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# 71ST SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

**Sixth Committee**

**Agenda Item 78**

**Report of the International Law Commission**
**on the work of its sixty-eighth sessions**
**Cluster I**

**Chapter IV: Protection of Persons in the event of disasters**
**Chapter V : Identification of customary international law**
**Chapter VI: Subsequent agreements and subsequent practice**
**In relation to the interpretation of treaties.**
**Chapter XIII: Other decisions and conclusions of the Commission**

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Mr. Chairman,

Allow me first of all to thank the Chairman of the International Law Commission, Mr. Pedro Comissário Afonso of Mozambique, for his presentation of this year's report and to express my countries appreciation for the valuable work accomplished by the Commission at its sixty-eighth Session.

Today I will address three topics: the "Identification of customary international law'', ''Subsequent agreements and subsequent practice in relation to the interpretation of treaties'', "Protection of persons in the event of disasters" and on the "other decisions and conclusions of the Commission''.

**Chapter V : Identification of customary international law**

Mr. Chairman,

I will now address the topic of the identification of customary international law. We are grateful to the ILC and the Special Rapporteur for the conclusion of the first reading of the draft conclusions on the identification of customary international law together with the draft commentaries thereon. Allow me in particular to express our deep appreciation to the Special Rapporteur Sir Michael Wood for the outstanding quality of his four reports that paved the way for the adoption of the draft conclusions in a rather short period of time, despite the inherent difficulties of the topic, which may be considered as one of the most theoretical that the ILC has ever put on its agenda. The quality of the Commission's work, based upon an exhaustive study of relevant case-law and scholarly writings, provides international lawyers with mostly needed normative guidance in dealing with the thorny issue of identification and precise content of customary international law rules.

Greece's comments will focus on the following issues : (i) forms of general practice (ii) the persistent objector rule (iii) particular customary international law.

**i.** Paragraph 1 of draft conclusion 6 rightly points out that practice as a constituent element of customary international law may include inaction but this only under certain circumstances. In fact, it is not any inaction that may be taken into account in this regard. In clarifying the meaning of the term "under certain circumstances", paragraph 3 of the relevant commentary makes clear that the latter refers to cases of "deliberate abstention from acting". True as it is, this qualification of the term should, in our view, be complemented by another element, namely that the deliberate abstention refers in particular to interested States, i.e., States whose rights and interests are specially affected by the action of another State or States. Abstention from acting may also be deliberate

from the part of States not expected to react for the reason that their interests are not at stake. In such a case, their deliberate inaction, whichever its motivation, is less conclusive than the one of interested States.

This differentiated weight of State inaction, already taken into account in paragraph 7 of the commentary to conclusion 10 relating to the element of the *opinio juris*[1], should, in our view, have its place also in the conditions that inaction should satisfy in order to constitute a form of general practice, taking also into account that it is already reflected in paragraph 3 of the commentary on conclusion 8[2], which, however, deals with action, rather than inaction of States expected or in a position to act.

Decisions of national courts may be a form of state practice, as well as an evidence of *opinio juris*, as it is clearly indicated in paragraph 2 of conclusion 6 and in paragraph 5 of the commentary to conclusion 10 respectively. However, the distinction made in paragraph 6 of conclusion 6 between decisions of national courts as a form of state practice and the same decisions as a subsidiary means for the determination of the rules of customary law, is not an obvious one and seems rather difficult to implement in practice, thus we consider that the matter should be further elucidated.

**ii.** Regarding conclusion 15 and the persistent objector rule, allow me first to recall Greece's last year's statement, namely that this rule's applicability is questionable not only in relation to the rules of jus cogens, but also in relation to the broader category of the general principles of international law which seem to apply to all members of the community of States irrespective of their consent to be bound by them. In our view the ILC's commentary on conclusion 15 should address the matter, given also that paragraph 2 of the commentary on conclusion 1 already refers to "principles" of international law as having "a more general and fundamental character", thus acknowledging the distinction between the former and mere "rules of customary international law".

The specific character of the general principles of international law justifies, in our view, their exclusion from the scope of application of the persistent objector rule. It

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[1] "First, it is essential that a reaction to the practice in question would have been called for; this may be the case, for example, where the practice is one that (directly or indireclty) affects -usually unfavourably- the interests or rights of the State failing or refusing to act".

[2] "The participating States should include those that had an opportunity or possibility of applying the alleged rule".

would be rather odd that a state might not be bound by rules having a fundamental character for the international community and it seems that state practice and decisions of international courts provide no evidence of such an extended application of the persistent objector rule.

