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Report of the International Law Commission on the work of its sixty-ninth session (2017)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session, prepared by the Secretariat

Contents

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I. Introduction

1. At its seventy-second session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, held on 15 September 2017, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixty-ninth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 18th to 26th and 30th meetings, held from 23 to 27 and on 31 October and 1 and 10 November 2017. The Committee considered the item in three parts. The Chairperson of the International Law Commission at its sixty-ninth session introduced the report of the Commission on the work of that session (A/72/10) as follows: chapters I to V and XI at the 18th meeting, held on 23 October, chapters VI and VII at the 22nd meeting, held on 26 October, and chapters VIII to X at the 25th meeting, held on 31 October, 2017.

3. At the 30th meeting, held on 10 November 2017, the Sixth Committee adopted draft resolution A/C.6/72/L.21 entitled "Report of the International Law Commission on the work of its sixty-ninth session", as orally revised. After the General Assembly had considered the relevant report of the Sixth Committee (A/72/460), it adopted the draft resolution at its 67th plenary meeting, held on 7 December 2017, as resolution 72/116.

4. The present topical summary has been prepared pursuant to paragraph 34 of resolution 72/116, in which the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the seventy-second session of the Assembly.

5. The present topical summary consists of two parts. The first part contains seven sections, reflecting the current programme of work of the Commission: A. Provisional application of treaties (A/72/10, chap. V); B. Protection of the atmosphere (ibid., chap. VI); C. Immunity of State officials from foreign criminal jurisdiction (ibid., chap. VII); D. Peremptory norms of general international law (*jus cogens*) (ibid., chap. VIII); E. Succession of States in respect of State responsibility (ibid., chap. IX); F. Protection of the environment in relation to armed conflicts (ibid. chap. X); and G. Other decisions and conclusions of the Commission (ibid., chap. XI). The second part contains the topic, Crimes against humanity, on which the Commission completed work at its sixty-ninth session on first reading (A/72/10, chap. IV). The Commission will resume its consideration of this topic at its seventy-first session, in 2019.

II. Topics and items on the current programme of work of the Commission

A. Provisional application of treaties

1. General comments

6. Delegations generally welcomed the presentation of the 11 draft guidelines with commentaries on the topic. It was observed that the draft guidelines should be consistent with regard to the 1969 and 1986 Vienna Conventions on the Law of Treaties[1] (hereinafter, "1969 Vienna Convention" and "1986 Vienna Convention")

[1] 1969 Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, No. 18232; 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, A/CONF.129/15.

and other norms of international law. While some delegations stated that the Commission should focus on clarifying the existing legal regime on provisional application in the 1969 and 1986 Vienna Conventions without widening its scope, others pointed out that the draft guidelines might require some refinement and possibly additions, which would go beyond a restatement of the 1969 and 1986 Vienna Conventions. It was emphasized that the 1969 and 1986 Vienna Conventions provided only for the possibility of choosing provisional application and did not impose it. Some delegations considered that it was important to further emphasize the voluntary nature of the provisional application of treaties, in the general commentary, for example.

7. Some delegations noted that it would be useful to conduct a comprehensive analysis of the provisions of the 1969 and 1986 Vienna Conventions in relation to the provisional application of treaties in order to gain a better understanding of the topic and answer several open questions. The view was expressed that a difference should be made between the provisional application of bilateral and multilateral treaties. While the distinction between provisional application and provisional entry into force in the general commentary was welcomed, it was noted that the provisional application of treaties should be clearly distinguished from the temporary application of treaties.

8. Delegations welcomed the memorandum prepared by the Secretariat,[2] and noted that it warranted careful consideration at the forthcoming session of the Commission. Some delegations suggested that the memorandum be supplemented by a comparative study of provisions and practice on the provisional application of treaties in domestic law. Several delegations described the practice of their States with regard to the provisional application of treaties.

2. Specific comments

9. In relation to draft guideline 1 (scope), some delegations welcomed the broadening of the scope of the draft guidelines to include international organizations, which should be made explicit in the text of the draft guidelines. A proposal was made to indicate that the draft guidelines applied to treaties concluded in written form, which would further emphasize the link between the draft guidelines and the 1969 and 1986 Vienna Conventions. It was suggested that the purpose defined in draft guideline 2 (purpose) be retained and merged with draft guideline 1, clarifying the purpose rather than the scope of the draft guidelines.

10. In relation to draft guideline 3 (general rule), it was observed that the departure from the language of the 1969 Vienna Convention had created ambiguity as to the binding effect of provisional application and the requirement of consent by the States concerned. It was pointed out that draft guideline 3 and draft guideline 4 (form of agreement) basically addressed the same issue. Furthermore, it was noted that the agreement on provisional application by a separate treaty might have more stringent consequences than other forms of agreement on provisional application. Several delegations expressed the view that draft guidelines 3 and 4 and their commentaries did not provide enough clarity regarding the source of the obligation for provisional application, especially when States or international organizations had not taken part in treaty negotiations or, respectively, in the decision-making procedure within an international organization or conference. Several delegations asked for further explanation as to when a resolution of an international organization should be considered an agreement on provisional application of a treaty. While some delegations requested the Commission to further clarify when “a declaration by a State or an international organization that is accepted by the other States or

[2] A/CN.4/707.

international organizations concerned" could serve as a legal basis for provisional application, others urged the Commission to delete the references to provisional application by unilateral declaration in subparagraph (b) and the relevant commentary (paragraph 5) because such references addressed a hypothetical scenario only.

11. Some delegations welcomed draft guideline 5 (commencement of provisional application) and requested that the moment of commencement of provisional application be further specified. In relation to draft guideline 6 (legal effects of provisional application), several delegations expressed disagreement with the view of the Commission, as stated in the commentary, that the provisional application of treaties was not subject to the same rules on termination and suspension of the operation of treaties provided for in Part V, section 3, of the 1969 Vienna Convention. Several delegations requested further consideration of the provisions on termination and suspension of provisional application of a treaty in the light of the relevant provisions in the 1969 and 1986 Vienna Conventions. Several delegations asked the Commission to further clarify the phrase "the provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force" and how it could be reconciled with the position that provisional application was different from entry into force. Some delegations noted that the intention of the parties should determine whether provisional application produced the same legal effects as when the treaty was in force, and that the parties should make sure that their intention was clearly recorded. Concern was expressed that the provisional application of treaties, at least of multilateral treaties, would establish different kinds of legal relationships between the parties, which would lead to a situation in which flexibility might affect the integrity of a treaty.

