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Chair: Mr. Sergeyev . . . . . (Ukraine)

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

Agenda item 79: Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions (*continued*) (A/66/10 and Add.1 and A/67/10)

1. **Ms. Robertson** (Australia), speaking on the topic of the expulsion of aliens, said that Australia was committed to providing a legal system that was predictable, transparent and respectful of the human rights and dignity of aliens. The draft articles adopted by the Commission were underpinned by the same objective and, in many respects, set out existing rules found in treaties and customary international law. However, they also advanced new principles that merited close attention.

2. For example, draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened) extended the non-refoulement obligation in the Convention relating to the Status of Refugees to include anyone whose life or freedom was threatened on any grounds, even if he or she was not a refugee within the meaning of the Convention. Draft article 26 (Procedural rights of aliens subject to expulsion) granted a range of procedural rights to aliens who had been present unlawfully in the territory of a State for more than six months, thereby departing from the existing distinction in international law between persons who were lawfully present in a State's territory and those who were unlawfully present. Given that the expulsion of aliens was governed by several widely ratified treaties, her delegation would suggest restraint in conflating existing principles and expanding established concepts in new directions.

3. Some aspects of the draft articles, such as draft article 14 (Obligation to respect the human dignity and human rights of aliens subject to expulsion) and draft article 21 (Departure to the State of destination), which promoted the voluntary departure of aliens subject to expulsion, were commendable. As overarching principles already inherent in the law on the topic, those provisions could usefully serve as a guide for domestic laws and policies. If framed as new substantive obligations, however, their precise content might be difficult to articulate.

4. The significant body of international law on the expulsion of aliens would continue to grow as movement across borders became more commonplace and the Commission's work would be most valuable if it helped States to meet their obligations under that law. The most appropriate final form for the draft articles would therefore be a set of principles or guidelines accompanied by commentary reflecting State practice and jurisprudence. The Commission's work would thus contribute to the consolidation of relevant laws and practice.

5. The Commission's work on the topic of the protection of persons in the event of disasters continued to contribute to the development of important humanitarian principles. Protecting people from serious harm during disasters was both a challenge and a core responsibility for all humanitarian actors; Australia's location in the Asia-Pacific region, the most disaster-prone region in the world, gave it a unique perspective on the issue. It had a long-standing commitment to the protection of affected populations but recognized that in the absence of safety and security, the delivery of humanitarian assistance had a limited or even detrimental effect.

6. Her Government continued to support the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IDRL Guidelines) and the Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, developed by the International Federation of Red Cross and Red Crescent Societies. It encouraged the Commission to consider formulating a model instrument for humanitarian relief operations in the form of a status-of-visiting-personnel agreement, which could be annexed to the draft articles. The formulation of such an instrument, which would have practical utility in facilitating timely assistance to persons affected by disasters, would be consistent with the original proposal for consideration of the topic by the Commission, which had suggested the 1946 Convention on the Privileges and Immunities of the United Nations as a possible model for the development of a set of provisions that would serve as a legal framework for international disaster relief activities (A/61/10, annex C, para. 24).

7. **Mr. Gharibi** (Islamic Republic of Iran), speaking on the topic of the expulsion of aliens, said that, generally speaking, his delegation was of the view that the Commission should restrict its work on the topic to the identification and codification of existing law

rather than embarking on its progressive development; some of the draft articles went beyond both customary and treaty law (*lex lata*), however. The Commission should also be cautious in generalizing rules that were set out in regional or subregional treaties or mechanisms, which could not necessarily be taken to be representative of State practice or *opinio juris*. The Commission tended to overvalue the practice of treaty bodies, such as the Human Rights Committee, in identifying rules, sometimes at the price of overriding the very rule that the treaty in question had meant to establish.

8. While his delegation did not challenge the general prohibition of collective expulsion, it disagreed with the Commission's methodology, which had also been used in identifying other rules such as those set out in draft article 26 (Procedural rights of aliens subject to expulsion). It should instead base its codification exercise on State practice as manifested, inter alia, in international treaties, for which subsequent developments could not substitute.

9. A State's right to expel an alien whom it deemed to pose a threat to its national security or public order appeared indisputable. It was therefore unnecessary to draw up an exhaustive list of grounds that might be invoked to justify the expulsion of aliens, nor did States have an obligation in all cases to specify the grounds for expulsion. Accordingly, paragraph 1 of draft article 5 (Grounds for expulsion) should be brought into line with draft article 3 (Right of expulsion) by adding "as appropriate" after "shall". Furthermore, in draft article 5, paragraph 4, "its obligations under" should be added before "international law" in order to prevent any ambiguity or competing interpretations of "contrary to international law".

10. His delegation questioned the advisability of placing refugees present lawfully, and those present unlawfully, in a State's territory on an equal footing in draft article 6 (Prohibition of the expulsion of refugees). It would be preferable to adhere to the regime established in the Convention relating to the Status of Refugees and either to delete paragraph 2 of the draft article or, if it was kept, to replace "shall" with "may", leaving the question of whether to accord the two categories of refugees the same treatment to the expelling State's discretion.

11. His delegation was unconvinced of the necessity and viability of a rule allowing for appeals against an expulsion decision, particularly as there was considerable doubt regarding the existence of a basis in international customary law for challenging such a decision. Granting such a right would imply recognition of an acquired right of residence in the territory of a foreign State, something unknown in State practice. The Commission had gone beyond existing treaty and customary law in paragraph 4 of draft article 26 (Procedural rights of aliens subject to expulsion) by granting unlawful aliens the right to challenge an expulsion decision, provided that they had been present in the territory of the expelling State for more than six months. According equal treatment to aliens who were lawfully, and those who were unlawfully, present in a State's territory could create an incentive for illegal immigration. Draft article 27 (Suspensive effect of an appeal against an expulsion decision) was also unacceptable because it constituted progressive development without a minimum basis in uniform or convergent State practice. Regarding the final form of the draft articles, his delegation reiterated its view that they should be reformulated as a set of guidelines.

12. Turning to the topic of the protection of persons in the event of disasters, he recalled that the Special Rapporteur on the topic had taken part in an informal meeting of legal experts from the Movement of Non-Aligned Countries and expressed his delegation's hope that the observations made during that meeting would be duly reflected in the subsequent reports and relevant draft articles on the topic.

13. On previous occasions, his delegation had expressed its views regarding the draft articles adopted thus far by the Commission. At the present time, it wished simply to note that its assessment of their reception by Governments was slightly different from that of the Special Rapporteur as stated in paragraph 57 of the Commission's report (A/67/10); many States had expressed concern with regard to certain draft articles and expected that their concerns would be appropriately reflected in the version submitted for second reading.

14. Sovereignty entailed both rights and obligations. Certainly, a State affected by a natural disaster had a duty to take all measures at its disposal to provide assistance to its nationals and other persons living in its territory who needed assistance in the wake of a

disaster; however, that duty could not be broadened so as to give rise to a legal obligation to seek external assistance. International law imposed no such obligation, nor was there any basis for inferring one from customary rules or emerging practice.

15. Draft article 5 (Duty to cooperate) should distinguish between States and international organizations, on the one hand, and relevant non-governmental organizations (NGOs), on the other. While nothing should prevent a competent NGO from providing assistance to an affected State upon request, that State had no duty to seek assistance from such organizations. Moreover, the duty to cooperate should not be understood as creating an obligation on the part of the affected State to accept external assistance, the provision of which should be subject to the latter's consent.

16. The remainder of his delegation's comments on the topic, together with its views on the provisional application of treaties, could be found in his written statement, which had been made available on the PaperSmart portal.

17. **Mr. Chowdhury** (India), speaking on the topic of the expulsion of aliens, said that his delegation supported the approach taken by the Special Rapporteur in dealing with the right of a State to expel and the rights and remedies available to persons subject to expulsion, including those relating to unlawful expulsion. India recognized, in principle, the right of a State to expel an alien from its territory, set out in draft article 3 (Right of expulsion), and acknowledged that that right was exercisable in accordance with the applicable rules of international law, particularly human rights law. The State concerned must also take into account the minimum standard for the treatment of aliens.

