

Provisional

For participants only

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International Law Commission
Seventy-fourth session (second part)

Provisional summary record of the 3636th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 4 July 2023, at noon

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Present:

Chair: Ms. Galvão Teles

Members: Mr. Akande
Mr. Asada
Mr. Aurescu
Mr. Cissé
Mr. Fathalla
Mr. Fife
Mr. Forteau
Mr. Galindo
Mr. Grossman Guiloff
Mr. Huang
Mr. Jalloh
Mr. Laraba
Mr. Lee
Mr. Mavroyiannis
Mr. Mingashang
Mr. Nesi
Mr. Nguyen
Ms. Okowa
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Oyarzábal
Mr. Paparinskis
Mr. Patel
Ms. Ridings
Mr. Ruda Santolaria
Mr. Sall
Mr. Savadogo
Mr. Tsend
Mr. Vázquez-Bermúdez

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 12.05 p.m.

Cooperation with other bodies (agenda item 10)

Inter-American Juridical Committee

Mr. Galindo, speaking as Vice-Chair of the Inter-American Juridical Committee, said that the Committee, as one of the principal organs of the Organization of American States (OAS), served as an advisory body to the Organization on juridical matters, promoted the progressive development and the codification of international law and studied the possibility of attaining uniformity in the legislation of the countries of the region. It was composed of 11 jurists who were nationals of States members of OAS and were elected by its General Assembly. Once elected, the members no longer represented their own countries and were completely independent. The Committee had its headquarters in Rio de Janeiro, held two regular sessions per year and was serviced by the Department of International Law of the OAS Secretariat for Legal Affairs. It undertook studies and work entrusted to it by the General Assembly and other organs of OAS, including the Permanent Council, but also had the power to undertake such studies and work as it deemed advisable on its own initiative, including matters related to private international law. In recent years, the OAS General Assembly had entrusted the Committee with a broad range of issues, underscoring the body's importance. The variety of the topics studied by the Committee was reflected in the agenda for its 103rd regular session, due to take place in August 2023, which included both topics assigned by the OAS General Assembly, such as the legal implications of sea-level rise in the inter-American regional context, and topics undertaken on the Committee's own initiative, such as particular customary international law in the context of the Americas.

The Committee had held two regular sessions in 2022 and had adopted two declarations. The first declaration, on international law, had been adopted to mark the Committee's 100th regular session. It stressed the need for States to respect the essential principles of the OAS Charter and the obligations arising from treaties and other sources of international law. The second declaration, on the inviolability of diplomatic premises as a principle of international relations and its relation to the concept of diplomatic asylum, affirmed that there were no exceptions to the rule on the inviolability of the premises of diplomatic missions and that any violations of that rule must be dealt with exclusively by recourse to the measures provided for in diplomatic law. The document containing the declaration included an explanatory note clarifying the sources of the rule on the inviolability of diplomatic premises and its relationship to the concept of diplomatic asylum. The Committee had also adopted a report on international law applicable to cyberspace, in which it described the current state of multilateral and academic processes in that area and presented an analysis of the main relevant issues of international law on which there were differences of opinion, including the attribution of responsibility in cyberoperations, the breach of an international obligation through cyberoperations and the responses available to States that were the victims of malicious cyberoperations. The report was intended to serve as a reference not only for the OAS member States, but also for countries in other regions.

In 2023, the Committee had finalized two further declarations. The first, an inter-American declaration of principles on neuroscience, neurotechnologies and human rights, contained a set of proposals for linking developments in neuroscience and neurotechnologies to protection measures in the field of human rights, including in relation to the rights to dignity, identity, privacy and physical and mental health and the prohibition of torture and cruel, inhuman or degrading treatment. The second, an inter-American declaration of principles on the creation, operation, financing and dissolution of non-profit civil entities, was aimed at facilitating the life cycle of such entities on the basis of national and international standards and best practices, including the relevant laws of member States. It systematized, updated and consolidated the standards developed in the region through an exhaustive study that was reflected in the commentaries to each principle. The Committee had also adopted a report on compulsory primary education, in which it urged member States to guarantee the full enjoyment of the right to primary education and to recognize free, compulsory and universal primary education as a fundamental human right. The declarations and reports described were available on the Committee's web page.

