

Unlocking the Sixth Committee's Potential to Act for Crimes Against Humanity as It Did for Genocide^{*}

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Abstract

The International Law Commission, on completion of its work on the draft articles on prevention and punishment of crimes against humanity, recommended to the General Assembly the elaboration of a convention by the said Assembly or by an international conference of plenipotentiaries based on the said draft articles. The Sixth Committee of the United Nations General Assembly at the first opportunity only took note of the draft articles and postponed consideration of the recommendation to its next session. The resolution of the General Assembly, as recommended by the Sixth Committee, does not readily disclose the full extent of the debate, proposals and concerns expressed in the Sixth Committee that prevented the General Assembly from acting on the Commission's recommendation. This article, in considering the cornucopia of views expressed by States, outlines a path to unlock the Sixth Committee's potential to act, by proposing a separation of the organizational and substantive matters and future-proofing the further consideration of elaborating a convention through the adoption of a structured approach.

Keywords: crimes against humanity, General Assembly, International Law Commission, Sixth Committee, United Nations.

It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and defenseless men, women, and children. This was the tragic fulfillment of a program of intolerance and arrogance. Vengeance is not our goal, nor do we seek merely a just retribution. We ask this Court to affirm by

* Views expressed herein are personal and not attributable to the Government of Sierra Leone or any other institution. I thank Mr. Abdul Tejan-Cole for his helpful review of this article. Opinions and errors are mine.

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*international penal action man's right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law.*¹

1 Introduction

The Sixth Committee of the United Nations General Assembly ('General Assembly' or 'Assembly'),² at the close of its debate on the agenda item, 'Report of the International Law Commission on the work of its seventy-first session'³ adopted without a vote the draft resolution on 'Crimes Against Humanity'.⁴ By the said resolution, the Sixth Committee decided "to include in the provisional agenda of its seventy-fifth session an item entitled 'Crimes Against Humanity', and to continue to examine the recommendation of the [International Law] Commission".⁵ Since the resolutions of the Sixth Committee, and indeed the other Main Committees of the General Assembly, are recommendations to the plenary of the General Assembly, the Assembly in its fifty-first plenary meeting, on 18 December 2019, adopted the said recommendation of the Sixth Committee.⁶

The neutral framing of the text of the 'Crimes Against Humanity' resolution does not reveal the intense deliberations, diverse views and rival proposals that characterized the Sixth Committee's debate and negotiation of the text. The diverse nature of the debate and proposals can be largely described as the process

- 1 B. Ferencz, 'Trial of the Major War Criminals', *Nuremberg*, Vol. IV, 1947, p. 494, available at: <https://benferencz.org/articles/pre-1970/ferencz-opening-statement-at-nuremberg/> (last visited 9 August 2020). The quotation is an excerpt from Benjamin Ferencz's opening statement before the Nuremberg Military Tribunal in 1947. He prosecuted the '*Einsatzgruppen case*', a case that involved German special action groups that rampaged throughout the then Soviet Union and massacred Jews, Communists, Roma and other classes of human beings that the Nazis viewed as undesirables. Emphasis added.
- 2 The Sixth Committee is also referred to as the Legal Committee of the United General Assembly, which "deals with legal issues. In particular, it assists the General Assembly in the discharge of its responsibilities under Article 13 of the Charter of the United Nations in the progressive development of international law and its codification". UNGA, 'Revitalization of the work of the General Assembly, Historical and analytical note on the practices and working methods of the Main Committees', Note by the Secretariat, U.N. Doc. A/58/CRP.5, 10 March 2004, p. 11, Para. 66.
- 3 "The item entitled 'Report of the International Law Commission on the work of its seventy-first session' was included in the provisional agenda of the seventy-fourth session of the General Assembly pursuant to Assembly resolution 73/265 of 22 December 2018." See United Nations General Assembly, *Report of the International Law Commission on the Work of Its Seventy-First Session: Report of the Sixth Committee*, U.N. Doc. A/74/425, 21 November 2019, p. 1, Para. 1.
- 4 *Ibid.* See U.N. Sixth Committee, draft resolution II on 'Crimes against humanity', U.N. Doc. A/C.6/74/L.21, 13 November 2019, Para. 3.
- 5 *Ibid.* The recommendation of the Commission is contained in Para. 42 of its report on the work of its seventy-first session, which states: "At its 3499th meeting, on 5 August 2019, the Commission decided, in conformity with article 23 of its statute, to recommend the 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." Int'l Law Comm'n, *Report on the Work of Its Seventy-First Session*, U.N. Doc. A/74/10, 2019, p. 10, Para. 42.
- 6 See GA Res. 74/187, 18 December 2019.

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versus substance debate. This debate fortuitously does not evince the proverbial ‘chicken and egg’ scenario, since a meticulous scrutiny can reveal a clear distinction between the proposals on the process to identify the forward path, as opposed to the substantive issues and concerns expressed by the member States. The challenge that remains, therefore, is how the Sixth Committee can act on the recommendation of the ILC on “the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the Draft Articles”.⁷ This, essentially, is an invitation to the General Assembly to do for crimes against humanity what it did for genocide, in the Assembly’s adoption in 1948 of the Convention on the Prevention and Punishment of the Crime of Genocide (the ‘Genocide Convention’).⁸

By way of a quick detour, it is well known within the UN international law-making community that the International Law Commission (‘ILC’ or ‘Commission’) is an independent specialized body created by the General Assembly in 1947 primarily to assist the Assembly in the discharge of its mandate under the Charter of the UN, which is to initiate studies and make recommendations to promote the progressive development of international law and its codification.⁹ The ILC’s Draft Articles on ‘Crimes Against Humanity’ sought to achieve just this – progressively develop and codify this critical area of international criminal law, as noted by Sierra Leone, which “found that it was appropriate for the Draft Articles to reflect a mix of codification and progressive development”.¹⁰ The Special Rapporteur in responding to States’ comments on the ‘Commission’s methodology in drafting the articles’ noted:

that while some aspects of these Draft Articles may reflect customary international law, codification of existing law [...was] not the primary objective of [...the] topic; rather, the objective [...was] the drafting of provisions that would be both effective and likely acceptable to States, based on provisions

7 See U.N. Doc. A/74/425, *supra* note 2.

8 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277.

