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

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11-56997 (E)

The meeting was called to order at 3 p.m.

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])

1. **Ms. Quezada** (Chile) said that the draft articles on the effects of armed conflicts on treaties, as adopted on second reading, were fully compatible with the rules articulated in the 1969 Vienna Convention on the Law of Treaties and with other international rules of relevance to armed conflicts, including those embodied in the Charter of the United Nations and in international humanitarian law. Indeed, the definition of armed conflict set forth in draft article 2 was not exhaustive to the point of competing with those rules, encompassing as it did armed conflict of a non-international character only to the extent that the use of force affected the application of conventional rules.

2. The stability of treaties was an important principle established by the draft articles insofar as they adequately safeguarded the *pacta sunt servanda* rule, which was waived only in specifically regulated situations. Another significant feature of the draft articles was the value attached in them to the intention of the parties to an armed conflict with a view to determining the consequences of the conflict on treaties in force, as exemplified in draft article 4 dealing with provisions on the operation of treaties. In the absence of a treaty regulating the matter concerned, the rules of international law on treaty interpretation applied in accordance with draft article 5, which constituted a reference to the rules established under articles 31 and 32 of the Vienna Convention on the Law of Treaties.

3. The indicative list of treaties mentioned in draft article 7 was sufficiently representative of the type of treaties that should continue to operate, in whole or in part, during armed conflict, although the understanding was that other categories of conventional instruments could be added over time. As to draft article 9, dealing with notification of intention to terminate or withdraw from a treaty or to suspend its operation, it provided an additional guarantee of the stability of treaties. Draft articles 10, 11 and 12 each recognized vital institutions of the law of treaties, while draft articles 14, 15 and 16 reiterated valuable principles enshrined in the Charter of the United Nations relating to the exercise of the right to individual or collective self-defence, acts of aggression and respect for decisions of the Security Council. The draft articles were notably without prejudice to the termination or suspension of a treaty as a consequence of other causes envisaged in the law of treaties.

4. Her delegation supported the Commission's recommendation that the General Assembly should adopt a resolution taking note of the draft articles and annexing them to the resolution. The advantage of that procedure was that it demonstrated State support for the draft articles and facilitated their dissemination among Governments, academic institutions and practitioners of international law for the purposes of analysis and comment. With respect to the second recommendation, namely that the General Assembly should consider, at a later stage, the elaboration of a convention on the basis of the draft articles, it should be remembered that the adoption of conventions was not the only means of advancing international law and that draft articles were not necessarily a failure if they did not culminate in a convention. The Commission's work on the present topic already constituted an important exercise in the development of international law that could be consolidated over time in the light of the overall use of the draft articles by States and international tribunals, which would also serve as grounds for subsequently considering the need for, or advisability of, a conference aimed at the adoption of a convention.

5. With respect to the draft articles on the expulsion of aliens, her Government was ever concerned to ensure that they balanced the State's right to expel aliens with the duty to respect the rules of international law, with full and effective cooperation among the States concerned as the basic premise. Draft article D1 (Return to the receiving State of the alien being expelled) met that criterion; paragraph 1 established the possibility of the voluntary departure of an alien being expelled, while paragraph 2 dealt with the forcible implementation of an expulsion decision. Emphasis should be placed, however, on the need for the expelling State to facilitate such voluntary departures. The obligation to respect the rules of international law in any expulsion process should also be established.

6. Draft article El (State of destination of expelled aliens) should set criteria for determining, at the time

[1] To be issued.

of expulsion, the priorities concerning the State of destination of expelled aliens. As an essential general safeguard, no alien should be expelled to a country where his or her life or personal freedom was endangered. It was also vital to spell out the duty incumbent on the transit State to respect the rules of international law on the protection of human rights, thereby establishing a legal framework providing safeguards during the transit of expelled aliens under revised draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State). Draft article G1 (Protecting the property of aliens facing expulsion) was apposite as a legal framework for protecting the right of ownership of aliens facing expulsion over their property. The inclusion of draft article H1 (Right of return to the expelling State) was likewise appropriate, but the grounds for readmission of an expelled alien to the expelling State, including expulsion in violation of domestic or international law, should be carefully defined. The meaning of "mistaken grounds" should also be clarified in that context.

7. Her delegation supported the inclusion of both draft article I1 (The responsibility of States in cases of unlawful expulsion) and draft article J1 (Diplomatic protection), which concerned the exercise of diplomatic protection by the expelled alien's State of nationality, particularly in order to guarantee the protection of human rights in the case of unlawful expulsions. With respect to revised draft article 8 (Expulsion in connection with extradition), as reproduced in footnote 540 of the Commission's report (A/66/10), her Government had particular concerns stemming from the connection between the two related but different institutions of expulsion and extradition, each of which had its own regulations. Satisfaction of the conditions for the expulsion of a person under the terms of the draft article did not necessarily meet the requirements for extradition. Appropriate attention should therefore be directed to the issue with a view to harmonizing the institution of expulsion with that of extradition.

8. As to the draft articles on protection of persons in the event of disasters, her delegation welcomed the fact that they were based on the fundamental premises it had always held to be intrinsic to the legal regulation of such protection, namely territorial sovereignty and non-interference in the internal affairs of affected States. The provision of strictly humanitarian aid to persons or forces of other countries could not be considered to be unlawful intervention or contrary to international law because the rights of disaster victims were fundamental rights that must be guaranteed. The duty established in draft article 10 (Duty of the affected State to seek assistance) accordingly derived from the affected State's obligations under international human rights instruments and customary international law. Indeed, protection of the various human rights directly implicated in the context of disasters, such as the right to life, food, health and medical care, was essential. Furthermore, the duty to "seek" rather than "request" assistance aptly implied a process of selection compatible with the provisions of draft article 9 (Role of the affected State), reinforcing the idea of the affected State's primary role in the direction, control, coordination and supervision of disaster relief and assistance. The word "seek" was also fully compatible with the phrase "as appropriate", which emphasized the affected State's discretionary power to make a choice as to the entity that would provide the most suitable assistance.

9. Her delegation had no observations to make with respect to draft article 11 (Consent of the affected State to external assistance), as provisionally adopted by the Commission, given that it was fully in accordance with the fundamental principles already mentioned and that it reflected a balanced view of the modern concept of sovereignty as having a dual nature entailing both rights and obligations. The wording of paragraph 2 of the draft article, which denoted the affected State's obligation not to withhold its consent to external assistance arbitrarily, was similarly balanced against the sovereign right recognized in paragraph 1.

10. Concerning draft article 12 (Right to offer assistance), as reproduced in footnote 549 of the Commission's report (A/66/10), her delegation shared the Special Rapporteur's view that offering assistance in the international community was the practical manifestation of solidarity. It also supported the general proposal that offers of assistance should not be considered as interference in the internal affairs of the affected State, provided that the assistance offered did not affect the latter's sovereignty or its primary role in the direction, control, coordination and supervision of such assistance. It was appropriate to identify the offer of assistance as a right, as to do so recognized the legitimate interest of the international community in protecting persons in the event of disasters, which was based on the principles of humanity, neutrality,

impartiality and non-discrimination, as well as on those of cooperation and international solidarity in general. It was important to emphasize, however, that offers of assistance should not be accompanied by conditions unacceptable to the affected State. Nor should they be made on a discriminatory basis.

11. **Ms. Telalian** (Greece) said that the difficulties of overcoming State practice, whether because it was age-old, scarce, contradictory or little known, in no way prevented the draft articles on the effects of armed conflicts on treaties from becoming a major instrument of codification of international law. The Commission's work on the topic had produced three major trends, the first of which was a statement of principle consisting in the presumption, enunciated in draft article 3, that armed conflict did not ipso facto terminate or suspend the operation of treaties. The second concerned the statement of factors, contained in draft article 6, indicating whether a treaty was susceptible to termination, withdrawal or suspension. The third was the pragmatic approach adopted with respect to the indicative list of treaties mentioned in draft article 7, which provided important practical and objective guidance to States in determining whether a treaty continued to operate during armed conflict.

12. The practical solutions adopted by the Commission in relation to specific issues were commendable, notably with respect to the applicability of the draft articles to territories under occupation, even in the absence of armed actions between the parties and when the occupation of territory met with no armed resistance, as stressed in the commentary to draft article 2. Her delegation also supported the approach of excluding the reference in the draft articles to the intention of the parties in order to ascertain when a treaty continued to apply in the case of armed conflict, since its inclusion would make way for subjectivity and potential dispute between the parties to the treaty. Useful guidance for those tasked with drafting future treaties was provided by the suggestion, contained in the commentary to draft article 4, that States should be encouraged to provide expressly for the application of treaties in times of armed conflict, although it was essentially realistic to do so only in the case of multilateral treaties; it was highly improbable that bilateral treaties would address that specific issue.

