

Report on the 69th session (2017) of the International Law Commission
for the Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)
Strasbourg, 21 September 2017

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Dear Madam Chair, dear Colleagues,

It is a great honor, and a pleasure, for me to follow your invitation to report on the 69th session of the International Law Commission in 2017. I understand that you have invited me both in my capacity as the Chair of the Commission and in my personal capacity as a member of the Commission. I will make every effort to be transparent when saying something which does not reflect the position of the Commission as a whole.

This year's session was the first after the Commission's elections of last year. Regarding the newly elected members, it is my impression that they have all been quite active. They established and integrated themselves into the work of the Commission earlier than many previous newly-elected members, at least as I have witnessed at the beginning of the two prior quinquennia.

This year the topics "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" were not debated by the Commission. As you will recall, full sets of draft conclusions on those two topics were adopted on first reading during last year's session. As is the established practice, the Commission suspends the consideration of topics after the first reading to give States an opportunity to carefully review the outcome and to give in-depth comments for the second reading. Written comments are requested by 1 January 2018,¹ so that the second reading of these two topics may take place in the summer of 2018. I encourage all CAHDI members and observers to submit written comments by the deadline, given that these are important topics on core issues of international law, and given that the Commission greatly values comments from States. I can assure you that we examine all comments most carefully; they are a very important part of our work.

Madam Chair!

The Commission has made progress with respect to a number of other topics. I will present them briefly in the order they were taken up this past summer:

The first topic which the Commission addressed in plenary was "Crimes against Humanity". The Special Rapporteur, Mr. Sean Murphy, made a special effort by submitting a lengthy Third report which covered all remaining issues. This enabled the Commission to provisionally adopt, on first reading, a full set of Draft Articles on Crimes against Humanity.² I think that this is an extraordinary achievement of the Commission for at least two reasons:

- First, it is generally recognized that, among the three core international crimes, only crimes against humanity lack a treaty focused on building up national laws, national jurisdiction and

¹ See Chapter II of the Report of the Commission on the work of the sixty-eighth session (2016), A/71/10, at paras. 15 and 17, available at:

<http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp2.pdf&lang=EFSRAC>

² See Chapter IV of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: <http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp4.pdf&lang=EFSRAC>

inter-State cooperation in the fight against impunity. The ILC Draft Articles on Crimes against Humanity, if ultimately adopted on second reading, would provide a model for States to fill this lacuna through a new treaty, if they so wish.

- Second, and more generally, by provisionally adopting these draft articles on first reading, the Commission has shown that it continues to work in the most classical part of its mandate, which is to prepare texts which have the capacity to become treaties.

Regarding the substance of the Draft Articles on Crimes against Humanity, I would like to direct your attention to the following points which have been subject to some debate among the members of the Commission:

- Draft Article 12 on victims, witnesses and others: paragraph (3) of this Draft Article provides that “Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.” This paragraph has been intensely debated and it has been very carefully formulated together with its commentary.³
- Draft Articles 13 and 14 on Extradition and Mutual Legal Assistance, as well as the Annex, have been drafted on the basis of texts which are well-established in State practice, in particular following the 2003 United Nations Convention against Corruption.
- Draft Article 15 on Settlement of Disputes would establish jurisdiction of the ICJ over disputes concerning interpretation or application, but provides for the possibility of a State to opt-out of such jurisdiction.
- As is often the case, it is not only important what is contained in a set of Draft Articles, but also what is not addressed. It is noteworthy that the following two matters are not addressed in the text of the Draft Articles on Crimes against humanity:
 - o First, the issue of amnesty is not addressed in the text of the draft articles; the matter is, however, raised in connection with Draft Article 10 and discussed in the commentary to Draft Article 10 on *aut dedere aut judicare*, at paras. 8-11.⁴
 - o Second, the issue of immunity of State officials from foreign criminal jurisdiction is also not addressed in the text of the draft articles. Draft Article 6, para. (5) provides, along the lines of Article 27 (1) of the Statute of the International Criminal Court, that “the holding of an official position is not a ground for excluding criminal responsibility”. The commentary to this provision, however, notes at para. 31 that “paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law”. It also notes that “paragraph 5 is without prejudice to the Commission’s work on the topic “Immunity of State officials from foreign criminal jurisdiction.” The Draft Articles on Crimes against Humanity thus do not con-

³ Chapter IV of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, pp. 96-98, at paras. 14-21, available at:

<http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp4.pdf&lang=EFSRAC>

⁴ Chapter IV, *ibid.*, pp. 86-87, at paras. 8-11.