9 United Nations Charter Art. 13, 1; GA Res. 174 (II), 21 November 1947, as amended by G.A. Res. 485 (V), 12 December 1950, G.A. Res. 984 (X), 3 December 1955, G.A. Res. 985 (X), 3 December 1955, G.A. Res. 36/39, 18 November 1981; Statute of the International Law Commission, Art. 1(1). For a brief discussion on the ILC and its core mandate, see M.I. Kanu, ‘70 Years of the International Law Commission, Its Future Role in the Changing Landscape of International Law and the Small-Developing States Nexus’, *FIU Law Review*, Vol. 13, 2019, pp. 1043-1064, at 1044-1051.

10 Int’l Law Comm’n, Crimes against Humanity: comments and observations received from Governments, international organizations and others, U.N. Doc. A/CN.4/726, 21 January 2019, ‘chapter II. A, Sierra Leone’. Chile shared similar views in the Sixth Committee in 2019, see Chile, Statement on the Report of the International Law Commission, 31 October 2019, available at: <http://statements.unmeetings.org/media2/23328717/-e-chile-statement.pdf>. For further discussion on the issue of the composite approach of progressive development and codification, see C.C. Jalloh, ‘The International Law Commission’s First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?’, *Case Western Reserve Journal of International Law*, Vol. 52, 2020, pp. 333-405, at 349 *et seq.*

often used in widely-adhered-to treaties addressing crimes, as the foundation for a future convention.¹¹

France acknowledged this advisory/assisting role in stating that the “methodology and approaches adopted have led to an excellent outcome that will be of practical relevance to States”.¹²

The ILC began its work on the topic in 2014, when it placed ‘Crimes Against Humanity’ on its active programme of work and appointed Mr. Sean Murphy as Special Rapporteur, a decision that the General Assembly took note of in the Assembly’s December 2014 resolution.¹³ In 2019, in an appreciable five years’ time span, during which States got the opportunity each year to comment on the text of the draft articles and to review the commentary as the topic progressed, the Commission completed the second reading of its ‘Draft Articles on Prevention and Punishment of Crimes against Humanity’.¹⁴ The Commission submitted its final text, with commentaries, to the General Assembly with a recommendation that States either elaborate a convention in the UN or convene a diplomatic conference to negotiate a convention based on the draft articles.¹⁵ While the pace of the Commission’s work may seem remarkable and appears to address the frustration by some States over its ‘too deliberative’ pace of work, the countervailing effect of this vigorous pace emerged when some States requested more time to fully appreciate the outcome of the Commission’s work.¹⁶

This article, in consideration of the diverse views expressed by the member States in the Sixth Committee, at the first instance rationalizes the basis of the cornucopia of opinions and then advances suggestions on unlocking the Sixth Committee’s potential to act on the recommendation of the Commission and desirability for a convention on ‘Crimes Against Humanity’. In so doing, it avers that the Sixth Committee may not be the most appropriate forum for a deep-dive into the substance of the ILC’s draft articles, since the Sixth Committee’s working

- 11 S. Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/725, 18 February 2019, p. 8, Para. 19 (references omitted). It has to be noted that the comments by States on the Commission’s methodology were largely supportive, with Chile, Switzerland, the Czech Republic, Belgium and France all expressing varying degrees of the draft articles, drawing from widely ratified treaties, concise scope and approach that will lead to an excellent outcome; *Ibid.*, Paras. 16-18. However, Iran commented that several of the draft articles represented “deviations from the rules of customary international law and failed to take account of State practice”. The Islamic Republic of Iran, Official Records of the General Assembly, Seventy-second Session, Sixth Committee, twentieth meeting, U.N. Doc. A/C.6/72/SR.20, 28 November 2017, Para. 34.
- 12 Murphy, *supra* note 10, France, p. 8, Para. 18.
- 13 *Ibid.*, p. 4, Para. 1. See also Int’l Law Comm’n, *Report on the Work of Its Sixty-sixth Session*, U.N. Doc. A/69/10, 2014, Para. 266; GA Res. 69/118, 10 December 2014, Para. 7.
- 14 Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, in Int’l Law Comm’n, *Report on the Work of Its Seventy-first Session*, U.N. Doc. A/74/10, 2019. The report, which also contains commentaries to the Draft Articles (Para. 45), will appear in Yearbook of the International Law Commission, 2019, Vol. II, Part Two.
- 15 See *supra* note 4.
- 16 See Jalloh, *supra* note 9, at 348. See also discussions below on the 2019 debate in the Sixth Committee.

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method, including its debates and negotiations on resolutions, may not be well suited to reconciling the varying proposals within a reasonable time frame.¹⁷ Consequently, the best path in the Sixth Committee is to agree on the best possible organizational track, a process debate that will duly respect the acclaimed work of the Commission. Otherwise, the Sixth Committee risks being seen as the ‘necropolis’ for the ILC’s work products recommending the elaboration of a convention whether by the General Assembly or by an international conference of plenipotentiaries.

2 Conspectus of the Views Expressed by States in the 2019 Sixth Committee Debate

In the succeeding section of this article, the working method of the ILC is briefly described to illustrate the avenues and opportunities for States to systematically comment on the work of the Commission in relation to a given topic.¹⁸ In this vein, the Commission’s *Fourth report on crimes against humanity* presents a useful summary of the previous observations made by States in the Sixth Committee and written comments on the topic.¹⁹ In the 2017 debate on the annual report of the Commission in the Sixth Committee, a reported

52 States (including presentations on behalf of the Caribbean Community (CARICOM), on behalf of the Community of Latin American and Caribbean States (CELAC) and on behalf of the Nordic countries) made observations on this topic.²⁰

17 The ongoing discussion on another ILC product, the ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ 2001 is one example. See the text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as part of the Commission’s report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, as corrected.

18 See Section 3.2 below. See also *The Work of the International Law Commission*, 8th ed., Vol. I, New York, United Nations, 2012; Kanu, *supra* note 8.

