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Chairperson: Ms. Picco (Monaco)
later: Mr. Park Chull-joo (Republic of Korea)

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The meeting was called to order at 3.05 p.m.

Agenda item 79: Report of the International Law Commission on the work of its sixty-second session
(*continued*) (A/C.6/65/10 and A/C.6/65/186)

1. **Mr. Serpa Soares** (Portugal) said, with regard to the topic of expulsion of aliens, that the provisions relating to the death penalty and torture or inhuman or degrading treatment in the revised and restructured draft articles on protection of the human rights of persons who had been or were being expelled (A/CN.4/617) required further consideration. It was unclear whether the provisions on the death penalty concerned expulsion or extradition; a clear distinction should be made between those two concepts. With regard to the Special Rapporteur's sixth report (A/CN.4/625/Add.1), it happened that the reference to Portuguese legislation was inaccurate because that legislation was no longer in effect.

2. It was important to have a provision prohibiting disguised expulsion in order to prevent States from expelling individuals without due regard for their rights or for due process. That provision should be as broad as possible and should include all situations where the intentional act or omission of a State resulted in the alien being forced to leave the country. In that sense, his delegation shared the view that draft article A could be further clarified.

3. His delegation had some doubts about the inclusion of a provision, such as draft article 8, on extradition disguised as expulsion or expulsion in connection with extradition. Although the revised version was an improvement over the initial proposal, it had no place in a study on the expulsion of aliens. The scope of draft article 9 (Grounds for expulsion) was broad enough to include other grounds not mentioned therein. It might be necessary, however, to distinguish between aliens who entered the territory of the expelling State legally and those who entered illegally, since illegal entry could constitute a ground for expulsion per se. Draft article B should be clarified further, because, while its purpose might be to protect expellees, it overlooked situations where expulsion was applied as an additional penalty. Draft article C1 should also be clarified, to indicate that while the procedures for handling cases involving legal and illegal aliens might be different, the procedural rights of both sets of aliens should be the same.

4. With regard to the effects of armed conflicts on treaties, his delegation was pleased that the Special Rapporteur on the topic had taken into account the comments and observations of Governments and had decided to consider each draft article individually while retaining the general outline of the draft articles adopted in 2008. With regard to draft article 1 (Scope), in a situation where two or more contracting States were parties to a conflict, the issue at stake was the level of trust necessary to the implementation of the treaty. Where just one contracting State was a party to the conflict, the issue was not one of good faith but of a serious difficulty or impossibility of performance. The Commission should therefore clarify the conditions to be met for a conflict to affect the operation of a treaty when only one State party to the treaty was a party to the conflict.

5. The inclusion of treaties concluded by international organizations raised practical and theoretical questions which could not be addressed within the framework of the current topic. In addition to the saving clause proposed by the Special Rapporteur, the commentary to draft article 1 could also clarify the categories of treaties involving international organizations which should be included within the scope of application of the draft articles.

6. With regard to the definition of "armed conflict" in draft article 2, subparagraph (b), although his delegation still had doubts as to whether internal conflicts should be included within the scope of the draft articles, the decision to adopt the definition used in the decision of the International Tribunal for the Former Yugoslavia in the case of *Prosecutor v. Duško Tadić* seemed appropriate. The definition not only reflected a more modern and comprehensive understanding of the concept of armed conflict, but was also more concrete.

7. While it might seem logical to have excluded from the draft article the clause dealing with armed force between organized armed groups within a State, further clarification might be necessary in order to account for situations of "armed violence by proxy" where an armed group engaged in an internal armed conflict against another armed group acting on behalf of a State, particularly when the latter armed group acted in the territory of that State. The case law of the International Tribunal for the Former Yugoslavia and the 2007 judgment of the International Court of Justice in the case concerning *Application of the Convention*

on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), illustrated the complexity of the position of armed organizations vis-à-vis a controlling State.

8. The Commission should also shed light on the relevant control test. In the *Genocide* case just cited, the International Court of Justice had applied the “effective control” test enunciated in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), rejecting the “overall control” test employed in the *Tadić* decision. Yet, case law and practice seemed more aligned with the *Tadić* decision. The Commission should also consider the possible impact of armed conflicts on treaties in the context of the so-called “revolution in military affairs”, especially in respect of asymmetrical armed conflicts.

9. With regard to draft article 13 (Effect of the exercise of the right to individual or collective self-defence on a treaty), in an armed conflict it was generally assumed that there was an aggressor and a victim who could resort to self-defence. As it was often difficult to distinguish between the two, it would be more prudent to adopt a cautious approach by including a “without prejudice” clause, as had been suggested by some members of the Commission.

10. In reference to draft article 15 (Prohibition of benefit to an aggressor State), his delegation was concerned that the draft article was linked to the earlier definition of “aggression” in General Assembly resolution 3314 (XXXIX). It therefore viewed with interest the option of extending the scope of the draft article to include the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. However, that principle included not only the actual use of force but also the threat of the use of force, which might widen the scope of draft article 15 excessively. Therefore, when discussing that option, the Commission should consider whether it was feasible to reduce the content of an existing *jus cogens* norm.

11. On the topic of protection of persons in the event of disasters, his delegation supported the inclusion of a reference to humanitarian principles and respect for and protection of human dignity in the draft articles. However, the reference to the principle of neutrality raised some concerns, as it was closely connected with situations of armed conflict, which fell outside the scope of the topic. The purpose behind the reference to

neutrality could be achieved simply through the reference to impartiality. Moreover, a reference to neutrality might be misleading, not only with respect to the scope and purpose of the topic, but also with regard to the course to be followed.

12. As for the primary responsibility of the affected State, it was important to balance State sovereignty against human rights protection. The Commission should therefore consider the hypothetical situations where an affected State failed to protect persons in the event of a disaster. The question whether, in such cases, external help could only be provided with the consent of the affected State should be discussed further.

