

Statement by Ambassador Pedro Comissário,

Chairman of the UN International Law Commission,

**to the 52nd meeting of the Committee of Legal Advisers on Public International Law (CAHDI)
of the Council of Europe**

(Brussels, 15 September 2016)

Mr. Chairman,

Excellencies,

Distinguished Legal Advisors,

Dear Colleagues, Ladies and Gentlemen,

I am deeply honoured to stand today before you, in my capacity as Chairman of the International Law Commission, in order to present a summary of its work at its 68th session which was held at the United Nations Office at Geneva, its seat, from 2 May to 10 June and from 4 July to 12 August 2016.

Let me start by expressing my profound gratitude to Chairman Paul Rietjens of CAHDI for the kind invitation and warm and generous hospitality. I thank Ms. Marta Requena and her so efficient team at the CAHDI Secretariat for the excellent conditions created for my stay at Brussels. I want to assure you that the ILC highly values its excellent and fruitful relationship with CAHDI which was further strengthened with your importance presence and statements before the Commission, in July this year.

Mr. Chairman, I wish to report that the International Law Commission had an extremely heavy and exacting session. This year's session was also the end of the quinquennium; a quinquennium that was very productive and one that the members can be very proud of. From the current session, the Commission is submitting a rich report to the General Assembly that includes the draft articles on *Protection of persons in the event of disasters*, which have been completed on second reading. We very much hope that those draft articles will be taken up by the General Assembly as the basis for the elaboration of a convention. We are also submitting two sets of draft conclusions which are complete on first reading. These are draft conclusions on *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, and draft conclusions on *Identification of customary international law*.

I wish to recall that, earlier in the quinquennium, the Commission had completed its work on 3 important topics, namely, *Expulsion of aliens*, *The Obligation to extradite or prosecute (Aut dedere aut judicare)*, and the *Most-Favored-Nation clause*.

Being this the end of the quinquennium, it follows that the entire membership of the Commission will be renewed for the next five years during this session of the General Assembly, in November.

Mr. Chairman,

Allow me that I offer a wider overview of the work of our Commission. This year, we had nine main topics on the agenda of the Commission.

1. Protection of persons in the event of disasters

As I mentioned, at this session, the Commission concluded its work on the topic “**Protection of persons in the event of disasters**” which had been on the programme of work of the Commission since 2007.

The Commission had before it the eighth report of the Special Rapporteur (A/CN.4/697), Mr. Eduardo Valencia Ospina, in which he surveyed the comments made by States and international organizations, and other entities, on the draft articles on the protection of persons in the event of disasters adopted on first reading at the sixty-sixth session (2014). He also made recommendations for consideration by the Commission during the second reading. The Commission also had before it the comments and observations received from Governments and international organizations (A/CN.4/696 and Add.1) on the draft articles adopted on first reading.

The Commission subsequently adopted, on second reading, a draft preamble and 18 draft articles, together with commentaries thereto, on the topic. In accordance with article 23 of its statute, the Commission recommended to the General Assembly the elaboration of a convention on the basis of these draft articles.

The preamble aims at providing a conceptual framework for the draft articles, setting out the essential rationale for the text and the general context in which the topic of the protection of persons in the event of disasters has been elaborated.

The three first draft articles are general in nature. Draft article 1 establishes the scope of the draft articles, while draft article 2 elaborates on draft article 1 by providing further guidance on the purpose of the draft articles, which is to facilitate the adequate and effective response to disasters and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights. Draft article 3 defines a number of terms for the purpose of the draft articles.

Draft articles 4, 5 and 6 emphasize the prominent role of human rights and humanitarian principles in the context of the topic. While draft article 4 addresses the principle of human dignity both in the context of disaster response and in the context of disaster risk reduction, draft article 5 reflects the broad entitlement to human rights protection held by those affected by disasters. Draft article 6 establishes the key humanitarian principles relevant to the protection of persons in the event of disasters.

Draft articles 7 and 8 relate to cooperation. Draft article 7, in particular, establishes the duty to cooperate, a well-known concept in the work of the Commission. It indicates that, in the application of the draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors. Draft article 8 seeks to clarify the various forms which cooperation between affected States, assisting States and other assisting actors may take in the context of response to disasters.