tain a provision on immunity along the lines of Article 27 paragraph (2) of the ICC Statute.⁵

The second topic which the Commission addressed in plenary was “Protection of the Atmosphere”. The Special Rapporteur, Mr. Shinya Murase, in his Fourth Report, had proposed four draft guidelines on the interrelationship of rules regarding the protection of the atmosphere and rules regarding other areas of international law, as well as several preambular paragraphs. The Commission ultimately decided to merge the proposed four draft guidelines into one single draft guideline, and to adopt three preambular paragraphs. With respect to the interrelationship of rules the Commission decided largely to follow the approach of its own Study Group in its 2006 report on “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”. The Commission did not include in the text of the draft guideline a reference to a “principle of mutual supportiveness”, and explains in the commentary that the preponderance of support for this principle originates from WTO law.⁶

Madam Chair!

The third topic which the Commission addressed in plenary was “Immunity of State Officials from Foreign Criminal Jurisdiction”. The Commission continued the debate on the Fifth Report of the Special Rapporteur, Ms. Concepción Escobar Hernández. In this report, the Special Rapporteur had proposed a Draft Article 7 on “limitations and exceptions” to such immunity. It will be recalled that the debate on the Fifth Report had already started in 2016, under exceptional circumstances, and that States have had a first opportunity to comment in the Sixth Committee in 2016.

The debate this year continued to be controversial and focused on whether an exception from immunity *ratione materiae* from foreign criminal jurisdiction was recognized under customary international law if it is alleged that a foreign State official has committed certain crimes (such as genocide, crimes against humanity, war crimes, torture or enforced disappearance), or whether there is at least a “trend” to that effect, and whether such an exception would be desirable. This is not the place to enter into the substance of this debate. Given the importance of the question, States are advised, and encouraged, to study closely the pertinent Chapter VII in the report of the Commission, which sets out in some detail the different positions within the Commission.⁷

At the end of the plenary debate, the Commission decided, after a vote to end the discussion,⁸ to refer Draft Article 7 to the Drafting Committee “taking into account all the comments made in the debate on the topic”. Whereas the Drafting Committee arrived at a decision to propose Draft Article 7 with some amendments, some members of the Drafting Committee were opposed to sending the draft article back to the Plenary for adoption at that stage, as recorded in the report of the Chair of the Drafting Committee of 20 July 2017.⁹

When Draft Article 7, as amended and proposed by the Drafting Committee, came back to the plenary for consideration, the Commission proceeded to adopt the Draft Article, but did so by a recor-

⁵ Chapter IV, *ibid.*, p. 69, at para. 31.

⁶ See Chapter VI of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: <http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp6.pdf&lang=EFSRAC>

⁷ Chapter VII of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, Available at: <http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp7.pdf&lang=EFSRAC>

⁸ See Summary Record of the 3365th meeting on 30 May 2017, pp. 16-18, available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3365.pdf&lang=E

⁹ Report of the Chairman of the Drafting Committee of 20 July 2017, available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_iso.pdf&lang=E

ded vote: 21 members in favor, 8 against, and one abstaining. Since the Commission almost always adopts its texts by consensus, the way in which Draft Article 7 was adopted was, say, unusual. It is therefore not surprising that a number of members have made statements in explanation of their votes, which can be found in the Summary Record of the 3378th meeting of 20 July 2017.¹⁰

Those members who voted against the adoption of Draft Article 7 spoke first and mainly emphasized that Draft Article 7 did not reflect existing law (*lex lata*) nor expressed a desirable progressive development of the law (*lex ferenda*), except possibly in relations between those States which were prepared to conclude a treaty to that effect. Those members also expressed their view that Draft Article 7 should not have been adopted without also adopting procedural safeguards against possible abuse in national criminal proceedings. Some members who voted in favor of the adoption of Draft Article 7 mainly criticized that the list of international crimes to which the exception would apply should have included the crime of aggression; some other members who voted in favour would have also included other crimes, such as the crimes of slavery, corruption, human trafficking, piracy and international terrorism. The Special Rapporteur said that she had voted in favour of the adoption of draft article 7, convinced that it reflected the position of the Commission and that both the Commission and the Drafting Committee had acted entirely within the Commission's mandate, namely to promote the codification and progressive development of international law. She asserted that the Commission's own procedure for dealing with proposals for draft articles had been strictly followed.¹¹ For the sake of transparency, I should mention at this point that, in my personal capacity as a member of the Commission, I was one of those who voted against the adoption of Draft Article 7.