13. Lastly, there should be further study of the relationship between international cooperation and international principles such as the principle of sovereignty and non-intervention, in order to establish what derogations were possible from the principles of sovereignty and non-intervention in international cooperation. His delegation supported the view that a State should bear responsibility for its refusal to accept assistance, which could constitute an internationally wrongful act if it violated the rights of affected persons under international law. It would therefore be important to determine the rights and obligations of the State vis-à-vis affected persons.

14. **Ms. Ryan** (New Zealand), addressing the topic “Expulsion of aliens”, said that her delegation welcomed the revision of draft articles 8 to 16 on the protection of the human rights of persons expelled or being expelled. It also welcomed the introduction of new draft articles addressing specific rights in the contexts of disguised expulsion, collective expulsion, the grounds for expulsion, and expulsion proceedings; as well as the new draft workplan for restructuring the draft articles in a coherent manner. She acknowledged the Commission’s analysis of the distinction between the procedures applied to expulsion of aliens who entered the territory of a State lawfully and those applied to aliens who might have entered the territory unlawfully. Her Government appreciated the consideration that had been given to its written response and those of other States on that topic.

15. With regard to the effects of armed conflicts on treaties, the draft articles would be most useful if they took into account all possible types of conflicts. Her delegation therefore supported the inclusion of non-international armed conflicts within the scope of the

draft articles. The exclusion of treaties to which one or more international organizations were a party along with States should be reconsidered. A formula might be devised for the inclusion of major treaties to which a single international organization was a party, such as the United Nations Convention on the Law of the Sea.

16. On the topic of protection of persons in the event of disasters, her delegation strongly supported the focus on principles that were directly relevant to the protection of individuals. In times of disaster, people were at their most vulnerable and the mechanisms of civil society were under considerable pressure. Her delegation therefore supported the consideration of the rights and obligations of the affected State and those of assisting States to the extent that they were relevant to the protection of persons and the facilitation of immediate assistance and relief activities.

17. **Mr. Hildner** (Germany), in reference to the sixth report of the Special Rapporteur on the expulsion of aliens (A/CN.4/625 and Add.1), said that the description of German practice on detention was misleading and did not accurately reflect contemporary practice in his country. His delegation was surprised to see that the detailed description of the grounds for expulsion and conditions for detention in Germany which it had provided to the Commission had not been taken into account in the report.

18. When addressing the issue of expulsion, there must be a common understanding as to whether it involved a State's right to expel an alien — to oblige an alien to leave the country — or a State's right to deport an alien — to enforce his or her departure. That distinction was important, as the right to expel derived from the principle of State sovereignty, which included the right to decide on the access of aliens to the State's territory. When it came to deportation, however, a State's discretionary powers were far more limited. Hence, his delegation once again called on the Commission to address the distinction between the right to expel and the right to deport, before going any further.

19. It was essential that non-citizens who were subject to expulsion or deportation should have procedural rights. However, deportation applied only to aliens residing illegally in a country; legal residents were entitled to remain in the country as long as there was no legally valid expulsion decision against them that rendered their presence illegal. As the topic of

expulsion involved primarily illegal aliens, their procedural rights could not be overlooked, as draft article A1, paragraph 2, seemed to suggest. A definition of legal and illegal aliens for the purpose of the draft articles would be most helpful.

20. With regard to the protection of human rights, every human being residing legally or illegally in a country was entitled to the protection of his or her rights in all situations. A State wishing to expel or deport an alien was bound by all international human rights instruments to which it was a party. As those instruments included the guarantees mentioned in the draft articles and more, a general reference to them would seem to be the most appropriate approach. The 2008 European Union directive on common standards and procedures for returning illegally staying third-country nationals not only set common, legally binding standards as a prerequisite for the return of aliens, but also included a catalogue of material and procedural rights for persons facing return, including the protection of human rights and the rights of refugees. He encouraged the Commission to use that directive as a further example of State practice.

21. With regard to the effect of armed conflict on treaties, the current draft articles met the objective of narrowing the options of States engaged in armed conflict to terminate or suspend treaty relations. As regards the use of terms, it was his understanding that the scope of the draft articles presupposed the existence of an armed conflict under international humanitarian law. Hence, it was not necessary to include a definition of "armed conflict" in the draft articles. It should be left up to international humanitarian law to decide when there was an armed conflict which would trigger the applicability of the draft articles.

22. It was difficult to decide whether non-international armed conflicts should be included in the draft articles, as the line between international and non-international armed conflicts could be blurred and both types of conflicts could have the same effects on treaties. Contemporary armed conflicts were mostly of a non-international character and came in a variety of forms. While an internal civil war or insurrection would not, in general, affect the application of treaties between States, other non-international armed conflicts might very well do so. Given the difficulty of drawing up general rules for such a multitude of possible

conflict scenarios, the question should be left open for further discussion.

23. **Mr. Dufek** (Czech Republic) said that there was a need to be cautious when determining the level of protection accorded to individuals in the draft articles on protection of human rights of persons who had been or were being expelled. In that connection, the Commission should set forth the principles of general international law rather than draw up an instrument on the protection of human rights which each State would be free to accept or reject. His delegation was pleased that the revised and restructured draft articles referred frequently to the jurisprudence of the European Court of Human Rights. He noted with appreciation that the Special Rapporteur on the expulsion of aliens had used a wide range of sources, including international and regional instruments, case law, and national legislation and jurisprudence. His delegation recommended, however, that the Special Rapporteur should reflect to a greater extent the views expressed by States in various international forums.

24. His delegation welcomed the progress made on the topic “Protection of persons in the event of disasters” and generally agreed with draft articles 6 to 9 as provisionally adopted by the Drafting Committee. With regard to draft article 6 (Humanitarian principles in disaster response), most international and national instruments on the topic were based on the four core humanitarian principles of humanity, neutrality, impartiality and independence. Those principles served as the basis for both the normative activities of donors that had endorsed the Principles and Good Practice of Humanitarian Donorship and their delivery of humanitarian assistance. All four principles were relevant to disaster response.

25. Concerning draft article 9 (Role of the affected State), his delegation agreed with the formulation of the two aspects of that role dealt with in the draft article and expected the next drafting session to deal with the outstanding provision regarding the consent of the affected State to receive outside assistance. The draft article should also address what the role of the international community should be when the affected State did not have sufficient capacity to provide humanitarian assistance.