12. While some delegations supported the inclusion of draft guideline 7 (responsibility for breach), other delegations questioned whether there was sufficient practice, also considering that not all of the articles on the responsibility of States for internationally wrongful acts and the articles on responsibility of international organizations constituted customary international law. Given the view expressed by the Commission that Part V, section 3, of the 1969 Vienna Convention was not applicable to provisionally applied treaties, the question of which legal consequences resulted from the breach of a provisionally applied treaty was raised. Furthermore, it was noted that in many cases, the identification of a breach of a treaty would occur only after its provisional application and during its definite application, which was not captured by the present tense used in the provision.

13. Several delegations pointed out that the commentary to draft guideline 8 (termination upon notification of intention not to become a party) did not explain whether termination was effective *ex nunc* or *ex tunc*, and therefore whether article 70 of the 1969 Vienna Convention applied *mutatis mutandis*. It was noted that the relationship between draft guideline 8 and article 18 of the 1969 Vienna Convention was not sufficiently set out. It was suggested that the Commission further study other possibilities of terminating provisional application or clarify in the text of draft guideline 8 that it was without prejudice to other methods of terminating provisional application. Moreover, it was noted that the commentary to the draft guideline should make clear that it was the provisional application that was being terminated and not the treaty as such which was not yet in force. Some delegations noted that a party might notify the termination of the provisional application of a treaty due to the lengthy ratification procedure but still become a party to the treaty later. That was particularly the case with regard to multilateral treaties the termination of which should be dealt with separately from bilateral treaties. The Commission was asked to address the question of how long provisional application could or should last, particularly in those cases in which a long period had elapsed since the commencement of provisional application. In addition, the Commission was

requested to further consider the inclusion in the draft guidelines of a safeguard in relation to the unilateral termination of provisional application by, for example, applying *mutatis mutandis* the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions. Moreover, the Commission was asked to examine the legal effects of provisional application after its termination, taking into account that the termination of provisional application might have to be distinguished from the cessation of the legal effects of provisional application.

14. Several delegations welcomed the decision of the Commission to further clarify the effects of reliance on and reference to internal law within the context of the provisional application of treaties in draft guidelines 9 to 11. In relation to draft guideline 9 (internal law of States or rules of international organizations and observance of provisionally applied treaties), some delegations requested that the Commission provide sufficient examples, and make reference to relevant norms such as constitutions or the constituent instruments of international organizations in the commentary. The Commission was commended for including a reference to the rules of the organization in the provision. It was noted that draft guideline 10 (provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties) reflected a well-established principle based on article 46 of the 1969 and 1986 Vienna Conventions, but the Commission was also requested to include more examples from practice.

15. Draft guideline 11 (agreement to provisional application with limitations deriving from internal law of States or rules of international organizations) was welcomed, particularly for the flexibility that it provided with regard to internal law and the distinction drawn with regard to the situation addressed in draft guideline 10. It was noted that the draft guideline and its commentary struck a careful balance that allowed for provisional application without prejudice to the internal laws or rules of a potential party to the treaty while making such qualifications conditional on being sufficiently clear to all relevant parties from the outset. However, it was pointed out that draft guideline 11 seemed to contradict draft guideline 9, which did not allow the invocation of internal law as a justification for failure to perform international obligations arising from provisional application. It was suggested that the drafting of the draft guideline be improved so as to better reflect the voluntary and exceptional nature of the provisional application of treaties. The Commission was asked to further clarify the legal consequences in cases where a State or international organization made a declaration on the provisional application of a treaty while other States or international organizations did not express clear acceptance of such a declaration. In addition, the question was raised of whether the language “the right of a State” was the most appropriate, given that it was unclear what the source of a such a right would be.

3. Final form

16. Several delegations welcomed the preparation of draft guidelines and stressed that they should be of practical value. Delegations also supported the approach of maintaining the flexibility implied in the provisional application of treaties and the brevity of the draft guidelines. Several delegations observed that the preparation of model clauses could be useful.

B. Protection of the atmosphere

1. General comments

17. Several delegations welcomed the work of the Commission on the topic. While emphasizing their commitment to the protection of the atmosphere, other delegations

expressed doubts with regard to the usefulness of the work of the Commission on a topic that concerned many policy issues regarding a broad range of socioeconomic, development and scientific questions that fell outside the scope of the primary mandate of the Commission. It was noted that existing international obligations concerning the protection of the environment generally covered many issues associated with the protection of the atmosphere and provided for sufficient flexibility. The work of the Commission on the topic was likely to complicate rather than facilitate ongoing and future negotiations, thus possibly inhibiting State progress in the environmental area.

18. Some delegations recalled the importance of the 2013 understanding, particularly in relation to draft guideline 9 (interrelationship among relevant rules) that had been adopted at the current session. While some delegations noted that the Commission had diverted from the 2013 understanding, others reiterated their concern regarding the blanket exclusion by the understanding of many rules and principles that were an integral part of the law on the protection of the atmosphere, such as the precautionary principle, the preventive principle, the polluter pays principle and the common but differentiated responsibility principle. Some delegations observed that the principle of common but differentiated responsibility and respective capabilities, based on the approach of the 2015 Paris Agreement, offered a balanced approach to the special situation and needs of developing countries, but it was also noted that the inclusion of that principle in the draft guidelines would undermine its evolution. It was suggested that the Commission take into account existing international treaties so as to avoid imposing additional obligations on States and focus on streamlining the current legal framework, which some delegations considered to be fragmented. The view was expressed that the Commission was the most appropriate body to close the legal gaps between those existing legal instruments, and should be given appropriate space and flexibility to work on the topic.

2. Specific comments

19. Several delegations welcomed the provisional adoption at the current session of three new preambular paragraphs, which related to the interaction between the atmosphere and the oceans, the special situation of low-lying coastal areas and small island developing States and the interests of future generations. Some delegations supported the recognition that small island developing States were more vulnerable to atmospheric degradation and pollution. It was noted that the preambular paragraphs provisionally adopted by the Commission during its previous session illustrated the high degree of scientific technicality of the topic, which was difficult to comprehend from a legal point of view. Several delegations emphasized the importance of the well-established principle of intergenerational equity, but it was pointed out that the principle should also be balanced with the atmospheric pollution and degradation suffered by the current generation. It was proposed that mention be made of a number of international agreements relevant to the protection of the atmosphere and that a reference to the principle of the common heritage of mankind be incorporated in the preambular paragraphs of the draft guidelines.