18. His delegation found the provisions of draft article 13 (Prohibition of the resort to expulsion in order to circumvent an extradition procedure) convincing. Although expulsion and extradition had the same effect, whereby a person left the territory of one State for that of another, the legal basis for and the laws governing the two procedures were altogether different and one could not be used as an alternative to the other. Draft article 27 (Suspensive effect of an appeal against an expulsion decision) and draft article 29 (Readmission to the expelling State), on the other hand, required further discussion as State practice in those areas was insufficient.

19. With regard to the topic of the protection of persons in the event of disasters, his delegation agreed fully with the Special Rapporteur's view that States should observe fundamental humanitarian principles in responding to disasters. Indeed, the principles of humanity, neutrality, impartiality and non-discrimination, set out in draft article 6 (Humanitarian principles in disaster response), should be central to any disaster response. Disaster relief and assistance must also be premised on respect for the principle of the sovereignty, territorial integrity and political independence of the affected State; humanitarian assistance must not be imposed arbitrarily on an affected State and the concepts of international humanitarian law, particularly the responsibility to protect, did not automatically apply in disaster situations.

20. Concerning draft article 12 (Offers of assistance), while his delegation recognized the importance of assistance in disaster situations, it was of the view that the offer of assistance was not a right, but rather an aspect of international cooperation. The question of whether such a right existed in the context of international cooperation should be clarified, bearing in mind that the guiding principle for receiving disaster assistance was the consent of the affected State. It was also necessary to clarify what might constitute "arbitrary" withholding of consent within the meaning of draft article 11 (Consent of the affected State to external assistance) and what criteria might be used to establish an affected State's inability or unwillingness to consent to external assistance. Regarding draft articles 13 and 14 as proposed by the Special Rapporteur in his fifth report (A/CN.4/652), his delegation agreed that the affected State should be entitled to place conditions on the provision of assistance and to decide when relief operations should be terminated.

21. **Mr. Al-Adhami** (Iraq), speaking on the topic of the expulsion of aliens, noted that, according to draft article 1 (Scope), the draft articles on the topic applied both to aliens who were present lawfully in a State and to those who were present unlawfully; the latter category would include aliens who had entered and taken up residence in a country in violation of its laws. The legislation of most States, including his own, imposed sanctions upon such aliens and it was unlikely

that States would abrogate their right to expel foreign nationals who had violated their immigration laws. He therefore considered that that group of aliens should be excluded from the scope of the draft articles.

22. Draft article 6 (Prohibition of the expulsion of refugees) authorized the expulsion of a refugee if there were reasonable grounds for regarding him or her as a threat to national security, without prejudice to the rules established in draft articles 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened) and 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment). It would be useful to include an explicit link between those two draft articles.

23. His delegation supported draft article 11 (Prohibition of disguised expulsion; it would appear that disguised expulsion encompassed situations in which the State tolerated certain acts carried out by citizens with the aim of provoking the departure of an alien from its territory.

24. Lastly, regarding the State of destination, his delegation was of the view that the State from which an expelled alien had come was under no obligation to readmit that alien at the request of the expelling State, provided that the alien had entered the expelling State lawfully.

25. **Ms. Hakim** (Indonesia) said that as the draft articles on the expulsion of aliens covered issues that fell under the jurisdiction of various national agencies and required close coordination among the relevant authorities, her Government would need to conduct inter-agency consultations before submitting written comments on the draft text. In general, her delegation concurred with the view that the draft articles should cover both aliens who were present lawfully in the territory of a State and those who were present unlawfully. Close cooperation on the basis of existing bilateral and regional agreements was important in dealing with expulsion matters.

26. The draft articles must achieve a balance between the right of aliens subject to unlawful expulsion to return to the expelling State and the sovereign right of a State not to readmit aliens whose return would pose a threat to public order in its territory. The various human rights recognized in the draft articles arose from different international instruments and conventions which might not have received universal acceptance, a situation that could complicate the future application of the draft articles since a State could not be bound by obligations established under treaties or agreements to which it was not a party.

27. With regard to the topic of the protection of persons in the event of disasters, her delegation understood that the Commission needed to conduct further deliberations on the draft articles proposed by the Special Rapporteur in his fifth report (A/CN.4/652), taking into account the views expressed by Member States. The topic was certainly relevant in the wake of Hurricane Sandy, to whose victims her delegation extended its deep sympathy. Indonesia's location made it highly vulnerable to disasters and its Government was working to strengthen its disaster management and mitigation capacity and to enhance cooperation with other countries through, inter alia, the establishment of a national agency to oversee disaster management activities, including the administration of national and international aid. Legislation governing international disaster relief cooperation had been enacted in 2007.

28. Her delegation agreed that it was the State's duty to do its utmost to protect its people and appreciated the Special Rapporteur's approach in highlighting the importance of cooperation in disaster relief and his elaboration of the specific types of possible cooperation between affected States and actors rendering assistance. However, given the unpredictable nature of disasters, the draft articles should not attempt to provide an exhaustive list of all forms of assistance.

29. The affected State should be allowed to subject the provision of assistance to the conditions that it deemed necessary. However, in order to strike a proper balance between the State's duty to protect its people in the event of a disaster and its sovereign rights, its conditions should be reasonable; the soul of cooperation was consultation and consent. The provisions of the draft articles concerning conditions required further elaboration and should highlight the importance of those two elements in relation both to the provision of assistance and to its termination.

30. **Mr. Hameed** (Pakistan), speaking on the topic of the protection of persons in the event of disasters, said that the primacy of the affected State in the provision of disaster relief assistance was rooted in a key principle of international law, State sovereignty, which was highlighted in the Charter of the United Nations,

numerous international instruments, the jurisprudence of the International Court of Justice and resolutions of the General Assembly. Sovereignty also entailed the primary responsibility of the affected State to protect its citizens; only that State could assess its need for international assistance and it had the primary role in facilitating, coordinating, directing, controlling and supervising relief operations on its territory. General Assembly resolution 46/182, which had created the United Nations architecture for the coordination of humanitarian assistance, established the primary role of the affected State and draft article 11 (Consent of the affected State to external assistance) rightly stipulated that the provision of external assistance required the latter's consent.

31. His delegation could find no empirical evidence to indicate that an affected State would arbitrarily fail to seek or accept external assistance, allowing its citizens to suffer indefinitely. The suggestion that States might engage in such irrational and arbitrary decision-making, inherent in draft articles 10 (Duty of the affected State to seek assistance) and 11 (Consent of the affected State to external assistance), could create complications and undermine international cooperation in the event of a natural disaster. For reasons of national security, however, a State might prefer to seek or receive assistance from historically friendly States rather than historically hostile ones. A sovereign State had the right, and must be free, to choose among various external offers of assistance. His delegation would welcome the inclusion in the draft articles of a provision aimed at assuring the affected State that the provision of humanitarian assistance would not be misused in order to undermine its sovereignty or interfere in its domestic affairs.

32. The Commission might wish to consider whether States, the United Nations and other competent intergovernmental and non-governmental organizations should be placed on the same legal footing in draft article 12 (Offers of assistance). With regard to draft article 13 (Conditions on the provision of external assistance), his delegation agreed that the affected State should be able to set whatever conditions it deemed necessary before accepting an offer of external assistance since, having the primary responsibility to protect its citizens, it would be far more concerned than external actors with expediting and facilitating the provision of assistance to and the protection of persons on its territory. The affected State should indicate the scope and type of assistance that it sought from other States.

33. His delegation supported draft article 14 (Facilitation of assistance) and agreed that once any conditions imposed by the affected State had been met, the latter must facilitate the delivery of assistance by making its legislation and regulations available to external actors in order to ensure their compliance with its law and disaster preparedness framework. As the provision of humanitarian assistance was a dynamic process, the affected State should have the right to review the situation in light of changing circumstances on the ground. Consultation between the affected State and those rendering assistance prior to its termination, as provided in draft article 15 (Termination of external assistance), would add legal certainty to the process. However, the affected State's primacy in taking the final decision should be respected.