19 Murphy, *supra* note 10, Paras. 4-7.

20 *Ibid.*, Para. 4.

Additionally, thirty-nine States submitted written comments on the topic,²¹ and, based on evidence in the last decade,²² the number of observations in the Sixth Committee and written comments demonstrates a high level of interest from States. Evaluative analyses of the comments and observations show that a majority of the views were strongly positive, positive or, at the barest minimum, neutral. However, strong adverse or negative feedback to the effect of not rushing into elaborating a convention, complicated unresolved issues, and even doubts as to the necessity for concluding a convention were also expressed by a few States.²³

The content of the views expressed by States notwithstanding, a large number of interventions in the Sixth Committee and written comments not only demonstrate the high level of interest in the topic but also reveal or manifest the symbiosis and cooperation expected between the Sixth Committee and the Commission, thereby enabling States to influence the work of the Commission. Thus, when the Commission put forward the recommendation for the elaboration of a convention, it must have been in consideration of the prior comments of States. About forty States, inclusive of the Nordic countries, in a group statement, had expressed support for a future convention on crimes against humanity in the Sixth Committee, many calling for the convention to be based on the ILC's draft articles.²⁴ Most States that submitted written comments also expressed support and the desirability to elaborate a convention on the basis of the draft articles.²⁵ However, the absence of consensus by States on the question of elaborating a future convention could be gleaned from the written comments, since a few but consistent States, for varying reasons, "suggested that a convention on the pre-

21 "As of 15 February 2019, written comments upon this topic have been received from 38 States: Argentina; Australia; Austria; Belarus; Belgium; Bosnia and Herzegovina; Brazil; Canada; Chile; Costa Rica; Cuba; the Czech Republic; El Salvador; Estonia; France; Germany; Greece; Israel; Japan; Liechtenstein; Malta; Morocco; the Netherlands; New Zealand; Panama; Peru; Portugal; Sierra Leone; Singapore; Sweden (on behalf of the five Nordic countries: Denmark, Finland, Iceland, Norway and Sweden); Switzerland; Ukraine; the United Kingdom of Great Britain and Northern Ireland; and Uruguay," *Ibid.*, Para. 5. See also U.N. Doc. A/CN.4/726, *supra* note 9; and comment by the United States of America in Int'l Law Comm'n, Crimes against humanity: Additional comments and observations received from governments, international organizations and others, U.N. Doc. A/CN.4/725/Add.2, 2 May 2019.

22 For the number of written comments by States in response to invitations by the ILC in the last decade (from 2010), see Kanu, *supra* note 8, 1051 *et. seq.*

23 The author benefitted from a descriptive categorization of the interventions by States on the basis of strong positive (10), positive (33), neutral (8), negative (2) to strong negative (2) in a compilation of government reactions to the International Law Commission's draft articles on crimes against humanity during the seventy-second session of the United Nations General Assembly Sixth Committee debate. The comments have been taken from country statements found on the United Nations PaperSmart website. Whitney R. Harris World Law Institute, Compilation of Government Reactions to the UN International Law Commission's Project on Crimes Against Humanity during UN Sixth Committee Meetings: Sixty-Eighth Session (2013) – Seventy-Fourth Session (2019), July 2020, available at: <https://law.wustl.edu/wp-content/uploads/2020/08/Compilation-of-6th-Committee-Responses-to-CAH-2013-2019.pdf>.

24 Murphy, *supra* note 10, Para. 22.

25 *Ibid.*

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vention and punishment of crimes against humanity was not needed or desirable".²⁶

The 2019 Sixth Committee Debate on the topic reflected the cornucopia of views previously expressed by States.²⁷ However, a more than cursory look at the interventions by States reveals two main streams of thought. On the one hand, States continued to express their views on the substance of the draft articles and the commentaries. On the other hand, they expressed views on the desirability to act on the recommendation of the Commission to elaborate a convention by the General Assembly or through the convening of an international conference of plenipotentiaries. On the substance, many States welcomed the Commission's draft articles and broadly endorsed or expressed openness to the elaboration of a convention as recommended.²⁸ However, following a similar trend in the previous observations and written comments, a few States expressed doubts as to the desirability of elaborating a convention based on the draft articles for substantive reasons, including concerns surrounding the definition and scope of crime against humanity,²⁹ the superfluity concerns,³⁰ or lack of clarity on several cited issues,³¹ absence of universality on the texts borrowed from analogous treaties, especially the Rome Statute of the International Criminal Court,³² and the poten-

26 *Ibid.*, Paras. 27-29 for States' comments and reasons for non-desirability of a convention.

27 The Sixth Committee considered the 'Report of the International Law Commission on the Work of its Seventy-first Session' at its twenty-third to thirty-third and thirty-fifth meetings, from 28 October to 1 November and on 5, 6 and 20 November 2019. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records: (A/C.6/74/SR.23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 35) available at: www.un.org/en/ga/sixth/74/ilc.shtml. See also United Nations General Assembly, 'Report of the International Law Commission on the Work of its Seventy-first Session: Report of the Sixth Committee', U.N. Doc. A/74/425, 21 November 2019, Para. 3.

28 The States that welcomed or expressed support for the recommendation to elaborate a convention or flexibility on the next steps include: Argentina, Armenia, Austria, Belarus, Belgium, Brazil, Bulgaria, Chile, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Ecuador, El Salvador, Estonia, France, Germany, Greece, Honduras, Indonesia, Japan, Malaysia, the Netherlands, Norway, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Thailand, Ukraine, United Kingdom, Uzbekistan. The European Union (on behalf of its member States) and the Holy See, both observers, also expressed support for the ILC's recommendation. See also Whitney R. Harris World Law Institute, Compilation of Government Reactions, *supra* note 22, pp. 42-56.

29 See Statement by China on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 28 October 2019, available at: <http://statements.unmeetings.org/media2/21999909/-e-china-statement.pdf>.

30 See statement by India on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 31 October 2019, available at: <http://statements.unmeetings.org/media2/23328673/india.pdf>.