20. Several delegations highlighted the reference to the relationship between the atmosphere and the protection of the oceans, including with regard to the risk of sea-level rise. While some delegations emphasized that all law of the sea matters were adequately regulated by the United Nations Convention on the Law of the Sea,[3] others noted that the Convention did not address the atmosphere itself or circumstances in

[3] United Nations, *Treaty Series*, vol. 1833, No. 31363.

which oceans might affect the atmosphere, and called for further efforts in overcoming those gaps.

21. In relation to draft guideline 1 (use of terms), as adopted previously by the Commission, it was emphasized that atmospheric degradation constituted a serious and growing problem. The Commission was asked to more clearly define the term "atmosphere" so as to distinguish it from other territorial domains, especially the area above the sea. In relation to the previously adopted draft guideline 2 (scope of the guidelines), the Commission was requested to more clearly delineate the scope of the draft guidelines in order to address possible overlaps between the rules on the protection of the atmosphere and existing rules on the protection of the environment in general. The Commission was also asked to emphasize that the draft guidelines applied without prejudice to the precautionary principle, the polluter pays principle and the common but differentiated responsibility principle and technology transfer to developing States. The view was reiterated that the obligation to protect the atmosphere, as stated in the previously adopted draft guideline 3 (obligation to protect the atmosphere), existed in international law and was of an *erga omnes* nature. It was noted that draft guideline 4 (environmental impact assessment), as adopted previously, should be treated with caution and required further consideration.

22. Some delegations recalled their criticism of the previously adopted draft guideline 7 (intentional large-scale modification of the atmosphere), which seemed to imply that measures of "geo-engineering" were generally permissible, and suggested including a reference to the 1992 Convention on Biological Diversity.[4] In relation to draft guideline 8 (international cooperation), as adopted previously, the Commission was asked to further clarify the term "joint monitoring" in paragraph 2, and to broaden the scope of the draft guideline to include other actors relevant to and other forms of international cooperation.

23. Several delegations welcomed draft guideline 9. While some delegations commended the Commission for merging the four proposed sectoral draft guidelines proposed by the Special Rapporteur into one, others expressed regret that the consolidated draft guideline 9 had deprived the draft guidelines and their commentaries of the detailed discussion provided by the Special Rapporteur in his fourth report. It was observed that the different branches of international law were interdependent, and that the approach of the Commission might help to overcome fragmentation and avoid overlap and conflict. The view was expressed that draft guideline 9, which might have utility for theoretical purposes, lacked support in practice. Moreover, some delegations noted that interrelationship was a general issue sufficiently covered in the report of the Study Group on Fragmentation of International Law,[5] and that neither doctrine nor State practice supported the idea that the international norms relating to the protection of the atmosphere created a separate branch of international law. It was suggested that an in-depth study on the relationship between the protection of the atmosphere and other fields of international law should be undertaken to identify the common factors before linking the protection of the atmosphere to any other field.

24. In relation to paragraph 1, several delegations supported the references to the principles of the harmonization and systemic integration of different rules of international law and the rules set forth in the 1969 Vienna Convention. While caution

[4] United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79.

[5] "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (available on the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)).

was expressed that the application of those principles should not reduce the intended protection of the atmosphere, the point was emphasized that the draft guideline should not be interpreted as subordinating other rules of international law to the protection of the atmosphere. Some delegations pointed out that the references to systemic integration and harmonization might be unnecessary because those principles were expressly stated in article 31, paragraph 3 (c), of the 1969 Vienna Convention. A number of delegations also noted that it was highly unrealistic to expect that any conflicting international obligations could be reconciled through politically oriented changes or variations in the identification, interpretation or application of those obligations. A number of delegations criticized the reliance on "mutual supportiveness", which was a policymaking tool rather than a legal principle. While some delegations supported the reference to particular areas of international law, concern was expressed that such a reference implied a special relationship between the protection of the atmosphere and those areas to the exclusion of other relevant areas. Noting the ambiguity inherent in that approach, it was suggested that specific examples be removed from the draft guideline altogether. Some delegations welcomed the link between the protection of the atmosphere and human rights, while others criticized the references to human rights and non-discrimination in the text of the draft guidelines or in the commentaries, and asked for further clarification.

25. Some delegations expressed support for paragraph 2, particularly for its emphasis on harmonization. It was stated that paragraph 2 constituted the only workable element in draft guideline 9, and could assist in avoiding fragmentation of international law. It was underlined that paragraph 2 should not be understood as requiring that new rules for the protection of the atmosphere had to be compatible with all existing rules of international law. While some delegations stated that paragraph 2 constituted progressive development of international law, others noted that the paragraph stated the obvious: in every area of international law, new rules should be developed harmoniously in relation to other rules of international law.

26. Several delegations appreciated the reference in paragraph 3 to persons and groups that were particularly vulnerable to atmospheric pollution. It was noted that the groups mentioned in the paragraph not only could, but rather should, be included among the particularly vulnerable groups. The view was expressed that the concern for particularly vulnerable groups should permeate the draft guidelines as a whole and not be limited to matters of interpretation. The observation was made that paragraph 3 introduced a new consideration that did not guide the application of the preceding paragraphs, and should therefore be included in a separate draft guideline. Furthermore, it was stated that those persons or groups were not vulnerable to atmospheric pollution and degradation *per se* but to their effects. The Commission was asked to revisit its understanding of "particularly vulnerable" persons and groups because those groups that were particularly vulnerable to climate change might not be the same as those that were vulnerable to atmospheric pollution and degradation.

3. Future work

27. While some delegations supported the intention of the Special Rapporteur to consider questions of compliance and implementation and dispute settlement in 2018, others reiterated their concern that such consideration may be inconsistent with the 2013 understanding. The view was reiterated that it was possible to extract principles from the law on State responsibility that would be particularly helpful in guiding States within the field of atmospheric pollution and degradation. While appreciating the importance of ensuring compliance with the rules pertaining to the protection of the atmosphere, it was noted that any compliance mechanism to be created had to be limited to the subject of protection of the atmosphere and focus on issues that were not already the subject of or addressed by existing, related mechanisms.

28. While some delegations looked forward to seeing the completion of the draft guidelines, on first reading, others reiterated their concerns regarding the work on the topic. The Commission was also requested to suspend or discontinue its work on the topic.

C. Immunity of State officials from foreign criminal jurisdiction

1. General comments

29. Delegations highlighted the importance of the topic on the Commission's agenda in general. Several delegations emphasized the need to strike a balance between the fight against impunity for serious international crimes and the need to preserve stability in inter-State relations. Some delegations insisted that perpetrators of grave international crimes must be held to account. A number of delegations recalled that immunity constituted a basic principle of the international legal order. It was pointed out that immunity should not be equated with impunity, given that officials could still be prosecuted in their national courts, by international courts, or on the basis of a waiver of immunity. A number of delegations underlined the procedural nature of immunity, arguing that immunity did not depend on the gravity or legality of the act and that it should be distinguished from jurisdiction. On the other hand, the point was made that immunity could have substantive effects if it resulted in impunity.

