

# Time to Deliver

## Defining a Process Towards the Negotiation of a Convention on the Prevention and Punishment of Crimes Against Humanity\*

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### Abstract

*In 2019, the International Law Commission (ILC) adopted its articles on the prevention and punishment of crimes against humanity and referred them to the UN General Assembly with the recommendation of adopting a multilateral treaty based on them. The General Assembly's Sixth Committee was unable to take a decision on this matter and deferred its consideration to 2020. This article focuses on how, in resuming its discussion, the Sixth Committee will have a unique opportunity to define the process towards intergovernmental negotiations. This will close a gap in international criminal law, while generating a new dynamic in its relationship with the ILC on codification, breaking its current cyclical inertia of inaction.*

**Keywords:** Sixth Committee, International Law Commission, intergovernmental negotiations, multilateral treaties, treaty-making process.

### 1 Introduction

On 5 November 2019, during the seventy-fourth session of the Sixth Committee of the General Assembly, Mexico delivered its statement on the second cluster of topics under agenda item 79, entitled 'Report of the International Law Commission on the work of its seventy-first session'. Cluster II included the articles on the prevention and punishment of crimes against humanity, adopted last year by the International Law Commission (ILC),<sup>1</sup> and sent to the Sixth Committee for its consideration. The Mexican delegation expressed its support for the eventual elaboration of a convention based on these articles, as did many other delegations. Additionally, at the end of its intervention, it signalled something that would become key in the negotiations to come:

\* All views are expressed in my personal capacity.

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1 See Yearbook of the International Law Commission, 2019, Vol. II, Part Two, U.N. Doc. A/74/10, Chap. IV, Paras. 34-45, available at: <https://legal.un.org/ilc/reports/2019/english/chp4.pdf>.

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Unfortunately, we live in times in which crimes against humanity are still being committed in the world. It is precisely for this reason that it is so urgent to have a debate on the role that States have towards threats to international peace and security that can lead to these atrocities. The study of crimes against humanity and, in particular, the obligations leading to their prevention, eradication and punishment, and of the applicable principles of international law in this regard, continue to be of the utmost importance. We will very closely follow the negotiations in the Sixth Committee on this topic, with the hope that we will be able to *define a process towards the negotiation of a convention*.<sup>2</sup>

This paragraph responds to the two main components of the ILC's recommendation to adopt a convention based on the articles: on the one hand, it would fill an existing gap in contemporary international law that, unfortunately, continues to prove to be a pressing issue. On the other, it allows the UN, mainly through the Sixth Committee, to break from the inertia of previous experiences and transition to a negotiating stage. In that sense, this project of the ILC offers a great opportunity to the General Assembly to move forward on the codification of international law and, at the same time, to demonstrate that not only can it deliver results when they are needed (if not demanded), but that it takes the work of its main legal subsidiary body seriously.

In other words, moving to a negotiation of a convention based on these articles, regardless of the result of such negotiations, would reinforce the message that the United Nations is ready to address current legal challenges and that it is ready to do so building upon the technical work carried out by the ILC. Win-win.

## 2 Current Dynamics Between the ILC and the Sixth Committee

For any international legal scholar, it is a well-known fact that the main objective of the ILC is "the promotion of the progressive development of international law and its codification".<sup>3</sup> The latter objective, namely codification, has normally been achieved through the development of sets of articles that are submitted to UN member states for their consideration via the Sixth Committee of the General Assembly, which on occasion has decided to adopt a convention based on them. This dynamic led to a 'golden era' of codification of international law in the 1960s. However, things have certainly changed. The president of the seventy-first session of the ILC, Pavel Šturma, recently addressed this issue as follows:

2 Spanish statement available at: <http://statements.unmeetings.org/media2/23329077/-s-mexico-statement.pdf>. Emphasis added.

3 Statute of the International Law Commission, adopted by the General Assembly in GA Res. 174 (II), 21 November 1947, as amended by GA Res. 485 (V), 12 December 1950; GA Res. 984 (X), 3 December 1955; GA Res. 985 (X), 3 December 1955; GA Res. 36/39, 18 November 1981. Art. 1 (1). Available at: <https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf>.

