

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 19, 2016
CORRESPONDENTS' REPORTS

CHINA¹

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Legislation

• Cybersecurity Law

On 7 November 2016, the 24th Session of the Standing Committee of the Twelfth National People's Congress adopted the Cybersecurity Law of the People's Republic of China [《中华人民共和国网络安全法》].

Chapter I General Provisions

...

Article 1: This Law is developed for the purposes of guaranteeing cybersecurity, safeguarding cyberspace sovereignty, national security and public interest, protecting the lawful rights and interests of citizens, legal persons and other organizations, and promoting the sound development of economic and social informatization.

...

Article 5: The state shall take measures to monitor, defend against and deal with cybersecurity risks and threats from both inside and outside the territory of the People's Republic of China, protect critical information infrastructure from attack, intrusion, interference and damage, punish illegal criminal activities on the network in accordance with the law, and maintain cyberspace security and order.

...

Article 7: The state shall actively carry out international exchange and cooperation in terms of cyberspace governance, research and development of network technologies, formulation of standards thereof, and crackdown on illegal crimes committed on the network and other aspects, promote the construction of a peaceful, safe, open and cooperative cyberspace, and establish a multilateral, democratic and transparent system for cyber governance.

...

Chapter VI Legal Liability

...

Article 75: Where foreign institutions, organizations or individuals engage in attacks, intrusions, interference, destruction and other such acts harming the critical information infrastructure of the People's Republic of China, resulting in grave consequences, legal liability will be prosecuted according to the law. The State Council public security

¹ Associate Professor, School of International Law, China University of Political Science and Law (CUPL), Beijing, P R China; PhD (Peking), LLM (Lund, Sweden), LLB (Peking) (email: lijiangz@cupl.edu.cn). All the websites were visited before 31 December 2016. I would like to express thanks to Mr Peng Zhao, LLM candidate, for his assistance in searching and collecting the practice.

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departments and relevant departments may also decide to freeze the assets of said institutions, organizations or individuals, or take other necessary punitive measures.

...

Chapter VII Supplementary Provisions

...

Article 78: The security protection of military network shall be prescribed by the Central Military Commission separately.²

☛ Law of the People's Republic of China on National Defense Transportation

On 3 September 2016, the 22nd Session of the Standing Committee of the Twelfth National People's Congress adopted the Law of the People's Republic of China on National Defense Transportation [《中华人民共和国国防交通法》].

Chapter I General Provisions

...

Article 3: The state shall adhere to the development strategy of military and civilian integration, promote the optimized allocation and rational sharing of military and local resources, enhance the capabilities of national defence transportation in peacetime, emergencies and wartime, and promote the coordinated development of economic construction and national defence construction.

...

Article 12: Where it is necessary to take national defence mobilization measures such as industry control in the transportation field and provision of transportation guarantee to armed forces in priority during wartime and under particular circumstances in peacetime, such measures shall be taken in accordance with the National Defence Law of the People's Republic of China, the National Defence Mobilization Law of the People's Republic of China and other relevant laws.

...

Article 13: During wartime and under particular circumstances in peacetime, the state shall, as required, set up the unified command institution for national defence transportation, make overall planning on transportation resources nationwide or in some regions, uniformly organize and command transportation nationwide or in some regions, and the emergency repair, emergency construction and protection of transportation facilities and equipment. Relevant organizations and individuals shall obey unified command.

...

Chapter III Transportation Engineering Facilities

...

Article 20: The construction of national defence transportation engineering facilities shall take the plan for the construction of national defence transportation engineering facilities

² The unofficial version is translated by <<http://www.pkulaw.cn/>> at: <<http://en.pkulaw.cn/display.aspx?id=22826&lib=law&SearchKeyword=&SearchCKeyword=>>. The full text of the Act in Chinese is available at: <http://www.npc.gov.cn/npc/xinwen/2016-11/07/content_2001605.htm>.

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as the basis, and guarantee smooth national defence transportation in wartime and under particular circumstances in peacetime.

...

