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STATEMENT

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Agenda item 81

Report of the International Law Commission on the work of its sixty-ninth session, Cluster 1, Chapter IV: Crimes against humanity, Chapter V: Provisional application of treaties, Chapter XI: Other decisions and conclusions of the Commission

72nd Session of the General Assembly
Sixth Committee

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Mr Chairman,

I would first like to thank the Chairman of the Commission, Mr Georg Nolte, for his helpful introduction of the report to the Sixth Committee and all members of the Commission for a productive session in which some notable progress has been made. We congratulate Mr Pavel Šturma and Ms Marja Lehto on their appointment as Special Rapporteurs.

Slovenia thanks the Codification Division of the Secretariat, also for their continuous updating of the Commission's website, which is an invaluable source of information on the Commission's work.

Before focusing on topics Crimes against Humanity and the Provisional Application of Treaties, Slovenia wishes to briefly address Chapter XI regarding 'Other Decisions and Conclusions of the Commission'.

Slovenia is grateful to the Commission for its careful consideration of its programme of work, and notes the Commission's decision to include two new topics in its long-term programme of work, which include (i) general principles of law, and (ii) evidence before international courts and tribunals. While we consider the topic "general principles of law" as potentially of interest to states, we are disinclined to support the work of the Commission on the issue of "evidence before international courts and tribunals". Since it is for international courts and tribunals to assess the evidence themselves, we do not see the need for the Commission to invest its efforts into this topic.

Slovenia attaches great importance to the Commission's choice of topics. We fully agree that the selection of new topics should be guided by new developments in international law and the pressing concerns of the international community as a whole. Given the limited capacities of the Commission and Member States, we believe that topics should be chosen with the necessary ambition as regards the relevance of the topics to the challenges of the international community, and sufficient prudence regarding the number of issues included in the Commission's programme of work. We should not be discouraged from addressing a topic merely because states have different views on it or because of the challenges it presents. What other body and which other General Assembly committee is better suited to tackle international law issues that concern topical matters? As noted, the Commission's programme of work should also reflect the capacity of the Commission and states to address specific issues in sufficient depth. In this light, Slovenia considers that the programme of work should be expanded, as appropriate, by including such topics from the long-term programme of work that would likely respond to the current needs of the international community in international law. In this respect, Slovenia proposes the inclusion of the topic 'the right to self-determination'.

Slovenia would also like to take this occasion to commend the Commission for its continuous contribution to the promotion of the rule of law.

Slovenia greatly values the Commission's indispensable role in promoting the progressive development and codification of international law and its promotion of the implementation of international law at both the national and international level. The rule of law is the cornerstone of inter-state relations, good governance, and human rights. International order based on rules and adherence to international law obligations, including the decisions of international courts and tribunals, are the foundations of peace and security and successful cooperation between nations. Slovenia thus expresses its utmost appreciation to the Commission for its contribution to the strengthening of the rule of law in its almost 70 years of existence.

We look forward to the events dedicated to this important jubilee scheduled to take place next year under the title 'Driving a balance for the future'. They will be an important opportunity to appreciate the Commission's invaluable contribution and to explore possible further improvements.

Mr Chairman,

In the context of the topic 'crimes against humanity', Slovenia wishes to express its appreciation for the outstanding contribution of the Special Rapporteur, Mr Sean D. Murphy, and his thorough third report, on the basis of which the Commission adopted the entire set of draft articles on crimes against humanity at first reading.

The third report addressed many important issues, including mutual legal assistance and extradition. Slovenia will study this important work in detail with a view to submitting any possible comments and observations by the deadline. In this context, Slovenia wishes to recall the joint initiative of Argentina, Belgium, the Netherlands, Senegal and my country, for a new treaty on mutual legal assistance and extradition, which would cover the crime of genocide, war crimes, and crimes against humanity (MLA initiative). While we support the ILC's work on the topic of crimes against humanity, and will continue to contribute to its examination, Slovenia also recognises particular merit in the MLA initiative in that it seeks to offer a modern framework for mutual legal assistance and extradition for all three groups of the most serious crimes under international law. We believe that the MLA initiative and the topic of crimes against humanity have points in common, but there are also important differences between them. Therefore, we consider that both efforts are complementary and should co-exist and continue to develop side by side.

