

**Briefing on the recommendation adopted by the International Law Commission on  
the occasion of the adoption of the draft articles on prevention and punishment of  
crimes against humanity**

**13 April 2023**

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**Introduction**

Mr. Chair,

The following briefing is being provided in accordance with the programme of work for the two resumed sessions envisaged in General Assembly resolution 77/249, which the Sixth Committee adopted on Monday, 10 April 2023. We have been requested to present on the recommendation of the Commission regarding the draft articles on prevention and punishment of crimes against humanity. I propose first to make some general remarks about the Commission's authority to make recommendations before discussing the recommendation being considered by the Committee. I will also seek to contextualize the recommendation within the overall history of the Commission's practice of making recommendations since its establishment.

## **Authority of the International Law Commission to make recommendations**

It bears recalling that the International Law Commission is granted the authority to make recommendations by its Statute. In adopting the Statute, in 1947, the General Assembly established the International Law Commission as a subsidiary body to assist it, the Assembly, in the performance of its functions under Article 13(1)(a) of the Charter of the United Nations, namely “to initiate studies and make recommendations for the purpose”, *inter alia*, “of ... encouraging the progressive development of international law and its codification.”

The function of the Commission in the progressive development and codification of international law is described *in extenso* in articles 16 to 22 of the Statute. For present purposes, it bears recalling that in the context of both progressive development and codification, the Statute envisages the Commission concluding its work with the preparation of a final draft text which is to be transmitted to the General Assembly together with “a recommendation”. Here, I draw the attention of delegations to Articles 16(j) and 22 of the Statute.

There is a logic to this. The submission of a finalized text to the Assembly is accompanied by a recommendation for action, i.e. what the Assembly might do with the text. This is not particularly unique to the Commission. It is standard practice for all subsidiary bodies to make recommendations to the parent body. The Sixth Committee itself routinely makes recommendations to the Plenary of the Assembly. So much so that one could say that the authority to make recommendations is common to all subsidiary bodies. What is perhaps unique or at least less common is that such authority is actually expressly

granted to the Commission by its Statute, which also purports to regulate the scope and types of recommendations that the Commission might make.

In fact, by doing so, the Statute goes further and actually **requires** that the Commission make a recommendation. Its work on a particular text is technically not complete without a recommendation for action having been made. This is different from other subsidiary bodies, which typically have the inherent right to make recommendations but which are not usually actually required to do so, and, in fact, may opt not to do so.

As I have mentioned, the Statute purports to regulate the Commission's recommendatory authority. This is done in Article 23, paragraph 1, which establishes four recommendations, or types of recommendations, that the Commission can make to the General Assembly:

1. To take no action, the report having already been published;
2. To take note of or adopt the report by resolution;
3. To recommend the draft to Members with a view to the conclusion of a convention; and
4. To convoke a conference to conclude a convention.

This list should be viewed in light of the practice of the Commission, particularly in recent years, which has involved the adoption of a variety of recommendations, sometimes constituted of multiple components, but always within the broad contours of Article 23. I will not dwell on this practice at this time, as it is strictly speaking beyond the scope of this briefing. Suffice it to say that the practice has evolved over time and the Commission has adopted recommendations tailored to particular outcomes and in

accordance with its perceptions of how particular texts will be received by the General Assembly.

Mr. Chair,

Permit me to end this section with one or two final general remarks. First, it bears pointing out that the Commission's adoption of its recommendation and subsequent transmission of the text to the General Assembly signals **a shift in the phase of the work**. While the Commission is developing a text, the nature of the work is obviously substantive, not only for the Commission but for States as well. As such, the Commission's work is typically subject to annual comment and review by States. The opportunity is provided at multiple points in time for substantive input into the formulation of the text, including at the stage of conclusion of the first reading where governments are typically given an entire year to digest and comment on the text.

The formal submission of the text, with accompanying commentaries and recommendation, to the General Assembly marks the end of the Commission's work. It also **inaugurates a new phase of work** for the Sixth Committee. Strictly speaking, the task before the Sixth Committee is now more procedural in nature, namely what to do with the recommendation of the Commission; whether to accept it or not? The point being that when looking at the matter of a recommendation made by the Commission, it is also important to consider the practice of the Sixth Committee. For example, it is the practice of the Committee to propose the inclusion of a new item in the agenda of the General Assembly, at the following session, precisely to consider the recommendation of the Commission.

