United Nations A/C.6/72/SR.18

General Assembly
Seventy-second session

Official Records

Distr.: General
14 November 2017

Original: English

Sixth Committee

Summary record of the 18th meeting
Held at Headquarters, New York, on Monday, 23 October 2017, at 10 a.m.

Chair: Mr. Gafoor . . . . . (Singapore)

Contents

17-18670 (E)

The meeting was called to order at 10.25 a.m.

Statement by the Legal Counsel

1. **Mr. de Serpa Soares** (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that the Sixth Committee and the International Law Commission played a central role in the progressive development of international law and its codification, in pursuance of Article 13, paragraph 1 (a), of the Charter of the United Nations. Together, they had stood at the foundation of many ground-breaking advances in the field of international law. It had been at the recommendation of the Sixth Committee that the General Assembly, by resolution 177 (II) of 21 November 1947, had first entrusted the International Law Commission with the preparation of a draft code of offences against the peace and security of mankind. Upon completion of its work, the International Law Commission had recommended the convening of a diplomatic conference, a recommendation on which the General Assembly, through the Sixth Committee, had acted in 1996. As a result, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, also known as the Rome Conference, had opened on 15 June 1998. On 17 July 1998, after five weeks of arduous negotiations, it had adopted the Rome Statute of the International Criminal Court.

2. Currently, the Sixth Committee was continuing its collaboration with the International Law Commission in the field of international criminal justice by considering the Commission's work on many topics, including "Crimes against humanity".

3. In 2018, the long-standing partnership between the Committee and the Commission would be celebrated upon the commemoration of the seventieth anniversary of the International Law Commission. The Commission was planning to hold the first part of its session in New York, from 30 April until 1 June 2018. To strengthen the bond between the two bodies, the Commission was anticipating holding a solemn meeting on 21 May 2018, followed by a conversation with representatives of the Sixth Committee. The Commission would convene the second part of its session at its regular seat in Geneva, where it was planning to hold a conference with legal advisers and other international law experts on 5 and 6 July, focusing on the work of the Commission and its cooperation with Member States.

4. Although a large part of international law had already been codified, international law continued to evolve in unforeseen directions. Only by working together could the Sixth Committee and the Commission continue to promote and guide that process. The Secretariat, and in particular the Office of Legal Affairs, would continue to work to strengthen cooperation between the two bodies.

Agenda item 81: Report of the International Law Commission on the work of its sixty-ninth session (A/72/10)

5. **The Chair** invited the Committee to begin its consideration of the report of the International Law Commission on the work of its sixty-ninth session (A/72/10). The Committee would consider the Commission's report in three parts, beginning with the first part, which would cover chapters I to III (the introductory chapters), chapter XI (Other decisions and conclusions of the Commission), chapter IV (Crimes against humanity) and chapter V (Provisional application of treaties).

6. **Mr. Nolte** (Chairman of the International Law Commission) said that the tradition of interaction and collaboration between the Committee and the Commission in the progressive development of international law and its codification was one that the Commission cherished and would like to see fostered. For that reason, he was pleased that many members of the Commission were able to be present in New York for International Law Week in 2017.

7. Introducing the first cluster of chapters of the Commission's report, he said that the sixty-ninth session had been the first year of the current quinquennium. As chapter II showed, the Commission had made important progress: it had completed work on first reading on the topic "Crimes against humanity" with the adoption of a complete set of draft articles. It had also worked on the topics "Provisional application of treaties", "Protection of the atmosphere", "Immunity of State officials from foreign criminal jurisdiction" and "Peremptory norms of general international law (*jus cogens*)". Following the departure from the Commission of the previous Special Rapporteur, Ms. Marie Jacobsson, and the appointment of the new one, Ms. Marja Lehto, the consideration of the topic "Protection of the environment in relation to armed conflicts" had been in transition. The Commission had also commenced work on a new topic, "Succession of States in respect of State responsibility", in 2017, with the appointment of Mr. Pavel Šturma as Special Rapporteur.

8. It was customary at the beginning of each quinquennium for the Commission to prepare its work programme for the remainder of the quinquennium, setting out in general terms the anticipated goals in respect of each topic on the basis of indications by the

Special Rapporteurs. Even though the work programme included in the report had a tentative character, it was anticipated that work on most topics on the agenda would be completed by the end of the quinquennium.

9. Chapter III drew attention to specific issues on which the comments of Governments would be of particular interest and assistance to the Commission.

10. The Commission would also welcome views on two new topics which it had decided to include in its long-term programme of work, namely, general principles of law and evidence before international courts and tribunals. That did not mean that those topics were already on the active programme of work. Such a decision would not be taken until States had had the opportunity to comment on the advisability of putting those topics on the Commission's active agenda.

11. The Commission had considered the first substantive topic (Crimes against humanity), on the basis of the third report of the Special Rapporteur, and had adopted, on first reading, a complete set of draft articles on crimes against humanity and commentaries thereto. The draft articles comprised a draft preamble, 15 draft articles and a draft annex.

12. That was a significant achievement. It was generally recognized that, among the three core international crimes, only crimes against humanity lacked a treaty focused on building up national laws, national jurisdiction and inter-State cooperation in the fight against impunity. The draft articles on crimes against humanity, if ultimately adopted on second reading, would provide a model for States to fill that lacuna through a new treaty, if they so wished. In accordance with articles 16 to 21 of its Statute, the Commission had transmitted the draft articles, through the Secretary-General, to Governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018.

13. Ten draft articles had been adopted at previous sessions and presented to the Sixth Committee by his predecessors. Other than minor technical adjustments, no substantive changes had been made to those draft articles, with one exception. His presentation would focus on the new draft provisions adopted at the 2017 session.

14. The draft preamble aimed to provide a conceptual framework for the draft articles, setting out the general context in which the topic had been elaborated and the main purposes of the draft articles. In part, it drew inspiration from language used in the preambles of treaties relating to the most serious crimes of concern to the international community as a whole.

15. The principle of non-refoulement, which obligated a State not to return a person to another State where there were substantial grounds for believing that he or she would be in danger of persecution or some other specified harm, was applied in draft article 5 to prevent persons in certain circumstances from being exposed to crimes against humanity.

16. Draft article 6 (Criminalization under national law) was a new provision addressing the question of an individual's official position. It set forth various measures that each State must take under its own criminal law to ensure that crimes against humanity constituted offences, to preclude certain defences or any statute of limitation and to provide for appropriate penalties commensurate with the grave nature of such crimes. In the light of a number of precedents in existing treaties, in particular article 27, paragraph 1, of the Statute of the International Criminal Court, the Commission had decided to include paragraph 5, which provided that "[e]ach State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility".

17. The Commission had indicated in paragraph (31) of the commentary to draft article 6 that paragraph 5 "has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law", and that "paragraph 5 is without prejudice to the Commission's work on the topic 'Immunity of State officials from foreign criminal jurisdiction'". The draft articles on crimes against humanity thus did not contain a provision excluding immunity along the lines of article 27, paragraph 2, of the Rome Statute.

18. Draft article 12 was a new provision relating to victims, witnesses and others affected by the commission of a crime against humanity. It addressed considerations of access, including the right of complaint, the right to participate in the proceedings and the right of reparation. Paragraph 3 provided that "[e]ach State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition". The formulation of that paragraph and

the commentary thereto reflected the particularly complex nature of the matter.

19. Draft article 13 addressed the rights, obligations and procedures applicable to the extradition of an alleged offender under the draft articles. The Commission had decided to base the draft article on article 44 of the 2003 United Nations Convention against Corruption, which in turn had been modelled on article 16 of the 2000 United Nations Convention against Transnational Organized Crime. Although a crime against humanity was quite different from a crime of corruption, the issues arising in the context of extradition were largely the same, regardless of the nature of the underlying crime, and the Commission was of the view that article 44 of the 2003 Convention had proven in practice to provide secure guidance as to all relevant rights, obligations and procedures for extradition in the context of crimes against humanity.

