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Held at Headquarters, New York, on Wednesday, 25 October 2017, at 3 p.m.

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

Contents

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The meeting was called to order at 3.10 p.m.

Agenda item 79: Report of the United Nations Commission on International Trade Law on the work of its fiftieth session (*continued*) (A/C.6/72/L.10, A/C.6/72/L.11)

Draft resolution A/C.6/72/L.10: Report of the United Nations Commission on International Trade Law on the work of its fiftieth session

1. **The Chair** announced that Armenia, Belarus, Ireland, Kiribati, Latvia, Poland and the Republic of Moldova had joined the sponsors of the draft resolution.

2. *Draft resolution A/C.6/72/L.10 was adopted.*

Draft resolution A/C.6/72/L.11: Model Law on Electronic Transferable Records of the United Nations Commission on International Trade Law

3. *Draft resolution A/C.6/72/L.11 was adopted.*

Agenda item 146: Administration of justice at the United Nations (*continued*) (A/72/138, A/72/204 and A/72/210)

4. **The Chair** said that informal consultations on the agenda item had included a question-and-answer segment with the Executive Director of the Office of Administration of Justice, the Acting Director of the Office of the United Nations Ombudsman and Mediation Services, the Chair of the Internal Justice Council and representatives of the Office of Legal Affairs. The informal consultations had centred on the legal aspects of the report of the Secretary-General on the administration of justice at the United Nations (A/72/204), the report of the Secretary-General on the activities of the Office of the United Nations Ombudsman and Mediation Services (A/72/138) and the report of the Internal Justice Council (A/72/210), which included annexes containing the views of the judges of the United Nations Dispute Tribunal and the views of the judges of the United Nations Appeals Tribunal.

5. A draft letter from the Chair of the Sixth Committee to the President of the General Assembly had been negotiated during the informal consultations. The draft letter drew attention to issues relating to the legal aspects of the reports discussed and contained a request that it should be brought to the attention of the Chair of the Fifth Committee. He took it that the Committee wished to authorize him to sign and send the draft letter to the President of the General Assembly.

6. *It was so decided.*

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

7. **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).

8. **Mr. Putra** (Indonesia) said that his delegation welcomed the fact that the draft articles on crimes against humanity adopted by the Commission on first reading covered not only punishment but also prevention in respect of such crimes. Nevertheless, prevention was not limited to the legislative, administrative and judicial measures prescribed in draft article 4 (Obligation of prevention); the provision should be made more specific and prescriptive, since the full set of draft articles was meant to become a legal instrument. For example, the phrase “other preventive measures” should be deleted, as it might lead to differing interpretations by States, resulting in legal uncertainty. Indonesia supported the inclusion in draft article 5 (Non-refoulement) of references to extradition, given the absence of uniform practice in that respect. It had criminalized 10 of the 11 acts listed in draft article 6 (Criminalization under national law) and had put in place the legal framework to ensure that victims of crimes against humanity had the right to obtain reparation.

9. With regard to international legal cooperation, covered in draft articles 13 (Extradition) and 14 (Mutual legal assistance), his delegation shared the Commission’s view, set out in paragraph (2) of the commentary to draft article 14, that there was no global or regional treaty addressing mutual legal assistance specifically in the context of crimes against humanity. Although the use of the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime as models seemed justified, it was doubtful that the crimes covered in those instruments were on a par with crimes against humanity. Given the gravity of crimes against humanity, consideration should be given to making international cooperation provisions on the topic mandatory, including mandating the use of the draft articles as a legal basis for extradition when a State made extradition conditional upon the existence of a treaty. Moreover, since not all countries considered a multilateral treaty to be a legal basis for extradition cooperation, the effectiveness of the draft articles would very much depend on the willingness of States to pursue bilateral treaties on extradition.

10. Turning to the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission, a challenging issue due to the diversity of national legal systems and the lack of practice and precedents, he said it was essential to consider the relationship between provisional application of treaties and constitutional law requirements at the domestic level for the entry into force of treaties. The provisional application of a treaty must take place only as an exception, and States should be encouraged not to use the mechanism too often. In order to prevent conflict within a domestic constitutional system, there must be certainty about the duration of the provisional application, particularly in the case of delayed entry into force or where the treaty concerned did not enter into force at all. His delegation endorsed draft guideline 11 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations), which provided flexibility to enable States to act in conformity with their internal constitutional rules.

