

## Chapter II

### SUMMARY OF THE WORK OF THE COMMISSION AT ITS SIXTY-EIGHTH SESSION

12. With regard to the topic “Protection of persons in the event of disasters”, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/697) surveying the comments made by States and international organizations, and other entities, on the draft articles on the protection of persons in the event of disasters adopted on first reading at the sixty-sixth session (2014)<sup>3</sup> and making recommendations for consideration by the Commission during the second reading. The Commission also had before it the comments and observations received from Governments and international organizations (A/CN.4/696 and Add.1) on the draft articles adopted on first reading.

13. The Commission subsequently adopted, on second reading, a draft preamble and 18 draft articles, together with commentaries thereto, on the protection of persons in the event of disasters, and, in accordance with article 23 of its statute recommended to the General Assembly, the elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters (chap. IV).

14. With respect to the topic “Identification of customary international law”, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/695 and Add.1), which contained, in particular, suggestions for amendments to several draft conclusions in the light of comments by Governments. It also addressed ways and means to make the evidence of customary international law more readily available. Finally, it provided a bibliography on the topic. In addition, the Commission had before it a memorandum by the Secretariat concerning the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691).

15. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 16 draft conclusions, together with commentaries thereto, on the identification of customary international law. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018 (chap. V).

16. With respect to the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, the Commission had before it the fourth

report of the Special Rapporteur (A/CN.4/694), which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts. The report also discussed the structure and scope of the draft conclusions.

17. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 13 draft conclusions, together with commentaries thereto, on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018 (chap. VI).

18. With respect to the topic “Crimes against humanity”, the Commission had before it the second report of the Special Rapporteur (A/CN.4/690), as well as a memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the Commission (A/CN.4/698). The second report addressed, *inter alia*, criminalization under national law, the establishment of national jurisdiction, general investigation and cooperation for identifying alleged offenders, the exercise of national jurisdiction when an alleged offender is present, *aut dedere aut judicare*, and the fair treatment of an alleged offender.

19. Following the debate in plenary, the Commission decided to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee. Upon consideration of the report of the Drafting Committee (A/CN.4/L.873), the Commission provisionally adopted draft articles 5 to 10, together with commentaries thereto. The Commission also decided to refer the question of the liability of legal persons to the Drafting Committee. Following its consideration of a further report from the Drafting Committee (A/CN.4/L.873/Add.1), the Commission provisionally adopted paragraph 7 of draft article 5, together with the commentary thereto (chap. VII).

20. Concerning the topic “Protection of the atmosphere”, the Commission had before it the third report of the Special Rapporteur (A/CN.4/692), which, building upon the previous two reports,<sup>4</sup> analysed several key issues relevant to the topic: the obligations of States

<sup>3</sup> *Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

<sup>4</sup> First report: *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/667; second report: *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/681.

to prevent atmospheric pollution and mitigate atmospheric degradation, and the requirement of due diligence and environmental impact assessment. The report also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as legal limits on certain activities aimed at intentional modification of the atmosphere. Consequently, five draft guidelines were proposed, on the obligation of States to protect the environment, environmental impact assessment, sustainable utilization of the atmosphere, equitable utilization of the atmosphere, and geoengineering, together with an additional preambular paragraph.

21. Following debate in the Commission, which was preceded by a dialogue with scientists organized by the Special Rapporteur, the Commission decided to refer the five draft guidelines, together with the preambular paragraph, as contained in the Special Rapporteur's third report, to the Drafting Committee. Upon its consideration of the report of the Drafting Committee (A/CN.4/L.875), the Commission provisionally adopted draft guidelines 3, 4, 5, 6 and 7 and a preambular paragraph, together with commentaries thereto (chap. VIII).

