

Chapter X

Other decisions and conclusions of the Commission

A. Special memorial meetings

297. On 3 September 2020, a virtual informal memorial meeting of members of the Commission was convened in honour of the memory of Judge Alexander Yankov, former Chair of the Commission and Special Rapporteur for the topic “Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier”.

298. At its 3547th meeting, held on 22 July 2021, the Commission convened a memorial meeting in honour of the memory of Judge James Crawford, Special Rapporteur for the topic “Responsibility of States for internationally wrongful acts”.

B. Programme, procedures and working methods of the Commission and its documentation

299. On 29 April 2021, the Planning Group was constituted for the present session.

300. The Planning Group held five meetings on 29 April, 25 May and 9, 23 and 27 July 2021. It had before it the topical summaries of the discussions held in the Sixth Committee of the General Assembly during its seventy-fourth (A/CN.4/734) and seventy-fifth (A/CN.4/734/Add.1) sessions, prepared by the Secretariat; General Assembly resolutions 74/186 of 18 December 2019 and 75/135 of 15 December 2020, relating to the work of the Commission; and General Assembly resolutions 74/191 of 18 December 2019 and 75/141 of 15 December 2020 on the rule of law at the national and international levels.

1. Working Group on the long-term programme of work

301. At its 1st meeting, on 29 April 2021, the Planning Group decided to reconvene the Working Group on the long-term programme of work, with Mr. Mahmoud D. Hmoud as Chair. The Chair of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group, at its 5th meeting, on 27 July 2021. The Planning Group took note of the oral report.

302. At the present session, the Commission, on the recommendation of the Working Group, decided to recommend the inclusion of the topic “Subsidiary means for the determination of rules of international law” in the long-term programme of work of the Commission. In the selection of the topic, the Commission was guided by its recommendation at its fiftieth session (1998) regarding the criteria for the selection of the topics, namely: (a) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; and (c) the topic should be concrete and feasible for progressive development and codification. The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.⁴⁵⁹ The Commission considered that work on the topic would constitute a useful contribution to the progressive development of international law and its codification. The syllabus of the topic selected appears as an annex to the present report.

2. Working Group on methods of work of the Commission

303. At its 1st meeting, on 29 April 2021, the Planning Group decided to re-establish the Working Group on methods of work of the Commission, with Mr. Hussein A. Hassouna as Chair. The Chair of the Working Group presented an oral report on the work of the Working

⁴⁵⁹ *Yearbook ... 1998*, vol. II (Part Two), para. 553.

Group at the current session to the Planning Group, at its 4th meeting, on 23 July 2021. The Planning Group took note of the oral report.

3. Consideration of General Assembly resolutions 74/191 of 18 December 2019 and 75/141 of 15 December 2020 on the rule of law at the national and international levels

304. The General Assembly, in resolutions 74/191 of 18 December 2019 and 75/141 of 15 December 2020 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. Since its sixtieth session (2008), the Commission has commented at each of its sessions on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report⁴⁶⁰ remain relevant and reiterates the comments made at its previous sessions.⁴⁶¹

305. The Commission recalls that the rule of law is of the essence of its work. The Commission's purpose, as set out in article 1 of its statute, is to promote the progressive development of international law and its codification.

306. Having in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level, and aims at promoting respect for the rule of law at the international level.

307. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission will continue to take into account, where appropriate, the rule of law as a principle of governance and the human rights that are fundamental to the rule of law, as reflected in the preamble and in Article 13 of the Charter of the United Nations and in the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels.⁴⁶²

308. In its current work, the Commission is aware of "the interrelationship between the rule of law and the three pillars of the United Nations (peace and security, development, and human rights)",⁴⁶³ without emphasizing one at the expense of the other. In this context, the Commission is cognizant that the 2030 Agenda for Sustainable Development recognizes the need for an effective rule of law and good governance at all levels.⁴⁶⁴

309. In fulfilling its mandate concerning the progressive development and codification of international law, the Commission is conscious of current challenges for the rule of law. Recalling that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law,⁴⁶⁵ the Commission wishes to recall that much of its work consists of collecting and analysing national practices related to the rule of law with a view to assessing their possible contribution to the progressive development and codification of international law.

