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

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The meeting was called to order at 10.10 a.m.

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

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and XI of the report of the International Law Commission on the work of its sixty-ninth session (A/72/10).

2. **Mr. Smith** (United Kingdom), referring to the topic "Crimes against humanity", said that his Government was broadly supportive of the draft articles provisionally adopted by the Commission on first reading. It acknowledged that there was currently no general multilateral framework governing the national prosecution of crimes against humanity and saw benefit in continuing to explore how an extradite-or-prosecute regime in respect of such crimes could operate. His delegation appreciated the careful consideration that the Special Rapporteur, the Drafting Committee and the Commission had given to the interrelationship between their work and the Rome Statute of the International Criminal Court. Indeed, a future convention on the topic would need to complement, rather than compete with, that Statute. Such a convention could facilitate national prosecutions, thereby strengthening the complementarity provisions of the Statute. Expansion of the scope of the work into issues such as civil jurisdiction and immunity would be unhelpful. The United Kingdom welcomed the fact that the Commission had kept the draft relatively simple, along the model of earlier *aut dedere aut judicare* conventions, in order to ensure wide ratification of the future convention.

3. Draft article 5 (Non-refoulement) went beyond the protections of the Convention relating to the Status of Refugees, adopting an expansive approach which his delegation queried, given the protections already guaranteed by international human rights law, including those covered under article 3 of the European Convention on Human Rights, which prohibited torture and inhumane or degrading treatment. Draft article 13 (Extradition) was modelled on the United Nations Convention against Corruption. Although that in itself was unlikely to be problematic, it gave rise to a number of considerations. First, it would be important to assess the interplay between the draft article and relevant domestic extradition laws, which gave effect to existing international extradition obligations, and enabled the conclusion of ad hoc extradition arrangements with territories with which a country had no prior extradition agreements. Second, it would also be important to consider the interaction between the draft article and domestic legislation that gave effect to obligations under the Rome Statute. His country's International Criminal Court Act 2001, for example, featured provisions on the operation of extraterritorial jurisdiction for certain criminal offences, including crimes against humanity.

4. Draft article 14 (Mutual legal assistance) was likewise modelled on equivalent provisions in the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime. His delegation was broadly supportive of the draft article, in particular paragraph 8 thereof, which made clear that the mutual legal assistance provisions would not apply where the requesting and requested States were parties to a separate mutual legal assistance treaty.

5. Turning to the topic "Provisional application of treaties", he said that the United Kingdom welcomed the extension of the scope of the draft guidelines provisionally adopted so far by the Commission to include treaties to which international organizations were party. In respect of draft guideline 6 (Legal effects of provisional application), his delegation would seek further clarity on the distinction between the legal effects of a provisionally applied treaty and the legal effects of a treaty that was in full force. Although the draft guideline indicated that the legal effects were the same, in paragraph (5) of its commentary, the Commission made it clear that provisional application did not give rise to the whole range of rights and obligations that derived from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. As such, although the substantive legal effects might be the same, the technical and procedural legal effects might be different. That point should be made clear in the body of the draft guideline and the relationship between the draft guideline and the provisions of the Vienna Convention on the Law of Treaties should be further elaborated. The Commission should give further thought to that and develop the commentaries accordingly.

6. Draft guideline 7 (Responsibility for breach) made it clear that breach of a provisionally applied treaty entailed international responsibility. However, it did not indicate the consequences of a breach on the operation of the provisionally applied treaty itself. In its commentary, however, the Commission indicated clearly that, in its opinion, part V, section 3, of the Vienna Convention would not apply. It could be helpful, therefore, for the Special Rapporteur to elaborate on the effects of a breach on the provisionally applied treaty itself.

7. His delegation welcomed the pragmatic and flexible approach taken by the Special Rapporteur and

the Commission to the provisional application of treaties, underlining the prerogative of sovereign States to enter into international agreements in a manner that best suited their international relations and domestic considerations at the time. However, given the difficulties that had arisen in the interpretation of some provisional application clauses, the Commission should begin work on draft model clauses with commentary to cater for the various modes of provisional application, particularly in respect of the completion of internal procedures. Model clauses which were fully explained and unambiguous could be adopted, where and when appropriate, to ensure legal certainty.

8. **Mr. Meza-Cuadra** (Peru) said that his delegation supported a future convention on the prevention and punishment of crimes against humanity, which would complement the existing legal framework comprising, inter alia, the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949 and the Additional Protocols thereto, and the Rome Statute of the International Criminal Court. His delegation took note with interest of the reference in the draft articles to inter-State cooperation with a view to preventing crimes against humanity and investigating, prosecuting, extraditing or punishing persons who committed such crimes; in that regard, the draft articles were compatible with the Rome Statute. With regard to cooperation to detain persons who committed such crimes and who were the subject of an arrest warrant issued by the International Criminal Court, it would be interesting to consider ways of doing so while taking into account the procedures of the Assembly of States Parties to the Rome Statute with regard to non-cooperation.

9. Although his delegation was still assessing the scope of the draft articles, it welcomed the inclusion of the definition of crimes against humanity in line with article 7 of the Rome Statute, as well as the reference to the principles of *aut dedere aut judicare* and non-refoulement, and the right to obtain reparation; it also wished to highlight the importance of having an article on the irrelevance of official capacity. It was important, however, to note the absence of a clear prohibition of a general amnesty for crimes against humanity, especially considering the odious nature of such crimes, which deeply shocked the conscience of humanity.

10. Concerning the provisional application of treaties, he said that his country did not have any domestic norm referring directly to the topic, with the exception of article 25 of the Vienna Convention on the Law of Treaties, which had been incorporated into the country's legal order under the 1993 Constitution. Upon acceding to that Convention, Peru had issued a reservation indicating that application of the Convention was subject to the process of treaty signature, approval, ratification, accession and entry into force stipulated by its constitutional provisions. In that connection, draft guideline 11 of the draft guidelines provisionally adopted so far by the Commission was of particular importance. There were examples of cases in Peru where the decision had been made to provisionally apply a treaty, including the Colombia and Peru–European Union Trade Agreement. However, such decisions were not taken by a single organ or authority, but by a series of State organs or authorities, depending on the stage of the treaty process where such decision was taken. In addition, the provisional application of a treaty terminated with the treaty's entry into force. The provisional application of a treaty gave rise to a legal obligation in international law between the subjects of international law that had adopted the said treaty. In such case, there was a legal obligation to apply, in whole or in part, the provisions of the treaty, even if said treaty had not entered into force.

11. His delegation welcomed the Commission's decision to hold the first part of its seventieth session in New York, which would help in improving the interaction between the Commission and the Sixth Committee. It also welcomed the decision to hold events in 2018 in New York and Geneva to commemorate the anniversary; as well as the decision to include the topic "Succession of States in respect of State responsibility" in the Commission's programme of work and to appoint Mr. Pavel Šturma as Special Rapporteur. The outcome of the work on that topic might be more effective for the adoption of guidelines than the elaboration of a draft convention on the topic.

12. Lastly, his delegation welcomed the inclusion in the Commission's long-term programme of work of the topics "General principles of law" and "Evidence before international courts and tribunals". It also welcomed the work programme of the Commission for the remainder of the quinquennium.

