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

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11-56666 (E)

The meeting was called to order at 10.10 a.m.

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

1. **Mr. Pellet** (Special Rapporteur on reservations to treaties), responding to comments made during earlier discussion of the item, said that it would have been difficult in practice for the International Law Commission to complete its work on the topic of reservations to treaties and finalize the Guide to Practice on Reservations to Treaties in less than the 17 years it had taken, given the sheer technicality and complexity of the topic. The fact that it had now done so was a significant achievement attributable in no small part to the drive of Commission members in reviewing the guidelines and commentaries constituting the Guide to Practice and the particularly skilful direction provided by the Chair of the Working Group on Reservations to Treaties. Amounting to some 800 pages, the full version of the Guide to Practice would be made available to the Committee in December with a view to its discussion in 2012, which would be the appropriate occasion for a response to the substantive comments already made concerning the text of the guidelines constituting the Guide to Practice adopted by the Commission at its sixty-third session and reproduced in paragraph 75 of its report (A/66/10 and Add.1).

2. Once available, the commentaries, which were inextricably linked to the guidelines, would demonstrate the inaccuracy of some of those substantive comments, including the contentions that guideline 1.1.3 (Reservations relating to the territorial application of the treaty) diverged from the spirit of article 29 of the Vienna Convention on the Law of Treaties; that guideline 2.3.1 (Acceptance of the late formulation of a reservation) was uncorroborated by existing practices; and that guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty) maintained a positive presumption of the validity of reservations. The Guide to Practice was intended to present, as a coherent whole, the current view of States and experts on the topic. Contrary to the view expressed by a small minority of delegations, its purpose would not have been served if it had simply restated the content of articles 19 to 23 of the Vienna Convention on the Law of Treaties. The Commission had therefore sought to provide comprehensive answers by exploring the practice, doctrine and logic embodied in that Convention. Its hope was that the Guide to Practice would clarify and facilitate the future practice of reservations to treaties by providing some order over and above that introduced by the Vienna Convention on the Law of Treaties.

3. The first of the two recommendations adopted by the Commission in 2011 had been generally well received. Contained in the conclusions on the reservations dialogue annexed to the Guide to Practice, that recommendation stated that the General Assembly should call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner. It would be a useful initiative to annex those conclusions to the General Assembly resolution to be adopted in that regard. As to the second recommendation, on mechanisms of assistance in relation to reservations to treaties, as contained in paragraph 73 of the Commission's report, the response had been more muted. Some delegations had rejected outright the idea of a reservations assistance mechanism, while others had endorsed it on the understanding that it would be subject to further development. The idea could be more comprehensively discussed in 2012, but under no circumstances whatsoever was the suggested mechanism intended to be compulsory. Nor was it intended to replicate similar mechanisms already in place within the framework of the European Union or Council of Europe; it was precisely because frameworks differed that a new solution was sought. The formulation of reservations to treaties or objections to reservations was not the exclusive preserve of wealthy countries with ample legal resources at their disposal, yet developing countries often lacked the means to resolve the technical issues associated with reservations. The suggested mechanism was intended to assist them in that task, with the recommendation providing an outline for more in-depth consideration.

4. Turning to the Commission's working methods and its relationship with the Committee, he said that his 22 years of service to the Commission qualified him to observe candidly that the genuine dialogue repeatedly emphasized as imperative by Committee members would never take place if the status quo persisted. The presence of Commission members at

[1] To be issued.

meetings of the Committee's legal advisers was barely tolerated, and all interactive dialogue was reduced to its simplest expression, including with respect to the report currently under consideration. The brutal truth was that the Committee had little interest in the Commission, which was a carefully preserved legacy that had undergone no truly radical changes since its establishment in 1948. The Committee had frequently criticized the Commission's suggestions for topics, sometimes with justification, but it was for States to formulate positive suggestions in return. While the Commission was fully open to receiving such suggestions — if not specific guidelines — from the Committee, neither had been forthcoming for many years.

5. Another oft-heard complaint was that the Commission no longer produced anything other than "soft" law. If that complaint were true, the Commission would scarcely be fulfilling its function. Clearly, it was again for States and the General Assembly to determine whether or not to translate into hard law the draft articles developed by the Commission. As indicated in its report, the Commission's efforts to reform its working methods continued, including in the light of the generally reasonable proposals of its Working Group on Methods of Work. The Committee might be advised to follow suit by forming its own working group to that end.

6. As to the criticism concerning the quality of the Commission's members, it would be more appropriately levelled at the States presenting candidates for membership and at the General Assembly, which was responsible for electing them to office. Emphasizing the crucial importance of the independence of Commission members, he cited the following excerpt from a resolution on the position of the international judge, adopted by the Institute of International Law in September 2011, which applied equally to the selection of Commission members: "The selection of judges should be carried out taking into consideration, first and foremost, the qualifications of candidates, of which political authorities should be fully apprised. It must be noted, in particular, that elections of judges should not be subjected to prior bargaining which would make voting in such elections dependent on votes in other elections."

7. **Mr. Gaja** (Special Rapporteur on responsibility of international organizations) said that his appreciation concerning the benevolent attitude shown by some delegations towards the draft articles on the responsibility of international organizations was not intended as an expression of displeasure at any critical remarks, which had always helped to promote improvements in the past and would no doubt continue to do so. He fully subscribed to the content of the much-praised introductory general commentary explaining the purpose and general character of the draft articles, which represented the first attempt to provide a comprehensive framework of law concerning the international responsibility of international organizations. As the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel herself had observed, that area of law might have significant implications for the United Nations and other international organizations, both now and in the years to come.

8. In the absence of any other texts, contemporary practice, including both international and domestic court decisions, had unsurprisingly given weight to the draft articles from the outset. Insofar as the Commission had always taken into account the great variety of existing international organizations, several draft articles contained only general rules, beyond or instead of which it had also consistently acknowledged that special rules might apply, particularly with respect to relations between an international organization and its members. No attempt had been made to identify those special rules, however, and nor had any rules been found that could be applied to categories of international organizations. Only the commentary on article 64 contained a possible example of a special rule, namely the attribution to the European Union of conduct of States members of the Union when they implemented binding acts of the Union. International organizations had, in fact, provided very few examples of the special rules on which they had placed so much emphasis in their comments on the draft articles.

9. Another point frequently made was that some of the draft articles were of little or no relevance to most international organizations. Examples comprised those on self-defence, countermeasures, and an international organization's circumvention of an international obligation through decisions and authorizations addressed to its members, all of which had been included, among others, to cover the eventuality of an issue arising for certain organizations in particular circumstances. If they had not been included, then the circumstances precluding wrongfulness, while possibly

irrelevant for most international organizations, could not be invoked. Their inclusion, however, in no way affected organizations for which they were irrelevant.