30. Several delegations urged the Commission to indicate to what extent the draft articles constituted an exercise in codification (reflecting *lex lata*) and where they engaged in progressive development of international law (reflecting *lex ferenda*). Moreover, several delegations disputed the suggestion that the draft articles, and in particular the recently adopted draft article 7 (crimes under international law in respect of which immunity *ratione materiae* shall not apply), reflected customary international law.

31. Some delegations asserted that the Commission had gone beyond codification (*lex lata*) and progressive development (*lex ferenda*) to propose "new law". A number of delegations pointed out that, in order to provide guidance to domestic courts and authorities, the Commission would have to rely on existing law. Other delegations maintained that the topic required both codification and progressive development, and urged the Commission to take into account the fundamental values of the international community.

32. Several delegations emphasized the link between exceptions and limitations to immunity and procedural safeguards and guarantees. It was noted that the two aspects had to be considered in conjunction. In that regard, a suggestion was made to establish an international mechanism to prevent misuse of exceptions and limitations to immunity. It was also suggested that decisions concerning immunity should be made in consultation with the sending State. Furthermore, some delegations suggested that particular attention should be paid to issues of timing, invocation and waiver of immunity. The work on those aspects by the previous Special Rapporteur on the topic was recalled in that regard.

2. Specific comments

33. Several delegations expressed their support for the Commission's position that no exceptions or limitations applied to immunity *ratione personae*. Some delegations emphasized the temporal nature of immunity *ratione personae* and urged the Commission to clearly distinguish it from immunity *ratione materiae*. While some delegations maintained that immunity *ratione personae* could only be enjoyed by the head of State, head of Government and minister for foreign affairs, others argued that

its scope extended beyond the *troika* to other high-level officials who frequently had to travel for their work.

34. It was suggested that the approach to immunity *ratione materiae* in draft articles 5 (persons enjoying immunity *ratione materiae*) and 6 (scope of immunity *ratione materiae*), provisionally adopted at the sixty-eighth session (2016), contained premature generalizations and risked being inaccurate and misleading, as the draft articles did not reflect the full extent of State practice. Moreover, it was asserted that immunity *ratione materiae* extended beyond officials to all those who exercised State authority, for example in the absence or on behalf of the Government.

35. Several delegations expressed concern over the adoption of draft article 7 by a vote, which was unusual in the recent practice of the Commission. Delegations noted that a lack of consensus in the Commission on the existence and desirability of exceptions and limitations to immunity *ratione materiae* could affect the topic's final reception in the Sixth Committee, that it might risk fragmentation of international law and that it could affect the Commission's standing with Member States. Several delegations urged the Commission to proceed cautiously with a view of reaching a consensual outcome, particularly if it were to engage in progressive development of international law.

36. Several delegations expressed general support for draft article 7 (crimes under international law in respect of which immunity *ratione materiae* shall not apply), as provisionally adopted by the Commission, with some of those delegations emphasizing the close relationship between draft article 7 and procedural safeguards and guarantees, and others calling for further consideration of the issue. Several other delegations argued that the State practice cited was too scarce and scattered to support the text of draft article 7, and a number of delegations noted that further study and consideration was required. Yet other delegations rejected the underlying premise of the draft article entirely and called for its deletion. While some delegations agreed with the Special Rapporteur that a trend existed towards exceptions and limitations to immunity for serious crimes in international law, other delegations did not recognize the existence of such a trend.

37. Several delegations criticized the analysis of State practice in paragraph (5) of the commentary to draft article 7. In particular, it was asserted that the analysis confused the practice relating to State immunity and immunity of State officials; that it focused on civil rather than criminal proceedings; that account had not been taken of cases not prosecuted due to immunity; that there was insufficient analysis of the reasons for denial of immunity by States; that practice disproving an alleged trend had not been considered; that the analysis ran counter to recent international jurisprudence; that there was a bias towards case law from particular regions; that the focus was on treaty-based exceptions and limitations to immunity, rather than on those based on customary international law; that not enough attention was paid to treaty practice; and that the jurisdiction of international criminal courts had no bearing on the jurisdiction of domestic courts. It was suggested that the Commission establish a working group to further examine the practice of States.

38. A suggestion was also made to include in the title of the draft article direct reference to exceptions and limitations, although support was expressed for the title as provisionally adopted by the Commission.

39. With regard to paragraph 1 of draft article 7, the use of the phrase "immunity *ratione materiae* … shall not apply" was questioned, as it left open the question whether immunity applied in the first place. It was pointed out, however, that the formulation followed the model of the 2004 United Nations Convention on

Jurisdictional Immunities of States and Their Property.[6] Some delegations welcomed the inclusion, in paragraph 1, of a list of specific crimes to which exceptions and limitations to immunity would apply. Other delegations suggested replacing the list of crimes with a general reference to "international crimes", as that would allow for flexibility in the development of international law and avoid conflicts with definitions in domestic systems. Another suggestion was to replace the list with procedural provisions on who would decide on the application of immunity and what constituted the evidentiary threshold for applying the exceptions. Some delegations considered the list arbitrary and called upon the Commission to clarify the reason for the selection of the list of crimes in paragraph 1. The Commission was cautioned not to attempt to redefine or rewrite the concept of crimes under international law. It was also suggested that the list lacked grounding in State practice and ought to be removed.

40. Some delegations stated that the crimes listed in paragraph 1 should be limited to the core international crimes, namely the crime of genocide, crimes against humanity and war crimes. Other delegations expressed their support for the inclusion of the crimes of apartheid, torture and enforced disappearance. The suggestion was made by some delegations to add to the list the crime of aggression. There was also opposition to the addition of that crime, as it was argued that acts of aggression should be subject to the jurisdiction of international courts only, rather than domestic courts. A number of delegations agreed with the exclusion of corruption from the list, as the crime of corruption could never constitute an official act, remained insufficiently defined, and its prosecution was open to abuse. Delegations also expressed opposing views regarding the inclusion of the "territorial tort exception", with some expressing support and others arguing against inclusion.