The subsequent articles address the role of States in the event of disasters. Draft article 9 deals with the duty to reduce the risk of disasters. Draft article 10 concerns the primary role of the affected State in the context of the protection of persons in the event of a disaster upon its territory,

or in territory under its jurisdiction or control. Under draft article 11, an affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors in situation in which a disaster manifestly exceeds a State's national response capacity.

The subsequent draft articles relate to external assistance. Draft article 12 acknowledges the interest of the international community in the protection of persons in the event of disasters, which is to be viewed as complementary to the primary role of the affected State. Draft article 13 addresses the consent of an affected State to the provision of external assistance and creates a qualified consent regime for affected States in the field of disaster relief operations. The conditions on the provision of external assistance are set out in draft article 14, while draft article 15 deals with the facilitation of such assistance. Draft article 16 establishes the obligation for the affected State to take the measures that would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods involved in the provision of external assistance. Draft article 17 deals with the question of termination of external assistance. Finally, draft article 18 addresses the relationship between the draft articles and other rules of international law.

2. Identification of customary international law

The Commission concluded its first reading of the draft conclusions on identification of customary international law. The topic has been in the programme of work of the Commission since 2012. It was successfully concluded in a single quinquennium. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/695), Sir Michael Wood, and an addendum to that report (A/CN.4/695/Add.1) providing a bibliography on the topic. The fourth report addressed the suggestions made by States on the draft conclusions provisionally adopted and contained suggestions for the amendment of several draft conclusions in light of the comments received. It also addressed ways and means to make the evidence of customary international law more readily available, recalling the background of the prior work of the Commission on that matter as a basis for further consideration by the Commission in the context of the topic. In addition, the Commission had before it a memorandum by the Secretariat concerning the role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691).

The Commission considered the fourth report of the Special Rapporteur, as well as the memorandum by the Secretariat. It referred to the Drafting Committee the proposed amendments to the draft conclusions contained in the report. It also decided to establish an open-ended working group, under the Chairmanship of Mr. Marcelo Vásquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be adopted by the Commission.

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

The 16 draft conclusions are divided into seven parts. Part One defines the scope of the draft conclusions, outlining their function and purpose. Part Two sets out the basic approach to the identification of customary international law. It is the "two element" approach. It specifies that determining a rule of customary international law requires establishing the existence of the two constituent elements: a general practice and acceptance of that practice as law (*opinio juris*). Parts Three and Four provide further guidance on the two constituent elements of customary international law, which also serve as the criteria for its identification. Part Five addresses certain categories of materials that are frequently invoked in the identification of rules of customary international law

(e.g., treaties, resolutions of international organizations and intergovernmental conferences, decisions of courts and tribunal, teachings). Parts Six and Seven deal with two exceptional cases. The first is *the persistent objector rule*. It says that a state that has persistently objected to an emerging rule of customary international law and maintains its objection after the rule has crystallised, is not bound by it. It is suggested that the principle is the logical consequence of the consensual nature of the formation of international law. The second is that of *particular customary international law*, that is, rules of customary international law that apply only among a limited number of States of a certain geographical area or those comprising a community of interest.

Still on this topic, the Commission decided to request the United Nations Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available. The study would survey the present state of the evidence of customary international law and make suggestions for its improvement.

3. Subsequent agreements and subsequent practice in relation to the interpretation of treaties

At the present session, the Commission also concluded its first reading of this topic with the provisional adoption of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

This topic has been on the programme of work of the Commission since 2008. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/694), Mr. Georg Nolte, which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts. The report also discussed the structure and scope of the draft conclusions.

The Commission decided to refer two proposed draft conclusions to the Drafting Committee and subsequently adopted these two draft conclusions on the basis of the report of the Committee.

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

The draft conclusions are divided into four parts. Part One is an introduction to the draft conclusions, which aims to explain the role that subsequent agreements and subsequent practice play in the interpretation of treaties. They are based on the Vienna Convention on the Law of Treaties of 1969. Part Two sets out the basic rules and definition. Part Three deals with the general aspects of the topic, while Part Four addresses its specific aspects.

4. Crimes against humanity

This topic has been on the programme of work of the Commission since 2014. The Special Rapporteur for the topic, Mr. Sean Murphy, has suggested that the Commission prepare a draft convention on the prevention and punishment of crimes against humanity.

Last year the Commission provisionally adopted four draft articles. At the present session, it had before it the second report of the Special Rapporteur (A/CN.4/690), as well as a memorandum by

the Secretariat providing information on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the International Law Commission (A/CN.4/698).