13. **Mr. Sharma** (India), addressing the topic "Crimes against humanity", said that considering the existing international mechanisms, including the International Criminal Court, available to deal with the subject matter of that topic, the necessity of the Commission's work on the topic was still not clear. Consequently, any work on the topic could lead to duplication of effort with the work already being undertaken within other existing regimes.

14. With regard to the topic "Provisional application of treaties", he said that a nation's political, social and

legal system had an important role to play in provisional application, including the manner of expressing consent to a treaty. Since India was a dualistic State, treaties did not automatically form part of its domestic law; their provisions became applicable only after being approved through internal procedures.

15. Concerning the Commission's long-term programme of work, his delegation in principle had no objection to the inclusion of the new topic "General principles of international law". However, those principles were already being considered under a number of other topics, including "Identification of customary international law" and "*Jus cogens*". It would therefore be advisable to devise a single topic that would cover the general principles of international law, the identification of customary international law and *jus cogens*, rather than have three separate topics addressing essentially the same thing.

16. His delegation welcomed the decision to hold the first part of the Commission's seventieth session in New York, as that would help to improve the interaction between the Commission and the Sixth Committee.

17. **Mr. Koch** (Germany), referring to crimes against humanity, said that a possible convention on the topic would not only complement treaty law on core crimes, but would also foster inter-State cooperation with regard to the investigation, prosecution and punishment of the perpetrators of such crimes. A future convention on the topic should provide further impetus to the aspiration to end impunity for atrocity crimes.

18. As an ardent supporter of the International Criminal Court, Germany welcomed the clear orientation towards the language of the Rome Statute adopted in the draft articles on crimes against humanity provisionally adopted by the Commission. Making every effort to ensure compatibility with existing rules and institutions of international criminal law, in particular the International Criminal Court and its Statute, would be crucial for the success of that endeavour. His delegation welcomed the fact that, following its first reading of the draft articles, the Commission did not propose any additional institutional mechanisms under the draft convention, as that would have created room for diverging interpretations.

19. **Mr. Mahnič** (Slovenia) said that his delegation took note of the Commission's decision to include the new topics "General principles of law" and "Evidence before international courts and tribunals" in its long-term programme of work. While Slovenia agreed that the first topic could be of interest to States, it was disinclined to support the inclusion of the second topic, since it was up to each international court or tribunal to assess any evidence presented before it.

20. Slovenia agreed with the Commission that in the selection of new topics, it should be guided by new developments in international law and the pressing concerns of the international community as a whole. Given the limited capacities of the Commission and Member States, topics should therefore be chosen with regard to their relevance to the challenges of the international community, and with sufficient prudence regarding the number of issues included in the Commission's programme of work. A topic should not be avoided simply because States had different views on it or because of the challenges it posed. The Commission's programme of work should also reflect the capacity of the Commission and States to address specific issues in sufficient depth. In that light, his delegation considered that the programme of work should be expanded to include topics that would likely satisfy the current needs of the international community in international law. In that respect, it proposed adding the topic "Right to self-determination" to the programme of work.

21. Turning to the topic "Crimes against humanity", he said that Slovenia wished to recall the joint initiative it had undertaken with Argentina, Belgium, the Netherlands and Senegal for the adoption of a new treaty on mutual legal assistance and extradition, which would cover the crime of genocide, war crimes and crimes against humanity. While Slovenia supported the Commission's work on the topic of crimes against humanity and would continue to contribute to its examination, it also recognized the particular merit of the proposed initiative, which sought to offer a modern framework for mutual legal assistance and extradition for all three groups of the most serious crimes under international law. The initiative and the topic of crimes against humanity had points in common, but also important differences. Both efforts were therefore complementary and should co-exist and continue to develop side by side.

22. On the topic "Provisional application of treaties", he said that the draft guidelines provisionally adopted so far by the Commission were an appropriate form of the outcome of the Commission's work to assist States and international organizations in their treaty practice. However, the draft guidelines required refinement and possibly additions. In that connection, over-reliance on the language of the Vienna Convention on the Law of Treaties and the reproduction thereof in the guidelines were effective in providing useful guidance. His delegation was concerned, however, by the Commission's departure from the Convention's language

in draft guideline 3 (General rule). The use of the word "may" in the draft guideline might be misunderstood if not read in conjunction with the commentary to the draft guideline, which itself was not very clear. That issue had already been discussed at the Vienna Conference on the Law of Treaties, where the Drafting Committee had replaced the word "may" with the word "is", because the former might imply a non-binding effect. The reappearance of the word "may" reversed the developments arising from the *travaux préparatoires* and might call into question draft guideline 6 (Legal effects of provisional application). His delegation therefore proposed the following wording for draft guideline 3: "States or international organizations may agree in the treaty itself or in some other manner to apply a treaty or a part of a treaty provisionally between certain or all of them pending its entry into force between them". In that case, the word "may" would relate more clearly to the mutually agreed decision to provisionally apply a treaty or part of it, not to the effect of such an agreement. In the commentary to the draft guideline, his delegation proposed replacing the first and second sentences of paragraph (2) with the following: "The opening phrase confirms that provisional application of a treaty or a part of it is subject to an agreement between States or international organizations".

23. In relation to draft guideline 8 (Termination upon notification of intention not to become a party), several issues would benefit from further analysis and inclusion at least in the commentary. It should be made clear, again at least in the commentary, that it was the provisional application that was being terminated, not a treaty as such that was not yet in force. Apart from other potential consequences of that conceptual difference between treaty termination and termination of provisional application, the differentiation between bilateral and multilateral treaties might become relevant. In the case of bilateral treaties, the termination of provisional application by one of the two signatories in effect implied the termination of the treaty as well. In the case of multilateral treaties, that was not necessarily true, since the remaining signatories might continue to provisionally apply the treaty and bring it into force.

24. The questions that arose in both cases were whether the notifying State could subsequently "change its mind" and ratify the treaty, and whether the notification was irreversible. The latter option did not appear at first sight to contradict article 25(2) of the Vienna Convention, which provided for notification by a signatory of "its intention not to become a party to the treaty", rather than notification that it "shall not" become a party. Such an interpretation would enable a signatory to terminate its provisional application obligations and simultaneously open the door for it to still become a party, a result that might benefit the treaty as such.

25. With regard to the termination of provisional application, draft guideline 8 gave no guidance on the relationship between that termination regime and the regime provided for in article 18 of the Vienna Convention, which contained a very similar termination provision. It appeared reasonable to believe that notification to terminate a provisional application implied a fortiori that a State made clear its intention to terminate its interim obligation under article 18 as well.

26. Another aspect of the relationship between articles 25 and 18 was how they interacted during provisional application. The question was whether the interim obligation implied that a State was bound to apply the treaty provisionally as if it had been in force and in such a manner that did not defeat the object and purpose of the treaty, as provided for in article 18. Consequently, if only certain treaty provisions were being applied provisionally, the question was whether the interim obligation applied to all provisions or only to those not being provisionally applied, or whether provisional application overrode the interim obligation, since it entailed responsibility for a breach of a more concrete obligation under the treaty being provisionally applied. In addition, in the commentary to draft guideline 8, the Commission did not explain whether termination was effective *ex nunc* or *ex tunc*, and therefore whether article 70 of the Vienna Convention applied mutatis mutandis. It appeared reasonable to believe that since provisionally applied treaty provisions were binding on the signatories, as stated clearly in draft guideline 6, the said article could also apply.