10. In its work on the draft articles, the Commission had endeavoured to collect and analyse examples of all available practices and had also considered the oral and written comments made by members of the Sixth Committee. During the current year, it had additionally considered all comments on the draft articles adopted at first reading, whether those made by the Committee or those submitted by States in writing both before and after the deadline set by the relevant General Assembly resolution. It was regrettable, however, that States had not taken greater advantage of the opportunity to submit written comments in the interest of further improving the draft articles. Comments from several international organizations had also been examined, and a meeting had been held with the United Nations Legal Counsel and the legal advisers of specialized agencies. Modifications made as a result of those various inputs had included an amendment relating to *ultra vires* acts covered in draft article 8, which now consequently provided that the conduct of an organ or agent was attributable to the relevant organization only if "the organ or agent acts in an official capacity and within the overall functions of that organization". One of the proposals that had not found acceptance was the insistence on the principle that full reparation should not apply to international organizations because it would cause "an excessive exposure", which the Commission had rejected on the ground that it would unjustifiably place international organizations in a more favourable position than States.

11. Notwithstanding the utility of such exchanges and the wishes of certain international organizations, the text of the draft articles was non-negotiable. The time for negotiations might eventually come, however, depending on a decision by the General Assembly concerning the possible adoption of a convention on the basis of the draft articles, which could reasonably occur only after the future of the draft articles on the responsibility of States for internationally wrongful acts had been settled. In the interim, the appropriate way forward would be for the General Assembly to adopt a resolution that took note of the draft articles and reproduced them in an annex.

12. **Mr. Kamto** (Chairman of the International Law Commission), introducing chapters VI, VIII and IX of the Commission's report on the work of its sixty-third session (A/66/10 and Add.1), said that during 2011 the Commission had completed its second reading of the draft articles on the topic "Effects of armed conflicts on treaties" (chapter VI). Following the adoption of those draft articles and the commentaries thereto, it had decided, in accordance with its Statute, to recommend to the General Assembly that it should take note of the draft articles in a resolution to which they should also be annexed, as well as consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

13. His overview of the topic would focus on the substantive changes made during the process of the second reading to the version adopted on first reading in 2008, which was divided into three parts, the first of which, entitled "Scope and definitions", incorporated draft articles 1 and 2. The only substantive change made with respect to the scope of application of the draft articles, as laid down in draft article 1, had been to include the words "relations of States under a treaty", which were based on a similar formulation in the 1969 Vienna Convention on the Law of Treaties. The new wording was intended to address the problem whereby the first-reading formulation, by defining the scope of the draft articles as covering treaties between States, seemed to exclude multilateral treaties to which other subjects of international law, such as international organizations, were also parties. Further clarification was provided by an addition to the definition of treaties. The Commission took the view, moreover, that the only armed conflicts of a non-international character falling within the scope of the draft articles were those that by their nature and extent were likely to affect a treaty; to maintain otherwise could have a potentially destabilizing effect on treaty relations by implying that all such conflicts might affect existing treaties. The Commission nonetheless preferred not to include language to that effect in draft article 1, insofar as it was suggested by the use of the word "protracted" in the definition of armed conflict contained in draft article 2.

14. As to the definition of "treaty" set forth in draft article 2, it had been amended in order to confirm that treaties between States to which international organizations were also parties fell within the scope of the draft articles. The major change, however, related to the definition of armed conflict. On the basis of suggestions made by Governments and raised in the plenary of the Commission, the first-reading version of

the definition had been replaced by a modified version of the definition employed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* decision. Specifically, it did not replicate the final clause of the latter referring to the resort to armed force between organized armed groups with a State insofar as that scenario was not covered by the draft articles.

15. Part two of the draft articles, entitled "Principles", was divided into two chapters, the first dealing with the operation of treaties in the event of armed conflicts and the second containing other provisions relevant to the operation of treaties. Chapter I, consisting of draft articles 3 to 7, was central to the operation of the entire set of draft articles. Draft article 3 established the basic orientation of the draft articles, namely that armed conflict did not ipso facto terminate or suspend the operation of treaties. Continuity or not, therefore, depended on the circumstances of each case. Draft articles 4 to 7 sought to guide such determination. During the second reading, the Commission had decided to rearrange the order of those draft articles so as to establish an order of priority. Accordingly, the first step was to examine the treaty itself. Under draft article 4, if the treaty contained an express provision regulating its continuity in the context of an armed conflict, such provision would govern. In the absence of an express provision, resort would next be had, under draft article 5, to the established international rules on treaty interpretation so as to ascertain the fate of the treaty in the event of an armed conflict. If no conclusive answer was found following the application of those two draft articles, the enquiry then shifted to considerations extraneous to the treaty, with draft article 6 providing a number of contextual factors that might be relevant in making a determination one way or the other. Finally, the reader was further assisted by draft article 7, which referred to the annexed indicative list of treaties, the subject matter of which involved an indication that they should continue in operation, in whole or in part, during armed conflict.

16. Concerning the substance of draft article 3, the Commission had decided not to recast the provision in affirmative terms, as a presumption of continuity, on the ground that it would then require an attempt to establish the scenarios when such presumption would not apply — or in other words, when treaties would not continue and under what circumstances. On balance, the Commission's view was that such an approach would not be conducive to the stability of treaty relations and it had accordingly maintained the orientation adopted at first reading. Presented as draft article 7 in the first-reading text, draft article 4 had been moved to its present location as part of the reorganization of the draft articles with a view to establishing the order of priority already described.

17. Draft article 5 was a new provision that had arisen out of the discussion concerning the inclusion, in draft article 4 of the first-reading text, of a reference to the criterion of intention and a cross-reference to articles 31 and 32 of the Vienna Convention on the Law of Treaties, which had been a matter of some debate both in the Commission and in the Sixth Committee. The problem was twofold: first, that of linking a subjective element with the more objective criteria listed in that provision, and secondly, whether it was realistic to refer to an intention of the parties as to the possibility of the effect of an armed conflict. The Commission's solution was, first, to draw a distinction between finding a solution within the treaty — through its interpretation — and considering factors external to the treaty, which it did by presenting the former as a new draft article 5 and the latter as draft article 6. With respect to the enquiry internal to the treaty, it remained to be decided whether the intention of the parties was a sufficient basis. In order to accommodate the divergent views that had arisen on that point over the years, the Commission had decided to make a more open-ended reference to the "rules of international law on treaty interpretation".

18. Draft article 6, accordingly, was a modified version of former draft article 4, and now focused only on factors extraneous to the treaty that ought to be taken into account when attempting to ascertain whether or not it had been affected by an armed conflict. In other words, it now drew a distinction between the factors relating to the treaty set out in subparagraph (a) and those relating to the characteristics of the armed conflict set out in subparagraph (b). The latter had been introduced as an additional threshold intended to limit the possibility whereby States could assert the termination or suspension of the operation of a treaty, or the right of withdrawal, on the basis of their participation in such types of conflicts. The greater the involvement of third States in a non-international armed conflict, the greater

the possibility that treaties would be affected, and vice versa.

