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Chair: Mr. Salinas Burgos..... (Chile)

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The meeting was called to order at 3.15 p.m.

Agenda item 79: Report of the United Nations Commission on International Trade Law on the work of its forty-fourth session (*continued*) (A/C.6/66/L.10, L.11 and L.12)

1. **Ms. Quidenus** (Austria), introducing draft resolutions A/C.6/66/L.10, A/C.6/66/L.11 and A/C.6/66/L.12 relating to the report of the United Nations Commission on International Trade Law (UNCITRAL) on the work of its forty-fourth session, said that Liechtenstein and Uganda had joined the group of sponsors of draft resolution A/C.6/66/L.10, which was the omnibus resolution on the report of the Commission. The text largely followed that of the previous year's resolution. Paragraphs 2 to 9 referred to the work accomplished and action taken during the Commission's forty-fourth session, including the finalization and adoption of two new international commercial standards: the UNCITRAL Model Law on Public Procurement and the document "The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective". Paragraph 12 welcomed the decision to establish an UNCITRAL Regional Centre for Asia and the Pacific in the Republic of Korea. Paragraphs 16 and 17 referred to the panel discussion on the role of the Commission in the promotion of the rule of law in conflict and post-conflict societies and the views expressed by the Commission at the end of the panel discussion. Paragraph 20 reaffirmed the need to ensure the broadest possible participation in the Commission's meetings, noted the Commission's agreement that every effort should be made to identify alternatives to abolishing the current alternating pattern of meetings, endorsed the Commission's agreement to achieve that result by reducing its allocation for conference services and encouraged Member States, jointly with the Secretariat, to continue to review current working practices with a view to achieving increased efficiency and identifying budgetary savings.

2. Draft resolution A/C.6/66/L.11 on the UNCITRAL Model Law on Public Procurement expressed appreciation for the Model Law, requested the Secretary-General to transmit the text to Governments and other interested bodies, and recommended that all States use the Model Law in assessing their legal regimes for public procurement and give it favourable consideration when enacting or revising laws. It also called for closer cooperation and

coordination with other international organs and organizations in that field to avoid duplication of efforts or inconsistent results and endorsed the efforts of the Commission secretariat to increase coordination of, and cooperation on, legal activities concerned with public procurement reform.

3. Draft resolution A/C.6/66/L.12 entitled "UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective" expressed appreciation for the completion of the document on the judicial perspective, requested the establishment of a mechanism for updating it and also requested publication of the text as updated from time to time. The draft resolution also recommended that the document should be given due consideration by judges and other stakeholders in cross-border insolvency proceedings and that States should consider the implementation of the Model Law.

4. She was confident that all three draft resolutions could be adopted without a vote.

Agenda item 81: Report of the International Law Commission on the work of its sixty-third session (*continued*) (A/66/10 and Add.1¹)

5. **Mr. Montecino Giralt** (El Salvador), referring to the draft articles on the effects of armed conflicts on treaties, said that his delegation supported the Commission's decision to update the definition of "armed conflict" on the basis of the definition used by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the case of *Prosecutor v. Duško Tadić*. His delegation also welcomed the amended wording of draft article 3, which reaffirmed the principle of legal stability and continuity that inspired the draft articles using the appropriate term ("existence of an armed conflict"), which had the advantage of covering all temporal and material aspects. With respect to draft article 7 (Continued operation of treaties resulting from their subject matter), his delegation considered the indicative list referenced in the draft article to be part of the normative core of the draft articles; its removal would alter their very sense. It would have been a mistake not to address the need to establish an obligatory standard in order to ensure compliance with certain treaties during armed conflicts, including not only those relating to the rules of international humanitarian law

¹ To be issued.

but also treaties on the environment, trade and peaceful dispute settlement. His delegation therefore welcomed the Commission's decision to retain the annex and to include comments on each category of treaty included in the list. It was gratifying to see the inclusion in the indicative list of the category "Treaties relating to aquifers and related installations and facilities" and likewise to see that the draft articles on the law of transboundary aquifers established the obligation to protect aquifers in the event of armed conflict. It was to be hoped that the Commission would strive to achieve similar linkages between other areas of its work. His delegation supported the Commission's recommendation to the General Assembly to take note of the draft articles in a resolution and annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

