COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

73rd Session of the Sixth Committee of the General Assembly of the United Nations

Report of the International Law Commission on the work of its 70th Session

Cluster 1 (Chapters I, II, III, IV, V, XII and XIII)

Statement by

Ms Marta REQUENA

Head of the Public International Law and Treaty Office Division of the Council of Europe

New York, 22-26 October 2018

Mr Chairperson,
Dear colleagues,
Ladies and gentlemen,

Since this is the first time that I am taking the floor, allow me to begin by congratulating you on your election as Chair of the Sixth Committee. I wish you and other members of the Bureau every success in your work.

I would also like to congratulate the International Law Commission (ILC) for its comprehensive, interesting and well-drafted Report prepared during its 70th Session. I would like in particular thank the Chair of the ILC, Mr Eduardo Valencia-Ospina, for having presented the main trends of this Report earlier this week. I would also like to express my gratitude to Mr Pavel Šturma, First Vice-Chair of the ILC, for his participation in the 56th meeting of the Council of Europe's *Committee of Legal Advisers on Public International Law* (CAHDI) held on 20-21 September in Helsinki (Finland).

Please allow me to make a few remarks in relation to **Chapter III** (Specific issues on which comments would be of particular interest to the Commission), **Chapter IV** (Subsequent agreements and subsequent practice in relation to the interpretation of treaties) and **Chapter V** (Identification of customary international law) of this year's report.

1. Chapter III (Specific issues on which comments would be of particular interest to the Commission: Succession of States in respect of State Responsibility)

On the specific issues on which comments would be of particular interest to the ILC, I would like to mention the theme of "Succession of States in respect of State Responsibility". In this respect, I would like to thank the Special Rapporteur, Mr Pavel Šturma, for his Second Report on this subject which we have examined with great interest. We welcome the progress made in relation to this subject

Indeed this matter is of particular importance for the Council of Europe taking into account the enlargement of our Organisation's membership following the numerous cases of succession of States in Central and Eastern Europe in the 1990s and the subsequent legal consequences and impact on the State responsibility rules (e.g. treaty law). In this respect, we welcome the references made in the Second Report to the case law of the *European Court of Human Rights* (ECtHR) [1] in the context of the relevant rules on State responsibility, in particular those on attribution and breach of an international obligation.

In relation to this subject, I would like to draw your attention to the *Pilot Project of the Council of Europe on State Practice regarding State Succession and Issues of Recognition* carried out under the aegis of the Council of Europe's *Committee of Legal Advisers on Public International Law* (CAHDI) as mentioned in the Second Report. For the Pilot Project sixteen member States of the Council of Europe submitted national reports covering official documents and statements made by all three branches of State powers, i.e. the executive, the legislative and national courts and tribunals, in the

[1] See for instance ECtHR, *Papamichalopoulos and Others v. Greece*, application no. 14556/89, Grand Chamber judgment of 24 June 1993; ECtHR, *Loizidou v. Turkey*, application no. 15318/89, Grand Chamber judgment of 18 December 1996; ECtHR, *Ilaşcu and Others v. Moldova and Russia*, application No. 48787/99, Grand Chamber judgment of 8 July 2004; ECtHR, *Šilih v. Slovenia*, application no. 71463/01, Grand Chamber judgment of 9 April 2009; ECtHR, *Bijelić v. Montenegro and Serbia*, application No. 11890/05, Grand Chamber judgment of 28 April 2009; ECtHR, *Ireland v. the United Kingdom*, application no. 5310/71 Grand Chamber judgment of 18 January 1978 (separate opinion of Judge O'Donoghue).

period from 1989 to 1995. On the basis of the information gathered, the CAHDI entrusted several experts to prepare a Report with the aim of analysing the practice of the contributing member States. We believe that this detailed study, available as a Council of Europe Book[2], could be of interest for the work of the International Law Commission and the Special Rapporteur concerning this topic.