11. **Mr. Bandeira Galindo** (Brazil) said that the adoption on first reading of the text on crimes against humanity marked a significant step towards a future convention. Such an instrument would be beneficial not only for promoting the harmonization of national legislation, but also for facilitating much-needed judicial cooperation. With reference to draft article 13, paragraph 6, on extradition, he pointed out that national legislation might require the commutation of certain penalties, especially the death penalty or life imprisonment, as conditions for extradition. The Commission should therefore include, at least in the commentaries, examples of such conditions under national legislation that did not necessarily imply the refusal of an extradition request.

12. On the topic of provisional application of treaties, he said that in paragraph (3) of its commentary to draft guideline 3 (General rule), the Commission claimed to have identified practice to show that negotiating States or non-negotiating States that subsequently acceded to a treaty could agree to provisionally apply it. Whereas article 25 of the Vienna Convention on the Law of Treaties referred explicitly to "negotiating States" having to agree to provisionally apply a treaty, draft guideline 3 contained no such reference. By distancing itself from article 25 in that manner, the Commission was navigating uncharted waters. It was questionable whether the current state of practice provided enough justification for the creation of a rule of international law. The main concern was not that non-negotiating States might agree to provisionally apply a treaty but that there could be a treaty which some parties agreed to provisionally apply while others did not. The logic behind the Vienna Convention, with the specific reference to "negotiating States", was that the provisional application of a treaty could not be achieved unless all States involved in the creation of the treaty agreed to engage in its provisional application. If the unanimity system was discarded, then under multilateral treaties with a large number of States parties, a group of States might decide, without the consent of all others, to apply it provisionally. That would be the case owing to the use in several of the draft guidelines of the expression "other States or international organizations concerned", where "other" and "concerned" were not equivalent to "all".

13. In draft guideline 4 (Forms of agreement), the Commission made reference to acceptance "by the other States or international organizations concerned", but did not clarify to whom such acceptance was directed. In its commentary, it indicated that the acceptance was "as opposed to mere non-objection". However, if silence was not the standard criterion for acceptance and if acceptance needed to be expressed, normally in writing, and if unanimity was not necessary for admitting the possibility of provisional application, then it was not clear which States or international organizations would have to make such an acceptance.

14. Referring to draft guideline 6 (Legal effects of provisional application), he said that under multilateral treaties, provisional application would establish different kinds of legal relationships between the parties, introducing an element of flexibility whereby some parties might allow it in their mutual relations with other parties while others might not, thereby affecting the integrity of treaties. As other speakers had rightly pointed out, the guidelines seemed to treat provisional application as the rule, whereas it should be an exception. Regarding draft guideline 8 (Termination upon notification of intention not to become a party), he suggested that the legal consequences of the termination of provisional application should be more tightly regulated. Moreover, the Commission should consider whether "termination" was the proper term to describe the cessation of the effects of provisional application. The possibility of applying different forms of termination and suspension to treaties provisionally applied should be scrutinized carefully, the risk being the development of an entirely new regime for provisional application. Finally, in draft guideline 11 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations), the Commission should consider whether the reference to "the right of a State" was appropriate. One might question what would be the

source for such right and if it had been fully recognized by the international community.

15. Turning to the proposed future topics for the Commission's consideration, he said that the inclusion of the topic "General principles of law" in the Commission's agenda would be in line with the work recently or currently undertaken regarding other sources of international law, such as the identification of customary international law and subsequent agreements and subsequent practice. When approaching the issue, the Commission should ensure that the identification of such principles was based on universality, meaning their use in all legal systems of the world. Regarding the proposed topic "Evidence before international courts and tribunals", it was important to note that questions regarding the burden of proof and types of proof might be resolved differently according to the nature of the dispute.

16. **Ms. Ighil** (Algeria) said that crimes against humanity constituted one of the most serious violations of international law; however, the topic should be addressed with care, bearing in mind that a legal framework regarding such crimes already existed under various multilateral treaties. With regard to the draft articles provisionally adopted by the Commission, her delegation noted the absence of a provision on immunity, as draft article 6, paragraph 5, imported the equivalent of article 27, paragraph 1, of the Rome Statute of the International Criminal Court pertaining to the irrelevance of a person's official position for the purposes of substantive criminal responsibility. However, it must be clearly stated that the inclusion of that paragraph was without prejudice to the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction. Draft article 12 (Victims, witnesses and others) did not contain any definition of "victims" and some clarification needed to be provided. Paragraph 3 of that draft article was unclear as to what the State's duty to provide reparation and other remedies for victims entailed. Lastly, concerning the absence of any reference in the draft articles to amnesty, she said that amnesty had proved to be an important tool for achieving peace, and the Commission should be considering that important aspect by examining the numerous examples of amnesty laws.