Chapter VII Material Reserves for National Defence Transportation

Article 51: The state shall establish a reserve system of national defence transportation materials to guarantee smooth national defence transportation in wartime and under particular circumstances in peacetime.

...

Article 53: Reserved materials for national defence transportation may be transferred for the implementation of transportation protection, and emergency repair and emergency construction tasks in wartime and under particular circumstances in peacetime, organization of major military exercises, emergency rescue and relief work, and training and drills of professional guarantee teams for national defence transportation, and other requirements.³

Oral Statements

☛ Protection of Medical Personnel and Facilities in Armed Conflicts

On 28 September 2016, a Chinese representative made a statement at the Security Council Debate on Protection of Civilians in Armed Conflict. He said:

Last May, the Council unanimously adopted resolution 2286 (2016), which calls upon the parties to armed conflicts to enhance the protection of medical personnel and facilities in armed conflict. This underscores the importance that the international community attaches to the question of the protection of medical personnel and facilities in armed conflict. China pays tribute medical personnel and the relevant humanitarian agencies for their humanitarian spirit in healing the wounded and rescuing the dying in extremely harsh conditions and at the risk of their own safety.⁴

☛ Protection of the Environment in Relation to Armed Conflicts

On 27 October 2016, a Chinese representative made a statement at the 71st Session of the UN General Assembly on Agenda Item 78 Report of the International Law Commission on the work of its 68th session. He said:

In respect of the topic 'Protection of the environment in relation to armed conflicts', the Chinese delegation supports the continued use in the third report by the Special Rapporteur Marie Jacobsson of the three-phase approach, namely, before, during and after the conflict. We would like to suggest that future study further address the timing for the application of the draft principles by specifying which principles apply to all

³ The unofficial version is translated by <<http://www.pkulaw.cn/>> at: <<http://en.pkulaw.cn/display.aspx?id=22581&lib=law&SearchKeyword=&SearchCKeyword=%d6%d0%bb%aa%c8%cb%c3%f1%b9%b2%ba%cd%b9%fa%b9%fa%b7%c0%bd%bb%cd%a8%b7%a8>>. The full text of the Act in Chinese is available at: <http://www.npc.gov.cn/npc/xinwen/2016-09/03/content_1996764.htm>.

⁴ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Chinese Ambassador Wu Haitao' (28 September 2016), <<http://www.china-un.org/eng/hyyfy/t1402943.htm>>. See also the statement made by Permanent Representative Ambassador Liu Jieyi at the Security Council Debate on Protection of Health Care in Armed Conflict on 3 May 2016 – Permanent Mission of the People's Republic of China to the United Nations, <<http://www.china-un.org/eng/hyyfy/t1361446.htm>>.

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phases and which apply to only one of the phases. We also believe that the current report relies too much on legislative practices and relevant regulations but lacks the backing of a sound analysis of in-conflict examples and acts.⁵

☛ Foreign Terrorist Fighters

On 4 October 2016, a Chinese representative made a statement at the 71st Session of the United Nations General Assembly ('UNGA') on Agenda Item 108: Measures to Eliminate International Terrorism. He said:

We must come up with a stronger response to the cross-border movement of foreign terrorist fighters. The frequent cross-border flow of foreign terrorist fighters has caused ever greater harm, exacerbating regional conflicts, making them harder to resolve, and posing serious threats to the security and stability of countries of origin, transit and destination. Countries should strengthen border control and law enforcement cooperation to stem the cross-border flow of foreign terrorist fighters, especially their 'back flow'. The UN and the relevant international agencies should set up counter-terrorism data bases as soon as possible and share intelligence so as to create conditions for effectively curbing the cross-border movement of foreign terrorist fighters.⁶

☛ Nuclear Weapons

17 October 2016, a Chinese representative made a statement at the Thematic Debate on Nuclear Weapons at the First Committee of the 71st Session of the UNGA. He said:

