



THE PRESIDENT
OF THE
GENERAL ASSEMBLY

24 June 2020

Excellency,

Further to my letter dated 23 June 2020 on the adoption of the General Assembly decision entitled, "*Postponement of the seventy-second session of the International Law Commission*" (A/74/559), I have the pleasure to transmit herewith, a letter dated 24 June 2020, from H.E. Mr. Michal Mlynar, Permanent Representative of the Slovak Republic to the United Nations, in his capacity as the facilitator for discussions by Member States on the recommendations outlined in the letter of the Chair of the seventy-first session of the International Law Commission and of the Chair designate of the seventy-second session dated 30 May 2020.

The aforementioned letter conveys the letter of the Chair of the seventy-first session of the International Law Commission and of the Chair designate of the seventy-second session dated 24 June 2020, and a brief note of the informal briefing held on 15 June 2020.

The facilitator also invites you to a virtual consultation scheduled for Monday, 29 June 2020, at 3 p.m. Details pertaining to the virtual arrangements for the meeting will be circulated in due course.

I avail myself of this opportunity to express my solidarity with Member States who are fighting COVID-19 and extend my sincere condolences for their loss.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read 'Tijjani Muhammad-Bande'.

Tijjani Muhammad-Bande

All Permanent Representatives and
Permanent Observers to the United Nations
New York

*The Permanent Representative of the Slovak Republic
to the United Nations*

June 24, 2020

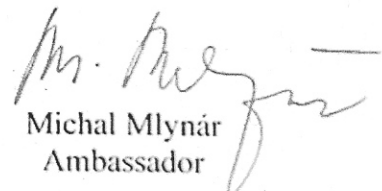
Excellency,

I have the honour to write to you in my capacity as Facilitator for discussions by Member States on the recommendations outlined in the letter of the Chair of the seventy-first session of the International Law Commission and of the Chair designate of the seventy-second session dated 30 May 2020. I recall that by decision 74/559 the General Assembly decided to postpone the seventy-second session of the International Law Commission to a later date. However, the General Assembly has not taken action hitherto on the other recommendations contained in the above-mentioned letter.

I express my appreciation to the President of the General Assembly for the trust and confidence placed in me to facilitate these discussions. I am committed to working closely with all Member States in this important process.

I have the pleasure to invite Member States and Observers to virtual consultations on 29 June 2020, at 3:00 p.m.. An information note issuing guidance on how to join the virtual meeting will be provided in due course.

Please accept, Excellency, the assurances of my highest consideration.


Michal Mlynár
Ambassador

All Permanent Representatives and
Permanent Observers to the United Nations
New York

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REFERENCE:

24 June 2020

Excellency,

We write to you further to the Letter dated 18 June 2020 and the Draft Decision of the General Assembly (A/74/L.70) issued by the President of the General Assembly, His Excellency Tijjani Muhammad-Bande, concerning the postponement of the seventy-second session of the International Law Commission.

The Commission is very grateful to you for having facilitated the informal briefing by the Chairs and incoming members of the Bureau of the Commission on 15 June 2020, and for being willing and available to facilitate further consultations among delegations on the recommendation of the International Law Commission contained in the letter dated 30 May 2020 from the incoming Chair of the 72nd session of the Commission, Mr. Mahmoud Hmoud, and the Chair of the 71st session of the Commission, Mr. Pavel Šturma.

As the Commission is at a critical stage, having eight topics on its current programme, including five topics at advanced stages, certainty is needed as soon as possible so as to allow forward planning for the orderly conduct of the Commission's work, and for the ability of the Sixth Committee to know how it will be expected to interact with the Commission, and to consider the Commission's reports with its customary thoroughness. We very much hope therefore that the consultations among delegations can be expedited. With a view to assisting your task in the consultations and for the information of delegations, we attach a brief note of the main points made and answers given by the Chairs and incoming members of the Bureau, as well as by the secretariat, at the informal briefing held on 15 June 2020. We would request that this letter and the attached note please be circulated to all delegations.

We are copying this letter to the President of the General Assembly, His Excellency Tijjani Muhammad-Bande.

H.E. Mr. Michal Mlynár
Chair of the Sixth Committee
at the 74th session of the General Assembly



Please accept, Excellency, the assurances of our highest consideration.

A handwritten signature in black ink, appearing to read 'P. Šturma'.

Pavel Šturma
Chair
Seventy-first session of the
International Law Commission

A handwritten signature in black ink, appearing to read 'M. Hmoud'.

Mahmoud D. Hmoud
Chair designate
Seventy-second session of the
International Law Commission

Attachment

cc: H.E. Prof. Tijjani Muhammad-Bande

The election

- An extension of the members' terms of office by one year would not automatically postpone the election. The Statute of the International Law Commission places the timing and organisation of the election in the hands of the Secretary-General. The Codification Division of OLA would consult States regarding the timing before making any recommendation to the Secretary-General in this regard.