31 See statement by United States of America on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 29 October 2019, available at: <http://statements.unmeetings.org/media2/21999967/united-states-of-america.pdf>.

32 *Ibid.*

tial conflict with a parallel mutual legal assistance (the MLA) initiative led by a group of States promoting a mutual legal assistance treaty for core crimes.³³

While the observations on the substance of the draft articles by States in the 2019 Sixth Committee debate either repeated previous comments or acknowledged changes made by the Commission, based on those comments, the views expressed on the process or subsequent steps were telling on how the Sixth Committee was going to act on the recommendation by the ILC. For instance, States in support of the ILC's recommendation unequivocally voiced their receptiveness to the options of a General Assembly led process or the convening of an international conference of plenipotentiaries.³⁴ Preference for the international conference gained momentum, given the possibility of delays with the General Assembly option,³⁵ and Austria even offered to host the diplomatic conference in Vienna.³⁶ The proposals that were tabled to pursue the recommendation of the ILC included, *inter alia*, convening a diplomatic conference of plenipotentiaries or the establishment of a preparatory committee or an *ad hoc* committee open to all member States of the UN to discuss the main substantive and organizational questions arising out of the draft articles, to fix the time frame for the work of the committee to be established and subsequently convene the diplomatic conference of plenipotentiaries.

Notwithstanding the majority support for options that would have led to the convening of a diplomatic conference of plenipotentiaries, a consistently small number of States expressed concerns about the suitable time for scheduling the conference, with delegations noting the need for caution given the complexity of the matters for consideration, which required additional time to allow for further reflection on the text and finalization at the expert level before an international conference is convened for adoption.³⁷ Egypt, for example, suggested that the Sixth Committee should not be rushed into deciding how to proceed during the seventy-fourth session of the General Assembly but rather in a future session.³⁸ The United States of America put forward a similar proposal with the suggestion that the item 'Crimes Against Humanity' be included in the agenda of the Com-

33 See statement by the Russian Federation on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 30 October 2019, available at: <http://statements.unmeetings.org/media/22000110/-r-russian-statement.pdf>.

34 See note 27.

35 South Africa supports the elaboration of a convention, in principle. "To do so via the General Assembly may take considerable time." See Statement by South Africa on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 31 October 2019, available at: <https://papersmart.unmeetings.org/en/ga/sixth/74th-session/statements/>.

36 See Statement by Austria, on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 28 October 2019, available at: <https://papersmart.unmeetings.org/en/ga/sixth/74th-session/statements/>.

37 See note 27 and statements by Belarus, Canada, China, Egypt, Iran, the Russian Federation, and the United States of America on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', available at: <https://papersmart.unmeetings.org/en/ga/sixth/74th-session/statements/>.

38 See Statement by Egypt, on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 31 October 2019, available at: <http://statements.unmeetings.org/media/223328713/-a-egypt-statement.pdf>.

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mittee for the seventy-sixth session for further consideration based on the draft articles.³⁹ Iran, in noting that the draft articles may still need some work to allow for informed decision making by States, expressed the

view that such an important instrument should be the product of an inclusive intergovernmental and member states driven process and the work of the ILC could be considered as a valuable source in a well-defined process that could be shaped under the auspices of the Sixth Committee.⁴⁰

Given the working method of the Sixth Committee, it was therefore no surprise that consensus was not reached on the more ambitious proposals, the 'ambitious and structured approach',⁴¹ as described by forty-three States that expressed disappointment over the Sixth Committee's inability to reach a consensus on the ILC's recommendation but expressing hopes for a consensus in the symbolic seventy-fifth session of the General Assembly.

3 The Impact of the Working Methods of the Sixth Committee and the ILC

In the 2019 Sixth Committee debate on the report of the ILC, two issues were quite apparent. First, the majority of States that took the floor expressed support for the work of the Commission on 'Crimes Against Humanity' and were ready to act on the Commission's recommendation. If the Sixth Committee was one of the main committees that adopt decisions by voting, then it would have been likely that such an outcome would have been achieved by majority vote. However, and rightly so, the Sixth Committee acts on the basis of consensus. The second issue relates to the continuous dialogue that took place between the Commission, mainly through the reports of the Special Rapporteur (the Commission), and the observations and written comments of States. Indeed, States expressed appreciation for the deference shown by the Commission in incorporating their views in the evolution of the draft articles. Although the ILC is independent in its work, it is expected to have a symbiotic relationship with the Sixth Committee, and this was made evident in the acknowledgment of the transparent and inclusive methodology adopted by the Commission on the topic.⁴² Nor must it be overlooked that the text presented to States, upon second reading, represents a consolidation of the prior work of the Commission that States had given views on in the Sixth Committee each year. Despite this transparency and inclusivity, the recommen-

39 See note 30.

40 See Statement by Iran on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 31 October 2019, available at: <http://statements.unmeetings.org/media/23328755/-e-iran-statement.pdf>.

41 See Austria, Explanation of Position, adoption of the draft resolution on 'Crimes Against Humanity', 74th Session of the UN General Assembly, 20 November 2019, available at: <http://statements.unmeetings.org/media/23557769/-e-austria-statement-item-79-eop.pdf>.

42 See statements by Belarus, France and the United States of America on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', available at: <https://papersmart.unmeetings.org/en/ga/sixth/74th-session/statements/>.

dation of the Commission was not acted upon at the first inning. Discussing the working methods of the Sixth Committee may provide insights into the reasons why the Sixth Committee was unable to act on the recommendation of the Commission when first presented the opportunity to do so.