China supports complete prohibition and total elimination of nuclear weapons, as well as the achievement of a world free of nuclear weapons. China always implements an open, transparent nuclear policy, and adheres to a nuclear strategy of self-defence. China has faithfully honoured its commitments of no-first-use of nuclear weapons, and is the only nuclear-weapon state that has committed unconditionally not to use or threaten to use nuclear weapons against non-nuclear-weapon states or nuclear weapon free zones.⁷

☛ Biological Weapons Convention

On 17 November 2016, a Chinese representative made a statement at the General Debate of the Eighth Review Conference of the Biological Weapons Convention. He said:

China has always been of the view that the best way of enhancing the effectiveness of the Convention is to negotiate and agree on a protocol which includes a verification mechanism and is legally binding for the purpose of comprehensively strengthening the

⁵ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Mr. XU Hong' (27 October 2016) <<http://www.china-un.org/eng/hyyfy/t1411697.htm>>.

⁶ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Deputy Permanent Representative Ambassador Wu Haitao' (4 October 2016), <<http://www.china-un.org/eng/hyyfy/t1403547.htm>>.

⁷ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by the Chinese Ambassador FU Cong' (17 October 2016), <<http://www.china-un.org/eng/hyyfy/t1407351.htm>>; See also the statement made by Permanent Representative Ambassador Liu Jieyi at the Security Council after voting on the Draft Resolution on Nuclear Non-proliferation and Nuclear Disarmament on 23 September 2016 – Permanent Mission of the People's Re-public of China to the United Nations, <<http://www.china-un.org/eng/hyyfy/t1401625.htm>>.

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Convention. Only through open and transparent intergovernmental negotiations and defining a globally applicable legal mechanism can we practically achieve 'fairness and effectiveness' and defend the shared interests of all State Parties to the highest degree.

Non-proliferation and international cooperation are two main obligations defined by the Convention which are mutually complementary and mutually supportive. Only when non-proliferation is thoroughly done, [can] exchanges in biotechnology can be carried out in a reassuring manner. Only when cooperation in biotechnology is substantively advanced for the practical benefit of all parties, a comprehensive and solid system of non-proliferation, yet international cooperation is neglected. Double standards and discriminatory approaches have become barriers in biotechnology cooperation. We have to re-prioritize implementation, advance non-proliferation and international cooperation in a balanced manner and pave the way for biotechnology cooperation.

The Convention requires State Parties to strengthen bioscience and biotechnology review. In doing so, we have to take into account two aspects of biotechnology. One concerns security, the other relates to development. Moreover, due consideration has to be given to national contexts and the needs of international biosecurity governance. When establishing a national biotech management regime and setting up a risk assessment and early warning mechanism, parties should also share useful experience in bio-risk management to ensure the Convention keeps pace with the development in bioscience and technology. Parties should start working at different levels covering the government, organizations and science researchers to strictly prohibit the abuse of biotech, so that it can benefit all mankind and serve as the fire torch brought by Prometheus in our new era.

We firmly support all initiatives of restarting the negotiation of the protocol and support the proposals made by Russia of establishing mobile biomedical units under the framework of the Convention as well as setting up a Scientific Advisory Committee. We welcome new proposals and new measures to comprehensively strengthen the Convention. In September, we hosted a joint international workshop in China with Canada and ISU, positively contributing to the preparation of the RevCon.⁸

☛ **Conventional Weapons Convention**

On 21 October 2016, a Chinese representative made a statement at the Thematic Discussion on Conventional Weapons at the First Committee of the 71st Session of the UNGA. He said:

The Convention on Certain Conventional Weapons (CCW) has played an irreplaceable role in addressing the humanitarian concerns caused by the abuse of conventional arms. As a High Contracting Party to the Convention and all its five Protocols, China has faithfully implemented its obligations under the Convention and its protocols, actively participated in international cooperation and worked to encourage countries not yet Parties to join the Convention and its Protocols.⁹

⁸ Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and other International Organizations in Switzerland, 'Statement by Ambassador Fu Cong' (17 November 2016), <<http://www.china-un.ch/eng/hom/t1416196.htm>>.