6. Concerning the draft articles on expulsion of aliens, the Commission had rightly decided to take a balanced approach, respecting the sovereign right of States to expel but subjecting expulsion to the limits imposed by international law, chiefly the obligation to respect human dignity and the rights inherent therein. His delegation shared the Special Rapporteur's view in respect of paragraph 1 of draft article D1: voluntary departure of an alien would ensure greater respect for his or her dignity and be easier to manage administratively. However, as draft article 2 defined expulsion as an act by which a State compelled an alien to leave its territory, it was doubtful that expulsion could be referred to as "voluntary" and the term should therefore be reconsidered.

7. His delegation disagreed with the treatment of forcible implementation of an expulsion decision in paragraph 2 of draft article D1, especially the incorporation of the idea that expelled aliens were "disruptive passengers", which amounted to stigmatization solely on the basis of nationality. In addition, the term "orderly" was ambiguous and imprecise and, in combination with the subsequent reference to the rules of international law relating to air travel, suggested that all expelled aliens constituted a threat to the safety of air travel. There were no grounds for such a conclusion. Moreover, practice clearly showed that air transport was only one possible means of transport used for expulsion purposes. The provisions on forcible expulsion in draft article D1 should reflect the broad approach taken in draft article 1, recognizing

that persons subject to expulsion were not a homogeneous group, nor did they all pose a security risk.

8. Draft article E1, which established in certain circumstances the right of an alien facing expulsion to be sent to the State of his or her choice, provided that the State was willing to admit the alien, would help to avoid many human tragedies. His delegation therefore urged the Commission to broaden the conditions under which such a possibility might arise, taking account of analogous circumstances in which the fundamental rights of a person being expelled might be threatened.

9. Draft article G1 seemed to present the protection of an alien's property as a legal consequence of expulsion, which would imply that the protection of property was subject inevitably to the implementation of an expulsion proceeding or that it could only result from the expulsion itself. That idea was flawed from a legal standpoint, as the protection of property, as an expression of property rights, was an autonomous right that existed independent of any expulsion proceeding. His delegation therefore proposed moving draft article G1 to the section of the draft articles that dealt with protection of human rights in order to maintain consistency with article 17 of the Universal Declaration of Human Rights.

10. His delegation supported the remainder of the draft articles submitted by the Special Rapporteur during the session. Draft articles I1 and J1 reflected the generally accepted concepts of responsibility of States for internationally wrongful acts and diplomatic protection. His delegation could also support draft article H1 on the right of an unlawfully expelled alien to return to the expelling State. However, the expression "mistaken grounds" in the latter article should be replaced by a more legally precise term, such as "an error of fact or law". Aware that the topic was a complex one that required extensive discussion and collaboration by all States, his Government would submit more comprehensive written comments on the whole set of draft articles, together with responses to the specific matters of interest to the Commission.

11. Turning to the topic "Protection of persons in the event of disasters", he said that the rules embodied in the draft articles could make a key contribution to the establishment of a general legal framework to guide the activities of States and other members of the international community in addressing the

consequences of disasters, including not just the loss of human life but also unequal access to assistance, forced relocation and involuntary resettlement, loss of documentation and problems relating to recovery of property.

12. Draft article 10 establishing the duty of the affected State to seek assistance was consistent with the obligation incumbent upon all States to meet the needs of persons affected by a disaster occurring within their territory, even if the State had limited means. His delegation shared the Special Rapporteur's view that the duty to seek assistance arose when a State's national response capacity was insufficient; his Government's practice was in accord with that view. However, the clause "to the extent that a disaster exceeds its national response capacity" in the draft article could be taken to mean that States could seek assistance only after lack of sufficient national capacity had been demonstrated, which could lead to delays in the provision of assistance, thereby exacerbating the consequences of the disaster. His delegation therefore proposed replacing the current wording of the draft article with the wording used in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of the International Federation of Red Cross and Red Crescent Societies: "If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons."