19. Draft article 7 was a revised version of draft article 5 as adopted on first reading. The Commission had decided to recast draft article 7 as a further elaboration of the element of subject matter listed in draft article 6, subparagraph (a), as one of the factors to be taken into account in ascertaining susceptibility to termination, withdrawal or suspension of operation in the event of an armed conflict. It thus served both to explain the basis on which the Commission had developed the list of treaties annexed to the draft articles with respect to which the subject matter involved an indication that they continued in operation, in whole or in part, during armed conflict; and to provide within the draft articles an explicit *renvoi* to the annex. The annex had largely been retained in the version adopted on first reading, with some consolidation and additions. The category of treaties relating to commercial arbitration had been deleted for the reason that its inclusion in the annex was not uniformly supported by the relevant practice. The list of treaties was indicative in nature. It was not presented in any particular order and did not reflect a hierarchy of instruments. Furthermore, no *a contrario* interpretation ought to be drawn from the fact that other treaties were not included in the list, as their survival in the event of an armed conflict would continue to depend on the application of draft articles 4 to 6.

20. Chapter II of part two, entitled "Other provisions relevant to the operation of treaties", contained draft articles 8 to 13. Draft article 8 concerning the question of the conclusion of treaties during armed conflict had been adopted without major changes to the first-reading formulation (of draft article 6). Draft article 9 established the requirement of notification of termination of or withdrawal from the treaty, or its suspension of operation, in the event of an armed conflict. A substantive change had been made to paragraph 3, which now indicated that an objection to a notification should be made within a "reasonable" time. Two additional paragraphs had been added to what had been draft article 8 in the first-reading text. Under new paragraph 4, if an objection was raised under the terms of paragraph 3, the States concerned would be required to seek the peaceful settlement of their dispute through the means listed in Article 33 of the Charter of the United Nations. New paragraph 5 sought to preserve the rights or obligations of States with regard to the settlement of disputes, to the extent that they had remained applicable in the event of an armed conflict. Draft articles 10 to 12 had been retained on the basis of the formulation of the corresponding provisions adopted on first reading, with some drafting refinements. Draft article 13, concerning the question of the revival or resumption of treaty relations subsequent to an armed conflict, was a combination of draft article 18, as adopted on first reading, the substance of which was now reproduced in paragraph 1, and draft article 12 as adopted on first-reading, which was now reflected in paragraph 2.

21. Lastly, part three, entitled "Miscellaneous", contained draft articles 14 to 18, all of which had been largely retained in the form adopted on first reading, with some drafting refinements. It should be noted that the Commission had not accepted proposals to expand the scope of draft article 15 beyond acts of aggression to the resort to force in violation of Article 2, paragraph 4, of the Charter of the United Nations. Furthermore, draft article 16 had been repositioned to come after the current draft article 15 so as to group it with the other saving clauses at the end of the draft articles. In addition, the reference to decisions taken by the Security Council in accordance with "provisions of Chapter VII" of the Charter of the United Nations had been deleted on the ground that there might be decisions by the Security Council, taken under other provisions of the Charter, that could be relevant. In the light of draft article 4, the agreement of the parties had also been excluded from what was now draft article 18.

22. In conclusion to his overview of the draft articles, he drew attention to paragraphs 98 and 99 of the Commission's report, which recorded its tribute to the Special Rapporteur, Mr. Lucius Caflisch, under whose able guidance the work had been brought to a successful conclusion, and to the previous Special Rapporteur, Sir Ian Brownlie.

23. Turning to chapter VIII of the Commission's report (Expulsion of aliens), he said that the Commission had had before it the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2) and the Special Rapporteur's seventh report (A/CN.4/642), in addition to comments and observations received thus far from Governments (A/CN.4/604 and A/CN.4/628 and Add.1). The second addendum to the sixth report, which contained the most recent version of the draft articles to be proposed on

the topic, completed the consideration of the expulsion proceedings and also considered the legal consequences of expulsion with respect to the property rights of aliens subject to expulsion and the responsibility of the expelling State. The seventh report essentially provided an account of recent development in relation to the topic, beginning with national developments and subsequently examining relevant parts of the judgment of the International Court of Justice in the *Ahmadou Sadio Diallo* case. It also included a restructured summary of the draft articles.

24. The general issues addressed during the debate on the topic, summarized in paragraphs 229 to 263 of the Commission's report, had included the potential impact of the proposed draft articles on State practice; the extent to which the draft articles counted as codification or progressive development of international law; the importance of taking due account of contemporary practice; the extent to which consideration should be given to practice and precedents derived from special regimes such as European Union law; and the need to improve cooperation between the States concerned, including the State of nationality of the alien subject to expulsion. The potential form of the final product had also been discussed.

25. Concerning the implementation of an expulsion decision, which was the subject of draft article D1 (Return to the receiving State of the alien being expelled), some had welcomed the approach of encouraging the voluntary departure of an alien being expelled insofar as measures to that end did not lead to undue pressure on the alien. According to another viewpoint, the fact that voluntary departure was but one option should be brought out, as there was insufficient practice to make it obligatory for the expelling State to encourage an alien to comply voluntarily with an expulsion decision. As to the implementation of the decision, it had been further proposed that the idea of placing an alien in detention should be considered, at least when there were no real grounds of public order or national security.

26. With regard to draft article E1 (State of destination of expelled aliens), the discussion had focused on priority to be given to the alien's State of nationality; the alien's choice of State of destination; and whether States other than the State of nationality, such as the State of residence, the passport-issuing State and the State of embarkation, were under any obligation to admit the person being expelled.

27. Some members had supported revised draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State), which provided that the rules that applied in the expelling State to protection of the human rights of aliens subject to expulsion should apply mutatis mutandis in the transit State. Other members had considered that the provision should be clarified; in particular, it had been noted that the transit State was simply required to comply with its own obligations and not those that were presumed to be binding only on the expelling State.

28. With respect to protecting the property of aliens, several members had supported draft article G1 concerning, on the one hand, the prohibition of the expulsion of an alien for the purpose of confiscating his or her assets and, on the other, the protection, free disposal and return of property. Some doubts had been expressed, however, as to the inclusion of such a prohibition, given the difficulty of assessing the expelling State's real intentions objectively. Other issues raised included the possibility of distinguishing, in the context of protecting property, between aliens lawfully or unlawfully present in the territory of the expelling State; the relationship between the obligation to return property to the alien, as set forth in paragraph 2, and the right of any State to expropriate the property of aliens, provided that certain conditions were met; and the particular case of property that had been acquired illegally.