27. **Mr. Celarie Landaverde** (El Salvador), referring to the topic "Crimes against humanity", said that since the inclusion of that topic in the Commission's programme of work, his delegation had always indicated that it was important to start considering the drafting of a text devoted exclusively to crimes against humanity, which it considered international crimes that constituted serious and cruel acts against humanity. As a result, his delegation reiterated its support for the topic and its readiness to collaborate in its development.

28. With regard to the draft articles on the topic adopted by the Commission on first reading, his delegation welcomed the stipulation in draft article 6 [5] (Criminalization under national law) that States had an obligation to ensure that crimes against humanity constituted offences in national criminal law, in order to ensure the effective implementation of the orientations that the draft articles were intended to develop. His

delegation was concerned, however, that the ways of engaging in a criminal activity that paragraph 2 of the draft article purported to regulate included only committing or attempting to commit crimes against humanity, and ordering, instigating, inducing, assisting and aiding and abetting the commission of such crimes, leaving out the concept of indirect perpetrator.

29. His delegation continued to note with concern that although the Commission included that concept in its commentary to the draft article, the draft articles did not address the regulation of indirect perpetrators in the framework of a power structure or organization. In concrete terms, the "perpetrator behind the perpetrator" might be held criminally responsible owing to his ability to oversee the commission of the criminal act. The criminal responsibility framework established by the draft articles should clearly differentiate between the various forms of perpetration and participation, taking into account developments in international criminal law. The draft articles should therefore include the concept of indirect perpetration, which was fully established in international law and had been recognized not only in contemporary doctrine but also in the case law of the International Criminal Court.

30. The regulation contemplated in paragraph 5 of draft article 6 [5] reaffirmed the application of the principle of individual criminal responsibility, since a person holding an official position who committed any of the offences mentioned in the draft articles was not absolved of responsibility. With respect to requests for mutual legal assistance, his delegation noted with concern that the draft annex, which applied to draft article 14, stipulated that mutual legal assistance might be refused "if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests". The regulation as contemplated offered a conditional interpretation with regard to mutual legal assistance; for that reason, his delegation found that the scenario in question constituted another ground for refusal, which should not apply to crimes against humanity, given their serious impact on human dignity.

31. Turning to the topic "Provisional application of treaties", he said that his delegation supported the detailed analysis conducted by the Special Rapporteur and the need for clarity on the operation of provisional application of treaties, in particular on the draft guidelines provisionally adopted so far by the Commission. It should be borne in mind that the interpretation of those guidelines should be systematic and consistent with the contents of other existing norms on the topic, including the 1969 Vienna Convention on the Law of Treaties, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, and other norms of international law. Specifically, the interpretation might clarify the regulation of situations involving, inter alia, termination of provisional application of treaties. The general regime of such termination called for a distinction between various scenarios, including termination of the provisional application of a treaty by its entry into force in the relevant States or international organizations, and determination of when the State or international organization which applied the treaty or a part thereof provisionally communicated its intention not to be a party to the treaty to other States or international organizations. The interpretation might also call for regulation analogous to that of the draft guidelines, especially in cases where it was possible to obtain just one single formulation with all the legal possibilities that might exist for different topics, such as termination of provisional application, clear violation of the domestic law of States and the rules of the organization upon giving its consent to the provisional application of a treaty.

32. His delegation supported the continued consideration of the topic of provisional application of treaties, bearing in mind that future work of the General Assembly might include a review of documents such as the 1946 Regulations on Registration and Publication of Treaties and International Agreements, and the Treaty Handbook of the Secretariat, to ensure that their content was consistent with current treaty practice, particularly with regard to the regulation of provisional application in accordance with the draft guidelines currently under review.

33. His delegation took note of the topics recommended for inclusion in the Commission's long-term programme of work and in the report on the work of its sixty-ninth session (A/72/10). It also welcomed the inclusion of the topics "General principles of law" and "Evidence before international courts and tribunals". There was a need to further develop the first topic, because in any national, regional or international legal order, courts might be faced with circumstances that were not governed by any conventional norm, custom or legal precedent. In that event, it would be necessary to apply existing precepts of the general principles of law. Future work on the topic would provide a better orientation as to the nature, scope and method of identifying such principles. As for the topic of evidence before international courts and tribunals, his delegation felt that its progressive development would strengthen the procedural nature of the work of such

courts and tribunals in considering the facts presented in a given international dispute.

34. Lastly, his delegation welcomed the Commission's decision to hold its seventieth session in New York and Geneva, as that would help to improve the interaction between the Commission and the Sixth Committee.

35. **Mr. Musikhin** (Russian Federation) said that the Commission's position of authority with regard to the codification and progressive development of international law conferred on it a special responsibility with respect to the selection of topics for consideration, the methodology for studying them and the conclusions that it presented to States for consideration. International law was a living organism that developed alongside international relations but it must also serve as a firm and stable foundation for the entire international system. Members of the academic community and various non-governmental organizations had their own opinions regarding future areas of development of international law. However, the main drivers of the development of international law were States themselves, and the Commission should be guided by their opinions and practice. Its approach should be one of healthy conservatism.

36. On the topic of crimes against humanity, his delegation would be providing comments in due course on the draft articles adopted by the Commission on first reading. Study of the draft guidelines on the protection of the atmosphere and the draft principles on protection of the environment in relation to armed conflicts revealed that there was insufficient State practice to suggest that additional regulation was needed; there were already international instruments that adequately regulated relations among States in both areas. The addition of general principles on the need for cooperation, the exchange of information and the conclusion of additional agreements contributed little to legal certainty. His delegation therefore had doubts about the benefits of further work in those two areas.

37. The provisions of international law concerning the immunity of State officials from foreign criminal jurisdiction applied to all such officials and constituted customary norms arising from the principle of State sovereignty, which was a founding principle of international law. Since immunity was of a procedural nature, and was thus not a question of substantive law, it was regrettable that the Commission had begun considering the question of exceptions to immunity before considering its procedural aspects. The formulation of procedural rules for the application of immunity could vitiate a number of the arguments for the establishment of exceptions to immunity. His delegation shared the Commission's view that exceptions did not apply to persons enjoying immunity *ratione personae*. Such immunity was not limited to the troika of Heads of State, Heads of Government and Ministers for Foreign Affairs but also applied to other high-ranking State officials, such as Ministers of Defence.

38. Neither the Commission's report nor the report of the Special Rapporteur (A/CN.4/701) provided evidence, in particular from State practice, that exceptions to immunity *ratione materiae* currently existed in international law. The exceptions set out in draft article 7, which the Commission had adopted by vote, were not confirmed by consistent practice of national or international courts or by national law. There had also been no agreement in the Commission on the question of whether such exceptions were to be considered *lex lata* or *lex ferenda*. Regrettably, objective consideration of the issue had been replaced by a subjective desire to create a new way of prosecuting State officials. The question of whether exceptions to immunity existed in international law and the question of whether they should exist were not one and the same, just as the concepts of immunity and impunity were not one and the same. The issue before the Commission was not how to prosecute officials but whether there were exceptions to the general rule of immunity of an official of one State from the national (not international) criminal jurisdiction of another State. It was clear from the very title of the topic that there were other ways of prosecuting the perpetrator of a crime, for example, in the person's own State or in properly constituted international bodies. Furthermore, the State could decide to waive the immunity of the official in question. The artificial establishment of an international legal norm that did not reflect reality and that States emphatically opposed could not constitute either codification or progressive development of the law and thus did not fulfil the purposes of the Commission's work.