3.1 *The Sixth Committee's Working Method*

With the General Assembly being the main deliberative organ of the UN relating to international law, the Sixth Committee, by providing advice on substantive legal matters, has overtime assisted the Assembly in accomplishing one of "the greatest achievements of the United Nations in the development of a body of international law", in the adoption of several multilateral treaties, including, as mentioned, the historic Genocide Convention.⁴³ The Assembly has been able to achieve these great feats within its defined and evolving method of work, including being assisted by and acting upon recommendations of the ILC.⁴⁴ In recognition of the contribution of the ILC, the Sixth Committee has structured the debate on the report of the ILC to encourage specific focus and interactions between the members of the Commission and States' representatives to enable a greater exchange of views between the Committee and the Commission.⁴⁵

The reports of the Commission and comments by States demonstrate that there was a greater exchange of views on the 'Crimes Against Humanity' topic than is typically seen with ILC projects. This being the case, an interested observer would be keen to ascertain and understand the reason(s) why the Sixth Committee did not act on the Commission's recommendation. One way to do this is to ascertain the means by which the Committee adopts draft resolutions and

43 See United Nations, Global Issues: International Law and Justice, available at: www.un.org/en/sections/issues-depth/international-law-and-justice/. Other examples of the multilateral treaties adopted by the General Assembly include the following: the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the United Nations Convention on the Law of the Sea (1982); the Convention on the Rights of the Child (1989); the Comprehensive Nuclear-Test-Ban Treaty (1996); the International Convention for the Suppression of the Financing of Terrorism (1999); the International Convention for the Suppression of Acts of Nuclear Terrorism (2005); the Convention on the Rights of Persons with Disabilities (2006); the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008); and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008).

44 See *ibid.*, for examples of ILC-inspired treaties, including "the Convention on the Non-navigational Uses of International Watercourses, adopted by the General Assembly in 1997, which regulates the equitable and reasonable utilization of watercourses shared by two or more countries; the Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted at a conference in Vienna in 1986; the Convention on the Succession of States in Respect of State Property, Archives and Debts, adopted at a conference in Vienna in 1983; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly in 1973".

45 United Nations, 'Revitalization of the work of the General Assembly: Historical and analytical note on the practices and working methods of the Main Committees', U.N. Doc. A/58/CRP.5, 10 March 2004, Para. 71.

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decisions. Since the mid-1990s, the Sixth Committee has adopted most of its draft resolutions and decisions without a vote (by positive consensus), barring exceptional and rare circumstances in which a draft resolution or decision may be put to a vote.⁴⁶ Even before an issue is put to a vote, the Sixth Committee must have explored other possible alternatives for compromise, and this usually takes time.⁴⁷ Often, in trying to address difficult questions and reach an amicable solution, the Sixth Committee may work informally through a working group or a subsidiary or ad hoc committee.⁴⁸ The consensus rule appears to serve the purpose of ensuring an inclusive and participatory approach in the work of the Sixth Committee and also in ensuring transparency in the international lawmaking process. Although States may have genuine reasons for not joining consensus or the majority view on a particular issue, the consensus rule in some instances, incidentally, may seem to serve as a de facto veto. This makes the work of the Sixth Committee often complex, delicate and methodical, with time and momentum ultimately and often sacrificed. This working method may have formed the unconscious bias that may have stirred some States not to readily accept the adoption of the optional proposals that would have led to convening a diplomatic conference or to agree on organizational matters through a preparatory or ad hoc committee to lead to such a conference.

3.2 *The ILC's Working Method*

Elsewhere,⁴⁹ I have argued that when the UN Charter was negotiated, especially Paragraph 1 of Article 13, the overwhelming view was that States were reluctant to grant the UN legislative power to adopt international rules that were binding or to impose certain general conventions on States by majority vote.⁵⁰ Therefore, member States of the UN reserved unto themselves the determinant view on the systemization and formulation of the rules of international law, and this is embodied in the Statute of the ILC.⁵¹ The ILC certainly relies on the member States of the UN, especially in the Sixth Committee, to effectively discharge its mandate. Member States' cooperation is one key denominator in determining the success of the ILC's output since its work is dependent on the quality of the relationship between the Commission and member States (mainly through their rep-

46 *Ibid.*, Para. 75.

47 *Ibid.*, Para. 73.

48 "In its relations with some of its ad hoc committees, the Sixth Committee has established a pattern whereby the work of an ad hoc committee that meets earlier in the year is followed, during the regular session of the General Assembly, by a working group of the Committee. This two-stage approach has facilitated interessional consultations among States, leading in some cases to the early conclusion of legal texts." *Ibid.*, Paras. 73 and 76.

49 See Kanu, *supra* note 8, at 1047-1050. See also Jalloh, *supra* note 9, at 341-348 for specific focus on the Crimes Against Humanity draft articles and ILC method of work.

50 See United Nations, Conference on International Organization, Documents of the United Nations Conference on International Organization, San Francisco, 1945, U.N. Doc. 1, 2 (Vol. III); U.N. Doc. 1151 (Vol. VIII); U.N. Doc. 203, 416, 507, 536, 571, 792, 795, 848 (Vol. IX). See also International Law Commission, Drafting and Implementation of Art. 13, Para. 1, of the Charter of the United Nations, available at: <http://legal.un.org/ilc/drafting.shtml>.

51 GA Res. 174, *supra* note 2, Arts. 16, 19, 21, 22.

representatives in the Sixth Committee).⁵² I also argued that the converse, which is also true, is that the General Assembly can only best utilize the ILC, in its advisory role under Article 13, Paragraph 1 of the UN Charter,⁵³ by enhanced cooperation between the two bodies.

It is important to note that the working method of the ILC enhances cooperation since the breadth of the work of the ILC involves or anticipates the intervention and participation of States. This ensures that the ILC does not become a de facto international lawmaker.⁵⁴ Based on the ILC Statute, the working method of the Commission allows for the participation of States at various stages, from the possibility to propose a particular topic;⁵⁵ responses to requests for data and information from governments in the preliminary stage of the study of a topic; to commenting on initial and final drafts; in between the first and second readings; through written comments and observations from governments; or the Sixth Committee; and culminating in the General Assembly giving consideration to the final product on a given topic.⁵⁶ Further, the "Commission's decision to commence its work on a topic is mainly influenced by the status of the consideration of other topics and requests by the General Assembly", including requests to give