29. The right of return to the expelling State (draft article H1) in the event of unlawful expulsion had been the subject of lively discussion as to whether it was a matter of *de lege lata* or *de lege feranda* and also concerning the conditions for its exercise and the possible implications thereof. Some members had considered that draft article H1, proposed as progressive development, offered a balance in that regard, whereas others had held that it was formulated too broadly. In particular, it had been suggested that recognition of the right of return should be restricted to cases where an expulsion decision was annulled on substantive grounds, if not only to cases where a substantive rule of international law had been violated. Support had also been expressed for the principle that only aliens legally present in the territory of the expelling State could benefit from the right of return in the event of unlawful expulsion.

30. Draft article I1 (The responsibility of States in cases of unlawful expulsion) had been widely supported. Some members had urged caution with respect to the concept of particular damages for interruption of the "life plan", recognized by the Inter-American Court of Human Rights, which the Special Rapporteur had proposed to address in the commentary.

31. Some members had supported draft article J1 (Diplomatic protection), whereas others had considered that it would suffice to refer to it in the commentary to draft article I1. Some had also suggested making reference, either in a draft article or in the commentary, to the individual complaint mechanisms available to expelled aliens under treaties on the protection of human rights.

32. Concerning expulsion in connection with extradition, dealt with in revised draft article 8 as reproduced in footnote 540 of the Commission's report (A/66/10), conflicting views had been expressed with respect to the inclusion of such a provision and its potential import.

33. The question of appeals against an expulsion decision had also engendered lively discussion. Some members had shared the Special Rapporteur's view that the right to challenge an expulsion decision was already adequately provided for in draft article C1 and that it was unnecessary to set it out in a separate draft article, particularly bearing in mind the considerable variations in national legislation and practice. Others had expressed the view that a separate draft article was merited insofar as that right was recognized in international customary law. Opposing views had been expressed with respect to the formulation of a rule, as part of progressive development, on the suspensive effect of an appeal against an expulsion decision. Some members had pointed out that such an appeal without suspensive effect would be ineffective, whereas others had stated that an appeal with suspensive effect would hamper the effective exercise of the right of expulsion and that acknowledgement of suspensive effect entailed certain drawbacks in terms of legal uncertainty resulting from procedural delays.

34. At the conclusion of the debate, the Commission had decided to refer to the Drafting Committee draft articles D1, E1, G1, H1, I1 and J1, as contained in the second addendum to the sixth report; draft article F1, also contained in the second addendum, as revised by the Special Rapporteur during the session; and draft article 8, in the revised version introduced by the Special Rapporteur during the sixty-second session. It had also decided to refer to the Drafting Committee the restructured summary of the draft articles contained in the seventh report of the Special Rapporteur.

35. The Drafting Committee had thus almost completed its work on the set of draft articles on expulsion of aliens with a view to their presentation to the Committee for adoption on first reading in 2012. In the interim, the Commission had requested comments from States on the debatable issue of the suspensive effect of appeals against an expulsion decision. In that context, he drew attention to chapter III, paragraphs 42 to 44, of the Commission's report.

36. Introducing chapter IX of the report (Protection of persons in the event of disasters), he said that the Commission had provisionally adopted draft articles 6 to 9 (A/CN.4/L.776), together with their commentaries, which had been provisionally adopted by the Drafting Committee in 2010 but of which the Commission had only taken note, owing to lack of time. The Commission had considered the fourth report of the Special Rapporteur on the topic (A/CN.4/643 and Corr.1), which contained proposals for draft articles 10 to 12, and subsequently formulated a provisional version of draft articles 10 and 11, together with commentaries. The Drafting Committee had been unable to complete its work on draft article 12 in the time allotted to it. The Commission was therefore expected to conclude its consideration of that draft article in 2012.

37. Draft article 6 recalled the key humanitarian principles applicable in the context of disasters, specifically those of humanity, neutrality and impartiality, which were well established as foundational to humanitarian assistance efforts and had featured in a significant number of instruments and texts, including General Assembly resolutions. The principle of humanity stood as the cornerstone of the protection of persons in international law, while the principle of neutrality referred to the apolitical nature of action taken in disaster response. The principle of impartiality spoke to the qualitative nature of the response, in the sense that it should meet the essential needs of the persons affected by a disaster, and was composed of three elements, namely non-discrimination, proportionality between the degree of suffering and urgency, and impartiality per se, involving the

obligation not to draw a substantive distinction between individuals on the basis of criteria other than need. The principle of non-discrimination reflected the inherent equality of all persons and the requirement that no adverse distinction could be drawn between them. The Commission had determined that non-discrimination should be referred to as an autonomous principle in light of its importance to the topic.

38. Draft article 7 concerned the concept of human dignity, which existed as a fundamental principle underlying all human rights. While related to the principle of humanity in draft article 6, it was nonetheless distinguishable. In the context of the protection of persons in the event of disasters, human dignity was situated as a guiding principle, both for any action to be taken in the context of the provision of relief and in the ongoing evolution of laws addressing disaster response.

39. Draft article 8 affirmed the entitlement of persons affected by disasters to have their rights respected. Implicitly, there was a corresponding obligation to respect such rights. The provision had been included in the draft articles as a general indication of the existence of human rights obligations, without seeking either to specify what those obligations were or to add to or qualify such obligations. The reference to "human rights" was understood to incorporate both substantive rights and limitations, such as the possibility of derogation, as recognized by existing international human rights law.

40. Draft article 9 dealt with the role of the affected State. Paragraph 1 reflected the obligation of an affected State to protect persons and provide disaster relief in accordance with international law. Paragraph 2 affirmed the primary role of an affected State in the response to a disaster upon its territory. As a whole, draft article 9 was premised on the core principles of sovereignty and non-intervention respectively, as enshrined in the Charter of the United Nations and recognized in numerous international instruments.

41. Draft article l0 addressed the particular situation in which a disaster exceeded a State's national response capacity. In those circumstances, an affected State had the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations. The Commission considered that cooperation was both appropriate and required to the extent that an affected State's national capacity was exceeded.

42. Draft article 11 addressed consent of an affected State to external assistance. As a whole, it created for affected States a qualified consent regime in the field of disaster relief operations. Paragraph 1 reflected the core principle that implementation of international relief assistance was contingent upon the consent of the affected State. Paragraph 2 stipulated that consent to external assistance should not be withheld arbitrarily, while paragraph 3 placed a duty upon an affected State to make its decision regarding an offer of assistance known whenever possible.

43. As already indicated, the Commission had been unable to conclude its consideration of the Special Rapporteur's proposal for draft article 12, which concerned the right of third parties, including States, international organizations or non-governmental organizations, to offer assistance.

44. In conclusion, he drew attention to chapter III of the Commission's report, in particular paragraphs 43 and 44 thereof, in which the Commission reiterated that it would welcome any information concerning the practice of States under the topic, including examples of domestic legislation. It would welcome, in particular, information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters. In addition, with regard to the Commission's view that States had a duty to cooperate with the affected State in disaster relief matters, Governments were invited to comment on whether that duty to cooperate included a duty on States to provide assistance when requested by the affected State.