17. The draft guidelines on the topic "Provisional application of treaties" provisionally adopted so far by the Commission would certainly provide States and international organizations with useful guidance and clarifications regarding the relevant law and practice. Although the Commission stated in the commentary that the draft guidelines were also based on the practice of States, for a better understanding of State practice on provisional application, it would have been useful for the Commission to examine the memorandum which, as indicated in the report on the work of its sixty-eighth session (A/CN.4/703), it had requested the Secretariat to prepare to analyse State practice in respect of treaties deposited or registered with the Secretary-General. Draft guideline 4 (Form of agreement) needed to clarify the point at which a resolution adopted by an international organization should be considered an agreement on provisional application.

18. As for the long-term programme of work, her delegation took note of the decision to include two new topics, namely "General principles of law" and "Evidence before international courts and tribunals", but suggested that the Commission should explore other topics, such as the right to self-determination, in order to better address the concerns of the international community.

19. **Mr. Visek** (United States of America), addressing the topic "Immunity of State officials from foreign criminal jurisdiction", said that the United States was in general agreement with the Commission's work on immunity *ratione personae*, the status-based immunity that protected incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs. Despite some residual disagreement on precisely which officials enjoyed status-based immunity, the Commission's draft articles on that subject could be seen to rest on customary international law.

20. The same could not be said for the Commission's work on immunity *ratione materiae*, however. As the combined efforts of two Special Rapporteurs had shown, there were basic methodological disagreements about how to identify customary international law, if any existed, in that area. It was unclear whether, in evaluating State practice, one would begin with a baseline of immunity, and then look for examples of exceptions, or whether one would begin with a baseline of no immunity, and then look for examples of immunity. It was equally unclear how to account for prosecutions that were not brought to begin with, where the exercise of prosecutorial discretion could conceivably rest on considerations of immunity, but could also rest on completely different grounds, such as the lack of available evidence, or the absence of probable cause. The categorical propositions on immunity *ratione materiae* set forth in draft articles 5 and 6 of the draft articles proposed by the Special Rapporteur in her fifth report (A/CN.4/701) did not reflect the full extent of State practice: there had, in fact, been prosecutions of foreign officials, including by the United States, for a range of conduct including corruption, violent crime and cybercrime. Because of

the difficulty of identifying and evaluating State practice and *opinio juris* in the form of prosecutions, or lack thereof, there was a tendency to focus on case law. However, the decisions of national courts on immunity *ratione materiae* remained sparse. As the Special Rapporteur had observed in her report, "there are very few national court decisions in which immunity was withheld in connection with the commission of any of the established international crimes" which were identified in draft article 7 as exceptions to immunity. Moreover, those few decisions might be based on treaties or on other considerations. Attempting prematurely to draw broad conclusions from a few decisions was both unwarranted as a legal matter, and unwise.

21. Surprisingly, despite the Special Rapporteur's finding that there were very few relevant court cases, at its sixty–ninth session, by a majority vote, the Commission had ratified her claim that there was a "clear trend" toward recognizing exceptions to immunity *ratione materiae* for certain international crimes. For his delegation, there was insufficient State practice to illustrate a "clear trend", let alone widespread and consistent State practice undertaken out of a sense of legal obligation to create, or to demonstrate the existence of sufficiently specific rules of customary international law to support the Commission's proposal.

22. Another rationale cited by the majority of the Commission members was that draft article 7 did not recognize immunity for the most serious crimes of concern to the international community. Although the United States shared the commitment to deterring and punishing the perpetrators of such crimes, that approach failed to acknowledge that immunity was procedural, not substantive in nature, as emphasized by the International Court of Justice in the cases concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. In both cases, the Court had held that the nature of the allegations did not affect the existence of immunity under customary international law, a point that was not taken into account in draft article 7.

23. In addition to serious concerns about the lack of consistent State practice and *opinio juris* supporting draft article 7, his Government was troubled by the article's statement that immunity *ratione materiae* "shall not apply" to specified crimes. One could not assess whether there was an exception to immunity without determining whether immunity would ordinarily attach to an act to begin with. The United States was also concerned by the cursory explanation in the commentary about why draft article 7 did not include an exception for crimes by foreign officials in the territory of the forum State. That fundamental issue of territorial conduct and its effect on criminal jurisdiction warranted much more serious attention and analysis. Likewise, the brief treatment of corruption in the commentary further confused, rather than clarified, the basis for the decision to exclude corruption from draft article 7.

