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Chair: Mr. Sergeyev (Ukraine)

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The meeting was called to order at 10.05 a.m.

Statement by the President of the International Court of Justice

1. **The Chair** welcomed the President of the International Court of Justice, noting that in the light of the Committee's compressed schedule following the disruptions caused by Hurricane Sandy earlier in the week, the President had agreed to make only brief remarks. His full statement would be recorded in a video, which would be made available on the Organization's website.

2. **Mr. Tomka** (President of the International Court of Justice) said that, as a former member of the Commission, he fully understood how important it was for the Commission to engage in dialogue with States and to receive feedback from States' legal advisors on its work. He wished to assure delegations that their statements were carefully scrutinized by the International Court of Justice, as was the work of the International Law Commission, particularly with respect to the interpretation of international conventions elaborated by the Commission and then discussed in the Committee. Those discussions constituted part of the *travaux préparatoires*, which could be relevant to the correct interpretation of treaties.

3. He would take the opportunity to speak briefly about the Court's contribution to the body of law governing maritime delimitation. The relevant provisions in the United Nations Convention on the Law of the Sea, specifically articles 74 and 83, were rather vague, but the Court through its adjudication had contributed to clarifying the rules and methodology. In the 14 maritime delimitation cases brought before the Court, the judgment had been unanimously rendered, with no separate opinions.

4. In its judgment in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* the Court had clearly set out its delimitation methodology. The Court first established a provisional equidistance or median line. It then determined whether there was a need to adjust or shift that line. Lastly, it ascertained whether the provisional line would lead to any marked disproportion between the lengths of the parties' respective coasts and the maritime areas apportioned to them.

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)

5. **The Chair** invited the Committee to continue its consideration of the report of the International Law Commission on the work of its sixty-fourth session (A/67/10). Noting that the full text of all written statements would be provided to the Commission and could be made available on the Committee's PaperSmart portal, he requested that speakers keep their remarks as brief as possible.

6. **Mr. Salinas Burgos** (Chile), referring to the draft articles on expulsion of aliens, said that a balance must be struck between States' sovereign right to expel aliens and the obligation to respect international law, international humanitarian law and international refugee law. To that end, the draft articles had to be premised on full and effective cooperation between the States concerned. Regardless of what decision was taken on the final form of the Commission's work on the topic, the text adopted on first reading by the Commission represented a valuable contribution to the codification of rules on the matter and would serve as a reference point for both academics and State policymakers. The existence of a single text comprising a well-organized set of draft articles with commentary would also facilitate the formulation of comments by Governments.

7. Draft article 2, subparagraph (a), presented a comprehensive definition of "expulsion" that reflected all possible scenarios found in State practice. Its greatest virtue was that it did not limit the meaning of the term to formal expulsion, but also encompassed actions or omissions that might have the same result. Draft article 11, on disguised expulsion, was fully in line with that definition. Draft article 13 prohibited the resort to expulsion in order to circumvent an extradition procedure, an action which was also seen as a form of disguised expulsion, a view that his delegation shared. However, the draft article might be taken to mean that expulsion could occur, even with an extradition procedure under way, provided the intent was not to circumvent that procedure, a situation that could jeopardize the rights of the alien concerned. To prevent such an interpretation, his delegation would favour wording that did not focus exclusively on circumvention and that protected the rights of the alien. For example, the draft article might provide that

expulsion could not occur while an extradition procedure was ongoing, except for reasons of public order or national security.

8. With regard to draft article 19 (Detention conditions of an alien subject to expulsion), in order to ensure that detention was not punitive in nature or imposed for ulterior motives or in violation of international law, and that the alien was not detained, save in exceptional circumstances, with persons sentenced to penalties involving deprivation of liberty, the possibility of requiring a review by a court or person authorized to exercise judicial power should be envisaged.

9. In keeping with paragraph 2 of draft article 26, the list of procedural rights of aliens subject to expulsion in paragraph 1 should be understood to be the minimum rights to which an alien was entitled, without prejudice to any other right that a State might accord or recognize. That idea should be made clear through the inclusion of the words “at least” or an equivalent expression. As aliens who were detained might have difficulty exercising their right of access to effective remedies to challenge an expulsion decision, provision should be made for that right to be exercised on their behalf by another person. Accordingly, draft article 27 (Suspensive effect of an appeal against an expulsion decision) should be amended to provide that an appeal might be lodged by another person acting on behalf of an alien subject to expulsion.

10. Concerning the topic of protection of persons in the event of disasters, his delegation remained of the view that the regulation of such protection must be in accordance with the principles governing the international community, including cooperation, respect for territorial sovereignty and non-interference in the internal affairs of affected States, and was pleased that the first 16 draft articles on the topic were rooted in those principles. With regard to the five draft articles provisionally adopted by the Drafting Committee, his delegation welcomed draft article 5 bis, which established the forms that cooperation under the draft articles could take, and agreed with its content and its placement as an additional paragraph elaborating on draft article 5 (Duty to cooperate). As the Special Rapporteur had affirmed, the duty to cooperate in relation to the protection of persons in the event of disasters implied an obligation of conduct, not one of result.

11. With respect to draft article 12 (Offers of assistance), his delegation shared the Special Rapporteur’s view that offers of assistance should be regarded as a practical manifestation of solidarity. By establishing the right to offer assistance, the draft article acknowledged the legitimate interest of the international community in protecting persons in the event of disasters in accordance with the principles of humanity, neutrality, impartiality, non-discrimination and, in general, international cooperation and solidarity. Offers of assistance should not be seen as interference in the internal affairs of the affected State, provided the assistance offered did not affect the latter’s sovereignty or its primary role in the direction, control, coordination and supervision of such assistance. However, offers of assistance should not be subject to conditions unacceptable to the affected State, nor should assistance be provided in a discriminatory manner.