45. **Mr. Gussetti** (Observer for the European Union), speaking also on behalf of the candidate countries Croatia, Iceland, Montenegro and the former Yugoslav Republic of Macedonia; the stabilization and association process countries Albania and Bosnia and Herzegovina; and, in addition, the Republic of Moldova, said that, as previously observed by his delegation, the Special Rapporteur's sixth report (A/CN.4/625 and Adds. 1 and 2), in emphasizing the potential role of European Union law and jurisprudence as a model for the draft articles on the expulsion of aliens, had taken insufficient account of the fundamental distinction apparent in the case law of

the Court of Justice of the European Union between standards applicable to European and non-European citizens, respectively. Nor had the report noted that, under European Union law, standards applicable to European Union citizens in matters of expulsion could not be automatically transposed to aliens. Moreover, it had tended to focus on somewhat outdated European Union documentation, including legislation that had been repealed or replaced. His delegation's letter in response to the request for specific information, contained in the report of the International Law Commission for 2009 (A/64/10), had included a detailed explanation of European Union law and jurisprudence relating to the topic, in addition to copies of relevant legislation and a readmission agreement, none of which had apparently been circulated to the Commission or considered by the Special Rapporteur.

46. The current European Union legislation most relevant to the topic was Directive 2008/115/EC on common standards and procedures in member States for returning illegally staying third-country nationals, known as the Return Directive, which set out clear, transparent and fair common rules concerning return, removal, detention and re-entry, taking fully into account respect for the human rights and fundamental freedoms of the persons concerned. It laid down a binding common legal framework for a European return policy and guaranteed that all returns were carried out in a humane and dignified manner. Key features of the Directive included: the requirement to follow a fair and transparent procedure for decisions concerning the return or removal of illegally staying third-country nationals; an obligation on member States either to return such nationals or grant them legal status and thereby avoid situations of legal limbo; promotion of the principle of voluntary departure through the establishment of a general rule that a period for voluntary departure should normally be granted; the guarantee of a minimum set of basic rights for third-country nationals pending their removal, including access to basic health care and education for children; limitation of the use of coercive measures in connection with the removal of persons, ensuring that such measures were not excessive or disproportionate; the establishment of a European dimension concerning the effects of national return measures by providing for an entry ban valid throughout the European Union; and limitation of the use of detention for the purpose of removal, binding it to the principle of proportionality and establishing minimum safeguards for detainees.

47. The Directive also constituted the first European Union legal instrument to provide for a common catalogue of specific rights for illegally staying third country nationals, notably extending to such persons the right to non-refoulement, which had previously been guaranteed under European Union law to asylum-seekers only.

48. His delegation concurred with the Commission's view that practices and precedents deriving from special regimes, including European Union law, should be treated with caution in the light of such issues as the fundamental distinctions already highlighted. However, there would soon be more than 30 European Union States with established legal standards corresponding to the provisions of the Return Directive, which set the standards of treatment for non-European Union nationals. Some of the guarantees applicable in the case of expulsion of European Union nationals might therefore be relevant for the formation of international law insofar as they constituted State practice.

49. With respect to new case law of relevance to the topic, on 28 April 2011 the Court of Justice of the European Union had rendered an important judgement in an interesting and far-reaching criminal case (case C-61/11 PPU) against a third-country national, Mr. El Dridi, who had been sentenced in Italy to one year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds, contrary to a removal order against him. After examining the relevant provisions of the Return Directive and noting its requirement for proportionality and due respect for, inter alia, fundamental rights throughout the stages of the return procedure, the Court had concluded that a European Union member State bound by the Directive was precluded from providing in its legislation that a prison sentence must be imposed on an illegally staying third-country national on the sole ground that the latter remained, without valid grounds, on the territory of that State, contrary to an order to leave that territory with a given period.

50. Concerning the question of whether suspensive effect was given to appeals against an expulsion decision, in accordance with article 13, paragraphs 1 and 2, of the Return Directive, third-country nationals were to be afforded an effective remedy to appeal against or seek review of decisions relating to return, and the appeals body had the power to review decisions relating to return, including the possibility of temporarily suspending their enforcement.

51. In short, European Union legislation and the case law of the Court of Justice of the European Union relating to third-country nationals were unquestionably relevant to the topic, forming part of current regional State practice that was binding on European Union member States, as well as on a significant number of other European States Members of the United Nations. They should therefore be taken duly into account in the process of elaborating authoritative draft articles and commentaries.

52. Turning to the topic of protection of persons in the event of disasters, he said that the work thus far undertaken by the Commission towards elaborating draft articles was particularly opportune in the light of the increasing number and intensity of natural disasters, the many interconnected global challenges of the day, and problems relating to humanitarian access and the need to fill the current gaps in the international protection regime. In that the European Union provided an important share of international humanitarian aid and was a key actor in the delivery of emergency relief to victims of man-made and natural disasters, his delegation strongly supported the continued reinforcement of the international humanitarian system. It also firmly believed that the Commission's work on the topic would promote the objective of advocating respect for and strengthening of the international legal regime pertaining to protection of persons in the event of disasters.

53. The European Union had at its disposal two main instruments, namely humanitarian assistance and civil protection, to ensure rapid and effective delivery of relief to people faced with the immediate consequences of disasters. In the first case, the competence of the European Union and its conduct of humanitarian aid operations were governed, respectively, by article 4, paragraph 4, and article 214, paragraphs 1 and 2, of the Treaty on the Functioning of the European Union. The latter operations were in turn governed by Council Regulation (EC) No. 1257/96 of 20 June 1996 concerning humanitarian aid, which was binding in its entirety on the 27 members of the European Union. The practical outcome was the provision of funding to some 200 partners, including non-governmental organizations, United Nations agencies and other international organizations such as the International Committee of the Red Cross, the International Federation of the Red Cross and the Red Crescent Societies and a number of specialized agencies from European Union member States. The overall humanitarian aid policy was reflected in the European Consensus on Humanitarian Aid, an instrument that was not legally binding but that nonetheless provided a common vision that guided action by the European Union and its individual member States to deliver humanitarian aid to third countries.

54. With respect to civil protection, the European Union encouraged and facilitated cooperation between the States participating in the Community Mechanism for Civil Protection and the Civil Protection Financial Instrument, which included not only all members of the European Union but also Croatia, Iceland, Liechtenstein and Norway. Assistance based on resources made available by member States was provided within the Union and to third countries struck by disasters, following a request from the Government of the country concerned.