On one hand, it is an undeniable fact that most parts of general international law have been already codified. Therefore, the Commission more and more often selects new, not traditional topics which bear on progressive development of international law or even differ from both codification and progressive development (for example studies, interpretative guides). On the other hand, today, States seem to be less interested in binding treaties, in particular the general codification conventions elaborated by the expert body, such as the ILC, instead of intergovernmental negotiations. This may push the Commission, in turn, to search for and adopt new, non-traditional topics and methods of work.<sup>4</sup>

Indeed, there has been a recent shift in the way the ILC selects and develops those topics under its programme of work, with an inclination towards other types of products different from draft articles (*i.e.* conclusions or guidelines). But the fact that, as mentioned by Šturma, most areas of the law have been covered has not been a deterrent for states to negotiate and adopt new multilateral treaties.

It has been 16 years since the United Nations adopted a multilateral treaty based on ILC articles, despite having several projects for its consideration. However, in this same period, the United Nations has adopted other multilateral treaties such as the Arms Trade Treaty (2013),<sup>5</sup> the Paris Agreement (2015)<sup>6</sup> and the Treaty on the Prohibition of Nuclear Weapons (2017).<sup>7</sup>

It is important to highlight that none of these treaties were negotiated or adopted under the auspices of the Sixth Committee. The Arms Trade Treaty and the Treaty on the Prohibition of Nuclear Weapons were negotiated as a consequence of decisions adopted by vote in the First Committee of the General Assembly, and the final texts were also adopted by vote in the plenary of the General Assembly and in the negotiating conference, respectively, while the Paris Agreement was negotiated and adopted (without a vote) in the context of the Conference of States Parties to the Framework Convention on Climate Change.

More recently, on 24 December 2017, the UN General Assembly decided to convene an intergovernmental conference to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, with a view to developing the instrument as soon as possible.<sup>8</sup> These negotiations, often referred to as the

4 P. Šturma, "The International Law Commission Between Codification, Progressive Development, or a Search for a New Role", *FIU Law Review*, Vol. 13, No. 6, 2019, pp. 1125-1135, at 1127.

5 See GA Res. 67/234B, 2 April 2013, available at: <https://undocs.org/A/RES/67/234%20B>.

6 See Conference of States Parties to the Framework Convention on Climate Change, Addendum Part two: Action taken by the Conference of the Parties at its twenty-first session, U.N. Doc. FCCC/CP/2015/10/Add.1, available at: <https://unfccc.int/sites/default/files/resource/docs/2015/cop21/eng/10a01.pdf>.

7 See voting results on document A/CONF.229/2017/L.3/Rev.1 during the second session of the United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, available at: [https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/A.Conf\\_.229.2017.L.3.Rev\\_.1.pdf](https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/A.Conf_.229.2017.L.3.Rev_.1.pdf).

8 See GA Res. 72/249, 24 December 2017, available at: <http://undocs.org/en/a/res/72/249>.

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'BBNJ process',<sup>9</sup> are still under way. So far, the intergovernmental conference has held three sessions, having had to postpone the fourth session to 2021 given the ongoing COVID-19 pandemic.

These examples reaffirm that there are still areas of the law that require codification and that states are willing to engage in multilateral negotiations towards codification.

On the other hand, the last multilateral treaty adopted by the UN on the basis of draft articles produced by the ILC was the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.<sup>10</sup> The draft articles, however, had been adopted by the ILC in 1991,<sup>11</sup> which means that it took the Sixth Committee thirteen years to reach this result.