2. Chapter IV (Subsequent agreements and subsequent practice in relation to the interpretation of treaties)

First of all, I would like to thank the Special Rapporteur, Mr Georg Nolte, for his comprehensive Reports. The fifth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties is of particular importance to the Council of Europe, taking into account the wide range of expert treaty bodies existing within our Organization.

The ILC Report refers to the interpretation of the *European Convention on Human Rights* and related case law of *European Court of Human Rights* in the commentaries of eight of the 13 draft conclusions on this topic adopted on second reading this year. I would like to highlight a few references made in the commentaries:

- as regards the commentary to paragraph 3 of the draft conclusion 4 ("***subsequent practice in the application of the treaty as a supplementary means of interpretation under Article 32***"), we agree indeed that the ECtHR's interpretation was "confirmed by the subsequent practice of the Contracting Parties"[3] denoting practically universal agreement amongst Contracting Parties. The *European Court of Human Rights* has relied on subsequent practice of the parties by referring to national legislation and domestic administrative practice, as a means of interpretation (page 34, ILC Report, para. 27).

- regarding the commentary to paragraph 2 of draft conclusion 5 ("***conduct as subsequent practice***"), which indicates that mere social practice is not sufficient to constitute relevant subsequent practice although it may be relevant when assessing the subsequent practice of parties to a treaty (pages 42-43, ILC Report, paras.18-20). In this respect, I would like to underline that, on the other hand, the case law of the *European Court of Human Rights* also influences State practice, and therefore it can influence the subsequent practice of parties to a treaty.

[2] *State Practice Regarding State Succession and Issues of Recognition*, edited by Jan Klabbers, Martti Koskenniemi, Olivier Ribbelink and Andreas Zimmermann, © Council of Europe, The Hague, Brill-Nijhoff 1999.
[3] ECtHR, *Loizidou v. Turkey*, application no. 15318/89, Grand Chamber judgment of 18 December 1996.

With respect to draft conclusion 11 ("***decisions adopted within the framework of a Conference of State Parties***") and its related commentary, we would like to note the relevance of this draft conclusion for the numerous conferences of State Parties set up under Conventions of the Council of Europe (pages 82-93, ILC Report).

Finally, as regards draft conclusion 13 ("***pronouncements of expert treaty bodies***"), we concur with the role ascribed by the ILC to expert treaty bodies and would like to note the Council of Europe's long-standing practice with such bodies, mostly in relation to convention-based monitoring bodies, whose members serve in a personal capacity. I can confirm that their contribution to the interpretation of treaties has been of great importance, in particular regarding the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT) [4], the *Group of Experts on Action against Violence against Women and Domestic Violence* (GREVIO), [5] the *Group of Experts on Action against Trafficking in Human Beings* (GRETA),[6] the *European Committee of Social Rights*[7] and *the Advisory Committee on the Framework Convention for the Protection of National Minorities*[8].

The *European Court of Human Rights* has used and continues to use the conclusions and recommendations of independent human rights monitoring mechanisms in its case law, illustrating the importance of pronouncements of expert treaty bodies.

3. Chapter V (Identification of customary international law)

With respect to the identification of customary international law, allow me first of all to thank the Special Rapporteur, Sir Michael Wood, for his outstanding work on the fifth Report on this topic. Allow me also to thank him for his continuous and close co-operation with the Council of Europe.

As stated in the ILC report, the sixteen draft conclusions on this topic, adopted in second reading this year, "reflect the approach adopted by States, as well as by international courts and organizations and most authors". This is certainly a field of

[4] Set up under Article 1 of the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ETS No.126).
[5] Set up under Article 66 of the *Council of Europe Convention on preventing and combating violence against women and domestic violence* (CETS No. 210).
[6] Set up under Article 26 of the *Council of Europe Convention on Action against Trafficking in Human Beings* (CETS No. 197).
[7] Set up under Article 25 of the *European Social Charter* [ETS No. 35] and Part IV Article C of the *European Social Charter* (revised) (ETS No. 163).
[8] Set up under Article 26 of the *Framework Convention for the Protection of National Minorities* (ETS No. 157).

great interest for the Council of Europe and its *Committee of Legal Advisers on Public International Law* (CAHDI).