- 52 See Statement by France on the 'Report of the International Law Commission on the Work of Its Seventieth Session', at the Seventy-third Session of the United Nations General Assembly Sixth Committee, 22 October 2018.
- 53 United Nations, GAOR, Second Session, Sixth Committee, Ann. 1(g). See also Drafting and Implementation of Art. 13, Para. 1, of the Charter of the United Nations, International Law Commission, available at: <https://legal.un.org/ilc/drafting.shtml>.
- 54 Murphy, *supra* note 10. "The United States reiterates that it is critical that the Commission account for the views of States in this and other topics on the Commission's program of work because international law is built on the foundation of State consent." U.N. Doc. A/CN.4/725/Add.2, *supra* note 20, p. 3.
- 55 GA Res. 174, (II), 21 November 1947, as amended by G.A. Res. 485 (V), 12 December 1950, G.A. Res. 984 (X), 3 December 1955, G.A. Res. 985 (X), 3 December 3, 1955, G.A. Res. 36/39, 18 November 1981, Statute of the International Law Commission, Arts. 16-18. See *The Work of The International Law Commission*, *supra* note 17, pp. 33-34. The criteria for the selection of topics demonstrate this States-led focus: (i) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (ii) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (iii) the topic should be concrete and feasible for progressive development and codification; and (iv) the Commission should not restrict itself to traditional topics but should also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. See 'Programme of Work - About the Commission', International Law Commission, available at: <http://legal.un.org/ilc/programme.shtml>.
- 56 The Commission has identified three different stages generally present in the consideration of a topic on its agenda: a preliminary stage, devoted mainly to the organization of work and the gathering of relevant materials and precedents; a second stage, during which the Commission proceeds to a first reading of the draft articles submitted by the Special Rapporteur; and a third and final stage, devoted to a second reading of the draft provisions provisionally adopted. 'Methods of Work - About the Commission', International Law Commission, available at: <http://legal.un.org/ilc/methods.shtml>. See United Nations, Yearbook of the International Law Commission, U.N. Doc. A/CN.4/325, U.N. Sales No. E.80 V.5 (Part II) (1991); Rep. of the Working Group on Review of the Multilateral Treaty-Making Process, 35, U.N. Doc. A/CN.4/325, 23 July 1979.

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priority to certain topics.⁵⁷ Therefore, the path for cooperation between the legal and technical ILC, with its members acting independently, and the politically influenced Sixth Committee is evident in the ILC's method of work.⁵⁸

In relation to the Draft Articles, States expressed appreciation for the cooperation of the Commission in the consideration of their observations and written comments. Estonia, for example, expressed delight and made the point that the ILC in the preparation of the draft articles and their commentaries was transparent and inclusive, with contributions by

all interested States, organizations, as well as civil society that could contribute. The numerous comments submitted to the ILC showed the interest and importance that different stakeholders pay to this topic [...and further] inspired by the attention paid in the ILC drafting process to the commentaries of States.⁵⁹

France went a step further in recommending the draft articles to constitute a model for the International Law Commission: a very high-quality and timely work on topics that are intended to become instruments for international organizations to meet the needs of States.⁶⁰ On the basis of the comments by States on the work of the Commission on 'Crimes Against Humanity', it becomes apparent that States, by design of the working method of the ILC and interest in the topic, had the opportunity to express views and even shape the work of the Commission and the final product. With this being the case, one may question whether the Sixth Committee should best resolve the outstanding issues or whether this should be left to the sovereign will of States in ultimately deciding to join the future convention on the prevention and punishment of crimes against humanity.

57 The Commission has usually recommended that the General Assembly take action envisaged with respect to the codification of international law under its statute, namely: (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; or (d) to convoke a conference to conclude a convention (Art. 23, Para. 1). United Nations, 'Methods of Work - About the Commission', International Law Commission, available at: <http://legal.un.org/ilc/methods.shtml>.

58 In the drafting of Art. 13 Para. 1, while some members of the Committee stressed the scientific and non-political nature of the work to be performed by the proposed commission, the majority of the Committee took the view that the work of the Commission should always be carried out in close cooperation with the political authorities of States and that actions in respect of the drafts prepared by the Commission should be decided upon by the General Assembly. United Nations, International Law Commission: Drafting and Implementation of Art. 13, Para. 1, of the Charter of the United Nations, available at: <http://legal.un.org/ilc/drafting.shtml>.

59 Statement by Estonia on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 31 October 2019, available at: <http://statements.unmeetings.org/media2/23328695/-e-estonia-statement.pdf>.

60 Statement by France on 'Agenda Item 79 Report of the International Law Commission on the work of its 71st session', 28 October 2019, available at: <http://statements.unmeetings.org/media2/23328954/france-statement.pdf>.

4 The Desirability of a Convention and Unlocking the Sixth Committee's Potential

At the conclusion of the debate on the ILC report and negotiations on the draft resolution entitled 'Crimes Against Humanity', a group of cross-regional States, in welcoming the completion of the ILC's work on the topic and recommendation, regretted the inability of the Sixth Committee

to agree on an *ambitious and structured approach* for the [...Committee's] future deliberation on the recommendation of the ILC to elaborate a convention on the basis of its Draft Articles.⁶¹

The inability of the Sixth Committee to agree on a structured approach clearly puts a damper on the future work of the Committee on the topic. Evidently, perhaps because of time and other negotiating constraints, the Sixth Committee was neither ready, by consensus, to act on the recommendation of the ILC, nor amenable to putting in place a structured process to guide the Committee's future deliberation of the issue. However, there was clearly a sense of the 'fierce urgency of now' by the group of cross-regional States to reach a consensus "on providing efficient guidance on the way ahead" on the topic.⁶²

The 'fierce urgency of now' has some bearings on the desirability of a convention and the reason(s) why States would see value in negotiating and adopting a new treaty on crimes against humanity. Valuable points have been advanced as compelling reasons to elaborate a convention,⁶³ and it is useful to reiterate those points, starting with a more general reason. Almost all the States that took the floor in the Sixth Committee on the topic expressed their resolve and commitment to end impunity for atrocity crimes, including crimes against humanity. A *fortiori*, nothing can be more compelling in demonstrating this commitment than by adding yet another brick to the edifice of treaties on international criminal law, similar to the adoption of the ILC's recommendation on the draft code of crimes against the peace and security of humankind, and, ultimately, the draft statute for a permanent international criminal court.⁶⁴ On more specific matters, the overwhelming sentiment expressed by States and commentators remains that the elaboration of a convention will 'destigmatize' crimes against humanity in elevating it to the level of genocide, and war crimes with their conventions – the

61 Statement by Austria *supra* note 35. Emphasis added.

62 *Ibid.*

63 The points iterated in the text form part of the benefits highlighted by the Special Rapporteur, Mr. Sean D. Murphy, in the briefing of the African Group of Sixth Committee Experts in New York, 21 October 2019.