24. The Committee's lengthy debate on draft article 7 demonstrated that no consensus yet existed regarding the contours of immunity *ratione materiae*. The unusual split vote that had led to the Commission's provisional adoption of the draft article further demonstrated that the topic did not command a true consensus and that the resulting language could not be said to represent customary international law or even the progressive development of existing law. Owing to the inconsistent nature of State practice on the topic, the premature attempts at codification could do more harm than good.

25. His delegation was deeply concerned that draft article 7 in its current form could disturb the current environment of relative stability and mutual restraint that generally characterized States' conduct with regard to immunity *ratione materiae*. Lacking any other guidance, magistrates, judges, prosecutors, private parties initiating criminal cases, and scholars could look to draft article 7 as the definitive and comprehensive expression of international law. However, the development of law in that area properly belonged in the first instance to States. The Commission's work was at its strongest when it rested on a solid foundation of coherent methodology, even-handed assessment of evidence, and modesty of conclusions. Draft article 7 exhibited none of those features, and risked giving the impression that the Commission was creating new law.

26. The Special Rapporteur had recognized the importance of developing safeguards against the abuse and politicization of jurisdiction. The United States looked forward to her next and final report on procedural provisions and safeguards. After the debate on procedural safeguards, however, the consideration of draft article 7 should be suspended until the Commission could endorse all of the draft articles, by consensus, and until the Commission's work could be re-established on a firmer footing.

27. Turning to the content of chapter IV of the report (A/72/10), he said that the development of the concept of crimes against humanity had played a critical role in the pursuit of accountability for some of the most horrific episodes of the past hundred years. Careful consideration and discussion of a set of draft articles that would form the basis of a convention on the prevention

and punishment of crimes against humanity could be valuable.

28. With regard to chapter V of the report, he said that in his delegation's view, the meaning of "provisional application" in the context of treaty law was well settled. Provisional application gave rise to a legally binding obligation to apply a given treaty or treaty provision, although the obligation could be more easily terminated than the treaty itself once the treaty had entered into force. While his Government was in agreement with many of the draft guidelines and commentaries on the topic provisionally adopted so far by the Commission, it also had a number of concerns.

29. Draft guidelines 3 (General rule) and 4 (Form of agreement) and the commentaries thereto failed to make it clear that the provisional application of a treaty within the meaning of article 25 of the Vienna Convention required the agreement of all the States and international organizations incurring rights or obligations pursuant to such provisional application. According to the draft guidelines, provisional application arose when "it had been so agreed"; however, they did not indicate whose agreement was required; that ambiguity was compounded by confusing and potentially misleading language in the commentaries. For example, paragraph (7) of the commentary to draft guideline 3 referred to the agreement of "only some negotiating States" and "one or more negotiating States or international organizations", without making it clear that only those States and international organizations that agreed would be engaged in the provisional application of the treaty.

30. Draft guideline 4 (b) and the accompanying commentary addressed what was described as a "quite exceptional" practice of establishing provisional application through a unilateral declaration by a State that was accepted by the other States and international organizations concerned. However, the examples cited in the commentary did not attest to provisional application within the meaning of article 25 of the Vienna Convention having been established through such a mechanism. The discussion of such a hypothetical form of agreement to establish provisional application risked creating confusion and should be removed both from draft guideline 4 (b) and paragraph (5) of the commentary.

31. Draft guideline 6 (Legal effects of provisional application) provided that the provisional application of a treaty or part of a treaty "produces the same legal effects as if the treaty were in force", unless otherwise agreed. That was not necessarily true in all respects. For example, provisional application could be more easily terminated than a treaty that was in force for that State. To avoid suggesting too close a parallel between provisional application and the entry into force of a treaty, draft guideline 6 should be revised to read: "An agreement on provisional application of a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof."

32. Concerning the Commission's decision to include the new topic "General principles of law" in its long-term programme of work, he said that while the United States agreed that the nature, scope, function and manner of identification of general principles of international law could benefit from clarification, it was concerned that there might not be enough State practice for the Commission to reach any helpful conclusions on the topic. With respect to the second new topic, "Evidence before international courts and tribunals," his delegation questioned both the need for and the practicability of discerning general rules of evidence from the heterogeneous practice of international courts and tribunals developed over time in light of each forum's particular circumstances and experience.

33. **Ms. Pino Rivero** (Cuba), referring to draft article 5 (Non-refoulement) of the text on crimes against humanity, said that Cuba agreed that a person must not be returned, surrendered or extradited if there were grounds for believing that he or she might be subjected to a crime against humanity. However, the phrase "all relevant considerations", in paragraph 2, should be replaced with "relevant evidence or proof", in order to remove the subjective element. With regard to draft article 6 (Criminalization under national law), she said that the primary grounds for determining criminal responsibility, such as effective control in the case of a military commander and non-application of a statute of limitations, must be retained. However, the wording on liability of legal persons should be reviewed and improved. Her delegation welcomed the inclusion of draft article 12, aimed at ensuring that victims, witnesses and others had the right to obtain reparation for damages, as well as draft article 14 (Mutual legal assistance), which helped to avoid impunity.

