



# General Assembly

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## International Law Commission

### Sixty-eighth session

Geneva, 2 May-10 June and 4 July-12 August 2016

## Report of the Planning Group

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

1. At its 3300th meeting, on 18 May 2016, the Commission established a Planning Group for the current session.<sup>1</sup>

2. The Planning Group held four meetings. It had before it Section H, entitled “Other decisions and conclusions of the Commission”, of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session; document A/71/6 (Prog. 6) Proposed strategic framework for the period 2018-2019: Programme 6, Legal affairs; General Assembly resolution 70/236 of 23 December 2015 on the Report of the International Law Commission on the work of its sixty-seventh session; and General Assembly resolution 70/118 of 14 December 2015 on the rule of law at the national and international levels.

3. At its 2nd meeting, on 8 June 2016, the Planning Group took note of the proposed Strategic Framework for the period 2018-2019 (A/71/6), covering subprogramme 3 (Progressive development and codification of international law) of programme 6 (Legal affairs).

#### 1. Working Group on the Long-term Programme of Work

4. At its 1st meeting, on 3 June 2016, the Planning Group decided to reconstitute for the present session of the Working Group on the Long-term Programme of Work, under the chairmanship of Mr. Donald M. McRae. The Working Group submitted its report on the work of the quinquennium to the Planning Group, at its 4th meeting, on 29 July 2016.

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<sup>1</sup> The Planning Group was composed of: Mr. G. Nolte (Chairperson), Mr. L. Caflisch, Mr. P. Comissário Afonso, Mr. A. El-Murtadi, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. K. Kittichaisaree, Mr. R.A. Kolodkin, Mr. A. Laraba, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. B.H. Niehaus, Mr. E. Petrič, Mr. G.V. Saboia, Mr. P. Šturma, Mr. D.D. Tladi, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood and Mr. K.G. Park (*ex officio*).



5. The Planning Group noted that, in the course of the consideration of potential topics during the current quinquennium, the Working Group on the long-term Programme of Work had already recommended the inclusion in the long-term programme of work of the Commission of (a) Crimes against humanity; and (b) *Jus cogens*. These two topics were already on the current programme of work of the Commission, included, respectively, at the sixty-fifth (2013)<sup>2</sup> and sixty-sixth<sup>3</sup> (2014) sessions of the Commission.

6. At the present session, the Planning Group, on the recommendation of the Working Group, decided to recommend the inclusion of the following topics in the long-term programme of work of the Commission:

(a) Settlement of international disputes to which international organizations are parties; and

(b) Succession of States in respect of State responsibility.

7. In the selection of the topics, the Planning Group was guided by the recommendation of the Commission 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 sufficiently advanced 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.<sup>4</sup> The Planning Group considered that these two topics constitute useful contributions to the progressive development of international law and its codification. The syllabuses of the two topics selected appear as annexes A and B to the present report.

8. It would be recalled that five other topics remain inscribed in the long-term programme of work from previous quinquennia, namely: (a) Ownership and protection of wrecks beyond the limits of national maritime jurisdiction;<sup>5</sup> (b) Jurisdictional immunity of international organizations;<sup>6</sup> (c) Protection of personal data in trans-border flow of information;<sup>7</sup> (d) Extraterritorial jurisdiction;<sup>8</sup> and (e) The fair and equitable treatment standard in international investment law.<sup>9</sup>

9. The Planning Group noted that the Working Group on the long-term programme of work considered its methods of work, at the beginning of the current quinquennium, taking into account its long-standing practice in the selection of topics. The Planning Group noted that Working Group on the Long-term programme of work had found that the established three-phase process, consisting of (a) identification of possible topics; (b) preparation of a short paper on a given topic; and (c) preparation of a more detailed syllabus, was a good basis for its work. This process allowed for a broad exchange of views on a given topic and,

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<sup>2</sup> *Official Records of the General Assembly, Sixty-eighth Session Supplement No.10* (A/68/10), paras. 169 and Annex B.

<sup>3</sup> *Ibid.*, *Sixty-ninth Session Supplement No.10* (A/69/10), paras. 268 and Annex.

<sup>4</sup> *Yearbook ... 1998*, vol. II (Part Two), para. 553. See also *Yearbook ... 1997*, vol. II (Part Two), para. 238.

