72nd session of the United Nations General Assembly
Sixth Committee

Report of the International Law Commission on work in its sixty-ninth session

Address by Mr François Alabrune
Legal Affairs Director
French Ministry for Europe and Foreign Affairs

New York, 23 October 2017
(Check against delivery)

Mr Chairman,

The French delegation would like to thank the International Law Commission for its latest report, which was extremely informative, and commends its members on the extensive work it accomplished.

I would particularly like to commend the adoption after the first reading of the draft articles on "Crimes against humanity". France will submit detailed observations on this topic to the Commission before 1 December 2018. Today I will express observations on the topic of the "Provisional application of treaties". Following the Sixth Committee's order of consideration of the International Law Commission's report, over the course of the week my delegation will speak on the topics of the "Protection of the atmosphere", "Immunity from foreign criminal jurisdiction" and "Peremptory norms of general international law (*jus cogens*)".

First, I will begin with several general remarks regarding how the Commission works.

General observations about how the Commission works

1) First, the French delegation welcomes the Commission's reaffirmation of its commitment to multilingualism and the paramount importance of the principle of equality of the United Nations official languages in its conduct of work.

In this respect, my delegation welcomes the fact that the Drafting Committee has adopted draft articles this year on the topics of "Crimes against humanity" and "Immunity from foreign criminal jurisdiction" and guidelines on the "Provisional application of treaties" in two United Nations working languages. These efforts ensure higher quality drafting. The same procedure should be followed for all drafts.

2) Secondly, the inclusion of two new topics in the Commission's long-term work programme adds to the already long list of topics being reviewed. The large number of topics can make it more difficult to complete work in reasonable timeframes. It also makes it more difficult for States to consider projects extensively. Paradoxically, at a time when the Commission's work sessions have been shortened from twelve to ten weeks a year, the number of topics considered by the Commission has increased considerably—almost doubling over the course of roughly twelve years.

The Commission's efforts to establish a planning group tasked with studying its programme, its procedures and its working methods should be commended. The initiative is expected to be repeated next year, particularly in order to look further into the idea of limiting the number of topics discussed at each session. These changes need to be made so that the Commission and the Sixth Committee can conduct genuine dialogue when the International Law Commission's annual report is being considered on just three of four topics every year. That way as much time as necessary can be dedicated to them.

The difficulties encountered this year regarding the "Immunity of State officials from foreign criminal jurisdiction"—and I will address this topic in more detail later in the week—must alert us to the risks of the Commission working too rapidly. Some of these difficulties could have been avoided if the Commission had been able to dedicate more time to the consideration of this topic, which it indeed required. A working group could have been tasked with carefully considering State practice, the interpretation of which divided the

Commission's members. That would have assisted the Commission in reaching a consensus on draft Article 7.

Chapter V. Provisional application of treaties

Mr Chairman, today I will share several observations on the topic of the "**Provisional application of treaties**". I will begin with two remarks on the Commission's working methods used to study the topic. I will then speak in more detail about the different draft guidelines adopted.

First, the French delegation welcomes the fact that a working group was established to help prepare the commentaries and draft guidelines. Such an initiative—already followed last year for the adoption of draft conclusions on the "Identification of customary international law"—adds to the Commission's collaborative way of working that should be supported.

Second, my delegation would like to thank the Secretariat General for the study it conducted on the contemporary practice of States regarding provisional application. This very informative report is a useful and valuable instrument at the Commission's disposal for preparing draft guidelines on the topic. It is however unfortunate that the Commission did not discuss this Memorandum this year. By definition, the Commission's drafts must be based on the study of international practice. The question can now be raised as to what extent the 11 draft guidelines adopted this year reflect the widespread practice reported by the Secretariat, the consideration of which the Commission decided to defer until next year. The comment of draft guideline 7 makes no reference to practice or precedents, which makes it more difficult for States to take a stance on this issue. It would have seemed better to examine the study conducted by the Secretariat this year, even if that would have meant deferring the adoption of the draft conclusions and their commentaries to next year.

I will now share a few observations concerning the draft guidelines.

In the **general commentary**, it is noted that "the draft guidelines allow States and international organizations to set aside, by mutual agreement, the practices addressed in

certain draft guidelines if they decide otherwise". Such an affirmation can be surprising in that the Commission's drafts are not legally binding texts. Such an approach also seems contrary to the logic of the law of treaties: the rules in the matter are supplementary by nature, States are free to decide whether to agree or not. The Commission should not lose sight of this fundamental principle.

The French delegation would like to underline that although "the purpose of the draft guidelines is to provide assistance to States and international organizations", they can also serve as a guide for courts when the question of provisional application of treaties arises.

Taking up **draft guideline 4**, the French delegation supports the proposal stating that provisional application of a treaty may be agreed through any means or arrangements. Such a solution has the advantage of flexibility and seems to be compatible with Article 25 of the Vienna Convention. However the Commission must provide precisions on the point at which a resolution of an international organization should be considered an agreement on provisional application. The examples provided by the Commission in support of its proposal do not clarify the criteria required to determine whether an agreement on provisional application exists. With regard to the Comprehensive Nuclear Test-Ban Treaty "although in the negotiations that led to the Comprehensive Nuclear-Test Ban Treaty Organization a proposal for provisional application was rejected, although the Comprehensive Nuclear-Test Ban Treaty has no explicit provision for provisional application, and although no separate treaty has been concluded to that effect", it is noted in the Commission's commentary, on the basis of two academic articles, that, "the resolution of the Meeting of States Signatories can be interpreted as evidence of an agreement in some other manner, or of an implied provisional application". Such an interpretation raises questions. To a great extent, the provisional application of treaties is a matter of States' constitutional law, the existence of an agreement to provisionally apply a treaty should not be readily presumed. In this respect, the Commission needs to explain in more detail the criteria required to determine whether an agreement on provisional application exists.

With regard to **draft guideline 6**, the wording of the provision is unclear: does provisional application of a treaty mean strict application of the treaty—as stated in the provisions of Article 24, paragraph 4, of the Vienna Convention on final clauses—or a *mutatis mutandis* application? This brings us to the more general question of determining

whether provisional application means that the treaty becomes binding or only that provisional application has a permissive power. It seems essential that the Commission clarify this point, which it has been silent about thus far. The approach the Commission has chosen seems very liberal in many respects. Yet the provisional application of a treaty is a practice that, because of its effects, must continue to be exceptional, and cannot be presumed. In France, a circular dated 30 May 1997 on the drafting and conclusion of international agreements thus notes that provisional application "may be provided for in final provisions for reasons related to the specific circumstances, but it must remain provisional. [...] It is to be prohibited in any event when the agreement may affect the rights and obligations of individuals and when its entry into force requires authorization by the Parliament".

With regard to **draft guideline 7** as I mentioned earlier, the Commission's work would have benefited from the support of international practice and precedents, to which reference was not made. It is noted that the draft guideline is aligned with draft articles of 2001 on the responsibility of the State and on draft articles of 2011 on the responsibility of international organizations. In my delegation's opinion it is not certain that all of these articles reflect international customary law. Under Article 20 of its Statute, the Commission must present practice and precedents and doctrine backing this draft guideline so that States can assess the content.

The same can be said for **draft guidelines 9 and10**, whose commentaries do not contain any reference to practice or precedents. The Commission should therefore not proceed on the basis of abstract deductions or analogies, but should base the drafts it adopts on law.

To conclude, France considers that the draft guidelines on the provisional application of treaties can only be finalized by the Commission at the first reading if these important clarifications and precisions are made.

Thank you, Mr Chairman.