34. As to the set of draft guidelines on provisional application of treaties, more precise language should be included regarding the extension of a treaty that had never entered into force but had been provisionally applied. It must also be made clear that provisional application through the adoption of a resolution, a treaty or a declaration had to be set out in writing. Draft guideline 6 (Legal effects of provisional application), which indicated that provisional application produced the same legal effects as if the treaty were in force, was important. However, it should go into greater detail concerning the termination or suspension of a treaty

being provisionally applied, as well as the procedure for entering reservations.

35. **Mr. Nguyen** Nam Duong (Viet Nam) said that his Government supported the institution of punishment for crimes against humanity based on respect for national sovereignty and non-interference in the internal affairs of other States. However, in view of the various challenges facing the International Criminal Court in investigating and prosecuting the perpetrators of serious international crimes, more consideration needed to be given to the necessity and effectiveness of having an international treaty dealing with crimes against humanity. Regarding the provisions on the prosecution of criminals, Viet Nam was of the view that the principle of complementarity should be upheld; thus, priority needed to be given to the jurisdiction of national courts in dealing with crimes against humanity. Disputes on the interpretation and implementation of such a treaty should be first settled by the concerned States before they were submitted to any international court or tribunal. In order to address the problem of differences among criminal law systems, States must have the possibility to enter reservations to the treaty, as long as such reservations did not contravene the object and purpose of the treaty. In particular, the criminal liability of legal persons had yet to gain wide acceptance in international law, and accordingly, sanctions for the acts of legal persons should be addressed in the domestic law of States and the matter should be removed from the draft articles.

36. Viet Nam supported the early completion of the draft guidelines on provisional application so as to meaningfully assist States in developing consistent practices regarding the provisional application of treaties. However, clarification was needed on a number of issues. With regard to the form of agreement, as reflected in draft guideline 4 (b), in cases where provisional application of a treaty was determined based on a resolution of an international organization that was adopted by the majority of States parties, it was unclear how the treaty would apply to States that opposed the resolution. If the treaty was provisionally applied to States despite their opposition, it was also unclear whether the national sovereignty of those States would be negatively affected.

37. Regarding draft guideline 11 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations), more details should be given concerning 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 that declaration, and on the rule that would apply in cases where a State or international organization was bound by a declaration and must provisionally apply the treaty, whereas other States or organizations had not made any such declarations and were under no obligation to provisionally apply the treaty. Lastly, the phrase “between the States or international organizations concerned” should be replaced with “between the provisionally applying States or international organizations” throughout the text.

38. **Mr. Shin** Seoung Ho (Republic of Korea) said that it was appropriate for the draft articles on crimes against humanity to address extradition, given that there was no global or universal convention on that subject. It was not necessary to address the issue of dual criminality under the provision on extradition, since the draft articles required each State to designate crimes against humanity as an offence under its own criminal law. The Republic of Korea supported the long-form provisions on extradition and mutual legal assistance. Such a specific and detailed approach could help to strengthen law enforcement cooperation among States parties by providing an appropriate legal basis for it, particularly in the absence of a bilateral treaty on extradition or mutual legal assistance.

39. The provision on non-refoulement, a well-established principle of international law, was important. No individual should be expelled, returned, surrendered or extradited to another State if there were substantial grounds for him or her to be subjected to a crime against humanity.

40. Turning to the criminal responsibility of individuals in official positions, stipulated under draft article 6 [5], paragraph 5, he noted that according to article 27 of the Rome Statute, holding an official position was not grounds for excluding criminal responsibility when an individual committed an offence. The Drafting Committee had dealt with a similar provision in draft article 7, paragraph 1, under the topic of immunity of State officials from foreign criminal jurisdiction, which indicated that immunity *ratione materiae* did not apply for certain crimes under international law, including crimes against humanity. There could be a variety of opinions on the compatibility or interrelationship of those two provisions, and their substance should be carefully reviewed in the course of the Commission’s drafting process.

41. Lastly, his delegation supported the provision on victims, witnesses and others (draft article 12). Given that they could provide important information and evidence, their participation in legal proceedings was vital, and their safety, physical and mental health, dignity and privacy should be protected at all stages of legal proceedings.

The meeting rose at 4.30 p.m.