Precedents

- There is one precedent from 1950 where the General Assembly extended the terms of office of the members of the International Law Commission on an ad hoc basis - UN General Assembly resolution 486 (v) of 12 December 1950.
- The Assembly, having noted that the then three year terms of office of the members were "...not sufficient to enable the Commission to achieve the tasks on which it is engaged" decided that, "...subject to any modifications which the General Assembly might make in the Statute of the International Law Commission, and without prejudice to such modifications, the term of office of the present members of the Commission shall be extended by two years ...".
- The Assembly is now asked to address an exceptional circumstance through an extraordinary measure that does not involve an amendment of the Statute.
- There are a significant number of precedents for members of other UN subsidiary bodies having their terms of office extended in place of elections taking place. A brief survey has produced around 23 precedents. Examples include:
 - ICTY and ICTR judges on a number of occasions between about 2008 and 2015 – by a combination of Security Council resolution and General Assembly decision, in place of General Assembly elections;
 - Members of the Commission on the Status of Women– in 2002, by a decision of ECOSOC;
 - Members of the Commission on Sustainable Development– in 1997, by decision of ECOSOC;
 - Ad litem judges of the UN Administrative Tribunals and Dispute Tribunal – on a number of occasions between about 2010 and 2017, by General Assembly decisions;

- The Organizational Committee of the Peacebuilding Commission – in 2007 and 2008, by General Assembly decisions.

Topics before the Commission carrying over from one quinquennium to the next

- There are several occasions when a topic has spanned more than one quinquennium, and some topics where a change of Special Rapporteur has taken place.
- What is not at all common, however, is that topics that are at the very point of completion – the second reading stage, where only one more session is needed to conclude the topic – are carried over to the next quinquennium. A change of Special Rapporteur at that very final step may well be unprecedented and would be disruptive of the on-going work on the topic.
- The five topics on the Commission's current programme that are at an advanced stage have largely been developed by the current membership of the Commission. Some of the Special Rapporteurs who have led this work may not be present in the next Commission to complete the very final stage. This would be far from ideal.
- In addition, in the past, when topics have carried over from one quinquennium to the next, this has been in a planned and methodical way. The carry over was expected and was caused by the volume and complexity of the project. The current circumstances facing the Commission are unique and unprecedented, a force majeure event, and the carry over of topics, if there is no extension, would be accidental and unplanned.
- If the pandemic had occurred earlier in the quinquennium, this might have allowed the Commission more flexibility to readjust its programme of work, to allocate the necessary time and adjust the process for each topic.

What is possible for the Commission in terms of virtual or intersessional work?

- Informal exchanges among the members of the Commission, including by virtual means, in the intersessional period, are common. They are already an established part of the work of the Commission.

- What is not possible at this stage, the Commission has concluded unanimously, is to advance the work virtually through formal meetings of the Commission.
- The Commission meets for six consecutive weeks, for six hours per day. Most of the work of the Commission at the moment is on the five topics at advanced stages, and takes place primarily in the Drafting Committee. The Drafting Committee involves intense negotiation of detailed legal provisions over many hours.
- These are provisions intended to be negotiated into treaties by States, or otherwise endorsed / taken note of by the General Assembly and given wide dissemination. The Commission's work is influential - many of its drafts are cited and relied upon by the International Court of Justice and other international courts and tribunals.
- The drafts are prepared with extreme care and thoroughness. The negotiating text in the Drafting Committee changes very rapidly, minute by minute, and is often before the members in English and French only. (The Codification Division produces on the spot translations). Simultaneous interpretation into the six languages for the members involved in the negotiation of these texts is essential if the resulting draft provisions are to carry the authority that they require across the six UN languages and the five UN regional groupings of States in the Sixth Committee.
- Multilingualism is an inherent and essential characteristic of the Commission and its working methods, taking into account the plurality of the Commission's composition representing the main legal traditions of the world.
- The Commission has concluded that to do this intense and detailed work in formal meetings across a 16-hour span of time zones, especially without simultaneous interpretation, is simply not possible.
- Given that the ILC works in the six official UN languages, interpretation is not just a technical issue as many Commission members rely on it during Plenary and Drafting Committee meetings and they would be effectively excluded from virtual participation if interpretation into all languages is not available.

Could the Commission meet for extra weeks during 2021?

- The option of postponing all work of the current (72nd) session until 2021, and moving the 73rd session to 2022, with an extension of the terms of office of the current members, was unanimously considered the best for two main reasons:
 - The normal process, care and thoroughness of the Commission's work is thereby maintained, with the full membership of the Commission from all of its regional groups able to attend and participate - so that the five topics that are at advanced stages can be brought to a satisfactory conclusion;
 - The normal rhythm of work of the Sixth Committee is also maintained, so that it is able to give thorough consideration to the Commission's drafts and commentaries in the normal way.

Additionally, it is also the option that allows for ensuring an even representation of Regional Groups in the ILC Bureau during the current quinquennium.

- Significant extra meetings during 2021 would:
 - Pose problems for UNOG Geneva. It is not at all certain that the conference services would be sufficiently available;
 - Pose problems of availability for the members of the Commission, who are appointed on a part-time basis. Less than full attendance and full representation from the regional groupings would not be an ideal way of completing five topics at second and first reading;
 - Raise financial difficulties – more than 11 weeks of meetings during 2021 would trigger financial consequences.