In his second report, the Special Rapporteur addressed criminalization under national law; establishment of national jurisdiction; general investigation and cooperation for identifying alleged offenders; exercise of national jurisdiction when an alleged offender is present; *aut dedere aut judicare*; fair treatment of an alleged offender; and the future programme of work on the topic. He proposed six corresponding draft articles that were referred to the Drafting Committee. On this basis, the Commission adopted draft articles 5 to 10, together with commentaries.

As for the subsequent programme of work for the topic, the Special Rapporteur has suggested that the third report address issues such as rights and obligations applicable to the extradition of the alleged offender; rights and obligations applicable to mutual legal assistance in connection with criminal proceedings; the obligation of *non-refoulement* in certain circumstances; dispute settlement and monitoring mechanisms; and conflict avoidance with treaties such as the Rome Statute of the International Criminal Court.

The question of the liability of legal persons in the context of crimes against humanity generated much discussion in the plenary debate. As we know, most criminal responsibility under international and national jurisdictions concerns the liability of natural persons, not legal persons (e.g., corporations). At the end, the Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In this context, the Plenary requested the Special Rapporteur to draft a concept paper on the matter for consideration of the Drafting Committee. On that basis, he also formulated a text of a draft paragraph 7 of draft article 5 which deals with “*criminalization under national law*”. The draft paragraph 7 was modelled on that contained in article 3, paragraph 4, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted in 2000, and currently accepted by 173 States.¹

5. Protection of the atmosphere

Since the inclusion of this topic in its programme of work in 2013, the Commission has considered two reports of the Special Rapporteur, Mr. Shinya Murase, and provisionally adopted three draft guidelines and four preambular paragraphs, together with commentaries thereto.

At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/692) who, building on the previous two reports, analysed several key issues relevant to the topic, namely, the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. He also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as the legal limits on certain activities aimed at the intentional modification of the atmosphere. Accordingly, the Special Rapporteur proposed draft guidelines on the obligation of States to protect the environment, environmental impact assessment, sustainable utilization of the atmosphere, equitable utilization of the atmosphere and geo-engineering, as well as an additional preambular paragraph. These proposals were referred to the Drafting Committee, and subsequently the Commission provisionally adopted five draft guidelines and a preambular paragraph together with commentaries.

¹The adopted text reads as follows: “Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative”. (Doc. A/CN.4/L.873/Add.1)

A fourth preambular paragraph has been inserted having regard to considerations of equity, and it concerns the special situation and needs of developing countries. Draft guideline 3 is a central provision according to which States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation. Draft guideline 4 deals with environmental impact assessment. Draft guidelines 5 and 6 respectively address the sustainable utilization of the atmosphere and the equitable and reasonable utilization of the atmosphere. Draft guideline 7 deals with activities the very purpose of which is to alter atmospheric conditions. It addresses only intentional modification on a large scale.

The Special Rapporteur indicated that in 2017 the Commission could deal with the question of the interrelationship of the law of the atmosphere with other fields of international law (such as the law of the sea, international trade and investment law and international human rights law).

6. *Jus cogens*

This is a new topic. It was included in the programme of work of the Commission in 2015. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/693), Mr. Dire Tladi. It addressed conceptual issues relating to peremptory norms (*jus cogens*), including their nature and definition, and traced the historical evolution of peremptory norms and, prior to that, the acceptance in international law of the elements central to the concept of *jus cogens*. The report further raised a number of methodological issues on which the Commission was invited to comment, and reviewed the debates held in the Sixth Committee in 2014 and 2015.

In the view of the Special Rapporteur, the debate on *jus cogens* in the Commission was robust and rich. It could be said that a few points of agreement emerged from the debate. First, that the existence of *jus cogens* was no longer seriously contested. Second, that the Commission should avoid an outcome that could result in, or be interpreted as, a deviation from the 1969 Vienna Convention on the Law of Treaties. But also, a number of divergent views on methodology were raised. Probably the most important and divisive, on methodology, was whether the Commission should produce an illustrative list of norms that had acquired the status of *jus cogens*. Members were also divided as to the issue of the existence of regional *jus cogens*. Some argued that it is a possibility that should not, *a priori*, be excluded. Others maintained that such an idea contradicted the very nature of *jus cogens* concept, its universal and peremptory character.

