

20th Meeting
Report of the International Law Commission on the work of its sixty-sixth session
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STATEMENT BY
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Report of the International Law Commission
Part 1

PART 1

Chapters I – III, XIV, IV and V

Mr. Chairman,

1. Let me first of all express our appreciation to the International Law Commission for the work achieved during its sixty-sixth session. The agenda of the Commission has become unusually full in recent years, and we congratulate the members of the Commission on their zeal and energy to work on such a broad range of topics.
2. The enthusiasm of the Commission has also lead to a long list of homework for States under the heading of “Specific issues on which comments would be of particular interest to the Commission”. We have taken note of the many matters on which the Commission seeks information and will do our best to provide this to further your work.

Chapter IV (Expulsion of Aliens)

Mr. Chairman,

3. I would like to turn to the topic of Expulsion of Aliens. My Government notes the ninth report of the Special Rapporteur, Mr. Maurice Kamto, and the adoption of the draft articles. The draft articles cite many standards, particularly those related to human rights, essential to the treatment of

everyone who is expelled. However, we regret that the draft articles as adopted by the Commission are not merely a codification of state practice but go beyond the currently applicable rules of international law on expulsion of aliens. Over the past years my government has consistently objected to such progressive development of international law, and we still have serious concerns.

4. We note the Commission's recommendations to the General Assembly, and feel compelled to state that we cannot support either of them. We refer to the statement by the European Union that details our disappointment with the draft articles. The elaboration in the future of a convention on the basis of these draft articles cannot not be supported by my government either.

Chapter V

(Protection of persons in the event of disasters)

Mr. Chairman,

5. I would now like to turn to the topic of the protection of persons in the event of disasters. On the outset, please allow me to wholeheartedly congratulate the Special Rapporteur, Mr. Valencia-Ospina, with the results of his study so far. Indeed, we currently have 21 articles adopted by the Commission in first reading with commentaries, which is an

impressive result, and my government intends to submit its comments on these draft articles.

6. I would like to take this opportunity to briefly comment on the newly proposed articles in the seventh report of the Rapporteur. The seventh report comprehensively focusses on the protection of relief personnel, equipment and goods, as well as on the relation between the draft articles and rules of international law.
7. Concerning the previous article 3 bis, currently article 4 (use of terms), my government, in general, sees merit in the inclusion of such a provision, as this enhances the clarity and the common understanding of these draft articles. As was suggested in the Commissions' debate, we consider it useful to merge this article with the previous article, i.e. article 3, which provides for a definition of the term "disaster". It seems logical to have a single provision which explains the meaning of all the terms used in the draft articles.
8. Concerning previous article 14 bis, currently draft article 18 (protection of relief personnel, equipment and goods) we are pleased to see the inclusion of a specific article on the duty to protect relief personnel, equipment and goods, as this is clearly an issue of concern in contemporary situations of disaster. We note that the Drafting Committee

has taken into account the concerns that were raised by a number of members in relation to the nature of the ‘obligation to protect’ as expressed in this article. We also consider this ‘obligation to protect’ to be an obligation of conduct, not of result. The redrafted wording clarifies this in a satisfactory manner.

9. While we were initially hesitant with regard to the articles 17 to 19, currently draft article 20 (relationship to special or other rules of international law), as originally proposed by the Special Rapporteur, we agree with the drafting of current draft article 20. Indeed, it is important to bear in mind that the draft articles can be seen as an authoritative reflection of contemporary international law, or an attempt to progressively develop the law, but draft articles as such are not legally binding and should not pretend to be so.
10. Let me again congratulate Mr. Valencia-Ospina on his skillful work so far, which impressively contributes to the overall aim of improved legal protection of persons in the event of disasters. We look forward to a successful conclusion of his important work.

