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

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11-56991 (E)

The meeting was called to order at 10.15 a.m.

Statement by the President of the International Court of Justice

1. **The Chair** welcomed the President of the International Court of Justice, noting that the activities of the Court, as the principal judicial organ of the United Nations, were of obvious interest and importance to the Sixth Committee.

2. **Mr. Owada** (President of the International Court of Justice) said he would take the opportunity to speak about some important functions of the Court, in addition to its roles of handing down judgments in contentious cases and rendering advisory opinions. "Incidental proceedings", defined in section D of the Rules of Court, included proceedings on interim measures of protection, or provisional measures; preliminary objections; counter-claims; intervention; special reference to the Court; and discontinuance. In recent years the Court had dealt with many such proceedings. They were of special relevance to the merits phase of a case.

3. Of the six kinds of incidental proceedings, he would describe four. By means of provisional measures, under Article 41, paragraph 1, of its Statute, the Court could order either or both parties to a case not to alter the status quo until it had rendered a final decision in the case, in order "to preserve the respective rights of either party". The party requesting provisional measures must establish, first, that the Court had prima facie jurisdiction in the case; second, that there was a link between its claim in the main case and the measures requested; and third, that there was an urgent risk of irreparable harm to itself if the Court did not make an order. Each of those criteria was linked to the merits stage of the case. Clearly, the Court could deal with the main case only if it had jurisdiction, so there must be prima facie jurisdiction at a preliminary stage. The Court's precondition for linking, at that preliminary stage, the rights of which protection was sought with their recognition or otherwise at the merits stage was that the rights must be at least plausible.

4. In the 1991 case concerning *Passage through the Great Belt* (*Finland v. Denmark*), *Provisional Measures*, Finland had asked the Court to prohibit Denmark, pending a decision on the merits, from continuing with the construction of a bridge over the East Channel of the Great Belt that it alleged would have violated its right of free passage. In his separate opinion in that case, Judge Shahabuddeen had stated that "a State requesting interim measures, such as Finland, is required to establish the possible existence of the rights sought to be protected". That was usually described as the "plausibility test", and its importance had increased with the Court's statement, in its judgment in the 2001 case concerning *LaGrand* (*Germany v. United States*), that provisional measures under Article 41 of the Statute were binding. In ordering provisional measures, the Court was not making a definitive decision on the rights involved in such cases, because to do so would pre-empt the merits stage.

5. In its 2009 order on provisional measures in the case concerning *Obligation to Extradite or Prosecute* (*Belgium v. Senegal*) the Court had confirmed that reasoning by stating that its power "to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible". In the more recent case concerning *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) the Court had likewise decided that it needed only to decide "whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible". The requirement to establish an urgent risk of irreparable harm was also related to the main claim.

6. The Court's determination of the plausibility of rights for the purpose of provisional measures did not determine the merits of the case itself, which it had to avoid prejudging. Nor did the Court's finding at the preliminary stage that it had prima facie jurisdiction to consider the merits prejudge a fully fledged consideration of jurisdiction at the merits stage of the proceedings. Such a finding was a rebuttable presumption which the Court might itself reverse at a later stage. It had in fact done so in two recent cases, the 2009 *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals* (*Mexico v. United States of America*), and the 2011 case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), *Preliminary Objections*, ultimately finding in both cases that it had no jurisdiction.

7. Turning to the second category of incidental proceedings, preliminary objections, he explained that

under article 79 of the Rules of Court a respondent could, within three months of the filing of a Memorial, submit a written objection to the jurisdiction of the Court or to the admissibility of the application. That had the effect of suspending the proceedings on the merits of the case. Having heard the views of both parties on the preliminary objection, the Court would issue a judgment in which it either upheld the objection or dismissed it, or declared that the objection did not possess an "exclusively preliminary character". In the time of the Permanent Court of International Justice, preliminary objections which were considered to bear on the merits of a case were officially "joined" to the merits, as in the 1933 case concerning the *Administration of the Prince Von Pless (Interim Measures of Protection)* (*Germany v. Poland*). The practice of the International Court of Justice, under the 1946 Rules of Court, had initially been the same, and for the sake of the "good administration of justice" it had joined preliminary objections to the merits in the case concerning *Right of Passage over Indian Territory* (*Portugal v. India*) and in the case concerning *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*). In so doing, it was not required to look into the substance of the objection. However, in time the procedure of joinder came to be seen as somewhat inadequate, since it tended to delay proceedings and to result in the same issues being discussed twice, first at the preliminary stage and for a second time at the merits stage.

