

100th session of the Legal Committee of the International Maritime Organization

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Bridge over troubled water: the Legal Committee's voyage in a changing world

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Distinguished delegates and friends

It is a great honour for me to have been invited to address this seminar which is being held on the occasion of the 100th session of the Legal Committee of the International Maritime Organization. I have had a close relationship with this Committee for many years, first from 1970 to 1984 representing Sweden and from 1985 to 2006 as representative of the International Oil Pollution Compensation Funds (IOPC Funds). I have thus had the privilege to witness the Committee's remarkable development over the years.

Firstly, I would like to make some observations on participation in the Committee's meetings. When I started to take part in meetings of the Legal Committee in 1970, the Committee's composition was very different from that of today. The 9th session of the Legal Committee, which took place in a cramped room at the IMO Headquarters at Piccadilly in October 1970, was attended by 27 States and a few non-governmental organisations. There were hardly any developing countries represented in the Committee at that time. The number of States participating in the meetings has continuously grown over the years, and so has the participation of developing countries,

There were several reasons for the very low participation of developing countries in the work of the Legal Committee in the early years. One major reason, I suggest, may have been that, with very few exceptions, developing countries did not at that time have the expertise in maritime law and were not therefore in a position to contribute fully to the Committee's work.

Great progress has been made in this regard, to a large extent through the IMO programmes on technical assistance and through the international maritime education provided by international institutions such as the World Maritime University (WMU) in my home town of Malmö, Sweden, and the IMO International Maritime Law Institute (IMLI) in Malta. The present chairman of the Legal Committee Dr. Kofi Mbiah, a former graduate of IMLI and a PhD graduate of WMU, is an excellent example of the immense value of the efforts of IMO in this field, and many delegates attending the Legal Committee meetings, and also those participating in meetings of other IMO bodies for that matter, are alumni of WMU or IMLI.

The 100th session of the Legal Committee held this week is attended by 88 States, out of which approximately half are developing countries, and by a number of intergovernmental and non-governmental organisations. The Committee of today has therefore the benefit of input from the whole spectrum of the international community.

How things have changed!

As is the tradition within IMO, the Legal Committee has always endeavoured to work to the extent possible by consensus. This approach can often lead to very time-consuming discussions, and it may not be the most efficient way to develop international treaties. It has, however, the great advantage that once a draft treaty has been approved by the Committee, there is a very great likelihood that the treaty will also be adopted at the subsequent Diplomatic Conference. As far as I can recall, it has only happened once, namely in 1984, that a draft treaty elaborated by the Committee failed to get adopted by the Diplomatic Conference.

It must be recognized that it was probably easier to reach consensus within the Legal Committee when its membership was fairly small than it is today, but in my view that is clearly a price worth paying for having a much more representative and balanced composition of the Committee.

A second observation is that the character of the discussions in the Legal Committee appears to have to some extent changed over the years. In the early days the debates generally focused on strictly legal issues, where eminent lawyers debated tricky questions of maritime law. This is of course largely still the case, but it seems that the discussions today often also address issues of a more political nature. This new dimension is probably a reflection of the increased political importance of the issues under consideration by the Committee, for instance as regards questions relating to the protection of the marine environment. However, this focus on political issues may also make it more difficult to arrive at consensus solutions within a reasonable time.

It was for me a very inspiring experience to attend Legal Committee meetings. I learned a great deal from listening to and taking part in the discussions in which have participated eminent maritime lawyers from countries representing different political and legal systems, and I am convinced that my former colleagues in the Committee agree that attending the Committee's meetings is an excellent school in maritime law and often also in treaty law.

The achievements of the Committee are to no small extent due to the excellent leadership of a number of outstanding Chairmen who steered the Committee with a firm hand when the seas became rough. One of the former Chairmen is with us here today, Mr. Alfred Popp, and of course the present Chairman Dr. Kofi Mbiah.

The constant support of a very knowledgeable and dedicated staff in the IMO Division for Legal Affairs and External Relations has also been of immense value to the Committee. The Directors of that Division have played a crucial role. In fact there have only been three eminent lawyers holding that post in 45 years, Dr. Thomas Mensah, Mr. Magnus Göransson and Dr. Rosalie Balkin.

A major achievement of the Legal Committee is in my view its contribution to innovations in maritime law. It comes perhaps as no great surprise if I mention as a first example in this regard the regime on liability and compensation for oil pollution damage which was developed in the aftermath of the *Torrey Canyon* incident in 1967. Immediately after having been established by the IMO Council in 1967, the Committee became involved in the elaboration of the first tranche of this regime, namely the 1969 Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention). That Convention introduced some important new features in the field of maritime law, namely strict liability for oil pollution damage for owners of oil tankers coupled with compulsory liability insurance and right of direct action by victims against the insurer. These features may not be considered very sensational today, but 44 years ago they were quite revolutionary in the fairly conservative world of maritime law. It was actually argued that it was immoral to hold somebody liable who had not been at fault! Since then strict liability and compulsory insurance have become standard in new liability conventions.

The Legal Committee also carried out the work that resulted in the second tranche of this regime, namely the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention), and as a very young and inexperienced lawyer I took part in the work on that project. The creation of an international fund was quite a new idea, and it was suggested from many quarters that such a system just would not work. As we know now, those who expressed such pessimistic views were wrong. The International Oil Pollution Compensation Funds, which could be considered as having been conceived within the IMO Legal Committee, are of course now grown up and fully mature and independent of IMO. The Funds have also in their turn made important contributions to the development of international law relating to liability and compensation for oil pollution damage. The innovative approach to supplement the liability of shipowners by an international fund was also taken in the 1996 Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), also prepared by the Committee, but which unfortunately has not yet entered into force.

