Mr. Chairman,

Please allow me to present China's comments on the relevant topics contained in the current ILC report.

With respect to "Crimes against humanity", the Commission considered at its 67th session the first report of Special Rapporteur Mr. Sean Murphy, and provisionally adopted four draft articles and related commentaries. The Chinese delegation thanks the Special Rapporteur for his in-depth research on the topic, and appreciates the outcome of the Commission's work.

The punishment of crimes against humanity and other serious international crimes is a common goal of the international community and is in our common interest. The discussion and codification of the topic by the Commission is therefore of great significance. The Chinese delegation would like to make the following comments on the above-mentioned draft articles.

First of all, codification of draft articles should be based on a thorough review of the practice of States. In the report of the Special Rapporteur and the draft articles adopted by the Commission, a great deal of attention is given to the practice of international judicial organs, and, by comparison, little reference is made to the general practice and *opinio juris* of States. For instance, draft article 2 has removed the traditional qualifier of "in time of war" for "crimes against humanity". Such an approach is based primarily on the practice of international judicial institutions and fails to consider whether the practice of States has reflected a general recognition that crimes against humanity under international law need not be committed during a war. In addition, draft article 3, in establishing the definition of "crimes against humanity", has adopted verbatim the provision of the Rome Statute of the International Criminal Court, effectively regarding the latter as a universally accepted definition. In fact, the definitions of crimes as contained in the Rome Statute should be interpreted in conjunction with the Elements of Crimes adopted by the Assembly of States Parties. Moreover, in

the negotiation of the Rome Statute, there were disagreements over the definitions and elements of various crimes, including crimes against humanity, which partly explains why some States are not yet party to the Rome Statute. It is therefore necessary for the Commission to review the positions and practice of States in a more comprehensive manner in order to lay down a really sound basis for the said definition.

Secondly, with respect to the list of specific crimes, full consideration should be given to differences among national legal systems. Draft article 3 contains a list of specific acts which constitute crimes against humanity, including "enforced disappearance of persons". However, in many States, especially those not party to the Rome Statute, the crime of "enforced disappearances" may not exist in their domestic law. The enforcement of relevant provisions by these States, and the harmonization of domestic law with the relevant rules of international law are subjects that merit the attention of and discussion by the Commission.

Thirdly, it warrants further consideration whether the obligation of States to prevent crimes against humanity as currently drafted is too broad. Paragraph 1 (b) of draft article 4 provides that States are under obligation to cooperate with "other organizations" as appropriate to prevent crimes against humanity. According to the commentary, "other organizations" include non-governmental organizations. However, the commentary is silent on the legal basis of such an obligation and the practice of States in this respect. In light of the above, the Commission should give cautious consideration as to whether it is appropriate to impose upon States such an obligation under international law.

With respect to "Identification of customary international law", the Commission has considered the third report of Special Rapporteur Mr. Michael Wood. We commend the excellent work of the Commission and the Special Rapporteur on this topic. I would like to avail myself of this opportunity to draw the Committee's attention to the contribution made by the Asian-African Legal Consultative Organization (AALCO) in this regard.

During the fifty-fourth annual session of the AALCO held in Beijing last April, Professor Sienho Yee, Special Rapporteur of AALCO's Informal Expert Group on Customary International Law, presented his report on the mandated topic. In addition, AALCO organized an informal experts meeting in Malaysia last August, and invited Mr. Wood to exchange views with its experts on the said report. I believe that AALCO's report will help the Commission appreciate the concerns and views of many Asian and African states in relation to the identification of customary international law. I would like to make two comments on the consideration of this topic by the Commission:

First, in determining whether a treaty provision reflects a rule of customary international law, the criteria of objectivity and impartiality should be applied, and the investigation should be based strictly on general practice and *opinion juris*. Consideration should be given to such factors as the extent to which the treaty in question has been ratified, acceded to or accepted by States, and whether a treaty provision has a universal character. In particular, non-party States should not arbitrarily determine which treaty provisions are rules of customary international law based on their narrow national interests. Such tactics of expediency is tantamount to utilitarianism or double standard.