8. Under the 1978 revised Rules of Court, a solution to the problem was found by providing that a preliminary objection could be reserved for the merits stage of a case, but only when it "does not possess an exclusively preliminary character". In the 2006 case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Jurisdiction and Admissibility*, the Court had determined that an objection advanced by the United States of America was so closely bound up with the substance and merits of the dispute that it did not possess an exclusively preliminary character, and was not therefore an obstacle for the Court to entertain the proceedings brought by Nicaragua. In three 1998 cases, the case concerning *the Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), *Preliminary Objections,* and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya v. United Kingdom*), *Preliminary Objections*, as well as a similar case brought by the United States of America, the Court had found that the objections did not have an exclusively preliminary character and so had to be addressed at the merits stage. In its present form, article 79 of the Rules of Court gave the Court discretion in the matter, in an attempt to balance the desire not to prejudge the outcome with concerns for judicial economy.

9. The third type of incidental proceeding was the counter-claim, which according to article 80, paragraph 2, of the Rules of Court had to be raised in the respondent's Counter-Memorial on the merits. A counter-claim was an "autonomous legal act, the object of which is to submit a new claim to the Court", that claim being linked to the principal claim. According to article 80, the Court could entertain a counter-claim only if it came within the Court's jurisdiction and was directly connected to the subject-matter of the other party's claim. However, a counter-claim must come within the Court's jurisdiction on its own standing; it could not be heard simply on the basis of the Court's jurisdiction over the main claim.

10. To determine whether a counter-claim was directly connected with the subject-matter of the main claim, the Court took account of the particular aspects of each case. 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*), the Court had explained that, as a general rule, the degree of the connection between the main claim and any counter-claim must be assessed both in fact and in law. In that case, it had ruled that Yugoslavia's counter-claims were admissible as such because the facts on which they rested had allegedly occurred on the same territory and during the same time period as the facts underpinning the main claim. Moreover, Yugoslavia had stated its intention to rely on certain identical facts, both in opposing the claim by Bosnia and Herzegovina and in supporting its own counter-claims; and the claims of both parties had the same legal aim, namely, the establishment of legal responsibility for violations of the Genocide Convention.

11. The Court used similar reasoning to admit the counter-claims of the United States of America in the 1998 case concerning *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), *Counter-Claim*. In determining the factual connection between a counter-

claim and the main claim, the Court inquired whether the facts in both were part of the same "factual complex". In the case concerning *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*) the Court had found Italy's counter-claim inadmissible because it was based on events occurring during the Second World War, whereas the European Convention for the Peaceful Settlement of Disputes, of 29 April 1957, on which the Court's jurisdiction over the counter-claim and Germany's own claim in the case were supposed to rest, did not apply to situations occurring before its entry into force.

12. The fourth type of incidental proceeding was intervention by a State in an existing case between other States, in order to present that State's observations on a particular aspect of the case. Under Article 62 of the Statute of the Court, for a third State to intervene it must have "an interest of a legal nature which may be affected by the decision in the case". It was for the Court to decide whether to grant a request to intervene, and it had done so in only three cases. For example, in the case concerning the *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) both Costa Rica and Honduras had made applications to intervene. The Court had found that Costa Rica had established that it had an interest of a legal nature in the delimitation of the boundary between Nicaragua and Colombia, but it had not succeeded in establishing that its interest would be affected by the Court's decision. The Court had therefore rejected the application. It had also rejected an application by Honduras to intervene, not only because Honduras had sought to do so as a party to the case, which would have made it subject to further conditions under Article 62 of the Statute, but also because it had failed to establish that its interest was of a legal nature. That was partly because it was the Court's consistent practice, in cases involving a maritime delimitation, to stop the delimitation line at any point where it might affect the interests of third States. An example of that practice was its judgment in the case of the *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*).

13. In the case concerning *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), permission had been given to Greece to intervene because Germany had referred, in its pleadings, to a judgment by a Greek court resulting in the enforcement of its order in an Italian court. That judgment could have been affected by the Court's decision in the main dispute between Germany and Italy, and Greece therefore had an interest of a legal nature in the main case. In the 1992 case concerning the *Land, Island and Maritime Frontier Dispute* (*El Salvador v. Honduras: Nicaragua intervening*), Nicaragua's application to intervene at an early stage had succeeded because it was one of the three riparian States in the area in question — the Gulf of Fonseca — and its rights would be affected by the judgment of the Court. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria: Equatorial Guinea intervening*) the Court had itself invited Equatorial Guinea to participate.

14. Intervention in the Court's cases was a complex matter, and it was not always easy for third parties to establish an interest of a legal nature. Nevertheless, intervention under Article 62 of the Statute, enabling a non-party State to make its interests fully known, could and did play a significant role in the Court's evolving jurisprudence. Many cases now coming before the Court contained elements that raised issues to be settled in incidental proceedings, an aspect of the Court's procedural law which was sometimes neglected.

15. **The Chair** thanked Mr. Owada, on behalf of the Committee, for his statement and expressed appreciation of the issues he had highlighted.