⁴⁶⁰ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10).*

⁴⁶¹ *Ibid.*, Sixty-fourth Session, Supplement No. 10 (A/64/10), para. 231; *ibid.*, Sixty-fifth Session, Supplement No. 10 (A/65/10), paras. 390–393; *ibid.*, Sixty-sixth Session, Supplement No. 10 (A/66/10), paras. 392–398; *ibid.*, Sixty-seventh Session, Supplement No. 10 (A/67/10), paras. 274–279; *ibid.*, Sixty-eighth Session, Supplement No. 10 (A/68/10), paras. 171–179; *ibid.*, Sixty-ninth Session, Supplement No. 10 (A/69/10), paras. 273–280; *ibid.*, Seventieth Session, Supplement No. 10 (A/70/10), paras. 288–295; *ibid.*, Seventy-first Session, Supplement No. 10 (A/71/10), paras. 314–322; *ibid.*, Seventy-second Session, Supplement No. 10 (A/72/10), paras. 269–278; *ibid.*, Seventy-third Session, Supplement No. 10 (A/73/10), paras. 372–380; *ibid.*, Seventy-fourth Session, Supplement No. 10 (A/74/10), paras. 293–301.

⁴⁶² General Assembly resolution 67/1 of 30 November 2012 on the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, para. 41.

⁴⁶³ Report of the Secretary-General on measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations, S/2013/341, 11 June 2013, para. 70.

⁴⁶⁴ General Assembly resolution 70/1 of 21 October 2015, para. 35.

⁴⁶⁵ General Assembly resolution 75/141 of 15 December 2020 on the rule of law at the national and international levels, paras. 2 and 19.

310. Bearing in mind the role of multilateral treaty processes in advancing the rule of law,⁴⁶⁶ the Commission recalls that the work of the Commission on different topics has led to several multilateral treaty processes and to the adoption of a number of multilateral treaties.⁴⁶⁷

311. In the course of the present session, which followed a postponement of its session in 2020 due to the COVID-19 pandemic, the Commission has continued to make its contribution to the promotion of the rule of law, including by working on the topics in its current programme of work, “Protection of the atmosphere” (adopted on second reading at the current session), “Provisional application of treaties” (adopted on second reading at the current session), “Immunity of State officials from foreign criminal jurisdiction”, “Sea-level rise in relation to international law”, “Succession of States in respect of State responsibility”, and “General principles of law”.

312. The Commission reiterates its commitment to the promotion of the rule of law in all of its activities.

4. Hybrid format of the International Law Commission at the present session

313. The Commission expresses its appreciation to the bureaux of its seventy-first and seventy-second sessions, together with the Secretariat, for the organizational arrangements put in place that allowed the Commission to be convened at its seventy-second session, in 2021, in a hybrid format. The hybrid format enabled members to participate either in person at the Palais des Nations or online through a platform (Zoom) with remote simultaneous interpretation into all official languages of the United Nations. The Commission also expresses its appreciation to the Government of Switzerland, the host of the Commission, for taking the necessary measures that allowed the convening of the hybrid session and facilitated travel to Geneva for members who attended the session in person and the staff of the Secretariat. The Commission notes that the convening of the session in the hybrid format and the functionality of the online platform used (Zoom) were crucial to the successful outcome of the session. The session of the Commission would have been impossible without the presence of some members and the staff of the Secretariat in Geneva. Their presence allowed for the smooth functioning of the Commission, whose work could otherwise have been adversely affected.

314. The Commission also notes that the session was held in accordance with the health regulations and COVID-19 mitigation measures in place at the United Nations Office in Geneva. This meant, for example, that the staff of the Secretariat were not permitted to distribute any paper copies of documentation. Documents required for participation in the meetings of the Commission were made available online through a dedicated drive set up by the Secretariat and through other electronic means.

315. The Commission acknowledges the extraordinary efforts made to ensure the smooth conduct of the Commission’s deliberations, which enabled the Commission to complete its session. However, the Commission wishes to note that the normal work of the Commission was disrupted significantly despite every effort and measures taken to ameliorate the issues. A variety of challenges were encountered, particularly during the first segment, including: (a) reduced hours of operation, especially for decision-making and negotiation, because of members being in different time zones; under the special conditions for the organization of the session, interpretation was assured for shorter periods than the usual three hours, thereby allowing the Commission to meet for fewer hours a day than the usual six; and, moreover, there was insufficient flexibility, as the meeting time not spent in plenary could not, under the circumstances, be used by the Drafting Committee, as would ordinarily have been the case, even though the members of the Commission did make use of that time for informal consultations; (b) members of the Commission having to work in different time zones meant a lot of adjustments to their work schedule, creating fatigue and additional stresses, particularly for those members who were continuously online either very early in the morning

⁴⁶⁶ *Ibid.*, para. 8.

