapporteurs, for their efforts, which are evident from the report under discussion.

My delegation fully aligns itself with the statements of the EU and we would like to make a few additional comments in our national capacity.

Mr Chairman,

Regarding the topic Reservations to treaties, we would like to pay tribute to the Special Rapporteur, Mr Alain Pellet, for his outstanding work on this issue over the past decades. The adopted version of the Guide to Practice on Reservations to Treaties, with an annex on the reservations dialogue, will be of great help to governments in dealing with reservations in their daily practice. *We also find interesting the proposal to establish a mechanism of assistance in relation to reservations.* Slovenia calls for the Guide to Practice to be endorsed by the General Assembly in the near future, with a view to ensuring its widest possible dissemination and use in practice. Since the acceptability and effectiveness of the Guide to Practice on Reservations to Treaties will depend greatly on its conformity with recent practice and the existing rules of the Vienna Convention on the Law of Treaties, we would like to make two additional comments. Slovenia suggests further deliberation on the question of the late formulation of reservations (guideline 2.3.), especially regarding such a possibility in cases when "none of the other contracting States and contracting organizations opposes the late formulation of the reservation". We believe such a directive could eventually lead to non-transparent and confusing practice regarding the formulation of reservations which, as a rule, need to be formulated in conjunction with the State's expression of its consent to be bound by a given treaty. In addition, regarding guideline 4.2.1., we would like to point to the practice of depositaries and question whether they

do, in fact, wait 12 months for the reservation to be established before they treat the author of a reservation as a contracting State to the treaty in question.

With your permission, Mr Chairman, in addition to Reservations to treaties, we would also like to address some other chapters of the Report, since my delegation will deliver only one statement under this agenda item.

Mr Chairman,

Allow me to briefly turn to the topic of the Protection of persons in the event of disasters (Chapter VI of the Report). Slovenia has addressed this topic regularly in previous sessions of the 6th Committee and again, we would like to commend the impressive progress made by Special Rapporteur Mr. Eduardo Valencia-Ospina and the Commission. We believe that this is one of the most topical and acute themes under the scrutiny of the ILC, dealing with an important area of international law and practice which has not yet been codified in a comprehensive manner at international level. The eighteen draft articles prepared so far accord with the main aim of the Commission's endeavour. The latter is based on the protection of disaster victims, their lives and basic human rights, while at the same time remaining mindful of the principles of sovereignty and non-intervention. Continuing to maintain this delicate balance is of extreme importance if draft articles are to succeed and gain global acceptance in the future.

In commenting on this year's Sixth report of the Special Rapporteur and the prepared drafts of articles 5 ter and 16, we welcome the fact that the ILC has dealt with aspects of prevention in the context of this topic, including disaster risk reduction. This corresponds to numerous current activities of the international community in this field

Close cooperation is of paramount importance in risk reduction endeavours. We therefore support the explicit mention of this aspect of the duty to cooperate in extended draft Article 5. We also believe that each individual State has a duty to reduce the risk of disasters by certain appropriate measures (draft Article 16). This duty is based on the contemporary understanding of State sovereignty, encompassing not only rights, but also the duties of States towards their

citizens, and providing that the affected persons should not suffer unnecessarily for the sake of sovereignty. The duty to reduce the risk of disasters is also in accord with States' obligation to respect, protect, and fulfil human rights, in particular the right to life, which is the most fundamental human right. The contemporary understanding of the right to life places an obligation on States to ensure respect for this right of individuals within their territory and within their prerogatives. *Inter alia*, this implies an obligation of States to take active measures and necessary steps to ensure the right to life and other basic human rights, also in the aftermath of natural disasters. Specifically, "taking all necessary steps" means that a State has a duty to prevent disasters, to prepare for disasters within its territory, to take direct measures to minimise suffering immediately after a disaster and, above all, to request international humanitarian relief when national efforts are insufficient to protect the lives of victims of natural disasters. In this regard, we would like to underline that Slovenia, as acknowledged by the ILC, has already adopted national legislation with the aim of implementing global strategies to reduce risk.

Mr Chairman,

As regards Chapter VII: Formation and evidence of customary international law, we would like to commend Special Rapporteur Sir Michael Wood for his first report on the topic, which provides an excellent basis for our future work. We would also like to thank the Secretariat for drafting the Memorandum, with an overview of the existing findings of the Commission that could be particularly relevant to the topic. We are convinced the Memorandum will serve as a helpful reference document in future discussions of the topic.

The approach suggested by the Special Rapporteur regarding the scope and possible outcome of the topic has our support. While it has been widely accepted that the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*, it is much less clear how such a rule is to be identified in practice. In consequence, the proposed approach to the topic, focusing on the formation and evidence of customary international law, should fill in some of the lacunae in understanding and the application of customary international law, particularly on the part of non-international lawyers. It is also with

the desired practical nature of the outcome in mind that we suggest that the work include concrete examples on how to best identify rules of customary international law.

Regarding the matter of this topic's title, which caused some divergent views in the Commission, we side with those who favour retaining the title unchanged or, alternatively, we propose a slight change to the "Requirements for the formation and evidence of customary international law." Given the proposed scope of the topic, which invariably deals with both the formation and evidence of customary international law, we would be reluctant to omit the term "formation" from the title of the topic, since this could lead to the false interpretation that it deals only with the issue of evidence or the recognition of customary international rules.