Agenda item 81: Report of the International Law Commission on the work of its sixty-third session (*continued*) (A/66/10 and Add.1[1])

16. **Mr. Dufek** (Czech Republic), commenting on the topic "Effects of armed conflicts on treaties", said he was gratified to note that many of the solutions adopted by the Commission were identical to those proposed by his delegation in the Sixth Committee. He welcomed the inclusion of draft article 3, which was the core of the entire set of draft articles and was derived from customary international law. He also welcomed the broadened range of criteria for determining whether the operation of a treaty had been terminated or suspended.

17. The decision on the future form of the draft articles required caution, because they were intended to apply not only to international conflicts but also to internal conflicts, where international law was a less reliable guide. It would therefore be premature, at the

[1] To be issued.

present juncture, to convene a diplomatic conference to negotiate an international convention. In the first instance, the draft articles should be adopted in a non-binding form annexed to a General Assembly resolution. Once it had been seen that States were applying them in practice, and that the rules contained therein were widely accepted, the next step would be to convene an international conference.

18. Turning to the topic "Expulsion of aliens", he said that the draft articles were now ready for adoption on first reading during the next session of the Commission. However, some provisions in the draft articles, such as the scope of the procedural rights to be granted to aliens illegally residing in the territory of the host State, exceeded the framework of codified rules of international law, and their wider acceptance could be problematic. It was important to ensure not only a high level of protection for the affected persons, but also the wide acceptance by the international community of rules in the matter.

19. With regard to the topic "Protection of persons in the event of disasters", he welcomed the three new draft articles (10, 11 and 12) proposed by the Commission in chapter IX of its report, dealing with the responsibility and capacity of the affected State, as well as the role of States and other entities offering assistance. Concerning draft article 12, he agreed with comments made in the Commission that it was difficult to categorize States, intergovernmental organizations and relevant non-governmental organizations as subjects enjoying the "right to offer assistance". Those three groups of actors had been placed in the same category in draft article 7, in relation to respect for the human dignity of recipients of humanitarian assistance, and their roles could therefore also be seen as similar for the purpose of offering and providing assistance under draft article 12. The use of the term "right" in relation to the offer of assistance was acceptable in the context of the previous draft articles 10 and 11.

20. **Ms. Quidenus** (Austria) welcomed the changes made to the text of the draft articles on the effects of armed conflicts on treaties. Those changes reflected some of her country's concerns. Doubts remained, however, about the inclusion in the draft articles of non-international armed conflicts, even if the definition of such conflicts was restricted to cases where there was "protracted resort to armed force between governmental authorities and organized armed groups". The inclusion of conflicts like those could detract from the stability and predictability of international relations. A State party to a treaty might not even be aware that there was an internal armed conflict, in those terms, in another State party. Moreover, the draft articles failed to distinguish between States parties to a treaty that were simultaneously parties to a conflict, and those that were not, and they did not therefore adequately reflect the different relations prevailing. Her country would have preferred more elaborate rules on the distinction between the two categories of States.

21. She agreed with the Commission's recommendation that the General Assembly should take note of the draft articles. The practice of States in the light of the draft text, however, should be monitored over a period of several years in order to ascertain how far it was acceptable to the community of States.

22. Turning to the topic "Expulsion of aliens", she addressed the points raised by the Commission in chapter III of its report. On the suspensive effect of appeals against expulsion, she explained that Austria's Aliens Police Act provided that all decisions on expulsion had suspensive effect when they related to an alien lawfully present in Austria, but the suspensive effect could be denied to aliens whose stay in the country was legal only if their immediate departure was required for reasons of public order or safety. The suspensive effect of appeals against expulsion decisions could be revoked in specific cases. In asylum proceedings, appeals against negative decisions normally had suspensive effect, which could be granted even in exceptional cases in order to satisfy the "non-refoulement" provision. As to whether international law required appeals to have suspensive effect, Austria was bound by article 1 of Protocol No. 7 of the European Convention on Human Rights.

23. In connection with the topic "Protection of persons in the event of disasters", she commented on the new draft articles 10 to 12, and the issues raised by the Commission in chapter III of its report. Austria had a federal constitution, and disaster relief was a matter mainly for the provinces, which had enacted legislation defining their own role in prevention, preparedness and response. Federal authorities coordinated action and supplied information to relevant provincial agencies. Austria's view was that there was no duty to cooperate with the affected State in disaster relief, nor should any such duty be established, because it would contradict the voluntary principle underlying international relief

efforts. As for draft article 10, Austria recognized that all States were obliged to provide an appropriate disaster relief system to protect their citizens, encompassing prevention, preparedness and response. However, draft article 10 failed to strike the right balance between State sovereignty and the protection of individuals. If the national response capacity was exceeded in the event of a disaster, the affected State should seek assistance to meet its responsibility, but had no duty to do so. That approach reflected guideline 3.2 of the *Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance* (the "IDRL Guidelines"), prepared by the International Federation of Red Cross and Red Crescent Societies.