⁴⁶⁷ See more specifically *Official Records of the General Assembly, Seventieth Session, Supplement No. 10 (A/70/10)*, para. 294.

or very late at night; (c) given that collegiality is central to the functioning of the Commission and even though an attempt was made to ensure equality of members and to level the playing field, the impact was more glaring in the Drafting Committee, whose ability to work in the usual manner, including through informal contacts and exchanges, was affected; (d) it was challenging to engage in detailed drafting in a virtual setting and this was not helped by the restriction on the circulation of paper copies of documents; (e) there were occasions during which Internet connectivity problems were encountered, sound was poor because of the equipment used, such that it was hard to understand what was being said and interpretation was rendered impossible; (f) access to Library facilities for members participating online proved to be a challenge, despite the improved availability of online resources and the bibliographical packages for members made available by the United Nations Library at Geneva; (g) the absence of the members' assistants from the Palais des Nations and from Geneva reduced the ability of members to involve them in their work, to the disadvantage of both; and (h) for the second year running, the International Law Seminar could not take place, which meant the loss of valuable interaction between members of the Commission and Seminar participants, who are usually young jurists and professors, specializing in international law, or government officials pursuing an academic or diplomatic career in posts in the civil service of their respective countries. Some of these challenges were to a slight extent overcome during the second part of the session; for example, there was flexibility in the working hours, more members attended in person and assistants were also able to attend in person.

316. Overall, the capacity of the Commission was reduced and, above all, the detailed negotiation of texts was rendered difficult. The Commission nevertheless notes that the convening of the session was worthwhile and that some lessons may be learned that could be useful for adapting the working methods of the Commission.

5. Honoraria

317. The Commission reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which have been expressed in the previous reports of the Commission.⁴⁶⁸ The Commission emphasizes that resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research.

6. Documentation and publications

318. The Commission underscored once more the unique nature of its functioning in the progressive development of international law and its codification, in that it attaches particular relevance to State practice and the decisions of national and international courts in its treatment of questions of international law. The Commission reiterated the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the function of the Commission. The reports of its Special Rapporteurs require an adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine, and a thorough analysis of the questions under consideration. The Commission stresses that it and its Special Rapporteurs are fully conscious of the need to achieve economies whenever possible in the overall volume

⁴⁶⁸ See *ibid.*, Fifty-seventh Session, Supplement No. 10 (A/57/10), paras. 525–531; *ibid.*, Fifty-eighth Session, Supplement No. 10 (A/58/10), para. 447; *ibid.*, Fifty-ninth Session, Supplement No. 10 (A/59/10), para. 369; *ibid.*, Sixtieth Session, Supplement No. 10 (A/60/10), para. 501; *ibid.*, Sixty-first Session, Supplement No. 10 (A/61/10), para. 269; *ibid.*, Sixty-second Session, Supplement No. 10 (A/62/10), para. 379; *ibid.*, Sixty-third Session, Supplement No. 10 (A/63/10), para. 358; *ibid.*, Sixty-fourth Session, Supplement No. 10 (A/64/10), para. 240; *ibid.*, Sixty-fifth Session, Supplement No. 10 (A/65/10), para. 396; *ibid.*, Sixty-sixth Session, Supplement No. 10 (A/66/10), para. 399; *ibid.*, Sixty-seventh Session, Supplement No. 10 (A/67/10), para. 280; *ibid.*, Sixty-eighth Session, Supplement No. 10 (A/68/10), para. 181; *ibid.*, Sixty-ninth Session, Supplement No. 10 (A/69/10), para. 281; *ibid.*, Seventieth Session, Supplement No. 10 (A/70/10), para. 299; *ibid.*, Seventy-first Session, Supplement No. 10 (A/71/10), para. 333; *ibid.*, Seventy-second Session, Supplement No. 10 (A/72/10), para. 282; *ibid.*, Seventy-third Session, Supplement No. 10 (A/73/10), para. 382; and *ibid.*, Seventy-fourth Session, Supplement No. 10 (A/74/10), para. 302.