12. As to draft article 13 (Conditions on the provision of external assistance), while the principle of State sovereignty gave States the right to impose certain conditions, that right was tempered by the requirement that such conditions must be in accord with international law and national legislation. When formulating conditions, States should indicate the scope and type of assistance required.

13. The obligation to respect the conditions imposed by the affected State arose from the duty to respect its sovereignty and from the duty to cooperate established under draft article 5. At the same time, as established under draft article 14 (Facilitation of external assistance) the affected State had a duty to facilitate the prompt and effective provision of assistance to its population. Draft article 14 thus established an exception to the rule that the affected State could impose conditions on the provision of external assistance. Affected States had an obligation to assist in ensuring compliance with national law and an obligation to examine whether the applicability of certain provisions of national law should be waived in the event of a disaster. His delegation found the wording of draft article 14 acceptable as it did not require the affected State to waive the provisions of national law but rather to facilitate the provision of external assistance, examining the circumstances in each case in order to strike a balance between the obligation to facilitate assistance and the duty to protect its population. The draft article thus reflected a

balanced view of the contemporary concept of sovereignty, which entailed both rights and duties.

14. While the providers of assistance and the affected State should consult each regarding the termination of assistance, the latter had the right to determine the duration of assistance and the providers of such assistance had an obligation to leave the territory of the affected State whenever it so requested. His delegation therefore found the current wording of draft article 15 (Termination of assistance) unacceptable. It should first affirm the right of the affected State to request the termination of assistance “at any time”, and then, once that right was established, the draft article could provide for notification of termination and consultation between the affected State and those providing the assistance.

15. **Mr. Kyffin** (Canada) said that, since the Commission’s report was being presented at the start of a new quinquennium, the Sixth Committee had an excellent opportunity to offer guidance on the Commission’s future work. In the light of the sensitive ongoing treaty negotiations in relation to protection of the atmosphere, his delegation believed that that topic should not be added to the Commission’s work programme for the quinquennium, although it might be addressed in future quinquenniums.

16. His delegation had noted with interest the draft articles and accompanying commentaries on expulsion of aliens and would consider the wealth of issues contained therein and submit comments by the January 2014 deadline. It encouraged the Commission to consider the utility of producing outcomes other than draft articles in respect of the topics that it addressed. Outcomes such as guidelines or principles would provide States with the fullest set of options and enable them to take full advantage of the Commission’s expertise.

17. **Ms. Luna** (Mexico), welcoming the Commission’s adoption on first reading of the draft articles on expulsion of aliens, said that her delegation was particularly pleased that the text had been organized in a more logical manner, setting out the basic substantive rules governing the expulsion of aliens and the rights and due process guarantees to which aliens subject to expulsion were entitled. It also welcomed the incorporation of the principles of legality and due process, which were fundamental to protecting the human rights of aliens subject to

expulsion. Also to be commended were the cross-cutting mention of such human rights norms as the right to life, the prohibition of torture and the obligation not to discriminate and the specific recognition of the rights of vulnerable persons, refugees and stateless persons, in keeping with the international conventions regarding them. Importantly, the draft articles in their current form clearly distinguished between expulsion of aliens and extradition, thus resolving the confusion that had existed in earlier versions. Overall, her delegation felt that the draft articles represented a positive contribution to the codification and progressive development of international law on the topic.

18. Turning to the topic of protection of persons in the event of disasters, she said that the duty to cooperate should not be considered an obligation of result but of conduct; in the absence of *lex specialis*, it should generally not be construed as an obligation to provide assistance but rather as an obligation to consider requests for assistance from the affected State, without there being a duty to accede to such requests. While draft article 5 bis (Forms of cooperation) could provide useful guidance to States offering assistance, its current wording might be interpreted as limiting States’ ability to offer forms of cooperation other than those mentioned. In order to ensure the flexibility needed in disaster situations, wording should be added to clarify that States had that option.

19. With regard to draft article 13 (Conditions on the provision of external assistance), her delegation agreed that the affected State had the right to place whatever conditions it deemed necessary on the provision of assistance. However, such conditions must be in accordance with international law and must be imposed in good faith such that the affected State did not arbitrarily withhold consent for external assistance, as to do so would breach its obligation to ensure the protection of its people. As for draft articles 14 (Facilitation of external assistance) and 15 (Termination of assistance), her delegation was of the view that both exemptions from compliance with domestic law and procedures for the termination of assistance should be provided for by the affected State under its laws through mechanisms that were consistent with international law on the matter.

20. Concerning the final form of the draft articles, while her delegation remained open to the possibility of developing a convention, inasmuch as most of the

issues addressed under the draft article would need to be given more precise expression in the domestic law of States it might be more useful for the draft articles to be presented as guiding principles.

21. **Mr. Kingston** (Ireland) said that in the interests of time, he would abbreviate his remarks, as the full text of his written statement would be available on the PaperSmart portal. With regard to the draft articles on the very timely topic of protection of persons in the event of disasters, as provisionally adopted by the Drafting Committee, his delegation shared the Special Rapporteur's view that the attempt to provide for assistance while respecting the sovereignty of the affected State was not a novel concept in international law and agreed that the duty to cooperate should be seen as an obligation of conduct rather than of result. However, it was not a legal obligation in customary international law.

22. With regard to draft article 5 bis (Forms of cooperation), his delegation recognized that the list of forms of cooperation it contained was not intended to be exclusive but wondered whether reference might usefully be made in the article to needs assessment. The issue of cooperation in disaster preparedness, prevention and mitigation might also be dealt with more explicitly.

23. Ireland welcomed the second sentence of draft article 13 (Conditions on the provision of external assistance) which required that conditions must take into account identified needs and quality of assistance. Draft article 14 (Facilitation of external assistance) provided a useful indication of the concrete measures to be taken in the event of disaster to ensure that assistance was delivered as promptly and effectively as possible. Draft article 15 (Termination of external assistance), also welcome, should include a reference to the needs of affected persons.