13. His delegation endorsed the fundamental principle of State sovereignty underlying draft article 11. At the same, it supported the inclusion in paragraph 2 of an exception prohibiting States from arbitrarily refusing assistance. The commentary helped to elucidate the meaning of "arbitrarily" and, in particular, to clarify that a State's withholding of consent to external assistance could not be considered arbitrary if the State had the capacity and the resources to provide an adequate and effective response, if the State had accepted appropriate assistance from other sources or if the offer of assistance was not extended in accordance with the draft articles. The expression "whenever possible" in paragraph 3 of draft article 11 was vague and could allow States excessive discretion in communicating their decision regarding the acceptance of assistance, adversely affecting populations in urgent need of such assistance. His delegation therefore suggested that the content of

paragraph 3 should be divided to express two distinct ideas, first, that the State had a duty to communicate its response to an offer of assistance in a timely manner, bearing in mind the type of disaster that had occurred and the needs of the population; and, second, that in extreme situations States might, for good cause, not be able to respond immediately, or indeed at all, to an offer of assistance.

14. As to the proposed draft article 12, the rules governing the right to offer assistance should be as broad as possible, since the primary aim was not to grant specific privileges to the entities in question, but to establish rules aimed at meeting the needs of a population affected by a disaster. His delegation therefore suggested reformulating the draft article so as to extend the right to offer assistance to all persons, both natural and legal.

15. His delegation would submit comments in writing on the specific issues of particular interest to the Commission.

16. **Mr. Zellweger** (Switzerland) said that his delegation welcomed the draft articles on the effects of armed conflicts on treaties and supported the Commission's recommendation to the General Assembly concerning them. His delegation concurred with the principle reflected in draft article 3, which appeared to be in accord with both State practice and most written opinion, that in general treaties continued to apply in the event of armed conflict. It also supported the Commission's decision to exclude treaty relations between States and international organizations or between international organizations from the scope of the draft articles.

17. With regard to the topic of expulsion of aliens, the Commission had requested information on national practice concerning the suspensive effect of appeals against an expulsion decision. Under Swiss law appeals had suspensive effect unless otherwise provided by the law, and an expulsion decision could only be executed when the decision could no longer be contested through a legal remedy, when the possible legal remedy did not have suspensive effect or when the suspensive effect attributed to a legal remedy had been withdrawn. An alien subject to expulsion could remain on Swiss territory while awaiting the decision of the competent authority. Several types of expulsion or repatriation existed under Swiss law, the provisions of which had been adapted following Switzerland's

accession to the Schengen Agreement to bring them into line with European Union Directive 2008/115/EC on common standards and procedures in member States for the return of third-country nationals who were in their territory unlawfully. The law expressly stated that for certain types of repatriation an appeal did not have suspensive effect, while for other types it was silent on the question. In the latter cases, the rules granting suspensive effect applied. Where the law provided for immediate repatriation, an appeal did not have suspensive effect, and the competent authority carried out the expulsion decision even if an appeal was pending. Generally speaking, whether an alien was lawfully or unlawfully in the territory had no bearing on whether or not the appeal had suspensive effect. His delegation had submitted further written information on the provisions of Swiss law with regard to return of aliens.

18. As to whether international law required that appeals should have suspensive effect, the principle of non-refoulement gave refugees the right, guaranteed by international law, to remain beyond the reach of a persecuting State, with no obligation to return against their will for as long as the danger of persecution persisted. That principle was enshrined in refugee law, in various human rights instruments and also in the Constitution of Switzerland. Hence, where the principle of non-refoulement applied, international law required that an appeal should have suspensive effect. Otherwise, international law did not require it. With regard to whether, as a matter of international law or otherwise, an appeal against an expulsion decision should have suspensive effect on the implementation of an expulsion decision, his delegation's view was that, as long as the minimum guarantees of international law, in particular the principle of non-refoulement, were respected, international law should not require appeals against expulsion decisions to have suspensive effect. It was a prerogative of the State to decide whether or not to allow an alien to remain in its territory.