Today, the Sixth Committee continues with its consideration of several sets of articles concluded by the ILC since 2001 and onwards, for which no decision on their status has been taken, namely:

- Responsibility of States for Internationally Wrongful Acts (concluded by the ILC in 2001;<sup>12</sup> currently considered by the Sixth Committee on a three-year cycle<sup>13</sup>).
- Prevention of Transboundary Harm from Hazardous Activities (concluded by the ILC in 2001;<sup>14</sup> currently considered by the Sixth Committee on a three-year cycle<sup>15</sup>).
- Diplomatic Protection (concluded by the ILC in 2006;<sup>16</sup> currently considered by the Sixth Committee on a three-year cycle<sup>17</sup>).
- The Law of Transboundary Aquifers (concluded by the ILC in 2008;<sup>18</sup> currently considered by the Sixth Committee on a three-year cycle<sup>19</sup>).

9 For more information on this process, see <https://www.un.org/bbnj/>.

10 Available at: [https://treaties.un.org/doc/source/RecentTexts/English\\_3\\_13.pdf](https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf). See GA Res. 59/38, 2 December 2004.

11 Text adopted by the ILC at its forty-third session, in 1991, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/46/10, at Para. 28). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 1991, Vol. II, Part Two, available at: [https://legal.un.org/ilc/texts/instruments/english/commentaries/4\\_1\\_1991.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf).

12 See Int'l Law Comm'n, *Report on the Work of Its Fifty-third Session*, U.N. Doc. A/56/10, 2001, Chap. IV, Paras. 30-77.

13 See background information, available at: [www.un.org/en/ga/sixth/74/resp\\_of\\_states.shtml](http://www.un.org/en/ga/sixth/74/resp_of_states.shtml).

14 See Int'l Law Comm'n, *supra* note 12, Chap. V, Paras. 78-98.

15 See background information, available at: [www.un.org/en/ga/sixth/74/prevention\\_of\\_harm.shtml](http://www.un.org/en/ga/sixth/74/prevention_of_harm.shtml).

16 See Int'l Law Comm'n, *Report on the Work of Its Fifty-eighth Session*, U.N. Doc. A/61/10, 2006, Chap. IV, Paras. 34-50.

17 See background information, available at: [www.un.org/en/ga/sixth/74/dipl\\_prot.shtml](http://www.un.org/en/ga/sixth/74/dipl_prot.shtml).

18 See Int'l Law Comm'n, *Report on the Work of Its Sixtieth Session*, U.N. Doc. A/63/10, 2008, Chap. IV, Paras. 34-54.

19 See background information, available at: [www.un.org/en/ga/sixth/74/transboundary\\_aquifers.shtml](http://www.un.org/en/ga/sixth/74/transboundary_aquifers.shtml).

- Responsibility of International Organizations (concluded by the ILC in 2011;<sup>20</sup> considered by the Sixth Committee on a three-year cycle<sup>21</sup>).
- Effects of Armed Conflicts on Treaties (concluded by the ILC in 2011;<sup>22</sup> currently without a date for future consideration<sup>23</sup>).
- Expulsion of Aliens (concluded by the ILC in 2014;<sup>24</sup> considered by the Sixth Committee on a three-year cycle<sup>25</sup>).
- Protection of Persons in the Event of Disasters (concluded by the ILC in 2016;<sup>26</sup> considered by the Sixth Committee on a two-year cycle<sup>27</sup>).
- Prevention and Punishment of Crimes Against Humanity (concluded by the ILC in 2019;<sup>28</sup> to be considered again by the Sixth Committee in 2020<sup>29</sup>).

This stark contrast begs the question of whether the dynamics recently developed between the Sixth Committee and the ILC allow for the effective realization of the objective that the General Assembly set for the ILC in the Statute adopted in 1947, which, as mentioned earlier, is to assist states with the promotion of the progressive development and codification of international law.

Perhaps the selection of topics for codification by the ILC has not really responded to the actual needs of states. Perhaps the working methods of the Sixth Committee, in particular the adoption of decisions almost exclusively by consensus, has led to a political abuse of a working method to prevent negotiations from taking place. Perhaps the cyclical consideration every two or more years of these pending issues in the Sixth Committee's agenda has created a negative inertia that, combined with the rotation of delegates in New York and in capitals coupled with the emergence of more pressing issues, has led to a vortex of 'technical rollovers' from which it seems almost impossible to break free. Perhaps there is a combination of all the aforementioned factors. In any case, the reality for almost two decades has been that very seldom have ILC draft articles led to a multilateral treaty or even to negotiations regardless of their outcome.