24. Turning to chapter XII of the Commission's report, he said that his delegation welcomed the ambitious work programme for 2013-2016. It also appreciated the consideration given by the Commission to General Assembly resolution 66/102 of 9 December 2011 on the rule of law at the national and international levels and welcomed the reference to the Commission's work in the Declaration adopted at the recent High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels. Lastly, Ireland was pleased to see the publication of the eighth

edition of *The Work of the International Law Commission*, and, having made a modest contribution to the trust fund for eliminating the backlog in publication of the *Yearbook*, welcomed the progress in that regard.

25. **Ms. Lijnzaad** (Netherlands), referring to the topic of expulsion of aliens, said that, although the Commission had noted an absence of State practice in some instances, a choice seemed to have been made to formulate draft articles, an approach which her delegation believed should be reconsidered. In any case, as was apparent from an examination of draft articles 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened) and 29 (Readmission to the expelling State), for example, the set of draft articles should be viewed as progressive development rather than codification.

26. In her delegation's view, the second paragraph of draft article 11 (Prohibition of disguised expulsion) should define more clearly which acts could be attributed to a State and which could not. The case law of the European Court of Human Rights regarding the effective control doctrine, which was mentioned in the commentary to draft article 24, might be helpful in that regard. In draft article 14 (Obligation to respect the human dignity and human rights of aliens), paragraph 1 mentioned protection of human dignity as a separate human right, but as there was no clear definition of the substance of that right, paragraph 2, which called for respect for human rights in general, would afford adequate protection. Paragraph 1 was thus redundant.

27. Her delegation endorsed the view put forward in the previous meeting by the observer for the European Union that the prohibition of discrimination on the basis of sexual orientation should be included in draft article 15 (Obligation not to discriminate). If an explicit prohibition was not included, the commentary should emphasize that the term "sex", as interpreted by the Human Rights Committee encompassed the notion of sexual orientation.

28. Regarding the final form of the work on the topic, the Commission should not seek to design a new human rights instrument. Her delegation supported the reformulation of the draft articles as statements of best practices or policy guidelines that reflected accepted principles of international law and elucidated details and nuances of those principles.

29. Turning to the topic of protection of persons in the event of disasters, she said that, although there might be merit in providing more precise language on the duty to cooperate in relation to non-State actors, her delegation could not agree with the formulation of draft article A (Elaboration of the duty to cooperate) proposed by the Special Rapporteur. With regard to draft article 13 (Conditions on the provision of assistance) as proposed by the Special Rapporteur, there was a need to strike a balance between assistance offered in response to the acute needs of victims and the responsibilities of the affected State. A balanced provision would allow for refusal by the affected State of aid that was not in conformity with accepted principles of humanitarian assistance, while avoiding arbitrary refusal by that State of urgently needed aid. The draft article should also place more emphasis on the need for the affected State to remove obstacles in national law that might hamper speedy provision of assistance where national capacity was insufficient.

30. With regard to the Special Rapporteur's future work on the topic, expansion of the draft articles to cover the notion of disaster risk reduction might not be appropriate. While recognizing the importance of disaster prevention and preparedness, her delegation would prefer a set of articles that was narrow in scope and focused on the acute needs and protection of persons in the event of disasters. On the other hand, it welcomed the Special Rapporteur's intention to elaborate on the important topic of protection of humanitarian assistance personnel.

31. Although her delegation was pleased with the detailed insight the Commission provided in chapter XII of its report regarding its work programme, it hoped that in future the Commission would inform States of the gist of its discussions of its long-term programme of work so that they would have the opportunity to comment in the early stages on the various topics. Her delegation was pleased that the Commission had decided not to include the topic "Protection of the atmosphere" in its current work programme, and it remained unconvinced of the need to address the topic of "Protection of the environment in relation to armed conflicts"; even if there was such a need, it questioned whether the Commission would be the best forum for consideration of the matter, which required specialized knowledge. "The fair and equitable treatment standard in international investment law", on the other hand, was a topic with great relevance for international legal

practice and was worthy of inclusion in the Commission's work programme.

32. **Mr. Leonidchenko** (Russian Federation) said that the set of draft articles on expulsion of aliens adopted by the Commission on first reading provided a good basis for future work on the topic. The judgment of 30 November 2010 of the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, in which the Court had touched on several aspects of the procedure for extradition of aliens and analysed legal guarantees available to a person subject to expulsion, might also provide useful guidance for future work.

33. In terms of the general approach to the topic, his delegation had some doubts about the applicability of the draft articles to all aliens irrespective of whether they were lawfully or unlawfully present in the territory of a State. Since the legal status of the two categories of aliens was different, the expulsion regime applicable to them should also be different. His delegation also had doubts about the language of draft article 12. While its underlying aim — namely, to prohibit States from expelling aliens in order to confiscate their property — was justified and deserved support, it could prove difficult in practice to determine a State's intentions. Moreover, there might be situations in which, under the laws of the State in question, offences committed by an alien might be punishable by both expulsion and confiscation of assets. In such cases, non-application of legal provisions on confiscation merely because a person was also subject to expulsion would hardly be justified, since the alien would thus enjoy a more privileged situation than citizens of the State.

34. The new language of paragraph 1 of draft article 21 (Departure to the State of destination) regarding voluntary departure of an alien subject to expulsion was welcome, as was the commentary's clarification that its provisions should not be interpreted as authorizing the expelling State to exert undue pressure on the alien. That approach eliminated the ambiguity of the previous version of the draft article, which had called for the encouragement of voluntary departure. His delegation noted with satisfaction that the current version of paragraph 2 of draft article 21 did not include a reference to the norms of international law relating to air travel, as such a reference would be redundant.