22. With regard to the topic "*Jus cogens*", the Commission had before it the first report of the Special Rapporteur (A/CN.4/693), which addressed conceptual issues relating to peremptory norms (*jus cogens*), including their nature and definition, and traced the historical evolution of peremptory norms and, prior to that, the acceptance in international law of the elements central to the concept of peremptory norms of general international law. The report further raised a number of methodological issues on which the Commission was invited to comment and reviewed the debates held in the Sixth Committee in 2014 and 2015. The Commission subsequently decided to refer draft conclusions 1 and 3, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission later took note of an interim report by the Chairperson of the Drafting Committee on draft conclusions 1 and 2 [3] provisionally adopted by the Committee, which was submitted to the Commission for information (chap. IX).

23. With respect to the topic "Protection of the environment in relation to armed conflicts", the Commission had before it the third report of the Special Rapporteur (A/CN.4/700), which focused on identifying rules applicable in post-conflict situations, while also addressing some preventive issues to be addressed in the pre-conflict phase. The report contained three draft principles on preventive measures, five draft principles concerning primarily the post-conflict phase and one draft principle on the rights of indigenous peoples. Following the debate in plenary, the Commission decided to refer the draft principles, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently received a report from the Drafting Committee (A/CN.4/L.876) and took note of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee. Furthermore, the Commission provisionally adopted the draft principles of which it had taken note during its sixty-seventh session,<sup>5</sup> which had been renumbered and

revised for technical reasons (A/CN.4/L.870/Rev.1) by the Drafting Committee at the present session, together with commentaries thereto (chap. X).

24. Concerning the topic "Immunity of State officials from foreign criminal jurisdiction", the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/701), which analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Since at the time of its consideration the report was only available to the Commission in two of the six official languages of the United Nations, the debate in the Commission was commenced, involving members wishing to comment on the fifth report at the sixty-eighth session, and would be continued at the sixty-ninth session of the Commission.

25. Upon its consideration of the report of the Drafting Committee on work done previously and taken note of by the Commission during its sixty-seventh session,<sup>6</sup> the Commission provisionally adopted draft articles 2 (f) and 6, together with commentaries thereto (chap. XI).

26. With regard to the topic "Provisional application of treaties", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/699 and Add.1), which continued the analysis of the relationship between provisional application and other provisions of the 1969 Vienna Convention on the Law of Treaties and of the practice of international organizations with regard to provisional application. The report included a proposal for a draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty. The addendum to the report contained examples of recent European Union practice on provisional application of agreements with third States.

27. Following the debate in plenary, the Commission decided to refer draft guideline 10, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently received a report from the Drafting Committee (A/CN.4/L.877) and took note of draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee during the sixty-seventh and sixty-eighth sessions. Draft guideline 5, on unilateral declarations, had been kept in abeyance by the Drafting Committee for further consideration at a later stage (chap. XII).

28. As regards "Other decisions and conclusions of the Commission", the Commission decided to request the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions on how it could be improved, and another memorandum analysing State practice in respect of treaties (bilateral and multilateral) deposited or registered with the Secretary-General in the last 20 years that provide for provisional application, including treaty actions related thereto (chap. XIII, sect. A).

<sup>5</sup> *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

<sup>6</sup> A/CN.4/L.865 (available from the Commission's website, documents of the sixty-seventh session); see also *Yearbook ... 2015*, vol. II (Part Two), pp. 71–72, para. 176.

29. The Commission also established a Planning Group to consider its programme, procedures and working methods (chap. XIII, sect. B). The Commission decided to include the following topics in its long-term programme of work: (a) The settlement of international disputes to which international organizations are parties; and (b) Succession of States in respect of State responsibility (*ibid.*).

30. The Commission recommended that it hold the first part of its seventieth session in New York and requested the Secretariat to proceed with the necessary administrative and organizational arrangements to facilitate this. The Commission recommended that a seventieth anniversary commemorative event be held during its seventieth session in 2018. The commemorative event would be held in two parts: the first during the first part of its seventieth

session, recommended to be held in New York, and the second during the second part of its seventieth session, in Geneva (*ibid.*).

31. The Commission continued its exchange of information with the International Court of Justice, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe. An informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) (chap. XIII, sect. D).

32. The Commission decided that its sixty-ninth session should be held in Geneva from 1 May to 2 June and 3 July to 4 August 2017 (chap. XIII, sect. C).