20. Draft article 13 should be considered in the overall context of the draft articles. For instance, under the draft articles, a State might satisfy the *aut dedere aut judicare* obligation set forth in draft article 10 by extraditing (or surrendering) the alleged offender to another State for prosecution. There was no obligation to extradite the alleged offender. The primary obligation was rather for the State in the territory under whose jurisdiction the alleged offender was present to submit the case to its competent authorities for prosecution. That obligation might be satisfied, in the alternative, by extraditing the alleged offender to another State. To facilitate extradition, the Commission had found it useful to have clearly stated rights, obligations and procedures for the extradition process.

21. Draft article 14 addressed the question of mutual legal assistance; it was directly related to the draft annex. Currently, there was no global or regional treaty addressing mutual legal assistance specifically in the context of crimes against humanity. Rather, to the extent that cooperation of that kind occurred, it did so through bilateral or multilateral treaties addressing mutual legal assistance with respect to crimes generally or through cooperation by recourse to domestic legislation or comity. As was the case for extradition, any given State often had no treaty relationship with a large number of other States on mutual legal assistance with regard to crimes generally, so that when cooperation was needed in connection with crimes against humanity, there was no legal framework in place to facilitate such cooperation.

22. Draft article 15 addressed the settlement of disputes between States concerning the interpretation or application of the draft articles. There was currently no obligation upon States to resolve disputes arising between them specifically in relation to the prevention and punishment of crimes against humanity. In particular, draft article 15 stated that a dispute concerning the interpretation or application of the draft articles that was not settled through negotiation must be submitted to the International Court of Justice, unless the States submitted the dispute to arbitration. It also provided States with the possibility to opt out of such jurisdiction or opt back in at any time.

23. Turning to chapter V (Provisional application of treaties), he said that the Commission had concluded its consideration of the remaining draft guidelines proposed by the Special Rapporteur and deferred from the previous session. It had also had before it the memorandum prepared by the Secretariat reviewing State practice in respect of treaties (bilateral and multilateral) deposited or registered in the past 20 years with the Secretary-General (A/CN.4/707), which provided for provisional application, including treaty actions related thereto.

24. The Commission had provisionally adopted 11 draft guidelines. Draft guideline 1 was concerned with the scope of application. It should be read together with draft guideline 2, which set out the purpose of the draft guidelines, namely to provide guidance to States and international organizations regarding the law and practice on the provisional application of treaties.

25. Draft guideline 3 stated the general rule on the provisional application of treaties. The Commission had deliberately sought to follow the formulation of article 25 of the 1969 Vienna Convention on the Law of Treaties, so as to underscore that the starting point for the draft guidelines was article 25. That was subject to the general understanding referred to in paragraph (3) of the commentary to draft guideline 2, namely that the 1969 Convention and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations did not necessarily reflect all aspects of contemporary practice on the provisional application of treaties.

26. Draft guideline 4 dealt with additional forms of agreement on the basis of which a treaty or a part of a treaty could be provisionally applied, in addition to when the treaty itself so provided. The structure of the provision followed the sequence of article 25 of the 1969 and 1986 Vienna Conventions. Subparagraph (b) incorporated the revised proposal, presented by the Special Rapporteur in 2016, for a draft guideline 5 on provisional application by means of unilateral declaration.

27. Draft guideline 5 was modelled on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions, on entry into force. It stated that the provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, took effect on such date, and in accordance with such conditions and procedures, as the treaty provided or as were otherwise agreed.

28. Draft guideline 6 stated that the provisional application of a treaty or a part of a treaty produced the same legal effects as if the treaty were in force between the States or international organizations concerned. Those effects were produced by an agreement to provisionally apply a treaty which could also be contained in the treaty itself, as was confirmed by the concluding phrase “unless the treaty provides otherwise or it is otherwise agreed”.

29. Draft guideline 7 addressed the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that was being provisionally applied. Since the provisional application of a treaty or a part of a treaty gave rise to a legally binding obligation, a breach of that obligation necessarily constituted a wrongful act giving rise to international responsibility.

30. Draft guideline 8 concerned the termination upon notification of intention not to become a party. The provisional application of a treaty or a part of a treaty by a State or an international organization typically ceased either when the treaty entered into force for the State or international organization concerned, or when the intention not to become a party to the treaty was communicated by the State or international organization provisionally applying the treaty to the other States or international organizations.

31. Draft guideline 9 indicated in paragraph 1 that a State could not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application. Paragraph 2 stated the same with regard to the rules of an organization.

32. Draft guideline 10 served as the analogue to article 46, paragraph 1, of the 1969 Vienna Convention and article 46, paragraph 2, of the 1986 Vienna Convention.

33. Draft guideline 11 concerned the agreement, between the parties seeking to provisionally apply a treaty, on limitations deriving from the internal law of States or rules of international organizations. It allowed for the possibility, and reflected the practice, that States agreed, for example, to limit provisional application so as to take into account their constitutional provisions on the competence to conclude and implement treaties. The provision was cast as a without-prejudice clause, applicable to the draft guidelines generally. Its purpose was to confirm that States or international organizations agreeing to the provisional application of a treaty could seek to condition such provisional application on limitations deriving from internal law, in the case of States, or the rules of the relevant organization, in the case of international organizations.

34. **Mr. Celarie Landaverde** (El Salvador), speaking on behalf of the Community of Latin American and Caribbean States (CELAC), said that the Community appreciated the important work carried out by the Commission in the progressive development and codification of international law. The part-session to be held in New York in 2018 would provide an opportunity to strengthen the interaction between the Sixth Committee and the International Law Commission. CELAC encouraged the exchange of views and discussions between the members of the Sixth Committee, as a body composed of government representatives, and members of the International Law Commission, as a body of independent legal experts; it therefore favoured a continuation of the initiative to hold a part-session in New York.

35. CELAC welcomed the work completed by the Commission at its sixty-ninth session. It took note that, with regard to the topic of crimes against humanity, the Commission had adopted on first reading 15 draft articles, their respective annexes and preambular paragraphs, including the recognition of the prohibition of crimes against humanity as a peremptory norm of general international law; that, in relation to the topic of immunity of State officials from foreign criminal jurisdiction, it had adopted the draft list of crimes for which immunity *ratione materiae* was not applicable; and that, concerning the topic of succession of States in respect of State responsibility, it had examined the first report submitted by the Special Rapporteur and had provisionally adopted articles 1 and 2 contained therein.

36. CELAC acknowledged the progress made towards the adoption of draft guidelines under the important topics of provisional application of treaties and protection of the atmosphere, and the adoption of draft conclusions 2, 4,5,6 and 7 relating to the peremptory norms of general international law (*jus cogens*).

37. CELAC took note of the specific issues identified in the report in respect of which the Commission required information from Governments in order to have material on national laws, court decisions, treaties, doctrine and diplomatic correspondence; it urged States

to cooperate so as to provide better input for the Commission's work.

38. CELAC welcomed the incorporation of the new topics of general principles of law and evidence before international courts and tribunals.

39. **Mr. Gussetti** (Observer for the European Union) said that the European Union was very interested in the topic of provisional application of treaties, and it appreciated the Commission's efforts to provide clarifications and guidance on and thereby help to enhance legal certainty in that important area of international law.

40. The European Union noted that the Commission had decided to enlarge the scope of the draft guidelines to include treaties entered into by international organizations and that the provisionally adopted draft guidelines and the commentaries thereto reflected that enlarged scope. The European Union was pleased that the approach followed was to retain the inherent flexibility of provisional application of treaties, something which the European Union had advocated in its previous interventions on the subject.

41. Referring to the draft articles provisionally adopted so far by the Commission, he said that in paragraph (5) of the commentary to draft guideline 4 (Forms of agreement), the Commission had stated that, when referring to the possibility that a State or an international organization could make a declaration to the effect of provisionally applying a treaty, the word "unilateral" had been deliberately avoided in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States. While the European Union understood the underlying logic of that approach, it noted that a clause on provisional application contained in a treaty was merely one of the provisions of a treaty not yet in force. Thus, if the consent to be bound by such provision was not given upon signature of the treaty and if the obligation to provisionally apply the treaty did not stem from a separate agreement, a question of the legal basis for provisionally applying the treaty arose. It was in that scenario that unilateral declarations and their effects could become relevant.