In preparing its declarations and reports, the Committee relied on the cooperation of member States, in particular their responses to questionnaires on the current state of play with regard to specific issues. However, such cooperation remained a challenge for the Committee, as it did for the Commission, since States did not always provide input on all topics with regard to which their feedback was requested. Nevertheless, the Committee had produced a considerable body of work on various areas of international law. Its work had been widely disseminated, in no small part thanks to the efforts of the OAS Department of International Law, which in recent months had organized a series of courses on the Committee's output in collaboration with diplomatic training institutions in various countries in the region. The work of the Committee was also disseminated through its annual Course on International Law, held in Rio de Janeiro, which was widely attended by participants from various member States.

The Committee's 103rd session would coincide with the Ninth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States, which was scheduled to take place in Rio de Janeiro on 9 August 2023. Such joint meetings were particularly important opportunities for direct dialogue between the members of the Committee and the officials who were directly in charge of legal issues in each member State, in both the public and private spheres.

Lastly, he wished to invite the Commission to strengthen its ties with the Committee by arranging for a representative of the Commission to attend the Committee's regular session in person each year, so that he or she could present and explain recent developments in the Commission's work.

The Chair said that there were various areas of common interest between the Commission and the Committee, in particular sea-level rise. It would be interesting for both bodies to look for ways to enhance the complementarity of their work.

Mr. Vázquez-Bermúdez said that another item on the Committee's agenda that touched upon a topic dealt with by the Commission was "Particular customary international law in the context of the Americas", for which Mr. Galindo was the Committee's rapporteur. In 2018, the Commission had adopted a set of conclusions on identification of customary international law, of which conclusion 16 dealt specifically with particular customary law. The Commission specified, in paragraph (7) of the commentary to conclusion 16, that the two-element approach requiring both a general practice and its acceptance as law (*opinio juris*) for the identification of rules of customary international law also applied to the identification of rules of particular customary international law, but that the application of that approach was stricter in the case of particular customary international law. The need for such strict application was clear when it came to the identification of rules of particular customary international law of a bilateral or subregional nature; however, he wondered whether, in its study of the topic, the Committee had found that the two-element approach was applied less stringently in the identification of regional rules of particular customary international law.

Mr. Jalloh said that the Committee's past work on non-binding agreements could also be of considerable value to the Commission, which had recently added the topic of non-legally binding international agreements to its long-term programme of work. Regarding cooperation with States, he would be interested to learn more about the Committee's strategy for promoting engagement with the OAS member States.

Mr. Ruda Santolaria said that the Committee carried out very valuable work. The Committee's meetings with State representatives in the framework of its Joint Meetings with the Legal Advisors of the Ministries of Foreign Affairs of the Member States provided an opportunity both to discuss the themes that it was considering and to obtain input on issues of practical relevance from an international law perspective on which it could then take action. The Committee had decided to consider the theme of non-binding agreements precisely because it had been raised as a concern at one such meeting.

There was much to be gained from strengthening arrangements for cooperation between the Commission and the Committee with a view to ensuring greater complementarity. For example, with regard to sea-level rise in relation to international law, the Committee was complementing the Commission's work by considering the legal

implications of the phenomenon in the inter-American regional context specifically. In that connection, he saw merit in generating further synergies between the Committee and the Commission's Study Group on sea-level rise in relation to international law.

Mr. Galindo, speaking as Vice-Chair of the Inter-American Juridical Committee, said that the Committee had been working on the theme of particular customary international law in the context of the Americas, for which he was rapporteur, for several years. The study of the topic consisted of three stages. First, the Committee had considered relevant jurisprudence, in particular that of the International Court of Justice, and certain advisory opinions of the Inter-American Court of Human Rights in which the possible existence of particular customary international law had been analysed. In some separate opinions, judges of the International Court of Justice had argued that such a concept did in fact exist. Second, the Committee had explored how the idea of particular customary international law was addressed in scholarship. It had found that international legal scholars based their arguments largely on the decisions of international courts and tribunals. The third and current stage of the project was focused on the practice of States in the Americas. However, the task of gathering input from States presented a challenge, as the Committee received few replies to the questionnaires that it circulated.