24. Austria endorsed the principle enunciated in draft article 11, that any assistance required the consent of the affected State. That principle was reflected in many international texts on the subject, including the solidarity clause in article 222 of the Treaty on the Functioning of the European Union (TFEU). Such consent must be valid within the meaning of article 20 of the articles on State responsibility, and that should be made clear in the commentary. Austria could also concur with the second principle in draft article 11, the duty not to deny consent arbitrarily, and thus to accept assistance. Under existing international law, other States would not be able to act without the consent of the affected State, even if the latter incurred international responsibility by refusing assistance. Austria welcomed the provision, in paragraph 3 of draft article 11, that an affected State had a duty to make known the decision it had made on any offer of assistance. That would make it easier for others to invoke its responsibility.

25. She welcomed in principle the provision in draft article 12 on the rights of States and intergovernmental and non-governmental organizations to offer assistance, and agreed that its scope should be reduced to the "offer" of assistance, since the actual provision of assistance depended on the consent of the affected State. Draft article 5 already established a duty of cooperation on the part of all actors. Assistance must be given in a spirit of cooperation, and that debarred the imposition of any obligation. Draft articles 5 and 12, taken together, would put States and other entities under some pressure to offer assistance, which was only to be welcomed.

26. **Mr. Hildner** (Germany) reiterated his country's view, in connection with the expulsion of aliens, that the term "expulsion" covered two distinct issues, and that the Commission's use of the term could lead to misunderstandings. A State's right to expel had to be distinguished from its right to deport an alien, because a State's discretionary power was far more limited in the matter of deportation. There could be no coherent approach to the issue unless that distinction was addressed. As for future work on the topic, he shared the doubts expressed by some members of the Commission about the advisability of elaborating draft articles which might then be incorporated into a convention, because the topic was not suitable for the development of rules *de lege ferenda*. Many national rules and regulations governed the question of expulsion, which was also addressed by human rights instruments and guarantees for protecting individuals. There was no need for further codification. Instead, draft guidelines or principles could be drawn up, enunciating best practices such as those already contained in the current draft articles. In analysing State practice, the focus should be on contemporary practice; the practice of the Federal Republic of Germany was not the same as that followed before the Second World War.

27. Turning to the draft articles discussed at the Commission's recent session, he emphasized that draft article H1 did not constitute *lex lata*. Even as a rule *de lege ferenda*, the inclusion of a "right of return" in some cases seemed to be too broadly framed. Draft article I1 should be reworded in order to make clear that States could only be responsible for the violation of international legal rules. The concept of "particular damages for the interruption of the life plan" proposed for inclusion in the commentary on that article was not universally recognized, nor was there enough international practice for it to be called an "emerging concept". It should be omitted from the commentary. Draft article J1 should be deleted. It would be sufficient to mention diplomatic protection in the commentary. He agreed with the Special Rapporteur's view that there was no general rule of international law requiring the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. His country would provide the Commission with further information about its own practice in that regard.

28. Concerning the topic “Protection of persons in the event of disasters”, and the discussion on draft article 12, the answer to the Commission’s question as to whether a duty to cooperate included a duty on States to provide assistance when requested by the affected State was an unambiguous “no”. There was no such duty, either for third States or for international organizations, either in international treaty law or in customary international law. Nor had the Special Rapporteur reported any cases of relevant practice affirming such a duty. A rule to that effect should not be created *de lege ferenda*. He did not question the need for international solidarity towards States hit by a disaster; Germany had been a major humanitarian donor in the past, and still had a humanitarian budget of up to 300 million euros a year. It was strongly committed to effective and internationally coordinated humanitarian aid. However, the only legal obligations in disasters were those of States towards their own citizens. The creation of a new “duty to provide assistance” would create many legal and practical problems, such as how to define the exact scope of such an obligation, who would decide whether the obligation had been violated, and how the rule would operate in the case of States with limited capacity to provide assistance, or in multiple disaster situations. It was already an enormous challenge to collect and analyse existing practice in order to elucidate *lex lata*, so it would be wise for the Commission to refrain from developing new rules *de lege ferenda* which could only be highly controversial. Draft article 12 should be reformulated to distinguish more clearly between third States and international organizations, on the one hand, and non-governmental organizations on the other. In its present wording, it gave the impression of conferring rights directly on non-governmental organizations, which were not subjects of international law.

29. **Ms. Schonmann** (Israel), commenting on the draft articles on the responsibility of international organizations, said she was concerned that they relied substantially on the articles on State responsibility, without taking account of the inherent differences between States and international organizations. She also questioned whether the draft articles could apply in the same way to all the very different kinds of international organizations. Some organizations had been established as discussion forums, and in their case the responsibility would remain primarily with their member States, whereas others were designed to carry out functions such as peacekeeping, where responsibility would lie mainly with the organization itself. Moreover, the specific nature of relations between organizations and their member States determined the extent of the responsibility incurred. The draft articles glossed over the difference between the responsibilities owed by an organization to its member States, and those owed by the organization to non-member States.