For whatever reason, this reality has in many cases started to become a disincentive for the ILC and for Special Rapporteurs to engage in codification exercises and, at the same time, has generated among many states the perception that once

20 See Int'l Law Comm'n, *Report on the Work of Its Sixty-third Session*, U.N. Doc. A/66/10, 2011, Chap. V, Paras. 77-88.

21 See background information, available at: [www.un.org/en/ga/sixth/75/int\\_organizations.shtml](http://www.un.org/en/ga/sixth/75/int_organizations.shtml).

22 See Int'l Law Comm'n, *supra* note 20, Chap. VI, Paras. 89-101.

23 See background information, available at: [www.un.org/en/ga/sixth/72/armed\\_conflicts.shtml](http://www.un.org/en/ga/sixth/72/armed_conflicts.shtml).

24 See Int'l Law Comm'n, *Report on the Work of Its Sixty-sixth Session*, U.N. Doc. A/69/10, 2014, Chap. IV, Paras. 35-45.

25 See background information, available at: [www.un.org/en/ga/sixth/75/expulsion\\_of\\_alien.shtml](http://www.un.org/en/ga/sixth/75/expulsion_of_alien.shtml).

26 See Int'l Law Comm'n, *Report on the Work of Its Sixty-eighth Session*, U.N. Doc. A/71/10, 2016, Chap. IV, Paras. 38-49.

27 See background information, available at: [www.un.org/en/ga/sixth/75/disasters.shtml](http://www.un.org/en/ga/sixth/75/disasters.shtml).

28 See Int'l Law Comm'n, *Report on the Work of Its Seventy-first Session*, U.N. Doc. A/74/10, 2019, Chap. IV, Paras. 34-45.

29 See background information, available at: [www.un.org/en/ga/sixth/75/cah.shtml](http://www.un.org/en/ga/sixth/75/cah.shtml).

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a set of ILC draft articles reaches the Sixth Committee, it will be shelved without further consequence.

In spite of this, the articles on the prevention and punishment of crimes against humanity offer a great possibility to change these dynamics, to break out of existing vicious cycles and to achieve a meaningful result that would reinforce the value of the Sixth Committee's role in the codification of international law and in the work of the ILC. It will show that the Sixth Committee can, acting in a mutually complementary manner with the ILC, get together and deliver as it has done in the past in relation to other international law topics.

All the necessary elements are in the mix. The project represents an area of international law that has not yet been codified in an independent, stand-alone instrument, and, therefore, it would close an existing legal gap; it builds upon the evolution of international criminal law and practice, reflecting contemporary international law; it responds to an urgent call from the international community to strengthen the fight against impunity over crimes that continue to be committed, which the General Assembly itself, *inter alia*, recognized decades ago when an *ad hoc* committee of the Sixth Committee negotiated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and, not only has the ILC recommended the elaboration of a convention, but also many UN member states have expressly agreed with this recommendation.

### 3 Consideration of the Topic 'Crimes Against Humanity' by the Sixth Committee

In 2014, the ILC decided to include the topic 'crimes against humanity' in its programme of work and appointed Mr. Sean Murphy as Special Rapporteur. In the following years, he presented four reports to the ILC, in which the draft articles and their commentaries were developed. Consequently, on 22 May 2019, the ILC adopted the entire set of articles on the prevention and punishment of crimes against humanity and on 5 August 2019 "recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles".<sup>30</sup> This recommendation was based on article 23, paragraphs (c) and (d), of its Statute.<sup>31</sup>