13. Draft article 11, dealing with the separability of treaty provisions, importantly provided for the possibility of differentiated effects of armed conflict on treaties, thereby enabling parties to maintain treaty provisions that were susceptible to application under the conditions set out in the draft article, irrespective of the termination or suspension of the treaty. For their part, draft articles 14 and 15, dealing respectively with the effect of the exercise to the right of self-defence on a treaty and prohibition of benefit to an aggressor State, served to provide practical guidance for States, placing as they did the entire set of draft articles within the United Nations framework.

14. The applicability of the draft articles to both international and protracted non-international armed conflicts constituted a breakthrough in treaty law by enabling States parties to a treaty to envisage practical solutions for the operation of the treaty in cases where one of them was undergoing prolonged civil strife. Although States in protracted domestic conflict might be inclined to invoke the provisions of the draft articles in order to suspend, terminate or withdraw from treaty obligations, the existence of a clear set of rules on the operation of treaties in those circumstances was preferable to the alternative of uncertainty. A potential source of difficulty, however, lay in the fact that neither draft article 9 nor its commentary clarified the means of determining the exact date of receipt of notification of intention to withdraw from, terminate or suspend the operation of a treaty. In that regard, the usual requirements that prevailed in times of peace were undoubtedly an unrealistic goal to aim for amid the confusion of war. The option of specifying, in the notification, a date on which it would take effect was therefore preferable.

15. Her delegation also found difficulty with the unilateral resumption of the operation of a treaty provided for under draft article 13, paragraph 2, in that treaties terminated or suspended as a consequence of armed conflict should be resumed solely on the basis of the agreement of the parties thereto, in accordance with paragraph 1 of the draft article. That basis could also be inferred by the requirement to provide prior notification of intention to terminate or withdraw from a treaty or suspend its operation, which would take effect only in the absence of an objection within a reasonable time by a party to the treaty, pursuant to draft article 9, paragraph 3. The tacit approval required in those circumstances should also be a prerequisite for the smooth resumption of a treaty suspended or terminated under the terms of draft article 6 and for the avoidance of any unilateral action that could lead to

further difficulties. Lastly, her delegation shared the Commission's view that the draft articles should form the basis for an international convention constituting a complementary instrument with normative effects equal to those of the Vienna Convention on the Law of Treaties.

16. Concerning the draft articles on the expulsion of aliens, her delegation favoured the elaboration of a more focused text containing well-established fundamental guiding principles, standards and guidelines that acknowledged the latitude enjoyed by States, bearing in mind the complex and sensitive nature of the subject matter. Many of the issues relating to the topic had not been settled in international law and did not lend themselves to codification or progressive development . An important aim was to strike a balance between a State's right to expel an alien and its obligation to respect the human rights of an alien being expelled. Relevant State practice, including European Union legislation transposed into the national legal order of European Union members such as Greece, was also particularly significant to the topic.

17. With respect to draft article D1 (Return to the receiving State of the alien being expelled), her delegation supported the inclusion of a provision on the voluntary return or departure of an alien being expelled in that it would increase respect for human dignity and was simpler to administer. A number of legal orders, moreover, favoured the voluntary option over the forcible implementation of an expulsion decision. In paragraph 1 of the draft article, specific wording requiring the expelling State to facilitate or promote voluntary compliance with an expulsion decision would therefore be preferable to the word "encourage", which lacked legal precision.

18. Voluntary return was not unconditional, however; States might shorten or refrain from granting a period for voluntary departure owing to such considerations as the risk of absconding or the risk to public policy or national security. Specific obligations might also be imposed on an alien benefiting from the option of voluntary return. Insofar as coercive measures might be necessary in cases where the person being expelled refused to abide by the expulsion decision, paragraph 2 of the draft article made appropriate provision for the orderly transportation to the receiving State of such persons. The competent authorities of the expelling State were, in any event, obliged to respect the fundamental rights of persons subject to expulsion and to enforce only those measures that were proportionate to the circumstances.

19. Concerning draft article E1 (State of destination of expelled aliens), the priority to be given to the State of nationality did not preclude expulsion to a State other than the State of nationality, even in cases not envisaged in paragraph 2 of the draft article. In that regard, readmission agreements or other similar arrangements with transit countries were of vital importance in determining the State of destination of expelled aliens.

20. As to draft article G1 (Protecting the property of aliens facing expulsion), while paragraph 1 rightly prohibited the expulsion of an alien for the purpose of confiscating his or her assets, the elaboration of a specific or privileged regime governing the property of expelled aliens was unnecessary in that such property was subject to protection under the general rules of international law, applicable international treaties and national legislation. Furthermore, the provision in paragraph 2 was couched in very general terms and might lead to confusion concerning the obligation to return property to the alien. Indeed, no State was under obligation to return lawfully expropriated property, and such action was not the only form of reparation in cases of unlawful deprivation of property.

21. The provision of draft article H1 (Right of return to the expelling state) was too broad, notwithstanding that it sought to balance the need to redress a wrongful act, following the annulment of an expulsion decision, with the right of States to regulate the entry or stay of aliens in their territory and to preserve public order or security. It introduced no differentiation on the basis of whether the alien being expelled was lawfully present in the expelling State, whereas the annulment of an expulsion decision could not confer a right to entry or residence in a State on an alien whose situation had been irregular before implementation of the decision. Moreover, a potential right to return to the expelling State could be envisaged only in cases where an expulsion decision was annulled because it was contrary to a substantive rule of international law. The competent authorities of the expelling State might also reassess the situation of the individual concerned and refuse entry to their territory on grounds other than those rejected by the body that had annulled the expulsion decision.

22. Two important elements were missing from draft article J1 (Diplomatic protection): the fact that the exercise of diplomatic protection presupposed an injury caused by an international wrongful act of the State; and the requirement that local remedies must be exhausted.

23. Her Government attached great importance to the issue of effective remedies in the case of expulsion decisions. Hence, under Greek legislation and in accordance with Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, known as the Return Directive, temporary judicial protection was provided to aliens subject to expulsion, including the possibility of temporary suspension of enforcement of the expulsion decision.

24. Concerning the draft articles on the protection of persons in the event of disasters, she said that draft article 9 (Role of the affected State) had the advantage of being all-encompassing; however, it was too general. It would therefore benefit from the inclusion of a specific reference to at least one category of persons who had been overlooked in the text of the draft articles, as well as in the commentary, namely persons with disabilities, who constituted a special category in situations of natural disaster, pursuant to article 11 of the Convention on the Rights of Persons with Disabilities. Such persons should otherwise be mentioned in the commentary.

25. As to draft article 10 (Duty of the affected State to seek assistance), the human rights listed in its commentary omitted any reference to the crucial right of access to fresh water, whereas it had been observed that in the case of earthquakes, in particular, such access was immediately affected as a result of well blockages. With respect to draft article 11 (Consent of the affected State to external assistance), the notion of the arbitrary withholding of consent mentioned in paragraph 2 was open to arbitrary interpretations. In order to avoid that eventuality, she suggested the addition of an explanation to the text, namely: "Consent is considered to be arbitrary in particular when in contravention of article 8".

26. **Mr. Cepero Aguilar** (Cuba) said that the topic of protection of persons in the event of disasters should be codified, given its impact on the protection of human lives, especially in developing countries. Draft articles 5 and 10 should be clarified, because they might be considered ambiguous and in breach of principles of humanitarian assistance recognized by international law and customary practice. His delegation stressed the need to formulate a new draft article that clearly reflected the principles of the Charter of the United Nations and the guiding principles of humanitarian assistance set out in General Assembly resolution 46/182.

27. Given that States had the sovereign right to accept or refuse any type of humanitarian assistance, the draft articles should, under no circumstances, give rise to interpretations that violated the principle of non-intervention in the internal affairs of States. Only the affected State could determine whether the magnitude of the disaster exceeded its response capacity and, based on the principle of sovereignty, decide whether to request or accept assistance from international organizations or other States.

28. The draft articles on the effects of armed conflicts on treaties lacked a broad definition of "armed conflict" that went beyond the traditional construct. The definition contained in draft article 2, paragraph (b), should include a broad formulation that captured other types of conflict characterized by direct attacks against the sovereignty of a State, whose effects on treaties were similar to those of typical armed conflicts. An example was the unilateral imposition of an economic, commercial or financial blockade against a State, given its real impact on existing bilateral treaties.

29. It was also necessary to define the phrases "material breach" and "fundamental change of circumstances" used in draft article 18, paragraphs (a) and (c). Lastly, the draft articles must not be at variance with the regime of the Vienna Convention on the Law of Treaties.