Draft conclusions 12 and 13 are of particular relevance to the Council of Europe (pages 147-151 of the ILC Report).

- Draft conclusion 12 concerns "**the role that resolutions adopted by international organisations or at intergovernmental conferences may play in the determination of rules of customary international law**". The Council of Europe agrees with the ILC that the practice developed within the framework of international organisations can indeed be useful in the identification of customary law. In this respect we can provide as example the ***Declaration on "The Jurisdictional Immunities of State Owned Cultural Property on Loan"*** which was prepared within the CAHDI in support of the recognition of the customary nature of certain provisions of the 2004 UN *Convention on Jurisdictional Immunities of States and Their Property*. The Declaration was presented in 2013 and, to date, it has been signed by the Ministers of Foreign Affairs of 20 States[9], with more signatures expected in the future. The Declaration's success can be conducive to the further development of the identification of customary international law.

- Draft conclusion 13 addresses "**the role of decisions of courts and tribunals, both international and national, as an aid in the identification of rules of customary international law**", including regional human rights courts. In this respect, the case-law of the European Court of Human Rights has referred to existing norms of customary international law (e.g. *Van Anraat v. Netherlands*, no. 65389/09, Chamber decision of 6 July 2010[10]; *Wallishauser v. Austria*, no. 156/04, Chamber judgment of 17 July 2012)[11].

[9] Albania, Armenia, Austria, Belarus, Belgium, the Czech Republic, Estonia, Finland, France, Georgia, Holy See, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Russia, and Slovakia.

[10] ECtHR, *Van Anraat v. Netherlands*, application no. 65389/09, Chamber decision of 6 July 2010. The applicant, convicted of war crimes by a domestic court for supplying chemicals to Iraq between 1984 and 1988 to be used in the production of chemical weapons, submitted that his conviction had been unforeseeable since there was no norm of international law at that time which prohibited the committed acts. The Court, noting that the prohibition of the use of chemical weapons had at the time of the commission of the acts already existed as a norm of customary international law and that the 1925 Geneva Gas Protocols, the 1949 Geneva Conventions as well as the United Nations General Assembly had condemned their use, declared the application inadmissible.

[11] ECtHR, *Wallishauser v. Austria*, application no. 156/04, Chamber judgment of 17 July 2012. The applicant, a former employee of the United States Embassy in Vienna who was owed salary payments after her unlawful dismissal, successfully argued that she had been denied access to a court when the United States' authorities had invoked immunity and refused to be served with summons to a hearing. The Court considered that the rule that the service of documents instituting proceedings against a State was deemed to have been effected on their receipt by the Ministry of Foreign Affairs of the State concerned applied to Austria as a rule of customary international law (in the absence of any objection by Austria to Article 20 of the International Law Commission's 1991 Draft Articles, which

Finally, I would like to thank the Secretariat for the Memorandum[12] prepared on this issue. In particular, we welcome the references to the work of the Council of Europe's *Committee of Legal Advisers on Public International Law* (CAHDI) and its publication on "*State Practice regarding State Immunities*" (Council of Europe, 2006). Furthermore, we also welcome and support the suggestion included in The Memorandum to foster co-operation between the ILC and other bodies, including the CAHDI[13]. Another suggestion made in the Memorandum, which we support, is that "States could also be encouraged to participate in regional efforts for the progressive development and codification of international law" (paragraph 118).

embodied the rule, or to a similar provision in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property).

[12] *Memorandum by the Secretariat* on "*Identification of customary international law - Ways and means for making the evidence of customary international law more readily available*", document A/CN.4/710, of 12 January 2018.

[13] "*In particular, requests for information on specific issues identified by the International Law Commission and for comments on draft provisions and commentaries thereto provisionally adopted by the Commission could be addressed more regularly to the African Union Commission on International Law, the Asian–African Legal Consultative Organization, the Council of Europe Committee of Legal Advisers on Public International Law and the Inter-American Juridical Committee*" (paragraph 117).