55. With regard to the topic of protection of persons as discussed in the Commission's most recent report (A/66/10), his delegation welcomed the efforts to clarify the specific legal framework pertaining to access in disaster situations, the inclusion of the fundamental principles governing disaster relief in the draft articles on the topic and the provisional recognition of various duties of affected States. It supported draft article 9, as provisionally adopted by the Commission, concerning the duty of the affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory, noting that a similar duty had been expressly recognized in the European Consensus on Humanitarian Aid and also mentioned in European Union legislation, in particular the Council Decision establishing a Civil Protection Financial Instrument.

56. His delegation concurred with the premise, articulated in draft articles 10 and 1l, that the primary responsibility for protection lay with the affected State. In that context, it wished to draw to the Commission's attention the preamble of the earlier mentioned Council Regulation No. 1257/96 concerning humanitarian aid, which stated: "[…] people in distress, victims of natural disasters, wars and outbreaks of fighting, or other comparable exceptional circumstances have a right to international humanitarian assistance where their own authorities prove unable to provide effective relief."

57. Lastly, on a more technical matter and in the light of its own work and those of its partner organizations, his delegation welcomed the Commission's recognition of the role of international organizations and other humanitarian actors in the protection of persons in the event of disasters in draft articles 5, 7 and 10, as provisionally adopted, and draft article 12, which had been referred to the Drafting Committee. However, the reference in those draft articles to the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations might raise the question as to whether the provisions also included regional integration organizations, such as the European Union. In order to dispel any doubts on that score, he suggested that regional integration organizations should be expressly mentioned in the draft articles or that their inclusion should be made clear in the commentaries.

58. **Ms. Kaukoranta** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Nordic countries supported the general approach adopted by the Commission in its recommendations to the General Assembly concerning the draft articles on effects of armed conflicts on treaties. Those draft articles should also apply to the effects of an internal armed conflict on the treaty relations of the State concerned and be broad enough in scope to cover cases in which only one of the States parties to a treaty was a party to an armed conflict. The formulation of draft article 1 was therefore welcome on both those counts. The definition of armed conflict, set forth in article 2, subparagraph (b), was likewise satisfactory, as it accurately reflected the meaning under international humanitarian law while taking into account the specific context of the draft articles. Draft article 6 was another welcome inclusion in that it clarified the sequence for investigating the possible indications of a treaty's susceptibility to termination, withdrawal or suspension. As to the indicative list of treaties mentioned in draft article 7, its incorporation into the commentary to the draft article would have been a preferable solution. The principle of a presumption of the continued operation of treaties had been consistently supported by the Nordic countries, although some provisions of a treaty that continued in operation did not necessarily have to be applied as they stood, given the need to take into account basic treaty principles during armed conflicts. An appropriate step would have been to formulate a draft article containing a statement of principle to that effect.

59. The Nordic countries were not alone in their scepticism concerning the usefulness of the Commission's efforts to identify general rules of international law with respect to the topic of expulsion of aliens. Insofar as a significant body of detailed regional rules was already in place, the Commission's limited time and resources would be better spent on the other more important topics on its agenda.

60. Concerning the topic "Protection of persons in the event of disasters", it was the primary duty of the affected State to protect persons and provide disaster relief by initiating, organizing, coordinating and implementing humanitarian assistance within its territory. Although the affected State was best placed to assess needs in that regard, its responsibility should not remain exclusive. The Special Rapporteur's efforts to achieve the right balance in draft article 10 between State sovereignty and the duty to seek assistance were therefore welcome, as was the fundamental provision in draft article 11 concerning the duty of States not to arbitrarily withhold consent to external assistance. With regard to the continuing work on draft article 12 (Right to offer assistance), the Nordic countries acknowledged and appreciated the interest of the international community in the protection of persons in the event of a disaster that exceeded the national response capacity, which should be viewed as complementary to the primary responsibility of the affected State to protect persons in its territory. As stated by the Special Rapporteur, the offer of assistance was an expression of solidarity.

61. **Ms. Defensor Santiago** (Philippines) said that the starting point and frame of reference with respect to the topic of effects of armed conflicts on treaties should always be the commitment of States under the Charter of the United Nations to the prevention of conflict and the peaceful resolution of disputes, bearing in mind the crucial and continuing individual and collective responsibility to maintain the security and stability of relations with the larger community of nations in the context of treaty obligations. With proper safeguards in place, moreover, it was in the interest of States to address the issue of those effects on treaties. Her delegation therefore welcomed the general principle articulated in draft article 3 on the topic and the illustrative and instructive manner in which draft articles 4, 5 and 6 built on that principle.

62. Covering such areas as the international settlement of disputes by peaceful means, international protection of the environment, and diplomatic and consular relations, the indicative list of treaties referred to in draft article 7 in no way implied any order of importance and rightly reflected obligations that should not be subject to suspension in cases of armed conflict owing to the value of the principles concerned and their importance to the international community. Together with draft article 10 (Obligations imposed by international law independently of a treaty), draft article 7 served to reinforce further the stability of State obligations and to underscore the rule of law in instances of armed conflict.

63. With respect to the remaining draft articles, the term "armed conflict" was of particular interest in that, as defined in draft article 2, it allowed for inclusion of the effect of non-international armed conflict on treaties. While the word "protracted" admittedly introduced a threshold requirement, that aspect of the draft articles should be subject to further examination and clarification.

64. **Mr. Koh** (United States of America) said that his delegation was pleased that the draft articles on the effects of armed conflicts on treaties, as adopted on second reading, continued to preserve the reasonable continuity of treaty obligations during armed conflict, while taking into account particular military necessities and providing practical guidance to States by identifying factors relevant to determining whether a treaty should remain in effect in the event of armed conflict. Defining the term "armed conflict" was likely to be confusing and counterproductive, however, given the wide variety of views as to its meaning. The definition set out in draft article 2, subparagraph (b), should make it clear that "armed conflict" referred to the set of conflicts covered, respectively, by common articles 2 and 3 of the Geneva Conventions. The *Tadić* formulation was a useful reference point but did not fit all contexts, whereas those two common articles enjoyed near universal acceptance among States. Further, draft article 15 (Prohibition of benefit to an aggressor State) should not be construed to mean that illegal uses of force that fell short of aggression would necessarily be exempt from the provision.

65. Concerning the Commission's recommendation that the General Assembly should consider, at a later stage, the elaboration of a convention on the basis of the draft articles, his delegation held that the draft articles were best used as guidance for individual States when determining the effect of specific armed conflicts on their treaty relations. In the light of its views on draft articles 2, subparagraph (b), and 15, moreover, it did not support the elaboration of such a convention. The General Assembly should simply take note of the draft articles and encourage their use by States in context-specific situations.