26. **Mr. Marrapodi** (Italy) said that recent tragic events in Haiti, Chile, Pakistan and other countries had shown the importance of the Commission’s study of

the protection of persons in the event of disasters with the aim of enhancing the effectiveness of international response to disasters. To that end, the Commission should interact closely with the international organizations operating in the field, including the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and relevant non-governmental organizations. In draft article 9, the Commission had stressed the primary role of the State where a disaster occurred. However, the term “primary role” needed to be clarified in further draft articles in order to answer questions as to how the role of the affected State related to that of other States and international organizations and their access to disaster victims.

27. On the topic of the effects of armed conflicts on treaties, the Special Rapporteur had wisely adhered to the general approach of the draft articles adopted on first reading. Nonetheless, his delegation would urge the Commission to distinguish between armed conflicts involving two or more States parties to a treaty and conflicts in which only one State party to the treaty was engaged. In the latter case, the principles and rules set out in the Vienna Convention on the Law of Treaties for the termination or suspension of treaties appeared to provide an adequate solution. The same might be said of the case of a plurality of States parties to a treaty being involved in an armed conflict on the same side. A thorough analysis of practice should allow the Commission to confirm, or possibly to restrict, the indicative list of categories of treaties for which a presumption of continuity was considered to apply despite the occurrence of an armed conflict.

28. With regard to the topic “Expulsion of aliens”, it was difficult to express views on the Commission’s work because the overall picture of the draft articles was not yet clear. That was probably due in part to the inconsistent numbering of the draft articles and the ensuing difficulty in identifying their sequence. The Commission should clarify whether its intention was to restate existing law, while adding a few provisions for the progressive development of international law, or to draft a new human rights instrument which States might wish to accept at their discretion. The outcome of that clarification would affect both the methodology of the study and the content of the draft articles. Those structural questions should first be addressed before States engaged in a specific discussion of the various issues raised by the topic.

29. **Mr. Tichy** (Austria) said that the restructuring of the draft articles on expulsion of aliens appeared to have made them even more complex. Austria therefore supported reorganizing the articles into five parts and renumbering them, in accordance with paragraph 147 of the Commission's report.

30. Revised draft article 8 provided that any person who had been or was being expelled was entitled to respect for his or her human rights, in particular those mentioned in the draft articles. However, it was a fundamental principle that human rights were universal, inalienable and indivisible. His delegation therefore understood the revised draft article as emphasizing the particular relevance of certain human rights without excluding others.

31. The Commission had raised the question of the relationship between expulsion and extradition. His delegation believed that it was preferable not to combine the two concepts in any way. The notion of disguised expulsion contained in draft article A should preferably be considered in conjunction with the general definition of expulsion, rather than separately.

32. The list of vulnerable persons in revised draft article 13 appeared to be incomplete. Other categories, such as victims of human trafficking, the wounded, the sick and perhaps single mothers with small children, also enjoyed special protection under international law and should be treated with particular care.

33. Revised draft article 14 provided that no one might be expelled to a State where his or her life or liberty would be in danger. His delegation had some concerns regarding that provision. Diplomatic assurances were not always effective in ensuring respect for human rights. The abolition of the death penalty in the expelling State bore no relation to the possible risk in the receiving State. Moreover, the obligation not to expel applied not only if a death sentence had been imposed but also if there was a threat to life or a risk that the death penalty might be imposed. The explicit reference to stateless persons in subparagraph 3 was redundant; human rights applied equally to all.

34. With regard to revised draft article 15, the question was how to determine whether the authorities in the receiving State were able to provide appropriate protection against the threat of torture or inhuman or degrading treatment. The draft article referred to the

receiving State's inability to obviate the risk; it was unclear whether that inability included unwillingness.

35. With regard to draft article 9 (Grounds for expulsion), his delegation suggested referring to the principle contained in article 13 of the International Covenant on Civil and Political Rights, which provided that an alien lawfully in the territory of a State Party to the present Covenant could be expelled therefrom only in pursuance of a decision reached in accordance with law. Under Austrian law, procedures differed depending on whether the alien was lawfully or unlawfully present, but all persons enjoyed equal human rights protection.

36. The right to consular protection mentioned in draft article C1 and the revised version of draft article A1 was not an individual right; it referred to the right of States to protect their nationals through consular assistance. With the exception of the right of detained foreign nationals to be informed without delay of their entitlement to consular assistance, no individually enforceable rights were derived from the international law of consular relations.

37. With regard to the topic "Effects of armed conflicts on treaties", the scope of the draft articles should not include non-international armed conflicts but should apply only to treaties between States engaged in an armed conflict. Austria supported the views expressed by the Special Rapporteur in connection with draft article 16. Neutrality was not always established by treaty; Austria's neutrality had been established by a unilateral declaration. His country's practice showed that neutrality was not overridden by the Charter of the United Nations in general, but only where the Security Council took action under Chapter VII of the Charter, and such military action did not constitute war in the sense defined in international law. Draft article 16 should therefore be retained. However, the Commission should consider the problem of occasional neutrality and the status of non-belligerency in international armed conflicts. Furthermore, if a belligerent State was entitled to suspend a treaty with a neutral State, the reverse should also apply in cases where the treaty was affected by armed conflict.

38. With respect to the topic "Protection of persons in the event of disasters", Austria supported the main objective of draft article 6 insofar as the purpose of relief operations should be confined to helping the

disaster victims. However, the term “neutrality” was closely connected with war. Even if understood more broadly, it presupposed the existence of two opposing parties. Since the situation did not exist in the case of a disaster, the term “neutrality” should be avoided and the term “impartiality” preferred. The resolution on humanitarian assistance adopted by the Institute of International Law in 2003 provided appropriate wording: humanitarian assistance should be offered and, if accepted, distributed “without any discrimination on prohibited grounds, while taking into account the needs of the most vulnerable groups”.