35. With regard to the protection of persons in the event of disasters, the growing number and scope of natural disasters and the enormous losses they caused lent urgency to the Commission's work on the topic, the logical outcome of which should be the adoption of a set of guidelines or guiding principles. The central challenge that the Commission faced in dealing with the topic was achieving an equitable balance between State sovereignty and the need to provide adequate assistance to victims. It was essential for the Commission to take a cautious approach and to be guided by existing norms of international law. Given the complexity of the subject, the establishment of new rights and obligations not supported by international practice would not be appropriate. In the interests of brevity, he would not read out his delegation's detailed comments on the draft articles; they could be found in the text of his written statement, which would be available on the PaperSmart portal.

36. In conclusion, he wished to comment on the suggestion put forward in the report of the Commission on its sixty-third session to hold part of its sessions in New York (A/66/10, para. 388). His delegation could not see how such an arrangement would improve the work of the Commission or its cooperation with the Sixth Committee. The current method of communication between members of the Commission and the Committee during sessions of the General Assembly was perfectly adequate, and Geneva was an ideal venue for efficient analytical work by the Commission. Moreover, a change of venue would doubtless have budgetary implications.

37. **Mr. Thananant** (Thailand), referring to the topic of expulsion of aliens, said that his delegation was grateful to the members of the Commission who had tried to take into account the various views of Members States, especially regarding exclusion of aliens whose status was regulated by special norms and expulsion in relation to other specific regimes such as immigration procedures and extradition. In that regard, Thailand wished to put on record that it was not a party to any convention or protocol on refugees, and it therefore reserved its position on draft article 6 (Prohibition of the expulsion of refugees). Nevertheless, as a country that was a host to more than 140,000 displaced persons and 3 million legal and illegal migrants, Thailand had been working closely with the United Nations and other humanitarian

organizations to ensure basic human rights protections to those people.

38. Some of the draft articles on the topic codified international law while others reflected an effort by the Commission to go beyond the existing norms and embark upon progressive development. His delegation believed that the draft articles should achieve a better balance between the rights of aliens and the sovereign rights of the State and reiterated its preference that the draft articles should be formulated as guidelines.

39. Concerning the protection of persons in the event of disasters, his delegation commended the efforts of the Commission and the Special Rapporteur on the topic to deepen understanding of the basic role of cooperation in the provision of relief and to clarify the duties of both affected and assisting States. Thailand had been both an affected and an assisting State in recent years, and its views on the draft articles were shaped by those experiences.

40. His delegation endorsed the Commission's view that the concept of "responsibility to protect" could not be extended to cover the response to natural disasters. It also maintained the view that offers and provision of assistance by the international community were part of international cooperation as opposed to an assertion of rights, so that the word "duty" was more appropriate than the word "right" in draft article 12 (Offers of assistance).

41. With regard to draft article 13 concerning conditions on the provision of assistance, assisting States or other assisting actors should be sensitive to the needs of affected States and to local factors, including food, culture, religion, language and gender. The conditions imposed by an affected State might include specific timeframes and requests for specific forms of assistance, as well as conditions on the quality and quantity of aid, in keeping with specific circumstances and needs and the security and safety of the country. His delegation therefore preferred the version of draft article 13 provisionally adopted by the Drafting Committee, which afforded flexibility to affected States and honoured their capacity to assess the situation and identify their needs. With respect to the draft article on termination of assistance, affected States should be accorded a certain degree of discretion in terminating external assistance, especially for reasons of national security or public interest. They should also be able to terminate assistance that had

become irrelevant or had deviated from the original offer.

42. Regarding additional elements that the Special Rapporteur proposed to consider in future reports, any work on the prevention and mitigation of disasters should be comprehensive and practical in scope. Elements to consider might include information-sharing, the right to receive appropriate warnings and correct information, public participation in the provision of relief and in risk management, better coordination of disaster response, and post-disaster rehabilitation.

43. **Ms. Escobar** (El Salvador) said that the most recent version of the draft articles on expulsion of aliens reflected input received from States and was substantially improved with respect to earlier versions. Restructuring of the text, coupled with the addition of commentary, had provided a fuller picture of the basis and scope of the draft articles.

44. Her delegation fully supported the content of draft article 4 (Requirement for conformity with law) as it ensured legal certainty for aliens, regardless of their immigration status, in the sense that their situation would not be changed except through previously established procedures conducted by competent authorities. Her delegation also supported the new scope of draft article 12 (Prohibition of expulsion for purposes of confiscation of assets), under which protection of the property of aliens subject to expulsion was no longer presented merely as a consequence of the expulsion decision but as a general obligation closely related to the property rights enshrined in the Universal Declaration of Human Rights.

45. While her delegation saw many positive developments in the current set of draft articles, it wished to offer some additional suggestions. For example, draft article 19 (Detention conditions of an alien subject to expulsion), which recognized that all persons deprived of their liberty should be treated with humanity and respect for their dignity, should make it clear that detention of aliens should be the exception, not the rule, consistent with article 9 of the International Covenant on Civil and Political Rights and article 7 of the American Convention on Human Rights. Those provisions should be reflected in the draft articles, which should uphold the right to liberty and protection from arbitrary detention — whether in

detention centres or transit facilities or any other place — of aliens subject to expulsion.

46. Given the non-punitive nature of detention of aliens subject to expulsion, the Commission should establish the obligation of States to separate detained aliens from individuals arrested for committing crimes. Certainly, administrative infractions such as remaining in a State after the expiration of an immigration permit could not be equated with the commission of violent acts.