We agree with the Special Rapporteur that it would be preferable not to deal in detail with the issue of *jus cogens* as part of the scope of the present topic. Although *jus cogens* can be part of customary international law and, as such, may well be addressed also within the present topic, it is nevertheless a norm which has inherently special characteristics.

Furthermore, we share the view that it is important to carefully examine the relationship between customary international law and other sources of international law. In particular, we maintain that the analysis could focus not only on the effects of other sources of international law, such as treaty law, or on customary international law, but also on the effects in the opposite direction, thereby offering a comprehensive understanding of the interplay between different sources of international law.

As a general comment on the approach to the topic, we believe the Commission should strive for a comprehensive analysis of various aspects of the formation and evidence of customary international law, therefore devoting particular attention also to those instances that do not follow general 'settled practice' - the 'opinio juris' formula, as well as the process of modification of customary international legal rules.

Mr Chairman,

Let me now address Chapter VIII: Provisional Application of Treaties. We would like to congratulate Special Rapporteur Mr. Gómez-Robledo on his First Report *on the provisional application of treaties*, in which he outlined the main elements of this mechanism and the issues to be discussed in the Commission. We also find the memorandum of the Secretariat on the *travaux préparatoires* with respect to Article 25 of the Vienna Convention on the Law of Treaties (VCLT) very useful.

In our view, the objective of the Commission should be to analyse as comprehensively as possible the mechanism of provisional application and its legal implications, so that States will be able to understand it better, both when they conclude treaties and agree to the mechanism and when they implement those treaties. As to the possible outcome of the consideration of this topic, we feel that it is perhaps too early to decide on whether guidelines, model clauses or some other form of outcome would be the most appropriate, since this will depend on the future work on the topic.

We would like to propose that the Special Rapporteur considers another aspect of provisional application. The Vienna Convention on the Succession of States in relation to Treaties, concluded after the VCLT, contains articles on the succession of provisionally applied treaties and the succession of treaties in force by way of provisional application. We believe that it would be useful to additionally examine the *travaux préparatoires* of that convention, as well as potential practice and doctrine in relation to it, since this could contribute to understanding of Article 25 of the VCLT and its implications in particular, and to the comprehensiveness of the analysis of provisional application in general. Such an approach would also correspond to the method of proceeding in relation to, *for example*, reservations to treaties, which were analysed also in the context of the succession of States in relation to treaties.

More specifically we would like to focus on three issues which we feel merit further consideration.

First, we agree with those members of the Commission and States that think that provisional application is not to be encouraged or discouraged, but should instead be understood,

as the Special Rapporteur himself recognised, as a legal concept with its accompanying international consequences. In this regard, it would be useful to include in the analysis the recent arbitral practice in the context of the Energy Charter Treaty.

Second, we are reluctant to ascribe great significance to the change in terminology from "provisional entry into force" to "provisional application", not least because this seems to appear from the *travaux préparatoires* with regard to the VCLT, in particular when comparing that on the draft article concerning *pacta sunt servanda* and that on Article 25, from which it is possible to conclude that the *pacta sunt servanda* rule applies to both concepts, which would mean in turn that, from the perspective of this rule at least, the two concepts are identical.

Third, although we agree that the main focus of the Commission's work on the provisional application should be on its analysis from the perspective of international law, we also believe that the decisions of States to use provisional application are often very closely related to their constitutional rules and procedures. This is apparent from the discussions of Article 25 at the Vienna Conference for the adoption of the VCLT, and it is our speculation that this is likely to emerge also from the results of the questionnaire to which States should reply by the end of January next year. Thus, the Commission will probably need either to expressly exclude this internal legal aspect from its considerations at the outset or decide how to include it. In the latter case, and in order to avoid an analysis of the internal law of States, which the Special Rapporteur correctly emphasised as not being the task of the Commission, the Commission could, for example, analyse the practice and implications of the internal legal "limitation clauses" in treaties which have been drafted in different variations and whereby provisional application is conditional upon being in accordance with internal or constitutional law.

Mr Chairman,

I would also like to touch upon Chapter XII: Other decisions and conclusions of the Commission. My delegation welcomes the decision of the Commission to include the topics "Protection of the environment in relation to armed conflicts" and "Protection of the atmosphere" in its programme of work. We also note with interest the inclusion of the topic "Crimes against humanity" in its long-term programme of work.

As noted in the contents of the topic included in Annex B to the Commission's report, crimes against humanity, unlike war crimes and genocide, are not covered by a treaty requiring States to prevent and punish such conduct and to cooperate in achieving this end. This legal gap in the international law has been recognised for some time and is particularly evident in the field of State cooperation, including mutual legal assistance and extradition. We believe all efforts should be directed at filling this gap. Consequently, Slovenia has together with the Netherlands, Belgium and Argentina launched an initiative for the adoption of a new international instrument on mutual legal assistance and extradition for the effective investigation and prosecution of the most serious crimes of international concern by domestic jurisdictions.

It seems to us that in view of the said initiative and the relationship between a potential Crimes against Humanity Convention and the ICC's Rome Statute the ILC decision requires further consideration.

Mr Chairman,

In conclusion, I would like to express the gratitude of my delegation for the hard work accomplished by the Commission and its Special Rapporteurs. Slovenia will continue to support the work of the Commission by contributing to the discussions and by providing the commentaries and observations requested.

Thank you, Mr Chairman, for your attention.