39. In draft article 8 (Primary responsibility of the affected State), the adjective “primary” was apt; irrespective of any consent required, the international community might also have a certain responsibility, at least to offer assistance. Although the Commission had discarded the concept of responsibility to protect, international law might evolve. A duty to render assistance could result from the regime of State responsibility, for instance where one State was responsible for a disaster affecting another. Moreover, the draft article should make it clear that an affected State had a duty to protect its population. Although the final scope of paragraph 2 could not yet be ascertained, the main idea was in accordance with the law in its current state.

40. **Ms. Noland** (Netherlands) said that her delegation continued to have concerns about the work on the expulsion of aliens. The topic appeared to lend itself more to political negotiation than to codification. With regard to the revised draft articles, her delegation noted that the Special Rapporteur had taken into consideration the comments of Member States. However, the draft articles should reflect the principles of general international law, and it was not the Commission’s task to draft a new human rights instrument. The Netherlands welcomed the inclusion of draft articles on non-refoulement and an effective legal remedy, but had doubts about provisions on non-discrimination and the protection of children in detention.

41. It was doubtful whether the draft articles proposed in the sixth report (A/CN.4/625 and Add.1) reflected State practice or *opinio juris*. The term “disguised expulsion” contained in draft article A raised many questions, and the cases cited in the report referred to a wide variety of situations. It would be preferable instead to draft a provision setting forth the

conditions that should be met for the expulsion of aliens. Draft article 8 (Prohibition of extradition disguised as expulsion) was too broad in scope. The Netherlands welcomed the revised version of draft article 8 (Expulsion in connection with extradition) proposed by the Special Rapporteur in his concluding remarks.

42. While recognizing the importance of the topic, her delegation believed that the direction that was currently being taken required further thought. The draft articles should be clear and unambiguous and should reflect the principles of international law. Her delegation was in favour of the suggestion to reorganize the draft articles into five parts.

43. Her delegation recognized the theoretical importance of the topic “Effects of armed conflicts on treaties”. However, it was unconvinced of the need to address it; recent armed conflicts had not led to problems in treaty law. The Netherlands continued to doubt whether the draft articles would help promote security in legal relations between subjects of international law. Some of the provisions contained in the draft articles, such as draft articles 6 and 7, and item (a) on the indicative list of categories of treaties referred to in draft article 5, merely stated the obvious. To reaffirm them was superfluous, if not ill-advised. Other provisions were without the benefit of State practice. The reference to the Vienna Convention on the Law of Treaties in draft article 4 was not appropriate. It was also doubtful whether States could be expected to make notifications and objections during armed conflict, as called for in draft article 8. If the project was not to be abandoned, however, it was appropriate to include a reference to non-international conflicts in draft article 1.

44. The third report on the protection of persons in the event of disasters (A/CN.4/629) usefully addressed the principles guiding the protection offered and the role of the affected State. Draft article 6 incorporated humanitarian principles in order to ensure that aid was not misused. The principle of humanity was an important and distinct guiding principle. The principle of impartiality was crucial, and included non-discrimination. Draft article 6 might therefore be amended to end with the word “impartiality”. The principle of neutrality was more problematic. It had a vital role to play in times of armed conflict, in particular with regard to humanitarian actors. However, her delegation wondered whether neutrality in the strict

sense could be expected of States and would welcome further clarification. The Special Rapporteur was encouraged to define the various humanitarian principles, for example in the commentary to draft article 6. There was a need to clarify how draft article 7 related to draft articles 6 and 8; it might usefully be merged with draft article 6.

45. Draft article 9 underlined the primary responsibility of the affected State. The Special Rapporteur might elaborate further on situations in which the affected State did not fulfil that role and wilfully refused offers of assistance. It might be useful to provide some detail regarding the grounds on which the affected State could refuse consent. It would also be interesting to examine whether there was a relationship between the principles contained in draft article 6 and the assistance provided by the affected State.

46. **Ms. Silkina** (Russian Federation), referring to the topic of expulsion of aliens, said that, notwithstanding the doubts expressed by some delegations about prioritizing certain human rights as opposed to others, her delegation believed that special attention should be paid to the human rights that were at the greatest risk of being violated in the context of expulsion. It endorsed the contents of revised draft articles 9, 10, 14 and 15 but thought it might be better to cover the right to life and the prohibition of torture in two separate articles rather than in revised draft article 11 alone. The formulation of revised draft articles 12 and 13 should be improved, as their practical application was unclear. While children, older persons and persons with disabilities certainly needed special attention, a total prohibition of their expulsion would not be appropriate.

47. The draft contained no provisions as yet on property rights. When that subject was addressed, the approach should be different from the one taken towards the right to life or the prohibition of torture. Expulsion, for obvious, objective reasons, rendered the full enjoyment of property rights impossible, especially with regard to immovable property; however, the inviolability of such property should be guaranteed, so that the owner could sell or lease it, even while abroad.

48. It was not certain that the solutions proposed in draft articles A and 8 on disguised expulsion and extradition disguised as expulsion, respectively, met the humanitarian concerns behind the texts. It was

unclear, for example, why an extradition request should become an obstacle to expulsion. The criteria that differentiated disguised expulsion from departure from a State for economic or cultural reasons should be identified. Such issues, which had very specific connotations, should probably be tackled at a later stage, when the Commission had completed its study of expulsion in the generally accepted meaning.

49. Concerning acceptable and unacceptable grounds for expulsion, her delegation thought it advisable to approach the question by stating which grounds were prohibited. National legislation on permitted grounds being very diverse, it would be difficult to formulate a uniform list. Such a list would also cast doubt on the discretionary right of the State to expel, something that was taken as a given, the Commission's task being simply to design an appropriate framework for expulsion.

50. The Russian Federation supported draft article B, which rightly established the principle that detention pending expulsion was not punitive and should be carried out differently from detention of accused or sentenced persons. With regard to the draft articles concerning expulsion procedures, the Special Rapporteur's attempt to draw a distinction between procedural guarantees for aliens lawfully present in the territory of a State and those for "illegal" aliens was inappropriate. Procedural guarantees should probably be identical for all persons being expelled, whereas the illegal status of an alien should be viewed not as a ground for limiting procedural rights but as a material ground for expulsion. Moreover, the very fact of illegality of stay could be challenged, which called for a specific procedure. In that connection, the draft articles should establish the presumption of legality of stay or provide that questions concerning legality or illegality of stay that could not be resolved should be interpreted in the alien's favour.