47. Her delegation attached particular importance to the procedural rights set out in draft article 26 (Procedural rights of aliens subject to expulsion) and wished to emphasize that protection of those rights was not merely a matter of legalism or formalism. They were fundamental rights, and their enjoyment by all constituted the very foundation of democracy. International law established certain non-derogable principles and due process guarantees that all States were obliged to respect and could not deny or limit under any circumstances, including the principles of legality and equality before the law and the right to a fair and public hearing conducted by a competent, independent and impartial tribunal established by law. El Salvador urged the Commission to take particular account of international standards on human rights, which had shown a clear evolution in terms of individual rights and guarantees.

48. With regard to the protection of persons in the event of disasters, effective risk management, civil protection, early warning systems and repair of the social fabric damaged by natural disasters were important to El Salvador, given its history of and vulnerability to such disasters. The Commission's decision to opt for codification and progressive development of international law in relation to the topic were consistent with the priorities of El Salvador.

49. With regard to the new draft articles proposed by the Special Rapporteur and refined by the Drafting Committee, the wording of draft article 5 bis rightly maintained the discretionary nature of cooperation between States. Her delegation was pleased that the wording of draft article 13 (Conditions on the provision of external assistance) as provisionally adopted by the Drafting Committee referred to “identified needs” and not to “identifiable needs”, as the needs of a population in the wake of a disaster existed as such, irrespective of the ease or difficulty

with which they could be identified. Her delegation also endorsed the wording of draft article 14 (Facilitation of external assistance), being of the view that only the affected State was entitled, by virtue of its sovereignty, to decide whether it was possible and reasonable to waive its domestic laws in order to ensure the provision of assistance. Undoubtedly, privileges and immunities and visa and customs requirements were relevant considerations, but the decision was an internal matter of the State, and that point should be clarified in the commentary. As to draft article 15 (Termination of external assistance), her delegation found the wording insufficiently precise, inasmuch as the central idea, to be found in other international treaties, should be that the State providing assistance could cease doing so, upon prior notification, at any time it deemed appropriate. It was the prerogative of the States concerned to decide whether to hold consultations with a view to ensuring that the termination of assistance was accomplished in an orderly fashion.

50. In conclusion, her delegation urged the Commission to reopen debate on the earlier draft articles, as many issues remained unresolved and further interaction between the Sixth Committee and the Commission on them was needed.

51. **Ms. Guo Xiaomei** (China), welcoming the Commission's progress on the various topics covered in the report on its sixty-fourth session (A/67/10), said that in selecting new topics, a matter of critical importance, the Commission must consider not only whether they were suitable for codification or progressive development but also whether the final product was urgently needed and likely to be widely accepted by the international community. Applying that standard, her delegation endorsed the Commission's decision to pursue the topics "Formation and evidence of customary international law" and "Provisional application of treaties".

52. Like other delegations, it did not support consideration of the topic "Protection of the atmosphere", which was both too general and too technical for examination by the Commission. Issues such as the delimitation between the atmosphere and outer space had been discussed by the Committee on the Peaceful Uses of Outer Space for several decades but remained unresolved. That being the case, the topic was not suitable for codification or progressive development. Even if the Commission managed to

produce a set of draft articles, they were unlikely to be of any guiding value or practical use to the international community. Moreover, the topic was already being effectively addressed to some extent under various conventions and agreements, including the Vienna Convention for the Protection of the Ozone Layer. Her delegation therefore maintained that the topic should not be included on the Commission's agenda for the time being, although the Commission might, as a first step, create a study group on the matter and then decide how to proceed on the basis of the group's report.

53. China welcomed the changes made since the previous session to the draft articles on expulsion of aliens, which reflected the Commission's efforts to achieve a balance between the regulatory power of expelling States and the legitimate rights of aliens subject to expulsion, while at the same time leaving States some room for manoeuvre in enforcing their domestic legislation. For example, draft article 19 (Detention conditions of an alien subject to expulsion) now allowed for the possibility that in exceptional circumstances aliens subject to expulsion might be detained with persons sentenced to penalties involving deprivation of liberty. That point addressed the concerns of countries, such as hers, in which expulsion was sometimes applied as an additional penalty to an alien convicted of a criminal offence.

54. There was still room for improvement of some draft articles, however. Paragraph 2 of draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened), for instance, constituted progressive development rather than codification of international law and deserved further study. Active participation of States would be essential to further improvement of the draft articles, since expulsion of aliens was an area with abundant national legislation and practice.

55. **Ms. Daskalopoulou-Livada** (Greece) said that the Special Rapporteur on protection of persons in the event of disasters had spared no effort to provide a full picture of how the international community had dealt with the matter through a comprehensive study of multilateral and bilateral practice and of a wealth of binding and non-binding texts. His thorough explanations of the various draft articles he had proposed and the Commission's debates had elucidated the issues involved.

56. Draft article 12 (Offers of assistance) referred to a “right” of States and international organizations to offer assistance. Formulation of the draft article in terms of a right was clearly intended to avoid any mention of a duty to render assistance, since neither States nor international organizations had such a duty — as was evident from the Special Rapporteur’s compilation of the views of Governments. Indeed, the duty to cooperate enunciated in draft article 5 did not go so far as to oblige a State or an international organization to provide assistance when requested. However, the phrase “right to offer assistance” might be a source of unnecessary confusion.

57. It was obvious that a State or an international organization could, at any time, offer assistance to an affected State, and there was therefore no need to couch such offers in terms of a “right”. Moreover, bestowing a right on a subject of international law entailed, in principle, a corresponding duty for another — the affected State in the case in question, a correlation not easy to establish. Although one might be tempted to establish a link between the right referred to in draft article 12 and the duty to seek assistance established in draft article 10, the two provisions did not, in fact, complement each other. For those reasons, her delegation, like others, was of the view that use of the term “right” in draft article 12 was not appropriate and that the article should be reformulated so that it focused more on the constructive character of the offer rather than on its legal nature.