The Commission subsequently decided to refer the draft conclusions, contained in the report of the Special Rapporteur, to the Drafting Committee, before taking note of the interim report of the Chairman of the Drafting Committee on the two draft conclusions 1 (on the scope, identification and legal effects of *jus cogens*) and 2 (definition of *jus cogens*) provisionally adopted by the Committee, which was submitted to the Commission for information only.

As regards the future programme of work, the Special Rapporteur envisages that the Commission would consider the criteria for *jus cogens* in 2017.

7. Protection of the environment in relation to armed conflicts

This topic has been considered by the Commission since 2013. Since then, the Commission has considered two reports of the Special Rapporteur, Ms. Marie Jacobsson, and took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee.

At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/700), which focused on identifying rules applicable in post-conflict situations, while also addressing some preventive issues to be undertaken in the pre-conflict phase. The report contained three draft principles on preventive measures, five draft principles concerning primarily the post-conflict phase and one draft principle on the rights of indigenous peoples.

Following the debate in Plenary, the Commission decided to refer the draft principles, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.876), and took note of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee. Furthermore, the Commission provisionally adopted the draft principles it had taken note of during its sixty-seventh session, which had been renumbered and revised for technical reasons (A/CN.4/L.870/Rev.1) by the Drafting Committee at the present session, together with commentaries thereto.

Structurally, the set of draft principles are divided into three parts following the initial part entitled "Introduction" which contains draft principles on the scope and purpose of the draft principles. Part One concerns guidance on the protection of the environment before the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for all three temporal phases: before, during and after an armed conflict. Additional draft principles will be added to this part at a later stage. Part Two pertains to the protection of the environment during armed conflict. Part Three deals with the protection of the environment after an armed conflict.

8. Immunity of State officials from foreign criminal jurisdiction

This topic was included in the programme of work of the Commission in 2007. It has been one of the most challenging topics on our agenda. The Commission has considered three reports from the first Special Rapporteur on the topic, Mr. Roman Kolodkin, between 2007 and 2011. Subsequently, between 2012 and 2015, four reports from the current Special Rapporteur, Ms. Concepción Escobar Hernández were considered. On the basis of these reports, the Commission has thus far provisionally adopted six draft articles and the commentaries thereto.

At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/701), which analysed the question of *limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction*.

In addition, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6 (scope of immunity *ratione materiae*), provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, together with the corresponding commentaries. Draft article 2, subparagraph (f), provides a definition of the term "act performed in an official capacity" for the purposes of the draft articles. Draft article 6 is intended to define the scope of immunity *ratione materiae*, which covers the material and temporal elements of this category of immunity of State officials from foreign criminal jurisdiction. Draft article 6 complements draft article 5, which refers to the beneficiaries of immunity *ratione materiae*. Both draft articles determine the general regime applicable to this category of immunity.

At the time of its consideration the report was only available to the Commission in two of the six official languages of the United Nations. Therefore, the debate in the Commission was only commenced, and would be continued and completed at the next session of the Commission, in 2017. In the debate, the link between limitations and exceptions and the procedural aspects of immunity was emphasized. In this connection, several members underlined the importance, for next year, of procedural guarantees to take into account the need to avoid proceedings which were politically motivated or an illegitimate exercise of jurisdiction.

9. Provisional application of treaties

This topic has been on the programme of work of the Commission since 2012. Since then, the Commission has considered three reports from the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo.

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

Subsequently, the Chairperson of the Drafting Committee presented the report of the Drafting Committee on "Provisional application of treaties", containing draft guidelines 1 to 4 and draft guidelines 6 to 9, as provisionally adopted by the Drafting Committee at the sixty-seventh and sixty-eighth sessions of the Commission, respectively. The Commission took note of these draft guidelines. It is anticipated that the Commission will take action on the draft guidelines and commentaries thereto at the next session.

Furthermore, the Commission decided to request from the Secretariat a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto.

10. Other decisions and conclusions of the Commission

The Commission decided to include in its long-term programme of work two new topics, namely, "*The settlement of international disputes to which international organizations are parties*" and "*Succession of States in respect of State responsibility*".

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

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

Let me finish by mentioning that the Commission decided that its sixty-ninth session will be held in Geneva from 1 May to 2 June and 3 July to 4 August 2017.

Thank you very much!