In this context, the Sixth Committee examined this issue during its seventy-fourth session (2019). It is important to note that even when this was the first time that member states had the final product before them, with commentaries, they were not unfamiliar with the articles. As with all ILC processes, states were informed of their development throughout the years, and they have had plenty of opportunities to submit comments, which many did. The text of the draft articles submitted each year can be found in the annual reports of the Commission to the General Assembly accompanied by detailed commentaries explaining the provisions. In 2015, Austria, Belgium, Cuba, the Czech Republic, Finland, France, Ger-

30 See Int'l Law Comm'n, *supra* note 28, Chap. IV, Para. 42.

31 *Ibid.*, note 4. Art. 23.

many, the Netherlands, the Republic of Korea, Spain, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America submitted written comments; in 2016, so did Australia; in 2017, more comments were submitted by Austria, El Salvador, France and Mexico; finally, in 2019, comments were submitted by 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 Nordic countries), Switzerland, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Uruguay.<sup>32</sup>

These inputs, though not necessarily emanating equally from the different regions, are crucial to the work of the ILC precisely because its products, although technical in nature, also seek to respond to the needs and interests of states. One example of how comments from states and other observers influence the work of the ILC is the deletion of what used to be Paragraph 3 of draft Article 2 entitled 'Definition of crimes against humanity'. The initial formula in the draft followed that which is contained in Article 7 of the Rome Statute of the International Criminal Court, a decision that itself was rooted in the ILC's desire to ensure that its work reflects the preferences of a large number of 165 states that negotiated and defined that crime at Rome in the summer of 1998. As explained by the chair of the ILC's Drafting Committee for the seventy-first session, Mr. Claudio Grossman:

[W]ith regard to Paragraph 3, a significant number of comments received from States, international organizations and others considered the definition of gender to be outdated and should be deleted or replaced. The proposal made by the Special Rapporteur in his fourth report to delete Paragraph 3 was met with general agreement during the plenary debate. This paragraph was therefore deleted by the Drafting Committee. As a consequence, the reference to this paragraph in Paragraph 1 (h) was also deleted. Some members of the Drafting Committee emphasized that the reason for this deletion and the substantive meaning of "gender" as reflected in international practice should be carefully explained in the commentary.<sup>33</sup>

In addition to having submitted written commentaries, last year, eighty delegations participated in the Sixth Committee's debate on the agenda item regarding the Report of the ILC with respect to crimes against humanity. This is a significantly large number of delegations to take the floor on a debate. As the recent

32 See Int'l Law Comm'n, *Analytical Guide to the Work of the International Law Commission*, available at: [https://legal.un.org/ilc/guide/7\\_7.shtml](https://legal.un.org/ilc/guide/7_7.shtml).

33 See Statement of the Chair of the Drafting Committee, Mr. Claudio Grossman Guiloff, 22 May 2019, pp. 7-8, available at: [https://legal.un.org/ilc/documentation/english/statements/2019\\_dc\\_chairman\\_statement\\_cah.pdf](https://legal.un.org/ilc/documentation/english/statements/2019_dc_chairman_statement_cah.pdf).

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study elaborated by the Whitney R. Harris World Law Institute shows,<sup>34</sup> a majority of states (fifty-six) expressed explicit support for a convention, while some (eleven) requested more time to examine the result of the ILC's work. Only three delegations expressed doubts on the need to have a convention on this topic. It is also important to underscore that support to the ILC's recommendation was cross-regional. In the case of the Group of Latin America and the Caribbean (GRULAC), there were only positive comments with nine delegations explicitly supporting the elaboration of a convention and one indicating that, in moving forward, comments made by states had to be taken into consideration.