34. **Mr. Karin** (Israel) said that, with the completion of the first reading of the draft articles on the expulsion of aliens, it was appropriate to reflect on the future course of action on the topic with due regard to its inherent legal complexity and sensitivity. The aim of the work was to strike a delicate balance between a State's exercise of its sovereign prerogatives regarding the admission of aliens to its territory and the protection of fundamental human rights. That goal would be best achieved by focusing strictly on well-established principles of law as reflected in broad State practice.

35. The Commission's work on the topic had raised numerous methodological questions, including the extent of its reliance on diverse and specific national and regional jurisprudence and the methods for determining the relevant general rules of international law. Those and other questions had arisen, for example, with respect to the issues of voluntary departure and protection of the property of aliens subject to expulsion, which were governed either by extensive national legislation or a regional framework of rules and regulations and had not been established in international law. Consequently, doubts remained as to the basis or need for *lex lata* codification. Equally controversial was the question of whether treatment *de lege ferenda*, as suggested by the Special Rapporteur regarding the current formulation of the provisions on readmission and appeal procedures, was suitable.

36. The draft articles contained analytically and substantively controversial elements, such as their scope of application with respect to aliens in transit and the interplay between their provisions and other fields of international law, particularly those relating to extradition, diplomatic protection and State responsibility. The topic also raised significant practical concerns regarding difficulties in the interpretation and application of the draft articles that would only be compounded by the topic's delicate public policy aspects, including migration and national security. Such considerations had direct implications for the future form of the Commission's work, including the question of whether the expulsion of aliens was an area of law that was ripe for prescriptive regulation.

37. In light of those considerations, his delegation was of the opinion that the final form of the Commission's work should be determined at a later stage. Well-established guidelines reflecting the best practices of States might be a more advisable and realistic outcome than a set of draft articles. Nevertheless, it concurred with the Special Rapporteur's assessment that since the full set of draft articles and commentary had become available, States were in a better position to make informed decisions with regard to their preferences for the final form of the work. He encouraged other delegations to share their views in that regard. As his Government was still studying the draft articles, it reserved its position on all substantive matters.

38. While Israel continued to attach great importance to the protection of persons in the event of disasters, it supported the view, expressed by some Commission members, that the topic should not be considered in terms of rights and duties, but rather with the ultimate goal of guiding international voluntary cooperation efforts. That approach should be reflected in the draft articles proposed by the Special Rapporteur. Regarding draft article A, while the proposed elaboration of the duty to cooperate was welcome, it should be made clear that cooperation was not an obligation imposed on the assisting State; it was optional and provided at that State's discretion. Similarly, it should be established that the affected State had the right to terminate assistance at any time. His delegation continued to hold the view that the duty of States to cooperate should be understood in the context of the affected State's primary responsibility for the protection of persons and the provision of humanitarian assistance in its territory.

39. **Ms. del Sol Domínguez** (Cuba) said that the principles of self-determination and State sovereignty must be respected in efforts to regulate the expulsion of aliens. Her delegation supported the study of the topic, appreciated the extensive research conducted by the Special Rapporteur and welcomed the appointment of special rapporteurs from developing countries. Her delegation wished to expand on the written comments that it had sent to the Commission.

40. The set of draft articles approved on first reading was useful in that it helped to codify the human rights of aliens subject to expulsion. Such codification should, however, always be guided by the principle of comprehensive protection of human rights and should not infringe on the sovereignty of States. Her delegation remained of the view that the draft articles should require respect for domestic and international law and the maintenance of each State's public safety and should prohibit the use of expulsion for xenophobic and discriminatory purposes. It therefore welcomed the inclusion of draft article 15 (Obligation not to discriminate).

41. The decision to expel an alien was a sovereign act of a State, to be carried out in accordance with its domestic laws. States should be required to notify the destination State of their intention to carry out an expulsion decision, and the draft articles should include a provision to that effect. In addition, persons subject to expulsion should have the right to communicate with their consular representatives.

42. Regarding the obligation to protect persons subject to expulsion from torture and cruel, inhuman or degrading treatment in the State of destination, a requirement to demonstrate "real risk" should be included in order to prevent States from using the provisions of the draft articles for political reasons and to avoid complying with their obligations under important international treaties, such as the obligation to prosecute or extradite terrorists. Her delegation maintained its unwavering commitment to combating impunity, applauded the Commission's efforts to regulate the theoretically and practically complex issue of the expulsion of aliens and reiterated that any rule of international law proposed in relation to the topic should focus on general issues and should fully respect

the spirit of the Charter of the United Nations and the sovereignty of States.

43. Concerning the topic of the protection of persons in the event of disasters, her delegation considered codification useful in light of the implications of the topic for the preservation of human life, particularly in developing countries. Any attempt at codification, however, should take account of the crucial importance of disaster prevention in the treatment and protection of the population, especially in the poorest countries. Her delegation noted with satisfaction that the draft articles provided for the affected State's consent to the provision of assistance and reiterated that such cooperation should be provided with respect for the principles of sovereignty and self-determination. It reaffirmed the sovereign right of States to accept or refuse any offers of humanitarian assistance. Under no circumstances should the draft articles 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 decide whether to request or accept assistance from international organizations or other States.

44. Cuba had had extensive experience with large-scale natural disasters and had a comprehensive response system. Its efforts were guided by the fundamental principle of safeguarding human life and protecting the population. It had cooperated with many countries and offered assistance in natural disaster situations, despite having had to contend for over 50 years with an economic, commercial and financial embargo that had significantly limited its development.

45. **Mr. Tchiloemba Tchitembo** (Congo) said that earlier discussions on the draft articles on the expulsion of aliens had revealed profound differences in the practice of States and the practical difficulties of carrying out expulsion decisions. They had also revealed that the topic was complex and cross-cutting in nature, that it involved both domestic and international public and private law and that human rights instruments did not cover all aspects of the issue. It had been agreed, however, that the expulsion of aliens did not fall solely within the domestic purview of any State. The Special Rapporteur's eighth report (A/CN.4/651) had confirmed his delegation's assessment of the merits of the draft articles submitted for consideration in 2011.

46. The definitions of "collective expulsion" in paragraph 1 of draft article 10 (Prohibition of collective expulsion) and "disguised expulsion" in paragraph 2 of draft article 11 (Prohibition of disguised expulsion) could have been included in draft article 2 (Use of terms). The references to "duration" and "excessive duration" in paragraph 2 (a) of draft article 19 (Detention conditions of an alien subject to expulsion) might create practical difficulties for the court or person authorized to exercise judicial power (para. 2 (b)). A clear statement that the duration of detention was subject to the provisions of domestic law would create an additional safeguard for detained persons, who would be able to invoke that provision in the event of an irregularity during expulsion proceedings.

47. The draft articles marked the first time that the expulsion of aliens had been the subject of a systematic and comprehensive study leading to the proposal of a uniform approach. National and regional practices were fragmented, incomplete and inconsistent, raised questions with regard to human rights and often led to serious complications in relations between States. To the best of his knowledge, the draft articles also marked the first time that the human rights of persons subject to expulsion had been codified in a universal instrument providing legal and practical protection mechanisms in accordance with international law and international humanitarian law.

48. The draft articles established a subtle but clear balance between the rights, interests and obligations of the alien subject to expulsion, the expelling State, the transit State, the State of destination and the State of nationality. His delegation shared the Special Rapporteur's view that few topics lent themselves as well to codification and would support the submission of a recommendation to the General Assembly with a view to the preparation of a United Nations convention based on the draft articles. There was a need for a universal, legally binding instrument in order to ensure the stability of inter-State relations and fill the legal void resulting from the absence of international regulation of an important category of human rights: those of aliens subject to expulsion.

49. **Mr. Pákozdi** (Hungary) said that while his delegation had noted with satisfaction the Commission's progress on the topics of the expulsion of aliens and the protection of persons in the event of disasters, it was important to complete that work, in

which the Commission had been engaged for some time with only moderate success, and to focus instead on topics in areas where new rules of international law were needed or the current rules required further development in response to recent changes.

