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Note by the Secretariat

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

1. Further to the programme of work adopted by the Sixth Committee at its thirty-seventh meeting, on 10 April 2023, the Secretariat provided the following information, at the forty-third meeting of the Committee, on 13 April 2023, on the recommendation of the International Law Commission contained in paragraph 42 of its report on the work of its seventy-first session¹ for the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.

Authority of the International Law Commission to make recommendations

2. By its resolution [174 \(II\)](#) of 21 November 1947, the General Assembly established the International Law Commission as a subsidiary body to assist 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 of encouraging the progressive development of international law and its codification. The Assembly resolved that the Commission should exercise its functions in accordance with the statute of the Commission. The authority of the International Law Commission to make recommendations is based primarily on the provisions of the statute of the Commission, which was annexed to Assembly resolution [174 \(II\)](#).²

3. The function of the International Law Commission with respect to 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, it is envisaged under the

¹ [A/74/10](#).

² The statute of the International Law Commission was amended by the General Assembly in its resolutions [485 \(V\)](#) of 12 December 1950, [984 \(X\)](#) and [985 \(X\)](#) of 3 December 1955 and [36/39](#) of 18 November 1981.



statute that the Commission shall conclude its work with the preparation of a final draft text which it will submit to the General Assembly together with its recommendations.³

4. The rationale for such authority is that the submission of a finalized text to the General Assembly is to be accompanied by a recommendation for action, that is to say, regarding what the Assembly might do with the text. This procedure is not particularly unique to the Commission. The authority to make recommendations is common to all subsidiary bodies, which typically make recommendations to their respective parent body. The Sixth Committee itself routinely makes recommendations to the plenary of the Assembly. What is perhaps unique, or less common, is that such authority is actually granted expressly to the Commission by its statute, which also purports to regulate the scope and types of recommendations that the Commission might make.

5. The practical effect of the statute is such that the Commission is actually required to make a recommendation. Technically, its work on a particular text is not complete without a recommendation for action having been made. This is not the case for other subsidiary bodies, which typically have the inherent right to make recommendations but are not usually actually required to do so and in fact may opt not to do so.

6. As indicated above, the statute purports to regulate the Commission's recommendatory authority. Under article 23, paragraph 1, of the statute, four recommendations, or types of recommendations, that the Commission can make to the General Assembly are established. The Commission may recommend:

- (a) To take no action, the report having already been published;
- (b) To take note of or adopt the report by resolution;
- (c) To recommend the draft to Members with a view to the conclusion of a convention;
- (d) To convoke a conference to conclude a convention.

7. Such options 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 of the statute of the Commission. While a discussion of such practice is beyond the scope of the present briefing, it may be observed that, generally, the Commission's practice has evolved over time. It has typically adopted recommendations tailored to particular outcomes and in accordance with its perceptions of how particular texts will be received by the General Assembly.

8. Furthermore, the Commission's adoption of its recommendation and subsequent transmission of a 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 substantive, not only for the Commission but for States as well. The Commission's work is consequently 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.

9. The formal submission of the text to the General Assembly, with accompanying commentaries and recommendation, marks the end of the Commission's work and inaugurates a new phase of work for the Sixth Committee. Strictly speaking, the task before the Committee, namely, deciding whether or not to accept the recommendation

³ See articles 16 (j) and 22 of the statute.

of the Commission, becomes procedural in nature. Accordingly, when a recommendation made by the Commission is confronted, it is important that the practice of the Sixth Committee be considered. For example, it is the practice of the Committee to propose the inclusion of a new item in the agenda of the Assembly, at the following session, precisely to consider the recommendation of the Commission.

10. While 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 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 was precisely the function of the two resumed sessions of the Committee, approved by the General Assembly in its resolution 77/249, which were held to discuss the present agenda item.