42. The European Union was aware that unilateral declarations had been discussed at length in the Drafting Committee, but the subject had not been sufficiently clarified in the commentary to draft guideline 4, and the Commission should attempt to do so there or at some other place deemed appropriate. A clear identification of all the possible scenarios and the sources of the obligation to provisionally apply a treaty would contribute to enhancing the integrity and coherence of the international legal order.

43. Similarly, the European Union welcomed the Commission's efforts to clarify the relationship between provisional application and other provisions of the 1969 Vienna Convention. It noted the Commission's view, set out in paragraph (5) of the commentary to draft guideline 6, that provisional application was not subject to the same rules of the law of treaties provided for in part V, section 3, of the 1969 Vienna Convention. He recalled that the position of the European Union on the applicability of article 60 of the Vienna Convention to provisionally applied treaties differed from the Commission's.

44. It was the understanding of the European Union that the Commission relied exclusively on the regime for termination of provisional application provided for in article 25, paragraph 2, of the 1969 Vienna Convention. However, that article did not explicitly provide for the possibility of terminating provisional application due to material breach of the treaty that was being provisionally applied. Although that could, of course, be agreed by the parties, in practice situations existed where that was not the case. In such a case, the aggrieved party would be left with only one option for terminating the provisional application, namely to declare its intention not to become a party to the treaty. The European Union considered that the sole option available might in some cases be considered disproportional; it therefore suggested relying on the principle, applied by analogy, contained in article 60 of the 1969 Vienna Convention for terminating the provisional application. While article 60 was not directly applicable to the case at hand, it might contain useful guidance in resolving that practical problem.

45. The above-mentioned disproportionality was further demonstrated by the fact that article 25, paragraph 2, of the 1969 Vienna Convention did not make any provision for the possibility of suspending provisional application. As in the case of termination, it would be to the benefit of all States and international organizations if the Commission provided clarity on rules of international law that at their face value appeared to limit or exclude the possibility of suspending provisional application on the basis of article 60 of the 1969 Vienna Convention.

46. The European Union considered that the question of legal effects of provisional application was essential for understanding the scope of the concept, and it urged the Commission to further develop the commentary to draft guideline 6 in that regard as well, in order to provide more clarity on the matter.

47. The European Union welcomed the Commission's decision to further clarify the effects of reliance on and references to internal law within the context of a provisional application of treaties. It had no objection to draft guidelines 9 to 11. References to internal law in the context of provisional application were not unusual; they often touched on sensitive aspects relating to constitutional law and were frequently used by the European Union in its own bilateral treaty practice.

48. Concerning draft guideline 11, relating to the right of a State or international organization to agree to provisional application with limitations deriving from the internal law of a State or the rules of the organization, the European Union noted that it often exercised that right in its bilateral treaty practice, in particular in cases of mixed agreements, meaning agreements concluded by the European Union and its member States with a third party. For example, article 59, paragraph 2, of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, provided that "(...) the Union and Afghanistan agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 3 of this Article, and in accordance with their respective internal procedures and legislation as applicable".

49. Pursuant to that provision, it was up to the European Union to define the parts of the treaty to be provisionally applied. That had been done by the respective internal acts of the Union, namely Council Decision (EU) 2017/434 of 13 February 2017 on the signing and provisional application of the Agreement, the fifth preambular paragraph of which stated that "(...) the provisional application of parts of the Agreement between the Union and the Islamic Republic of Afghanistan are without prejudice to the allocation of competences between the Union and its Member States in accordance with the Treaties", and article 3 of which provided that "(...) the following parts of the Agreement shall be provisionally applied between the Union and the Islamic Republic of Afghanistan, but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy".

50. Provisions along the same lines could also be found in article 86, paragraph 3, of the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, and in Council Decision (EU) 2016/2232 of 6 December 2016 on the signing and provisional application of that Agreement.

51. Another example was article 19, paragraph 4, of the Agreement between the European Union and the Kingdom of Norway on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund for the period 2014 to 2020, which read: "Except for article 5, the Parties shall apply this Agreement provisionally as from the day following that of its signature, without prejudice to constitutional requirements".

52. Concerning the memorandum by the Secretariat on State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General (A/CN.4/707), the European Union was pleased that the suggestions it had made in 2016 on priorities to be tackled in a future analysis had been taken into account. The examination of the commencement, scope and termination of provisional application and the analysis of the legal basis for provisional application in both bilateral and multilateral agreements were much appreciated and deserved careful consideration.

53. The memorandum stated, in paragraph 5, that mixed agreements "share certain structural characteristics with bilateral and multilateral treaties, particularly those multilateral treaties with limited membership", and it referred to those agreements in paragraph 46. Mixed agreements were a specific feature of the European Union legal order, having regard to the allocation of competences between the Union and its member States as contracting parties. Many mixed agreements entered into by the European Union and its member States and a State/international organization had characteristics of bilateral agreements, and some had characteristics of multilateral agreements because of their specific aim, content and context.

54. **Ms. Hammarskjold** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that crimes against humanity were clearly prohibited under international law, and efforts must be redoubled to end impunity for such acts. The Nordic countries therefore welcomed the adoption by the Commission on first reading of the draft articles on crimes against humanity, the draft annex and the commentaries.

55. The Nordic countries were pleased that draft article 5 (Non-refoulement) had been moved forward in the draft, coming immediately after draft article 4 (Obligation of prevention). That was logical, since the principle of non-refoulement itself was concerned with

prevention. The current draft article 5 was an important provision for the purpose of preventing persons from being exposed to crimes against humanity. Although it focused on avoiding exposure of a person to such crimes, it was without prejudice to other obligations of non-refoulement arising from treaties or customary international law.

56. The Nordic countries fully supported the obligations under draft article 6 [5] (Criminalization under national law). They welcomed the obligation of each State to take the necessary measures to ensure that the official position of an alleged offender was not a ground for excluding criminal responsibility. That principle was firmly rooted in international law and was of great importance in that context, given the grave nature of crimes against humanity.

57. The Nordic countries endorsed draft article 12 (Victims, witnesses and others), although it did not contain a definition of a victim of such crimes. They attached great importance to the rights of victims, including their ability to raise their case with the competent authorities, and they also expressed their support for the obligation of each State to ensure that victims of crimes against humanity had the right to obtain reparation for material and moral damages.

58. The draft articles on crimes against humanity had the potential to be of great practical relevance to the international community. Among the three core international crimes, only crimes against humanity lacked a convention seeking to build up national laws, national jurisdiction and cooperation among States in the fight against impunity. The draft articles could serve as a good basis for a future convention.

59. With regard to the topic of provisional application of treaties, the Nordic countries were pleased that the Commission had provisionally adopted 11 draft guidelines and commentaries thereto, which appeared to reflect their earlier comments and observations. While it was clear that domestic legislation played an important role in the context of provisional application of treaties, the topic also presented several questions of an international law character that merited consideration.

60. The Nordic countries welcomed the memorandum by the Secretariat on State practice on provisional application of treaties (A/CN.4/707), and they looked forward to its consideration by the Commission at its next session.

61. The Nordic countries had earlier suggested that it might be useful if the Commission could develop model clauses on provisional application. At the same time, they had acknowledged the challenges involved, owing to the diversity of national legal systems. However, in some cases provisional application might provide a suitable instrument for bringing a treaty into effect sooner than the actual entry into force. Model clauses might be of assistance in that regard. The Nordic countries were therefore pleased to learn from the Commission's report that, apart from additional draft guidelines, the Special Rapporteur intended to propose model clauses in his report to the next session of the Commission.

62. Similarly, the Nordic countries were pleased that the Commission had scheduled the completion of the draft guidelines for 2018 on first reading and for 2020 on second reading.

63. With regard to the inclusion in the long-term programme of the topics of general principles of law and evidence before international courts and tribunals, the Nordic countries believed that priority should be given to general principles of law. The Nordic countries agreed with the Special Rapporteur for the topic that the Commission could provide an authoritative clarification on the nature, scope and function of that important source of law, which in doctrinal discussions had been distinguished from other concepts, such as "general principles of international law" or "fundamental principles". Despite that fact, international courts and tribunals had applied, more or less explicitly, "general principles of law" as a source of law. The methods used to identify such "general principles of law" often presented a conundrum, and the Commission could help by clarifying the criteria and methods for identifying general principles of law from sources other than municipal law.