58. Regarding the Special Rapporteur’s proposed draft article A (Elaboration of the duty to cooperate), her delegation agreed with those Commission members who had expressed the view that the use of mandatory language — the word “shall” — indicated the existence of an obligation to provide assistance — an assertion found not to be supported by State practice. Furthermore, the text would benefit from an indicative list, as opposed to a restrictive one, of the types of assistance that might be provided. Such a list would give the assisting State more options within the framework outlined by draft article 13.

59. With respect to future work on the topic, her delegation supported a focus on disaster risk reduction. Protection of persons in the event of disasters should not be limited to the provision of relief assistance, but should also encompass measures to prevent such disasters or mitigate their effects through appropriate

infrastructure, international cooperation, early warning systems and contingency plans. Such an approach would have added value, particularly in relation to recurrent harmful events such as river floods. With respect to the latter, she wished to stress the importance of the Model Provisions on Transboundary Flood Management, adopted, together with commentaries, at the Fourth Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes held in 2006. The model provisions were meant to guide riparian States in drafting bilateral or multilateral agreements on the issue. As that document was one of very few normative instruments at the international level that addressed matters of flood-related disaster prevention and mitigation, her delegation believed it provided a useful precedent to be taken into account in the future work on the topic.

60. **Mr. Serpa Soares** (Portugal) said that, with regard to the topic of expulsion of aliens, his delegation welcomed the new wording of draft articles 13 (Prohibition of the resort to expulsion in order to circumvent an extradition procedure), 21 (Departure to the State of destination) 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), which was an improvement over the text discussed during the previous session and addressed several of Portugal’s concerns. Regarding the final form of the draft articles, his delegation did not believe that the subject-matter was suitable for codification and therefore would prefer the draft articles to become an overview of existing legal norms, possibly establishing a general framework of principles. It would submit written comments on the draft articles in due course.

61. Turning to the topic of protection of persons in the event of disasters, he said that, while affected States might subject the provision of assistance to certain conditions, they should not be able to do so arbitrarily. The wording provisionally adopted by the Drafting Committee for draft article 13 (Conditions on the provision of external assistance) was clearer than that proposed by the Special Rapporteur, particularly with respect to the range of conditions that affected States might impose. By specifying that such conditions must take into account the identified needs of the persons affected by disasters and the quality of the assistance, the new wording would prevent the

possibility of a broad interpretation that might lead to the placement of random conditions. However, the Commission still needed to analyse situations in which conditions might prove unreasonable or restrict assistance in a way that could adversely affect its quality or the protection afforded to persons affected by disaster; situations in which such conditions might violate international law; and situations in which there was an incorrect assessment of the needs of the affected persons or in which the affected State was unable to undertake such an assessment.

62. With regard to draft article 15 (Termination of assistance), his delegation shared the view that an approach allowing the affected State a blanket, unilateral right to terminate assistance might be detrimental to the rights of affected persons. His delegation therefore welcomed the wording establishing a mechanism of consultation between all actors. The provision should also state that such consultations must take into consideration the needs of the affected persons.

63. More detailed comments on chapters I to III and XII of the Commission's report on its sixty-fourth session would be made available on the PaperSmart portal.

64. **Mr. Macleod** (United Kingdom), welcoming the progress made by the Commission during the first year of the new quinquennium, commended the Codification Division for its support of the Commission's work, in particular its management and regular updating of the Commission's website, which was an invaluable resource.

65. Concerning the topic of protection of persons in the event of disasters, his delegation continued to believe that the terminology of "rights" and "duties" used in the draft articles was at odds with existing State practice and with the essentially voluntary nature of the principle of cooperation. The points set out in paragraph 62 of the Commission's report on the work of its sixty-fourth session (A/67/10) seemed particularly apposite in that regard. Indeed, a rigid system of legal rights might discourage cooperation in many situations. His delegation also continued to have doubts as to whether a convention would be the best outcome of the Commission's work; a more flexible result, such as a guide to good practice, might be preferable.

66. The text of draft article A would be improved if the mandatory element were removed. As for draft article 13, States were free to refuse assistance and should therefore have the right to accept assistance subject to conditions. His delegation endorsed the view expressed on behalf of the European Union in the previous meeting that a needs-based perspective was preferable to a rights-based one. With regard to termination of assistance, the assisting State always had the right to withdraw, and the duration of assistance should therefore not be conditioned on consultation. His delegation was also unconvinced of the need for a model status-of-forces agreement for purposes of humanitarian relief operations and shared the Special Rapporteur's view that the formulation of such an instrument would exceed the scope of the topic as originally envisaged.

67. Following its initial analysis of the draft articles on expulsion of aliens, his delegation continued to have the same concerns that it had expressed in previous years. The topic was problematic and raised many difficult and complex issues which intruded directly into the domestic sphere of States. It was a difficult topic for the Commission to address and was not a suitable for codification or consolidation at the present time. While his country's domestic legal framework showed its commitment to protection of the rights of aliens faced with expulsion, his delegation maintained that individual States should enjoy considerable discretion in that regard. Any legal framework for a modern globalized world had to permit the effective enforcement of domestic immigration controls.

68. Lastly, his delegation welcomed the inclusion of the topics "Provisional application of treaties" and "Formation and evidence of customary international law" in the Commission's current programme of work. It also welcomed the Commission's decision not to take up the topic "Protection of the atmosphere" in the current quinquennium and took the view that the topic should not be included in the future.

69. **Mr. Stańczyk** (Poland) said that the Commission had examined a rich and varied agenda during its sixty-fourth session and had successfully accomplished its statutory tasks. His delegation welcomed the commencement of the Commission's work on the topics "Formation and evidence of customary international law" and "Provisional application of treaties", both of which were issues of theoretical and practical importance. It also welcomed the

Commission's decision to reformulate the topic "Treaties over time" as "Subsequent agreements and practice in relation to the interpretation of treaties". He wished to underline the importance of two other topics under consideration by the Commission, namely "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute" (*aut dedere aut judicare*), both of which could and should be approached in the context of combating impunity and restoring the rule of law.