While I said that, formally speaking, the task before the Sixth Committee is procedural in nature, in the sense that a discussion on the substance of the text is not required *per se*, the Sixth Committee has, on occasion, chosen to undertake a consideration of matters of substance **as part of** its decision-making process towards taking action on a recommendation made by the Commission. Indeed, this is precisely the function of the two resumed sessions that have been scheduled for this particular agenda item.

The second point relates to the question raised during the discussion earlier this week, namely whether the Commission's recommendation is binding on States. By their very nature recommendations are not binding. Nor for that matter can action taken by a subsidiary body be binding on the parent body. However, the matter does not end there. We would suggest that notwithstanding its non-binding nature, recommendations adopted by the International Law Commission **are very important**. This, for precisely the reason that the Commission's recommendation is an integral part of the machinery that has been established to operationalize the outcome envisaged in Article 13(1)(a) of the Charter.

In other words, it serves as a key procedural step in the process of the progressive development and codification of international law. This is the effect of the express grant of such authority to the Commission by its Statute. While not exclusively so, it has been on the basis of a recommendation by the Commission that the Assembly has taken, and continues to take, action under Article 13(1)(a). Therefore, the recommendation of the Commission is dispositive in the sense that it is an **authoritative proposal** made by the subsidiary body established by the General Assembly to assist it in fulfilling its mandate under Article 13; and is thus worthy of the consideration of the Assembly. It goes without saying that the recommendations of the International Law Commission over the decades

have played a seminal role in the development of the contemporary body of international law.

Such recommendatory function is thus arguably one of the most important responsibilities placed on the Commission. As a member of the Secretariat of the International Law Commission, I can confirm that the Commission takes the matter of each recommendation it makes **very seriously**. Each recommendation is debated extensively in the Commission, typically on the basis of a discussion and proposal contained in the final report of the respective Special Rapporteur. This includes undertaking an assessment of the suitability and viability of a text being developed to serve as a basis for the conclusion of an international convention. In doing so, the Commission routinely takes into account the comments made by States as to the final form of the text. Furthermore, the Commission typically adopts its recommendations by consensus, that is without a vote. They thus reflect the collective view of all 34 members of the Commission.

Nonetheless, having said all of this, in the final analysis, the question of whether or not to accept a recommendation of the Commission remains entirely in the hands of the Member States.

### **Recommendation of the Commission with regard to crimes against humanity**

Mr. Chair,

Turning now to the matter of the recommendation presently under consideration, I would like first to provide a brief recapitulation of the history of the Commission's recommendation on the draft articles.

The Commission commenced its work on the topic of "crimes against humanity" in 2014, with its decision to include the topic in its programme of work. From the very inception of the topic in the Commission, the stated intention was the preparation of a set of draft articles intended to serve as the basis for an international convention. Hence, the syllabus on the topic, adopted by the Working Group on the Long-term Programme of Work in 2013, clearly stated the goal as being a treaty. I quote from the syllabus:

"... a global convention on crimes against humanity appears to be a key missing piece in the current framework of international humanitarian law, international criminal law and international human rights law. The objective of the International Law Commission on this topic, therefore, would be to draft articles for what would become a convention on the prevention and punishment of crimes against humanity ..." (para. 3)

In other words, the Commission was unambiguous from the very beginning as to the intended objective. That the text being worked on would eventually be recommended for adoption as a treaty was also evident from the four reports of the Special Rapporteur and throughout the debates in the Commission. Furthermore, the commentary accompanying the text of the draft articles, adopted by the Commission on first reading, in 2017, clearly confirmed once again that:

"... 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.” (para. (2) of the general commentary).

The Commission, including its Drafting Committee, thus worked on that basis and with that goal in mind.

Likewise, not only was the Commission consistent in its intention, but the member governments were also well aware throughout the process that the intended outcome of the Commission’s work would be a text meant to serve as a basis for an international convention. This is evident from the debates held in the Sixth Committee each year.

Thus, upon adopting the draft articles on prevention and punishment of crimes against humanity, the Commission at its seventy-first session in 2019:

“decided, in conformity with article 23 of its statute, to recommend the draft articles [...] 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.”