⁹ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Mr Li Chunjie of the Chinese Delegation' (21 October 2016), <<http://www.china-un.org/eng/hyyfy/t1408979.htm>>.

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☛ **Improvised Explosive Devices**

On 21 October 2016, a Chinese representative made a statement at the Thematic Discussion on Convention Weapons at the First Committee of the 71st Session of the UNGA. He said:

Improvised Explosive Device (IED) has increasingly become a major tool for terrorist, extremist and criminal organizations to spread fear and cause chaos. China has been committed to exercising strict control over civil and military explosives and other dangerous chemicals that could be used to produce IEDs, supported and actively taken part in relevant international discussions.¹⁰

☛ **Small Arms and Light Weapons**

On 4 April 2016, a Chinese representative made a statement at the general debate of the 2016 Substantive Session of the United Nations Disarmament Commission. He said:

China attaches great importance to the fight against illicit trade against small arms and light weapons (SALW). China has been earnestly implementing the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. In this regards, China has adopted a series of measures on legislation, law enforcement, capacity building, international exchanges and cooperation, achieving remarkable results. China will actively participate in the Sixth Biennial Meeting of States on SALW to be held in this June and work with all sides to make positive progress in this meeting.¹¹

☛ **Lethal Autonomous Weapon Systems**

On 4 April 2016, a Chinese representative made a statement at the general debate of the 2016 Substantive Session of the United Nations Disarmament Commission. He said:

China attaches great importance to and actively participates in the on-going discussions about lethal autonomous weapon systems. We are of the view that the international community shall intensively study and properly address the relevant concerns on the basis of comprehensive and inclusive discussions.¹²

On 21 October 2016, a Chinese representative made a statement at the Thematic Discussion on Conventional Weapons at the First Committee of the 71st Session of the UNGA. He said:

In recent years, the humanitarian problems caused by Lethal Autonomous Weapons (LAWS) received growing attentions. China supports continued and in-depth discussion on the issue under the appropriate arms control framework, so that countries could gradually deepen understanding, reach consensus, to jointly address the challenges caused by LAWS.¹³

¹⁰ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Mr Li Chunjie of the Chinese Delegation' (21 October 2016), <<http://www.china-un.org/eng/hyyfy/t1408979.htm>>.

¹¹ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Counsellor Sun Lei' (4 April 2016), <<http://www.china-un.org/eng/hyyfy/t1353766.htm>>.

¹² Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Counsellor Sun Lei' (4 April 2016), <<http://www.china-un.org/eng/hyyfy/t1353766.htm>>.

¹³ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Mr Li Chunjie of the Chinese Delegation' (21 October 2016), <<http://www.china-un.org/eng/hyyfy/t1408979.htm>>.

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☛ Arms Trade Treaty

On 26 August 2016, a Chinese representative made a statement at the Second Conference of State Parties of Arms Trade Treaty (ATT). He said:

China has all along supported international efforts to regulate international arms trade and to combat illicit transfers of conventional arms. In this vein, China had actively and constructively participated in the negotiation of the ATT and made positive contributions in the process.

Taking a prudent and responsible attitude towards arms export, China has established a comprehensive and strict legislative and regulatory mechanism on export control of military items. China's arms export activities always strictly observe the following three principles, namely, the exports should be conducive to the legitimate self-defence capability of the recipient country; the exports should not undermine peace, security and stability of the region concerned and the world as a whole; and the exports should not be used as a means of interfering in the internal affairs of the recipient country. China never exports arms to countries or regions under arms embargo imposed by the Security Council of the UN; never transfers arms to non-state actors or individuals. We have put in place an arms-export regulation system with standards much higher than the requirements of the ATT.