41. Some delegations expressed support for paragraph 2 and the list of treaties contained in the annex to the draft articles. Suggestions were made to include the 1949 Geneva Conventions and their additional protocols[7] as a source for the definition of war crimes, and the Rome Statute of the International Criminal Court[8] as a source for the definition of apartheid, torture and enforced disappearance. Some delegations questioned the usefulness of the annex, since the criteria for the inclusion of conventions remained unclear; the annex included conventions that did not enjoy universal participation; and States would continue to define international crimes differently in their domestic jurisdictions. It was suggested that the list be replaced with a general reference to the sources of definitions of international crimes.

42. Some delegations welcomed the deletion of the "without prejudice" clauses that formed part of draft article 7 proposed by the Special Rapporteur, arguing that such clauses should apply to the draft articles as a whole. Other delegations would have preferred to retain such clauses in draft article 7.

3. Future work

43. Several delegations looked forward to the forthcoming report of the Special Rapporteur, dealing with procedural safeguards and guarantees. The Commission was requested to consider the link between immunity and the gravity of the unlawful act; the link between immunity and peremptory norms of international law (*jus cogens*); the possibility of implicit waiver of immunity in the absence of invocation; the idea of introducing an obligation to "waive immunity-or-prosecute"; and the consequences of the differences between monist and dualist systems of international law. The Commission was urged not to rush the first reading of the project, but to ensure consensus on the draft articles as a whole. It was also suggested that, upon

[6] General Assembly resolution 59/38, annex.

[7] United Nations, *Treaty Series*, vol. 75, Nos. 970–973, and vol. 1125, Nos. 17512–17513.

[8] United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

consideration of the procedural safeguards and guarantees, the project should be put on hold for State practice to settle.

4. Final form

44. Some delegations noted that if the Commission aimed at progressively developing international law or proposing "new law", the outcome of its work should be a draft treaty on immunity of State officials from foreign criminal jurisdiction, which States could elect to join or not.

D. Peremptory norms of general international law (*jus cogens*)

1. General comments

45. While delegations generally supported the Commission's work on the topic, some delegations expressed doubts in the light of uncertainties surrounding peremptory norms of general international law (*jus cogens*).

46. A number of delegations expressed general agreement that article 53 of the 1969 Vienna Convention ought to be the starting point for identifying the criteria of *jus cogens*, and some delegations stated that the topic should stay within the realm of that Convention. Other delegations considered that the topic should not be limited to the law of treaties, or that it would be best dealt with at a conceptual and analytical level. It was also suggested that the topic should focus on the identification of *jus cogens*, and that it should be aligned with the Commission's work on the identification of customary international law and on general principles of law. The lack of practice, and the fact that it was important not to draw conclusions where no State practice existed and that a cautious approach was required, were also emphasized.

47. Whereas a number of delegations voiced their support for the development of an illustrative list of peremptory norms, some did so without qualification, while others supported a non-exhaustive list based on a clear legal rationale and on prudence. Furthermore, it was noted that, in identifying peremptory norms, the Commission should include grounds and evidence on which it would base its selection, or that the selection should be based on States' consent and that peremptory norms should fulfil criteria already identified by the Commission.

48. Some delegations nonetheless advised against preparing an illustrative list of *jus cogens* norms, stating either that that had already been done in other work of the Commission, or that they only favoured an approach addressing ways in which norms might be identified. It was noted that such a list would soon become obsolete, that there was no consensus on what to include, and that an illustrative list could inhibit the open and flexible character of *jus cogens*. It was underlined that, if a list were included, it should refer to article 52 of the 1969 Vienna Convention or the list included in the commentary to the 2001 articles on responsibility of States for internationally wrongful acts.[9]

49. Delegations expressed general support for the change of the title of the topic from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)", as it was more in line with the 1969 Vienna Convention.

[9] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

2. Specific comments

50. Comments were made on the draft conclusions considered in the Drafting Committee. Draft conclusion 2 [3 (2)] (general nature of peremptory norms of general international law (*jus cogens*)) was questioned by some delegations that were of the view that it could be moved to the preamble or that it was at variance with article 53 of the 1969 Vienna Convention. It was noted that the three-element approach reflected in the draft conclusion lacked support in State practice. The view was expressed that hierarchical superiority was a consequence, not a characteristic or precondition or criterion of *jus cogens*. The need to clarify whether the hierarchical superiority of *jus cogens* would affect procedural rules, in particular in relation to immunities, was also emphasized. Furthermore, while some delegations supported the reference to "fundamental values", others expressed doubts.

51. While some delegations welcomed draft conclusion 3 [3 (1)] (definition of a peremptory norm of general international law (*jus cogens*)), supporting, for example, the exclusion of elements foreign to the 1969 Vienna Convention, which had been moved to draft conclusion 2, others called for clarification as to the distinction between descriptive elements and the criteria of *jus cogens* and their practical effects. The need to provide a definition of "general international law" was emphasized.

52. Support was expressed by some delegations for the criteria for the identification of *jus cogens* set out in draft conclusion 4 (criteria for identification of a peremptory norm of general international law (*jus cogens*)), as well as for the two-pronged test referred to therein. It was, however, noted that draft conclusion 4 could be merged with draft conclusion 3, with which it overlapped, and that a more in-depth study was required to ensure an accurate definition of the concept "the international community of States as a whole". Furthermore, an additional criterion for a norm to qualify as part of *jus cogens* was suggested, namely, that it be "accepted and recognized by the international community of States as reflecting and protecting its fundamental values".

53. With regard to draft conclusion 5 (bases for peremptory norms of general international law (*jus cogens*)), delegations suggested that the Commission distinguish between the criteria and sources of *jus cogens* in different conclusions, as well as between sources that could serve as a basis for *jus cogens* norms (such as customary international law) and those that only reflected *jus cogens* (such as treaty law). While support was expressed by some delegations for different bases or sources of law for *jus cogens*, and some delegations considered that customary international law was the most common basis for the formation of *jus cogens*, other delegations did not share that view and considered that further work was required on presumptions, in line with the Commission's work on customary international law or general principles of law.

54. Support was voiced for treaty law to serve as a basis for *jus cogens* norms. Yet, some delegations considered that treaties could reflect *jus cogens* but not serve as its basis, and others expressed doubts as to whether treaty provisions could be used for that purpose at all. It was emphasized that caution was required when including treaties as part of general international law. Divergent views were conveyed with regard to general principles of law, with some delegations in favour of using them as a basis for peremptory norms while others expressed doubts in that regard.

55. The view was expressed that clarification should be provided on the use of Article 38 (1) of the Statute of the International Court of Justice as a basis for determining peremptory norms of international law. It was stated that the relationship between general principles of law, customary international law and treaty law needed further elaboration.

56. The importance of acceptance and recognition by States in draft conclusion 6 (acceptance and recognition) was welcomed. So was the position of the Commission that the recognition of *jus cogens* norms should be different from the recognition for the purpose of general principles of law.

