

Report on the 71st session (2019) of the International Law Commission

**58th Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)
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**by Mr. Pavel Šturma
Chair of the International Law Commission**

23 September 2019

Mr. Chair,

Members of the Committee of Legal Advisers on Public International Law,

Ladies and Gentlemen,

It is an honour and a pleasure for me to address the 58th meeting of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI) in my capacity as the Chair of the International Law Commission. I am grateful to the CAHDI for the opportunity to present the work of the Commission at its seventy-first session, which took place from 29 April to 7 June and from 8 July to 9 August this year.

On 31 May, during its session, the Commission had the privilege of receiving the Chair of the CAHDI for an exchange of views. We thus had the pleasure of meeting Mr. Petr Válek of the Czech Republic, who recently assumed the Chair position of the CAHDI from Ms. Päivi Kaukoranta of Finland. The Chair spoke about the work of the CAHDI, including on legal challenges related to “hybrid war,” derogations to the European Convention on Human Rights, humanitarian needs and rights of internally displaced persons, peaceful settlement of disputes, and different aspects of immunities, among other things. Being here with you today, I am grateful to continue the tradition of this dialogue between our two entities and to present to you the work of International Law Commission over this past year in turn.

This year, at its 71st session, the International Law Commission concluded the second reading of one topic by adopting a full set of draft articles and commentaries thereto. It also concluded its work on two topics on first reading, adopting a set of draft conclusions and draft

principles, respectively, as well as commentaries thereto. In addition, the Commission continued its consideration of a number of other topics.

As mentioned, on **second reading**, the Commission considered one topic.

With respect to this topic, “**Crimes against humanity**”, the Commission had before it the fourth report of the Special Rapporteur Mr. Sean D. Murphy as well as comments and observations received from Governments, international organizations and others. The fourth report of the Special Rapporteur addressed these comments and observations on the draft articles and commentaries adopted on first reading and made recommendations for each draft article.

The Commission adopted, on second reading, the entire set of draft articles on prevention and punishment of crimes against humanity, comprising a draft preamble, 15 draft articles and a draft annex, together with commentaries thereto.

The draft articles on prevention and punishment of crimes against humanity have as their objective the potential drafting of a convention concerning prevention and punishment of crimes against humanity within the national law of States as well as inter-State cooperation for this purpose. Since “[t]reaties focused on prevention, punishment and inter-State cooperation exist for many offences far less egregious than crimes against humanity, such as corruption and transnational organized crime,” as noted in the commentary, “a global convention on prevention and punishment of crimes against humanity might serve as an important additional piece in the current framework of international law, and in particular, international humanitarian law, international criminal law and international human rights law.” Unlike for example the Rome Statute, which concerns the vertical relationship between States parties and the International Criminal Court, these draft articles are focused on the horizontal relationship among States. They were elaborated from the outset with the intention that they form the basis for a possible convention. This renders the topic an exercise not as much of codification of international law, but of its progressive development. As indicated in the commentary, “[w]hile some aspects of these draft articles may reflect customary international law, codification of existing law is not the objective . . . rather, the objective is the drafting of provisions that would be both effective and likely acceptable to States, based on provisions often used in widely adhered-to treaties

addressing crimes, as a basis for a possible future convention.” The draft articles are roughly organized into: general provisions, including a definition of crimes against humanity and general obligations; provisions on prevention and *non-refoulement*; measures to be taken at the national level and with respect to international cooperation; provisions on extradition and mutual legal assistance; and provisions on the settlement of disputes.

The Commission decided, at the 71st session, in conformity with article 23 of its statute, to recommend these draft articles on prevention and punishment of crimes against humanity to the General Assembly. In particular, the Commission recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. Since the Commission has concluded its work on the topic, which started in 2014, action now lies with the Sixth Committee, which is set to adopt a resolution at this year’s session addressing the Commission’s recommendation.

After its adopting the draft articles on prevention and punishment of crimes against humanity, the Commission also expressed to the Special Rapporteur, Mr. Sean D. Murphy, its deep appreciation and warm congratulations for the outstanding contribution he made to the preparation of the draft articles.

As for topics concluded on **first reading**, there were two.

With regard to the first of these, the topic of “**Peremptory norms of general international law (*jus cogens*)**,” the Commission had before it the fourth report of the Special Rapporteur Mr. Dire Tladi, which discussed the question of the possible existence of regional *jus cogens* and the inclusion of an illustrative list, based on norms previously recognized by the Commission as possessing a peremptory character. As a result of its consideration of the topic at the present session, the Commission subsequently adopted, on first reading, 23 draft conclusions and a draft annex, together with commentaries thereto, on peremptory norms of general international law (*jus cogens*).