Based on the need to have a geographical balance in the coordinators of draft resolutions for the seventy-fourth session, the Bureau of the Sixth Committee reached out to the legal advisers of Georgia, Mr. Giorgi Mikeladze, and Singapore, Mr. Luke Tang, to act as co-coordinators of the draft resolution on crimes against humanity, both of whom were appointed.<sup>35</sup>

The zero draft resolution was introduced on 1 November 2020, and consultations on the text began. Given the fact that the last plenary session of the Sixth Committee in which draft resolutions could be adopted was held on 22 November<sup>36</sup> and taking into consideration the days needed for the UN Secretariat to process draft resolutions for adoption (including their editing and translation to all six UN official languages), together with the need to accommodate pending debates and informal consultations for all other opened draft resolutions, delegations faced a very tight schedule to negotiate (one week, in practical terms). Informal rounds of negotiations, most of which were only one hour long, took place on 6, 8, 11 and 12 November.<sup>37</sup> This proved to be not enough time to come to an agreement on the way forward, taking again into consideration that the prevailing working method in the Sixth Committee is to adopt resolutions without a vote.

Even when most delegations were ready to advance to a negotiating stage towards the elaboration of a convention, some delegations were still unable to take that step forward. The debates quickly turned into a dichotomy between those 'in favour of a convention' and those 'against a convention'. In my view, these types of simplifications do not contribute to the environment of the negotiations, and they undermine the actual role of the Sixth Committee. In most cases the failure of the Sixth Committee to move forward on ILC products is rooted in the fact that debates are limited to the 'in favour/against' dynamic, instead

34 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)*, available at: <https://law.wustl.edu/wp-content/uploads/2020/08/Compilation-of-6th-Committee-Responses-to-CAH-2013-2019.pdf>.

35 See the list of coordinators of draft resolutions for the seventy-fourth session of the Sixth Committee, available at: [www.un.org/en/ga/sixth/74/coordinators.pdf](http://www.un.org/en/ga/sixth/74/coordinators.pdf).

36 See U.N. Sixth Committee, *Program of Work for the Seventy-fourth session*, available at: [www.un.org/en/ga/sixth/74/provisional\\_programme\\_of\\_work.pdf](http://www.un.org/en/ga/sixth/74/provisional_programme_of_work.pdf).

37 See U.N. Sixth Committee, *Schedule of informal consultations – seventy-fourth session*, available at: [www.un.org/en/ga/sixth/74/informals.shtml](http://www.un.org/en/ga/sixth/74/informals.shtml).



of *focusing on the process* that would allow delegations to have the necessary substantive discussions, in the appropriate forum and at the appropriate time. This is what Mexico referred to in its intervention quoted earlier, in the sense that the Sixth Committee should define a *process* towards the negotiation of a convention.

In an attempt to break this dichotomy, a group of states, in which Mexico played an active role, tried to establish a road map that would give clarity and certainty to the process moving forward, in order to avoid the cyclical consideration of the topic with no tangible outcome. Despite these efforts, and given the pressure to conclude the work of the Sixth Committee in time, an agreement could not be reached.

The draft resolution was then simplified and reduced by the coordinators to the text that was adopted by the General Assembly on 18 December 2019, as resolution 74/187.<sup>38</sup> In its third operative paragraph, the General Assembly

Decides 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 Commission* contained in Paragraph 42 of its report on the work of its seventy-first session.<sup>39</sup>

When the report of the Sixth Committee was presented to the General Assembly, the Rapporteur, Mr. Hamad Al-Thani (Qatar), indicated that

Under the terms of the draft resolution, the Assembly would take note of the draft articles presented by the Commission and *decide to resume its consideration* of the topic at its seventy-fifth session.<sup>40</sup>

In other words, given the pressing circumstances and the need to have more time, the Sixth Committee decided to ‘suspend’ its negotiations and to continue the discussion from where it had left it the following year, meaning 2020.

#### 4 An Opportunity to Make a Difference

To be able to move forward once the consideration of this topic is resumed, it will be particularly important to think of a strategy that gets everyone on board. This requires addressing pending concerns of delegations. In general terms, two types of objections were expressed in 2019: i) that *more time* was needed for capitals to analyse the articles produced by the ILC; and ii) that there were *substantive questions* emanating from the ILC draft.