<sup>5</sup> *Ibid.*, 1996, vol. II (Part Two), p. 97, para. 248 and Annex II, Addendum 2.

<sup>6</sup> *Official Records of the General Assembly, Sixty-first Session Supplement No. 10* (A/61/10), para. 257 and Annex B.

<sup>7</sup> *Ibid.*, Annex C.

<sup>8</sup> *Ibid.*, Annex D.

<sup>9</sup> *Official Records of the General Assembly, Sixty-sixth Session Supplement No.10* (A/66/10), para. 365 and Annex D.

at the same time, provided a good means of ensuring a topic's feasibility. Moreover, while aware that the decision on new topics had usually been taken at the end of the quinquennium, the Working Group considered it appropriate during the current quinquennium to distribute the work over the sessions as evenly as possible.

10. The Planning Group also noted that the Working Group on the Long-term programme of work in its further consideration of its working methods, had identified the need to conduct a systematic review of the work of the Commission and a survey of possible future topics for consideration. To this end, the Commission in 2014 requested the Secretariat to review the illustrative general scheme of topics prepared by the Commission in 1996, in the light of subsequent developments and to prepare a list of potential topics for the Commission, accompanied by brief explanatory notes ("survey"), by the end of the present quinquennium. In response to that request, the Secretariat had prepared two memoranda, the first in 2015 which reviewed the list of topics established in 1996 in the light of subsequent developments (A/CN.4/679), and the second for the present session concerning "Possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments" (A/CN.4/679/Add.1), which contains six working papers setting out brief explanatory notes on potential topics for the Working Group's consideration.

11. The Planning Group welcomed the two memoranda prepared by the Secretariat, and took note of the six potential topics, namely (a) General principles of law; (b) International agreements concluded with or between subjects of international law other than States or international organizations; (c) Recognition of States; (d) Land boundary delimitation and demarcation; (e) Compensation under international law; and (f) Principles of evidence in international law. It recommended that the six potential topics be further considered by the Working Group on the Long-term programme of work at the sixty-ninth session of the Commission (2017).

## **2. Consideration of General Assembly 70/118 of 14 December 2015 on the rule of law at the national and international levels**

12. The General Assembly, in resolution 70/118 of 14 December 2015 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 annually on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report (A/63/10) remain relevant and reiterates the comments made at its previous sessions.<sup>10</sup>

13. 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.

14. 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.

<sup>10</sup> *Official Records of the General Assembly, 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.

15. 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.<sup>11</sup>

16. 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)”,<sup>12</sup> 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.<sup>13</sup> 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.

17. Recalling that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law,<sup>14</sup> the Commission wishes to recall that much of its work consists in 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.

18. Bearing in mind the role of multilateral treaty processes in advancing the rule of law,<sup>15</sup> 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.<sup>16</sup>

19. In the course of the present session the Commission has continued to make its contribution to the rule of law, including by working on the topics “Protection of persons in the event of disasters” (adopted on second reading at the present session), “Immunity of state officials from foreign criminal jurisdiction”, “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” (adopted on first reading at the present session), “Provisional application of treaties”, “Identification of customary international law” (adopted on first reading at the current session), “Protection of the environment in relation to armed conflicts”, “Protection of the atmosphere”, “Crimes against humanity” and “*Jus cogens*”.

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

### **3. Consideration of paragraphs 9 to 12 of resolution 70/236 of 23 December 2015 on the Report of the International Law Commission on the work of the sixty-seventh session**

21. The Commission took note of paragraphs 9 to 12 of resolution 70/236 of 23 December 2015. By the terms of paragraph 10 and 11 of the resolution, the Assembly noted that the Commission had affirmed its wish that consideration be given to the possibility of holding one half session in the next quinquennium in New York and had indicated that,

<sup>11</sup> General Assembly resolution 67/1 of 30 November 2012 (“Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels”), para. 41.

<sup>12</sup> 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.

<sup>13</sup> General Assembly resolution 70/1 of 21 October 2015, para. 35.

<sup>14</sup> General Assembly resolution 70/118 of 18 December 2015, paras. 13 and 19.

<sup>15</sup> General Assembly resolution 70/118 of 18 December 2015, para. 8.