11. A question was raised during the discussion at the resumption of the Committee's session, namely, whether the Commission's recommendation is binding on States. By their very nature, recommendations are not binding. Nor for that matter is action taken by a subsidiary body usually binding on the parent body. Notwithstanding their non-binding nature, however, recommendations adopted by the International Law Commission are highly important. It is precisely for this 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 of the United Nations. In other words, it serves as a key procedural step in the process of the progressive development and codification of international law, which is the effect of the express grant of such authority to the Commission by its statute. It has been on the basis of a recommendation by the Commission, while not exclusively so, that the General Assembly has taken, and continues to take, action under Article 13 (1) (a) of the Charter. The recommendation of the Commission is therefore dispositive in that it is an authoritative proposal made by a subsidiary body established by the Assembly to assist the Assembly in fulfilling its mandate under Article 13 of the Charter and is thus worthy of the consideration of the Assembly. Recommendations made by the International Law Commission over the decades have played a seminal role in the development of the contemporary body of international law.

12. Such a recommendatory function is accordingly one of the most important responsibilities placed on the Commission, which takes the matter of each recommendation that it makes very seriously. Each recommendation is debated extensively, 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 that is being developed to serve as a basis for the conclusion of an international convention. In this regard, the Commission routinely takes into account the comments made by States with respect to the final form of the text. Furthermore, as the Commission typically adopts its recommendations by consensus, that is to say, without a vote, they thus reflect the collective view of all 34 members of the Commission.

13. Nonetheless, it remains for the Member States to decide the question of whether or not to accept a recommendation of the Commission.

Recommendation of the Commission with regard to the draft articles on the prevention and punishment of crimes against humanity

14. 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 inclusion of the topic in the programme of work of the Commission, the stated aim 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, as follows:

“... 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 ...”⁴

15. 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 Rapporteur⁵ 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.”⁶

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

16. 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.”

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

(a) Whether or not to accept the recommendation of the International Law Commission;

(b) And, if so, which procedure to follow, that is to say:

(i) Either the elaboration of a convention by the General Assembly;

(ii) Or the elaboration of a convention by an international conference of plenipotentiaries.

18. It is also worth recalling a further element, namely, that the Commission recommended that the future convention be negotiated “on the basis of draft articles”. In other words, the Commission’s intention is 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.

⁴ *Yearbook of the International Law Commission, 2013*, vol. II, Part Two (United Nations publication, Sales No. E.16.V.6), report of the International Law Commission on the work of its sixty-fifth session (2013), annex. II, para. 3.

⁵ Documents [A/CN.4/680](#) and Corr.1, [A/CN.4/690](#), [A/CN.4/704](#) and [A/CN.4/725](#) and Add.1.

⁶ *Yearbook of the International Law Commission, 2017*, vol. II (Part Two) (United Nations publication, Sales No. E.22.V.6), report of the International Law Commission on the work of its sixty-ninth session (2017), chap. IV, para. 46, general commentary to the text of the draft articles on crimes against humanity, para. 2.

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

19. The Commission's recommendation for the draft articles on prevention and punishment of crimes against humanity should be considered in the 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 past recommendations made by the Commission.

20. Since its establishment, the Commission has concluded its consideration of 47 items (including phases of items) in its programme of work. 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.

21. 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, sometimes including possible alternative actions. In almost all cases, the recommendation was for distinct action or actions to be taken by the General Assembly. Not all of the recommendations made by the Commission were related to the adoption of texts, usually because of the nature of the document that was prepared, such as 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.

22. 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 recommendations, 14 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.⁷ On four occasions, the General Assembly chose