50. With regard to the expulsion of aliens, his delegation welcomed the Special Rapporteur's attention to the Return Directive of the European Union, which had harmonized the minimum standards on the matter established under the national laws of more than 30 European States. Nevertheless, it continued to regard the topic as controversial and had doubts as to whether the draft articles would provide a good basis for a future convention and whether a balance could be found between the mere repetition of State practice and the introduction of a new regime with high human rights standards.

51. His delegation supported the principle, set out in paragraph 1 of draft article 21 (Departure to the State of destination), that voluntary compliance with expulsion decisions should be encouraged. However, States should not be obliged to seek voluntary compliance where the alien concerned posed a threat to public order or national security. Therefore, paragraph 1 should be reworded to reaffirm the right of States to use coercive measures to achieve forcible implementation, provided that they were in line with international human rights obligations and respect for human dignity. As draft article 32 (Diplomatic protection) did not appear closely related to the subject matter of the draft articles, it should be deleted.

52. With regard to the topic of the protection of persons in the event of disasters, there was a fundamental difficulty in finding the right balance between the need for international cooperation and the need to safeguard State sovereignty. A disaster was primarily an issue of national concern and protection was primarily the obligation of the Government of the affected State. His delegation supported the inclusion in the draft articles of a provision on the duty to provide assistance when so requested, but the wording must be carefully considered. It welcomed draft article 5 bis (Forms of cooperation), which clarified draft article 5 (Duty to cooperate), and supported the view of the European Union that the draft articles should mention the obligation of international actors to cooperate. The Drafting Committee's refinements to draft article 13 (Conditions on the provision of external assistance), and particularly the requirement that any conditions imposed by the affected State must take into account the identified needs of the persons affected by disasters and the quality of the assistance, were also welcome.

53. Turning to the questions on which the Commission had sought the views of States in relation to the topic of the immunity of State officials from foreign criminal jurisdiction, he said that Hungary's legal system made no specific distinction between immunity *ratione personae* and immunity *ratione materiae*. For example, the Criminal Code provided that the criminal indictment of persons enjoying diplomatic or other immunity in accordance with international law must be governed by international treaties or, failing that, by international practice. Similar provisions applied to procedural matters in civil and administrative cases.

54. Where a person enjoyed privileges and immunities under an international treaty, the situation was straightforward since the privileges and immunities stipulated in that treaty would apply. There was no difference, from a procedural standpoint, between immunity *ratione personae* and immunity *ratione materiae* and the Hungarian authorities would ensure that the person concerned was treated in accordance with his or her privileges and immunities under international law. In practice, that meant that the relevant authorities would determine those privileges and immunities on a case-by-case basis and would so inform the court or administrative authority, which, upon receiving proof of immunity, would suspend the case immediately. If a treaty on judicial cooperation was in force between Hungary and the sending State, the case would then be transferred to the latter's courts or authorities.

55. Concerning the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), his delegation shared the view that an attempt to harmonize the different multilateral treaty regimes would be a less than meaningful exercise. It would be more useful to carry out a systematic survey and analysis of State practice in order to determine whether there was a customary rule reflecting a general obligation to extradite or prosecute for certain crimes. However, in the wake of the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the future of work on the topic must be re-evaluated. His delegation was of the view that the

Commission had no further contribution to make in the area of law concerned and should therefore terminate its work on the topic during its next session.

56. His delegation welcomed the Commission's decision to change the format of its work on the topic of treaties over time. The six additional general conclusions prepared by the Chair of the Study Group on the topic were steps in the right direction and the new Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties should pursue a similar approach.

57. Lastly, his delegation attached great importance to discussion of the new topics of the provisional application of treaties and the formation and evidence of customary international law. Regarding the former, he noted that the number of international treaties containing provisional application clauses had increased substantially in recent years. His country, for example, had become a party to numerous multilateral international treaties concluded between the European Union, its member States and third countries, almost all of which included such a clause so that they could take effect before they had been formally ratified by all parties. Article 25 of the Vienna Convention on the Law of Treaties did not contain detailed rules on provisional application and there were numerous issues to be addressed in that regard. His delegation therefore supported the Commission's plan to formulate draft articles, guidelines or model clauses, which would give much-needed guidance to Member States.

58. **Mr. Lukwasa** (Zambia), speaking on the topic of the expulsion of aliens, said that Zambia hosted many foreigners, some of whom were present legally while others were not, a situation that posed a challenge to national security. His Government was working with the United Nations and other humanitarian organizations to ensure basic human rights protection for those people and, despite the constraints that it faced, had not wavered in meeting its humanitarian obligations. Foreign nationals in Zambian territory were granted equal treatment in accordance with the Constitution and with their human rights.

59. Some of the draft articles on the topic codified international law, while others reflected the efforts of the Commission to go further. His delegation held the strong conviction that a balance should be struck between the rights of aliens and the sovereignty of States. Further details of its opinions on that topic and on the topic of the protection of persons in the event of disasters could be found in his written statement, which would be made available in due course.

60. **Mr. Jilani** (International Federation of Red Cross and Red Crescent Societies), referring to the topic of the protection of persons in the event of disasters, said that his organization found the proposed list of forms of cooperation in draft article 5 bis to be quite limited, particularly in comparison with instruments such as the Agreement of the Association of Southeast Asian Nations on Disaster Management and Emergency Response, on which it was partly patterned. The list seemed focused on relief and might be taken to exclude cooperation in disaster risk reduction and preparedness. It also omitted such common types of cooperation as financial support, technology transfer, training, information-sharing and joint simulation exercises and planning, which should be encouraged.

61. Moreover, the addition of draft article 5 *bis* changed the Federation's reading of draft article 5 (Duty to cooperate); it had understood that that duty referred not only to States providing assistance, but also to those receiving it and had found that general concept to be quite helpful as a building block for more specific language on facilitation of the provision of assistance in later draft articles. Since "cooperation" appeared to be defined in draft article 5 *bis* only in terms of the provision of assistance, that interpretation might no longer apply.

62. Draft articles 13 (Conditions on the provision of external assistance) and 14 (Facilitation of external assistance) affirmed two conclusions that his organization had also drawn from its global consultations on regulatory problems in international disaster response: first, that States should oversee the quality of incoming international assistance and, second, that they should provide legal facilities to those furnishing assistance so as to avoid unnecessary delays, restrictions and expense. As currently drafted, the two draft articles set out only very broad parameters for the regulation and facilitation of international relief, leaving nearly all details to be determined by the State concerned. Such an approach would limit the operational value of the draft articles since they would not create clear expectations about the concrete rules that would apply to relief personnel and materials. That uncertainty was compounded by the fact that few States had clear domestic rules on

such questions. His organization had been encouraging States to develop such rules, using the IDRL Guidelines as a tool for analysis. Ten States thus far had adopted legislation or procedures and others were considering doing so. He recognized that it would be difficult for the Commission to develop detailed rules on international relief, which, by their very nature, called for direct negotiation by States. However, if the draft articles were eventually to be presented as a draft treaty, it would be important to consider revisiting the matter.

63. Draft article 13 seemed to imply that States should place its conditions on an ad hoc basis after each disaster; his organization would recommend that they determine the requirements that they would impose on providers of external assistance before a disaster struck, as a preparedness measure. Ideally, such conditions should be in line with widely accepted standards of humanitarian quality and conduct, such as the Humanitarian Charter and Minimum Standards in Humanitarian Response and the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-governmental Organizations in Disaster Relief. With regard to draft article 14, it was unfortunate that no distinction was made between military and civilian assistance, contrary to existing international norms; the Oslo Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief and the IDRL Guidelines showed a clear preference for civilian assistance to be supported, where necessary, by military resources.