70. His delegation was satisfied with the structure of the draft articles on expulsion of aliens, which reflected the Commission's efforts to reconcile the right of States to expel aliens and the limits imposed on that right by international law, including the obligation to protect human rights and the principle of non-discrimination. States unquestionably had the right to expel aliens who posed a threat to national security or public order, as defined in their domestic law. Since expulsion and extradition were governed by separate legal regimes, issues relating to extradition should be excluded from the draft articles. Draft article 13 (Prohibition of the resort to expulsion in order to circumvent an extradition procedure), in particular, did not reflect international practice.

71. Regarding draft article 27 (Suspensive effect of an appeal against an expulsion decision), domestic legal practice in the matter varied, and the question should therefore be treated with caution; State practice should be studied carefully and a general assessment of the legal character of the proposed norm undertaken. Under his country's legislation, expulsion decisions could be made immediately enforceable if the continued presence of an alien would constitute a threat to State security, national defence or public order or would otherwise be contrary to the country's interests. Since the regime governing the responsibility of States for internationally wrongful acts and the regime governing diplomatic protection were well established in international law, his delegation supported the inclusion of draft articles 31 and 32 relating, respectively, to international responsibility of States in cases of unlawful expulsion and diplomatic protection of aliens. His delegation agreed with the Special Rapporteur that there was no need to link the expulsion of aliens with the issue of readmission agreements. Obviously, States were free to conclude any agreements they considered necessary in that area.

72. Although there was still work to be done, particularly in the evaluation of State practice, his Government was of the view that the topic of expulsion of aliens could, with appropriate modifications, be considered ripe for codification.

73. Since the deliberations thus far on the topic of protection of persons in the event of disasters had clearly shown that the work constituted progressive development of international law, not codification of existing norms, his delegation was of the view that a framework of principles for States and others actors engaged in disaster relief would be of much more practical value than draft articles. It would support the inclusion in such a framework of the duty to cooperate and of humanitarian principles, respect for human dignity and human rights and the principle of the primary responsibility of the affected State. It had doubts, however, about the principle enunciated in draft article 10, namely the duty of the affected State to seek humanitarian assistance, which raised the question of whether a State that did not seek external assistance would, by that fact alone, breach international law and, if so, what form of reparation such a violation would entail. In future work on the topic, the Commission should take into account similar work conducted by other international bodies, such as the International Conference of the Red Cross and Red Crescent and United Nations Office for the Coordination of Humanitarian Affairs.

74. **Mr. Otsuka** (Japan), welcoming the Commission's election of its first female Special Rapporteur, said that its sixty-fourth session had been marked by a new forward-looking dynamism. Japan remained strongly supportive of the Commission's work in the codification and progressive development of international law and appreciated its contributions to promotion of the rule of law, which was essential for the prevention and peaceful settlement of conflicts and disputes.

75. His delegation continued to hold the view, however, that some of the Commission's recent practices should be reconsidered, particularly the tendency to set up study groups, which had only limited effect on the development of international law. Formulating draft articles for possible codification of international law and contributing to its progressive development should remain the Commission's main functions. Of course, it should be allowed a number of forms for deliberation, and a study group for a specific

topic might be one of them. However, the outcomes of study groups were inherently limited by the nature of their work, which was not aimed at the drafting of articles for a potential international treaty. Members of the Sixth Committee should therefore seriously consider what areas of international law urgently required elucidation and might be suitable for the formulation of concrete rules by the Commission and should refer appropriate tasks to it. Close collaboration between the Committee and the Commission was crucial for strengthening and enhancing the effectiveness of the latter's work.

76. He noted that the topic "Protection of the atmosphere", which had been placed on the Commission's long-term programme of work during the previous session, had not been included in the current programme of work. The topic required coordinated action by the international community, and his delegation therefore hoped that any concerns surrounding the topic would be addressed so as to allow the Commission to proceed to examine the legal aspects of the issue in an appropriate manner.

77. His delegation looked forward to contributing to the deliberations on the Guide to Practice on Reservation to Treaties in 2013 with a view to making the Guide a more sophisticated set of rules in the area of treaty law. Mindful of time constraints, he would omit his delegation's detailed comments on the topics of expulsion of aliens and protection of persons in the event to disasters; those comments could be found in the text of his written statement, available on the PaperSmart portal.

78. **Ms. Dwarika** (South Africa) said that the topic of expulsion of aliens was of crucial importance to South Africa, where migration was an ever-present phenomenon. The national Constitution provided that all persons in South African territory, including foreign nationals, must be treated with respect for their human rights. The legislation governing the admission and expulsion of foreign nationals sought to ensure that the deportation of foreign nationals was effected with due regard for their human rights, which was consistent with a Constitutional Court judgement that held that all persons in the national territory, including non-citizens, were entitled to protection of their human rights.

79. A balance had to be struck between protecting State sovereignty and ensuring protection and promotion of the human rights of foreign nationals

lawfully or unlawfully present in the territory of a State. The Commission had made significant and welcome progress towards ensuring that the rights of individuals were a central consideration in the expulsion process. However, while her delegation was convinced that a set of draft articles was an appropriate outcome of the Commission's work on topic and it supported the Commission's approach in that regard, it was of the view that more clarity was needed with regard to differentiating the rights and obligations of foreign nationals who were lawfully present from those of foreign nationals who were unlawfully present. For the most part the human rights and procedural rights should be the same, but more reflection should be given to possible distinctions. Her delegation also had doubts about the use of the term "aliens", which had negative connotations linked to South Africa's past, as a result of which domestic legislation had been amended to refer to "migrants" or "foreign nationals".