51. It was of the utmost importance that the draft articles on effects of armed conflicts on treaties should clearly reflect the presumption that armed conflict did not entail automatic termination or suspension of an international treaty. Armed conflict should be viewed only as a specific circumstance that, owing to its exceptional character, gave States the possibility to address the issue of further application of the treaty.

52. Her delegation remained of the view that armed conflicts of a non-international nature should be

outside the scope of the draft articles, since such situations were adequately covered by the provisions of the Vienna Conventions. On the other hand, it would not be logical to exclude from the scope of the draft articles multilateral treaties to which international organizations, along with States, were parties.

53. Regarding draft article 2, a definition of armed conflict based on the *Tadić* definition was too general. Indeed, defining armed conflict in the draft articles was inadvisable: instead, those armed conflicts covered by the draft articles should be clearly delineated.

54. Further discussion was needed on the indicative list of treaties annexed to draft article 5. The underlying idea was sound: the subject matter of a treaty might indeed presuppose that it continued in operation in the event of armed conflict, even if it did not contain an explicit provision to that effect. However, the certainty of continued operation varied among the categories in the indicative list. It was doubtful, for example, whether treaties of friendship would continue in operation. It could be taken for granted that boundary treaties would remain in operation, but to put them on the same footing as environmental treaties could undermine the stability of the boundary treaty regime. The category of law-making treaties was problematic because “law-making” could not be considered to be subject matter. The suggestion to include the category of treaties containing rules of a preemptory (*jus cogens*) nature was also inconsistent with the logic of the list, since *jus cogens* norms applied independently of any treaty in which they might be reproduced. Reducing the number of categories might provide a more solid foundation for draft article 5.

55. Regarding draft article 8, it was not relevant to cite the procedures for termination in the Vienna Convention on the Law of Treaties. Setting a time frame for raising an objection to the termination of a treaty would be artificial in the absence of consistent practice in that area. The earlier wording of the draft article was more in keeping with the real situation during an armed conflict. The proposed new wording for draft article 12 required clarification: if paragraph 1 was applied, there would seem to be no need for paragraph 2. The commentary should provide that explanation. Some ambiguities concerning the operation of treaties during armed conflict could not be resolved in the draft articles because of the lack of settled customary norms and consistent practice.

However, the draft articles could provide guidance that would make it possible for future practice to evolve within a clearer framework.

56. With regard to the protection of persons in the event of disasters, her delegation agreed on the need for compliance with the principles of humanity, neutrality and impartiality, as indicated in draft article 6. However, it also wished to stress the importance of compliance with the principle of non-interference in the internal affairs of States and the non-political nature of assistance in disaster situations.

57. Concerning draft articles 7 and 8, the Russian Federation shared the view that recognition of human dignity and respect for human rights were of the utmost importance in disaster situations. However, States had the right to suspend the certain human rights in emergency situations. The draft articles would benefit from the inclusion of a principle that would require the interests of the affected society — its main values, its way of life — to be protected, especially as public places and institutions might be damaged by a disaster, and their reconstruction had little to do with the rights of the individual cited in draft articles 7 and 8.

58. With regard to draft article 9 (Role of the affected State), her delegation agreed that a State affected by a disaster had the right and responsibility, by virtue of its sovereignty, to take legitimate measures to ensure the protection of the persons on its territory. Other States or international organizations could not unilaterally interfere in that process, and the affected State had the primary role with regard to control and coordination of relief and assistance from other entities. However, the purpose of the draft articles should be to stress the moral and political imperative of the State, not to establish a legal obligation that could entail international responsibility. The advisability of framing cooperation between the affected State and other States, not in the form of legally binding provisions, but rather in a guide to practice, should be explored.

59. **Mr. Chushev** (Belarus) said that both international and non-international conflicts should be covered by the draft articles on effects of armed conflicts on treaties. Internal conflicts were the most common contemporary form of conflict, and they had just as much and perhaps more of an effect on the capacity of States to fulfil their treaty obligations.

60. Belarus agreed with the widely held view, reflected in the draft articles, that armed conflict did

not ipso facto terminate or suspend international treaties. They should continue in operation except when that became impossible owing to the emergence of insuperable objective circumstances in a conflict situation. The Commission's intention in its work on the topic was, quite rightly, not to create a special legal regime for the suspension or termination of treaties, superseding that of the Vienna Convention on the Law of Treaties. Some of the grounds cited in the Vienna Convention, such as a fundamental change in circumstances, should be viewed as basic criteria, in conjunction with the indicia set out in draft article 4, for determining whether treaties could be suspended or terminated in situations of armed conflict. The criterion cited in draft article 4, subparagraph (a), the intention of the parties to the treaty, was unlikely to be of much practical value: it was hard to imagine States, whenever they concluded an international treaty, asking themselves whether to incorporate provisions on the treaty's suspension or termination in the event of armed conflict.

61. On the other hand, his delegation welcomed the inclusion in draft article 4, subparagraph (b), of the elements of intensity and duration of the conflict, since it was mainly prolonged and unabating conflicts that prevented treaties from being implemented. Belarus likewise supported the basic idea expressed in draft article 5, although the text could be improved. A reference to elements other than the subject matter of the treaty as criteria for determining whether the treaty should continue in operation might be incorporated, and the indicative list would more properly be placed in the commentary.

62. Upon completion of its work on the current topic, the Commission should discuss the advisability of extending the scope of the draft articles to international treaties to which international organizations were parties.

63. **Mr. Giralt** (El Salvador), referring to the protection of persons in the event of disasters, said that draft article 1 (Scope) was lacking in content and could be improved by the inclusion of a short summary of the rich material on scope *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci* contained in the commentary to that article. With respect to draft article 2 (Purpose), an "adequate and effective response" was essential to the protection of persons in disaster situations, the word "effective" entailing a temporal aspect. His delegation likewise endorsed the

phrase "with full respect for their rights", a reference that comprised not only basic human rights, but also acquired rights.