30. With respect to the draft articles on the expulsion of aliens, his delegation considered that the codification of the human rights of persons who had been or were being expelled was useful, provided that such codification was guided by the principle of comprehensive protection of the human rights of the person in question, and did not infringe on the sovereignty of States. It was also necessary to include an article of a general character, equivalent to a declaration of principles, requiring respect for domestic legislation, the maintenance of each State's

public security and respect for the principles of international law, as well as opposition to the use of expulsion as a pretext for xenophobic and discriminatory practices.

31. The draft articles should reflect the principle of *non bis in idem*, which established that a person expelled was exonerated from legal and criminal responsibility in the expelling State and should therefore not be tried again for the same offence in the receiving State. Furthermore, given that the draft articles did not mention an obligation to notify the receiving State prior to the implementation of an expulsion, his delegation proposed the inclusion of an article requiring States to inform the receiving State that a person was being expelled to it. In that regard, it would be appropriate to include in the draft articles the right of persons subject to expulsion to communicate with the corresponding consular representatives.

32. With regard to the obligation to protect persons at risk of torture or inhuman and degrading treatment in the receiving State, the draft articles should include a clear obligation for any State alleging a "real risk" to demonstrate the existence thereof. Such an obligation would ensure that certain States did not avoid their international treaty obligations on pretences or for political reasons — as they did with the obligation to prosecute or extradite terrorists — and that they did not use subjective and politically motivated interpretations to abuse the legitimate right of persons to be protected from torture and cruel, inhuman and degrading treatment.

33. **Mr. Leonidchenko** (Russian Federation), referring to the draft articles on the expulsion of aliens, said that an additional guarantee of respect for the rights of the person being expelled was offered by paragraph 1 of draft article D1 (Return to the receiving State of the alien being expelled), which provided that the State should encourage voluntary compliance with the expulsion decision. The means of such encouragement should be more clearly specified, however. In paragraph 2, the words "in particular those relating to air travel" should be deleted as being redundant, insofar as other means of transportation could also be used in the forcible implementation of an expulsion decision.

34. Concerning draft article G1 (Protecting the property of aliens facing expulsion), prohibition of the expulsion of aliens with a view to confiscating their property, as provided in paragraph 1, was a well-founded notion that deserved support. It might prove difficult to assess a State's intentions, however, and the totality of a person's actions within a State might also entail both expulsion and confiscation as independent sanctions. In such cases, the non-application of legal provisions concerning confiscation on the ground that an alien was subject to expulsion could hardly be justified, since it would discriminate against citizens to whom those provisions would continue to apply. The provision contained in paragraph 2 was welcome, but the words "to the extent possible", which appeared in square brackets, should be deleted in the interest of avoiding extensive interpretations that could lead to unjustified restriction of the rights of persons being expelled.

35. The right of an alien expelled on wrongful or erroneous grounds to return to the expelling State under the terms of draft article H1 (Right of return to the expelling State) should exclude cases where the alien's return would threaten public order or security. Moreover, it should be spelt out more clearly in the draft article that the right of return should be exercised only if the expulsion decision was reversed on substantive grounds and only if the alien concerned had been lawfully present on the territory of the expelling State.

36. Pursuant to revised draft article 8 (Expulsion in connection with extradition), as reproduced in footnote 540 of the Commission's report (A/66/10), compliance with the requirements for expulsion under international law was sufficient for the expulsion of a person to a State that demanded extradition. The draft article therefore embodied a new approach meriting support, which was that the existence of an extradition request did not in itself constitute a circumstance that prevented expulsion. As to the suggested addition of such procedural guarantees for the expelled person as the right to impartial judgement, it was doubtful whether they befitted inclusion in the draft articles, irrespective of legal motives.

37. Concerning the draft articles on the protection of persons in the event of disasters, provisions open to debate had included that concerning the right to offer assistance, set out in draft article 12, which had no evident independent value but simply recognized the reality in disaster situations. As to draft articles 10 and 11, rather than imposing a strictly legal obligation with respect to assistance that would entail international

legal consequences in the event of non-compliance, their purpose should be to determine that the affected State had simply a moral and political duty to seek assistance and not to withhold arbitrarily its consent to external assistance. In the light of those considerations and other similar concerns relating to draft article 9 (Role of the affected State), the interaction of the affected State with other States and organizations would be better addressed in the form of guidelines on recommended practice than in the form of legal norms.

38. With regard to the draft articles on the effects of armed conflicts on treaties, as adopted on second reading, his delegation supported the addition to draft article 6 of subparagraphs (a) and (b), which provided an open-ended list of factors indicating whether a treaty was susceptible to termination, withdrawal or suspension. However, non-international conflicts should remain beyond the scope of the draft articles insofar as their properties did not substantially affect the status of relations between a State implicated in such a conflict and other States. On the basis of their intensity and their legal and political effects, such armed conflicts could be regarded as cases of *rebus sic stantibus* and thus engender the consequences stipulated in the 1969 Vienna Convention on the Law of Treaties.

39. In draft article 2, subparagraph (b), the definition of "armed conflict" modelled on that used by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Tadić decision was too general. It should instead clearly designate the subject matter of the draft articles and specify the armed conflicts to which they applied. Moreover, the indicative list of treaties annexed to the draft articles threatened to increase uncertainty rather than serve as a useful reference. A list containing fewer categories of treaty would be more coherent and provide a more solid foundation.

40. **Mr. Jahangiri** (Islamic Republic of Iran) said that his delegation concurred with the earlier insightful comments of the Special Rapporteur on reservations to treaties to the effect that the quality of the Commission's work was necessarily dependent on the quality of its members. States had a direct responsibility to ensure the quality of persons elected as members of the Commission or judges of the International Court of Justice in terms of their legal and judicial capacities and their personal integrity, which were criteria to be borne in mind when voting for candidates. It was unfortunate and indeed a disservice to an august body such as the International Law Commission that the voting pattern of States had in many cases been influenced by ultra-political biases and considerations, thereby adversely affecting the Commission's overall quality and credibility.

41. Turning to the draft articles on the responsibility of international organizations, as adopted on second reading, he said that the definition of "international organizations" contained in draft article 2, subparagraph (a), was more appropriate than that contained in the 1969 Vienna Convention on the Law of Treaties. In the latter, the term "intergovernmental" was a misnomer, given that the composition of some organizations also included other international organizations. Governments, moreover, did not always represent States in the organs of an international organization. To the extent that an international organization enjoyed "objective" personality, it was not necessary for it to be recognized by an injured State before considering whether it could be held internationally responsible under the draft articles.

42. While the draft articles adopted the same approach as those on State responsibility, their implementation could pose practical difficulties. An international organization might, for example, invoke self-defence, a term that had indeed often been used in a different sense in the context of United Nations peacekeeping forces. The use of self-defence with respect to an attack by a non-State entity appeared to be a possibility in the light of the assertion that it included the defence of the safe areas established by the United Nations against attacks usually carried out by non-State actors. The conduct of military forces of States could not be attributed to the organization when the Security Council had authorized Member States to take appropriate action outside a chain of command linking those forces to the United Nations.

43. In the case of the United Nations, the subsidiary or joint responsibility of its Member States for its actions was a problematic issue. In situations where an organization failed to comply with an obligation to respect a relevant principle of international law, however, including where it was responsible for damage to the extent that it was unable to provide redress to the injured State in the internationally wrongful act attributable to it, the brunt of the responsibility should be borne by its members in view of their role in the organization's decision-making or

their stance within the organization that had contributed to its wrongful act. Those situations might be covered by draft article 60 (Coercion of an international organization by a State), notwithstanding the Special Rapporteur's assertion that an act of coercion by a State member of an international organization under the rules of that organization seemed highly unlikely. The same applied as to the consequences of the dominant position of a State member of the organization.

44. His delegation endorsed the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution and annex them to the resolution, as well as consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

45. Concerning the draft articles on the effects of armed conflicts on treaties, his delegation continued to share the view that the inclusion of non-international conflicts within their scope was inappropriate; indeed, the Special Rapporteur on the topic had himself tellingly acknowledged that such inclusion might cause difficulties. In short, the possible effects of non-international conflicts on treaties were governed by chapter V (Circumstances precluding wrongfulness) of the draft articles on the responsibility of States for internationally wrongful acts. Furthermore, article 73 of the Vienna Convention on the Law of Treaties forming the basis of the Commission's work referred exclusively to the effects on treaties of armed conflicts between States. It was therefore of some relief that the inclusion of non-international conflicts was highly qualified and conditional in that the only internal conflicts covered were those that by their nature or extent were likely to affect a treaty, namely those entailing outside involvement.