64. On the topic of evidence before international courts and tribunals, the Nordic countries were of the view that the syllabus needed further elaboration before the Commission could include it in its current programme of work.

65. The Nordic countries welcomed the planning of the commemoration of the seventieth anniversary of the Commission and looked forward to taking part in the anniversary programme.

66. **Mr. Tichy** (Austria) said that he would deliver a shortened statement; the full version could be found on the PaperSmart portal. His delegation expressed its support for the elaboration of an instrument, preferably a convention, regarding extradition and mutual legal assistance in cases of crimes against humanity. The Commission should, however, be fully informed about other relevant international initiatives concerning legal

cooperation on the prosecution of atrocity crimes so that it could take them into account and avoid duplication.

67. Concerning draft article 11 [10] (Fair treatment of the alleged offender), Austria had doubts about the current wording of paragraph 3, on the relationship between the rights of persons in prison, custody or detention and the laws and regulations of the State exercising its jurisdiction. Paragraph 2 defined the rights of those persons, such as the right to communicate without delay with the nearest representative of their State of nationality. Paragraph 3, on the other hand, stated that such rights "shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended". His delegation was aware that that wording was based on article 36, paragraph 2, of the Vienna Convention on Consular Relations as well as on other important international instruments, but practice had shown that such a formulation did not exclude an interpretation according to which national laws and regulations might prevail over the rights of detainees. Therefore, paragraph 3 should either be deleted or replaced by a clear rule protecting the rights of detainees against restrictions based on national law, for example by stating that the national laws and regulations "must enable the full exercise of the rights accorded under paragraph 2".

68. Concerning draft article 13 (Extradition), Austria interpreted the phrase "[e]xtradition shall be subject to the conditions provided for by the national law of the requested State" in paragraph 6 as allowing States to refuse the extradition of their own nationals if such refusal was required by their national law. In Austria, constitutional law excluded the extradition of Austrian nationals, apart from certain cases governed by European Union law. However, non-extradition in a case of a crime against humanity would not lead to impunity, as such crimes were punishable in Austria under section 321a of the Criminal Code, introduced in 2016.

69. As explained in paragraph (17) of the commentary to draft article 13, paragraph 6, extradition could be made conditional on the exclusion of the death penalty or respect for the rule of speciality, pursuant to which a trial could be conducted in the requesting State only for the specific crime for which extradition had been granted. However, according to the commentary, certain grounds for the refusal of extradition based on national law were impermissible, such as the invocation of a statute of limitations in contravention of paragraph 6 of draft article 6 [5], or other rules of international law. It would be interesting to know which other grounds the Commission had in mind for the impermissibility of a refusal of an extradition based on national law, since the statute of limitations contravening international law was the only example cited.

70. Concerning draft article 13, paragraph 9, which excluded the obligation to extradite if extradition would lead to a prosecution or punishment based on discrimination, Austria had doubts about paragraph (26) of the commentary, in which the Commission stated, in the penultimate sentence, that "States that do not have such a provision explicitly in their bilateral [extradition] arrangements will have a textual basis for refusal if such a case arises". That seemed to imply that a multilateral agreement could even affect the scope of application of future bilateral extradition treaties. His delegation wondered whether the Commission assumed that a multilateral agreement would always prevail over future bilateral treaties.

71. With regard to draft article 14 (Mutual legal assistance), his delegation was of the view that such assistance must be rendered with due respect for the national laws and regulations governing the protection of personal data. The phrase "[w]ithout prejudice to its national law" in draft article 14, paragraph 6, offered the basis for such an interpretation.

72. Although draft article 15 (Settlement of disputes) followed traditional patterns in dealing with that subject, his delegation wondered why paragraph 2 did not set a time limit for the negotiations before a case could be submitted to the International Court of Justice. That omission could be used to unduly protract the settlement of a dispute. Although the current text left it to the International Court of Justice or to arbitration to decide whether the condition of negotiations had been met, a fixed time limit, for example six months, would undoubtedly facilitate the implementation of that provision. In paragraph 3, it should be stipulated, as in other conventions, that a declaration to opt out of compulsory dispute settlement could be made no later than at the time of expression of the consent to be bound by the future convention.

73. With regard to paragraph 8 of the draft annex, relating to requests for mutual legal assistance where no bilateral agreement applied, Austria believed that mutual legal assistance could be refused not only if the request was not in conformity with the provisions of the draft annex, but also if it was not in conformity with the draft articles themselves.

74. His delegation reiterated its understanding that the reference to "international criminal courts" in the draft articles also included hybrid courts.

75. With regard to the topic “Provisional application of treaties”, his delegation welcomed draft guideline 4 (Form of agreement) of the draft guidelines provisionally adopted so far by the Commission, but noted that an agreement on provisional application through a separate treaty might have more stringent consequences than other forms of agreement. That applied in particular to the termination of a provisional application.

76. His delegation accepted that draft guideline 6 addressed the legal effects of provisional application, which, as explained in the commentary, were the legal effects of the treaty applied provisionally and not the legal effects of the agreement to apply provisionally, as referred to in draft guideline 4. Draft guideline 6 stated, however, that provisional application “produces the same legal effects as if the treaty were in force”. While that was acceptable as a principle, it was not without exceptions. In paragraph (5) of the commentary itself, the Commission stated that “provisional application is not intended to give rise to the whole range of obligations that derive” from a treaty in force, and that “termination or suspension” were not subject to the same rules as those applicable to treaties in force. His delegation agreed, but in that case believed that the general manner in which draft guideline 6 referred to “the same legal effects” might be misleading.

77. That impression was only partly mitigated by the existence of a separate draft guideline 8, on termination, as that guideline did not address suspension at all and, as far as termination was concerned, only took up the specific case addressed in article 25, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, namely termination of provisional application if a State provided notification of its intention not to become a party to the treaty. Other cases should also be considered, above and beyond that article. For example, it might be necessary, for political reasons, to terminate the provisional application of a treaty without definitely expressing the intention never to become a party to it. The Commission itself seemed to be of the view that draft guideline 8 did not indicate the sole possibility of a termination of a provisional application, since it mentioned in paragraph (4) of the commentary that that provision had been adopted without prejudice to other methods of terminating provisional application. That should be reflected not only in the commentary, but also in the text of the guidelines.

78. His delegation supported a flexible approach, wherever possible, to the termination of a provisional application of a treaty. However, where a flexible approach was possible and more stringent rules did not apply, it would be advisable to provide for notifications and notice periods to ensure a minimum of stability of provisionally applied treaty relations. Austria regretted the Commission’s decision not to include such safeguards in the draft guidelines.

79. Austria, as a host State for many international organizations, was particularly interested in one of the topics that the Commission had decided to include in its long-term programme of work at its sixty-eighth session, namely “Settlement of international disputes to which international organizations are parties”, and it would greatly welcome the appointment of a Special Rapporteur for that topic. It was an area of utmost practical importance, in particular if it were not limited to disputes and relationships governed by international law. Disputes with private parties, governed by domestic law, were most relevant in practice and had raised important questions, including the scope of privileges and immunities enjoyed by international organizations and the requirement of adequate dispute settlement mechanisms.

80. Austria endorsed the recommendation to include the topic “General principles of law” in the Commission’s agenda. The source of international law known as “general principles of law” was subject to the most divergent interpretations and needed urgent clarification. It was widely acknowledged that the “general principles of law” referred to in Article 38, paragraph 1(c), of the Statute of the International Court of Justice, which had already been recognized in the Hague Rules of 1899 and 1907, were an autonomous source of public international law. According to Sir Robert Jennings and Sir Arthur Watts, those principles were based on the application in the international sphere of the general principles of municipal jurisprudence, insofar as they were applicable to relations of States. In other words, a rule qualified as a general principle of law if it was applied in the main systems of national law and if it was “transposable” into international law.