64. His organization fully supported draft article 15; its language was similar to that of the IDRL Guidelines, which had been thoroughly negotiated with disaster management officials from countries around the world and with humanitarian partners. The draft article addressed a very real operational problem, namely that international response activities were often terminated too abruptly, plunging the affected persons into a second period of crisis. Governments often came under substantial pressure to declare a crisis over and while all concerned, including responsible international relief providers, were keen to bring about a return to normalcy as soon as possible after a disaster, a premature decision to terminate aid could be a real setback for recovery. Experience had shown that it was good practice for State officials to consult with international responders in order to determine what would happen to affected persons after the termination of their response operations, as the draft article suggested, in order to ensure a smooth transition.

65. In closing, as in previous years, he reiterated his organization's offer to organize briefings for interested members of the Commission, relevant partners within the United Nations system and other key stakeholders in the field of disaster management. Thus far, that offer had not been accepted but he hoped that there would be opportunities in the near future.

66. **Mr. Kamto** (Special Rapporteur on the expulsion of aliens) said that he was pleased by the Commission's adoption on first reading of a coherent set of draft articles on the expulsion of aliens, a result that few would have expected at the start of the work on the topic. He was grateful to the members of the Committee for their interest in the topic and to those States that had consistently supported the Commission's work on it. Although other States had shown less enthusiasm, their comments and observations had contributed to the significant progress achieved. The Commission's work was intended to benefit States and it was always keen to know their views. He had taken due note of all comments and suggested changes and would bear them in mind in preparing his next report; the Commission would accept the formulations that it deemed most appropriate in light of international law.

67. The draft articles submitted to date represented minimum standards for the expulsion of aliens, without prejudice to more favourable rules that might apply under domestic law or rules adopted by groups of States. With respect to the final form of the Commission's work on the topic, he understood that some States might be reluctant to think that rules of international law could, in future, regulate a matter that had previously been governed primarily by domestic law. However, just as human beings were the focus of the international community's efforts with regard to protection in the event of natural disasters, so were they at the heart of the issue of the expulsion of aliens and it was difficult to reconcile the enthusiasm of some Governments for the former topic with their reluctance vis-à-vis the latter. Indeed, few of the topics on the Commission's agenda in the previous 30 years had had such a solid basis in international law.

68. It should be recalled that State practice on certain aspects of the expulsion of aliens had emerged only towards the end of the nineteenth century; a number of

contemporary international treaties contained provisions on the matter. Much of the jurisprudence that had contributed to the codification of State responsibility for internationally wrongful acts and diplomatic protection had to do with the expulsion of aliens. Moreover, the International Court of Justice, in its 2010 judgment in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, had provided an international jurisprudential basis for most aspects of the issue. He understood that some Governments might have misgivings about a topic for domestic reasons, but it could not be suggested that the draft articles were not grounded in international law.

69. Several speakers had rightly emphasized that the draft articles should be founded on State practice. It should be borne in mind that a practice could be unanimous, in which case it could be inferred from domestic law. In such cases, one could speak of general principles of law recognized by civilized nations, as provided in Article 38 of the Statute of the International Court of Justice, which could thus be considered either general principles of international law or — as they had been viewed by the Court on a number of occasions — customary rules. Where practice was not uniform, it could nevertheless be indicative of a clear trend discernible in the legislation or jurisprudence of a number of States. In such cases, practice could serve as the basis for the formulation of draft articles under the heading of the progressive development of international law.

70. The Commission had made no secret of the fact that some provisions of the draft articles represented an exercise in the progressive development of international law, which was part of its mission. The issue of the expulsion of aliens was especially relevant in a globalized world characterized by large flows not only of goods and funds, but also of people. As a phenomenon that brought relations between two or more States into play, it could not, in his view, remain outside of the sphere of international law. The General Assembly, would, however, make the final decision on the form that the outcome of the Commission's work on the topic should take.

71. **Mr. Caflisch** (Chair of the International Law Commission), introducing chapters VI to XI and VI of the Commission's report on the work of its sixty-fourth session (A/67/10), said that the Commission had had before it a preliminary report (A/CN.4/654) prepared by the new Special Rapporteur on the topic of the immunity of State officials from foreign criminal jurisdiction (chapter VI), which provided an overview of the previous work on the topic and the debate in the Commission and the Committee, assessed future issues to be addressed and charted out a new workplan.

72. During the present quinquennium, the Commission intended to focus — using as a basis the draft articles to be prepared by the Special Rapporteur — on the distinction between immunity *ratione personae* and immunity *ratione materiae* and the basis for that distinction; the scope of the two types of immunity, including possible exceptions; the distinction and the relationship between the international responsibility of the State and that of the individual and their implications for immunity; and the procedural issues surrounding immunity. The issues raised by the Special Rapporteur in the introduction to her report included key methodological and substantive considerations, which the members of the Commission had commented upon in the ensuing debate.

73. The topic was highly complex and raised politically sensitive concerns for States and the international community. Members of the Commission were still wondering how to establish an appropriate balance in the methodological approaches to be taken, bearing in mind its statutory mission. It seemed clear that once the Special Rapporteur had submitted draft articles for consideration, the focus of the debate would be on the substantive issues evoked by the topic. In that connection, the Commission had considered the identification of basic questions for analytical review and study, taking a step-by-step approach, as a useful technique.

74. The new Special Rapporteur intended to build on the substantial work done by her predecessor and had identified a number of issues to be explored in light of recent developments, particularly in case law. The Commission had already dealt with certain aspects of immunity in respect of diplomatic and consular relations, special missions, prevention and punishment of crimes against diplomatic agents and other internationally protected persons, representation of States in their relations with international organizations and jurisdictional immunity of States and their property. It had been pointed out that those codification efforts had to be taken into account in order to ensure coherence and harmony in the international legal order and that the Commission should not seek to expand or reduce the immunities to which persons were already

entitled as members of diplomatic missions, consular posts or special missions or as official visitors, representatives to international organizations, or military personnel.

75. It had been considered useful to maintain the distinction between immunity *ratione personae* and immunity *ratione materiae*. However, opinions had differed as to who was entitled to status-based immunity *ratione personae* and whether there were exceptions to such immunity under general international law. There had been similar differences of opinion in respect of conduct-based immunity *ratione materiae*, and it had been considered crucial to determine what constituted an "official act". The question of possible exceptions to immunity *ratione materiae* had been considered equally important.

76. As noted in chapter III of the report, the Commission would find it particularly helpful to receive information on national law and practice in relation to the question of whether the distinction between immunity *ratione personae* and immunity *ratione materiae* resulted in different legal consequences and, if so, to what extent they were treated differently. It would also welcome information on the criteria used in identifying persons covered by immunity *ratione personae*.

77. Chapter VII concerned the first of two new topics to be included in the Commission's current work programme: the provisional application of treaties. A preliminary exchange of views on the topic had been held in the context of informal consultations chaired by the newly-appointed Special Rapporteur, Mr. Juan Manuel Gómez-Robledo. Bearing in mind the preliminary nature of the discussions held on the topic thus far, it had nonetheless been considered that the basis for the Commission's consideration of the topic should be its work on the law of treaties and the *travaux préparatoires* of the relevant provisions of the Vienna Convention and that the goal was not to change that Convention, but to extract whatever would be useful for States to consider when resorting to provisional application. At the present early stage, delegations might wish to focus their statements on the four issues identified by the Special Rapporteur for consideration during the informal consultations: the procedural steps that would be needed as conditions for provisional application and for its termination; the extent to which article 18 of the 1969 Vienna Convention, which established the obligation not to defeat the object and purpose of a treaty prior to its entry into force, was relevant to the regime of provisional application under article 25 thereof; the extent to which the legal situation resulting from the provisional application of treaties was relevant for the purpose of identifying rules of customary international law; and the need to obtain information on the practice of States.

78. Turning to the second new topic to be included in the Commission's current programme of work, the formation and evidence of customary international law, he said that the Commission had had before it the note on the topic (A/CN.4/653) prepared by the Special Rapporteur, Sir Michael Wood, in order to launch the debate on the topic. The note explored the possible scope of the topic, addressed issues of terminology and methodology and identified specific issues that might be examined. The Commission's discussion had revolved around the scope of the topic and the methodological and substantive issues raised by the Special Rapporteur.