46. With respect to the indicative list of treaties annexed to the draft articles, his delegation welcomed the inclusion of the categories of treaties referred to in paragraphs (b) and (h) of the annex and agreed with the Special Rapporteur's earlier proposal that the list should be placed in the body of the text, immediately after draft article 7. However, draft article 9 (Notification of intention to terminate or withdraw from a treaty or to suspend its operation) appeared to be applicable to all treaties, including treaties establishing borders, raising the concern that it could be misconstrued as encouraging a State engaged in an armed conflict and eager to alter its borders to invoke the loophole thus provided. It would be safer to restrict the draft article by excluding from its scope the treaties referred to in the indicative list, which would not only be in keeping with the Commission's overall approach to the topic but also reinforce the stability of certain categories of treaties that were critical to the maintenance of peace and security. It would, moreover, be the most straightforward way of ensuring respect for the territorial integrity of States.

47. The saving clause in draft article 14 (Effect of the exercise of the right to self-defence on a treaty) was another welcome inclusion, as was draft article 15 (Prohibition of benefit to an aggressor State), although a broader formulation referring to the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations would be preferable to the current reference to aggression within the meaning of the Charter and General Assembly resolution 3314 (XXIX). The wide implication of the saving clause in draft article 16 (Decisions of the Security Council) also gave rise to doubts. The first-reading version was more appropriate in that it was limited to Security Council decisions taken under chapter VII of the Charter.

48. Turning to the topic "Expulsion of aliens", he said that a State had not only the right to expel aliens on its territory who posed a threat to its national security or public order but also the right to determine the components of those two concepts on the basis of its national laws and the prevailing circumstances. It would therefore be a pointless exercise to enumerate the grounds that a State might invoke to justify the expulsion of aliens. Expulsion must be conducted with due respect for the fundamental human rights of the person being expelled, who must be protected against any inhuman and degrading treatment, including during pre-expulsion detention. The property rights of all persons subject to expulsion must also be respected and guaranteed by the authorities of the expelling State.

49. Notwithstanding the doubtful advisability of formulating a provision on appeals against an expulsion decision, an additional draft article on the matter was redundant in any event, given the lack of information on existing State practice. Many national laws made no provision for such appeals, and there was serious doubt about the existence of customary rules in that area. The right of return to the expelling State could not be recognized in the case of aliens who had been on its territory unlawfully prior to the expulsion

decision, as it would imply recognition of an acquired right of residence, concerning which State practice was unknown. Lastly, the development of guidelines on the expulsion of aliens was a more appropriate and feasible proposition than the elaboration of a convention on the basis of the draft articles.

50. As to the draft articles on the protection of persons in the event of disasters, his delegation expressed caution concerning the development of a rule with respect to which there was insufficient State practice. Views and concerns expressed during the Committee's discussions on the topic must also be taken into account. Entailing both rights and obligations, the dual nature of sovereignty was unquestionable. A State affected by a natural disaster clearly had a duty to take all measures at its disposal to provide assistance required as a result of the disaster by its nationals and other persons on its territory. That duty, however, could not be disproportionately broadened to the level of a legal obligation to seek external assistance. International law imposed no such obligation, the presumption of which was far removed from any established or emerging practice, let alone any existing customary rule. The draft articles should therefore avoid the use of any imperative language. In other words, the affected State was entitled to seek external assistance in the event that it was unable to provide the necessary assistance to disaster victims. In the light of existing State practice, it would be more appropriate to indicate in draft article 10 that a State in such a position "should" seek assistance.

51. There was little doubt concerning the obligation of the affected State to cooperate with other States and competent intergovernmental organizations in the event of a natural disaster. That obligation, however, was limited only to the subjects of international law and entailed no requirement on the part of the affected State to accept relief; once it had consented to the provision of humanitarian aid, it retained the right, in accordance with its domestic law, to direct, control, supervise and coordinate the assistance provided in its territory in keeping with the principles of humanity, neutrality and impartiality. All practices and principles identified by the International Federation of the Red Cross and Red Crescent Societies and reaffirmed by General Assembly resolutions should be applied in good faith.

52. A distinction should also be made between States and international organizations, on the one hand, and relevant non-governmental organizations on the other. While there was nothing to prevent a competent non-governmental organization from providing assistance to an affected State that so requested, it was not incumbent on the affected State to seek assistance from such an organization. His delegation was also mindful of the word "arbitrarily" in draft article 11 (Consent of the affected State to external assistance), as it overshadowed the non-violability of State sovereignty and might pave the way for subjective biases and judgements as to the conduct of the affected State, which could decide at its discretion to refrain from accepting foreign assistance. At best, the "arbitrariness" of the refusal of consent should be determined on a case-by-case basis. No refusal was arbitrary, for instance, if the affected State had previously accepted appropriate assistance from another source. The necessary guarantees should be provided, including by underlining the relevant principles of the Charter of the United Nations, to ensure that the cause of humanitarian assistance was not abused with a view to undermining the sovereign rights of the affected State and interfering in its internal affairs.

53. The Commission should consider situations where the alleged inability of the affected State to provide effective and timely assistance to victims was caused by economic and other sanctions arbitrarily imposed by foreign States and/or the Security Council under the influence of those States. In such situations, the foreign State was not to blame for the possible inconveniences involved in addressing the plight of victims, since its capacity in that regard was arbitrarily impaired by the imposition of economic and other external restraints. An obvious example would be a ban on the importation of medical equipment and air transportation facilities, which were essential in any disaster relief operation.

54. **Mr. Horváth** (Hungary) said that the restructured summary of the draft articles on the expulsion of aliens, as set out in chapter III of the seventh report of the Special Rapporteur (A/CN.4/642), improved their coherence and was therefore welcome. The elaboration of a convention on the basis of the draft articles nonetheless remained a controversial question, and concerns persisted over the need to balance the mere repetition of State practice with the introduction of a new regime with high human rights standards.

55. With respect to the Commission's request in paragraph 42 of its report (A/66/10) for views concerning the suspensive effect of an appeal on the implementation of an expulsion decisions, he cited article 13, paragraph 2, of the earlier mentioned Return Directive of the European Parliament and of the Council, which stated that the authority or body with the necessary competence pursuant to paragraph 1 of the article had the power to review decisions related to return, including the possibility of temporarily suspending their enforcement, unless a temporary suspension was already applicable under national legislation. Special regimes of that nature merited careful consideration by the Special Rapporteur with a view to reflecting relevant developments in his next report. Under Hungarian legislation, no distinction was made between legally and illegally staying aliens; moreover, appeals in cases of non-refoulement had suspensive effect. All third-country nationals were able to file an objection against an expulsion decision and claim that effect. Since most of the issues relating to suspensive effect fell within the scope of national competence, it was both unnecessary and inappropriate to make detailed provision for them in the draft articles. A reference to general human rights guarantees that should be respected might suffice.

56. His delegation supported the principle of encouraging voluntary compliance with expulsion decisions, as articulated in paragraph 1 of draft article D1(Return to the receiving State of the alien being expelled), although not in cases where the person concerned posed a threat to public order or security. The provision should therefore be reformulated to emphasize that, as far as possible, appropriate measures should be taken by States to facilitate voluntary compliance. Paragraph 2 of the draft article should also be amended in order to reaffirm the right of States to use coercive measures in cases of forcible implementation of an expulsion decision, provided that such measures were consistent with international human rights obligations and the dignity of the human being.

57. As currently worded, paragraph 1 of draft article E1 (State of destination of expelled aliens) was too restrictive; the primary destinations for an alien being expelled should include not only the State of nationality but also the State of residence. Similarly, paragraph 2 of the draft article suggested that fundamental human rights guarantees should be respected only with regard to the State of nationality, whereas the principle of non-refoulement should extend to all States of destination. Given that the words "mistaken grounds" in draft article E1 did not qualify as legal terminology, the criteria for the lawful return of an expelled alien should be spelt out. His delegation's understanding was that the legality of return could be determined only in cases where the expulsion decision was based on substantive grounds. As to draft article J1 (Diplomatic protection), consideration should be given to omitting it; not only did it address a controversial issue, but it was not closely related to the subject matter of the draft articles.

58. Responding to the Commission's request, contained in paragraph 43 of its report (A/66/10), for information concerning the practice of States with respect to the protection of persons in the event of disasters, he said that the relief of natural disasters in Hungary was a national matter. The Government therefore coordinated protection, rescue and restoration efforts, in which all national authorities and citizens had a duty to participate. Measures to be taken in the event of disasters and emergencies were specified in the Hungarian Constitution and in a dedicated law that would enter into force at the start of 2012.