This topic, it may be noted, was borne out of a recognition that while the existence of *jus cogens* as part of the modern fabric of international law is now largely uncontroversial, its precise nature, what norms qualify as *jus cogens*, as well as the consequences of *jus cogens* in

international law remain unclear. Thus, the draft conclusions, in terms of scope, concern the identification and legal consequences of peremptory norms. They define peremptory norms of general international law (*jus cogens*), as norms “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character,” which in terms of function “reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.” Examples of such *jus cogens* norms, as previously identified by the Commission, are provided in an annex to the draft conclusions, and include the prohibition of genocide, the prohibition of torture, the prohibition of slavery, and the prohibition of racial discrimination and apartheid. The draft conclusions themselves are “aimed at providing guidance to all those who may be called upon to determine the existence of peremptory norms of general international law (*jus cogens*) and their legal consequence.” On this the commentary notes that “[g]iven the importance and potentially far-reaching implications of peremptory norms, it is essential that the identification of such norms and their legal consequences be done systematically and in accordance with a generally accepted methodology.”

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 December 2020.

With respect to the second topic concluded on first reading, “**Protection of the environment in relation to armed conflicts**,” the Commission had before it the second report of the Special Rapporteur Ms. Marja Lehto, which discussed questions related to the protection of the environment in non-international armed conflicts, and matters related to responsibility and liability for environmental damage. As a result of its consideration of the topic at the present session, the Commission adopted, on first reading, 28 draft principles, together with commentaries thereto, on protection of the environment in relation to armed conflicts.

The draft principles were prepared bearing in mind the intersection between international law relating to the environment and the law of armed conflict, as well as other branches of

international law such as human rights law. The Commission addressed this topic in three temporal phases: before in “peacetime”, during, and after an armed conflict (“post-conflict”) – although the Commission has noted that there is not a strict dividing line between the different phases. Along these lines, the draft principles are likewise divided into five main parts. The “Introduction” contains draft principles on the scope and purpose of the draft principles. Part Two 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, such as ones on the protection of the environment of indigenous peoples and on human displacement. Part Three pertains to the protection of the environment *during* armed conflict and includes discussion of pillage and environmental modification techniques. Meanwhile, Part Four pertains to the protection of the environment in situations of occupation, while Part Five deals with the protection of the environment *after* an armed conflict.

The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft principles on protection of the environment in relation to armed conflicts, through the Secretary-General, to Governments, international organizations, including from the United Nations and its Environment Programme, and others, including the International Committee of the Red Cross and the Environmental Law Institute, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020.

Following the receipt of comments and observations by States and others on both the topic of peremptory norms of general international law (*jus cogens*) and the topic of protection of the environment in relation to armed conflicts, the Commission will consider these items on second reading in 2021 and aims to conclude its work on the two topics at that session.

As I mentioned earlier, the Commission also continued its work on four **other main topics**.

On the topic “**Succession of States in respect of State responsibility**”, for which I serve as the Special Rapporteur, the Commission had before it my third report, which addressed introductory issues, including certain general considerations, questions of reparation for injury resulting from internationally wrongful acts committed against the predecessor State as well as its nationals, and technical proposals in relation to the scheme of the draft articles. Following the debate in plenary, the Commission decided to refer all draft provisions, as contained in the third report of the Special Rapporteur, to the Drafting Committee. Upon its consideration of a first report of the Drafting Committee, the Commission provisionally adopted draft articles 1, 2 and 5, with commentaries thereto. Furthermore, the Commission took note of the interim report of the Chair of the Drafting Committee on draft articles 7, 8 and 9 provisionally adopted by the Committee, which was presented to the Commission for information only.

With regard to the topic “**Immunity of State officials from foreign criminal jurisdiction**”, the Commission had before it the sixth and the seventh reports of the Special Rapporteur Ms. Concepción Escobar Hernández, which were devoted to addressing procedural aspects of immunity from foreign criminal jurisdiction. In particular, the sixth report, on which the debate was not completed at the seventieth session in 2018, provided an analysis of three components of procedural aspects related to the concept of jurisdiction, namely: (a) timing; (b) kinds of acts affected; and (c) the determination of immunity. The seventh report completed the examination of the procedural aspects of immunity regarding the relationship between jurisdiction and the procedural aspects of immunity; addressed questions concerning the invocation of immunity and the waiver of immunity; examined aspects concerning procedural safeguards related to the State of the forum and the State of the official, considered the procedural rights and safeguards of the official, and proposed nine draft articles. Following the debate in plenary, the Commission decided to refer draft articles 8 to 16 to the Drafting Committee, taking into account the debate and proposals made in plenary. The Commission received and took note of the interim report of the Chair of the Drafting Committee on the provisionally adopted draft article 8 *ante*, which was presented to the Commission for information only.