64 GA Res. 489 (V), 12 December 1950; Draft Code of Crimes Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/L.532, 1996, *reprinted in* Yearbook of the International Law Commission 1996, Vol. 2, Part 2, U.N. Doc. A/CN.4/SER.A/1996/Add.1; Draft Statute for an International Criminal Court with Commentaries, 1996, p. 2, *in* Yearbook of the International Law Commission, U.N. Doc. A/CN.4/SER.A/1996/Add.1, Part 2. See Jalloh, *supra* note 9, at 339.

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gap-filling argument.⁶⁵ Further, there is the added element of the obligation to prevent such crimes, rather than just punish perpetrators.⁶⁶ In this prevention and punishment drive, States will be in a position to develop their national laws and judicial systems and cooperate with other States in the prevention, investigation and prosecution for such crimes. Will these reasons be enough to compel or unlock the Sixth Committee to act? The answer should emphatically be in the affirmative if the difficult substantive issues are ring-fenced and separated from the process debate. This will clear the path for the ‘ambitious and structured’ approach for future deliberations on the recommendation as advocated for by the group of cross-regional States.

4.1 *The Path Forward on the Substance Debate*

There is a sense of inevitability in returning to the substance versus process debate in consideration of the issue of desirability for a convention and unlocking the Sixth Committee’s potential to act. At first glance, it may be tempting to think that the substance and process issues are inextricably linked and inseparable. However, a closer examination suggests that the Sixth Committee can decide on the organizational matters to discuss the recommendation of the ILC further and simultaneously but separately compile the comments of States and even deliberate on the significant outstanding issues with a view to resolving them in a diplomatic conference of plenipotentiaries. Thus, a structured way to approach the issue is to first agree on the process, which, like the *renvoi* notion, may lead to the big question of the desirability of a convention on crimes against humanity. The rest of the process will depend on the answer to this vital question, for which we already have a range of views expressed by States.

The main views expressed by States on the substance of the draft articles to chart a way forward can be clustered into three groups. The first is the desirability of elaborating a convention on crimes against humanity on the basis of the draft articles; second, identifying and compiling the substantive issues resolvable at the technical level that require further deliberation; and, third, political issues to be resolved only through the expression of the sovereign will of a State to sign onto a possible future treaty. A few States, namely China, Greece, Iran, Malaysia and Sudan, had previously suggested that a crimes against humanity convention ‘was not needed or desirable’.⁶⁷ Greece, in the 2019 Sixth Committee debate, expressed a positive view on the draft articles, noting the significant improve-

65 Jalloh, *supra* note 9, at 331, 344-345.

66 Comments by Sierra Leone, *supra* note 9.

67 For example, Greece was “not entirely convinced about the desirability and the necessity of a convention addressing exclusively” crimes against humanity, finding that the Rome Statute of the International Criminal Court “provides a sufficient legal basis for the domestic criminalization and prosecution of” such crimes, through its definition in Art. 7 of crimes against humanity and the principle of complementarity. Further, Greece was of the view that “the risk of reopening during a future negotiation of a convention the consensus reached on the definition of crimes against humanity cannot be excluded” and that “such a convention may hamper efforts to achieve the widest possible acceptance of the Statute, since some States may deem it sufficient to ratify the former without adhering to the latter”. Murphy, *supra* note 10, p. 11, Para. 27.

ments made and indicating readiness to actively participate in the negotiation process on the recommendation of the Commission.⁶⁸ Malaysia joined Greece in adopting a positive position on the draft articles.⁶⁹ Iran and Sudan, in the same debate, expressed neutral views, and Sudan further noted that the recommendation is “an idea worthy of finding momentum”.⁷⁰ However, China was consistent in stating that the “time is not yet ripe for the elaboration of a convention”.⁷¹

The second cluster of views are appropriately focused on the issue of time, as some States, including Egypt and the Russian Federation, requested time to consider the draft articles further.⁷² The request for time has to be given the utmost consideration, given the all-embracing approach in the international law-making mandate of the General Assembly. Allowing time to further consider the draft articles can coexist with an agreement on the organizational matter necessary to convene the recommended diplomatic conference or the General Assembly's elaboration of the convention. The third cluster of views are evidently political, seemingly leading to an impasse if the Sixth Committee proceeds to deliberate on them given the consensus rule.⁷³ Any insistence on the part of the Sixth Committee to resolve those issues before taking the next procedural step will lead to the circularity snare – what I will refer to as the ‘*the impasse cycle*’. Evidence abounds of Sixth Committee debates on difficult topics being cyclical, leading to the ritual of States repeating their views without much movement over time,

68 Statement by Greece on ‘Agenda Item 79 Report of the International Law Commission on the work of its 71st session’, 29 October 2019, available at: <http://statements.unmeetings.org/media2/23329232/greece-statement.pdf>.

69 Statement by Malaysia on ‘Agenda Item 79 Report of the International Law Commission on the work of its 71st session’, 31 October 2019, available at: <http://statements.unmeetings.org/media2/23328715/-e-malaysia-statement.pdf>.

70 Statement by Sudan on ‘Agenda Item 79 Report of the International Law Commission on the work of its 71st session’, 29 October 2019, available at: <http://statements.unmeetings.org/media2/21999942/sudan.pdf>.

71 Statement by China, *supra* note 28.

72 See note 36 and statements by Egypt and the Russian Federation.

73 The purport of this article is not to unpack the consensus rule and which type of consensus operates at the General Assembly. This is an unwritten rule that seems, however, to be leading to a de facto veto scenario. For States that are in support of a convention, they may have to expend the necessary diplomatic capital to secure the political will needed to unlock the Sixth Committee on the issue.