39. His delegation welcomed the decision to change the title of the topic "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)", which would help to conclusively define the scope of the topic by excluding the question of whether regional peremptory norms existed. The Commission was also right to base its work on article 53 of the Vienna Convention on the Law of Treaties. Referring to the draft conclusions provisionally adopted by the Drafting Committee at the sixty-eighth and sixty-ninth sessions (available on the Commission's website), he said that draft conclusion 3 [3 (1)] (Definition of a peremptory norm of general international law (*jus cogens*)), went in the right direction. His delegation was pleased to note that the

provision that *jus cogens* norms protected fundamental values, were hierarchically superior to other rules of international law and were universally applicable — a provision which did not appear in the Vienna Convention — had been moved from draft conclusion 3 to draft conclusion 2 [3 (2)] (General nature of peremptory norms of general international law (*jus cogens*)). Nonetheless, draft conclusion 2 raised a number of questions. It was not of a normative nature and its content could therefore be moved to the preamble or the commentary. Furthermore, the concept of "the international community of States as a whole", which was central *to jus cogens* norms, had been replaced in draft conclusion 2 by the concept of "the international community". That introduced legal uncertainty. Draft conclusion 3 and the subsequent draft conclusions referred to two criteria for the identification of *jus cogens* norms: they must be norms of general international law; and they must be accepted and recognized by the international community of States as a whole as norms from which no derogation was permitted, and which could be modified only by a subsequent norm of general international law having the same character. The fact that *jus cogens* norms invalidated treaties that conflicted with them, which was not only an effect of such norms but also a criterion for identifying them, should be added to the definition of those norms.

40. Draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)) stated that customary international law was the most common basis for peremptory norms, and that treaty rules and general principles of law could also serve as bases for such norms. His delegation did not agree with that approach. The fundamental peremptory norms of international law had been established pursuant to a universal treaty — the Charter of the United Nations — which had been the first instrument to enshrine, for example, the principle of the non-use of force. The Commission should correct the draft text accordingly.

41. With regard to draft conclusion 6 (Acceptance and recognition), his delegation agreed with the Commission's view that the recognition of *jus cogens* norms was different from the recognition of norms of general international law and that a distinction should be drawn between them.

42. With regard to draft conclusion 7 (International community of States as a whole), paragraph 1 referred correctly to the recognition of *jus cogens* norms by "the international community of States as a whole", which signified consensus among all States. His delegation disagreed with the provision in paragraph 2 that recognition by a large majority of States was sufficient. Recognition by all States was required, although in some cases such recognition might not be active in nature: a *jus cogens* norm could be identified on the basis of active recognition by a large majority of States and a lack of objection from the remaining ones.

43. In its future work on the topic, the Commission should consider the issue of evidence of recognition of a norm as a *jus cogens* norm. Such evidence should be drawn from the practice of States rather than that of other actors. The question of preparing a list of *jus cogens* norms should be approached with some degree of caution; at the current stage, the Commission should focus on the identification of general requirements for determining *jus cogens* norms.

44. It was not currently clear whether work on the topic "Succession of States in respect of State responsibility" was likely to be productive. The Special Rapporteur, in his first report on the topic (A/CN.4/708), stated that it was necessary to shed more light on the question of whether there were rules of international law governing the transfer of rights and obligations arising from the international responsibility of States for internationally wrongful acts, and to research State practice and other relevant evidence required for the identification of norms of international law in order to decide whether such norms existed. It was his delegation's understanding that the Commission had not yet reached a conclusion as to whether a general rule on succession of States in respect of responsibility existed, but that it was leaning towards the view that there was a general rule of non-succession to which there might be exceptions.

45. The codification of international law was possible only where rules of customary law already existed. There was no customary rule establishing the possibility of the automatic transfer to a successor State of obligations arising from an internationally wrongful act. The Special Rapporteur had presented examples of judicial decisions that, in his view, provided evidence of a trend towards reconsideration of the general rule of non-succession, but those decisions contained no findings on the existence of a general rule on succession or non-succession. The most important such decision referred to by the Special Rapporteur was that handed down by the International Court of Justice in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case. However, in that case, the Court had ruled that Slovakia had secondary obligations to Hungary primarily under the Special Agreement between the two parties in which they had agreed that Slovakia was the sole successor of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. The case documents made it clear that the responsibility of Slovakia for the

acts of Czechoslovakia was not based on any general rule on succession in respect of international responsibility. The Special Rapporteur also cited agreements on the transfer of responsibility in situations of succession as further evidence of a departure from the rule of non-transfer of responsibility. However, it was not clear whether the parties to such agreements had been acting on the basis of a belief that there was a rule in international law establishing the transfer of responsibility in situations of succession or merely on the basis of the rule of freedom to conclude treaties. Such agreements could therefore not be considered to confirm the existence of a rule on the transfer of responsibility in situations of succession. The Special Rapporteur also referred in his report to the dissolution of the Soviet Union as an example of succession that had taken place in the second half of the twentieth century, whereas it was well known that the Russian Federation was the continuator of the Soviet Union. Continuation was not part of the topic of succession.

46. His delegation was not certain at the current stage that work on the topic reflected the needs of States. It was well known that the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, both based on texts prepared by the Commission, had not garnered the necessary support of States.

47. Concerning the topic of provisional application of treaties, he reiterated that the Commission should study the special nature of provisional application in the case of different types of international treaties — bilateral treaties, open multilateral treaties and multilateral treaties with a limited circle of parties — and should also study the special nature of provisional application based on a unilateral declaration or decision of an international organization and the special nature of termination in the case of a treaty that was being provisionally applied. It should prepare model clauses on the topic.

48. Lastly, his delegation welcomed the inclusion of the topics “Evidence before international courts and tribunals” and “General principles of law” in the Commission’s long-term programme of work.

49. **Ms. Telalian** (Greece), referring to the draft articles on crimes against humanity adopted by the Commission on first reading, said that her delegation noted with interest the Commission’s decision to include a draft article on the principle of non-refoulement (draft article 5), which was based on an equivalent provision in the International Convention for the Protection of All Persons from Enforced Disappearance. That draft article must be examined taking into account the well-established and comprehensive non-refoulement obligations of States deriving from international conventions and the case law of regional and international judicial and quasi-judicial bodies. It should also be borne in mind that the inclusion of the article could cause the text to overlap with other treaty regimes.

50. With regard to draft articles 13 (“Extradition”) and 14 (“Mutual legal assistance”), she recalled that, following a lengthy debate, the Commission had opted for long-form rather than short-form articles in order to include the most advanced and detailed provisions on those matters in the text. However, those draft articles were so extensive that they risked overshadowing the main topic of the text. The division of the draft article on mutual legal assistance into two parts, with the second part forming the annex to the draft articles, was not a sufficient remedy. Her delegation also wished to recall the current efforts to negotiate a multilateral treaty for mutual legal assistance and extradition for domestic prosecution of the most serious international crimes. More detailed comments reflecting her delegation’s position on the draft articles on crimes against humanity could be found in her written statement, available on the PaperSmart portal.