In other words, formally speaking, the question now before the General Assembly, and in particular the Sixth Committee, is

(1) whether or not to accept the recommendation of the International Law Commission;

(2) And, if so, which procedure to follow, either:

- The elaboration of a convention by the General Assembly; or

- The elaboration by an international conference of plenipotentiaries

There is a further element in the recommendation that States may wish to consider. The Commission also recommended that the future convention be negotiated “on the basis of draft articles”. In other words, the Commission’s intention was for the draft articles themselves to serve as the base text for any future negotiation. While there have been exceptions, it has been the traditional practice for the text developed by the Commission to serve as the base text for a subsequent treaty negotiation.

### **Overview of the practice in relation to the recommendations of the Commission**

Mr. Chair,

It is important to also consider the Commission’s recommendation for the draft articles in light of the Commission’s general practice on recommendations, as well as that of the General Assembly, and in particular the Sixth Committee, in connection with recommendations made by the Commission in the past.

Since its establishment, the Commission has concluded its consideration of 47 items (including phases of items) on its programme of work. I am referring here to topics it brought to a conclusion through the adoption of a final report or text. Hence, topics that were discontinued or merged into other topics are not being counted. Also, it should be recalled that in a few cases the Commission made no recommendation for action *per se*,

choosing instead, for example, simply to bring the contents of its annual report to the attention of the General Assembly.

An analysis of the work of the Commission, over the 74 years of its existence, reveals that it adopted approximately 44 recommendations. On some occasions it adopted multiple and even composite recommendations involving several possible steps, including sometimes possible alternative actions. In almost all cases the recommendation was for distinct action or actions to be taken by the General Assembly. Not all the recommendations made by the Commission were related to the adoption of texts, usually because of the nature of the document that was prepared, e.g. a report on a particular topic, or, in more recent times, “soft-law” instruments such as draft guidelines, draft conclusions and draft principles, which were not intended for adoption by the Assembly *per se*.

Of the 44 recommendations made, the Commission proposed the conclusion of an international convention, either immediately or as a possible future outcome, on 27 occasions. Of those, 14 recommendations were followed and resulted in the adoption of 17 treaties (including protocols) either directly or indirectly on the basis of the proposal of the Commission. (*In the case of the law of the sea, one recommendation resulted in four conventions.*)

- *Convention on the Territorial Sea and the Contiguous Zone, 1958*
- *Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958*
- *Convention on the High Seas, 1958*
- *Convention on the Continental Shelf, 1958*

- *Convention on the Reduction of Statelessness, 1961*
- *Vienna Convention on Diplomatic Relations, 1961*
- *Vienna Convention on Consular Relations, 1963*
- *Convention on Special Missions, 1969*
- *Vienna Convention on the Law of Treaties, 1969*
- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973*
- *Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 1975*
- *Vienna Convention on Succession of States in respect of Treaties, 1978*
- *Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 1983*
- *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986*
- *Convention on the Law of the Non-navigational Uses of International Watercourses, 1997*
- *Rome Statute of the International Criminal Court, 1998*
- *United Nations Convention on Jurisdictional Immunities of States and their property, 2004*

On four occasions, the General Assembly chose not to pursue the recommendation of the Commission that a convention be adopted or possibly adopted:

- Draft on arbitral procedure, 1953 (which was later transformed into model rules);
- Draft Articles on Most-Favoured-Nation Clauses, of 1978;
- Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier, 1989; and
- Draft articles on the effects of armed conflicts on treaties, 2011

On one occasion, the Commission recommended two distinct conventions, but only one was adopted: the Convention on the Reduction of Statelessness, 1961. On another occasion, the Commission left the outcome entirely to the General Assembly. However, among the options it referred to was the possibility of an international convention. Here I am referring to the Draft Code of Crimes against the Peace and Security of Mankind, 1996.