On this topic of immunity of State officials from foreign criminal jurisdiction, the Commission would in particular welcome any information that States could provide on the

existence of manuals, guidelines, protocols or operational instructions addressed to State officials and bodies that are competent to take any decision that may affect foreign officials and their immunity from criminal jurisdiction in the territory of the forum State.

As for the topic “**General principles of law**”, the Commission had before it the first report of the Special Rapporteur Mr. Marcelo Vázquez-Bermúdez, which addressed the scope of the topic and the main issues to be addressed in the course of the work of the Commission. The report also addressed previous work of the Commission related to general principles of law and provided an overview of the development of general principles of law over time, as well as an initial assessment of certain basic aspects of the topic and future work on the topic. Following the debate in plenary, the Commission decided to refer draft conclusions 1 to 3, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee on draft conclusion 1 provisionally adopted by the Committee, which was presented to the Commission for information only.

On the topic of general principles of law, the Commission also requested States to provide information on their practice relating to general principles of law, in the sense of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, including as set out in: (a) decisions of national courts, legislation and any other relevant practice at the domestic level; (b) pleadings before international courts and tribunals; (c) statements made in international organizations, international conferences and other forums; and (d) treaty practice.

Finally, with respect to the topic of “**Sea-level rise in relation to international law**”, the Commission decided to include the topic in its programme of work and established a Study Group, co-chaired by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria. The Study Group held one meeting, at which time it agreed on its composition, methods and programme of work, based on the three subtopics identified in the syllabus. The Commission subsequently took note of the joint oral report of the Co-Chairs of the Study Group.

On the topic of sea-level rise in relation to international law, the Commission would welcome any information that States and others could provide on their practice and other relevant information concerning sea-level rise in relation to international law. At the seventy-second session in 2020, the Study Group will focus on the subject of sea-level rise in relation to the law of the sea.

In this connection, the Commission would appreciate receiving, by 31 December 2019 this year, examples from States of their practice that may be relevant, even if indirectly, to sea-level rise or other changes in circumstances of a similar nature. Such practice could, for example, relate to baselines and where applicable archipelagic baselines, low-tide elevations, islands, artificial islands, land reclamation and other coastal fortification measures, and any other relevant issues. Relevant materials that the Commission would appreciate receiving could include, for example, treaties, national legislation or regulations, declarations, statements, and jurisprudence, among other materials.

The Commission would further welcome receiving in due course any information related to statehood and the protection of persons affected by sea-level rise, both of which will be considered by the Study Group during the seventy-third session in 2021 of the Commission.

As regards “**Other decisions and conclusions of the Commission**”, the Commission took note of an oral report of the Special Rapporteur on the topic “**Provisional application of treaties**”, Mr. Juan Manuel Gómez Robledo, on the informal consultations convened to consider the draft model clauses on provisional application of treaties, and decided to annex the Special Rapporteur’s revised proposal for the draft model clauses to the report, with a view to seeking comments from Governments in advance of the commencement of the second reading of the draft Guide to Provisional Application of Treaties at the seventy-second session of the Commission.

As for other activities that took place during the 71st session, in addition to continuing its traditional exchanges of information with the CAHDI, the Commission also received Mr. Abdulqawi Ahmed Yusuf, President of the International Court of Justice; the Inter-American

Juridical Committee; the Asian-African Legal Consultative Organization; and the African Union Commission on International Law. Members of the Commission also held an informal exchange of views with the International Committee of the Red Cross.

Now, before I conclude my account today, allow me to also say a few words about the Commission's **future work**.

This year, the Commission re-established a Planning Group to consider its programme, procedures and working methods, which in turn decided to re-establish the Working Group on the long-term programme of work, chaired by Mr. Mahmoud D. Hmoud, and the Working Group on methods of work, chaired by Mr. Hussein A. Hassouna.

The Commission decided to include in its long-term programme of work the following topics: (a) **“Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”**; and (b) **“Prevention and repression of piracy and armed robbery at sea”**.

Finally, I would like to inform you that the Commission decided that the seventy-second session of the Commission would be held in Geneva from 27 April to 5 June and from 6 July to 7 August 2020.

Let me conclude my presentation by reiterating the importance that the Commission gives to its exchanges with the CAHDI. Experience has shown that we benefit greatly from each other's work and from our regular interactions, and I would like to express my gratitude once more for being able to speak with you about the Commission's recent work.

Thank you for your attention.