51. Turning to the topic “Provisional application of treaties”, which was of great practical and doctrinal importance, she said that the commentaries to the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission were a useful complement to the draft guidelines and to article 25 of the Vienna Convention on the Law of Treaties and provided guidance and clarification on the scope and operation of existing rules of international law governing the provisional application of treaties.

52. Greece agreed with the Commission that the legal basis for provisional application of a treaty should be found either in the treaty itself or in a separate agreement, which might take one of the forms specified in draft guideline 4 (Forms of agreement). However, it was not clear to her delegation how a declaration by a State or an international organization that was accepted by the other States or organizations concerned could constitute an agreement to provisional application, as indicated in draft guideline 4 (b). The Commission stated in paragraph (5) of the commentary to that draft guideline that the declaration must be clearly accepted by the other States or international organizations concerned; non-objection did not constitute acceptance. However, given the voluntary nature of provisional application and the fact that the practice of a State or an international organization making a declaration to the

effect of provisionally applying a treaty or a part of a treaty was still quite exceptional, specific examples of State practice should be added to the commentary if the reference to an accepted declaration was retained in the draft guideline. The commentary should also include explanations referring to the legal concepts of acceptance, acquiescence and non-objection, in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States.

53. Draft guideline 6 (Legal effects of provisional application) and the commentary thereto should be amended to expand on the Commission's position that, unless otherwise agreed, provisional application produced the same legal effects as if the treaty were in force. In draft guideline 8 (Termination upon notification of intention not to become a party), it would be useful to address in more detail the question of how long provisional application could or should last, in particular in cases where a long period of time had elapsed since the commencement of provisional application, where there was no indication that the States concerned intended to become parties to the treaty, and where no treaty provision stipulated the termination of provisional application. Her delegation noted with satisfaction the inclusion of a "without prejudice" clause in the form of the new draft guideline 11 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations) to take into account a situation that occurred frequently in State practice. Her delegation supported the preparation of model clauses on provisional application to assist States and international organizations in the negotiation and application of treaties. Such clauses should take into account the flexible nature of provisional application.

54. With regard to other decisions and conclusions of the Commission, her delegation welcomed the preparation of syllabuses on the two new topics that had been included in the long-term programme of work of the Commission: "General principles of law" and "Evidence before international courts and tribunals". However, the expansion of the list of new topics in the long-term programme of work gave cause for concern. The Commission should first complete its work on the topics currently under consideration, in a timely manner, and then give priority to the examination of the new topics that were of the greatest relevance in light of recent developments in international relations and the needs of the international community. In that connection, the Commission should undertake a thorough examination of the topic of general principles of law, which was closely related to the topic of sources of international law; article 38 of the Statute of the International Court of Justice listed "the general principles of law recognized by civilized nations" as one of the sources of international law. The Commission should undertake to clarify the nature, scope and functions of general principles of law and find ways to identify them, in line with its previous and current work on treaties and customary international law.

55. **Mr. Špaček** (Slovakia) said that the Special Rapporteur's decision to approach the topic of crimes against humanity with a view to drafting a future convention on the prevention and punishment of crimes against humanity was a wise one. The Commission should not only consider the comments from States on the draft articles on crimes against humanity but also closely follow the various international initiatives aimed at strengthening mutual legal cooperation and assistance in relation to international atrocity crimes.

56. Referring to the draft articles adopted by the Commission on first reading, he said that his delegation welcomed the inclusion of draft article 5 (Non-refoulement). Reaffirming that non-refoulement was a fundamental principle to be applied in relation to crimes against humanity, as part of the broader obligation of prevention, could play an important role in strengthening the prevention mechanism of the future convention on the topic. His delegation also wholeheartedly supported the inclusion of draft article 12 ("Victims, witnesses and others"), which reflected the global trend, captured in the Rome Statute of the International Criminal Court, of exercising victim-oriented justice in relation to international crimes. The obligation under draft article 12, paragraph 3, to take measures to ensure that the victims of a crime against humanity had the right to obtain reparation for material and moral damages was of the utmost importance.

57. Draft articles 13 ("Extradition") and 14 ("Mutual legal assistance") were core elements of a functioning legal framework for ensuring that crimes against humanity did not go unpunished. His delegation concurred with the view expressed in paragraph (4) of the commentary to draft article 13 that a State might satisfy the *aut dedere aut judicare* obligation set forth in draft article 10 through extradition. The proposed concepts and modalities concerning extradition and mutual legal assistance were in line with similar mechanisms already adopted in several multilateral conventions on criminal matters. His delegation also welcomed the inclusion of a dispute settlement mechanism, in draft article 15. While it might be necessary to further refine that draft article, his delegation supported the basic concept of the draft article, as giving jurisdiction to the International Court

of Justice would strengthen the application and interpretation of the future convention overall.

58. With regard to the provisional application of treaties, he said that the work on the topic could result in a useful set of guidelines or model clauses that would help to clarify certain issues and facilitate the harmonization of State practice. Referring to the draft guidelines provisionally adopted so far by the Commission, he suggested that draft guidelines 1 and 2 should be merged, as the definition of the scope in draft guideline 1 was rather redundant. There was also overlap between draft guidelines 3 and 4, which both dealt with means of agreeing to the provisional application of a treaty. It should be made clear in draft guideline 4 (b) that the consent of a State to provisional application must be explicit, meaning that all other forms, means or arrangements for provisional application, including resolutions of international organizations, must involve the express consent of the State.

59. Draft guideline 8 should be further elaborated to reflect that notification by a State or international organization of its intention not to become a party to a treaty was not the only means of termination of provisional application permitted by State practice. For example, termination could be allowed if the ratification process was prolonged beyond the envisaged time frame. There could also be grounds for termination arising from a particular conditionality directly or indirectly linked to the agreement to provisional application. The exclusion of the possibility of suspending or terminating the provisional application of a treaty except in the case of notification by a State or international organization of its intention not to become a party would restrict the rights retained by States until they gave their final consent to be bound by a treaty.

60. His delegation welcomed the inclusion of the topic "General principles of law" in the long-term programme of work of the Commission and the preparation of the excellent syllabus on the matter. General principles of law were an essential complement to primary sources of international law but had not been given much attention by the Commission to date. The consideration of the topic was a natural next step, following the Commission's work on the law of treaties, customary international law and *jus cogens*. Slovakia encouraged the Commission to proceed with the consideration of the topic as soon as possible. However, his delegation was not convinced that work on the topic "Evidence before international courts and tribunals" would have a successful and useful outcome and therefore called for further reflection before a decision was taken on whether that topic should be examined by the Commission.

61. His delegation did not support the proposals to hold all or part of the future sessions of the Commission in New York. The Commission's engagement with Member States should take place primarily during the consideration by the Sixth Committee of the Commission's annual report and through written comments; it should not take place during the sessions of the Commission. His delegation therefore understood that the decision to hold the first part of the seventieth session of the Commission in New York was an exception directly related to the commemoration of the seventieth anniversary of the Commission and would strongly support the continuation of the long-standing practice of holding the Commission's sessions in Geneva.