<sup>16</sup> See more specifically *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 294.

taking into account the estimated costs and relevant administrative, organizational and other factors, such a possibility could be anticipated during the first segment of a session in either the first year (2017) or the second year (2018) of the next quinquennium. The Assembly took note of the recommendation made by the Commission in paragraph 298 of its 2015 report that preparatory work and estimates proceed on the assumption that the first segment of its seventieth session (2018) would be convened at United Nations Headquarters in New York, as well as of the request of the Commission that the Secretariat proceed to make the necessary arrangements for that purpose so as to facilitate the taking of the appropriate decision by the Commission at its sixty-eighth session, in 2016.

22. Upon being afforded further information by the Secretariat that, taking into account the estimated costs and relevant administrative, organizational and other factors, it would be feasible to hold one half session in the first year (2017) or the second year (2018) of the next quinquennium in New York, the Commission considered that holding such a half session during its seventieth session in 2018 would be the most convenient.

23. It was noted that 2017 would be the first year of the quinquennium for the membership of the Commission to be elected during the seventy-first session of the General Assembly. A session at its seat at the United Nations Office at Geneva would be optimal for new members as they transition into the work of the Commission. In addition, it was recognized that the Commission would be commemorating its seventieth anniversary session in 2018, and having part of its session in New York could serve the endeavours of further enhancing the dialogue between the Commission and the Sixth Committee.

24. Accordingly, the Commission recommends that it holds the first part of its seventieth session in New York, and requests the Secretariat to proceed with the necessary administrative and organizational arrangements to facilitate the holding of such a session in New York. Particular attention was drawn to the need to ensure access to library facilities at Headquarters, and electronic access to the resources and research assistance of the Library of the United Nations Office at Geneva. The need to ensure access and sufficient space for assistants to members of the Commission to attend meetings of the Commission was also emphasized.

#### **4. Seventieth anniversary session of the International Law Commission**

25. The Commission recommends that a seventieth anniversary event be held during its seventieth session in 2018. The anniversary event could be held in two parts, the first during the first part of its seventieth session in New York, and the second during the second part of its seventieth session in Geneva.

26. The Commission recommends that during the first part of its seventieth session that is recommended to be held in New York:

(a) a solemn half day meeting of the Commission be held at which would be invited high-level dignitaries;

(b) an informal half day meeting be held with delegates to the Sixth Committee of the General Assembly to exchange views on the work of the Commission, the relationship between the Commission and the Sixth Committee, and the role of both bodies in the promotion of the progressive development and codification of international law.

27. The Commission recommends that during the second part of its seventieth session in Geneva, a one and a half day conference be held with legal advisers of States and international organizations, academics and other distinguished international lawyers, dedicated to the work of the Commission. The Commission also recommends that a report of these meetings shall be presented and discussed in an appropriate form at the annual meeting of the Legal Advisers in New York.

28. The Commission further recommends that the anniversary event leads to a publication.

29. The Commission requests the Secretariat, in consultation with the Chairman of the Commission and the Chairman of the Planning Group, to commence making arrangements for the holding of the commemorative event.

## 5. Honoraria

30. 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 has been expressed in the previous reports of the Commission.<sup>17</sup> The Commission emphasizes that resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research work.

## 6. Documentation and publications

31. The Commission reiterated its recognition of the particular relevance and significant value to the work of the Commission of the legal publications prepared by the Secretariat.<sup>18</sup> It once more recalled that the Codification Division had previously been able significantly to expedite the issuance of its publications through its highly successful desktop publishing initiative which had greatly enhanced the timeliness and relevance of those publications to the Commission's work for more than a decade. The Commission expressed its strong concern at the curtailment and discontinuation of that initiative due to lack of resources, and its deep regret that consequently no new legal publications were distributed at its current session.

32. The Commission expressed its strong view that the resumption of this initiative was essential to ensure the timely issuance of these legal publications, in particular *The Work of the International Law Commission*, the early availability of which in the various official languages was a vital tool in the Commission's work, and accordingly the Commission called for the resumption of the desktop publishing initiative. The Commission again reiterated the particular relevance and significant value of the legal publications prepared by the Codification Division to its work, and reiterated its request that the Codification Division continue to provide it with those publications.