The Legal Committee was instrumental in the elaboration of the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Damage (Intervention Convention). That Convention is one of the earliest treaty instruments which recognized the so-called "precautionary principle", by allowing States, already before an oil spill has occurred, to take proportional measures outside territorial waters to prevent, mitigate or eliminate pollution damage when, following a maritime casualty, there is a grave and imminent threat of pollution of their coastline, taking into account the extent and probability of imminent damage if those measures are not taken.

The 1989 Convention on Salvage also included important new features, in the form of special provisions relating to the salvors' duty to protect the marine environment and the deviation, in certain circumstances, from the "no cure no pay" principle, which had traditionally been a fundamental element of the law of salvage, for the purpose of creating an incentive for salvors to take measures to protect the environment. Also the 2007 Nairobi Convention on the Removal of Wrecks has broken new grounds in maritime law in

that it establishes a framework for the prompt and effective removal of wrecks located beyond the territorial sea.

An important element in the work of the Legal Committee has been, in my view, the co-operation with intergovernmental and non-governmental organisations. For instance, the Committee benefitted greatly from the expertise and experience within the International Oil Pollution Compensation Fund 1971 in the revision of the 1969 Civil Liability and 1971 Fund Conventions which eventually resulted in the adoption of the 1992 Protocols to these Conventions, as well as from the preparatory work undertaken by the 1992 Fund in the development of the 2003 Protocol to the 1992 Fund Convention resulting in the establishment of a third tier of compensation in the form of the Supplementary Fund. The Committee also had important contributions from the Fund in the elaboration of the HNS Convention, and even more so in the preparation of the 2010 Protocol to that Convention.

Another example is the Committee's long-standing and fruitful co-operation with the Comité Maritime International (CMI), which began already in 1967 in connection with the elaboration of the 1969 Civil Liability Convention. The Committee benefitted greatly from the preparatory work carried out by CMI in relation to what became the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) and the 1989 Salvage Convention. The Committee has also been open to input from organisations representing the different private interests in the maritime community, such as the International Chamber of Shipping (ICS), the International Association of Independent Tanker Owners (INTERTANKO), the International Group of P&I Associations and the Oil Companies International Marine Forum (OCIMF).

Perhaps I may be permitted to make some reflections on the Legal Committee's role in the future. The Committee has over the years developed a large number of international conventions and other treaty instruments in various fields of maritime law, and many of these instruments have received widespread ratifications. The majority of the treaties fall within the field of civil law, but some of the instruments deal mainly with public law issues, for instance the 1989 Salvage Convention, and two instruments relate to criminal law, namely the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its 1998 Protocol Relating to Fixed Platforms Located on the Continental Shelf (SUA Protocol). The Committee has therefore made significant contributions to the development of international law.

It appears, however, that the instruments developed under the auspices of the Committee cover most of the aspects of shipping that fall within the Committee's field of competence. In view of this, and considering that the IMO Assembly has adopted Resolutions emphasizing that new conventions and amendments to existing conventions should be considered only if there is a clear and well-documented compelling need, the Legal Committee may become less involved than in the past in preparing new treaty instruments and amendments to existing conventions.

The Committee will nevertheless certainly be called upon in the future to carry out important work within IMO. It will for instance be requested to consider up-dating limitation amounts in certain conventions by application of the so-called tacit acceptance procedure, as was the case in 2012 in respect of the LLMC. The

Committee may be able to assist States in their ratification process, as has been evidenced by the Committee's involvement, in co-operation with the IOPC Funds, in the preparations for the entry into force of the HNS Convention.

The Committee could also play an important role in promoting uniform application of existing conventions, and as an example I refer to the work carried out in 2009 on the issue of insurance certificates for bareboat chartered ships under the 2001 Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention) which resulted in an important IMO Assembly Resolution on the subject. Furthermore, the Committee could as in the past contribute to finding solutions to important problems that have arisen after the adoption of a particular convention; an example is the development by the Committee in 2006 of a proposed reservation to the 2002 Convention relating to the Carriage of Passengers and Their Luggage by Sea (2002 Athens Convention) with respect to the difficulties in obtaining insurance cover for acts of terrorism. It is very likely that such issues will have to be addressed by the Committee also in the future. I venture to suggest that other IMO bodies could benefit in their work from input by the Legal Committee in the elaboration of conventions or on other issues of a legal character to a larger extent than has been the case in the past.

The Legal Committee has already carried out important work in the development of what is normally known as "soft law" by preparing Guidelines in specific areas of maritime law. Major examples are Guidelines developed together with ILO, namely Guidelines on provision of financial security in cases of abandonment of, personal injury to, or death of seafarers, and Guidelines on fair treatment of seafarers in the event of a maritime accident. I should of course also refer to the subject considered by the Committee this week, namely the draft Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected, which have been submitted to the Assembly for adoption. I suggest that the Committee could also in the future make valuable contributions to the development of "soft law" in the maritime field.

It should be emphasized that law is not – and should not be – static but should develop, and will develop, to take into account changes in society and in economic, social and political priorities, so as to ensure that the law meets the requirements of modern society and the concerns and aspirations of the citizens in a rapidly changing world. This applies equally to national laws and to international treaties, although as we all know it is much more difficult to amend international treaties than national laws. I am convinced that the Legal Committee will take up this challenge and that it will also in the future, during the period up to its 200th session, and beyond, play an important role in this regard in the field of maritime law.