62. **Ms. Mangklatanakul** (Thailand), welcoming the adoption on first reading of the draft articles on crimes against humanity, said that her delegation would support the development of a convention on the basis of the draft articles, which would help to facilitate national prosecutions and strengthen international cooperation in the suppression of crimes against humanity. Her delegation supported the decision to base the definition of crimes against humanity in draft article 3 on article 7 of the Rome Statute, as the core elements of that article had been refined and elaborated by international criminal tribunals over the course of many years. Thailand also supported in principle the obligation to prosecute or extradite established in draft article 10, as it would help to narrow jurisdictional gaps in the prosecution of crimes against humanity. However, since it was still unclear whether that obligation was a rule of customary international law, it would be useful to further examine State practice in order to clarify the nature and scope of the obligation with respect to crimes against humanity.

63. Her delegation supported the inclusion of draft articles 13 on extradition and 14 on mutual legal assistance. Given the serious nature of crimes against humanity, the exclusion of the "political offence" exception to extradition from draft article 13, paragraph 2, was logical. Thailand welcomed the flexibility provided for in draft article 13, paragraphs 3 and 4, to allow States to use the draft articles as the legal basis for extradition in cases where their domestic law made extradition conditional on the existence of a treaty. Her delegation also supported paragraph 6, which made extradition subject to the conditions provided for by national law or by applicable extradition treaties. Nevertheless, since draft articles 13 and 14 were modelled on provisions of treaties that addressed different types of crimes, further analysis was needed to determine whether they were compatible with the other provisions on crimes against humanity. It would be

useful if the Special Rapporteur could provide more detailed justification for his choice of model provisions in those instances.

64. Thailand welcomed the inclusion of the topic "General principles of law" in the long-term programme of work of the Commission. The Commission should focus its efforts on clarifying the nature, scope and functions of general principles of law and determining how they could be identified. Her delegation welcomed the Commission's continued engagement with other international and regional organizations, including the Asian-African Legal Consultative Organization. Such efforts contributed significantly to the development of synergies between international and regional efforts to promote the wider appreciation of international law. Her delegation wished to thank the Commission for supporting the International Law Seminar, which had enabled young lawyers specializing in international law, notably from developing countries, to familiarize themselves with the work of the Commission. Her delegation hoped that Member States would continue to make voluntary contributions to the United Nations Trust Fund for the International Law Seminar in order to secure the broadest possible participation in future seminars.

65. **Mr. Mohamed** (Sudan), referring to the topic "Crimes against humanity", said that his delegation had always warned against any attempts to establish a connection between the draft articles adopted by the Commission and the Rome Statute of the International Criminal Court, owing to the sensitivity of the matter, the lack of unanimity on the Statute, the gaping loopholes in the Statute, and the legal and political controversy surrounding the Court itself.

66. His delegation had been and remained concerned at the Commission's continued attempts to establish such connection. As a case in point, in the draft articles on crimes against humanity adopted by the Commission on first reading, text from the Statute was reproduced in draft article 3 (Definition of crimes against humanity). Yet, at no point had there been any agreement reached as to a specific definition of the concept. The Commission had adopted that definition despite dissenting opinions from certain delegations, including his own, which had proposed waiting until the Commission had finalized the draft Code of Crimes against the Peace and Security of Mankind before attempting any such definition. The Commission reproduced the definition from the Rome Statute without any change that reflected the most recent developments, as if there had been a need for an annex to a Statute that was full of legal defects and loopholes. The Commission should have come up with a definition that was independent of the definition in the Rome Statute, taking into consideration relevant domestic laws and practices. It should be borne in mind that the Rome Statute was still not universally accepted, as States representing more than half of the world's population had not yet ratified or acceded to it. It was important for the Commission not to politicize international justice as was the case with the Rome Statute, articles 13 and 16 of which vested in the Security Council an additional authority that was not included in the Charter of the United Nations.

67. With regard to paragraph 3 of draft article 6 [5] (Criminalization under national law), he said that given the controversy surrounding the immunity of State officials, his delegation had hoped that the Commission would rely on peremptory norms of international law or *jus cogens* to resolve the matter, rather than simply reflecting the provisions of the Rome Statute. His delegation would have preferred for the Commission to wait until it had finalized the provisions on the immunity of State officials from foreign criminal jurisdiction before attempting to address the issue of immunity in the context of crimes against humanity. It was also important to note that article 10 of the Rome Statute contradicted article 27 of the same Statute. Whereas article 10 stated that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute", article 27 stated that the Statute applied equally to all persons without any distinction based on official capacity. However, the concept of official capacity was well established in customary international law and *jus cogens*, as well as in the judgments and other documents of international courts and tribunals, in particular the International Court of Justice.

68. His delegation took note of draft article 6 [5], paragraph 1, which called on each State to take the necessary measures to ensure that crimes against humanity constituted offences under its criminal law. It also took note of draft article 7, which called on each State to take the necessary measures to establish jurisdiction over the offences covered in the draft articles, and draft article 8, which called on each State to ensure that its competent authorities proceeded to a prompt and impartial investigation whenever there was reasonable ground to believe that acts constituting crimes against humanity had been or were being committed in any territory under its jurisdiction. All three draft articles were appropriate in terms of content and succinct in terms of language. They indicated that domestic judicial systems bore the primary responsibility for prosecuting the perpetrators of international crimes, something to which the Sudan was firmly committed.

69. Lastly, his delegation felt that it was premature to consider a new international instrument on crimes against humanity, given that there were already several international conventions covering the topic.

70. **Ms. Varga** (Hungary) said that her delegation supported the Commission's intention to draw further attention to the need to prevent and punish crimes against humanity. The codification of strong prevention and punishment measures could help States to adopt and harmonize national laws, which would in turn open the door to more effective cooperation on the prevention, investigation and prosecution of crimes against humanity.

71. Her delegation also welcomed the inclusion of extensive provisions on extradition (draft article 13) and mutual legal assistance (draft article 14) in the draft articles on crimes against humanity adopted by the Commission on first reading, as crimes against humanity were often transnational in nature and thus could not be punished without effective cooperation between States. While her delegation was not convinced that the draft articles could serve as a legal basis for extradition in the absence of an extradition treaty, it would be worth considering whether a convention on crimes against humanity could become a legal basis for extradition. With regard to mutual legal assistance, it might be useful to introduce provisions in draft article 14 requiring States to share information with one another concerning the possible commission of crimes against humanity, in line with draft article 4 (Obligation of prevention).

72. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that the draft articles on the topic ought to strike a balance between, on the one hand, the sovereign equality of States and the need for stability in international relations and, on the other hand, the interest of the international community as a whole in preventing and punishing the most serious crimes under international law. Furthermore, it was a fundamental principle of sovereignty that the courts of one State should not have jurisdiction over the acts of another State.

73. International crimes should be regarded prima facie as exceptions to immunity. Her delegation therefore welcomed the provisional adoption, at the sixty-ninth session of the Commission, of draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* shall not apply) of the draft articles on immunity of State officials from criminal jurisdiction. The draft article clearly set out exceptions to immunity *ratione materiae* from the exercise of foreign criminal jurisdiction. Further work should be done to determine whether there was sufficient State practice to justify the inclusion of torture, enforced disappearance and apartheid as separate categories of crimes under international law in respect of which immunity *ratione materiae* should not apply. Her delegation accepted the Commission's decision not to include in that list the crime of aggression, the crime of corruption and various other crimes that had been proposed.