79. Several members of the Commission had emphasized the importance of the topic and noted its theoretical and practical interest, given the significant role that customary international law continued to play in the international legal system and the domestic law of States. The general view had been that the Commission should avoid an overly prescriptive or dogmatic approach in order to preserve the flexibility of the customary process. As to the scope of the topic, several members had supported the approach proposed by the Special Rapporteur, stressing that the work on the topic should cover the formation and evidence of customary law in the various areas of international law.

80. However, some members had suggested that the main focus of the work should be the identification of rules of customary international law rather than the formation of those rules. It had also been pointed out that a study of the formation of customary law was of both theoretical and practical importance since customary law was the result of a process. Several members had expressed the view that a general discussion of *jus cogens* should not be included within the scope of the topic, while others had thought that it would be premature to exclude an analysis of that area. Support had been voiced for the Special Rapporteur's proposal to compile a short lexicon or glossary of relevant terms in the six official languages of the United Nations.

81. With regard to methodological issues, several members had supported the Special Rapporteur's proposal to focus on the practical aspects of the topic while others had been of the view that an analysis of the main theories would be useful in order to understand the nature of customary law and the process of its formation and that a proper theoretical foundation was necessary if the practical outcome of the work was to be seen as authoritative. Several members had highlighted the importance of a thorough study of case law, including that of regional courts. The need to take into account contemporary practice had been emphasized, as had the importance of using relevant documentary sources in various languages and from various regions in order to represent the diversity of legal cultures.

82. Suggestions regarding specific points to be covered by the Commission had included State practice and *opinio juris*, including their characterization, their relevant weight and their possible expressions or manifestations in relation to the formation and identification of customary international law; the origins of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice and its interpretation by courts and tribunals and, more generally, within the international community; the extent to which certain changes in the international legal system during the second half of the twentieth century had affected the process of formation of customary law; the question of whether there were different approaches to customary law in various fields of international law; the question of the degree of participation by States in the formation of rules of customary international law, including the concept of "specially affected States" and that of "persistent objector"; and the role of the actual practice of States, resolutions of international bodies and widely ratified treaties in the formation and identification of customary law. Other points of possible interest had included the relationship between customary law and treaty law and the relationship between custom and general international law, general principles of law and general principles of international law.

83. The plan of work for the quinquennium as proposed by the Special Rapporteur had received wide support within the Commission, although some members had thought that it was rather ambitious and should be approached with flexibility. As to the final outcome of the Commission's work on the topic, there had been broad support for a set of conclusions with commentaries. Following the debate, the Special Rapporteur had stressed that the aim was to examine not the substance of the rules of customary international law, but only "secondary" or "systemic" rules relating to the identification of such law. There had seemed to be broad agreement that the outcome of the Commission's work should be practical.

84. Chapter IX of the report dealt with the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), which had been on the Commission's programme of work since 2005. In 2012, it had been decided to establish a Working Group under the chairmanship of Mr. Kriangsak Kittichaisaree to evaluate progress on the topic and explore possible future options. The Working Group had made a general assessment against the background of the Sixth Committee's debate and had proceeded on the basis of informal working papers prepared by its Chair. The Working Group had held five meetings, the last of which had been convened after the International Court of Justice had rendered its judgment, on 20 July 2012, in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

85. The Working Group had analysed the major issues raised by the topic, its relationship to universal jurisdiction, its practical usefulness and the possible impact of the Court's judgment. The topic required a systematic survey and analysis of State practice and the Chair of the Working Group had been requested to prepare and submit to the Commission, at its next session, a working paper reviewing the various perspectives in relation to the topic in light of the 20 July 2012 judgment of the Court and any further developments, as well as comments made in the Working Group and the debate of the Committee. It was hoped that the discussions during the Commission's sixty-fifth session would yield concrete suggestions.

86. The Commission had reconstituted the Study Group on the topic of treaties over time (Chapter X) and had elected to change, with effect from its sixty-fifth session, the format of the work as suggested by the Study Group and to appoint Mr. Georg Nolte as Special Rapporteur for the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. The Study Group had held eight meetings and had completed its consideration, begun during the Commission's sixty-third session, of

the second report of its Chair. It had also considered the Chair's third report and had begun debate on the scope and modalities of the Commission's work on the subject.

87. After the consideration of his second report, which had examined jurisprudence under special arrangements relating to subsequent agreements and practice, the Chair of the Study Group had modified the text of his six preliminary conclusions, which related to: (1) subsequent practice as reflecting a position regarding the interpretation of a treaty; (2) specificity of subsequent practice; (3) the degree of active participation in a practice and silence; (4) effects of contradictory subsequent practice; (5) subsequent agreement or practice and formal amendment or interpretation procedures; and (6) subsequent practice and possible modification of a treaty. As it had done for the first nine preliminary conclusions, which appeared in the report of the Commission on its sixty-third session (A/66/10), the Study Group had agreed that the new preliminary conclusions would be revisited and expanded in light of future reports of the newly-appointed Special Rapporteur, including on additional aspects of the topic, and of future discussions within the Commission.

88. The third report of the Chair of the Study Group examined agreements and subsequent practice of States outside judicial and quasi-judicial proceedings and covered many aspects, including the forms, evidence, interpretation and possible effects of subsequent agreements and subsequent practice. It also addressed the influence of specific cooperative contexts on the interpretation of some treaties by way of subsequent practice and the role of conferences of States parties and treaty monitoring bodies in the emergence or consolidation of subsequent agreements or practice.

89. The Study Group's discussion of the Commission's work on the topic had led to several recommendations regarding modification of the format of the work and the appointment of a Special Rapporteur. It had been considered that a change of format would enable the Commission to define more sharply the scope of the topic, in keeping with the view of the Study Group and its Chair that it would be preferable to limit the topic to the narrower aspect of the legal significance of subsequent agreements and practice. The topic would, of course, remain within the scope of the law of treaties and the main focus would be on the legal significance of subsequent agreements and practice for interpretation (article 31 of the Vienna Convention), as explained in the original proposal for the topic (A/63/10, annex A).

90. Following the Commission's consideration of the first report of the Special Rapporteur during its sixty-fifth session and the subsequent discussion within the Committee, one or two further reports on the practice of intergovernmental organizations and the jurisprudence of national courts would present additional conclusions or guidelines accompanied by commentaries complementing or modifying, as appropriate, the work done on the basis of the first report. It was expected that work on the topic would be finalized during the current quinquennium.

91. Concerning the topic of the most-favoured nation clause (Chapter XI), the Commission had reconstituted the Study Group under the chairmanship of Mr. Donald M. McRae. The Group had held six meetings. It had had before it a number of documents: a working paper entitled "Interpretation of MFN Clauses by Investment Tribunals", prepared by its Chair, which was a restructured version of a 2011 working paper entitled "Interpretation and Application of MFN Clauses in Investment Agreements"; a working paper entitled "Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions", prepared by Mr. Mathias Forteau, which considered whether the mixed public/private nature of arbitration was a relevant factor for the way in which a tribunal approached treaty interpretation; an informal working paper on model most-favoured-nation clauses following the decision in *Emilio Agustín Maffezini v. Kingdom of Spain*, which examined the various ways in which States had reacted to that decision, including by specifically stating either that the most-favoured-nation clause did or did not apply to dispute resolution provisions or by specifying the fields to which the clause applied; and an informal working paper providing an overview of most-favoured-nation-type language in headquarters agreements conferring on State representatives to the organization the same privileges and immunities as those granted to diplomats in the host State. Those documents, together with an informal working paper on bilateral taxation treaties and the most-favoured-nation clause, which had not been discussed by the Study Group, would continue to be analysed and updated to ensure completeness.

92. The Study Group's discussions had focused on the question of whether most-favoured-nation provisions could be applied to the dispute settlement provisions of bilateral investment treaties; whether the conditions for invoking dispute settlement provisions under such treaties were matters that affected the jurisdiction of a tribunal; and what factors were relevant in the interpretative process for determining whether a most-favoured-nation provision in a bilateral investment treaty applied to the conditions for invoking dispute settlement. Although work on the topic was still in progress, the broad outlines of the final product had begun to emerge and the Group was optimistic that its work could be completed within the next two or three sessions of the Commission. It did not intend to prepare draft articles or to revise the 1978 draft articles on most-favoured-nation clauses but would continue to consider the factors taken into account by investment tribunals in the interpretation of most-favoured-nation clauses with a view to making recommendations.