66. The revised draft articles on the expulsion of aliens covered complex issues and consequently merited careful review. Methodology was vital to balancing the recognition of protection for persons with the avoidance of any undue restraint of the sovereign right of States to control admission to their territories and enforce their immigration laws. The principal focus should therefore be on the well-established principles of law reflected in the texts of global human rights conventions that had been widely ratified, rather than on crafting new rights specific to the expulsion context or importing concepts from regional jurisprudence in which not all States participated. His delegation was particularly concerned about the incorporation of non-refoulement obligations into numerous provisions of the draft articles and the expansion of such obligations far beyond situations prescribed under well-established principles of international law, one example being the provision of draft article E1(State of destination of expelled aliens), paragraph 2, which went beyond the non-refoulement protection accorded under the Convention against Torture and the Convention and Protocol relating to the Status of Refugees.

67. Extradition should be excluded from the scope of the draft articles; it was not in the same category as expulsion, in that it entailed the transfer of an alien or a national for a specific law enforcement purpose. Many of the proposals embodied in the draft articles were inconsistent with the settled practices and obligations of States under multilateral and bilateral extradition treaty regimes, including the new draft articles on disguised expulsion and extradition disguised as expulsion.

68. Another concern related to the various references made to the rights of persons after they had been expelled. Generally speaking, and in conformity with the framework adopted in international human rights treaties, the draft articles should apply to individuals within the territory of a State who were subject to a State's jurisdiction. Failure to limit the obligations to

treatment of persons prior to their expulsion would place States in the impossible situation of being responsible for conduct by third parties after expulsion had occurred.

69. With respect to the draft articles on the protection of persons in the event of disasters, his delegation commended the Special Rapporteur for recognizing the core role played by the principles of humanity, neutrality, impartiality and non-discrimination in the coordination and implementation of disaster relief and encouraged him to continue considering possible ways in which those principles related to and shaped the context of disaster relief. His delegation also appreciated that draft articles 5 and 9 incorporated the principle that the affected State had the primary responsibility for the protection of persons and the provision of humanitarian assistance on its territory. As to draft article 12, given the likelihood of widely diverging views on the issues surrounding the "right" to offer assistance, the Commission should perhaps structure its work in such a way as to avoid the need for a definitive pronouncement on those issues, in the interest of facilitating the development of a product that would be of the most practical use to the international community.

70. **Mr. Yee** (Singapore) said that the draft articles on the effects of armed conflicts on treaties constituted a useful collection of relevant State practice and academic writings on a difficult area of treaty law. His delegation strongly supported draft article 3, which clearly set out the general principle of legal stability and continuity while also affirming that treaty rights and obligations could not be ignored merely because of the existence of an armed conflict.

71. By contrast, the analytical approach embodied in draft articles 5, 6 and 7 was somewhat problematic. The commentary stated that draft article 5 had been included by way of providing expository clarity, whereas its relationship to draft articles 6 and 7 should have been better articulated. Furthermore, the commentary to draft article 6, subparagraph (a), acknowledged a measure of overlap with regard to the inquiry undertaken under draft article 5 and subsequently stated that "the object and purpose of the treaty when taken in combination with other factors, such as the number of parties, [might] open up a new perspective". His delegation respectfully disagreed with that statement; the rules articulated in draft articles 6 and 7 should be treated as an application of the normal rules of treaty interpretation referred to in draft article 5 and not as rules that operated partially or fully independently of draft article 5.

72. As to the indicative list of treaties referred to in draft article 7, it would have been more appropriate to focus the analysis more squarely on the character of specific treaty provisions in order to determine the continued operation of the treaty, rather than on the categorization of the treaty. The weakness of the latter approach was that it included treaties that would not necessarily fall within the implication created by draft article 7. His delegation therefore remained uncertain about the correctness of that approach, preferring instead an indicative list of specific types of treaty provisions to one of categories of treaties.

73. In the light of its comments on the topic, his delegation did not support the Commission's recommendation to the General Assembly that it should consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

74. Concerning the topic of expulsion of aliens, his delegation would endeavour to provide written responses to the three specific issues, as set forth in paragraphs 40 to 42 of the Commission's report, on which comments would be of particular interest to the Commission.

75. Turning to the topic "Protection of persons in the event of disasters", he said that his delegation shared the doubts expressed by others concerning the correctness of describing the offer of assistance to States covered in draft article 12 as a right. The focus would be more fittingly placed on the duty of the State to give consideration to offers of assistance received from States, the United Nations, intergovernmental organizations or non-governmental organizations. Moreover, it was not certain that all of those entities should be treated on the same juridical footing.

76. Concerning the question posed by the Commission in paragraph 44 of its report, namely whether the duty to cooperate included a duty on States to provide assistance when requested by the affected State, he drew attention to the Agreement on Disaster Management and Emergency Response, adopted by the Association of Southeast Asian Nations in 2005. Under article 4, subparagraph (c), parties to the Agreement were required only to respond promptly to a request for assistance from an affected party, meaning that they

were not in fact obliged to provide assistance on request.

77. Lastly, he said his delegation strongly supported inclusion of the topic "The fair and equitable treatment standard in international investment law" in the Commission's long-term programme of work. He did not share the view that it was an area of law that was too specialized to be taken up by the Commission. First, international investment law was no more specialized in character than many other fields of public international law on which the Commission had undertaken work. Second, the Commission's priorities must be guided by the practical value and input of its work on the activities of Governments and the international community as a whole and not by whether a particular endeavour engaged a specialized field of international law.

78. The practical value and impact of work on the fair and equitable standard could not be ignored. The cross-border movement of investors and investments was a huge and growing phenomenon of high priority to both exporting and receiving States. Capital flows from developing economies to other developing economies were as significant as the more traditional movements of capital from developed to developing economies. Rules governing the treatment of such investments, including the "fair and equitable treatment" standard, might not be familiar to many public international lawyers. Nonetheless, the inescapable reality was that the volume of jurisprudence emanating from that field, its impact on governmental activity and the amount of legal work generated for government lawyers and private practitioners were each significantly higher than in the case of many other topics that were or had been on the Commission's agenda. International investment law could not remain on the periphery of public international law but must be mainstreamed into the Commission's work if that work was to remain relevant to the realities of international discourse and public policy. It was not a matter of private international law, as the rights and obligations in question were treaty-based and governed by public international law, not domestic law. They did not fall within the mandate of the United Nations Commission on International Trade Law insofar as the latter's work on investment arbitration rules did not touch on the substantive norms, which were public international law norms.

79. The need for a thorough study of the "fair and equitable treatment" standard was underlined by the fact that much of the jurisprudence in that area had emanated from arbitration tribunals adjudicating claims brought by private investors against States. Those tribunals were usually ad hoc in nature and a good number of them had limited public international law expertise, but their pronouncements on whether State measures breached the legal requirements of "fair and equitable treatment" were nonetheless often extremely far-reaching and involved claims running into hundreds of millions of dollars. The existing jurisprudence would benefit greatly from an authoritative study and articulation of relevant principles by the Commission, which would facilitate consistency in interpretation and consequently improve certainty for investors and governments alike.