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whether the item is debated annually, biennially or triennially.⁷⁴ The draft articles on crimes against humanity risk being added to that infamous list if any attempt is made to resolve all of the outstanding issues at the Sixth Committee.

4.2 *About the Process on the Way Forward*

The preceding discussion on the cluster of views expressed by States leads to the question of how much time is needed for States to make an assessment of the concerns expressed regarding the substantive elements of the draft articles. If and when the Sixth Committee eventually decides to separate the substantive issues from the process (organizational matters), the path may become clearer, although not less difficult. Again, States' representatives will be faced with two options, incidentally emanating from the recommendation of the ILC for the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries. The first option of the General Assembly elaborating the convention was firmly supported by Iran, advancing the

view that such an important instrument should be the product of an inclusive intergovernmental and member States driven process and the work of the ILC could be considered as a valuable source in a well-defined process that could be shaped under the auspices of the Sixth Committee.⁷⁵

However, most States indicated flexibility with respect to both options but with a preference for an international conference of plenipotentiaries, leading Austria to offer to host the diplomatic conference. The compelling process-related rationale for the convening of a diplomatic conference instead of the General Assembly is the considerable time it will take the General Assembly to adopt a decision. "Ultimately, the [...option] selected should be one that will not [...lead to undue delay] and that will allow for the largest number of ratifications for cooperation to be successful."⁷⁶ This ambitious benchmark by which the Sixth Committee can unlock itself requires the Committee employing the tools in the limited number in its toolbox. Indeed, while the Commission may be bound in formulating its recommendations in line with its statutory mandate, the Sixth Committee, being a

74 For example, Portugal (on behalf of Argentina, Mexico and Sierra Leone), while delivering an explanation of position on the agenda item on States' responsibility, had this to say: "While our delegations join consensus on the final text of this Resolution, we would like to put on record that in our view this Resolution perpetuates a status quo that we deem unbalanced and hindering a serious discussion on this issue. Nearly 20 years after the Draft Articles were brought to the attention of the General Assembly, this Resolution continues to significantly ignore and fail to accurately reflect not only the views of a large number of delegations in this Hall, but also the full extent of the Recommendations made by the ILC to the General Assembly in 2001, which include the consideration at a later stage, in the light of the importance of the topic, of the possibility of convening an international conference of plenipotentiaries to examine the Draft Articles with a view to concluding a convention on the topic." General Assembly, Responsibility of States for internationally wrongful acts: Report of the Sixth Committee, U.N. Doc. A/74/421, 21 November 2019, Para. 9.

75 See note 39.

76 See note 34.

more political organ, is not so bound. Thus, it can – as it has done in the past – adopt the methods that best accomplish the overarching goal of carrying out its mandate in relation to the promotion of the codification and progressive development of international law. For example,⁷⁷ while it created an ad hoc committee to prepare a draft of the Genocide Convention, the General Assembly may in the context of crimes against humanity establish a preparatory committee open to all UN member States to discuss major organization questions, but also substantive issues arising out of the draft articles, and prepare a consolidated text that will be based on the ILC's draft articles but incorporating or taking into account all comments submitted by States, and the consolidation acceptable by all to be considered by a conference of plenipotentiaries.⁷⁸ This is a path the Sixth Committee has successfully employed, where comments are taken into account, but, fundamentally, the organizational questions are clearly laid out and agreed, thereby allowing the General Assembly to act in a structured manner. The Sixth Committee must, given its working methods and agenda, resist the urge to take a deep-dive into the substantive comments and instead focus on a process that allows for all views to be taken into account. At the same time, it should commit itself to making definitive progress on the convening of the diplomatic conference, thereby respecting the work of the ILC.

5 Conclusion

The General Assembly can point to several conventions, including the Genocide Convention,⁷⁹ to demonstrate the achievement of the UN in fulfilling the important mandate under Article 13 Paragraph 1 of the Charter of the Organization on behalf of 'peoples' of the UN. In the discharge of this critical function, the General Assembly has relied on its Legal (Sixth) Committee and the independent assistance offered by the members of the ILC. On issues of international criminal law, this symbiosis between the Sixth Committee and the ILC from 1947 has led to fruitful assistance by the Commission, from the formulation of the principles of international law recognized in the Charter and in the Judgment of the Nurnberg International Military Tribunal,⁸⁰ but all of these may be at risk for the gap-filling proposed convention on crimes against humanity. This article has highlighted, through the working methods of the Sixth Committee and the ILC, the deference and influencing role of the views of States in shaping the draft articles. Admittedly, not all problematic substantive issues have been and can be resolved with-

77 GA Res. A/50/46, 18 December 1995, Para. 2 (resolution on the establishment of an international criminal court).

78 The Sixth Committee can also establish an ad hoc committee, open to all member States of the UN, to review the major substantive and administrative issues arising from the draft articles, and, in the light of the review, to consider arrangements for the convening of an international conference of plenipotentiaries. *See, e.g.*, GA Res. A/49/53, 17 February 1995, Para. 2.

79 *See* note 43.

80 Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, *in* Yearbook of the International Law Commission 1950, Vol. II, Para. 97, U.N. Doc. A/CN/SER.A/1950/Add. I; Jalloh, *supra* note 9, at 337.

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out negotiations. The history of international law treaty making at the international level, even in relation to some of the benchmark instruments, suggests that this is a natural rather than exceptional experience. The role of the Commission as a body of independent legal experts, which takes into account the views of states, is intended to set the stage for States to then use the outcome of its work – in this case the draft articles – to make it their own in negotiating the international law that they will abide by as only sovereigns can. Ultimately, States, as international lawmakers, will have to decide on taking the decisive step, leaning on the commentaries attached to the draft articles for technical insights. The risk that the Sixth Committee may fail to act, however, can only be limited by separating the process and substance issues through the necessary demonstration of the expressed political will to end impunity for atrocity crimes and agreeing to a structured and ambitious path for the Sixth Committee to do for crimes against humanity what it did for genocide. It is in such a way that States can better achieve their goal of enhancing the fight against impunity for some of the worst crimes condemned by international law.