I will address these concerns in reverse order. First, regarding substantive questions that remain, it is only natural for delegations to have comments on the articles prepared by the ILC. It would be unthinkable to receive a product so per-

38 See GA Res. 74/187, 18 December 2019, available at: <https://undocs.org/en/A/RES/74/187>.

39 *Ibid.* Emphasis added.

40 See Official Record of the UN General Assembly, U.N. Doc. A/74/PV.51, 18 December 2019, p. 6, available at: <https://undocs.org/en/A/74/PV.51>. Emphasis added.

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fect and all-encompassing that it could be immediately endorsed by all 193 member states without comments or revisions. Issues of international law tend to be complex and do require to be studied carefully. However, the natural time and place to address those concerns would be during the actual negotiations of the treaty, not during the debate in the Sixth Committee of an item that has already been concluded by the ILC or in the consultations on the corresponding resolution. It is in the negotiation process of the instrument that the necessary adjustments would have to be made.

Moreover, the fact that the Sixth Committee decides to advance to a negotiating phase does not bind states to any outcome in the sense that only once the negotiations have concluded and there is a final draft treaty, states will have the opportunity to decide whether to adopt the treaty and, if that is the case, whether to sign and ratify it. Hence, substantive questions at this stage, which are reasonable and understandable, should not be the reason why delegations do not allow the process to move forward. In fact, the only way to directly address those substantive concerns is precisely by moving forward and engaging in negotiations.

Regarding the need to have more time to analyse the articles and their commentaries, this was a fair and reasonable request given that the Report of the ILC was issued on 15 August 2019 and states had a little over two months to take a decision through the Sixth Committee's resolution. The analysis of these types of drafts by capitals normally goes through several areas, both legal and political, within the Ministries of Foreign Affairs (sometimes including other ministries), and these consultation processes take time. In that sense, the decision to resume the discussion in the Sixth Committee one year later offered the necessary breathing space that some delegations asked for.

Consequently, the two aforementioned objections should no longer stand in the way of the Sixth Committee taking action once it resumes its consideration of the topic. The question, then, is, what would 'take action' mean? As mentioned before, the discussions in the Sixth Committee should depart from the binary debate of 'in favour/against' a convention and focus on the establishment of a full process that would give states clarity and certainty on how and when the next steps are to be taken towards negotiations for a future legally binding instrument based on the articles submitted by the ILC. The question that should be tackled, therefore, given the broad support to the ILC recommendation expressed by states, is not *whether* to move forward but *how* to move forward.

In this respect, the only way to break the inertia of cyclical consideration of ILC articles in the Sixth Committee is to agree to a road map that moves, slowly but surely, in the direction of intergovernmental negotiations.

With this goal in mind, the key aspects to be discussed should be the *process* and its *timeline*. At the United Nations, there is no single rule or formula to tackle these issues. States can decide to establish a subsidiary body (*i.e.* a preparatory committee, an ad hoc working group of the whole, etc.) to discuss modalities of the negotiations, such as the definition of the zero draft, adoption of the rules of procedure for an intergovernmental conference (which normally also include the decision-making process), participation of observers and the selection of the presiding officer(s).

Every treaty process is different, and there are a wide variety of examples of how things could be developed. To mention only two that have already been referenced, in the case of the Arms Trade Treaty, the General Assembly decided to convene, in 2012, a UN negotiating conference that lasted four consecutive weeks and took place after a preparatory committee that held four sessions during 2010 and 2011.<sup>41</sup> On the other hand, in the BBNJ process, the General Assembly decided to split these stages; in 2015 it decided to develop an international legally binding instrument and to set up a preparatory committee, prior to holding an intergovernmental conference, with the mandate “to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument”.<sup>42</sup> The preparatory committee held four sessions of 10 days each during 2016 and 2017 and reported back to the General Assembly. It was only after the preparatory committee had concluded its mandate that the General Assembly decided to convene an intergovernmental conference to elaborate the text of an international legally binding instrument.<sup>43</sup>

To be successful, it will also be essential to have a clear time frame for the entire process. Deciding to take only one step forward, for example, to defer the consideration of further steps to an ad hoc working group, without setting out clear deadlines for further decisions to be made to move to the next stage, could lead to yet another vortex of political impasse.