The Committee had yet to determine whether its position regarding the identification of particular or regional custom differed from that of the Commission. However, in relation to the judgment of the International Court of Justice in the *Colombian-Peruvian asylum case*, the Committee had noted that the Commission's conclusion that States were not bound by a rule of particular customary international law unless all the States concerned had expressly accepted the practice as law was only one possible interpretation. Another was that the burden of proof, rather than particular customary international law *per se*, had been the focus of the case. The Committee needed additional elements of State practice to confirm that interpretation. A dedicated questionnaire for States had been prepared, and the Committee should soon be in a position to determine the general views of American States on the matter.

The Committee faced some of the same challenges as the Commission. One of the Committee's practices that the Commission could adopt was the organization of meetings with legal advisers as a way of gauging their views on the themes under consideration. One such meeting had revealed a strong interest in non-binding instruments. In response, the Committee had produced a useful set of guidelines on binding and non-binding agreements, in addition to considering such agreements as a distinct theme.

The Committee made efforts to ensure that its work complemented that of the Commission. For example, when the Committee had been considering whether to add the theme "Legal implications of the sea-level rise in the inter-American regional context" to its agenda, it had discussed at length the need to ensure complementarity with the Commission's work on the topic of sea-level rise in relation to international law. The two bodies were thus able to benefit from each other's perspectives on the same set of issues. In addition, any input that the Committee received from States could be regarded as practice of relevance to the Commission's work.

Mr. Grossman Guiloff said that, as a member of both the Commission and the Committee, Mr. Galindo was well placed to forge links between the two bodies. There were various similarities between the Commission and the Committee, including their educational and outreach activities, common topics or themes and the fact that many years had passed since their work had led to a treaty. Following its annual Course on International Law, the Committee published the course content in the form of a compilation of articles, which brought the initiative to a wider audience. The Commission might wish to consider producing a similar publication following its annual International Law Seminar. Mr. Galindo's invitation to the Commission members to participate in the Committee's annual sessions was an opportunity to think more generally about how to strengthen the Commission's relations with regional bodies on the basis of their shared interests. To that end, the Commission could establish a working group to explore avenues for further cooperation.

Mr. Fathalla said that, owing to the costs associated with travel to Brazil to participate in the Committee's sessions, it might be preferable for Mr. Galindo, as a member of both bodies, to make a presentation to the Committee on the Commission's work.

Ms. Okowa said that international lawyers had long been fascinated by regional custom in relation to diplomatic asylum and the question of whether the *Asylum* case continued to have any practical relevance. Ecuador had taken a position on the matter in the context of the Julian Assange case. In that connection, she would be grateful for an update on the Committee's work on diplomatic asylum in the regional context. Had a definitive pronouncement on the matter been made?

Mr. Oyarzábal said that Latin America was a region with a rich history in relation to international law, and the Commission could learn a great deal from the Committee's work. He would be grateful for more information on the Committee's methods of work, such as how it selected topics for consideration and avoided overlap with the Commission's work.

Mr. Galindo, speaking as Vice-Chair of the Inter-American Juridical Committee, said he agreed with Mr. Grossman Guiloff that further cooperation was needed and that the compilations published after the annual editions of the Course on International Law were useful for students and practitioners of international law and played an important role in disseminating the Committee's work. The publication could be downloaded from the Committee's website free of charge. The course content was published in the form of articles in the language in which the course had been delivered.

With regard to Mr. Fathalla's suggestion, it would be preferable if a Commission member other than himself participated in the Committee's sessions. New technological tools provided a way of overcoming the lack of resources, which was particularly severe at the regional level, through remote participation. Concerning diplomatic asylum, the Committee's declaration concerned the inviolability of diplomatic premises as a principle of international relations and its relation to the concept of diplomatic asylum and was therefore not applicable to the Julian Assange case.

With regard to methods of work, the members of the Committee came from a wide range of backgrounds and had training in fields as varied as public international law, private international law, administrative law and tax law. That diversity required them to address issues of public international law in more common and less technical terms than the Commission. In that connection, as public international law needed to be interpreted in a holistic manner, it would be interesting to reflect on how the Commission could draw on the language used in other branches of law.

The meeting rose at 1.05 p.m.