64. The definition of disaster in draft article 3 was very broadly formulated, with no limitation concerning the origin of the event, whether natural or man-made. The three possible results by which disasters could be defined were perfectly consonant with the purpose of the draft, having been included for their grave implications for the protection of persons. Draft article 4, on the relationship of the draft articles with international humanitarian law and the extent to which they covered situations of armed conflict, should be construed as permitting their application in situations of armed conflict, to the extent that existing rules of international law, and particularly of international humanitarian law, did not apply. The duty to cooperate set out in draft article 5 was well established as a principle of international law and was one of the basic tenets of the Charter of the United Nations.

65. The work on the draft articles had particular resonance for his country, which was chronically affected by a variety of natural disasters such as tropical storms, hurricanes, floods and drought. It was precisely for that reason that extensive domestic legislation on civil protection and risk management had been adopted.

66. **Mr. Bambus** (Estonia) said that, since a State's right to expel a non-national was inherent in the concept of State sovereignty, the issue of expulsion of aliens was particularly sensitive. In tackling it, the groups of persons who might be affected must be clearly defined. The distinction made between aliens considered to be lawfully in a State's territory and those unlawfully in that territory was important, especially for determining the procedural rights to be accorded to aliens facing expulsion. On the basis of that distinction, new definitions should be formulated for incorporation in draft article 2.

67. The procedural rights proposed in draft articles A1 and C1 were part of Estonian law; nevertheless, his delegation shared the scepticism expressed about whether they reflected general State practice. The Secretariat's study on national legislation (A/CN.4/565) revealed differing State practice and the lack of customary law on the subject. Relying on generally recognized provisions of international law, in particular article 13 of the International Covenant on

Civil and Political Rights, was the best way to approach the issue of procedural rights.

68. As to the draft articles on protection of persons in the event of disasters, Estonia agreed that the principles of humanity, neutrality and impartiality were well established in international humanitarian law and that the provision of assistance must not interfere with the sovereignty of the receiving State, but must first and foremost take account of the interests of the people who were suffering. It was hesitant, however, about the use of the term “neutrality” in that context. The principle of neutrality was well grounded in humanitarian law and in the context of armed conflict as the duty not to choose sides, but in inter-State relations in the absence of conflict its exact meaning was much harder to determine. The Special Rapporteur seemed to suggest that it referred to the duty of those responding to disasters to avoid any political or ideological actions towards the receiving State. If that was the case, then the references to the principles of impartiality and non-discrimination might well suffice.

69. With respect to the duty to cooperate, his delegation welcomed the inclusion of the principle of the primary responsibility of the affected State but thought that the relevant draft article should go further and specify the duties stemming from that responsibility. The question of consent, what form it should take and how specific it must be, needed to be addressed. The question of consent to the activities of private and non-governmental actors also deserved further discussion.

70. **Mr. Kittichaisaree** (Thailand), after expressing support for the central role of ASEAN (Association of Southeast Asian Nations) in handling disaster relief in the Asia-Pacific region and beyond, said that Thailand’s policy was to protect the lives and property of victims of natural disasters and to assist the countries affected through collaboration with the international community and regional disaster relief centres. Disaster relief must always be carried out in accordance with the rules of international human rights and humanitarian law and the principles of independence, sovereignty and non-interference in the domestic affairs of the affected State. Independence was a well-recognized principle in humanitarian assistance and State practice and was not merely implicit in the principle of sovereignty, nor was it necessarily equivalent to neutrality, which encompassed the concept of non-intervention. The

Commission should therefore determine the content of the principle of independence in the context of protection of persons in the event of disasters. It might entail, for example, a prohibition against the imposition of any conditions other than altruistic ones on the provision of humanitarian assistance to persons affected by disasters or to States in whose territorial jurisdiction disasters had occurred.

71. The scope of the draft articles should certainly cover the pre-disaster phase, involving disaster risk reduction and prevention and mitigation activities, as suggested in paragraph (5) of the commentary to draft article 1.

72. With regard to draft article 3 (Definition of disaster), if “widespread loss of life, great human suffering and distress, or large-scale material and environmental damage” were only three possible outcomes among others, as the commentary explained, then the words “inter alia” should precede them. The draft article set too high a threshold with the requirement of serious disruption of the functioning of society. It was not clear to his delegation how the requirement would exclude from the scope of application of the draft articles other types of crises such as serious political or economic crises. On the contrary, the high threshold could exclude disasters that fulfilled all other requirements under the definition of disasters but could not be objectively determined to have caused a serious disruption of the functioning of society. The text should be rewritten to make its object and purpose meaningful in the contemporary world.

73. With regard to the topic of expulsion of aliens, there was a need to strike a fair balance between the sovereign rights of States and the human rights of aliens. Revised draft article 12 did precisely that in connection with the right to a family life. Thailand also welcomed revised draft article 10, paragraph 2 of which made it clear that the discrimination prohibited was discrimination among aliens subject to expulsion, not between such aliens and the nationals of the expelling State. Thailand agreed with the idea behind draft article A1 that the procedures applicable to aliens unlawfully present in the territory of the expelling State were better left to be regulated by national legislation, without prejudice to a State’s rights to provide aliens in that situation with the same guarantees as those enjoyed by aliens lawfully present.

74. With respect to the revised version of draft article B, some States, especially transit or host States for economic migrants unlawfully present in their territories, hundreds of aliens might be awaiting expulsion in detention centres. The “reasonably necessary” duration of detention referred to in paragraph 2 (a) of the draft article should therefore be construed in the light of the expelling State’s capacity and actual circumstances.

75. Lastly, he pointed out that the draft articles used the phrases “with law”, “by law”, “with the law”, “the law” and “international law” indiscriminately and in a confusing manner, with no clarification as to what each meant in the specific context.