74. The consideration of the topic "Succession of States in respect of State responsibility" by the Commission could help to address the existing gaps in the rules codified in the Vienna Convention on the Law of Treaties and the Vienna Convention on Succession of States in respect of Treaties. Her delegation agreed with the Special Rapporteur that the scope of the examination should include trends and case law in current practice, political and historical contexts, traditional rules, relevant international agreements, national laws and decisions of national courts. However, a cautious approach should be taken, given the complexity of the topic, its controversial nature, the rarity of succession, the time it would take to adopt codified rules and the uncertainty concerning the readiness of States to apply such rules.

75. With regard to the provisional application of treaties, she said that the concept of provisional application existed under Hungarian law. However, the law simply enabled such application to commence at an earlier date. It did not provide for a fast-track approach to treaty conclusion; the same procedures had to be followed as for the standard entry into force of an international treaty. Therefore, provisional application of bilateral agreements was practically non-existent in Hungary. Nevertheless, her delegation welcomed the memorandum analysing State practice in respect of bilateral and multilateral treaties deposited or registered in the last 20 years with the Secretary-General that provided for provisional application (A/CN.4/707). Her delegation was confident that the consideration of the memorandum would substantially assist the Commission in the discussions of the issue at its next session, and that the draft guidelines on provisional application and the commentaries thereto would provide useful guidance to States and international organizations.

76. More detailed comments reflecting her delegation's position on a number of the abovementioned topics could be found in her written statement, available on the PaperSmart portal.

77. **Ms. Orosan** (Romania), recalling that the Commission had had to resort to voting on whether or not to adopt certain draft texts during its sixty-ninth session, said that the Commission should generally work on the

basis of consensus. While diverging views of States might make it necessary to resort to less frequently used procedures in order to make progress on certain topics under consideration, it was crucial for the final outcome of the work on any topic to be adopted by consensus.

78. With regard to the topic "Crimes against humanity", she said that strengthening inter-State cooperation was key to combating impunity, in particular for international crimes. Her delegation therefore appreciated the emphasis in the draft articles adopted by the Commission on first reading on improving national measures to prevent, investigate and prosecute such crimes and on fostering more effective inter-State cooperation in that regard. However, any new instrument on crimes against humanity must not undermine or conflict with existing international law. Her delegation therefore supported the Commission's decision not to depart from the relevant provisions of the Rome Statute of the International Criminal Court and agreed with the Commission that the draft articles should contribute to the implementation of the principle of complementarity under the Rome Statute. Romania also supported the inclusion of provisions that drew attention to the gravity of crimes against humanity, such as those concerning the obligation of prevention and those requiring States to provide for appropriate penalties in their national legislation. In that connection, her delegation noted that, in paragraph (18) of the commentary to draft article 4, the Commission clarified that a State must pursue effective preventive measures in any territory under its jurisdiction, including in situations of de facto jurisdiction.

79. Her delegation welcomed the confirmation by the Commission of the possibility of prosecuting non-State actors for crimes against humanity, in line with article 7 of the Rome Statute. However, the recommendation in paragraph 8 of draft article 6 [5] (Criminalization under national law) that States should establish the liability of legal persons departed from the approach taken in the Statute, and States had diverging views on that matter. Her delegation therefore wished to emphasize that there was flexibility for States in implementing that provision, as the liability of legal persons was subject to the provisions of national law.

80. The provisions on the establishment of jurisdiction fulfilled the objective of ensuring that there was no safe haven for the perpetrators of crimes against humanity. The principle of *aut dedere aut judicare* should therefore be at the heart of the framework for the establishment of jurisdiction in the text, in line with other international treaties. It would be worth clarifying the conditions under which a State could establish passive personality jurisdiction under draft article 7 [6], paragraph 1 (c). That paragraph provided for a State to establish jurisdiction when the victim of the crime against humanity was a national of that State. However, a crime against humanity was by definition an act committed as part of a systematic attack directed against a civilian population; there was always more than one victim. The current formulation of draft article 7 [6], paragraph 1 (c) might not accurately reflect that definition and could raise questions about whether there was a threshold for the number or proportion of victims that could trigger the jurisdiction of their State of nationality. Furthermore, it might be worth modelling paragraph 1 (c) on paragraph 1 (b) in order to enable a State to establish passive personality jurisdiction when the victims were stateless persons who were habitually resident in the territory of that State, in order to ensure there was no room for impunity.

81. Her delegation welcomed the fact that the possible conflict between the obligation upon a State to submit a case to the competent authorities and the ability of the State to implement an amnesty was addressed in the draft articles. The Commission noted in paragraph (11) of the commentary to draft article 10 [9] that an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence and that the permissibility of the amnesty would need to be evaluated in light of the State's obligation to criminalize crimes against humanity.

82. The draft articles on extradition and mutual legal assistance would establish a comprehensive normative framework for the implementation of the *aut dedere aut judicare* principle based on recent United Nations conventions. The barring of the political offence exception to extradition was consistent with the overall approach to heinous crimes that caused harm to the entire international community.

83. On the topic "Provisional application of treaties", she said that while provisional application had been addressed in the early stages of treaty law codification, practice that had been emerging at the time had continued to develop, so there was now a significant amount of new material to analyse.

84. It was appropriate that the scope of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission covered both States and international organizations. While the draft guidelines and the commentaries thereto represented substantial progress, a number of matters required additional clarification. With regard to draft guidelines 3 ("General rule") and 4 ("Form of agreement"), the commentaries did not provide sufficient clarity concerning the source of the obligation for

provisional application for States or organizations not participating in treaty negotiations or not involved in the decision-making process within an international organization or conference. Before the entry into force of a treaty, the source of a provisional application obligation could be participation in the treaty-making process, formalized through signature, or a separate valid international agreement in any form, including a unilateral declaration accepted by the other States or international organizations concerned. The possibility of non-signatories joining a provisional application regime for a treaty not yet in force through accession, which was currently covered by draft guideline 3, could be included in draft guideline 4. The identification of the source of the obligation was of practical importance in determining when provisional application and responsibility for material breach began. It was also important to clarify the circumstances under which States that voted against or did not take part in the adoption of a resolution by an international organization or intergovernmental conference were bound by the resolution.

85. With regard to the differences between provisional application and entry into force for the purposes of suspension and termination, detailed in the commentary to draft guideline 6 ("Legal effects of provisional application"), she said that the memorandum by the Secretariat tracing the negotiating history of article 25 of the Vienna Convention (A/CN.4/658) made it clear that other possibilities for the termination of provisional application had been examined during that process. While those possibilities had not been codified, they had continued to exist and should be taken into account, given the explicit statement in draft guideline 2 that the draft guidelines were based not only on article 25 but also on other rules of international law. Furthermore, the commentaries to draft guidelines 6 (Legal effects of provisional application) and 8 (Termination upon notification of intention not to become a party) did not sufficiently reflect the temporary nature of provisional application. There were instances where, in the absence of a specific agreement to the contrary, provisional application in respect of a State or organization could be terminated unilaterally even if the State or organization in question had not provided notification of its intention not to become a party. Such would be the case, for example, if there was an unreasonable delay in ratification or if the likelihood of the State or organization ratifying the treaty was reduced. Although efforts to establish a time limit for provisional application had proven difficult, further attention should be given to the temporary nature of provisional application.