The Sixth Committee is presently considering recommendations by the Commission for the adoption, or possible future adoption, of a further eight international conventions, in relation to the:

- draft articles on responsibility of states for internationally wrongful acts, 2001
- draft articles on prevention of transboundary harm from hazardous activities, 2001
- draft articles on diplomatic protection, 2006
- draft articles on the law of transboundary aquifers, 2008
- draft articles on the responsibility of international organizations, 2011
- draft articles on the expulsion of aliens, 2014
- draft articles on the protection of persons in the event of disasters, 2016
- draft articles on prevention and punishment of crimes against humanity, 2019

Mr. Chair,

I wish to conclude this section of my briefing by pointing to a particular recent practice of the Commission concerning recommendations that a convention be concluded on the basis of a text it has developed. Earlier on I alluded to the fact that the authority of the Commission to make recommendations, granted to it under its Statute, should be considered in light of its practice over the years, which has varied and has included the adoption, on occasion, of composite recommendations. One such notable example is the recommendation it adopted in 2001 in connection with the draft articles on responsibility of States for internationally wrongful acts.

Different from past recommendations, the Commission did not propose the taking of immediate action on the elaboration of an international convention. Instead, it adopted a two-step recommendation, whereby the Assembly was invited to first take note of the draft articles and to annex them to a resolution. In addition, the Commission recommended that the General Assembly “consider, at a later stage, and in light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles on responsibility of States for internationally wrongful acts with a view to adopting a convention on the topic”. In other words, while the Commission took the view that the draft articles could indeed serve as the basis for an international convention, it preferred to leave the decision on the viability of such an outcome for the member Governments to take at a later stage and in light of subsequent developments.

Since then the Commission has adopted the same, or similar, more “indirect” recommendation for the conclusion of an international convention on four occasions. I am referring to the recommendations adopted in connection with the:

- draft articles on the law of transboundary aquifers, 2008
- draft articles on the effects of armed conflicts on treaties, 2011
- draft articles on the responsibility of international organizations, 2011
- draft articles on the expulsion of aliens, 2014

However, this does not necessarily mark a change in the practice of the Commission, but rather merely the emergence of a variation thereof. Since 2001, the Commission has also continued to make more traditional recommendations, directly proposing the elaboration of international conventions, in connection with other texts it has developed.

Examples here are the:

- draft articles on diplomatic protection, 2006;
- draft articles on the protection of persons in the event of disasters, 2016; and
- draft articles on prevention and punishment of crimes against humanity, 2019.

The point being that, while the Commission had the option of the two-step approach for those texts, in each case **it instead felt sufficiently confident** as to the suitability of the traditional, more affirmative, type of recommendation recommending prompt action in the direction of the conclusion of a treaty.

## **Conclusion**

Mr. Chair,

In summary, the International Law Commission, being a subsidiary body of the General Assembly, has the inherent authority to make recommendations. Such authority is also expressly recognized in its Statute, and as such constitutes a key procedural step in the process of the progressive development and codification of international law, as envisaged in Article 13(1)(a) of the Charter.

The Commission has consistently exercised such authority throughout its existence by recommending a range of outcomes for the texts it produced, including, on a number of occasions, the conclusion of international conventions on the basis of such texts. The General Assembly, in turn, has proceeded to take action on most of the recommendations of the Commission, including those recommendations that an international convention be concluded on the basis of the proposal of the International Law Commission. But, the Assembly has continued to retain its discretion on the matter, and has in fact, on occasion not accepted every single such recommendation, and instead opted for other outcomes.

Finally, I wish to note that it would be premature at the present stage to comment on the specifics were the Assembly to decide to pursue the recommendation of the Commission in regard to the draft articles on prevention and punishment of crimes against humanity. We have not been requested to do so, and we understand that some delegations would be uncomfortable having such a discussion at this stage. Suffice it simply to state that any decision to pursue the recommendation of the Commission should be expressly and clearly reflected in a resolution adopted by the General Assembly. Such decision would ideally be preceded by a reflection on the various procedural options and consequences, both practical and financial, of pursuing the outcome in question, i.e. between a convention or convoking an international conference.

As I said, I will refrain from going any further on such matters right now. Instead, I would simply refer interested delegations to the report the Secretariat will prepare for the eightieth session of the Assembly, in fulfilment of operative paragraph 6 of resolution 77/97 on the responsibility of States for internationally wrongful acts, “on all procedural options based on precedents regarding action taken on other products of the International Law Commission”. That report will cover some of the specifics were the Assembly to pursue the recommendation by the Commission that an international convention be concluded in that context, which would likely apply in the present context as well.

Mr. Chair,

This concludes my briefing. I would be happy to take any questions.

Thank you.