United States of America
71st General Assembly Sixth Committee
Agenda Item 78: Report of the International Law Commission on the Work of its 68th Session
Protection of Person in the Event of Disasters, Identification of Customary International Law, Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties

Statement by Brian J. Egan, Legal Adviser, United States Department of State, Washington D.C.
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Mr. Chairman, I would like to thank the chairman of the Commission for his helpful and detailed introduction of the Commission's report. I would also like to congratulate the Commission for a productive Session and for its extensive and valuable work and I look forward to our debate on these on these important topics of international law over the next two weeks.

Mr. Chairman, I appreciate the opportunity to comment on the topics that are currently before the committee and will in these remarks address more topics in Cluster 1.

Protection of Person in the Event of Disasters

On the subject of "Protection of persons in the event of disasters," we thank the Commission and the Special Rapporteur, Mr. Eduardo Valencia-Ospina, for their efforts. In particular, we appreciate their consideration of the comments of Member States, including the United States, on the draft articles adopted after first reading.

The Commission has now completed its second reading and produced in final form a preamble, 18 draft articles and commentary, and has recommended to the General Assembly the elaboration of a convention based on the draft articles, which the Commission stated contain elements of progressive development as well as codification of international law. Although we are continuing our review of the final text, we do not believe all of our concerns have been resolved. We continue to believe that this topic would best be approached through the provision of practical guidance to countries in need of, or providing, disaster relief, rather than in the form of a treaty.

Identification of customary international law

Mr. Chairman, with respect to the topic "Identification of customary international law," the United States would first like to express its thanks and great appreciation for the extraordinary contribution that the Special Rapporteur, Sir Michael Wood, and the Commission have made to international law through the draft conclusions and commentary that were adopted by the Commission this summer. They are already an important resource for practitioners and scholars alike.

We are in the process of conducting a detailed review of the draft conclusions and commentary and look forward to submitting comments and observations by the end of next year.

Although our review is not complete, we would like to note two areas of initial concern.

Our first comment relates to aspects of the draft conclusions and commentary that appear to go beyond the current state of international law such that the result is progressive development rather than codification on the particular issues. While recommendations regarding progressive development are appropriate in some ILC topics, we do not think that they are well- suited to this project, whose purpose and primary value, as we understand it, is to provide non-experts in international law, such as national court judges, with an easily understandable guide to the established rules regarding the identification of customary international law. Mixing elements of progressive development and established rules in this project risks confusing and misleading readers and undermining the utility and authority of the ILC's product. To the extent that the ILC wishes to include recommendations with regard to progressive development in its conclusions and commentary on this topic, we believe it is essential that such recommendations be clearly identified as such and distinguished from elements that reflect the established state of the law.

In this regard, we are most focused on Draft Conclusion 4 and its discussion of the role of the practice of international organizations in contributing to the formation or expression of customary international law. We are concerned that it suggests that the practice of international organizations may serve as directly relevant practice, or play the same role as State practice, in the formation and identification of customary international law, at least in certain cases. We do not believe that the practice and *opinio juris* of States, or relevant case law, support the proposition that the conduct of international organizations – as distinct from the practice of member States in the IOs – contributes directly to the formation of customary rules. The commentary adopted by the Commission provides very little support for this proposition, and what is included does not appear to support the broad language of Draft Conclusion 4. Indeed, we believe that such language unnecessarily confuses matters by implying that every time one engages in an analysis of the existence of a rule of customary international law, it is necessary to analyze the practice of hundreds if not thousands of international organizations with widely varying competences and mandates. In this respect, we view Draft Conclusion 4 as essentially a proposal for progressive development of the law on this issue, raising the concerns noted earlier.

We encourage other States to give careful consideration to these issues as they review the draft conclusions and commentary.

The second topic that we expect to address in our comments on the draft conclusions and commentary relates to aspects of the text that we believe need adjustments to avoid potentially misleading the reader.

For example, we believe that there is a risk that the draft conclusions and commentary as a whole may leave the impression that customary international law is easily formed or identified. Because that is not the case, we believe that the commentary may need to reinforce the point that customary international law is formed only when the strict requirements for extensive and virtually uniform practice of States, including specially affected States, accompanied by *opinio juris* are met.

Mr. Chairman, once again, we thank Sir Michael Wood and the Commission for their very impressive work on this topic that is so important to all of us.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Mr. Chairman, turning to the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", the United States would like to thank the Special Rapporteur, Professor Georg Nolte, and the Commission for their extensive and impressive work on this important topic. We have begun our review of the draft conclusions and lengthy commentary and look forward to commenting next year.

In the meantime, we would like to note certain of our concerns with the draft conclusions as adopted by the Commission on first reading.

We are particularly focused on paragraph 3 of Draft Conclusion 12, which states that the "[p]ractice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32."

The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization "as such" in the interpretation of the instrument by which it was created. In other words, it refers, not to the practice of the States party to the international organization, but to the conduct of the international organization itself. In citing VCLT articles 31(1) and 32, the Commission recognized that the practice of that international organization is not "subsequent practice" for the purposes of the rule reflected in Vienna Convention, Article 31(3)(b), which we believe is correct because the international organization itself is not a party to the constituent instrument and its practice as such, therefore, cannot contribute to establishing the agreement of the parties.

However, in light of the inapplicability of Article 31(3)(b), the draft conclusion states instead that consideration of the international organization's practice is appropriate under paragraph 1 of Article 31 as well as Article 32 of the Vienna Convention.

The United States believes that paragraph 1 of Article 31 is not relevant in this context. Paragraph 1 reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose." The factors to be considered pursuant to Article 31(1) – "ordinary meaning," "context" and "object and purpose" -- do not encompass consideration of subsequent practice regardless of whether the actor is a party or the international organization. The draft commentary fails to explain how Article 31(1) can properly be interpreted – consistent with the Vienna Convention itself – in this way. Indeed, it provides no support for this proposition, such as in relevant international or national case law.

Article 32 of the Vienna Convention may potentially provide a basis for considering the practice of an international organization with respect to the treaty by which it was created, particularly where the parties to the treaty are aware of and have endorsed the practice. We believe that circumstances in which the practice of the international organization may fall within Article 32, however, would need to be explained in the commentary. The current draft does not do so.

Before concluding on this topic, we would also like to note our comments regarding Draft Conclusions 5 and 11. With respect to Draft Conclusion 5, we question the language of paragraph 1, which states that subsequent practice "may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law." In our view, there are many acts that are attributed to a State for purposes of holding a State responsible that are not properly viewed as the practice of the State for purposes of the interpretation of a treaty to which it is party. An example would be the actions of a State agent contrary to instructions.

It is also our view that the inclusion in this ILC product of Draft Conclusion 11, on decisions adopted within the framework of a Conference of States Parties, may suggest that the work of such conferences frequently involves acts that may constitute subsequent agreements or subsequent practice in the interpretation of a treaty. We believe that these results are by far the exception, not the rule, and we are studying the commentary, including the examples included in it, from this perspective.

In conclusion, we again thank the Special Rapporteur and the Commission for their valuable work on this important topic.

Thank you, Mr. Chairman.