81. Irrespective of the vagueness of the substance of the general principles of law, they must be clearly distinguished from the general principles of international law, although they were frequently treated as identical. Whereas the general principles of international law were general normative concepts created by customary international law or treaties, the general principles of law originally resided in the legal framework of national law and acquired their nature as sources of international law only through acknowledgment as such by States.

82. In the paper on general principles of law presented as an annex in the Commission’s report (A/72/10), the Special Rapporteur referred to the view of G. I. Tunkin,

who had advocated an interpretation of principles of law as principles of international law. That view had stemmed from the Soviet ideology of international law, which had rejected any deduction of rules of international law from rules of national law, since, according to that view, the laws of States with different social structures could not coincide and thus common legal principles could not be developed from them. The Commission's future work on general principles of law should not be based on that outdated view, which most countries, including Austria, did not share.

83. Tunkin had interpreted the introductory sentence of Article 38 of the Statute of the International Court of Justice as meaning that "principles of law" were synonymous with "principles of international law". It should, however, be noted that the reference in Article 38, paragraph 1, to the effect that the Court's decisions were to be taken "in accordance with international law" was only designed to explain that the sources of law to be applied by the Court were sources of international law.

84. The uncertainties inherent in the notion of general principles of law had prevented the Court from resorting to those principles explicitly, which would make a clarification by the Commission most welcome. It would first be necessary to define general principles of law, including the concept of principles as such, and to distinguish them from other concepts, such as rules or norms. Moreover, the Commission would have to address the origin of general principles of law, the method of their identification, their nature, their functions and their limits. In sum, his delegation was convinced that the work of the Commission on general principles of law would substantially contribute to a clarification of a vague, but important source of international law.

85. On the other hand, Austria was reluctant to support work on the new topic "Evidence before international courts and tribunals", as it believed that it was for the international courts and tribunals themselves to assess the value of evidence and that it was unnecessary for the Commission to elaborate general rules for that purpose.

86. **Mr. Bliss** (Australia) said he welcomed the Commission's extensive work on the topic of crimes against humanity and the adoption on first reading of a draft preamble, 15 draft articles and a draft annex, together with commentaries. The international community continued to grapple with a range of situations in which those crimes were committed. The common objective must be to prevent such acts, to effectively punish the perpetrators and to deter future atrocities. States needed to abide by their international obligations, including with respect to crimes against humanity, and to condemn other States and non-State actors where such crimes were committed.

87. His delegation welcomed the draft articles' contribution to complementing the legal framework set out in the Rome Statute of the International Criminal Court for dealing with crimes against humanity. Importantly, the definition of crimes against humanity in the draft articles was taken directly from the Rome Statute, and in the general commentary to the draft articles it was emphasized that the draft articles avoided any conflicts with States' obligations under the Rome Statute.

88. His delegation was pleased to note the importance which the draft articles attached to the adoption of national laws and to the enhancement of inter-State cooperation on the investigation and prosecution of crimes against humanity and the punishment of the perpetrators thereof. Australia had expressly and comprehensively criminalized crimes against humanity under its domestic law, consistent with the Rome Statute and draft article 3 as adopted by the Commission. The Commission's work on the topic would contribute to the international community's efforts to prevent and punish those crimes and would encourage States to implement effective legislative, administrative, judicial or other preventive measures, as envisaged in draft article 4.

89. Australia also welcomed the Commission's important work on the provisional application of treaties, including the provisional adoption of draft guidelines 1 to 11 and the commentaries thereto. Australia appreciated the Commission's approach to the interaction between internal law and provisional application and its focus on States' obligations at the international level. It welcomed the clarification during the drafting process that draft guidelines 9 and 10 were without prejudice to articles 27 and 46 of the 1969 Vienna Convention.

90. Australia considered it crucial that flexibility should be maintained where States agreed to provisional application, to enable States themselves to shape the procedural aspects and substantive consequences of such application. In that regard, his delegation welcomed draft guideline 11, which specifically acknowledged the right of contracting States to limit provisional application on the basis of their own internal law, and draft guidelines 5 and 6, which provided scope for contracting parties to agree on those issues themselves.

91. **Ms. Vaz Patto** (Portugal) said that her delegation welcomed the adoption by the Commission on first reading of the draft articles on crimes against humanity

and the progress made on the topic of immunity of State officials from foreign criminal jurisdiction. With regard to the latter topic, and on the broader issue of the Commission's working methods, the search for a consensus should not prevent the Commission from progressing with its work. Like other subsidiary bodies of the General Assembly, the Commission had clear voting rules. A vote was not a setback, but simply a way of moving ahead, in conformity with the Commission's mandate and its rule of procedure.

92. Portugal took due note of the inclusion of the topic of succession of States in respect of State responsibility in the Commission's programme of work, and it welcomed the inclusion of the topics of general principles of law and evidence before international courts and tribunals in its long-term programme of work.

93. Portugal continued to follow the Commission's work on the topic of crimes against humanity with high expectations regarding its outcome as a future binding international instrument. The draft articles already presented by the Commission provided a solid basis for discussions about a future convention. However, the Commission should proceed cautiously when considering the adoption of solutions that had proved successful for other types of crimes. It should avoid giving in to the temptation of simply transposing existing regimes that had not been designed for the context and legal nature of crimes against humanity. That was an issue that might have to be revisited during the second reading of the draft articles.

94. With regard to draft article 12 (Victims, witnesses and others), her delegation noted that the current wording dealt with both the participants in the criminal proceedings — victims, witness and others — and with different stages of the proceedings, namely, participation in the proceedings and the award of compensation to the victims. If the question of compensation were to be addressed in a separate article, it would provide for greater clarity and would give more emphasis to the rights of victims.

95. Her delegation hoped that the Commission's work on the topic would prove to be an important contribution to the fight against impunity, ensuring accountability for crimes against humanity.

96. With regard to the topic "Provisional application of treaties", her delegation understood the pressing need for swift and flexible solutions and responses in world affairs, including the need for an almost instant production of effects of treaties, especially in cases of multilateral treaties with a large number of contracting parties. The 1969 and 1986 Vienna Conventions on the Law of Treaties had sought to cope with those concerns. Indeed, the aim of article 25 of both Conventions had been to allow some degree of flexibility concerning the date of production of effects of treaties.

97. As her delegation had stated on previous occasions, the focus of the Commission's work should be on clarifying the legal regime of provisional application contained in the Vienna Conventions, without widening its scope. Moreover, such clarification could on no account compel States to change their national constitutional practices. The Vienna Conventions merely opened the possibility of choice of provisional application; they did not impose it. The ultimate decision to provisionally apply a treaty lay with the State or international organization concerned. Accordingly, it was important for the voluntary nature of the provisional application to be further emphasized in the general commentary.

98. Her delegation suggested that the memorandum prepared by Secretariat reviewing State practice in respect of treaties (A/CN.4/707) should be supplemented by a comparative study of domestic provisions and practice relating to provisional application, on which information continued to be sparse. State practice was highly relevant, and important differences in the way each State treated the question of provisional application in its internal law must not be overlooked.

99. Portugal welcomed the revised draft guidelines 1 to 11, which demonstrated a consistent and practical approach to the topic. The wording of guideline 11 could, however, be improved to better reflect the voluntary nature of the mechanism of provisional application. As it stood, it might give rise to the mistaken conclusion that provisional application was the default rule and that the prerogative of the States to accept it or not was a special or even an exceptional situation. Everyone knew that that was not the case.

100. That imprecision was somewhat offset by paragraph (2) of the commentary to guideline 11, where it was stated that "the present draft guideline recognizes the flexibility of a State or an international organization to agree to the provisional application of a treaty or part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations deriving from their internal provisions". That idea was at the core of draft guideline 11 and should be better reflected in the text of the draft guideline.

101. **Ms. Carnal** (Switzerland), commending the Commission for its excellent work, said with regard to the topic of crimes against humanity that her delegation was pleased that the draft preamble of the draft articles

adopted at the sixty-ninth session of the Commission emphasized prevention, which was just as important as punishment. The reference made to the Rome Statute in the preamble was welcome, since the definition of crimes against humanity in the draft convention was consistent in every respect with the definition set forth in the Statute. As in the case of the draft articles adopted at previous sessions, her delegation was pleased that the new draft articles were based on the existing international legal framework. Crucially, the Commission was seeking to avoid any conflict with the texts of existing treaties, such as the Rome Statute. Her delegation was also pleased that the draft articles were concise and confined themselves to the essential aspects.