of documentation and will continue to bear such considerations in mind. While the Commission is aware of the advantages of being as concise as possible, it reiterates its strong belief that an *a priori* limitation cannot be placed on the length of the documentation and research projects relating to the work of the Commission. It follows that Special Rapporteurs cannot be asked to reduce the length of their report following submission to the Secretariat, irrespective of any estimates of their length made in advance of submission by the Secretariat. Word limits are not applicable to Commission documentation, as has been consistently reiterated by the General Assembly.⁴⁶⁹ The Commission stresses also the importance of the timely preparation of reports by Special Rapporteurs and their submission to the Secretariat for processing and submission to the Commission sufficiently in advance so that the reports are issued in all official languages ideally four weeks before the start of the relevant part of the session of the Commission. In this respect, the Commission reiterated its request that: (a) Special Rapporteurs submit their reports within the time limits specified by the Secretariat; and (b) the Secretariat continue to ensure that official documents of the Commission are published in due time in the six official languages of the United Nations.

319. The Commission reiterated its firm view that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, cannot be subject to arbitrary length restrictions. The Commission once more noted with satisfaction that the measures introduced at its sixty-fifth session (2013) to streamline the processing of its summary records had resulted in the more expeditious transmission to members of the Commission of the English version for timely correction and prompt release. The Commission once more called on the Secretariat to resume the practice of preparing provisional summary records in both English and French, and to continue its efforts to sustain the measures in question, in order to ensure the expeditious transmission of the provisional records to members of the Commission. The Commission further noted that the more recent practice of submitting the provisional records electronically for changes to be made in track changes was working smoothly. The Commission also welcomed the fact that those working methods had led to the more rational use of resources and called on the Secretariat to continue its efforts to facilitate the preparation of the definitive records in all official languages, without compromising their integrity.

320. The Commission expressed its gratitude to all Services involved in the processing of documentation, both in Geneva and in New York, for their efforts in seeking to ensure timely and efficient processing of the Commission's documents, often under narrow time constraints. It emphasized that timely and efficient processing of documentation was essential for the smooth conduct of the Commission's work. The work done by all Services was all the more appreciated under the current conditions.

321. The Commission reaffirmed its commitment to multilingualism and recalls the paramount importance to be given in its work to the equality of the six official languages of the United Nations, which had been emphasized in General Assembly resolutions 69/324 of 11 September 2015 and 73/346 of 16 September 2019.

322. The Commission once again expressed its warm appreciation to the United Nations Library at Geneva, which continued to assist members of the Commission very efficiently and competently. It welcomed the bibliographic package that the Library prepared for the Commission. The Commission also wished to note that the Library continued to provide valuable services even under the limitations imposed by the COVID-19 pandemic at the present session.

7. *Yearbook of the International Law Commission*

323. The Commission reiterated that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in

⁴⁶⁹ For considerations relating to page limits on the reports of Special Rapporteurs, see, for example, *Yearbook ... 1977*, vol. II (Part Two), p. 132, and *Yearbook ... 1982*, vol. II (Part Two), pp. 123–124. See also General Assembly resolution 32/151 of 9 December 1977, para. 10, and General Assembly resolution 37/111 of 16 December 1982, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

international relations. The Commission took note that the General Assembly, in its resolutions 74/186 and 75/135, expressed its appreciation to Governments that had made voluntary contributions to the trust fund on the backlog relating to the *Yearbook*, and encouraged further contributions to the trust fund.

324. The Commission recommends that the General Assembly, as in its resolutions 74/186 and 75/135, express its satisfaction with the remarkable progress achieved in the past few years in catching up with the backlog of the *Yearbook* in all six languages, and welcome the efforts made by the Division of Conference Management of the United Nations Office at Geneva, especially its Editing Section, in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; and encourage the Division of Conference Management to continue providing all necessary support to the Editing Section in advancing work on the *Yearbook*.

8. Assistance of the Codification Division

325. The Commission expressed its appreciation for the invaluable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and the ongoing assistance provided to Special Rapporteurs and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission. In particular, the Commission expressed its appreciation to the Secretariat for its efforts in 2020 and 2021, which enabled the Commission to meet informally and formally even against the backdrop of the COVID-19 pandemic.

9. Websites

326. The Commission expressed its deep appreciation to the Secretariat for the website on the work of the Commission, and welcomed its continuous updating and improvement.⁴⁷⁰ The Commission reiterated that the website and other websites maintained by the Codification Division⁴⁷¹ constituted an invaluable resource for the Commission and for researchers of the work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website on the work of the Commission included information on the current status of the topics on the agenda of the Commission, as well as links to the advance edited versions of the summary records of the Commission and the audio and video recording of the plenary meetings of the Commission.