57. It was, however, emphasized that the reliance on States' practice was too limited to reach such conclusions, and that evidence that a norm was accepted and recognized as *jus cogens* might be limited. It was also noted that draft conclusion 6 duplicated draft conclusion 4, that the manner in which the *opinio juris cogentis* of States was to be established required clarification, and that both the role of acquiescence, and the role of the practice of States in identifying peremptory norms required clarification.

58. Delegations expressed divergent views as to the way in which to understand the concepts of "international community as a whole" and "very large majority" in draft conclusion 7 (international community of States as a whole). While it was considered, on the one hand, that recognition by all States, even if not active in all cases, was required, or that "very large majority" must mean "virtually all States", it was also noted, on the other hand, that the expression "very large majority of States" was controversial, as it did not refer only to the number of States, but also attributed importance to their representative character. Hence, it was recommended that a definition or clarification be included in the commentary.

59. Concern was also expressed over the fact that the expression "very large majority" departed from the 1969 Vienna Convention and should be reconsidered as it was very difficult to implement in practice.

60. Some other delegations considered that acceptance and recognition by all States was not required. It was observed that *jus cogens* norms were not based on consent alone. For some delegations, acts of international organizations could aid in establishing acceptance and recognition, and acts of non-State actors were similarly relevant to the identification of such norms. For other delegations, acts of non-State actors could not be considered relevant.

3. Future work

61. Some delegations suggested that the Commission address the relationship between *jus cogens* and *erga omnes* obligations, and between universal applicability of *jus cogens* and the possibility of persistent objectors. They also recommended considering the issue of evidence of recognition of a peremptory norm through the practice of States rather than other actors.

62. Some delegations proposed considering the element of modification that existed under article 53 of the 1969 Vienna Convention and addressing the possibility of considering violations of peremptory norms in the context of limitations and exceptions to immunities. The suggestion was reiterated to include the issue of new norms of *jus cogens* that derogated from previous ones and their effect, including who determined the status of *jus cogens* norms or the existence of a possible conflict of norms, within the scope of the study.

63. While some delegations supported the possibility of considering the concept of regional *jus cogens* while others did not, a number of delegations looked forward to the Special Rapporteur's third report on the consequences of *jus cogens*.

E. Succession of States in respect of State responsibility

1. General comments

64. While a number of delegations welcomed the inclusion of the topic in the Commission's programme of work, highlighting the need to clarify applicable rules, several other delegations expressed doubts as to the usefulness and timeliness of the topic. In the view of the latter delegations, the complexities of the topic and the absence of clearly established customary international law rules in that area made the codification of such rules difficult, if not impossible in practice.

65. A number of delegations considered that the principle of non-succession regarding State responsibility reflected the current law on the matter, while several others were inclined to support the preliminary conclusion of the Special Rapporteur that the "traditional" theory of non-succession had recently been challenged. Several delegations suggested that the Commission should conduct further analysis of State practice and case law in order to substantiate any conclusion in that regard. The proposal was made that the title of the topic should be changed to "State responsibility problems in cases of succession of States" in order to avoid the implication that the succession of States in respect of State responsibility was indeed an established rule.

66. It was suggested that the rules governing succession of States should not affect the rights and obligations of liberation movements on the basis of the "clean slate" theory. The view was advanced that continuation of States should not be assimilated to succession of States and should thus remain beyond the scope of the topic.

2. Specific comments

67. A number of delegations expressed support for draft article 1 (scope) as proposed by the Special Rapporteur and provisionally adopted by the Drafting Committee. Some delegations expressed satisfaction at the narrow focus of the project on secondary rules concerning State responsibility rather than liability, responsibility of international organizations, or succession of Governments. For their part, other delegations expressed the view that the scope should be extended to the responsibility of States towards international organizations, the responsibility for acts of wrongdoing not necessarily in breach of international law, as well as cases where the predecessor State and the successor State both existed at the same time. It was suggested that the reference to articles 34 to 36 of the 1969 Vienna Convention be made explicit.

68. Support was expressed for draft article 2 (use of terms) as proposed by the Special Rapporteur and provisionally adopted by the Drafting Committee with a minor modification. In particular, the adoption of language identical to the two Vienna Conventions on succession[10] was welcomed. In that regard, it was suggested that the draft article, or at least the commentaries thereto, should reflect the principle that territorial change in legal and peaceful ways was an essential requirement for the succession of States.

69. A number of delegations expressed doubts in relation to draft article 3 (relevance of the agreements to succession of States in respect of responsibility), as proposed by the Special Rapporteur, in particular because of its reference to the distinctions between types of agreements ("devolution agreements" and others), which were not

[10] Vienna Convention on Succession of States in respect of Treaties, United Nations, *Treaty Series*, vol. 1946, No. 33356; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, see Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, vol. II (United Nations publication, Sales No. E.94.V.6).

clearly established in State practice. Doubts were also expressed as to the necessity and timeliness of the draft article, which could perhaps be simplified. Delegations emphasized that the acquiescence of third States in relation to devolution agreements should not be taken for granted, in conformity with articles 34 to 36 of the 1969 Vienna Convention.

70. In relation to draft article 4 (unilateral declaration by a successor State), as proposed by the Special Rapporteur, while support was expressed, a number of delegations voiced concerns, including as to the timeliness and necessity of the draft article. The view was expressed that paragraph 2 should be made clearer. It was suggested that situations where a third State did not accept a transfer of obligations should be considered. Also, it was recommended that a reference should be made to the guiding principles adopted by the Commission on unilateral acts of States.

3. Future work

71. Support for the Special Rapporteur's proposed future work programme was expressed. Several delegations underlined the need to carefully study issues of responsibility, by taking into account every specific type of succession. It was suggested that the Commission should make clear whether it was setting out *lex lata* or *lex ferenda*. It was proposed that the structure of the work should not follow the structure of the two Vienna Conventions on succession, but should rather revolve around the specific elements of State responsibility. The issue of a potential link between succession to a treaty and succession to the obligations arising from the breach of such a treaty was raised. The need for clarification in cases of complicated forms of reparation ordered by a court was mentioned. The attention given to the issues of the plurality of responsible States and shared responsibility was welcomed, and the Commission was encouraged to apply the same attention to instances of plurality of injured States.