102. The draft articles relating to extradition and mutual legal assistance made provision for national law, where applicable. That said, draft article 13, paragraph 2, rightly pointed out that offences constituting crimes against humanity were not to be regarded as political offences that would justify refusal of a request for extradition. In her delegation's view, the draft articles covered the main questions arising in that respect, but they should perhaps also address the issue of competing requests for extradition, at the very least by introducing criteria for taking a decision, in the same way as the European Convention on Extradition had done.

103. Another important point needing attention was the handling of requests from countries that still applied the death penalty. The draft articles must include a provision allowing for extradition to be refused in such cases unless the requesting State gave assurances that the death penalty would not be sought, imposed or carried out.

104. **Mr. Alday** (Mexico) welcomed the adoption by the Commission on first reading of the 15 draft articles on crimes against humanity. His delegation agreed about the relevance of the fundamental concepts of international criminal law addressed in the draft preamble and, in particular, the emphasis placed on the primary responsibility of States to investigate and prosecute such crimes, on the importance of prevention and on the recognition of the *jus cogens* nature of their prohibition.

105. His delegation endorsed the wording of draft article 5 (Non-refoulement). That principle was enshrined in international treaties as applying to cases where there was a danger of loss of life or of becoming the victim of torture or enforced disappearance, and it was therefore consistent that it should also apply to crimes against humanity, which went further than those individual acts.

106. His delegation welcomed the focus of draft article 12 on the rights of victims, witnesses and others, including the right to lodge a complaint, to be protected against ill-treatment or intimidation and to obtain reparation for the damages caused by crimes against humanity, and was pleased that it referred to the various types of reparation and the possibility for reparation to be on an individual or collective basis, in line with the example of the Rules of Procedure and Evidence of the International Criminal Court, taking into account the scope and extent of the damage.

107. Draft articles 13 and 14, on extradition and mutual legal assistance, together with the draft annex, formed a useful basis for facilitating procedures both for countries that made extradition contingent on the existence of a treaty and for those, like Mexico, which did not impose such a condition.

108. The added value of the draft articles was that they not only codified a direct international obligation for States to define and prosecute crimes of humanity, but also promoted cooperation and mutual legal assistance in their investigation and prosecution, thereby closing a legal lacuna on the subject.

109. Mexico was pleased that draft article 15 established negotiations, arbitration and dispute settlement before the International Court of Justice as ways of settling disputes about the interpretation and application of the draft articles. It had recognized the mandatory jurisdiction of the Court in 1947 and was pleased that more and more instruments recognized the Court's jurisdiction in their texts.

110. In his delegation's view, the commentary to draft article 3 needed to be recast to reflect, in a more balanced manner and in line with the current state of debate in the literature and among international judges, the discussion on the requirement that organizations that might be perpetrators of crimes against humanity must have features similar to those of a State or must have acted at the instigation or with the acquiescence of a State. There had been very few judgments in that area, and the commentary should therefore reflect current academic debate, which regarded the ultimate purpose of the system of international criminal justice as complementing national systems.

111. The Commission should proceed cautiously with the inclusion of liability of legal persons in draft article 6, bearing in mind that some legal systems still did not recognize that concept, nor was it included in the jurisdiction of the ad hoc international tribunals or the International Criminal Court.

112. With regard to the topic of provisional application of treaties, the draft guidelines reflected a pragmatic approach and a carefully delimited content that could facilitate their use by the legal experts of States and international organizations. His delegation welcomed, in that connection, the valuable contribution of the memorandum by the Secretariat on State practice.

113. The draft guidelines were consistent with the provisions of the 1969 Vienna Convention on the Law of Treaties and other relevant sources of international law, and they clearly reflected the consensual basis of the provisional application of treaties. At the same time, they were in line with State practice to date, which ensured the coherence of the theoretical and practical content.

114. The Commission's work had taken into account a number of comments and suggestions made by his delegation in earlier debates. For example, his delegation was pleased that in paragraph (4) of the general commentary, the Commission had clarified the legal differences between "provisional application" and "provisional entry into force". In addition, draft guidelines had been included which addressed both the relationship between unilateral declarations and the provisional application of a treaty, and the relationship between that concept and internal law.

115. The approach adopted by the Commission of expanding the scope of the draft guidelines to include the provisional application of treaties by international organizations was very useful, given the growing role that such bodies played in international law. Bearing in mind the progress made on the topic, his delegation was confident that the next report would serve to round off the catalogue of guidelines. Perhaps a draft guideline should be added on termination or suspension of the application of a provisionally applied treaty, owing to its breach by a party that had agreed to the provisional application. That would be in line with article 60 of the Vienna Convention. It would also be helpful to have a set of model clauses on provisional application that States could use when negotiating international treaties.

116. **Mr. Xu** Hong (China) said that his delegation noted that the Commission had made important progress at its sixty-ninth session on a number of topics and that other developments had attracted wide attention. China would continue to support the work of the Commission by providing constructive comments.

117. His delegation appreciated the Commission's work on the topic of crimes against humanity. In terms of the overall direction of the topic, it endorsed the importance accorded to prevention and punishment. However, many provisions of the draft articles were not grounded in empirical analysis. They were mostly based on the analogous provisions of existing international conventions for combating international crimes and relied primarily on the practice of international criminal justice organs, without a comprehensive review of the existing practice and *opinio juris* of States. The provisions relating to the liability of legal persons, extradition, mutual legal assistance, and protection of the rights and interests of victims and witnesses were not backed by State practice.

118. In explaining the third draft preambular paragraph, which stated that "the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)", the Commission cited as evidence in the commentary the language contained in the commentary to its articles on responsibility of States for internationally wrongful acts, and also judgments of the International Court of Justice, the International Tribunal for the Former Yugoslavia, the Inter-American Court of Human Rights and the European Court of Human Rights. However, those references and judgments were merely general comments without a detailed analysis of relevant practice and *opinio juris* of States. As such, they could hardly prove that the prohibition of crimes against humanity had satisfied the requirement for *jus cogens* set forth in article 53 of the Vienna Convention on the Law of Treaties, namely "a norm accepted and recognized by the international community of States as a whole". In his delegation's view, given that "peremptory norms of general international law (*jus cogens*)" were an ongoing topic of the Commission, and that the practice and *opinio juris* of States concerning such important issues as the identification and effects of *jus cogens* remained unclear in some respects, the need for the draft articles to address the issue of *jus cogens* character warranted further study.

119. With respect to the definition of crimes against humanity as contained in draft article 2, and the removal of the traditional element of "committed in time of armed conflict" from the said crimes in draft article 3, his delegation reiterated the reservation it had expressed at previous sessions.

120. Further discussion was required as to the need for and reasonableness of draft article 6, paragraph 8, which drew on the provisions on the liability of legal persons contained in the Convention against Corruption, the Convention against Transnational Organized Crimes, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the International Convention for the Suppression of the Financing of Terrorism. While there were in fact cases in which the above-mentioned crimes were committed by legal persons, there were

major differences between those acts and crimes against humanity in terms of their nature and elements. The commentary was unconvincing about the likelihood of actual participation of legal persons in the proscribed acts and the need for criminalization under domestic law. Those issues were better left to the autonomous decision of States.

121. With respect to the topic "Provisional application of treaties", his delegation commended the Commission for the adoption of draft guidelines 1 to 11 and the commentaries thereto and for the progress it had made on the topic. It noted that draft guideline 6 established a "default rule", namely that the provisional application of a treaty produced the same legal effect as if the treaty were in force, unless the parties indicated to the contrary. As that formulation represented a major development of the rules governing the provisional application of treaties as defined by the Vienna Convention, the Commission should proceed with utmost caution. To determine whether the provisional application of a treaty was the same as the entry into force of the treaty, the key was to ascertain the actual intent of the parties and to closely examine the relevant practice of States, including any possible exceptions.