76. **Ms. Belliard** (France), recalling her delegation’s statement at the sixty-fourth session that some of the draft articles on expulsion of aliens were too general or were backed by insufficient practice to demonstrate the customary nature of their content, said that the same concerns prevailed with regard to the work done over the past year. Not only was much of the information on France in the Special Rapporteur’s sixth report (A/CN.4/625) from non-governmental sources, it was often at variance with the facts. Contrary to paragraph 270 of the report, for example, it was quite easy to calculate the duration of detention: at 2 to 32 days, it was among the shortest in Europe. Moreover, the “forcible return schemes” mentioned in paragraph 34 were merely voluntary programmes, and the information in paragraph 218 on physical conditions of detention was outdated. Some of the proposals in the Special Rapporteur’s sixth report were already part of France’s practice in expulsion matters: for example, the extension of procedural guarantees to aliens lawfully as well as unlawfully in the country and the procedural rights set out in draft articles C and A1.

77. Some terms used in the draft articles, for example “disguised expulsion” in draft article A, needed to be better defined, while others, such as “extradition disguised as expulsion”, in draft article 8, had no place in the text, particularly as the European Court of Human Rights had not confirmed its jurisprudence on that point in the *Bozano v. France* case in its decision in the *Öcalan v. Turkey* case. It would be preferable to avoid any reference to extradition, to which other considerations and a different legal framework applied.

78. Since the expulsion of aliens was covered in a variety of legal instruments, there might be a conflict

between those instruments and the text the Commission was drafting. For example, draft article 7 authorized collective expulsion in one specific situation, whereas it was entirely prohibited by article 4 of Protocol No. 4 to the European Convention on Human Rights.

79. With regard to the effects of armed conflicts on treaties, the Special Rapporteur had wisely decided not to limit the scope of the draft articles to inter-State conflicts but to extend it to some non-international conflicts. That would enable the text to be applied in the situations that were most often encountered in practice. However, the proposal to draw a distinction between treaties that concerned international organizations and those to which international organizations were parties was problematic, especially in view of the growing number of treaties to which such organizations acceded. Her delegation was not in favour of deferring the matter to a later stage.

80. The definition of armed conflict in draft article 2, which incorporated some but not all elements of the definition used by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* decision, was unsatisfactory as a fundamental notion of international humanitarian law. Non-international armed conflict was in fact not limited to situations where at least one State party was a party to the conflict and the definition in draft article 2 should accordingly be described as being only for the purposes of the draft articles. The inclusion of a reference to occupation, however, was appropriate.

81. Her delegation welcomed the new wording of draft article 3. Moreover, it was pleased that draft article 4 took into account not only the intention of the parties but also other factors such as the nature of the armed conflict. However, articles 31 and 32 of the Vienna Convention did not seem relevant to determining the intention of the parties, and the term “indicia” might not be the most appropriate.

82. Draft article 5, particularly the annex listing categories of treaties whose subject matter implied that they continued in operation during armed conflict, was much more problematic. Although the Special Rapporteur prudently stated that the list was indicative in nature, it presented more disadvantages than advantages. For example, while many human rights treaties were operational during armed conflict, they were not necessarily operational in their entirety or in all situations, unlike international humanitarian law

treaties. The description of some, such as multilateral law-making treaties, was so broad as potentially to encompass all existing treaties. Draft article 5, paragraph 1, was entirely adequate to the purpose, with no need for paragraph 2 and the annex.

83. Concerning draft article 15, her delegation had a strong preference for the inclusion of a reference to resort to force in violation of article 2, paragraph 4, of the Charter of the United Nations, rather than a reference to aggression. It could accept the current reference to aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly, but could never go along with a reference to the crime of aggression within the meaning of article 8 bis of the Rome Statute of the International Criminal Court. With regard to the “benefit” to an aggressor State mentioned in draft article 15, France had serious concerns about what that covered, how “benefit” was to be determined and by which authority.

84. On the topic of the protection of persons in the event of disasters, to avoid confusion with international humanitarian law, the title of draft article 6 should refer, not to humanitarian principles, but to the principles of humanitarian response. The notion of humanitarian response should be defined, possibly in a draft article 3 or 3 bis on definitions. In the text of the draft article, the phrase “while taking into account the needs of the particularly vulnerable” seemed to imply that meeting the needs of the most vulnerable could contradict the principle of non-discrimination; it was important to emphasize that the differential treatment of persons who were in different situations was not discriminatory. It was not clear what was covered by the principle of humanity, which might be confused with the idea of human dignity set out in draft article 7. A reference to the principle could be retained as long as the text indicated that helping people was the real purpose of humanitarian response. If the principle of humanity was confined to protection of human dignity, then draft article 7 could be deleted; if it went beyond that notion, then the text could be retained, but its relationship with draft article 6 should be studied.

85. Concerning draft article 8, her delegation was not convinced that it added anything to the principles that already applied to human rights: perhaps a reference to human rights in the preamble to the draft articles would suffice. With regard to draft article 9 (Role of the affected State), her delegation supported the proposal

that the term “affected State” should be defined in a provision on the use of terms. Before commenting on the substance, it would prefer to wait for the premised future draft articles on the scope and limits of the role of the affected State.

86. Lastly, it remained her delegation’s view that in order for the work being done to be of real use in consolidating rules on protection in the event of disasters, it must adhere closely to actual State practice.

87. **Mr. Anselmi** (Monaco), referring to the protection of persons in the event of disasters, said that Monaco endorsed the reference to the principle of humanity, the veritable cornerstone of such protection under international law. It likewise welcomed the reference to neutrality, which reflected the apolitical nature of actions undertaken in the event of disasters. The interests of persons affected must remain paramount among the concerns of those who were providing assistance to disaster victims. Monaco was especially attached to the principle of impartiality and its components of non-discrimination and proportionality. All three principles were universally accepted and should be transformed into the foundation for protection of persons in disaster situations.

88. Monaco had long been sensitive to humanitarian issues, particularly the situation of refugees, and had stepped up its international cooperation in such matters in recent years. The Government’s assistance, free from all political considerations, to victims of natural disasters or food shortages was carried out through an active partnership with Monaco’s numerous non-governmental organizations working in the humanitarian field. His delegation wished to underline the importance under the topic of promoting cooperation not only among States but also with international and non-governmental organizations capable of providing and coordinating emergency assistance with respect for the principles of humanity, neutrality and impartiality.