59. With regard to the question set forth in paragraph 44 of the Commission's report, his delegation was sympathetic to the idea that the duty of States to cooperate with the affected State in disaster relief matters included a duty to provide assistance when requested by the latter. It might be wiser, however, to formulate that obligation as a strong recommendation or as an example, using wording that took into account the capacities of the States to which requests were made. The aim was to avoid jeopardizing the Commission's work on the draft articles, which might never enter into force if States refused to undertaken such an obligation. Other mechanisms such as official development assistance were in place, moreover, for the provision of relief — which was a basic moral obligation — to those in need.

60. **Mr. Serpa Soares** (Portugal), speaking on the topic "Effects of armed conflicts on treaties", said that difficulties had emerged in establishing, in the event of an outbreak of hostilities, what the intention of the parties to a treaty had been at the time of its conclusion, albeit that treaties were understood to be concluded in good faith and with the intention of

compliance. The key therefore lay in striking a balance between the mutual trust of the parties concerning the fulfilment of their treaty obligations, as a prerequisite for compliance, and the need for legal certainty. Despite its earlier doubts concerning certain aspects of the topic, his delegation was now generally in agreement with the draft articles in terms of both their content and their suitability as a basis for an international convention.

61. In that regard, the prudent approach advocated by the Special Rapporteur in his note on the recommendation to be made to the General Assembly about the draft articles (A/CN.4/644) was understandable; indeed, issues with respect to which neither practice, jurisprudence nor doctrine offered a single clear-cut answer, such as the inclusion of internal armed conflicts within their scope, or the position of third States, would be divisive at any diplomatic conference to be convened on the topic. Dialogue and collective thinking were no doubt the best way forward in attempting to strike a balance between preserving the Commission's work and ensuring the stability of international law through the adoption of a convention. His delegation therefore welcomed the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution and consider, at a later stage, the elaboration of a convention, provided that the time frame for doing so was relatively short. To that end, he suggested the establishment of a working group to explore the various perspectives on key substantive issues and reach a decision accordingly with respect to the possibility of elaborating a convention on the basis of the draft articles.

62. Concerning the draft articles on the expulsion of aliens, draft article D1 (Return to the receiving State of the alien being expelled) should specify, in order to eliminate the potential for negative interpretation of its provisions, that the expelling State must adopt measures to promote the voluntary return of the alien being expelled. The provision of assistance to aliens in such cases also merited consideration in the form of a separate draft article rather than as part of the commentary.

63. Draft article E1 (State of destination of expelled aliens) should likewise specify that the expulsion of an alien to any State where he or she might be subjected to torture or other cruel, inhuman or degrading treatment was prohibited. The question of what would happen if no State was willing to take in an expelled alien should also be addressed. The possibility of establishing adequate assurances with regard to torture or other cruel, inhuman or degrading treatment should similarly be considered. Concerning paragraph 3 of the draft article, any necessary distinction between a State that had not consented to admit an expelled alien into its territory and a State that had refused to do so should be clarified.

64. The matters addressed in draft articles I1 (Responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) should be approached with caution, bearing in mind that States had domestic mechanisms available to aliens subject to expulsion that would enable them to appeal against a wrongful or unlawful expulsion decision or hold the expelling State responsible for such a decision, a fact which had apparently been overlooked. The issues of international responsibility and diplomatic protection should be brought to bear only if the relevant domestic mechanisms foundered or were not made available to the alien concerned.

65. Concerning revised draft article 8 (Expulsion in connection with extradition), as reproduced in footnote 540 of the Commission's report (A/66/10), it remained uncertain whether it had a rightful place in the draft articles. A fine line between the two legal concepts of expulsion and extradition should be drawn.

66. With respect to the draft articles on the protection of persons in the event of disasters, further consideration should be given to the situation in which the affected State failed in its duty to seek assistance under draft article 10, to the extent that a disaster exceeded its national response capacity, as well as to the case where an affected State failed to protect persons in the event of a disaster. Concerning the duty of an affected State not to withhold its consent arbitrarily, pursuant to draft article 11, a clear answer was needed to the question of whether the delivery of external assistance was dependent on consent. An additional study on the relationship between international cooperation and international principles would be helpful in establishing possible derogations to those of sovereignty and non-intervention. A State should bear the responsibility for its refusal to accept assistance, since such a refusal could give rise to an internationally wrongful act if it undermined the rights of the affected persons under international law. The circumstances in which an affected State could refuse

offers of assistance should therefore be clearly defined in draft article 12, dealing with the right to offer assistance. Lastly, in draft article 11, paragraph 3, the words "whenever possible" required further consideration in the interest of clarifying the consequences for the protection of persons in cases where a decision by the affected State proved impossible.

67. **Ms. Hakim** (Indonesia) said that her delegation welcomed the adoption of the valuable Guide to Practice on Reservations to Treaties and supported the Commission's recommendation that the General Assembly should take note of the Guide to Practice and ensure its widest possible dissemination. It also supported the recommendation suggesting that the General Assembly should consider establishing a reservations assistance mechanism. On the other hand, the establishment of various "observatories" on reservations to treaties would be ineffectual; in practice, it was States parties to treaties that would decide the means of settling differences of views in the matter of reservations.

68. Her delegation similarly supported the adoption of the draft articles on the responsibility of international organizations, on second reading, and the Commission's recommendation that the General Assembly should take note of them in a resolution and annex them to the resolution, as well as consider, at a later stage, the elaboration of a convention on the basis thereof. In that context, however, the Commission should first take into account the variety of national legal systems that could be invoked concerning the wrongful acts of an international organization, including those of individuals acting on its behalf. A more comprehensive host country agreement providing for the responsibility of international organizations should also be elaborated. As to the controversial issue of the right to self-defence, the provision of Article 51 of the Charter of the United Nations should not apply to international organizations.

69. The Commission's identical recommendation concerning the draft articles on the effects of armed conflicts on treaties was also supported by her delegation. In keeping with the Vienna Convention on the Law of Treaties, however, the draft articles should apply only to situations of international armed conflict and not to internal armed conflicts, which were often triggered by separatist rebels and had no bearing on treaties concluded freely between two sovereign States.

70. As for the draft articles on the protection of persons in the event of disasters, they did not sufficiently balance the core principles of sovereignty, non-intervention and State consent with the duty of protection. The wording of draft article 10 (Duty of the affected State to seek assistance) imposed an obligation on the affected State to seek assistance if a disaster exceeded its national response capacity, thereby undermining the principles of non-intervention and the sovereign right of that State to use its own judgement and keep all options open. Moreover, the imposition of such an obligation was inconsistent with the right of the affected State not to consent to external assistance. State practice in dealing with major disasters should not be undermined. Indeed, States affected by disaster in various parts of the world had always promptly joined in working with the international community.

71. As a disaster-prone country, Indonesia had in place a disaster-management law, pursuant to which external assistance was to be provided on the basis of its domestic legislation and with due regard for its political independence, sovereignty and territorial integrity. The Indonesian Government was also under obligation to direct, coordinate, manage and supervise the disbursement of foreign aid within Indonesian territory, thereby reflecting its commitment to accepting international assistance in times of disaster.

72. Turning to the topic "Immunity of State officials from foreign criminal jurisdiction", she said that immunity *ratione personae* should be limited to the troika comprising the head of Government, the head of State and the Minister for Foreign Affairs. It should not be extended to other senior officials, nor should there be any exceptions to the immunity of members of the troika who committed core crimes, including in an official capacity. Only the State could legally invoke the immunity of its officials. It was important to strike a balance between the principle of immunity emanating from national sovereignty and the prevention of impunity. In the interest of achieving further progress, the Commission should establish a mechanism to facilitate further discussion aimed at reaching common ground on the sensitive issues still outstanding with respect to the immunity of State officials that were raised in the second and third reports of the Special Rapporteur on the topic (A/CN.4/631 and 646).

73. In conclusion, she expressed the hope that the Commission's work would be enhanced through implementation of the welcome recommendations

made by the Commission's Working Group on Methods of Work. As to future sessions of the Commission, it was important to retain split sessions for the efficiency and effectiveness of the Commission's work.

74. **Ms. Šurková** (Slovakia) said that her delegation supported the Commission's recommendation that the General Assembly should take note of the draft articles on the effects of armed conflicts on treaties and annex them to the resolution, as well as consider, at a later stage, the elaboration of a convention based on them. In that context, it was prepared to contribute to further *de lege feranda* considerations, which should take into account the latest developments in international relations and inter-State practice, as well as experience gained from recent armed conflicts, which both individually and collectively affected the operation of treaties between the countries concerned. The two major fields of international law in which those effects had direct impacts merited further consideration, namely international law norms regulating the international responsibility of States and international organizations, and those regulating the succession of States with respect to treaties, State property, debts and archives.