122. The Commission seemed to suggest, in the commentary to draft article 6, that the legal effect of the provisional application of a treaty differed from that of the treaty's being in force only in cases of termination or suspension of the treaty. The Commission should clarify whether a difference in legal effects existed in cases of reservation to treaties, State succession or other special situations.

123. **Mr. Alabrune** (France) said his delegation commended the Commission on the adoption on first reading of the draft articles on crimes against humanity. Moreover, it welcomed the Commission's reaffirmation of its commitment to multilingualism and the paramount importance of the principle of the equality of the United Nations official languages in the conduct of its work. In that connection, it was pleased that the Drafting Committee had adopted the draft articles on the topics "Crimes against humanity" and "Immunity from foreign criminal jurisdiction", together with the draft guidelines on the provisional application of treaties, in two United Nations working languages. Those efforts ensured higher-quality drafting. The same procedure should be followed for all drafts.

124. The inclusion of two new topics in the Commission's long-term programme of work added to the already long list of topics being reviewed. The large number of topics could make it more difficult to complete the work within reasonable time frames and for States to consider projects extensively. Paradoxically, at a time when the Commission's work sessions had been shortened from 12 to 10 weeks a year, the number of topics considered by the Commission had almost doubled in the course of roughly 12 years.

125. His delegation commended the Commission's efforts to establish a planning group tasked with studying its programme, procedures and working methods. The initiative was expected to be repeated in 2018, particularly in order to look further into the idea of limiting the number of topics discussed at each session. Those changes needed to be made so that the Commission and the Sixth Committee could conduct a genuine dialogue on just three or four topics when the International Law Commission's annual report was being considered. That way, as much time as necessary could be devoted to them.

126. The difficulties encountered in 2017 regarding the topic of immunity of State officials from foreign criminal jurisdiction showed the risks of the Commission working too rapidly. Some of those difficulties could have been avoided if the Commission had been able to devote more time to the consideration of that topic. A working group could have been tasked with carefully considering State practice, the interpretation of which divided the Commission's members. That would have assisted the Commission in reaching a consensus on draft article 7.

127. With regard to the topic "Provisional application of treaties", his delegation was pleased that a working group had been established to help prepare the commentaries and draft guidelines. Such an initiative — already followed in 2016 for the adoption of draft conclusions on the identification of customary international law — promoted collaborative work in the Commission and should be supported.

128. His delegation expressed appreciation for the memorandum by the Secretariat on State practice (A/CN.4/707). That was a valuable document for preparing draft guidelines on the topic. It was unfortunate, however, that the Commission had not discussed the memorandum in 2017. By definition, the Commission's drafts must be based on the study of international practice. The question could now be raised as to what extent the 11 draft guidelines adopted in 2017 reflected the widespread practice reported by the Secretariat, the consideration of which the Commission had decided to defer until 2018. The commentary to draft guideline 7 contained no reference to practice or precedents, which made it more difficult for States to take a stance on the issue. It would have been preferable to examine the memorandum in 2017, even if that would

have meant deferring the adoption of the draft guidelines and their commentaries to 2018.

129. In paragraph (3) of the general commentary, the Commission stated that "the draft guidelines allow States and international organizations to set aside, by mutual agreement, the practices addressed in certain draft guidelines if they decide otherwise". Such an affirmation could be surprising, in that the Commission's drafts were not legally binding texts. That approach also seemed contrary to the logic of the law of treaties: the rules on the matter were supplementary by nature, and States were free to decide whether to agree or not. The Commission should not lose sight of that fundamental principle.

130. Although, as stated in paragraph (1) of the general commentary, "the purpose of the draft guidelines is to provide assistance to States [and] international organizations", they could also serve as a guide for courts when the question of provisional application of treaties arose.

131. His delegation endorsed the proposition in draft guideline 4 (Form of agreement), subparagraph (b), that provisional application of a treaty could be agreed through any means or arrangements. That had the advantage of flexibility and was compatible with article 25 of the Vienna Convention. However, the Commission must clarify the point at which a resolution of an international organization should be considered an agreement on provisional application; the examples provided by the Commission did not do so.

132. With regard to the Comprehensive Nuclear-Test-Ban Treaty, the Commission stated in footnote 653 of its report (A/72/10) that "although in the negotiations that led to the Comprehensive Nuclear-Test -Ban Treaty Organization a proposal for provisional application was rejected, although the Comprehensive Nuclear-Test-Ban Treaty has no explicit provision for provisional application, and although no separate treaty has been concluded to that effect", academic scholars argued that "the resolution of the Meeting of States Signatories can be interpreted as evidence of an agreement 'in some other manner', or of an 'implied provisional application'". Such an interpretation raised questions. To a great extent, the provisional application of treaties was a matter of States' constitutional law; the existence of an agreement to provisionally apply a treaty should not be readily presumed. The Commission needed to explain in more detail the criteria required to determine whether an agreement on provisional application existed.

133. With regard to draft guideline 6 (Legal effects of provisional application), it was unclear whether the provisional application of a treaty meant strict application of the treaty — as stated in article 24, paragraph 4, of the Vienna Convention on final clauses — or a *mutatis mutandis* application. That raised the more general question of determining whether provisional application meant that the treaty became binding or only that provisional application had a permissive power. The Commission needed to clarify that point, on which it had been silent thus far.

134. The Commission's approach seemed very liberal in many respects. Yet the provisional application of a treaty was a practice that, because of its effects, must continue to be exceptional, and could not be presumed. In France, a circular dated 30 May 1997 on the drafting and conclusion of international agreements noted that provisional application "may be provided for in final provisions for reasons related to the specific circumstances, but it must remain provisional (...). It is to be prohibited in any event when the agreement may affect the rights and obligations of individuals and when its entry into force requires authorization by the Parliament".

135. In relation to draft guideline 7 (Responsibility for breach), once again, the Commission's work would have benefited from the support of international practice and precedents, to which no reference had been made. The Commission noted in paragraph (3) of the commentary that the draft guideline was aligned with the articles on the responsibility of States for internationally wrongful acts and with the articles on responsibility of international organizations. It was not certain that all those articles reflected international customary law. Pursuant to article 20 of its Statute, the Commission must present practice, precedents and doctrine in support of the draft guideline so that States could assess the content.

136. Similarly, the commentaries to draft guidelines 9 (Internal law of States or rules of international organizations and observance of provisionally applied treaties) and 10 (Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties) did not contain any reference to practice or precedents. The Commission should not proceed on the basis of abstract deductions or analogies, but should base the drafts on law. The draft guidelines on the provisional application of treaties could not be finalized on first reading unless those important clarifications were made.

137. **Mr. Tiriticco** (Italy) said that his delegation welcomed the progress made on the topic "Crimes against humanity". Enhancing the legal framework to

prevent and punish such crimes was an important objective for today's world order. The draft provided an excellent basis for the possible conclusion of an international convention which would also cover the promotion of inter-State cooperation in that regard. Italy had always been in the forefront of initiatives aimed at reinforcing respect for the rule of law and fighting impunity for crimes that offended the conscience of humankind, and it therefore reiterated its support for the general thrust of the draft articles.

138. Italy had consistently stressed the need to avoid any conflict between the draft articles on crimes against humanity and the rights and obligations of States under the constituent instruments of competent international criminal tribunals, in particular the Rome Statute of the International Criminal Court, the key judicial institution for the prosecution and punishment of the core crimes under international humanitarian law. No provision in the draft articles should detract from the Rome Statute. Italy appreciated that the concerns about the relationship with international criminal tribunals were taken into account in various parts of the draft articles, for example in draft article 3 (Definition of crimes against humanity), which reproduced article 7 of the Rome Statute verbatim, or in draft article 10 [9] (*Aut dedere aut judicare*). However, it was still in favour of adding a general formulation that would eliminate any risk of conflicting with State obligations. As indicated by the Special Rapporteur in paragraph 200 of his third report (A/CN.4/704), one possible formulation might be: "In the event of a conflict between the rights or obligations of a State under the present draft articles and its rights or obligations under the constituent instrument of a competent international criminal tribunal, the latter shall prevail".