The Chinese government has actively engaged itself in international cooperation and assistance in combating illicit trade of small arms and light weapons. China has been sharing with all parties concerned our policies, experiences and best practices in combating illicit arms trade through participation in the relevant Group of Governmental Experts, attending seminars, conducting bilateral consultations and submitting national reports. The Chinese police and custom authorities have maintained regular operational contacts with their counterparts and relevant international organizations. China has also provided assistance to relevant counties and regions. It's worth mentioning that China has made its own contributions to combating illicit arms trade by providing funds, technologies and training courses within the framework of Shanghai Cooperation Organization and China-Africa Cooperation Forum.¹⁴

☛ International Criminal Court (ICC)

On 31 October 2016, a Chinese representative made a statement at the 71st Session of the UNGA on Agenda Item 72 Report of the International Criminal Court. He said:

China always attaches great importance to the role of international criminal justice bodies in promoting the international rule of law and punishing serious international crimes. China has consistently taken a constructive approach in building international criminal justice system and follows closely the ICC's activities, as demonstrated by our participation in all of its Assemblies of States Parties as an observer to explain our position and views.

China takes note of the recent announcement by several African countries to withdraw from the Rome Statute of the International Criminal Court. We respect their decision and understand their long-standing concerns about the ICC. At the time of its creation, the ICC enjoyed widespread popularity and support among African countries. However, it is

¹⁴Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and other International Organizations in Switzerland, 'Statement by Ambassador Fu Cong' (26 August 2016), <<http://www.china-un.ch/eng/hom/t1392107.htm>>.

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now the subject of criticism and opposition of an increasing number of African countries, some of whom even withdrew. The reasons behind this trend merit in-depth reflection.

States bear the primary responsibility for punishing international crimes, eliminating impunity and achieving justice. The ICC was established to complement national criminal jurisdictions. It should therefore fully respect their judicial sovereignty, instead of trying to replace them, letting alone allowing itself to be used as a tool by some countries or groups of countries to achieve political gains. How should the ICC fulfil its mandate under the Rome Statute in a cautious manner, how should it win the trust and respect through objective and fair conduct, and achieve the initial purposes of its creation, these questions merit serious reflection.¹⁵

☛ **International Criminal Tribunal for the former Yugoslavia ('ICTY') and Mechanism for Criminal Tribunals ('MICT')**

On 8 December 2016, a Chinese representative made a statement at the Security Council Debate on the ICTY and the MICT. He said:

China believes that the ICTY should implement its completion strategy as soon as possible and conclude its work before the end of November 2017.

On the MICT, China is pleased to learn that the office building of its Arusha branch has been officially open and that the MICT has taken over all the remaining work of the International Criminal Tribunal for Rwanda (ICTR). In continuously carrying out its judicial activities, the MICT has started the re-trial of the Stanisic & Simatovic case, formulated new rules and procedures, issued a large number of decisions and orders, and cooperated with the countries concerned in support of their domestic prosecution. China appreciates these activities. We hope that the MICT will keep in mind the request that it should be 'small, temporary and efficient', and further strengthen and improve its work.

The ICTY will conclude its work before the end of November 2017. China hopes that the ICTY will cooperate closely with the MICT in order to ensure the smooth transfer of its remaining work to the MICT. China will continue to support the work of the two institutions. Finally, I would like to take this opportunity to thank Uruguay as the Chairman of the Informal Working Group on International Tribunals and the UN Office of Legal Affairs for their work.¹⁶

☛ **Scope and Application of Universal Jurisdiction**

On 13 October 2016, a Chinese representative made a statement at the 71st Session of the UNGA on Agenda Item 85: the Scope and Application of the Principle of Universal Jurisdiction. She said:

First of all, the establishment and exercise of universal jurisdiction should be in line with the purposes and principles of the UN Charter and the norms of international law without violating state sovereignty, interfering in the internal affairs of States, or infringing upon the immunity enjoyed by States, state officials and diplomatic and consular personnel.

Secondly, universal jurisdiction is complementary in nature. Respect should be given to the primacy of the exercise of territorial, personal and protective jurisdiction by States,

¹⁵ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Mr Li Yongsheng of the Chinese Delegation' (31 October 2016), <<http://www.china-un.org/eng/hyyfy/t1412086.htm>>.

¹⁶ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Counsellor LI Yongsheng of the Chinese Mission' (8 December 2016), <<http://www.china-un.org/eng/hyyfy/t1422962.htm>>.