⁷ Convention on the Territorial Sea and the Contiguous Zone, 1958 (United Nations, *Treaty Series*, vol. 516, No. 7477); Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958 (United Nations, *Treaty Series*, vol. 559, No. 8164); Convention on the High Seas, 1958 (United Nations, *Treaty Series*, vol. 450, No. 6465); Convention on the Continental Shelf, 1958 (United Nations, *Treaty Series*, vol. 499, No. 7302); Convention on the Reduction of Statelessness, 1961 (United Nations, *Treaty Series*, vol. 989, No. 14458); Vienna Convention on Diplomatic Relations, 1961 (United Nations, *Treaty Series*, vol. 500, No. 7310); Vienna Convention on Consular Relations, 1963 (United Nations, *Treaty Series*, vol. 596, No. 8638); Convention on Special Missions, 1969 (United Nations, *Treaty Series*, vol. 1400, No. 23431); Vienna Convention on the Law of Treaties, 1969 (United Nations, *Treaty Series*, vol. 1155, No. 18232); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973 (United Nations, *Treaty Series*, vol. 1035, No. 15410); Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 1975 (*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12)); Vienna Convention on Succession of States in respect of Treaties, 1978 (United Nations, *Treaty Series*, vol. 1946, No. 33356); Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 1983 (*Official Records of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts*, vol. II (United Nations publication, Sales No. E.94.V.6)); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 (*Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, vol. II (United Nations publication, Sales No. E.94.V.5)); Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997 (United Nations, *Treaty Series*, vol. 2999, No. 52106); Rome Statute of the International Criminal Court, 1998, United Nations (*Treaty Series*, vol. 2187, No. 38544); and United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 (General Assembly resolution 59/38, annex).

not to pursue the recommendation of the Commission that a convention be adopted or possibly adopted, specifically in the context of:

- (a) Draft on arbitral procedure, 1953⁸ (which was later transformed into model rules);
- (b) Draft articles on most-favoured-nation clauses, of 1978;⁹
- (c) Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, 1989;¹⁰
- (d) Draft articles on the effects of armed conflicts on treaties, 2011.¹¹

23. On one occasion, the Commission recommended two distinct conventions,¹² but only one was adopted, namely, the Convention on the Reduction of Statelessness, 1961. On another occasion, the Commission left the outcome entirely to the General Assembly. Among the options it referred to, however, was the possibility of an international convention.¹³

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

- (a) Draft articles on responsibility of States for internationally wrongful acts, 2001;¹⁴
- (b) Draft articles on prevention of transboundary harm from hazardous activities, 2001;¹⁵
- (c) Draft articles on diplomatic protection, 2006;¹⁶
- (d) Draft articles on the law of transboundary aquifers, 2008;¹⁷
- (e) Draft articles on the responsibility of international organizations, 2011;¹⁸
- (f) Draft articles on the expulsion of aliens, 2014;¹⁹

⁸ *Yearbook of the International Law Commission, 1952*, vol. II (United Nations publication, Sales No. 58.V.5, Vol. II), report of the International Law Commission to the General Assembly, chap. II, para. 24.

⁹ *Ibid.*, 1978, vol. II, Part Two (United Nations publication, Sales No. E.79.V.6 (Part II)), chap. II, para. 74.

¹⁰ *Ibid.*, 1989, vol. II (Part Two) (United Nations publication, Sales No. E.91.V.5 (Part 2)), chap. II, para. 72.

¹¹ *Ibid.*, 2011, vol. II (Part Two) (United Nations publication, Sales No. E.16.V.3 (Part 2)), chap. VI, para. 100.

¹² *Ibid.*, 1954, vol. II (United Nations publication, Sales No. 59.V.7, Vol. II), report of the International Law Commission to the General Assembly, para. 25.

¹³ *Ibid.*, 1996, vol. II (Part Two) (United Nations publication, Sales No. E.98.V.9 (Part 2)), chap. II.D, Articles of the draft Code of Crimes against the Peace and Security of Mankind, para. 50.

¹⁴ *Ibid.*, 2001, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)), chap. IV, para. 76.

¹⁵ *Ibid.*, chap. V, para. 97.

¹⁶ *Ibid.*, 2006, vol. II (Part Two) (United Nations publication, Sales No. 12.V.13 (Part 2)), chap. IV, para. 49.

¹⁷ *Ibid.*, 2008, vol. II (Part Two) (United Nations publication, Sales No. E.13.V.11 (Part 2)), chap. IV, para. 53.

¹⁸ *Ibid.*, 2011, vol. II (Part Two) (United Nations publication, Sales No. E.16.V.3), chap. V, para. 87.

¹⁹ *Ibid.*, 2014, vol. II (Part Two) (United Nations publication, Sales No. E.19.V.1), chap. IV, para. 44.