Secondly, a comprehensive assessment should be made of the supplementary role of judicial rulings and writings of states in the identification of rules of customary international law. The Commission should not highlight only the judicial decisions of international judicial institutions while neglecting the decisions of national courts; it should not focus exclusively on decisions from a few jurisdictions while ignoring those from other national courts; and it should not rely heavily on the writings of publicists from a few countries while overlooking those authored by scholars of other states.

Mr. Chairman,

Since I will not be able to participate in the Committee's deliberations next week due to prior commitments, please allow me to take this opportunity to present my delegation's views on "Immunity of State officials from foreign criminal jurisdiction" and other topics in cluster 3.

With respect to "Immunity of State officials from foreign criminal jurisdiction", the Commission considered the fourth report of Special Rapporteur Ms. Hernández and the Drafting Committee has adopted ad ref two draft articles. The Chinese delegation commends the progress achieved in the Commission's work on this topic. On the whole, we endorse the provision of draft article 6 on the scope of immunity *ratione materiae*. Similarly, with respect to subparagraph (f) of draft article 2, which states that an "act performed in an official capacity" means "any act performed by a State official in the exercise of State authority", we concur with this provision as it stands. Here I would like to make a few specific comments:

First, the "exercise of State authority" should be interpreted in a broad sense. As my delegation stated during last year's deliberation by the Sixth Committee on the definition of State official as any individual who "represents the State or who exercises State functions", the definition of an act as "exercise of State authority" should be made on a case-by-case basis in accordance with the constitutional system and legislation of the State of nationality as well as the circumstances of the case in question, rather than determined subjectively or arbitrarily by the forum State. In addition, we would like to seek the Commission's clarification on the difference between the phrase "exercise of State authority" in this subparagraph and the phrase "exercise of State functions" in subparagraph (e) of the same article as part of the definition of State official.

Secondly, according to paragraph 1 of draft article 6, the only yardstick in determining whether acts of State officials enjoy immunity *ratione materiae* should be whether such acts are "performed in an official capacity". However, the reports of the Special Rapporteur and the Commission made reference to the view that *ultra vires* acts, acts

constituting serious international crimes, and *acta jure gestionis*, or acts performed in an official capacity but exclusively for personal benefit, do not qualify as acts "performed in an official capacity" and therefore are not covered by immunity *ratione materiae*. China believes that these views are not in line with the relevant positive international law, and are even in clear breach of relevant rules. For example, the *ultra vires* character of an act does not affect its recognition as an act "performed in an official capacity". Article 7 of the Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the Commission clearly provides that an act that exceeds its authority or contravenes instructions shall nonetheless be considered an act of the State.

Finally, the Commission may wish to consider clarifying in the draft article or the commentary thereto that immunity rules are procedural rules and do not pertain to substantive rules of international law that deal with the legality of acts or the issue of accountability. The Special Rapporteur has indicated her intention to address the exceptions to immunity of State officials in her report next year. The Chinese delegation wishes to reiterate that the immunity of State officials is based on the principle of sovereign equality of States and reflects the mutual respect among nations. Immunity provisions are procedural rules and should not be associated with impunity. The International Court of Justice has already made clear this point in its rulings in the Arrest Warrant case and the Jurisdictional Immunities of the State case.

Mr. Chairman,

Last but not least, with respect to "Protection of the environment in relation to armed conflicts", the Chinese delegation is of the view that the Commission should distinguish between rules applicable to international armed conflicts and those applicable to non-international armed conflicts. While the Commission successfully sorted out the applicable rules in relation to the protection of the environment during international armed

conflicts, research on non-international armed conflicts is relatively limited.

Given the current scarcity of international rules directly relevant to non-international armed conflicts and the difficulties involved in obtaining information on relevant practices, it is indeed a challenging task to codify rules for the protection of the environment in the context of non-international armed conflicts. We suggest that the Commission consider limiting the scope of the draft principles to international armed conflicts only. Without the support of international practice, it will be inappropriate to simply transpose rules applicable in international armed conflicts to non-international armed conflicts.

Thank you, Mr. Chairman.