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so as to avoid overlapping or competing jurisdictions and maintain the stability of the system of international law and international relations. At the same time, universal jurisdiction is different from the obligation of *aut dedere aut judicare*, and from the jurisdictions explicitly conferred upon existing international judicial bodies by treaties or other legal instruments.

Thirdly, with the exception of acts of piracy, States have divergent views on whether universal jurisdiction exists in other situations as well as on its scope and conditions of its application, and no rule of customary international law has yet taken shape in this regard. The discussion of this topic at the current stage should focus on questions such as ensuring that States apply universal jurisdiction in a prudent manner and refrain from overstepping the existing international law, unilateral claims or the exercise of universal jurisdiction that is not explicitly permissible under the existing international law, with the view to maintaining the stability and healthy development of international relations.¹⁷

• **Immunity of State Officials from Foreign Criminal Jurisdiction**

On 27 October 2016, a Chinese representative made a statement at the 71st Session of the UNGA on Agenda Item 78 Report of the International Law Commission on the work of its sixty-eight session. He said:

This year, under the topic ‘Immunity of State officials from foreign criminal jurisdiction’, the highly complex and sensitive issue of exceptions was considered. The Commission conducted preliminary deliberation on the fifth report submitted by Special Rapporteur Mrs Hernández. The Chinese delegation wishes to thank the Special Rapporteur and the Commission for their work.

The Chinese delegation supports the conclusion of the report that there is no exception in respect of immunity *ratione personae*. We do not support, however, the three exceptions to immunity *ratione materiae* as posited by the Special Rapporteur, ie, serious international crimes, crimes that cause harm to persons or property in the territory of the forum State and crimes of corruption. My delegation noticed that the bulk of the evidence cited in the report for or against the aforementioned exceptions consists of just objections in minority opinion regarding (a small number of objections to) relevant ICJ decisions and civil cases before some national or international judicial bodies, such as the European Court of Human Rights. Such evidence is hardly convincing in that it lacks relevance and is clearly tendentious.

One, serious international criminal offences do not constitute an exception to immunity from foreign criminal jurisdiction. First of all, immunity is procedural in nature and falls under an entirely different category of rules vis-à-vis that of substantive rules which determine the lawfulness of a given act (including *jus cogens*). Therefore, violation of substantive rules should not preclude the application of procedural rules. This was confirmed in both the ICJ’s Arrest Warrant case and the case of jurisdictional immunities of the State. Secondly, although international conventions against serious international crimes oblige states parties to establish jurisdiction or to assume obligations of cooperation in investigation, apprehension and extradition, this is without prejudice to the immunity of officials from foreign criminal jurisdiction under customary international law. This was also confirmed in the ICJ’s Arrest Warrant case.

Two, as regards crimes committed in the territory of the forum State that cause harm to persons or to property (territorial tort), we have noted that the report mainly draws on international treaties governing consular immunity and State immunity, as well as

¹⁷ Permanent Mission of the People’s Republic of China to the United Nations, ‘Statement by Ms Ji Xiaoxue’ (13 October 2016), <<http://www.china-un.org/chn/hyyfy/t1405636.htm>>.

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national legislations on immunity of countries like the United Kingdom, the United States, Russia and Australia. However, the exceptions in respect of harm to persons or property as established by these treaties and domestic legislations apply exclusively to civil procedures. By drawing direct parallels between these exceptions and exceptions to immunity of State officials from criminal jurisdiction, the report confuses immunity from civil jurisdiction with that from criminal jurisdiction without sufficient support in legislation and in practice.