30. Regarding draft article 21, it was questionable whether the principle of self-defence, an inherent right of States, was appropriate in the context of international organizations. As for draft article 22, she questioned whether the concept of countermeasures should be included in the draft, in view of the many unanswered questions about the relationship between international organizations and non-member States, and between them and their own members. Again, in draft article 25, account should be taken of the essential difference between States and international organizations. That draft article was too vague, especially considering that the notion of necessity was much wider in relation to States.

31. Turning to the topic “Effects of armed conflicts on treaties”, she reiterated her delegation’s concern at the definition of “armed conflict” in draft article 2 (b), proposed on the basis of the *Tadić* decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The definition was too broad for the purposes of the draft articles and risked becoming a matter of legal controversy. Her delegation much preferred the universally accepted definition of armed conflict in common articles 2 and 3 of the Geneva Conventions. She also doubted the practical value of draft article 15. It raised many unresolved issues, some of which could only be settled in an ex post manner, on the basis of the draft articles on State responsibility.

32. For Israel, the topic “Expulsion of aliens” was complex, requiring considerable care in balancing the sovereign rights of States with the fundamental rights and interests of individuals. A State’s right to expel aliens must be exercised in accordance with international law, including the rules on the protection of human rights and dignity. Given that different States had different obligations, arising from a variety of national, regional and international instruments, she encouraged the Special Rapporteur and the Drafting Committee to focus strictly on well-settled legal principles and established State practice in the matter. In particular, further consideration should be given as

to whether draft articles D1 to J1 adequately reflected the practice and *opinio juris* of States. Elements of the draft articles constituted progressive development of the law, rather than its consolidation, and might give rise to difficulties in their interpretation and application.

33. Turning to the topic "Protection of persons in the event of disasters", she noted that draft article 9 reflected the primary role of an affected State in protecting persons and providing humanitarian assistance on its own territory. International law recognized that an affected State was best placed to determine the gravity of an emergency situation on its territory and to frame appropriate responses. For that reason, draft article 10 (Duty of the affected State to seek assistance) must be further clarified. The Commission should consider the scope and content of such a duty, to whom it would be owed and what it would entail in practice. Concerning draft article 11, Israel supported the principle that external assistance could be provided only with the consent of the affected State. The term "arbitrarily" could give rise to difficulties of interpretation and should be further clarified. The role of third parties in offering assistance to affected States should be defined on the basis of international cooperation, not as an assertion of rights. Israel strongly supported international cooperation and collaboration in providing disaster relief. The duty of States to cooperate should be understood, however, in the context of an affected State retaining primary responsibility for providing protection and humanitarian assistance on its territory.

34. **Ms. Belliard** (France) expressed appreciation of the efforts of the Commission and the Special Rapporteur to reorganize the text of the draft articles on the effects of armed conflicts on treaties. However, the editing could be improved, especially in part three. The heading "Miscellaneous" was too vague.

35. She welcomed the inclusion in draft article 2 of treaties "to which international organizations are also parties". Concerning the definition of "armed conflict" in draft article 2 (b), she reiterated her delegation's reservations about the partial reuse of the definition used by the International Criminal Tribunal for the Former Yugoslavia in its 1995 *Tadić* decision. The new sequence formed by draft articles 3, 4, 5 and 6 was satisfactory. The previous wording of draft article 4 could have risked confusing the intention of the parties with the interpretation of the treaty. In draft article 6, the reference to object and purpose as a factor indicating whether a treaty was susceptible to termination, withdrawal or suspension was perhaps superfluous, in view of the new draft article 5 on the "application of rules on treaty interpretation". However, the second factor, "the characteristics of the armed conflict", was highly relevant. Concerning draft article 7, "Continued operation of treaties resulting from their subject matter", she questioned the relevance of the annex listing categories of treaties, even for indicative purposes. Some treaties, especially those relating to armed conflicts, would continue in operation anyway. Several of the listed categories, such as "Multilateral law-making treaties" were too vague and might lead to the inclusion of all existing treaties. The reference in draft article 6 to the subject matter of treaties ought to be sufficient. In draft article 15 (Prohibition of benefit to an aggressor State), the notion of "benefit" should be clarified.

36. Turning to the topic "Expulsion of aliens", she expressed her delegation's concerns regarding the Special Rapporteur's discussion of French law, especially the French draft legislation on immigration, integration and nationality, which became law on 16 June 2011. The Special Rapporteur's discussion of nationality issues in the seventh report (A/CN.4/642) bore no relation to the topic under consideration by the Commission. Moreover, the provisions cited therein from the French draft law had since been removed, and the description of that law as a whole was simplistic, ignoring certain provisions directly relating to the expulsion of aliens. She emphasized that the law itself was a transposition of the European Union directive 2008/115/EC of 16 December 2008, on "Common standards and procedures in Member States for returning illegally staying third-country nationals". As for draft article D1 (Return to the receiving State of the alien being expelled), possible derogations to the principle laid down in paragraph 3 should be extended to include other extremely important circumstances, where immediate deportation was justified on grounds of public order or national security.