Turning to the topic of the 'Provisional application of treaties', Slovenia appreciates the work done thus far on this topic by the Special Rapporteur and the Commission. We believe that the guidelines are an appropriate form of result of their work, aimed at assisting states and international organisations in their treaty practice. In order for that to be so, the guidelines require some refinement and, possibly, additions. In this regard, we are not convinced that overreliance on the VCLT terminology and its effective restatement in the guidelines is effective in providing useful guidance. We believe that the Commission could be more ambitious and provide further guidance.

On this occasion, Slovenia will concentrate on certain guidelines, but we are ready to provide further written comments to the Special Rapporteur in due course if requested.

In relation to the VCLT terminology in the guidelines, we are concerned by the Commission's departure from the VCLT terminology in draft Guideline 3. The use of the word 'may' in draft Guideline 3 might be misunderstood if not read in conjunction with the commentary, which itself is not very clear. Our concern is based on the fact that this issue was discussed already during the Vienna Conference on the VCLT, where the Drafting Committee replaced the word 'may' with the word 'is' because the former might imply a non-binding effect. The reappearance of the word 'may' reverses the developments arising from the *travaux préparatoires*, and might call into question Guideline 6 on legal effects. We therefore propose the following wording of draft guideline 3: *"States or international organisations may agree in the treaty itself or in some other manner to apply a treaty or a part of a treaty provisionally between certain or all of them pending its entry into force between them."* In this case, the word 'may' would relate more clearly to the mutually agreed decision to provisionally apply a treaty or part of it, not to the effect of such an agreement. In the commentary, we propose to replace the first and second sentence of paragraph 2 by the following: *"The opening phrase confirms that provisional application of a treaty or a part of it is subject to an agreement between States or international organizations."*

In relation to Guideline 8, we believe that there are several issues which would benefit from further analysis and inclusion at least in the commentary. It should be clarified in the commentary that it is the provisional application that is being terminated, not a treaty as such which is not yet in force. Apart from other potential consequences of this conceptual difference between treaty termination and provisional application termination, the differentiation between bilateral and multilateral treaties might become relevant. In the case of bilateral treaties, the termination of provisional application by one of the two signatories in effect implies treaty termination as well. This is not necessarily true in the case of multilateral treaties, since the remaining signatories may continue to provisionally apply the treaty and bring it into force. In both cases, the question arises as to whether the notifying state can subsequently "change its mind" and ratify the treaty or whether the notification is irreversible. The latter option does not appear at first sight to be contrary to Article 25(2), which provides for a notification that a signatory 'does not intend' to become a Party rather than a notification in the sense that a signatory 'shall not' become a Party. Such an interpretation would enable a signatory to terminate its provisional application obligations and simultaneously open the door for it to still become a Party, a result that might benefit the treaty as such.

With regard to the termination of provisional application, Guideline 8 gives no guidance on the relation of this termination regime to that provided for in Article 18 of the VCLT, which contains a very similar termination provision. It appears reasonable to believe that a notification to terminate provisional application implies *a fortiori* that a state made clear its intention to terminate its so-called 'interim obligation' under Article 18 as well.

Another aspect of the relation between Articles 25 and 18 is how they interact during provisional application. Does the interim obligation imply that a state is bound to apply the treaty provisionally as if it were in force and in such a manner so as not to defeat its object and purpose as provided for in Article 18? Consequently, if only certain treaty provisions are being applied provisionally, does the interim obligation apply to all provisions or only those not being provisionally applied? Or does provisional application override the interim obligation, since it entails responsibility for a breach of a more concrete obligation under the treaty being provisionally applied?

In addition, the commentary on Guideline 8 does not explain whether termination is effective *ex nunc* or *ex tunc*, and therefore whether Article 70 of the VCLT applies *mutatis mutandis*. It appears reasonable to believe that, since provisionally applied treaty provisions are binding on the signatories as clarified in Guideline 6, the said Article could also apply.

Slovenia looks forward to the discussion on the ILC Report in the coming days, where it will present its views on the remaining two clusters.

Thank you.