4. Final form

72. Some delegations were of the view that the outcome of the work should not take the form of draft articles but rather a set of principles, guidelines, summary conclusions or model clauses. Support for the subsidiary nature of the text to be adopted was also expressed. Nonetheless, the view was also expressed that the result of the Commission's work should take the form of draft articles with commentaries entailing rules applicable in case of absence of a special agreement between the successor and the predecessor State. Doubts were raised as to the benefit of having default rules, as well as in relation to a potential outcome conflating codification and progressive development of international law. A few delegations were of the view that it was premature to decide on the final form of the Commission's work.

F. Protection of the environment in relation to armed conflicts

1. General comments

73. Several delegations expressed support for the work of the Commission on the topic, as well as for the establishment of a Working Group at its sixty-ninth session. The importance of the topic was highlighted and the appointment of a new Special Rapporteur welcomed.

74. Some delegations expressed concern in connection with the scope of the topic, emphasizing that international humanitarian law was the *lex specialis* in the area of protection of the environment in relation to armed conflicts and that the Commission should be careful not to redefine existing rules of international humanitarian law. The view was expressed that the protection of the environment in relation to armed

conflicts should not be restricted to the laws of warfare and, accordingly, the draft principles on the topic should clarify the relationship between international humanitarian law, international criminal law, international environmental law, human rights law, and treaty law.

75. While the view was expressed that the existing legal rules on protection of the environment in international armed conflicts did not necessarily apply to non-international armed conflicts, it was stressed that no distinction should be drawn for the topic between international and non-international armed conflicts, as both could cause irreversible damage to the environment. A concern was raised that several of the draft principles were phrased in mandatory terms.

76. The need for active engagement and interaction with relevant international organizations was mentioned.

2. Specific comments

77. The view was expressed that draft principle 5 [I-(x)] (designation of protected zones), which allowed States to designate areas of major environmental and cultural importance as protected areas, contradicted draft principle 9 [II-1] (3) (general protection of the natural environment during armed conflict), since the latter admitted that the environment could be attacked if it had become a military objective.

78. With regard to draft principle 8 (peace operations), the point was made that the draft principle introduced new substantive legal obligations in respect of peace operations, going beyond existing legal requirements. A similar concern was raised in relation to draft principle 16 (remnants of war), which would expand existing obligations under the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (1980)[11] to clear, remove or destroy explosive remnants of war to include “toxic and hazardous” remnants of war.

79. In relation to draft principle 9 [II-1] (general protection of the natural environment during armed conflict), it was suggested that paragraph 3 should be amended so as not to accept that the natural environment could be attacked if it became a military objective.

3. Future work

80. The Commission was encouraged to address other areas relating to the topic, such as the protection of the environment in situations of occupation, protection of the environment in relation to hybrid conflicts, and the relationship of the topic with the law of the sea. Some delegations suggested that a more general reference to existing rules and principles on responsibility and liability would be preferable at that stage. While the Commission was asked to exercise caution in relation to issues of complementarity, support was expressed for a focus on complementarity. It was suggested that the concerns of special vulnerable categories should also be taken into account. The importance of the continuation of the work already done on the topic and of the coherence between the work undertaken to date and the future work by the new Special Rapporteur was underlined.

4. Final form

81. On the outcome of the work on the topic, a question was raised as to how the compilation of various provisions of existing legal instruments could enhance

[11] United Nations, *Treaty Series*, vol. 1342, No. 22495, p. 13.

environmental protection in the context of armed conflicts. It was suggested that the final form of the draft principles should be considered at a later stage.

G. Other decisions and conclusions of the Commission

1. Future work of the Commission

82. Some delegations expressed concern regarding the number of topics on the agenda of the Commission and stressed that the Commission needed sufficient time to consider each topic during its sessions. Some delegations indicated they would welcome a decision by the Commission to put the topic "Settlement of international disputes to which international organizations are parties" on its programme of work, since it was a field of utmost practical importance in which the Commission could continue its work on the law of international organizations. It was suggested that the Commission address the topic "The fair and equitable treatment standard in international investment law", which was an important topic for the work of government legal advisers.

83. A number of delegations welcomed the inclusion of two new topics on the long-term programme of work of the Commission. Delegations generally welcomed the inclusion of the topic "General principles of law", noting that it would complement the Commission's existing work on the sources of international law identified in Article 38 (1) of the Statute of the International Court of Justice. Some delegations indicated that the topic was ripe to be included on the programme of work of the Commission and suggested that it should be given priority. It was noted that the topic should be consistent with other related topics on the agenda of the Commission. Several delegations indicated that the Commission should provide an authoritative clarification on the nature, scope and function of that source of law. The view was expressed, however, that there might not be sufficient State practice available to do so. Some delegations added that the Commission could help by clarifying the criteria and methods to identify general principles of law from other sources of law. According to another view, the work of the Commission on the topic should not be based on theories rejecting any deduction of rules of international law from rules of national law. As for the outcome of the topic, it was suggested that the Commission could set out such principles, while according to another view, the Commission should rather prepare a set of draft conclusions.

84. Several delegations questioned the inclusion of the topic "Evidence before international courts and tribunals", stressing that rules of evidence were varied and that it was for international courts and tribunals themselves, and not for the Commission, to assess the value of evidence. Some delegations stressed that unifying evidence before different courts with diverse jurisdiction and structures would lead to further fragmentation. The exclusion of international criminal courts and tribunals and of the various human rights international courts and monitoring bodies from the scope of the topic was also questioned. It was suggested that addressing the topic was not a pressing matter for the Commission since it had already been the subject of past and ongoing study by other bodies. According to another view, the final outcome of the topic would be of little relevance to States. Other delegations welcomed the inclusion of the topic in the long-term programme of work of the Commission.

85. The inclusion of several new topics on the long-term programme of work of the Commission was proposed, including "Duty of non-recognition of a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law", "Legal implications of climate change on the ocean", "Legal implications of sea-level rise", and "The right to self-determination".

2. Programme and working methods of the Commission

86. In general, delegations welcomed the commemorative events planned in 2018 for the seventieth anniversary of the Commission, which it was felt would strengthen the interaction between the Sixth Committee and the Commission.

87. Several delegations welcomed the decision of the Commission to hold the first part of its seventieth session in New York, which would lead to fruitful exchanges between the Sixth Committee and the Commission. Concerns were voiced in that regard, however, and the view was expressed that interactions with Governments should be conducted at the Sixth Committee or in written statements, and that such interactions should remain exceptional and concern the celebration of the seventieth anniversary.

88. Some delegations supported the Commission's reaffirmation of its commitment to the principle of multilingualism and the paramount importance of the principle of equality of the United Nations official languages in the conduct of its work. The view was expressed that the Drafting Committee should adopt provisions in two official languages for all topics.