37. In draft article E1 (State of destination of expelled aliens), she failed to see the reason for the restriction of return to the State of nationality, since the expelled alien might wish to travel to another State consenting to receive him or her. In paragraph 2, the language concerning the "risk of torture", must be the same as in article 3 of the Convention against Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment, which stated that no person should be returned, expelled or extradited to a State "where there are substantial grounds for believing that he would be in danger of being subjected to torture". That danger must be sufficiently established, and the protection should apply irrespective of the State of return and not be confined to the State of nationality. Furthermore, a separate draft article could provide for the frequently occurring situation in which it was impossible to expel an alien because there was no feasible State of return. Draft articles F1 and H1, on protecting the human rights of aliens subject to expulsion in the transit State, and their right of return to the expelling State, should be clarified. Other references calling for clarification were "violation of law or international law" in draft article H1, and "the general regime of the responsibility of States for internationally wrongful acts" in draft article I1.

38. Commenting on the topic "Protection of persons in the event of disasters", she welcomed the Special Rapporteur's approach in draft article 9 to the role of the affected State, as long as a reference to sovereignty was included. The terms "duty" and "role" were appropriate because they avoided any confusion with the concept of responsibility. Paragraph 5 of the commentary was useful in explaining the concept of "the primary role" of the affected State, pointing out as it did that a State exercised final control over the manner in which relief operations were carried out in accordance with international law. However, she doubted whether draft article 10 (Duty of the affected State to seek assistance) could be described as *de lege ferenda*. There was no consensus on the existence of an obligation on the part of the affected State to ask for help. The view expressed in paragraph 9 of the commentary, that the Government of an affected State was in the best position to determine the severity of a disaster and the limits of its own response capacity, might usefully be reflected in the actual text of the draft articles.

39. She welcomed the codification, in draft article 11, of the fundamental principle that the affected State must give its consent to external assistance. In that connection, it would appear problematic to require reasons to be stated in the event of its refusal, as implied by paragraphs 2 and 3. She also queried the exact scope of the provision in paragraph 2 that "consent to external assistance shall not be withheld arbitrarily".

40. **Mr. Huang** Huikang (China), commenting on the topic "Effects of armed conflicts on treaties", said that the scope of the draft articles should extend to treaties concluded between international organizations and States. With the increasing participation of international organizations in international activities, it was becoming more common for them to conclude treaties with States. Treaties of that kind, such as an agreement between an international organization and its host country, could not escape the effects of armed conflicts. He did not object to the inclusion, in draft article 2, of non-international armed conflicts, and he also welcomed the provision in draft article 6 (b) that in ascertaining whether treaty relations were affected by a non-international armed conflict, the degree of outside involvement should be taken into account. However, it was not necessary to redefine non-international armed conflicts on the basis of the *Tadić* case, given the universal acceptance of the 1949 Geneva Conventions and Additional Protocol II thereto. Moreover the situations faced by States undergoing non-international armed conflicts and by States involved in international armed conflicts could differ in many ways in their impact on the operation of treaties. The question of whether the same criteria should be applied in both circumstances should be further studied. The Commission should also study a wider range of State practice in the matter, in addition to the practice of the United States of America and the United Kingdom. His delegation supported the inclusion of the draft articles in an annex to a General Assembly resolution and would assist in resolving outstanding issues, such as the final format of the draft articles.

41. Turning to the topic "Protection of persons in the event of disasters", he said it was a common goal of the international community, including countries affected by disasters, to strengthen international cooperation in disaster relief in order to save lives and reduce losses. Response to natural disasters, on the basis of respect for the sovereignty of affected States, facilitated more effective international cooperation and motivated affected States to build their own disaster relief capacities. Disaster relief should never be politicized or be made an excuse for interfering in the internal affairs of a State.

42. He welcomed the Commission's efforts, in draft articles 6, 9 and 11, to strike a balance between strengthening international cooperation and respecting State sovereignty. However, draft articles 10 and 12, by referring to the "duty" of an affected State to seek assistance and the "right" of the international community to offer it, failed to properly address the relationship between the international community and disaster-affected States. That relationship could not be simplistically defined as one between rights and duties, nor should a duty on the part of an affected State be linked with a right on the part of the international community, because establishing such a link could have a negative impact on international cooperation. An affected State faced with a disaster which exceeded its own national response capacity would have no reason not to draw fully on assistance from the international community, as long as there were no ulterior motives underlying the offer of assistance. With regard to draft article 11, paragraph 2, he noted that neither customary international law nor State practice provided for any obligation on the part of an affected State to accept outside assistance. The wording of draft articles 10, 11, paragraph 2, and 12 should be revised in line with the true spirit of international relief cooperation. Draft article 9, paragraph 1, providing for the "duty" of an affected State to protect its people, reflected the Commission's clear understanding of the relationship between protection in the event of disasters and the concept of "responsibility to protect".