In addition, paragraph 3 (fn. 353) of conclusion 15, while recognizing that the "ability of effectively preserving a persistent objector status overtime may sometimes prove difficult", does not put into question the applicability of the rule over time. In our view, the ILC should elaborate further on this temporal aspect. There seem to be no eternal or decades-lasting precedents of persistent objections and one can hardly imagine of a State being a persistent objector to an established customary international law rule dating far back in time.

**iii.** With regard to the particular custom, we welcome the clarification in paragraph 7 of the commentary to conclusion 16 that "the application of the two-element approach is stricter in the case of rules of particular customary law". We are of the view that in this context we might also distinguish between novel particular customs, whose scope of application refers to State behavior not already regulated by specific rules of international law and derogatory particular customs, the latter derogating from a general rule of customary international law, by requiring a stricter standard of proof in the latter case.

## Chapter V: Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Let me now turn to Chapter VI, Subsequent agreements and subsequent practice in relation to the interpretation of treaties.

First of all, I would like to express our deep appreciation to the Special Rapporteur for his fourth report on this topic, which specifically addresses the legal significance, for the purpose of the interpretation of treaties, of pronouncements of expert treaty bodies and of decisions of national courts, as well as to the International Law Commission for the conclusion of its first reading of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Having, thus, before us the outline of a full set of draft conclusions provisionally adopted on first reading, we are in a position to make a few general remarks.

The draft conclusions at hand and, in particular, Parts Two and Three thereof, which respectively address the basic rules and definitions and the general aspects of the topic (i.e. draft conclusions 2 to 10), are the outcome of a thorough analysis of articles 31

and 32 of the Vienna Convention on the Law of Treaties, supported by a considerable amount of relevant case-law and State practice. We, therefore, believe that they will provide useful guidance and assistance to States, international courts and tribunals, as well as to any other actors whose role is to interpret international treaties.

In addition, to the extent that they establish an appropriate balance between unity, dictated by the need to preserve the integrity of the process of treaty interpretation, and flexibility, based on the primacy of the treaty provisions, we consider that the draft conclusions may contribute significantly in promoting legal certainty and stability of interstate relations, as well as respect for international law and the principle *pacta sunt servanda* which stands at its core.

Regarding the possible effects of subsequent agreements and subsequent practice, we particularly welcome the establishment of a presumption in favour of interpretation, in draft conclusion 7, which reaffirms that the possibility of amending or modifying a treaty by a subsequent practice of the parties has not been generally recognized.

Moreover, with respect to draft conclusion 8, which addresses the role that subsequent agreements and subsequent practice may play in the context of an equally delicate question as to whether the treaty terms may evolve over time, it is noteworthy that the Commission, while seeking to clarify in its commentary that it does not intend to take any position regarding the appropriateness of a more contemporaneous or more evolutive approach to treaty interpretation in general, rightfully in our view recognizes the need for some caution when it comes to arriving at a conclusion in a specific case as to whether to adopt an evolutive approach.

Turning now to Part III, which addresses specific aspects of subsequent agreements and subsequent practice in relation to the interpretation of treaties, we understand that, given the significance of certain forms of treaty practice, as identified by the Rapporteur and the Commission, it is appropriate to specifically address their role in relation to the interpretation of treaties.

It is important, however, to bear in mind that, while decisions adopted within the framework of a Conference of States Parties may be a direct source of subsequent agreement or subsequent practice under article 31, paragraph 3, and article 32, in so far as they express agreement in substance between the parties regarding the interpretation of a treaty, nevertheless the practice of an international organization as such, as well as the pronouncements of expert treaty bodies, do not constitute *per se* subsequent practice within the meaning of the above provisions of the 1969 Vienna Convention on the Law of Treaties.

Accordingly, the latter may only have indirect effect to the subject matter of the topic under consideration, as this is defined in draft conclusion 1, which delimits the

scope of the work undertaken by the Commission in this field by stating that the present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

We are therefore of the view that above considerations should be reflected not only in the commentary but also in draft conclusion 13. Indeed, given the lack of relevant State practice in this field, one should be cautious and not overestimate the legal significance of the pronouncements of expert treaty bodies for the purpose of treaty interpretation within the scope of article 31, paragraph 3, and article 32 is rather .

Having said that, I wish to conclude, by commending the International Law Commission for the high quality of the work accomplished so far in this field and the Special Rapporteur for his commitment and efficiency as well as the promptness demonstrated in fulfilling his mandate.