A clear timeline would offer states a flight plan for the years to come, including, for example, when such a subsidiary body would begin its work and for how long it would be in session; what type of documentation would be needed; and, more importantly, when the transition to the negotiating conference would occur and how long it would be. This would prevent the process from derailing and, at the same time, provide enough flexibility to make delegations comfortable in moving forward.

In sum, states are the masters of their own processes. And this is precisely the type of conversation that the Sixth Committee should be ready to have when it resumes its consideration of this topic.

There is one more element of immense proportions that cannot be overlooked: the ongoing COVID-19 pandemic. When the Sixth Committee decided to continue to examine this issue in its seventy-fifth session, no one imagined the crisis the world would be facing in 2020. As this article is being written (August 2020), there is still no clarity on how the General Assembly and its main committees will operate in the fall. The United Nations is still conducting safety assessments, routinely trying to adapt to the magnitude of this challenge. Most probably, the programme of work of the Sixth Committee will have to be revised to reduce as much as possible face-to-face sessions at UN headquarters. It is hard to imagine that delegations will have the necessary conditions to engage in tough negotiations, which normally require a good number of huddles and group meetings both in conference rooms and corridors.

41 See GA Res. 64/48, 5 December 2009, available at: <https://undocs.org/A/RES/64/48>.

42 See GA Res. 69/292, 19 June 2015, available at: <https://undocs.org/en/a/res/69/292>.

43 See GA Res. 72/249, 24 December 2017, available at: <https://undocs.org/en/a/res/72/249>.

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In the worst-case scenario, though perhaps not optimal given the above discussion, consideration of the topic on crimes against humanity could be deferred once again to the seventy-sixth session (2021). The silver lining would be that states would have had two whole years to reflect and consider, including with their relevant national authorities, what a process moving forward could look like and come fully prepared to have such a conversation. In any case, it is still too soon to discard a hybrid programme of work that would combine in-person and virtual meetings, allowing delegations to engage in negotiations and agree on a road map this year.

## 5 Conclusion

After nearly two decades of having taken a passive approach to draft articles elaborated by the ILC on different areas of the law, the Sixth Committee now finds itself at an important crossroads. Before it stand a set of articles that not only close an existing gap in international criminal law, but also have a great potential to contribute to the fight against impunity regarding one category of the most appalling atrocities known to humanity. There is absolutely no doubt that there should be no place for crimes against humanity in the twenty-first century and that their prevention and punishment is an imperative on all possible counts. The fact that the world still witnesses the perpetration of these crimes is ample reason to take all steps necessary to stop this from happening, and an international convention would make an enormous contribution to that end as it would also boost and strengthen national criminal justice systems in their fight against impunity. This is why a majority of states have expressed their support in moving the process in the United Nations towards the negotiation of a convention on the basis of the said articles.

In so doing, the Sixth Committee would achieve two great accomplishments: the international community would take effective action to prevent and punish crimes against humanity through a robust legal instrument, and, additionally, it would break the cyclical inertia of inaction that has prevailed over almost two decades in regard to the results of the work of the ILC on codification. These two objectives are of considerable importance in strengthening the rule of law, inside and outside the United Nations. It is, after all, the responsibility of the Sixth Committee to lead the General Assembly's efforts, mandated to it under Article 13(1) of the Charter of the United Nations, to initiate studies and make recommendations for the purpose of advancing international cooperation in the political field and encouraging the progressive development of international law and its codification.

Given the current state of affairs, where the most viable option for the international community to effectively face the challenges that the world is going through is to reinforce multilateralism and international law, the opportunity at hand cannot be understated. It would take the Sixth Committee only one decision to demonstrate that it is willing and able to play its role in the prevention of mass

atrocities and that it will avail itself of the work of the ILC to do so, reinforcing its relevance. Once again, it is time for the United Nations to walk the talk.