75. The indicative list of treaties mentioned in draft article 7 facilitated understanding of the very meaning of the draft articles. The question arose, however, as to what extent a territorial State or an insurgent movement seeking to become a new democratic government in that State was in a position to ensure uninterrupted compliance with treaty obligations. The formal enforcement of international treaties would be counterproductive in situations where a State or movement was temporarily unable to fulfill its commitments. Further expert analysis was therefore needed to determine whether the draft articles fully embraced the new developments and challenges emerging from democratic revolutionary and reform movements.

76. **Mr. Kessel** (Canada), referring to the draft articles on the expulsion of aliens, said that State practice did not yet appear to warrant the formulation of a provision on the suspensive effect of an appeal against an expulsion decision. Nor should the draft articles attempt to address the issue of extradition, which was both legally and conceptually different from the issue of expulsion of aliens. In many countries, both aliens and citizens could be extradited, but only aliens could be expelled. The main purpose of extradition was to ensure that criminals were not able to escape prosecution simply by fleeing from one State to another. Such considerations would not be relevant in many instances of the expulsion of aliens.

77. Consequently, there was insufficient practice to support the conclusion on which revised draft article 8 (Expulsion in connection with extradition) was based. Given the significant difference between extradition and expulsion of aliens, the draft article should be deleted on the ground of prematurity. Draft guidelines or principles describing best practices might be the most practical outcome to seek from the topic. Indeed, the range of State practice illustrated in the seventh report of the Special Rapporteur (A/CN.4/642) and the challenging issues raised lent themselves to an approach that not only reflected the variety of strategies pursued by States but also was not overly prescriptive.

78. **Mr. Joyini** (South Africa), commenting on the draft articles on the effects of armed conflicts on treaties, said that his delegation shared the view that customary international law applied independently of treaty obligations, as reflected in draft article 10, which was clearly designed to preserve the requirement to fulfil an obligation under general international law in cases where the same obligation appeared in a treaty that had been terminated or suspended or from which the State party concerned had withdrawn as a consequence of an armed conflict. Indeed, that principle was embodied in the famous *dictum* of the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction of the Court and Admissibility of the Application (Nicaragua v. United States of America)*, cited in paragraph (2) of the commentary to the draft article.

79. The inclusion of treaties on international justice in the indicative list of treaties annexed to the draft articles was commendable, aimed as it was at ensuring the survival and continued operation of such treaties as the Rome Statute of the International Criminal Court. His delegation agreed with the views expressed with respect to those treaties in paragraphs (22) and (23) of the commentary to the indicative list, as well as with those expressed in paragraph (74) of the commentary concerning treaties relating to diplomatic relations. It was also comfortable with the position articulated in paragraph (8) of the commentary concerning treaties declaring, creating or regulating a permanent regime or

status, or related permanent rights. There was a certain amount of case law supporting the position that agreements such as boundary treaties were unaffected by the incidence of armed conflict and, as detailed in paragraph (14) of the commentary, the special status of boundary treaties was recognized in article 62 (2) (a) of the 1969 Vienna Convention on the Law of Treaties and article 11 of the Vienna Convention on Succession of States in Respect of Treaties.

80. **Mr. Kim** Jae-seob (Republic of Korea), commenting on the same topic, said that insofar as they complicated or prevented the fulfilment of certain treaty obligations, armed conflicts impaired the stability of treaties and relations between the parties thereto, as did a State's invocation of armed conflicts as grounds for the suspension, withdrawal or termination of a treaty. In order to avoid that situation, a distinction must be made between treaties of which the operation was unaffected by armed conflicts and other treaties. His delegation therefore supported the annexation of an indicative list of treaties to the draft articles on the topic.

81. Concerning the topic "Expulsion of aliens", he said that in accordance with the principle of sovereign equality, all States had the right to expel aliens who violated domestic regulations or damaged national interests. It was essential, however, to balance that sovereignty with measures to ensure that the human rights of aliens subject to expulsion were not violated. To that end, appeals against an expulsion decision had suspensive effect in the Republic of Korea pursuant to an immigration control law governing expulsion. As a high contracting party to the Convention relating to the Status of Refugees, moreover, it was bound by the non-refoulement principle in that it was prohibited to expel or return a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

82. As to the topic "Protection of persons in the event of disasters", such protection was not a duty but a right of the aid donor. International organizations such as the United Nations should therefore actively request assistance for affected States. Draft article 10 (Duty of the affected State to seek assistance) should be less obscurely worded; while it appeared to increase the chances of protection, it was not clear whether or not the affected State's national response capacity should be exceeded in order for the provision to apply. The structure of the draft articles would also be improved by changes to their order. Draft articles 7 (Human dignity) and 8 (Human rights), for example, addressed key principles and would therefore be best placed at the beginning of the text.

83. **Mr. Kittichaisaree** (Thailand), referring to the draft articles on the expulsion of aliens, said that the right to challenge an expulsion decision under draft article C1 (Procedural rights of aliens facing expulsion), as contained in the sixth report of the Special Rapporteur on the topic (A/CN.4/625/Add.1), was applicable only to aliens who were lawfully in the territory of the expelling State, in which respect it mirrored the provision of article 13 of the International Covenant on Civil and Political Rights.

84. Concerning revised draft article D1 (Return to the receiving State of the alien being expelled), reproduced in footnote 531 of the Commission's report (A/66/10), the illustrative reference to the rules of air travel in paragraph 2 was vague and unhelpful, particularly as no reference was made to travel by sea or land, which were also frequently used channels for the expulsion of aliens. Further, the word "possible" should preferably be replaced by "feasible" or "practical" in order to take account of the capability and means of the expelling State.

85. As to revised draft article E1 (State of destination of expelled aliens), the order of paragraphs 2 and 3 should be reversed in the light of the close link between paragraphs 1 and 3. Paragraph 2 should also elaborate on what would happen in the event that no State consented to admit an expelled alien; moreover, the words "in that order" should perhaps be added at the end of the paragraph, unless the choice of the State of destination was likewise at the discretion of the expelling State.

86. With regard to draft article G1 (Protecting the property of aliens facing expulsion), the application of paragraph 1 could be problematic when it came to making an objective assessment of the intention of the expelling State. His delegation therefore proposed an amendment of the wording to read: "The expulsion of an alien for the sole purpose of unlawfully confiscating his or her assets is prohibited." It also favoured the proposed exception of cases where a court had found, after a fair trial, that certain property had been acquired illegally. In paragraph 2, the term "to the extent

possible" should either be further elaborated or replaced by the phrase "in accordance with the domestic law of the expelling State".

87. In draft article H1 (Right of return to the expelling State), it would be preferable to replace "right of return" with "right of readmission", as the word "return" was more appropriately used in cases where a person was expelled from his or her own country. Furthermore, the term "mistaken grounds" had no legal basis; the grounds in question were either attributable to an error of fact or law, or were legally unjustifiable.

88. As reproduced in footnote 540 of the Commission's report (A/66/10), revised draft article 8 (Expulsion in connection with extradition) was perhaps misplaced in the current set of draft articles. In order to address the relation between extradition and expulsion of aliens, a provision to the effect that the draft articles were without prejudice to international legal obligations regarding extradition among the States concerned should be added to the text of the draft article. Lastly, the draft articles should not apply to aliens whose status was regulated by special norms, such as international refugee law. As to the final product, his delegation favoured the development of draft guidelines or guiding principles rather than a set of draft articles.

89. With respect to protection of persons in the event of disasters, his delegation endorsed the view that the concept of responsibility to protect must not be extended to cover the response to natural disasters and other matters relating to the topic. The commentary to draft article 8 (Human rights) should elaborate further on the meaning of human rights in that context by referring to the protection of rights relating to such matters as the provision of food, health, shelter and education; housing, land and property, livelihoods and secondary and higher education; and documentation, movement, re-establishment of family ties, expression and opinion, and elections.

90. The first part of draft article 10 (Duty of the affected State to seek assistance) should be amended to read: "To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations". The aim of that proposed amendment was to emphasize the discretionary power of the affected State to choose from among various sources of assistance, in contrast to the current version in which the State was afforded no such power in view of the positioning of the words "as appropriate" at the end of the draft article.

91. Paragraph 2 of draft article 11 (Consent of the affected State to external assistance) should also be more closely harmonized with the resolutions of the Institute of International Law mentioned in the commentary to the draft article by amending it to read: "Consent to external assistance offered in good faith and exclusively intended to provide humanitarian assistance shall not be withheld arbitrarily and unjustifiably." The words "whenever possible" in paragraph 3 should also be understood to cover the situation where the affected State was unable to make its decision known for fear of jeopardizing international relations with another State. The words "without prejudice to article 10" should be added at the beginning of draft article 11 for the sake of harmony.