**Chapter XIII: Other decisions and conclusions of the Commission.**
***Annex A. The settlement of disputes to which international organizations are parties***

Mr Chairman,

Greece welcomes the decision taken by the Commission to recommend for inclusion in its long-term programme of work the topic "The settlement of international disputes to which international organizations are parties".

I also take this opportunity to thank Sir Michael Wood for his syllabus appearing in Annex A of the present year's Report of the International Law Commission. As stated therein, this syllabus flows from the earlier work of the Commission on the responsibility of international organizations and takes note of the widely recognized need to improve the methods for settling disputes to which international organizations are parties.

We considers that this is a very topical and challenging topic, which deserves to be further explored, in the light of relevant practice and current developments related to the expansion of the activities of international organizations and their growing impact on individuals.

Moreover, given its expertise and its long-standing competence, the International Law Commission is, in our view, the most appropriate body to deal with this topic.

We, therefore, believe that the Commission should not miss the opportunity to deal with it in a more comprehensive manner, which would cover, not only disputes of an international character, such as those identified by Sir Michael Wood in the aforementioned syllabus, but also disputes of a private law character to which international organizations are parties.

We understand, of course, that a broader approach to this topic would necessarily raise difficult questions, as was rightly pointed out by Sir Michael Wood, such as the consideration by the Commission of questions related to immunities of international organisations as well as to the latter's obligation to make provisions for appropriate modes of settlement under certain treaties.

We are fully aware that the immunities enjoyed by international organizations, which are primarily treaty-based, are essential for their proper and effective functioning.

However, taking into account the decision of the Commission not to limit itself to traditional topics, but to also consider those which reflect new developments in international law and pressing concerns of the international community as a whole, we consider that it is timely for the Commission to undertake a thorough study of the best means to address disputes to which international organizations are parties, depending on their nature, since different types of disputes may call for different solutions.

This would, among others, imply a review of the definition and the scope of disputes of a private law nature as opposed to disputes of a public law nature, as well as an assessment of the possibility of waiving immunity in certain specific cases. With respect to the latter, it should be recalled that the topic of jurisdictional immunity of international organizations has already been included in the Commission's long-term programme of work.

In the light of the above, I wish conclude by underlying the significance of this topic for the purpose of ensuring justice for the individuals who have suffered harm from the unlawful conduct of international organizations. This would also be in the interest of the organizations themselves and their member States, given that the total lack of remedies may amount to a denial of justice, which could jeopardize the moral authority and credibility of international organizations and, accordingly, undermine the principle of international cooperation.

Finally, regarding the possible outcome of this topic, as already envisaged in the syllabus annexed to the Commission's report, we also believe that such outcome could include proposals for strengthening the existing or developing new dispute settlement procedures as well as proposals for model clauses to be included in relevant instruments or treaties.

**Chapter IV : Protection of Persons in the event of disasters**

Lastly Mr. Chairman, I wish to welcome the eighth Report of the Special Rapporteur, Professor Eduardo Valencia Ospina, on the protection of persons in the event of disasters and to commend him and the Commission for the important work accomplished so far on this topic. We have made many comments on the content of the Draft Articles during the previous discussions of this topic in the Six Committee and at this stage I will

confine myself to some brief remarks on the Preamble as well as on the future form of the Draft Articles.

Mr. Chairman, the Draft Articles are in our view well balanced and constitute an important framework for the reduction of risks in disasters. They also provide a useful legal tool regarding future treaty regimes (A/C.6/69/SR.21).

In relation to the preambular paragraphs proposed for inclusion in the text of the draft articles we are of the view that the Preamble is succinct and carefully drafted. We would propose, however, an addition to the last paragraph of the Preamble which refers to the sovereign equality of State and to the duty of States not to intervene in matters of domestic jurisdiction. The proposed addition would include an invitation to all States to assist the United Nations and its specialized Organizations when providing relief to persons in the event of disasters. The *rationale* for this proposal relies on the fact that the UN and its Agencies are in most cases the direct receiver of any call for immediate action in the event of disasters. It reflects in our view the support needed from UN Agencies in order to proceed timely and accurately in alleviating the suffering of persons in the event of disasters.

On the future form of the Draft Articles, since their content reflects a progressive codification of international law, Greece is of the view that the Draft Articles should be considered as a package to be adopted through a GA Resolution, in order to preserve their integrity and avoid opening up their content in the context of a renegotiation process. The anticipated wide support for such a Resolution, ideally through consensus, would give the necessary boost to the Draft Articles in order to become a source of inspiration for future treaty texts at the regional or bilateral level.

I thanks you Mr. Chairman