19. His Government was fully aware of the issues raised by the Special Rapporteur in his seventh report (A/CN.4/642) concerning the popular initiative "For the expulsion of foreign criminals" adopted by the people and cantons of Switzerland in November 2010, but believed that the Special Rapporteur's reservations were somewhat premature. As a result of the initiative, the Swiss Constitution had been modified to allow for

the expulsion of foreigners who had been convicted of certain crimes. The new provision would not, however, take effect until implementing legislation had been adopted. Switzerland had a long and rich history of implementing the decisions of the people while also ensuring respect for international law. Over more than a century, Swiss lawmakers had managed successfully to balance the tensions between the requirements of a democratic system and those of the rule of law, and his delegation had no doubt that they would do what was needed to ensure that the new law would be implemented in a manner that was in conformity with the practice of States and with international law.

20. **Mr. Sánchez Contreras** (Mexico), referring to the draft articles on protection of persons in the event of disasters, said that his delegation generally agreed with the idea behind the title of proposed draft article 12 (Right to offer assistance), since the international community did, in fact, have the right to offer assistance to a State affected by a disaster. However, the exercise of that right was subject to two constraints. First, only subjects of international law were entitled to exercise that right and, second, it must be exercised in accordance with the principle of non-interference in the internal affairs of the affected State, without undermining its sovereignty or its primary role in the direction, control, coordination and supervision of assistance.

21. As to whether States had a duty to provide assistance when requested by the affected State, his delegation held the view that, absent *lex specialis*, the duty to cooperate should generally not be construed as an obligation to provide assistance but rather as an obligation to consider requests for assistance from the affected State, without there being a duty to accede to such requests. That view was based on a systematic interpretation of draft articles 5 (Duty to cooperate) and 10 (Duty of the affected State to seek assistance). Taken together, they implied that, although there was an obligation to cooperate, it was subject to two conditions: a decision by the affected State — after determining that its national capacity had been overwhelmed by the disaster — that it required assistance, and a determination by the State from which assistance was sought that it had the capacity to provide it.

22. **Mr. Rietjens** (Belgium), noting the Commission's request for information on State practice with regard to the expulsion of aliens, said that Belgian

law provided for four types of removal (*éloignement*) of aliens. Refusal of entry (*refoulement*) was an administrative decision whereby an alien who had not yet crossed the border was prohibited entry into Belgian territory. An order to leave the territory (*l'ordre de quitter le territoire*) was an administrative decision whereby an alien who was not authorized to remain for more than three months or to settle in Belgium was required to leave. Repatriation (*renvoi*) was a ministerial decree ordering the removal of an alien who was authorized to stay for longer than three months but not to take up permanent residence in Belgium and who had breached public order or national security or had not complied with the conditions of his or her admission. A royal expulsion decree (*l'arrêté royal d'expulsion*) was an action taken in respect of a resident alien who had committed a serious breach of public order or national security. Such a decree imposed a 10-year ban on re-entry.

23. Appeals against removal decisions were heard by a special council (*Conseil pour le contentieux des étrangers*) that dealt with cases involving aliens; the council had exclusive authority to suspend the enforcement of a removal decision. The suspensive effect of appeals did not depend on whether the alien was lawfully or unlawfully in the territory but rather on the type of procedure, in other words, whether the alien had lodged an “ordinary” or an “extreme urgency” appeal. Aliens could lodge an appeal within 30 days of notification of an expulsion decision (15 days for aliens held in custody) and could specifically ask to have enforcement of the decision suspended. In an ordinary appeal a suspension might be granted after the parties had been heard, whereas in cases of extreme urgency a suspension might be ordered on a provisional basis without the parties having been heard. Only an extreme urgency appeal was suspensive. The law established a period of five days, including no fewer than three working days, following notification during which aliens subject to a removal decision whose execution was imminent could file an extreme urgency appeal for suspension; when such an appeal was filed, the alien could not be forcibly removed until the council had rendered its decision.