92. Lastly, the word "duty" should replace the word "right" in draft article 12 (Right to offer assistance), as reproduced in footnote 549 of the Commission's report (A/66/10), in that offers of assistance from the international community were part of international cooperation, as opposed to an assertion of rights.

93. **Mr. Caflisch** (Special Rapporteur on the effects of armed conflicts on treaties), commenting on the discussions of the draft articles on the effects of armed conflicts on treaties, said it was regrettable that questions had been raised concerning the utility of the draft articles and the insufficiency of practice on which they were based. The Commission had, in fact, made considerable efforts to focus on practice, with particular reference to domestic courts, and both he and his predecessor had built their work on an impressive memorandum on practice prepared by the Secretariat. The most sensitive and tendentious issue related to the scope of application of the draft articles, the definition of which had been criticized as being either too narrow or too broad. In the latter case, however, it was important to bear in mind the limitation imposed by the reference to "protracted" resort to armed force in draft article 2, subparagraph (b), and, in draft article 6, to the "degree of outside involvement." As to the exclusion of treaties to which international organizations were a party, any related problems could be addressed

separately at a later stage, not least because the work entailed might prove difficult.

94. With respect to observations that the relationship between draft articles 5 and 6 was not sufficiently apparent from the text, the need to apply each in succession was clearly explained in the respective commentaries. The list of indicative treaties annexed to the draft articles had also proved to be a sensitive issue, with some delegations opposing the idea and others favouring a more concise list. The compromise solution had therefore been to compile an indicative list establishing a presumption that was nonetheless not incontrovertible. The list contained some categories of treaty stemming from the development of international law that were plainly destined to survive in view of their nature, one example being treaties on international criminal justice. Such treaties must be included in the indicative list in order to adapt it to the needs and circumstances of contemporary international relations, even in the absence of relevant practice.

95. **Ms. Abdul Rahman** (Malaysia) said that the rearrangement in order of priority of the draft articles on the effects of armed conflicts on treaties, in particular draft articles 3 to 7, provided a more structured basis for determining the effect of an armed conflict on treaties. Although merely expository in nature, the draft articles were notably important codifications of applicable general principles.

96. Her delegation welcomed the decision to exclude from the scope of draft article 1 relations arising under treaties between international organizations, or between States and the latter, in recognition of the complexity of incorporating that additional dimension. Nevertheless, draft article 1 should not be construed as excluding multilateral treaties to which international or regional organizations were parties in addition to States, a clarification that could be made by adding language to the definition of "treaty" in draft article 2, subparagraph (a), as had indeed been proposed.

97. As to subparagraph (b), her delegation appreciated the efforts to include both international and non-international armed conflicts within its purview through a modernized definition of "armed conflict" based on that employed by ICTY in the *Tadić* decision. It also noted the consistency of the word "protracted" with its use in the Geneva Conventions of 1949 and the Additional Protocols thereto to qualify armed conflicts of a non-international character, as well as the intent to include situations where territory had been occupied without armed resistance, as provided for in article 18, paragraph 2, of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, and of blockades imposed in the absence of armed actions between the parties concerned. Express inclusion of the latter two situations in the definition of "armed conflict" might be necessary; while jurisprudence and court decisions had established that international humanitarian law applied in both situations, their effect on treaties might be less clearly established. The term "ipso facto" in draft article 3 was also more appropriate in the context than the word "necessarily" in the previous draft.

98. The inclusive general criteria set out in draft article 6 formed a useful basis for evaluating the external factors indicating whether a treaty was susceptible to termination, withdrawal or suspension. The commentary to draft article 7, however, raised a number of uncertainties relating to some categories of treaties contained in the indicative list annexed to the draft articles, in particular multilateral law-making treaties and treaties of friendship, commerce and navigation and agreements concerning private rights. Those two categories should be further explored before being included in the list, the annexation of which to the draft articles remained in itself a matter of debate.

99. The mechanism enabling States not parties to an armed conflict to deal with their treaty obligations towards States parties to that conflict, as proposed by the words "or may agree to amend or modify the treaty" in draft article 8, might be more clearly provided for in a separate draft article. The reason was that, following as it did the reference to "a State party to that conflict" in paragraph 1 of the draft article, the reference to "States" in paragraph 2 might be understood to be limited to the States parties to the armed conflict. Draft article 9, paragraph 1, also gave rise to a similar issue.

100. Notwithstanding that draft article 14 was formulated on the basis of article 7 of a resolution adopted by Institute of International Law in 1985, as reproduced in footnote 402 of the Commission's report (A/66/10), clarification was necessary as to why the right to the suspension of a treaty was limited. The need to terminate a treaty might also be foreseeable if a State invoked its right to self-defence under Article 51 of the Charter of the United Nations. In accordance with the principles of the Charter, however, an

aggressor State should not be permitted to benefit from its act of aggression, including through the suspension or termination of applicable treaties as provided under draft article 15. In addition, the procedural steps envisaged in the commentaries for the resolution of any allegation involving aggression had not been included in the draft articles.

101. Draft article 16 was intended to preserve the legal effects of Security Council decisions under the Charter; however, it contained no express provision concerning the suspension, withdrawal from or termination of treaties either in the case of the States targeted by sanctions regimes imposed through such decisions or with respect to the other Member States. The implementation of sanctions might nevertheless require those consequences for a treaty if the relevant resolutions were to be fully implemented by States.

102. In the light of the Commission's comments, her delegation supported its recommendation to the General Assembly to take note of the draft articles on the effects of armed conflicts on treaties in a resolution, and to annex them to the resolution. It might be premature, however, to recommend consideration of the draft articles as a basis for the elaboration of a convention, given that the issues highlighted by the Commission required further study and the gathering of further information on relevant State practice.

103. Turning to the topic "Expulsion of aliens", she said that her delegation would in due course submit its response to the specific issues raised in paragraphs 40 to 42 of the Commission's report (A/66/10). Concerning the draft articles on the topic, specifically draft article D1 (Return to the receiving State of the alien being expelled), codification of the duty or extent of the obligation imposed on States to encourage the voluntary departure of an alien being expelled was unnecessary, in that the expulsion decision concerned would have legal force. The alien would therefore be required to comply with that decision unless it was overturned or altered. The formulation of paragraph 1 of the draft article was, moreover, so broad that it was impossible to determine the extent of the duty imposed upon States to encourage compliance with an expulsion decision. Further, the mandatory duty imposed upon States through the use of the term "shall" implied that such a duty must first be discharged by States before an expulsion decision was brought into effect, thereby placing an unnecessary burden on States.

104. Under Malaysian law, the current practice was that an alien unlawfully present on Malaysian territory could be detained in custody while arrangements for his or her removal by order of the Director General were being made. No specific period of notice for the purpose of departure preparations was required in the case of an alien subject to removal, whose detention was nonetheless at the discretion of the Government. In practice, therefore, aliens being expelled might be afforded the time needed to prepare for their departure from Malaysia. Taking into account such State practices, a reasonable time frame for compliance with an expulsion order might accordingly be put in place, rather than the appropriate notice provided for in draft article D1, paragraph 3.

105. As to draft article E1 (State of destination of expelled aliens), the current formulation of paragraph 2, which listed options for expulsion destinations in cases where the State of nationality of the alien being expelled had not been identified, was unacceptable to her delegation because, under Malaysia's immigration laws, such an alien could be returned only to his or her place of embarkation or country of birth or citizenship. In any event, not only would it be difficult to foresee whether the destination selected by the expelling state for deportation would expose the deportee to prosecution and punishment; it would also impose an undue additional burden and duty on the expelling state and encroach on its right to exercise its powers in accordance with domestic laws. The formulation of paragraph 3 of the draft article was, on the other hand, satisfactory in that States should always have the flexibility to decide to admit aliens to their territory or not, as circumstances required. Indeed, States were vested with the inherent right to determine the State of destination of expelled aliens.

106. Concerning the revised version of draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State), her delegation's position was that rules applicable in the expelling State to protection of the human rights of aliens subject to expulsion should not apply in the transit State, which should be obliged only to observe and implement its own domestic laws and other international rules governing the human rights of aliens arising from instruments to which it was a party. The formulation of the draft article should be reconsidered, bearing in mind that the specific legal framework required for the

return of aliens utilizing transit points would be better addressed at the bilateral or multilateral levels.