43. **Mr. Charania** (United Kingdom) welcomed the drafting changes made by the Commission to the draft articles on the effects of armed conflicts on treaties, especially the statement of principle in draft article 3 and, in addition, the substitution of the term "existence" for "outbreak", given that an effect on a treaty could well occur later in time. It was not sufficiently clear, in draft articles 5 and 6, that article 6 would apply in situations where the interpretation of the treaty in accordance with article 5 did not lead to a conclusive result. He welcomed the substitution of "factors" for "indicia" in draft article 6, and its new paragraphs (a) and (b). However, it was not clear whether the "factors" in draft article 13, paragraph 2, were those in both paragraphs of draft article 6, or only those in paragraph (a). He wondered whether the factors named in paragraph (a) were relevant to reviving or resuming treaty relations when the armed conflict had come to an end.

44. With regard to the prohibition of benefit to an aggressor State, the reference in draft article 15 to the 1974 definition of aggression in General Assembly resolution 3314 (XXIX) might not be sufficient, especially in the light of article 4 of the definition in the annex to that resolution, authorizing the Security Council to characterize other acts as constituting aggression. The new article 8 bis of the Statute of the International Criminal Court provided a more sophisticated definition. He welcomed the improvements to the annex to the draft articles, with the indicative list of the treaties referred to in draft article 7.

45. Turning to the topic "Protection of persons in the event of disasters", he reiterated her delegation's view that the codification or progressive development of detailed rules on the topic would prove to be unsuitable. Non-binding guidelines or a framework of principles for States and other parties engaged in disaster relief would be more practical and more likely to enjoy wide support. That view was borne out by draft articles 10, 11 and 12 as provisionally adopted. It was questionable whether a duty on the part of affected States to seek external assistance could be derived from existing international obligations under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as inferred in the commentary to draft article 7. The existing work done by the International Federation of Red Cross and Red Crescent Societies, together with the General Assembly resolutions quoted by the Special Rapporteur, went no further than a recommendation or an outline of good practice. The statement in draft article 11 of a requirement of consent by the affected State, not to be arbitrarily withheld, represented progressive development rather than a statement of the law as it stood. It was not clear how arbitrary refusal would be determined, or what its consequences would be. The idea in draft article 12 that there was a right to offer assistance seemed superfluous, since States already had a sovereign right to make such offers. It was moreover doubtful whether the provision of assistance when requested could usefully be defined as a duty. He did not question the fundamental importance of humanitarian assistance from the international community to disaster-affected States, but the principles underlying it could not necessarily be transformed into legal rules.

46. Concerning the topic “Expulsion of aliens”, his delegation remained of the view that it was not suitable for codification or consolidation at the present time.

47. **Ms. Lijnzaad** (Netherlands) said that her delegation remained opposed to the Commission’s recommendation to the General Assembly to consider elaborating a convention on the effects of armed conflicts on treaties. Her delegation also had concerns about the topic “Expulsion of aliens”, which represented progressive development of the law rather than State practice. The Commission should not be involved in designing new human rights instruments. Moreover, the draft articles did not seem to take account of existing instruments, such as the 1951 Convention relating to the Status of Refugees, and that omission could cause uncertainty as to which international legal regime applied in a specific situation. The draft articles should be reformulated as guidelines or principles enunciating best practice.

48. With regard to the topic “Protection of persons in the event of disasters”, she noted that the draft articles rightly focused on the position of the affected State, which had primary responsibility for persons on its territory if a disaster occurred. She agreed with the general thrust of draft article 10 (Duty of the affected State to seek assistance), but it should also address situations in which the affected State might be unwilling to provide assistance and protection for them. She also preferred the previous wording “if the disaster exceeds its national response capacity” to the present formulation “to the extent that a disaster exceeds its national response capacity”. The latter wording seemed to require a precise overview of all aspects of the national response capacity, and that would be too heavy a burden for the affected State. The order of draft articles 11 and 12 should be reversed, with the right of third States and other entities to offer assistance being stated first. It was worth considering whether the term “unreasonably” should be substituted for “arbitrarily”. The Netherlands did not agree that the general duty to cooperate should include a duty to provide assistance. That would be going too far, and would ignore situations in which a requested State did not have the national capacity to do so. She suggested retaining the Special Rapporteur’s earlier understanding of the duty to cooperate.