24. His Government was of the view that international law did not require that appeals against an expulsion decision be given suspensive effect because there was no specific provision establishing such an obligation. As extreme urgency appeals did have

suspensive effect in Belgium, the Commission’s third question — whether, as a matter of international law or otherwise, an appeal against an expulsion decision should have such effect — did not apply to it. His delegation would submit further information in writing.

25. **Mr. Quintana** (Colombia) said that of the topics currently on the Commission’s agenda, the one of greatest practical interest was protection of persons in the event of disasters. Identifying the applicable international rules and existing State practice was a challenge owing to the relatively novel nature of the topic, and his delegation applauded the Commission’s swift progress in provisionally adopting 11 draft articles that would provide a solid basis for future work. The Special Rapporteur had succeeded in formulating balanced draft articles that took account of the views of States and other stakeholders and that sought to resolve the inherent tensions between the need to protect persons and the principles of respect for the territorial sovereignty of the affected State and non-interference in its internal affairs. His delegation endorsed the view that the concept of “responsibility to protect” fell outside the scope of the topic and applied only to four specific crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.

26. Draft article 7 enshrined a fundamental concept that had often been overlooked or ignored in international instruments: the principle that human dignity was the ultimate foundation for rules aimed at protecting individuals, including the provisions of both human rights law and international humanitarian law. It must not be forgotten that the protection of human beings lay at the heart of the topic, and it was therefore both appropriate and necessary to place special emphasis on the concept of human dignity and on the fundamental role that it should play during disaster response and recovery. Draft article 7 established a preemptory duty to respect and protect human dignity incumbent on States and on intergovernmental and nongovernmental organizations, which under draft article 5 also had the duty to cooperate. As recognized in the commentary to the draft article, the duty to “respect and protect” was very broad, encompassing both a negative obligation to refrain from injuring the dignity of the human person and a positive obligation to maintain that dignity. The State, given its primary role in disaster response, also had the primary role in fulfilling that duty.

27. Draft articles 9 to 11, which were closely linked and mutually complementary, formed the core of the draft articles, elucidating the roles and division of labour among the various stakeholders involved in providing relief and assistance. Draft article 9, which was premised on the principle of sovereignty, established the clear duty of the affected State to ensure the protection of persons and the provision of relief and assistance, while draft article 10 established the duty of the affected State to seek assistance, but with two important caveats: the State had a duty to seek assistance “as appropriate”, and that duty arose only in exceptional circumstances, when the disaster exceeded national response capacity. The use of the term “duty” in those two draft articles could be seen as an appropriate means of reconciling the two desiderata of preserving State sovereignty and protecting the affected population. The duty to cooperate, to seek assistance and to refrain from arbitrarily withholding consent imposed an obligation of conduct or means, not of result, on the affected State, which was obliged to give good faith consideration to the possibility of accepting assistance from another State or from an international actor and could not, under draft article 11, withhold its consent arbitrarily. The latter draft article reflected, perhaps more than any of the others adopted by the Commission on the topic, the balance between conflicting interests and values that was a distinctive feature of all the draft articles.

28. There appeared to be a contradiction between the Commission’s question in chapter III of its report, concerning whether States’ duty to cooperate included a duty to provide assistance when requested by an affected State, and the philosophy underlying the whole of the draft articles. Proposed draft article 12 established the right of third States to offer assistance, not an obligation to do so. Indeed the majority of the Commission members had been of the view that it would be going too far to recognize a specific legal obligation of third States or organizations to provide assistance, and that the only duty they had was to consider any requests for assistance received from affected States, a view with which his delegation concurred. The obligation postulated in the question posed in paragraph 44 lacked any basis in international law. His delegation urged States to respond to the Commission’s requests for information on specific issues, such as those relating to State practice mentioned in paragraphs 43 and 284 of the

Commission’s report, as input from States was essential to future work on the topic.

The meeting rose at 4.30 p.m.