Regarding the issue of procedural safeguards, the Commission decided to insert a footnote in the text of the Draft Articles according to which "The Commission will consider procedural provisions and safeguards applicable to the present draft articles at its seventieth session."

Madam Chair!

The question of possible exceptions from immunity from foreign criminal jurisdiction is one of the most important questions of general international law. The Commission has conducted a thorough debate on the matter and submits this debate and the provisional result of its work to the consideration of States. The reaction of States is now very important for the continuation of the work on this fundamental question. I would encourage CAHDI members and observers to address this issue in the Sixth Committee debate next month.

Moving to the topic "Provisional Application of Treaties", the Commission provisionally adopted, under the guidance of the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, draft guidelines 1 to 11, with commentaries thereto.¹² I commend to your particular attention draft guidelines 6, 10, and 11.

Regarding the topic "Jus Cogens", the Commission had before it the second report of the Special Rapporteur, Mr. Dire Tladi, which sought to set out the criteria for the identification of peremptory norms of general international law (*jus cogens*). On the basis of his analysis, the Special Rapporteur proposed six draft conclusions. After considering the report in plenary, the Commission referred the proposed draft conclusions to the Drafting Committee where, for lack of time, they could not be fully considered and remain pending. The Chairman of the Drafting Committee submitted an interim re-

¹⁰ Summary Record of the 3378th meeting on 20 July 2017, available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3378.pdf&lang=EF

¹¹ Ibid.

¹² See Chapter V of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: <http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp5.pdf&lang=EFSRAC>

port to the plenary which is on the website of the Commission.¹³ On the proposal of the Special Rapporteur, the Commission decided to change the title of the topic from “Jus cogens” to “Peremptory norms of general international law (jus cogens)”.¹⁴

During this past session, the Commission decided to include the topic “Succession of States in respect of State responsibility” in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.¹⁵ Mr. Šturma was able to very quickly submit a First Report which was largely introductory in nature and which proposed four draft articles. The Commission, after a debate in plenary, referred the proposed draft articles to the Drafting Committee which provisionally adopted, within the limited available time, two draft articles. The consideration of the draft articles remains pending in the Drafting Committee. The Chair of the Drafting Committee submitted an interim report to the plenary for information purposes only.¹⁶

The consideration of the topic “Protection of the environment in relation to armed conflicts” could not be pursued with the same speed at this year’s session because the Special Rapporteur, Ms. Marie Jacobsson, was no longer a member of the Commission, having not sought re-election. In order to maintain momentum, the Commission established a Working Group on the topic, under the Chairmanship of Mr. Marcelo Vazquez-Bermudez, to propose a way forward. Upon the proposal of the Working Group, the Commission decided to appoint Ms. Marja Lehto as the new Special Rapporteur for the topic.

Regarding “Other decisions”, the Commission has taken the decision to put the topics “General principles of law” and “Evidence before international courts and tribunals” on its long-term programme of work. This decision does not mean that those topics are already on the active programme of work. Such a further decision would only be taken after States have had the occasion to comment on the advisability to put those topics on the active agenda of the Commission. The syllabuses of the two proposed new topics are annexed to this year’s report of the Commission.¹⁷

Madame Chair,

I would like to conclude my intervention by making three short points:

First, I would like to take the opportunity to thank States for contributing to the ILC seminar and encourage them to continue doing so.

Second, next year’s session, in 2018, will mark the 70th anniversary of the Commission. The Commission has decided to hold two inter-related commemorative events on this occasion, in New York and Geneva, under one overarching theme, namely: “70 years of the International Law Commission – Drawing a Balance for the Future”. The Commission would be happy if representatives of States and international organizations, in particular legal advisers, would follow the invitations to participate.

¹³ Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf&lang=E

¹⁴ Chapter VIII of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: <http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp8.pdf&lang=EFSRAC>

¹⁵ See Chapter IX of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: <http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp9.pdf&lang=EFSRAC>

¹⁶ Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_ssrsr.pdf&lang=E

¹⁷ Available at: <http://legal.un.org/docs/?path=../ilc/reports/2017/english/annex.pdf&lang=EFSRAC>

Finally, and most importantly: this year's session of the Commission has been very productive, but also very intense. In such a situation, it is particularly important that the Commission receive thoroughly considered reactions from States – which are its addressees and its principals. I therefore strongly encourage States to speak in the debate in the Sixth Committee in October on the ILC report, particularly on difficult points, and to annex detailed comments to their speeches if appropriate.

Thank you very much for your attention!