49. **Ms. Escobar Hernández** (Spain) supported the Commission’s recommendation that the General Assembly take note of the draft articles on the effects of armed conflicts on treaties. She welcomed the improvements made to the draft articles on the expulsion of aliens, and was generally in agreement with the Commission’s approach to the question of the fundamental rights of aliens facing expulsion, and the protection of their property. Extradition and expulsion were two different categories that must be kept separate, in order to prevent expulsion procedures from being exploited for the purpose of extradition. More thought should be given to some of the aspects of expulsion, and especially the question of the particular State to which an alien could be expelled, and whether that State had an obligation to receive him or her. As for the possible suspensive effect of an appeal by an alien subject to expulsion, under Spanish law there was the possibility of either an administrative appeal, to the Government authorities which had made the decision on expulsion, or an appeal to the courts. In neither instance did an appeal have suspensive effect. If the appeal was lodged in a court, however, suspension of the decision on expulsion could be requested in the form of an application for provisional measures, in which case the court retained the discretion whether or not to grant them. An application for asylum, or for international protection, took immediate suspensive effect, lasting until the application was heard.

50. On the topic “Protection of persons in the event of disasters”, she reiterated her delegation’s view that in offering assistance, the will of the affected State must be respected, but that the affected State had both a right and a duty to assist its own population. That was an essential consideration in judging the scope of the obligation of an affected State to consider and accept offers of external assistance, especially from States and international organizations. There was no legal rule requiring third States to provide assistance when requested, nor was there sufficient State practice to warrant the conclusion that such a rule existed. However, a request for assistance must be considered in good faith by any affected State in the light of the general principle of cooperation, having regard also to the principles of impartiality and neutrality, which must always govern humanitarian assistance.

51. **Mr. Popkov** (Belarus) said his delegation approved of the draft articles on the effects of armed conflicts on treaties, which made a valuable contribution to improving the stability and predictability of treaty relations during armed conflicts. Current events pointed to the importance of having clearly defined

rules to govern inter-State relations both during and after armed conflicts, and of protecting the interests of the numerous parties affected by them. The draft articles supplemented and clarified the relevant rules in the 1969 Vienna Convention on the Law of Treaties. However, it was unnecessary to elaborate a convention on the basis of the draft articles. They could instead take the form of an optional protocol to the Vienna Convention, elucidating and illustrating its operation in the event of armed conflict. Draft article 8, paragraph 1, could usefully be modelled on draft article 3 to express the principle that the existence of an armed conflict did not ipso facto affect the capacity of a State party to that conflict to conclude treaties. Some armed conflicts could, by their nature and scale, affect the treaty status of States and their traditional means of performing treaties. External interference in conflicts could also disturb the ordinary functions of States and undermine the presumption that their treaty relations continued unaffected. In draft article 9, paragraph 3, the notion of a "reasonable time" for objecting to the termination or suspension of a treaty should be clarified, setting criteria for the minimum duration of the period concerned and the possibility of extending it according to the intensity and the nature of the armed conflict, and enabling either party to the treaty to react in time to an announcement by the other party of its intention to terminate or suspend the treaty. The draft did not make sufficient provision for the legal consequences of an objection, or for the possibility of a dispute between States in such situations as to their rights and obligations, and those of their citizens and legal persons, under a treaty.

52. He also had doubts about draft article 12 (Loss of the right to terminate or withdraw from a treaty or to suspend its operation), especially its paragraph (b). Although the concept of tacit consent was familiar to international law, it applied mainly under normal circumstances. The existence of an armed conflict might render the performance of treaty obligations impossible or extremely difficult, or relegate them to secondary importance. Draft article 12 (b) should be reworded on the understanding that the conduct of a State must be judged in the light of all the factors prevailing in a situation of armed conflict.

53. **Mr. Garba Abdou** (Niger), commenting on the topic "Expulsion of aliens", said that aliens were vulnerable individuals in need of protection. In the Niger, an alien could obtain a residence permit through a simplified procedure within three months of arriving in the country, and he or she would then have most of the same rights and obligations as nationals. In that light, his delegation was substantially in agreement with the judgment of the International Court of Justice in the case concerning *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), of 30 November 2010. In the draft now under preparation, the preservation of human dignity must be given pride of place. Because of the very universality of human rights, a set of draft articles would be preferable to mere guidelines. However, the conditions governing the stay of aliens fell within the exclusive competence of the State of residence. The international protection of human rights should not extend into diplomatic protection, which would constitute interference in that sphere.

54. The draft articles on the protection of persons in the event of disasters were a welcome addition to the international humanitarian law applicable in armed conflicts, which was inspired by the principles of humanity, neutrality and impartiality. The draft was an example of the progressive development of international law. However, he harboured doubts about the practicability of certain provisions. Who, for example, were the "particularly vulnerable" persons mentioned in draft article 6 (Humanitarian principles in disaster response), and who was to assess their needs? The experience of food crises in the Niger had shown that it was difficult for the providers of assistance to identify the needs of the affected population and the groups or regions concerned. Misunderstandings could arise between the affected State and the relief agencies in that respect. The requirement to obtain the consent of the affected State was reasonable, but could cause delay in cases where rapid reaction was needed.

The meeting rose at 12.55 p.m.