80. As to the other new topics, his delegation aligned itself with the view that the Commission should give priority to the topics "Formation and evidence of customary international law" and "Provisional application of treaties", both of which directly engaged a central aspect of public international law, namely, the doctrine of sources. In both cases, concise final products that could serve as practical and authoritative guidance on those important issues would be welcome.

81. **Mr. Sarkowicz** (Poland) said that some of the key elements of the most recent version of the draft articles on the effects of armed conflicts on treaties left room for further improvement. The approach to the topic was rooted in article 73 of the 1969 Vienna Convention on the Law of Treaties, which excluded three areas from the scope of the Convention while simultaneously reinforcing its applicability to the subject matter of treaties in all other areas not diminished by those exclusions. That designation of the scope should be followed to the letter and interpreted with the utmost caution. Article 73 of the Convention referred to the outbreak of hostilities between States but did not exclude from the scope of the Convention any hostilities of an internal character; the Convention must therefore apply to treaty relations between States during internal armed conflicts. The contemporary practice of States should be more thoroughly researched by the Commission with a view to proposing solutions to reflect that practice, thereby ensuring that the results were in line with the Vienna Convention on the Law of Treaties.

82. Concerning the draft articles on the expulsion of aliens, his delegation endorsed the restructured summary set out in the Special Rapporteur's seventh report (A/CN.4/642). He nonetheless suggested further restructuring of chapter III of the draft articles (Fundamental rights of persons subject to expulsion), which was disproportionately long. One solution might be to incorporate section A (General provisions) into chapter I.

83. He welcomed the progress achieved in a relatively short period of time on the topic of protection of persons in the event of disasters, bearing in mind its urgency in the light of the rising number of losses produced by natural hazards. The various disaster reduction efforts of the General Assembly in recognition of the threats and challenges posed by those hazards had persuaded States, international organizations, non-governmental organizations and academic institutions to turn their attention to the role of law in response to disaster situations, the aim being to transform international humanitarian assistance in the event of disasters from a reactive to a preventive system. Disaster preparedness should become an important part of a holistic approach to such assistance and be appropriately embodied in an international legal and regulatory framework.

84. The consolidation of such an emerging concept as disaster relief law would, however, depend greatly on the Commission's work in the area of the progressive development of international law. In that regard, due consideration must be afforded to the relevant General Assembly resolutions, in particular resolution 46/182 on strengthening of the coordination of human emergency assistance of the United Nations. Disconcertingly, however, the proposed scope of the draft articles was too narrow with respect to the events to be covered by the text. A broader range of situations to which the draft articles were applicable should be indicated, and activities in the pre-disaster phase relating to risk reduction, prevention, preparedness and mitigation should also be included.

85. As to the proposed draft articles 10, 11 and 12, they failed to take adequate account of the responsibility to protect, which was among the most dynamically developing and innovative concepts in international relations. Further careful consideration must therefore be given to the appropriateness of extending that concept, which currently applied only in the four specific cases of genocide, war crimes, ethnic cleansing and crimes against humanity — but only until Member States decided otherwise, which was an important reservation. The magnitude of threats and losses from natural disasters now meant that the time was ripe for deciding otherwise and undertaking the challenge of extending the concept to include natural catastrophes.

86. His delegation supported the general premise, articulated in draft article 12, that the offer of assistance should not be viewed as interference in the internal affairs of the affected State, subject to the conditions provided for in draft article 9. The qualification of such offers as a "right", however, would be best avoided insofar as they were typically extended as part of international cooperation. In many cases, moreover, the mere expression of solidarity was as important as offers of assistance. The provision should therefore be recast to portray offers of assistance as a positive duty. The Commission should also seek to encourage the international community to make such offers on the basis of the principles of cooperation and international solidarity.

87. **Mr. Bernardini** (Italy) said that the clarity and readability of the draft articles on the effects of armed conflicts on treaties, as adopted on second reading, had improved and that the commentary had been usefully developed, including through the particularly welcome addition of an extensive analysis of State practice. A new feature was the inclusion of a definition of armed conflict that closely mirrored the now widely accepted definition adopted by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case. The effects of internal armed conflicts on treaties did not depend on any specific rule but rather occurred in the event that the conflict entailed the supervening impossibility of performance of the treaty or a fundamental change in circumstances, as in the case of international armed conflicts when the treaty relations concerned a State that was not a party to the conflict. It would have been preferable for the draft articles to state expressly that, in the latter circumstance, the conflict might be only indirectly relevant. The conflict could be relevant insofar as it triggered causes of suspension or termination of a treaty provided for in the Vienna Convention on the Law of Treaties.

88. Concerning the indicative list of treaties annexed to the draft articles, he said that a treaty could be complex in its subject matter and might contain some provisions involving an implication that they continued

in operation and others with respect to which the presumption of continuation did not apply. It should be noted that the criteria applied under draft article 11 to determine the separability of treaty provisions, which had been drawn from article 44 of the Vienna Convention, were somewhat strict and could often entail the suspension or termination of a treaty in its entirety, including provisions that, on the basis of their subject matter, would otherwise involve an implication that they continued in operation.

89. Turning to the topic "Expulsion of aliens", he pointed out that States other than the State of nationality might be willing to accept the expelled alien. In any event, it would be useful, bearing in mind that expulsion was often hampered by the difficulty of ascertaining an alien's nationality, to envisage the possibility of placing the States concerned under obligation to cooperate with a view to determining a person's nationality. Given the current variation in the stages of development of the draft articles, the Commission could provide readers with helpful guidance in the form of a clearer overall picture by presenting, at its next session, a revised version of all draft articles that had been provisionally adopted.

90. As to the question set forth in chapter III, section B, of the Commission's report concerning the existence of an obligation under international law to provide an alien with remedies against an expulsion order, States parties to Protocol No. 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms and/or to the International Covenant on Civil and Political Rights were under such an obligation with respect to aliens lawfully resident in their territory. Those States therefore had little scope for resorting to general international law in such circumstances, and remedies available to other aliens were likely to be based on national legislation rather than on an obligation under general international law.

91. With respect to the question posed in paragraph 44 of the Commission's report in connection with the protection of persons in the event of disasters, it was scarcely necessary to assert that States had a duty to cooperate when requested by an affected State. Moreover, States were generally willing to provide assistance in the event of disasters, and the imposition of a specific obligation to cooperate would prove difficult. The key issue to be addressed by the Commission was how to define the modalities of assistance. Draft article 10 dealt with the duty of the affected State to seek assistance in the event that a disaster exceeded its national response capacity, but it could be useful to provide incentives for the affected State to seek assistance at an even earlier stage, as soon as prompt relief for disaster victims was appropriate. The Commission should also aim to elaborate proposals designed to improve the organization of international assistance and enhance its acceptability to affected States. To that end, close cooperation with the United Nations Office for the Coordination of Humanitarian Affairs was essential.

The meeting rose at 1.05 p.m.