10. United Nations Audiovisual Library of International Law

327. The Commission once more noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law⁴⁷² in promoting a better knowledge of international law and the work of the United Nations in the field, including the work of the Commission.

C. Date and place of the seventy-third session of the Commission

328. The Commission decided that its seventy-third session would be held in Geneva from 18 April to 3 June and from 4 July to 5 August 2022.

D. Budgetary resources concerning the convening of future sessions of the International Law Commission

329. The Commission stresses the importance of ensuring that the necessary budgetary resources are provided for all of its members to be able to attend the annual session, and for attendance by the full substantive Secretariat team that is necessary for the Commission's effective functioning. The Commission is concerned that budgetary constraints in recent

⁴⁷⁰ <http://legal.un.org/ilc>.

⁴⁷¹ In general, available from: <http://legal.un.org/cod/>.

⁴⁷² http://legal.un.org/avl/intro/welcome_avl.html.

years have reduced the budgeted amounts to below these levels. Given its function in the progressive development of international law, and its codification, the Commission considers it essential that all of its members are able to attend its meetings, as this ensures the representation of the main forms of civilization and of the principal legal systems of the world in the Commission as a whole. The Commission has on numerous occasions reiterated its views concerning the question of honoraria, as well as the extent to which the research of Special Rapporteurs is affected by lack of resources. It stresses the importance of ensuring that the necessary budgetary resources are allocated for the functioning of the Commission and its Secretariat, including the need for Special Rapporteurs (particularly those from developing regions) to obtain the necessary assistance to undertake the research required for the preparation of their reports. The Commission welcomes all efforts made under the relevant programme budget to address these concerns. The Commission proposes that consideration be given to the establishment of a trust fund to support the Special Rapporteurs and to address any budgetary shortfalls in provision for full attendance of its Secretariat.

E. Cooperation with other bodies

330. At the 3548th meeting, on 22 July 2021, Judge Joan E. Donoghue, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.⁴⁷³ An exchange of views followed.

331. In view of the limited arrangements available due to the COVID-19 pandemic, the Commission was regrettably unable to have an exchange of views with the African Union Commission on International Law, the Asian-African Legal Consultative Organization, the Committee of Legal Advisers on Public International Law of the Council of Europe or the Inter-American Juridical Committee. The Commission continues to value its cooperation with such bodies and expresses the hope that the exchanges of views can be organized at future sessions.

332. On 15 July 2021, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on topics of mutual interest. Welcoming remarks were made by Mr. Gilles Carbonnier, Vice-President, ICRC and opening remarks by Ms. Cordula Droege, Chief Legal Officer, Head of the Legal Division, ICRC, and Mr. Dire D. Tladi, First Vice-Chair of the Commission. Presentations were made on the topics, “ICRC position on autonomous weapon systems”, by Mr. Neil Davison, Scientific and Policy Adviser, ICRC, and “Sea-level rise in relation to international law”, by Ms. Patrícia Galvão Teles and Ms. Nilüfer Oral, Co-Chairs of the Study Group of the Commission on the topic. There was also a discussion moderated by Ms. Helen Durham, Director, International Law and Policy Department, ICRC, on “The protection of the environment in armed conflict” between Ms. Marja Lehto, Special Rapporteur on the topic “Protection of the environment in relation to armed conflicts” and Ms. Helen Obregón Gieseken, Legal Adviser, ICRC. Concluding remarks were made by Ms. Durham.

F. Representation at the seventy-sixth session of the General Assembly

333. The Commission decided that it should be represented at the seventy-sixth session of the General Assembly by its Chair, Mr. Mahmoud D. Hmoud.

G. International Law Seminar

334. The Commission stresses the importance it attaches to the International Law Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations based in Geneva. Owing to the COVID-19 pandemic, the Seminar was not

⁴⁷³ The statement is recorded in the summary record of that meeting.

convened in 2020 or 2021. The Commission expresses the hope that the Seminar will be convened in 2022.

335. The Commission is grateful to those States that have continued to make voluntary contributions to the United Nations Trust Fund for the International Law Seminar and recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2022 with as broad participation as possible, and an adequate geographical distribution.