86. Her delegation welcomed the inclusion of time frames for each topic in the programme of work of the Commission for the coming years, which would help delegations to better plan the submission of the contributions requested in relation to various topics. Her delegation supported in principle the inclusion of the important topic of general principles of law in the programme of work. The Commission should focus on the practical relevance of the topic and avoid producing an overly theoretical outcome. However, her delegation would be reluctant to include the topic of evidence before international courts and tribunals in the programme of work, as it was a very technical and specific area that bore little relevance to international law more generally. Her delegation hoped that the Commission would soon begin work on the topic of the settlement of international disputes to which international organizations were parties, which had been proposed at the sixty-eighth session for inclusion in the long-term programme, given that such disputes now arose frequently. The Commission should also consider including the vitally important emerging issue of the implications of rising sea levels for international law in its long-term programme of work. There were myriad issues associated with rising sea levels, such as territorial changes, migration and potential effects on maritime boundaries, which must be addressed at least in part by international law.

87. **Mr. Troncoso** (Chile) said that his delegation welcomed the inclusion of the topics of general principles of law and evidence before international courts and tribunals in the long-term programme of work of the Commission. The latter issue was one of increasing importance, given the proliferation of international judicial bodies and the increase in the number of cases before the International Court of Justice.

88. It was possible that the draft articles on crimes against humanity adopted by the Commission on first reading could become the basis for an international convention. Their purpose was to bridge legislative gaps at the national level, as international courts had limited budgets and capacities for trying the suspected perpetrators of crimes against humanity and, furthermore, the principle of complementarity under which the International Criminal Court operated restricted its jurisdiction, meaning that the initial work on such cases must be conducted by national courts. It was therefore important for States to define crimes against humanity properly and in line with the required international standards in order to strengthen international criminal law and thereby help prevent impunity.

89. His delegation fully supported draft article 5 (Non-refoulement). It was more important than ever to establish the duty of States to refrain from delivering, returning or extraditing a person to another State where

that person might become a victim of a crime against humanity. The entire international community should make a commitment in that regard, as the many persons who had to flee their countries because of the risk of being subjected to crimes against humanity deserved to have their lives and physical integrity protected.

90. With regard to draft article 12 (Victims, witnesses and others), his delegation saw merit in establishing both the duty of protection of States and the right of victims to obtain reparation for material and moral damages, on an individual or collective basis. His delegation welcomed the detailed and complete content of draft article 14 (Mutual legal assistance), with even more details set out in the annex to the draft articles, which applied in accordance with draft article 14, paragraph 8. The importance of harmonizing the rights and duties of States should not be underestimated; poor cooperation and excessive bureaucracy were seen in many unsuccessful investigations into crimes against humanity. With regard to draft article 15 ("Settlement of disputes"), there was merit in granting the International Court of Justice competence to settle disputes concerning the interpretation or application of the draft articles while also maintaining flexibility by allowing States to declare that they did not consider themselves bound by that provision. Chile endorsed the initiative promoted by Argentina, Belgium, the Netherlands, Senegal and Slovenia to negotiate a multilateral treaty for mutual legal assistance and extradition for domestic prosecution of the most serious international crimes and called for the commencement of a dialogue between the sponsors of that initiative and the Special Rapporteur.

91. Turning to the topic "Provisional application of treaties", he recalled that the Commission had provisionally adopted the set of 11 draft guidelines on the topic and the commentaries thereto as presented to the Drafting Committee without having previously considered draft guidelines 5, 10 and 11. It was appropriate that draft guideline 5 (Commencement of provisional application), which was modelled on article 24, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, specified the exact point at which provisional application took effect. Draft guideline 10 ("Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties") was fully in line with the provisions of both Vienna Conventions and the well-known principle of international law that violation of a provision of the internal law of a State or violation of the rules of an international organization could not be invoked as invalidating the consent of that State or organization, unless it could be demonstrated that the violation was manifest and concerned a rule of fundamental importance. His delegation also welcomed the flexibility provided by draft guideline 11, which permitted States and international organizations to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization. His delegation welcomed the memorandum analysing State practice in respect of bilateral and multilateral treaties deposited or registered in the last 20 years with the Secretary-General that provided for provisional application (A/CN.4/707), which represented a significant contribution to the work on the topic.

92. **Mr. Misztal** (Poland) said that Poland, which had been the victim of horrifying crimes against humanity perpetrated during the Second World War, considered work on that topic, culminating in the elaboration of a convention, to be of vital importance. Referring to the draft articles on crimes against humanity adopted by the Commission on first reading, he said that his delegation welcomed the inclusion of the new draft article 12 (Victims, witnesses and others), but felt that it might be improved if it were amended to include a definition of the term "victim" and if it determined the scope of reparations and guaranteed the right to establish and participate freely in organizations and associations, to assist victims and protect their rights. His delegation approved of the wording of paragraph 6 of draft article 13 (Extradition), which allowed a State to refuse to execute an extradition that would violate its domestic legislation. That approach ensured that States were able to comply with their specific human rights obligations.

93. As his delegation had stated in previous years, the draft articles would benefit from the introduction of a victim-oriented approach, with particular attention to the most vulnerable category of victims, namely children. It should thus be stipulated in draft articles 1 and 2 that the draft articles also applied to "a remedy and reparation for victims". The draft articles should also include a separate provision on the rights of children.

94. With regard to the draft guidelines on provisional application of treaties, the addition of an explicit reference in draft guideline 4 (b) to a declaration by a State or an international organization that was accepted by the other States or international organizations was an improvement on the previous version, which referred only to a unilateral declaration and did not mention acceptance. However, the provision should be further elaborated. While the draft guidelines did not require the acceptance of a declaration to the effect of provisionally

applying a treaty to take written form, the scarcity of State practice made it difficult to determine that acceptance of such declarations could take non-written form. His delegation welcomed the inclusion of a "without prejudice" clause in draft guideline 11.

95. There was a need for a comprehensive analysis of the provisions of the Vienna Convention on the Law of Treaties in the context of provisional application in order to provide clearer guidance as to which provisions of the Convention applied to provisional application and which did not. In that context, his delegation would appreciate further explanations with regard to the apparent conflict between the statement in draft guideline 6 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, and the statement in paragraph (5) of the commentary to that draft guideline, according to which provisional application was not intended to give rise to the whole range of rights and obligations that derived from consent to be bound by a treaty or a part of a treaty. Further clarification was also needed with regard to the statement in the same paragraph that provisional application of treaties remained different from the entry into force of treaties, insofar as it was not subject to the same rules of the law of treaties in situations such as termination or suspension of the operation of treaties provided for in part V, section 3, of the 1969 Vienna Convention.

96. With regard to the future work of the Commission, he reiterated the proposal that the Commission's long-term programme of work should include a topic entitled "Duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law". His delegation also supported the inclusion therein of the topic "General principles of law", as proposed by the Secretariat, as general principles of law were the only source of law applied by the International Court of Justice that had not been analysed by the Commission.

The meeting rose at 1 p.m.