33. The Commission reiterated its satisfaction that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, would not 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 their more expeditious transmission to members of the Commission for timely correction and prompt release. The Commission called on the Secretariat to continue its efforts to

<sup>17</sup> See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 (A/57/10)*, paras. 525-531; *ibid.*, *Fifty-eighth Session, Supplement 10 (A/58/10)*, para. 447; *ibid.*, *Fifty-ninth Session, Supplement 10 (A/59/10)*, para. 369; *ibid.*, *Sixtieth Session, Supplement 10 (A/60/10)*, para. 501; *ibid.*, *Sixty-first Session, Supplement 10 (A/61/10)*, para. 269; *ibid.*, *Sixty-second Session, Supplement 10 (A/62/10)*, para. 379; *ibid.*, *Sixty-third Session, Supplement 10 (A/63/10)*, para. 358; *ibid.*, *Sixty-fourth Session, Supplement 10 (A/64/10)*, para. 240; *ibid.*, *Sixty-fifth Session, Supplement No. 10 (A/65/10)*, para. 396, and *ibid.*, *Sixty-sixth Session, Supplement No. 10 (A/66/10)*, para. 399; *ibid.*, *Sixty-seventh Session, Supplement 10 (A/67/10)*, para. 280; *ibid.*, *Sixty-eighth Session, Supplement 10 (A/68/10)*, para. 181; *Sixty-ninth Session, Supplement 10 (A/69/10)*, para. 281; and *Seventieth Session, Supplement 10 (A/70/10)*, para. 299.

<sup>18</sup> See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, paras. 387-395. See also *ibid.*, *Sixty-eighth Session, Supplement No. 10 (A/68/10)*, para. 185.

sustain the measures in question, in order to ensure the expeditious transmission of the provisional records to members of the Commission. The Commission also welcomed the fact that these 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 languages, without compromising their integrity.

34. The Commission expressed its gratitude to all Services involved in the processing of documents, 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. The Commission expressed concern and disappointment, however, that the issuance in all official languages of some reports of Special Rapporteurs had been delayed, thereby disrupting its programme of work. It noted that timely and efficient processing was essential for the smooth conduct of the Commission's work.

35. The Commission reaffirms 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 has been emphasized in General Assembly resolution 69/324 of 11 September 2015. This commitment is reflected, *inter alia*, in the established practice of the Commission to debate in plenary the reports of the Special Rapporteurs after they have been published in all official languages. In this regard, the Commission wishes to emphasize that the measures of a very exceptional character which have been resorted to during the present session with regard to the debate on the topic "Immunity of State officials from foreign criminal jurisdiction" (see Chap. XI) will not constitute, in any respect, a precedent.

36. In this respect, the Commission (a) requests the Secretariat to continue to ensure that official documents of the Commission are published in due time in the six official languages of the United Nations; and (b) requests Special Rapporteurs to submit their reports within the time limits specified by the Secretariat.

37. The Commission expressed its warm appreciation to the United Nations Office at Geneva Library, which continued to assist members of the Commission very efficiently and competently.

## **7. *Yearbook of the International Law Commission***

38. 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 international relations. The Commission took note that the General Assembly, in its resolution 70/236, 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.

39. The Commission recommends that the General Assembly, as in its resolution 70/236, *express its satisfaction* with the remarkable progress achieved in the last 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, especially its Editing Section of the United Nations Office at Geneva 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**

40. The Commission expressed its appreciation for the valuable 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 preparation of memoranda on 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\*), and on Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission (A/CN.4/698), and also in preparing six working papers on potential future topics for the Commission's long-term programme of work (A/CN.4/679 Add.1).

## **9. Websites**

41. The Commission expressed its deep appreciation to the Secretariat for the website on the work of the Commission, and called on it to continue updating and managing the website.<sup>19</sup> The Commission reiterated that the website and other websites maintained by the Codification Division<sup>20</sup> constitute 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 advance edited versions of the summary records of the Commission.

## **10. United Nations Audiovisual Library of International Law**

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

## **B. Date and place of the sixty-ninth session of the Commission**

43. The Commission decided that the sixty-ninth session of the Commission be held in Geneva from 1 May to 2 June and 3 July to 4 August 2017.

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<sup>19</sup> Located at <<http://legal.un.org/ilc>>.

<sup>20</sup> In general, available from: <<http://www.un.org/law/lindex.htm>>.



## **Annexes**

- A. Settlement of international disputes to which international organizations are parties**
  - B. Succession of States in respect of State responsibility**
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