89. Several delegations welcomed the contribution of the Commission to advancing the rule of law.

III. A topic on which the Commission completed work at its sixty-ninth session

Crimes against humanity

1. General comments

90. Delegations generally welcomed the adoption, on first reading, of the entire set of draft articles and the draft preamble, at the sixty-ninth session of the Commission. It was emphasized that the draft articles should complement and be compatible with existing legal instruments and regimes relevant to the topic, in particular the Rome Statute of the International Criminal Court. It was suggested that a specific provision that would eliminate any risk of conflicting State obligations under the draft articles and under the constituent instruments of the international criminal tribunals should be included. The view was expressed that the draft articles should be disconnected from the Rome Statute.

91. The importance of the prevention and punishment of crimes against humanity was acknowledged. A number of delegations welcomed the focus of the draft articles on measures to be taken by States at the national level and on enhancement of inter-State cooperation. It was reiterated that the Commission should avoid addressing the issue of civil jurisdiction and immunity. The view was expressed that the draft articles, the draft preamble and the commentaries thereto lacked a comprehensive review of the existing practice and *opinio juris* of States; further analysis and study of the question of the *jus cogens* character of the prohibition of crimes against humanity was called for.

2. Specific comments

92. While support was expressed for draft article 2 [2] (general obligation), the view was expressed that, by omitting the link between crimes against humanity and armed conflict, the provision deviated from customary international law.

93. Some delegations expressed support for draft article 3 [3] (definition of crimes against humanity), while the view was expressed that further discussion on that draft article was needed. It was suggested that paragraph 1 (h) of the draft article should include definitions of war crimes and genocide, or include a reference to other legal sources that had a bearing on that matter.

94. Further elaboration on draft article 4 [4] (obligation of prevention) in order to make it more specific and prescriptive was suggested. A concern was raised regarding the scope of the expression "other organizations" in paragraph 1 (b); it was stated that the commentary to the provision referred also to non-governmental organizations, but it did not provide a legal basis for an obligation of States to cooperate with non-governmental organizations, or the practice of States in that respect.

95. Several delegations expressed support for the adoption of draft article 5 (*non-refoulement*), with some delegations welcoming the inclusion of the principle as part of a broader concept of the obligation of prevention. The view was expressed that draft article 5 did not accurately reflect the systematic nature of crimes against humanity. A concern was raised about what seemed to be an expansive approach taken in draft article 5 in the light of the existing international human rights law.

96. A number of delegations expressed support for draft article 6 [5] (criminalization under national law). The importance of the relationship between the work of the Commission on the topic "Immunity of State officials from foreign criminal jurisdiction" and paragraph 5 of draft article 6 [5] was emphasized.

97. Some delegations expressed support for draft article 7 [6] (establishment of national jurisdiction). Clarifications and further analysis were sought in relation to the exercise of extraterritorial jurisdiction and to the conditions for passive personality jurisdiction under paragraph 1 (c).

98. Some delegations expressed support for draft article 8 [7] (investigation).

99. With respect to draft article 9 [8] (preliminary measures when an alleged offender is present), the concern was raised that paragraph 3 seemed to disproportionately burden a State that had taken into custody a person alleged to have committed an offence, since such a State was required to notify the States that had established jurisdiction over the offence. It was pointed out that the State that had taken the alleged offender into custody might not be aware of which States had established jurisdiction over the offence.

100. Several delegations expressed support for draft article 10 [9] (*aut dedere aut judicare*).

101. Regarding draft article 11 [10] (fair treatment of the alleged offender), it was suggested that the importance of applying the highest standards of respect for international human rights should be emphasized in the provision. The view was expressed that paragraph 3 should either be deleted or replaced by a clear rule protecting the rights of detainees against restrictions based on national law.

102. A number of delegations welcomed the inclusion of draft article 12 (victims, witnesses and others). Support was expressed for the fact that reparations had been envisaged for both material and moral damages in paragraph 3, as well as for the flexibility given to States to determine the appropriate form of reparation. The view was expressed that paragraph 3 required further consideration, as the extent of a State's obligation to provide reparations and other remedies was not clear. Some delegations suggested that the draft article should contain a definition of the term "victim". It was also suggested that the draft article would be improved if the question of reparation was addressed in a separate provision, in order to make it clear that there

were two distinct stages of the proceedings (participation in the proceedings and the award of compensation to the victims).

103. Several delegations expressed support for draft article 13 (extradition). In relation to paragraph 2, support was expressed for the exclusion of "political offence", while the view was also expressed that such exclusion conflicted with the contemporary practice on extradition. While support was expressed for paragraph 6 and the flexibility afforded to States, further clarification was requested from the Commission on the grounds for a refusal of an extradition request based on national law. Further explanation on the inclusion of the term "culture" in paragraph 9 was sought. It was suggested that specific provisions on the issues of conflicting requests for extradition and of requests from countries that still applied the death penalty should be included.

104. A number of delegations supported the inclusion of draft article 14 (mutual legal assistance). Support for paragraph 6, which would offer the basis for mutual legal assistance to be rendered in accordance with national laws and regulations concerning the protection of personal data, was also expressed. It was suggested that the draft article would benefit from the inclusion of a provision requiring States to share information concerning the possible commission of crimes against humanity. A preference was expressed for a shorter version of the provision so as to avoid overshadowing the main focus of the draft articles and undermining its overall balance.

105. With respect to the draft annex, it was suggested that paragraph 8 should provide that mutual legal assistance might be refused if the request was not in conformity with the provisions of the draft articles themselves.

106. While the view was expressed that draft article 15 (settlement of disputes) should be left for States to negotiate and decide, along with other final clauses, some delegations supported its inclusion. Further explanation was requested on paragraph 2 and the reasons why it did not include a time limit for negotiations to be concluded. Some delegations welcomed the fact that the draft article granted States flexibility to opt out in paragraph 3, and a suggestion was made to include a time limit for States to make a declaration to opt out.

107. Some delegations noted the absence of a provision on the prohibition of amnesty, while others cautioned against a blanket prohibition of amnesty, which could be a solution within the context of conflict resolution.

3. Final form

108. Support for the Commission's work in developing a draft convention on the prevention and punishment of crimes against humanity in order to end impunity, facilitate cooperation and assistance, and fill the existing gap in international law, was expressed by a number of delegations. The question, however, was raised as to whether the object of the work on the topic should be a convention. Attention was drawn to the international initiative to conclude a treaty for mutual legal assistance and extradition for domestic prosecution of the most serious international crimes, the need for close cooperation between the Commission and the promoters of the initiative, and the possibility that the draft articles and the initiative could coexist.