89. *Mr. Park Chull-joo (Republic of Korea), Vice-Chairman, took the Chair.*

90. **Mr. Delgado Sánchez** (Cuba), referring to the topic of expulsion of aliens, said that his delegation was in favour of developing draft articles on the human rights of persons being expelled, as long as they reflected the principle of protection of all the human rights of the persons concerned and did not undermine

respect for the sovereignty of States. The draft articles should include a general provision, equivalent to a declaration of principles, referring to respect for domestic law, maintenance of public security, respect for the principles of international law in all proceedings, and opposition to the use of expulsion as a xenophobic and discriminatory practice. Persons who had been expelled should not be prosecuted in the receiving State for the same offence for which they had been tried in the expelling State, in keeping with the general prohibition of double jeopardy. The draft articles should also include provisions on the obligation to inform the receiving State about any decision to expel a person to its territory and the right of persons being expelled to contact their consular representatives.

91. More work needed to be done on draft article 13 (Specific case of vulnerable persons) to define precisely what was meant by “child” and “older person”. The protection accorded to pregnant women should be extended to all women and girls. The language of draft article 14 on the right to life and personal liberty in the receiving State should be harmonized with the rest of the text. Draft article 15, paragraph 1, should provide for the obligation to prove “real risk”, so as to avoid subjective interpretations. Some countries used such ambiguities to avoid fulfilling their international obligations — for example, by refusing to extradite terrorists out of politically motivated considerations.

92. Cuban legislation provided for the expulsion of aliens as an accessory penalty applicable before or after the main sentence was served when the presence of the convicted person was deemed detrimental to the public interest. The Minister of Justice also had discretionary power, on an exceptional basis, to order the expulsion of an alien. In all such cases, criminal liability was considered extinguished.

93. With respect to the draft articles on effects of armed conflicts on treaties, his delegation suggested the inclusion of the term “embargo” in the definition of armed conflict in article 2, subparagraph (b), since in such situations the level of hostility, while falling short of armed conflict, could nevertheless have a major impact of the implementation of bilateral treaties. His delegation supported the Special Rapporteur’s views on the need to cover non-international armed conflicts since, like international conflicts, they could affect compliance with treaties. It likewise supported the idea of defining what was meant by “material breach” and

“fundamental change of circumstances” in draft article 17, subparagraphs (b) and (d).

94. With regard to the protection of persons in the event of disasters, Cuba saw the need to include a reference to the principles of international law relating to friendly relations and cooperation among States, in particular the principle of non-intervention in the domestic affairs of member States, which implied that States receiving assistance should set the priorities. It agreed with the definition of disaster in draft article 3, provided that it was understood not to include armed conflicts. The prevention of natural disasters, which were becoming ever more frequent as a result of human depredations against the environment, was the most effective way to protect persons: hence the importance of international cooperation at the disaster prevention stage, based on respect for State sovereignty, non-interference and the need to support countries with fewer resources.

95. **Mr. Szpunar** (Poland) said that in the draft articles on the expulsion of aliens the right of the State to expel an alien should be emphasized. That right should not be limited to the grounds of public order and State security, and freedom of action by States in emergency situations should not be restricted. While the fundamental human rights of expelled aliens should be protected, an unduly detailed list of guarantees for such rights should not be incorporated in the draft articles. Rather, a minimum standard of protection comprising guarantees of the rights to life, human dignity and freedom from torture should be included, as well as procedural guarantees to prevent group expulsion, provide for the right to defence, including legal counsel, and ensure the right to judicial review of individual decisions on expulsion. There should not be an absolute obligation to give reasons for an expulsion decision, since in practice States did not provide detailed reasons, especially when national security or public policy were the grounds for expulsion.

96. The tendency to universalize special regimes for the treatment of aliens should be avoided. The relevant European Union regulations provided a high level of human rights protection that was far from universal. A distinction should be drawn between irregular aliens and those who had been lawfully admitted into the territory of the State concerned, since the substantive rights and procedural guarantees available to the latter could justifiably exceed those available to the former.

97. With regard to the effects of armed conflicts on treaties, his delegation endorsed the definition of

armed conflict based on the *Tadić* decision but considered that the effects of internal armed conflicts on treaties should also be taken into account. A *rebus sic stantibus* clause might be relevant in that respect. Moreover, the limitation of the scope of application to States should be reconsidered, as international organizations and other non-State actors could also play an important role in the event of armed conflict. Poland agreed that under current international law, there was no rule providing for automatic suspension or termination of treaties. Draft articles 4 and 5, which were closely interrelated, could be combined to create a rule according to which the subject matter of a treaty was decisive for its continuation or suspension.

98. In draft articles 14 and 15, his Government supported a reference to the unlawful use of force contrary to Article 2, paragraph 4, of the Charter of the United Nations, rather than to aggression. With respect to possible damages, the relationship between the two draft articles and the law of State responsibility should be clarified.

99. With regard to the timely topic of the protection of persons in the event of disasters, the effort to establish a comprehensive legal framework should not be limited to the phases of the disaster itself, in terms of disaster response, and the post-disaster stage, or disaster recovery: disaster preparedness, prevention and risk reduction at the pre-disaster stage were also of the utmost importance.

100. His delegation fully supported the reference in draft article 6 to the humanitarian principles applicable to disaster response, which were well established in international law. More detailed references to their content might be included in the commentaries. The reference to human dignity in draft article 7 was fully justified. It should not be in the preamble, but in the text itself, as had been done under the topic of expulsion of aliens.

101. His delegation supported the idea expressed in draft article 8 as proposed by the Special Rapporteur that the affected State had the duty to protect individuals in its territory, while retaining the right to refuse assistance from abroad. However, there was no need for specific mention of the principles of sovereignty and non-intervention. Since the responsibility to protect was among the most dynamically developing concepts in international relations, the question of whether or not it was applicable to the topic of protection of persons in the

event of disasters needed to be given careful consideration.

The meeting rose at 6 p.m.