Three, regarding crimes of corruption, in our opinion, these crimes generally do not involve immunity from criminal jurisdiction of a foreign court and therefore do not warrant being singled out as a standalone exception for study. Any official involved in a corruption case is held accountable primarily through domestic prosecution and, in case the suspect has fled abroad, he may be prosecuted in his home country after being extradited, repatriated or persuaded to return. Where assistance is required for prosecution in a foreign country, the State of the official should provide a waiver of his immunity.¹⁸

☛ Crimes Against Humanity

On 27 October 2016, a Chinese representative made a statement at the 71st Session of the UNGA on Agenda Item 78 Report of the work of its sixty-eighth session. He said:

First, on the working method of the Commission. The Chinese delegation has noted that the ILC has set under this topic the objective of formulating an international convention specifically on crimes against humanity. But judging from the deliberations at the Sixth Committee last year, it is apparent that States have not reached a wide consensus on this point. The second report and the Draft Articles adopted by the Commission basically rely on analogous deduction primarily by sorting and summarizing relevant provisions in other international conventions on combating international crimes. This is not codification of the provisions related to crimes against humanity as found in existing laws, but proposing to draft a new law. Though the Commission used a similar approach in relation to very few topics such as the Law on Non-navigational Uses of International Watercourses, in view of the complexity and sensitivity of the topic on crimes against humanity per se, the advisability of this working method is open to question.

Second, on the stipulation in Draft Article 5 that States should legislate to list crimes against humanity as offences under their respective criminal code. Chinese delegation is of the view that on the need or otherwise for legislation and on how to go about it, States should be given certain room for autonomy in decisions. As for the form of legislation, States should be allowed to stipulate, in light of the realities of their national legislation, provisions on the crimes listed in the above-mentioned draft article under the offences of 'crimes against humanity' or some other offences.¹⁹

☛ *Jus Cogens*

On 27 October 2016, a Chinese representative made a statement at the 71st Session of the UNGA on Agenda Item 78 Report of the International Law Commission on the work of its sixty-eighth session. He said:

¹⁸ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Mr XU Hong' (27 October 2016), <<http://www.china-un.org/eng/hyyfy/t1411697.htm>>.

¹⁹ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Mr XU Hong' (27 October 2016), <<http://www.china-un.org/eng/hyyfy/t1411697.htm>>.

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First, the deliberations on this topic should strictly follow the provision in Article 53 of the 1969 Vienna Convention on the Law of Treaties, ie, *jus cogens* is 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. The work on this topic should focus on clarifying the meaning of the basic elements of *jus cogens* as mentioned above on the basis of taking stock of state practice, with the emphasis on codifying existing laws rather than drafting a new law. Addition of new elements, if needed, should be fully backed by state practice and be universally accepted or recognized by States.

Second, China has taken note of the core elements of the *jus cogens* concept as proposed by the Special Rapporteur, including 'universal applicability', that '*jus cogens* norms are superior to other norms of international law' and 'protect[ion] of fundamental values of the international community'. In China's view, these proposed elements are obviously at variance with the basic elements of *jus cogens* as defined in Article 53 of the above-mentioned convention and are, in essence, an alteration of *jus cogens*. Elements of *jus cogens* have a bearing on the major interests of all States and direct implications on their rights, obligations and responsibilities. Is there a need for adding new core elements? What is the basis for such additions? And what implications would they have? These are questions that China suggests warrant further studies.

Third, China has noted the Special Rapporteur's proposal that '*jus cogens* norms are superior to other norms of international law'. Does this imply that *jus cogens* should prevail over the UN Charter and relevant resolutions of the Security Council? Article 103 of the UN Charter stipulates explicitly that 'obligations under the present Charter shall prevail' over 'obligations under any other international agreement'. How is the relationship between *jus cogens* and the Charter of the United Nations to be handled? China believes that this kind of questions await further explanation.

Fourth, in China's view, it is not suitable to prepare at this stage a list or annex related to the rules of *jus cogens*. The correct approach would be to collect and study state practices as they relate to *jus cogens* and, on that basis, clarify the specific standards of *jus cogens* before exploring the need or otherwise for preparing a list or annex.²⁰

LIJIANG ZHU

²⁰ Permanent Mission of the People's Republic of China to the United Nations, 'Statement by Mr XU Hong' (27 October 2016), <<http://www.china-un.org/eng/hyyfy/t1411697.htm>>.