- (g) Draft articles on the protection of persons in the event of disasters, 2016;²⁰
- (h) Draft articles on prevention and punishment of crimes against humanity, 2019.²¹

25. Consideration might also be given to a particular recent practice of the Commission concerning recommendations that a convention be concluded on the basis of a text that it has developed. As indicated above, 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 notable example in this regard is the recommendation that it adopted in 2001 in connection with the draft articles on responsibility of States for internationally wrongful acts.²²

26. The Commission, differing in its practice from that on past recommendations, did not propose the taking of immediate action on the elaboration of an international convention. Instead, it adopted a two-step recommendation, whereby the General 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 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.”

Hence, 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.

27. Since then, on four occasions, the Commission has adopted the same, or similar, more “indirect” recommendation for the conclusion of an international convention, related to:

- (a) Draft articles on the law of transboundary aquifers, 2008;²³
- (b) Draft articles on the effects of armed conflicts on treaties, 2011;²⁴
- (c) Draft articles on the responsibility of international organizations, 2011;²⁵
- (d) Draft articles on the expulsion of aliens, 2014.²⁶

28. The Commission’s having done so, however, did not necessarily mark a change in the practice of the Commission per se but, rather, merely the emergence of a variation thereof. Since 2001, the Commission has continued to make more traditional recommendations, directly proposing the elaboration of international conventions in connection with other texts that it has developed, for example, as regards:

²⁰ *Ibid.*, 2016, vol. II (Part Two) (United Nations publication, Sales No. E.20.V.7), chap. IV, para. 48.

²¹ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, 2019, chap. IV, para. 44.

²² *Yearbook of the International Law Commission, 2001*, vol. II (Part Two) (United Nations publication, Sales No. E.04.V.7 (Part 2)), chap. IV, paras. 72–73.

²³ *Ibid.*, 2008, vol. II (Part Two) (United Nations publication, Sales No. E.13.V.11 (Part 2)), chap. IV, para. 49.

²⁴ *Ibid.*, 2011, vol. II (Part Two) (United Nations publication, Sales No. E.16.V.3 (Part 2)), chap. VI, para. 97.

²⁵ *Ibid.*, chap. V, para. 85.

²⁶ *Ibid.*, 2014, vol. II (Part Two) (United Nations publication, Sales No. E.19.V.1), chap. IV, para. 42.

- (a) Draft articles on diplomatic protection, 2006;²⁷
- (b) Draft articles on the protection of persons in the event of disasters, 2016;²⁸
- (c) Draft articles on prevention and punishment of crimes against humanity, 2019.²⁹

29. Hence, while the Commission had the option of applying the two-step approach for those texts, it nonetheless felt sufficiently satisfied as to the suitability of the traditional, more affirmative type of recommendation entailing prompt action in the direction of the conclusion of a treaty.

Conclusion

30. 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 of the United Nations.

31. The International Law Commission has consistently exercised such authority throughout its existence by recommending a range of outcomes for the texts that it has 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 Commission. Nonetheless, the Assembly has continued to retain its discretion on the matter and has in fact, on occasion, not accepted every single such recommendation and has opted instead for other outcomes.

32. A decision to pursue the recommendation of the Commission should be expressly and clearly reflected in a resolution adopted by the General Assembly. Such a 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, that is to say, a convention or the convocation of an international conference.³⁰

²⁷ *Ibid.*, 2006, vol. II (Part Two) (United Nations publication, Sales No. 12.V.13 (Part 2)), chap. IV, para. 46.

²⁸ *Ibid.*, 2016, vol. II (Part Two) (United Nations publication, Sales No. E.20.V.7), chap. IV, para. 46.

²⁹ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, 2019, chap. IV, para. 42.

³⁰ Some of the same procedural details will be discussed in the forthcoming report, to be prepared by the Secretariat for the eightieth session of the General Assembly, on “on all procedural options based on precedents regarding action taken on other products of the International Law Commission”, in fulfilment of the request contained in paragraph 6 of Assembly resolution 77/97 on the responsibility of States for internationally wrongful acts.