93. In its future work, the Study Group should give further attention to aspects concerning the interpretation of the most-favoured-nation clause beyond the *Maffezini* decision and to the questions of whether additional light could be shed on the case law distinction between jurisdiction and admissibility, who was entitled to invoke most-favoured-nation clauses, whether a particular understanding could be given to "less favourable treatment" in the context of bilateral investment treaties and whether there was any role for policy exceptions designed to limit the application of the most-favoured-nation clause.

94. It would be recalled that the Study Group had previously identified the need to study further the question of most-favoured-nation clauses in relation to trade in services under the General Agreement on Trade in Services and investment agreements and the relationship between most-favoured-nation status, fair and equitable treatment and national treatment standards. The relationship between most-favoured-nation clauses and regional trade agreements was also an area earmarked for further study. The Study Group had noted that there were other areas of contemporary interest, such as investment agreements and human rights considerations; however, it was mindful of the need not to broaden the scope of its work unduly and was therefore cautious about exploring aspects that might divert attention from its work on areas that posed problems relating to application of the provisions of the 1978 draft articles.

95. A draft report providing general background, analysing and contextualizing the case law, drawing attention to issues that had arisen and to trends in the practice and, where appropriate, making recommendations, including possible guidelines and model clauses, would be prepared for the Commission's next session. The working papers considered by the Study Group would constitute preparatory documents forming part of the overall report.

96. **Mr. Fife** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that in order to contribute to the efficiency of the Committee's deliberations, he would deliver an extremely abbreviated summary of his full written statement, which would be made available on the PaperSmart portal.

97. Concerning the topic of the immunity of State officials from foreign criminal jurisdiction, he stressed that the concept of sovereignty was closely linked to that of the equality of States and that customary law was not static and might change in line with State practice. The Nordic countries welcomed the emphasis, in the Special Rapporteur's preliminary report (A/CN.4/601), on the functional basis for immunity. At the same time, they recognized that immunity *ratione personae*, which was enjoyed by a limited number of persons, was status-based. In considering the current state of international law, the Commission should take into account the rulings of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.

98. As to immunity *ratione materiae*, which was conduct-based, the Nordic countries favoured further study of the distinction between acts and situations that did, and did not, require immunity in order to allow States to act freely at the inter-State level without interference. On the issue of combating impunity for the most serious crimes of concern to the international community as a whole, the relevant landmark treaties and international jurisprudence should be taken fully into consideration; legal developments to which international criminal tribunals had contributed could not be ignored. Crimes such as genocide could not be considered official acts.

99. In the ongoing debate over which categories of persons should enjoy immunity *ratione personae*, it might be useful to consider whether such immunity for officials beyond the so-called "troika" should be limited to certain situations and whether the group of State officials who could enjoy immunity might be expanded somewhat.

100. With regard to the topic of the provisional application of treaties, the Nordic countries welcomed the informal consultations on the informal paper prepared by the Special Rapporteur and noted that the relationship between articles 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) and 25 (Provisional application) of the Vienna Convention had been considered. They were of the view that provisional application under article 25 went beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force and that the different legal regimes to which the two draft articles gave rise should be treated as such. The question of which organs were competent to decide on provisional application and the connection of that issue to article 46 (Provisions of internal law regarding competence to conclude treaties) of the Vienna Convention did not merit in-depth attention because of the largely domestic and constitutional nature of the question. Elements that could gain from further clarification included the exact meaning of "provisional application of a treaty" and the nature of the obligations created by provisional application.

101. At the current initial phase of deliberations on the topic, it would be premature to envisage the desired outcome. The Special Rapporteur's view that the Commission should not aim to change the regime of provisional application of treaties in the Vienna Convention, however, provided an appropriate starting point.

102. Concerning the topic of the formation and evidence of customary international law, the Nordic countries agreed that, in the sometimes challenging process of identifying a rule of customary international law, a set of conclusions with commentaries or guidelines could be a valuable tool for practitioners. Both the issue of formation and that of evidence were important. In that connection, he highlighted the importance of the relationship and interplay between treaties and customary international law, which had gained importance with the rise in the number of international treaties. The International Court of Justice had identified important issues in that regard in *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, where it had referred to the potential situation in which a treaty-based rule either reflected, crystallized or generated a customary rule. Those distinctions could be useful conceptually.

103. Turning to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), he said that codification and further clarification of applicable international law would help to ensure maximum effect and compliance with existing rules. The Nordic countries saw the need for more systematic work on the identification of the relevant core crimes. However, taking both the progressive development and the codification of international law into account, the absence of a clear determination or agreement on the customary nature of the obligation could not be regarded as an insurmountable obstacle to further consideration of the topic.

104. Lastly, concerning the most-favoured-nation clause, the Nordic countries were of the view that the Study Group's methodical attempts to identify the normative content of various most-favoured-nation clauses could make an important contribution to the increased coherence of international law. That approach should be grounded in the principles reflected in draft articles 31 to 33 of the Vienna Convention. It would also be important to continue to draw upon the practice and considerations that had emerged from the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO), the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) and to consider a typology of various sources of case law, especially arbitral awards, which had shown the existence of differences in approaches taken in the interpretation of most-favoured-nation provisions, particularly by various arbitrators.

105. **Mr. Norman** (Canada) said that the topic of the immunity of State officials from foreign criminal jurisdiction raised sensitive and controversial issues. There seemed to be a trend in international law away from the traditional principles of absolute immunity; a balance must be struck between protecting the principle of State immunity and holding perpetrators to account for their crimes. The Commission should therefore conduct an in-depth study of the potential

exceptions to State immunity, particularly for serious international crimes, under criminal law.

106. Canadian law recognized the distinction between immunity *ratione personae* and immunity *ratione materiae* and, depending on the context, the assertion of one form or another of immunity might indeed have different consequences; in particular, persons enjoying limited immunity might not be immune from prosecution in criminal cases. It was for the judiciary to decide whether a specific act committed in Canada had been performed in an official capacity. Canadian law accepted that such immunity flowed directly from the established concept of "sovereign immunity". Accordingly, its criminal courts applied customary international law, which reserved such immunity for high-level officials such as incumbent Heads of State or Government, ministers for foreign affairs and diplomatic agents.

107. Turning to the topic of the formation and evidence of customary international law, he said that his Government would, in due course, provide examples of relevant official statements and courts' decisions; however, those examples would be context-specific and must be understood as such. It was widely recognized that the formation of customary international law was a State-centred process and that the assessment of its existence was a complex task. The types of evidence and their relative weight in such an assessment depended on the circumstances. Canada's examples all concerned the relationship between treaties and customary international law and showed that the contents of a treaty were generally not considered to be customary law. Although they covered several aspects of the question, including the extensive and virtually uniform State practice and *opinio juris* regarded as elements of customary international law, they did not address the types of evidence that might be most appropriate in evaluating the existence of such law.

108. His Government would also provide information on three decisions handed down by Canadian courts that had analysed and applied the substantive criteria and evidentiary requirements necessary in determining when customary international law had been formed. In *Reference re Secession of Quebec* (1998), the Supreme Court of Canada had determined that the right of self-determination was part of customary international law, whereas in *Reference re Newfoundland Continental Shelf* (1984), it had determined that the right of a State to an adjacent continental shelf was not. In *Mack v. Canada (Attorney-General)* (2002), the Ontario Court of Appeal had determined that no rule prohibiting racial discrimination had existed in customary international law before 1947. Those decisions, too, had to be seen in context.

109. His delegation welcomed the efforts of the Study Group on the topic of the most-favoured-nation clause to avoid fragmentation of international law and provide guidance as to why tribunals were taking different approaches to the interpretation of most-favoured-nation provisions. That work would be of practical use to policymakers and to those dealing with such provisions in the investment field. The two working papers examined by the Study Group thus far provided excellent summaries of the issues and his delegation looked forward to receiving recommendations from the Commission on the topic.