Mr. Chairman,

Chapter XIV
(Other decisions and conclusions of the Commission)

11. In closing, some comments on the other decisions and conclusions of the Commission (Chapter XIV).
12. First of all, we note that the Commission decided to include the topic of *ius cogens* on its long-term programme of work. One of the criteria for the selection of a topic is that it should reflect the needs of the States in respect of the progressive development and codification of international law. My government remains to be convinced that there is actually a need for the Commission to embark on a study of *ius cogens*.
13. We very much appreciate the note by Mr. Tladi, annexed to the ILC report, which clarifies the origin of the idea to address *ius cogens*. It would appear that the reference to *ius cogens* in the Vienna Convention on the Law of Treaties, and the fact that this was a novelty at the time of drafting the VCLT (thus: progressive development) is more or less the trigger for the debate, together with the failed attempt of then ILC member Mr. Jacovides in the ninety-nineties to return to the matter.
14. However – we wish to raise some doubts, in particular on the remit of a study of the notion of *ius cogens*. It is hard to see whether there is a specific need amongst States with respect to the codification or progressive development of the notion *ius cogens*. There is language in

- the VCLT, which may not have been codification at the time of drafting but would appear satisfactory at this stage.
15. While the VCLT contains express references to *ius cogens*, it equally appears in the shape of customary law. We would have similar hesitations with considering *ius cogens* in the form of rules of customary international law. The subject has been excluded from the customary law project, and the logic would be to not embark on this issue – if at all – before the conclusion of the current ILC work on customary law.
 16. It may be – but I hesitate – that there is room for a descriptive and analytical study as to how the notion of *ius cogens* has been and is understood in contemporary practice, how the existence of *ius cogens* is established and what legal consequences are drawn from the conclusion that a particular rule has a *ius cogens* character. There may be merit in having a broad overview of how in practice it is determined whether such a character is attached to a particular rule, without the intention to somehow codify or progressively develop the law. So far we have not understood the kind of issues concerning *ius cogens* would require progressive development, and would consider this needs to be clarified first.

Mr. Chairman,

17. The Commission earlier decided to include the topic of crimes against humanity onto its programme of work, and we congratulate mr Sean Murphy on his appointment as Special Rapporteur.
18. As I stated last year, there is no doubt that the prevention and prosecution of this horrendous crime is of the utmost importance, and it is an issue that requires the constant vigilance of the international community. Thus we appreciate that the Commission is looking into the desirability of formulating a specific instrument with respect to crimes against humanity, as none currently exists. However, we consider that this issue is to a large extent already addressed in the Rome Statute, in a provision reflective of existing customary law.
19. The formulation of article 7 of the Statute of the International Criminal Court has greatly contributed to specifying and defining the crime against humanity. This definition in the Rome Statute is based on jurisprudence from the Yugoslavia tribunal and other major international tribunals. It reiterates an existing rule of customary international law. Thus a specific criminalization of crimes against humanity already exists, and is applicable to states parties and non-states parties to the Rome Statute alike. We consider that it is not the definition of the crime that is missing,

- but rather the operational tools to ensure an effective prosecution at the domestic level.
20. The principle of complementarity requires that we facilitate the cooperation between the judicial authorities of our States in order to strengthen the investigation and prosecution of crimes against humanity at the national level, including the strengthening of mutual legal cooperation. In our view, what is needed for the prevention and prosecution of crimes against humanity at this stage is essentially a reinforced focus on improving the international capacity to investigate and prosecute such crimes.
 21. We note the request for information on domestic approaches to the criminalization of crimes against humanity and will certainly respond in due time. However, we consider it regrettable that the questions raised do not require information on the mutual legal assistance aspect of the prosecution on this international crime. After all, in prosecuting international crimes the co-operation with other States is often crucial, and preparatory steps to this effect must be taken in advance.
 22. What is currently missing is an international instrument on mutual legal cooperation covering all major international crimes, including but not limited to crimes against humanity. Together with Argentina, Belgium,

Senegal and Slovenia, my country has taken the initiative to propose opening negotiations for a Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes. Many states from all regional groups support this initiative, and we hope that others will join us in this effort.

23. And finally, we would like to reiterate our wishes for the website of the Commission. The website contains a wealth of valuable information, but that information is unfortunately not always easily accessible. That is a great pity. One has to persevere and to keep looking and clicking to retrieve information. We would suggest that the Secretariat make another effort to improve the accessibility so as to make the website, and thus the important work of the International Law Commission, more accessible. That would benefit practitioners and academics alike, and would do justice to the important work of the ILC.

Thank you, Mr. Chairman.