139. With regard to draft article 11 [10] (Fair treatment of the alleged offender), the text could be improved by emphasizing the importance of applying the highest standards of respect for international human rights. For example, the reference in paragraph 1 to applicable national and international law, including human rights law, should be further qualified by stating that national law was applicable only to the extent that it was fully consistent with internationally recognized human rights.

140. Italy welcomed the detailed provisions contained in draft articles 13 (Extradition) and 14 (Mutual legal assistance). "Horizontal" inter-State cooperation was particularly important in that regard, provided that it did not replace cooperation with international criminal justice or in any way affect its effectiveness.

141. With regard to the topic "Protection of the atmosphere", his delegation welcomed the Special Rapporteur's initiative to organize a meeting with scientific experts prior to the plenary of the Commission in 2018. Input from the scientific community was essential to the Commission's future work on the topic, as had been seen in the past in connection with the topic of transboundary aquifers. Although the draft guidelines on the protection of the atmosphere were an integral part of the wider discussion surrounding environmental issues, Italy was pleased that the Special Rapporteur had remained within the limits of his mandate so as to avoid interference with ongoing political negotiations on environmental protection.

142. His Government had consistently supported the Commission's efforts, in its work on the fragmentation of international law, to enhance a systemic interpretation and application and a harmonious integration between the various bodies of international law, and it was against that background that it welcomed draft guideline 9 (Interrelationship among relevant rules), paragraphs 1 and 2. The studies referred to in paragraphs (7) to (13) of the commentary to draft guideline 13 might prove of significant assistance in pursuing harmonization with other bodies of international law.

143. His delegation regarded the intergenerational dimension as key to the principle of sustainable development, in the pursuit of a balance between the protection of common goods, such as the atmosphere, on the one hand, and economic development, on the other, and it therefore supported the inclusion in the draft guidelines of the third preambular paragraph, as proposed by the Commission.

144. Provisions requiring special consideration to be given to particularly vulnerable persons and groups were recurrent in international environmental instruments. Such consideration was all the more appropriate with regard to the potential impact of atmospheric pollution and degradation and should reflect the concern of the international community as a whole. Accordingly, his delegation supported draft guideline 9, paragraph 3.

145. Concerning the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation noted, as shown in the Commission's report, that the debate on the exceptions, or limitations, to such immunity largely reflected the lack of consensus with regard to some of the exceptions originally proposed for discussion. Italy was in the forefront in combating corruption and fostering international cooperation to that end. However, acts constituting corruption, since they were carried out for purposes of private gain, fell outside the objective scope of immunity *ratione*

materiae and therefore did not require to be exempted from it.

146. As previously stated, Italy did not regard the so-called "territorial tort exception" in draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply), paragraph 1(c), originally proposed by the Special Rapporteur, as reflecting either *lex lata* or even a trend towards *lex ferenda*. The elements of State practice referred to in the Special Rapporteur's fifth report (A/CN.4/701) were insufficient to establish the existence of the exception to the customary rule of immunity of State officials *ratione materiae*. Moreover, most of the domestic case law cited concerned civil, rather than criminal, proceedings or revolved around clandestine conduct, such as espionage or sabotage.

147. Against that background, his delegation welcomed the Drafting Committee's decision to curtail the list of crimes in relation to which immunity *ratione materiae* did not apply, while changing the wording of article 7, paragraph 1, which was evidentiary of customary international law. It was also in favour of referring to those crimes which were strictly defined in the relevant treaties to be listed in an annex to the draft articles.

148. Italy welcomed the deletion of article 7, paragraph 2, on the understanding that that was without prejudice to draft article 4, paragraph 2, on the scope of immunity *ratione personae*. His delegation also supported the deletion of article 7, paragraph 3, with a view to spelling out the deleted "without prejudice" clauses in a separate article, and hence expanding their scope of application to the whole text of the draft provisions on that topic.

149. Italy was confident that the third report by Special Rapporteur Kolodkin would serve as a useful basis for the sixth report by Special Rapporteur Escobar Hernández.

150. **Mr. Yee** (Singapore) said that his delegation acknowledged the outstanding support provided to the Commission by the Codification Division.

151. With regard to the topic "Crimes against humanity", his delegation thanked the Special Rapporteur for bringing his workshop on the drafting of a convention on the prevention and punishment of crimes against humanity to Singapore in 2016, and it commended the Commission for adopting on first reading a draft preamble, 15 draft articles and a draft annex, as well as the commentaries thereto.

152. Given the varying views of States on the precise scope and ambit of key draft articles and the complexity and sensitivity of the subject matter, the topic would benefit from further detailed consideration. The final outcome of the Commission's work should take into account States' views. Singapore would respond to the Commission's request for comments on the draft articles before the deadline of 1 December 2018.

153. On the topic "Provisional application of treaties", his delegation noted that provisional application was a tool of immense practical value in modern international life, and Singapore continued to support the Commission's work on the topic. Concerning the key aspects of legal effects, termination and the relation between internal law and provisional application, draft guideline 6 (Legal effects of provisional application) could be more definitively stated. With respect to the use of the words "same legal effects", his delegation noted that in the Commission's earlier syllabus for the topic, in paragraph 4 of annex C to document A/66/10, the term "legal effects" had in fact been used as an umbrella term encompassing four possible meanings of provisional application.

154. However, the Commission's debates and the wording of draft guideline 6 and the commentary thereto showed that the Commission had settled on the first of those four possible "legal effects", namely, that in the provisional application phase, the parties were "bound by the agreement to apply the treaty in the same way as if the treaty had entered into force". That was confirmed in paragraph (2) of the commentary to draft guideline 6, in which the Commission stated that "a treaty or a part of a treaty that is provisionally applied is considered as binding on the parties provisionally applying it". His delegation therefore suggested that the Commission should consider recasting draft guideline 6 to include an explicit reference to the binding character of provisional application, instead of using the words "legal effects". That would ensure that the meaning of provisional application was perfectly clear.

155. In the commentary, the Commission should elaborate upon the exception to the default position contained in the proviso "unless the treaty provides otherwise or it is otherwise agreed". His delegation commended the Secretariat for the wealth of information on State practice contained in its excellent memorandum and noted that it was referred to in general terms in footnote 657 in the Commission's commentary to draft guideline 6. When the Commission considered the memorandum in detail in 2018, it should cite specific examples of clauses that, in its view, would fall within the proviso "unless the treaty provides otherwise or it is otherwise agreed". That would provide a useful reference point for States and international organizations when the guidelines were eventually finalized.

156. In paragraph (5) of the commentary to draft guideline 6, the Commission stated that the termination rule was reflected in article 25, paragraph 2, of the 1969 Vienna Convention and was “without prejudice” to the question of responsibility for breach arising in the provisional application phase. In his delegation’s view, a more definitive statement should be made to the effect that, in the absence of express treaty language or agreement to the contrary, termination of provisional application could only have prospective effect. In other words, the position in the provisional application phase mirrored that currently articulated in article 70 of the 1969 Vienna Convention. As a matter of practical guidance, it would be helpful for the Commission to set that out not only in the commentary but also in the draft guidelines.

157. Singapore was pleased that the topic “General principles of international law” had been added to the Commission’s long-term programme of work, whereas it felt that the topic “Evidence before international courts and tribunals” was less pressing; as noted in the syllabus, it was already the subject of past and ongoing study by other bodies. Moreover, his delegation believed that, given their character, there would have to be some degree of latitude for the development of evidential rules on the basis of judicial and arbitral practice.

158. Singapore looked forward to the celebration of the Commission’s seventieth anniversary and supported the programme recommended for the commemorative events. As that date approached, it was more important than ever that the Commission’s work output should reflect not only the needs of States, but also new developments in international law and pressing concerns of the international community as a whole, those being two of the four criteria which the Commission itself had recommended in 1996 for guiding the identification of new topics. Singapore noted that several other important topics, including “The fair and equitable treatment standard in international investment law”, continued to be on the Commission’s long-term programme of work as of 2017. His delegation had previously spoken on the significant impact of international economic law on government activity and the amount of legal work that it generated for government legal advisers, and it would therefore be interested in learning more about the Commission’s plans for addressing the other topics on its long-term programme of work, perhaps at a suitable juncture during the commemorative events planned for 2018.

The meeting rose at 1 p.m.