110. **Mr. Reinisch** (Austria) said that the full text of his statement would be made available on the PaperSmart portal. His delegation attached particular importance to the topic of the immunity of State officials from foreign criminal jurisdiction and welcomed the remarkable insight into the topic evident in the preliminary report of the new Special Rapporteur. Regarding the approach to the topic, the starting point must be the identification of existing norms of international law (*lex lata*), after which the Commission might embark on progressive development (*de lege ferenda*) in accordance with the present needs of the international community. There was no need to address the issue of universal jurisdiction; in his delegation's view, the scope of the topic was confined to the question of whether States were impeded in the exercise of criminal jurisdiction by the immunity of foreign State officials under international law.

111. His delegation was of the opinion that under contemporary customary international law, immunity *ratione personae* did not extend to high-ranking officials beyond the "troika", although such officials might enjoy immunity *ratione materiae*. The rules of attribution set out in the articles on State responsibility might be helpful in identifying the officials or other persons who acted on behalf of a State in an official capacity. It would also be necessary to establish the official acts of a State for which immunity could be invoked. On the question of whether exceptions to either immunity *ratione personae* or immunity *ratione*

materiae existed, his delegation remained of the view that certain exceptions for international crimes were emerging; therefore, further reflection was necessary. In light of the procedural nature of immunity, elements such as the point in time that determined the extent of immunity, should also be examined.

112. An important question concerning the topic of the provisional application of treaties was the scope of such application. Article 25 of the Vienna Convention did not specify the extent to which a treaty would be applied provisionally: in its entirety, including its procedural provisions on matters such as dispute settlement, or only in its substantive provisions. Provisional application raised a number of problems in relation to domestic law; it had been argued both that such application was possible even if domestic law, including the constitution of a State, was silent on the possibility, and that domestic law comprehensively defined the procedures by which a State accepted international commitments. In addition, the tension between provisional application and parliamentary approval procedures based on the idea of democratic legitimacy should be noted.

113. Draft articles 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) and 25 (Provisional application) of the Vienna Convention concerned different matters and should be kept separate, although the two provisions applied simultaneously. Whereas provisional application was subject to its own conditions and might entail restricted application of a treaty, the duty not to defeat its object and purpose related to the treaty as a whole.

114. His delegation welcomed the work envisaged by the Commission on the topic of the formation and evidence of customary international law and supported the Special Rapporteur's intention to limit the scope of the topic to secondary or systemic rules on the identification of such law. Without prejudice to further discussion, it saw no difficulty in including *jus cogens* even though it did not seem inherently related to customary law. The judicial findings of both international and domestic courts and tribunals should be scrutinized; the emphasis of the Commission's work should be a critical assessment of how those institutions had identified customary rules, in line with its intention to focus on secondary rules. The Commission's work should also include an analysis of State practice and *opinio juris*, including their characterization, relative weight and possible manifestations in relation to the formation and identification of customary international law.

115. His delegation also endorsed the Commission's decision to reorient its work on treaties over time and to upgrade the matter to a full-fledged topic on subsequent agreement and subsequent practice in relation to the interpretation of treaties. It was not convinced that the subsequent practice of only some parties was sufficient; in order to serve as context for the interpretation of a treaty, the practice must, according to article 31 (General rule of interpretation) of the Vienna Convention, have been recognized by all States parties unless an effect only for certain States was envisaged.

116. It had been demonstrated that formal procedures did not exclude the consideration of subsequent practice for interpretation purposes. Concerning the relationship between formal modification of a treaty and its interpretation on the basis of subsequent practice, States usually preferred the latter because it allowed them to avoid national treaty amendment procedures; however, a proposal that would have allowed treaties to be modified by subsequent practice had been defeated at the United Nations Conference on the Law of Treaties.

117. The Commission's work on the topic of the most-favoured-nation clause had helped to clarify a specific problem of international economic law that had led to conflicting interpretations, particularly in the field of international investment law. His delegation took the view that the extremely contentious interpretation of the scope of such clauses by investment tribunals made it highly questionable whether work on the topic could lead to draft articles, but there was certainly room for an analytical discussion of the controversies surrounding the matter. The question of the proper scope of most-favoured-nation clauses was primarily one of treaty interpretation and depended primarily on the specific wording of the applicable clause and whether it included or excluded procedural and jurisdictional matters.

118. **Mr. Salinas Burgos** (Chile), commenting on the topic of the immunity of State officials from foreign criminal jurisdiction, said that his delegation agreed with the new Special Rapporteur's desire to foster a structured debate that of work on the topic. It was vital for the Commission to clarify the issues that had emerged from the discussions thus far and to determine

the current status of the issue of the immunity of State officials with a view to guiding the work and concluding it as soon as possible.

119. The related rulings by national courts had revealed widely divergent approaches and, in more than a few cases, had shown the court's lack of awareness of the current state of international law. Some type of guidance instrument was therefore urgently needed. With regard to the Special Rapporteur's intention to take a systemic approach that explored the various relationships between the rules relating to the immunity of State officials and the structural principles and essential values of the international community and international law, it must be borne in mind that immunity was exceptional and must therefore be subject to restrictions. It must not lead to impunity or to violations of human rights. With that in mind, the Special Rapporteur should analyse practice, doctrine and possible new trends.

120. With regard to the scope of the topic, his delegation shared the previous Special Rapporteur's view that immunity from the jurisdiction of the State of nationality of the official, immunity from international criminal courts and the immunity of officials and agents of the State, diplomatic and consular officials, officials on special mission and others should be excluded. It also agreed that the scope should be limited to immunity from criminal, rather than civil, jurisdiction. The outcome of the work should be in line with existing conventions and norms on the matter. None of those considerations, however, precluded an analysis of how international law had dealt with the question with the aim of providing guidance for debate at the national level.

121. To that end, the Commission and its Special Rapporteur should, as a first step, provide definitions or clarification of certain essential concepts. In particular, it was essential to define the concept of "State official" or "public official" and the term "official act", determine when immunity *ratione personae* and immunity *ratione materiae* were applicable and clarify the notion of jurisdiction in order to consider the procedural matters pertaining to the exercise of immunity. As a second step, the Special Rapporteur should undertake a more in-depth analysis of the scope and duration of immunity *ratione personae* and *ratione materiae*, waivers of immunity, circumstances in which immunity might be invoked and exceptions to immunity. Although definitions of "State official" or "public official" were contained in international instruments relating to other areas of international law, it was necessary to clarify whether a broad or narrow definition of the concept was applicable in order to determine which officials enjoyed immunity; a narrower definition would appear more appropriate inasmuch as immunity was a privilege to be granted in exceptional circumstances.

122. The Commission should clarify the distinction between immunity *ratione personae* and immunity *ratione materiae*, the persons to whom each applied and the question of whether the criteria applicable in each case were broad or narrow in nature. Immunity *ratione personae* in respect of the "troika" had a clear and undeniable basis in international law. The Commission should therefore consider whether such immunity could extend to other officials, such as other State ministers. It was clear that immunity *ratione personae* applied in respect of all acts. Immunity *ratione materiae*, on the other hand, might be extended to a broader range of officials or to State officials in general, but its scope would be determined by whether the official was acting in an official capacity and it should never apply in respect of the most serious international crimes.

123. His delegation considered it appropriate for the Special Rapporteur to undertake an analysis of procedural aspects of immunity since immunity was essentially a procedural institution that came into play when a State exercised jurisdiction. The concept of "official act", or the activities undertaken by State officials in an official capacity, must also be clarified. Specifically, the Commission should seek to elucidate the types and scope of acts to be regarded as official in order to determine the extent of immunity *ratione materiae*.

124. Lastly, his delegation supported the preparation of draft articles by the Special Rapporteur but believed that further discussion was required before deciding whether the final outcome of the work should be a binding instrument.

The meeting rose at 6 p.m.