107. As to draft article G1 (Protecting the property of aliens facing expulsion), while the right to property was guaranteed under Malaysia's Federal Constitution in conformity with the relevant international standards, her delegation held that the property of aliens should be protected without prejudice to the rights of the expelling State to take any necessary action under its criminal laws to seize or forfeit properties forming the proceeds of crimes. It also supported the view that paragraph 1 of the draft article was *lex ferenda* and did not reflect existing State practice, which in the case of Malaysia did not entail confiscation measures against expelled aliens.

108. Draft article H1 (Right of return to the expelling State) complemented draft article 4 (Non-expulsion by a State of its nationals), contained in the Special Rapporteur's third report on the topic (A/CN.4/581), which provided that "a national expelled from his or her own country shall have the right to return to it at any time at the request of the receiving State". Her delegation supported the view that an expelled alien should be allowed to return to the expelling State, subject to its immigration laws. Nonetheless, the scope and intent of the words "violation of law or international law" required further clarification.

109. Concerning draft article I1 (The responsibility of States in cases of unlawful expulsion), the proposal that the legal consequences of an unlawful expulsion should be governed by the general regime of the responsibility of States for internationally wrongful acts necessitated further deliberation once that regime had been identified and could be clearly incorporated into the proposed formulation. As for the proposal to make it clear that a State could be held responsible under draft article I1 only for violating a rule of international law, which was supported by her delegation, a more cautious approach should be adopted by conducting an in-depth analysis of the formulation of the text with a view to enhancing understanding of the application of the regime of State responsibility in relation to the draft article.

110. The formulation of draft article J1 (Diplomatic protection) was consistent with draft article 3, paragraph 1, of the draft articles on diplomatic protection, which specified that the State entitled to exercise diplomatic protection was the State of nationality. Furthermore, the word "may" in draft article J1 indicated that the exercise of diplomatic protection was at the discretion of the State of nationality. In that regard, the exercise of diplomatic protection must be subject to certain international obligations, particularly if treaty obligations prohibiting diplomatic protection arose where an investment dispute settlement mechanism between a foreign investor and the State had been invoked.

111. Concerning draft article 8 (Prohibition of extradition disguised as expulsion), as contained in the sixth report of the Special Rapporteur (A/CN.4/625), the decision as to whether to exercise deportation or extradition must remain the sole prerogative of a sovereign State. The wording of the draft article should therefore be re-evaluated with the aim of ensuring a clear distinction between disguised extradition and a genuine act of deportation. Given the complexity of the issue, present laws and principles of extradition and immigration were well established and sufficient to cater to the protection of the rights of aliens.

112. Moving on to another topic (Protection of persons in the event of disasters), she reiterated her delegation's position that the principles of sovereignty, territorial integrity and non-interference must be respected in any further elaboration of the draft articles. Humanitarian assistance should never be arbitrarily imposed on an affected State, nor should concepts under international humanitarian law be automatically applied, since the duty of protection might differ in the context of disaster situations. Her delegation also maintained the position expressed in its statement to the Sixth Committee in 2010 with respect to draft articles 6 to 9, as provisionally adopted by the Drafting Committee (A/CN.4/L.776).

113. The duty apparently incumbent on the affected State to seek assistance did not arise in all of the disaster situations defined in draft article 3: pursuant to draft article 10, it materialized only in situations where the disaster exceeded the affected State's national response capacity. As to the determination of the point at which the proposed draft article 10 became operational, the affected State should retain the right to determine whether a particular disaster was beyond its national response capacity or otherwise, in line with the principle of State sovereignty under international law. In short, the affected State was best placed to make a rational and reasonable decision as to its capabilities to respond to a disaster and provide for the

needs of its population. The words "to the extent that" appropriately provided for situations where the affected State's national response capacity might be exceeded in relation to one aspect of disaster relief operations but where the State remained capable of undertaking the operations in other areas of the relief effort, giving it the flexibility to determine and accept foreign aid in the areas of greatest need. That wording was also in keeping with draft article 9, paragraph 2, which provided that the affected State had the primary role in the direction, control, coordination and supervision of humanitarian assistance.

114. The Commission should further consider the matter of whether the duty imposed under draft article 10 constituted a legal obligation on States to seek assistance, before it took any decision concerning the nature of that duty, with due regard for the principle of the sovereignty of States. International law currently imposed no legal duty on States to assist one another in disasters, and all responses were purely on a voluntary humanitarian basis.

115. The words "from among", "competent" and "relevant" in draft article 10 enabled the affected State to maintain its right to decide which intergovernmental and non-governmental organization was best placed to assist it. Placement of the words "as appropriate" at the end of draft article 10 also had the effect of strengthening the affected State's discretion in determining and choosing the best assistance provider, taking into consideration its particular needs.

116. Her delegation concurred with the provision of draft article 11, paragraph 1; in line with the principle of State sovereignty, no external assistance should be imposed on a disaster-affected State without its consent. Nonetheless, the ambiguities highlighted by the Drafting Committee merited further consideration. The draft article should categorically refuse to allow consent to be implied or dispensed with completely in situations where a lack of consent would not bar the provision of assistance. The situation where there was no functioning government to provide consent might be acceptable from a humanitarian standpoint, as consent could not be given in the absence of a government. Nevertheless, it raised questions as to who should decide whether a government, functioning or otherwise, existed.

117. The situation where consent was being withheld arbitrarily in the face of a manifest need for external assistance required further clarification, however, concerning the matter of who should determine the seriousness of the situation and whether consent was being arbitrarily refused. As interpreted by the Drafting Committee, the draft article thus raised a number of serious legal and practical issues and required further consideration by the Commission with a view to striking a balance between respect for the affected State's sovereign right not to admit foreign entities to its territory and the right of its population to receive humanitarian assistance in the event of disasters.

118. As to paragraph 2 of the draft article, it seemed to crystallize the affected State's inherent right to withhold its consent for any assistance while simultaneously appearing to impose a condition that the grounds for not granting consent should not be arbitrary in nature. Although the term "arbitrariness" had been said to be the preferred qualifier, in that it implied that a more objective test would be used when determining whether a decision on the part of the affected State was arbitrary or otherwise, no general rule could in fact be deduced because no clear practice had been found to exist in that regard.

119. Taking into account the meaning of "not withholding consent arbitrarily", as clarified in paragraph 74 of the fourth report of the Special Rapporteur on the topic (A/CN.4/643), and the principles proposed by the Commission for determining actions not considered to be arbitrary, her delegation had difficulty in understanding how use of the term "arbitrarily" added an objective consideration to paragraph 2. For all practical purposes, the use of a more politically correct term did not necessarily mean that it was more objective or any clearer in its application. Further explanation of the proposed test of "arbitrariness" in the context of the paragraph was therefore needed. Insofar as the underlying purpose of draft article 11 was to protect the rights of the affected population from being deprived of aid without sufficient and cogent reasons, however, her delegation shared the view that decisions to reject assistance should be determined as arbitrary or otherwise on a case-by-case basis.

120. Concerning the specific question in paragraph 44 of the Commission's report (A/66/10) as to whether the duty to cooperate with the affected State in disaster relief matters included a duty on States to provide assistance when requested by that State, her Government's preliminary response was that the

general duty of cooperation among States and with intergovernmental and non-governmental organizations provided for in draft article 5 should be clearly defined in order to enable States to understand the extent of their obligation under that draft article. In particular, the question posed would have an impact on the practical operation of draft articles 10 and 11. The duty to seek assistance in the event of disasters would need to be mutually supported by a corresponding duty to assist. The duty to render assistance, however, could not be categorically imposed on a State without taking into account its resources and capabilities, as well as its domestic priorities and national interests. As stated by the Special Rapporteur in his fourth report on the topic (A/CN.4/643), cooperation should not be interpreted in such a way as to diminish the prerogatives of a sovereign State within the international legal regime.

121. Any duty to provide assistance when requested was usually a moral duty based on humanitarian considerations. It should not be transposed into a legally binding duty lest new obligations that were too onerous deterred future adherents from the elaboration of other important principles through the draft articles. A legal duty imposed on States would indeed be onerous; moreover, a binding obligation on States to provide assistance upon request could be deemed unacceptable interference in a State's sovereign decision-making. A State should be permitted to respond to requests for assistance in any manner that it deemed fit. Whether providing or seeking and accepting assistance, all States should also be allowed to interact freely and coordinate their actions with respect to the need for assistance, as well as the type and manner of such assistance.

122. In short, the affected State had the principal obligation and the right to address the needs of victims of disasters within its own border. It also had the right to decide where, when and how relief operations were to be conducted and possessed the inherent power to dictate the terms of the humanitarian response.

The meeting rose at 6.05 p.m.