80. An important consideration with regard to achieving an appropriate balance between the right of a State to deport a foreign national and the rights of that individual was whether the foreign national could determine or have a say in determining the State of destination. Draft article 22 (State of destination of aliens subject to expulsion) provided that the request of the alien regarding the State of destination would be taken into consideration, "where appropriate". Her delegation was of the view that such requests should always be taken into consideration and that the words "where appropriate" should therefore be removed. Admittedly, practical complexities could arise where it was not possible to identify either a State of nationality or a State that had the obligation to receive the alien under international law, as provided in paragraph 2 of draft article 22, but her delegation questioned whether a foreign national could be expelled to any State where he or she had a right of entry, as such an outcome might conflict with other principles. A requirement for the consent of the third State should be included. In addition, the provisions of draft article 22 should be explicitly subject to the conditions set forth in draft articles 6 (Prohibition of the expulsion of refugees), 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).

81. Her delegation also questioned the utility of including specific provisions on diplomatic protection and responsibility of States in cases of unlawful expulsion. Those were, of course, important considerations, but they were best dealt with within the context of the specific draft articles on those matters.

82. There could not be a more pertinent moment to discuss the topic of protection of persons in the event of disasters. South Africa had been actively involved in work in that area at the national, regional and international levels. In the interests of time, however, she would not provide details on domestic and regional approaches; that information could be found in the text of her statement on the PaperSmart portal.

83. With regard to the draft articles on the topic provisionally adopted by the Drafting Committee, draft article 5 bis (Forms of cooperation) provided a useful list of the various forms of assistance, but it made no reference to any form of consultation between the States concerned as to the type of cooperation or assistance required. In her Government's experience, lack of consultation could result in the rendering of ineffective or inadequate assistance. It might also limit the discretion of the assisting States to determine the type of assistance they were capable of providing.

84. Draft article 12 (Offers of assistance) should clearly state that the right of States and others to offer assistance must not interfere in the internal affairs of the affected State. States and other actors offering assistance must acknowledge the affected State's sovereignty and its primary duty to direct, control, coordinate and supervise relief and assistance in the event of disasters. Provision should also be made in the draft articles for situations in which an affected State might reject offers of assistance because it had the capacity and resources to address the situation itself or because it had already accepted assistance from another State or actor. In order to ensure the primary goal of protection of people in the event of disasters, draft article 13 (Conditions on the provision of external assistance) should provide explicitly that any conditions imposed must be reasonable, deemed necessary in the circumstances and in compliance with the domestic law of the affected State and with international law. Her delegation was of the view that an international legal framework in the format of draft articles would ensure consistent and uniform norms governing the protection of persons in the event of disasters in the global arena. It would submit more

detailed written comments on both the protection of persons in the event of disasters and on the draft articles on expulsion of aliens in due course.

85. Lastly, her delegation welcomed the efforts of the Commission and the support of States in making the International Law Seminar possible, thereby enabling young lawyers to familiarize themselves with the important work of the Commission.

86. **Mr. Gâlea** (Romania), referring to the topic of expulsion of aliens, said that it was extremely difficult to find an appropriate balance between the sovereignty of States, including their right to determine their immigration policies, and the rights of individuals subject to expulsion. Certainly all expulsion decisions must be in accordance with the law and must clearly state the grounds for expulsion, but the grounds need not be limited to public order or national security. The inclusion of paragraph 2 of draft article 6 (Prohibition of the expulsion of refugees), regarding refugees unlawfully in the territory of the State, was questionable, as it appeared to represent progressive development rather than codification. In any event, the situation in which a person submitted an application for recognition of refugee status for the sole purpose of avoiding the implementation of an expulsion decision should be taken into account.

87. His delegation supported the inclusion of a provision on disguised expulsion, since it shared the view that any conduct of a State intended to provoke the departure of aliens from its territory should be qualified as expulsion, irrespective of its form. There was a strong link between draft article 11 (Prohibition of disguised expulsion) and paragraph 1 of draft article 21 (Departure to the State of destination), which dealt with voluntary departure. His delegation attached great importance to the notion of "free consent", discussed in the commentary to draft article 11, and would prefer to have concept included in the article itself.

88. Although his delegation understood that the Commission was taking the approach of progressive development in draft article 27 (Suspensive effect of an appeal against an expulsion decision), it believed that further consideration should be given to granting the benefit of the suspensive effect of an appeal only to aliens lawfully present. For the final form of the work on the topic, a set of guidelines on the issue of expulsion of aliens would be most appropriate.

89. In relation to the protection of persons in the event of disasters, the draft articles could better reflect the importance of the duty to cooperate and needed to strike the right balance between the sovereignty of the affected State and the measures that the affected State might take to facilitate the provision of assistance by another State and its personnel. With respect to draft article 12 (Offers of assistance), the reference to a right to offer assistance might create confusion, as there was no correlative obligation to receive assistance. As to draft article 5 bis (Forms of cooperation), it might be useful to include financial assistance among the types of cooperation that might be provided. The final form of the draft articles should be considered at a later stage when the Commission's work on topic was nearer completion.

90. His delegation welcomed the inclusion of the topics "Provisional application of treaties" and "Formation and evidence of customary international law" in the Commission's current programme of work. Also welcome was the Commission's decision to change its approach to the topic "Treaties over time" in order to focus on subsequent agreements and, more importantly, subsequent practice in the interpretation of treaties.

91. **Ms. Belliard** (France), noting that a more detailed version of her statement would be available on the PaperSmart portal, said that, while the Commission's programme of work for the quinquennium seemed very promising, her delegation encouraged it to focus on the topics already under study and to avoid taking up topics for which it might not be the most appropriate forum, such as "Protection of the atmosphere". The scientific and technical aspects of that topic appeared to make it unsuitable for examination by the Commission. As for the topic "Protection of the environment in relation to armed conflicts", identification of the rules already regulating the issue would not appear to be a priority at the present time. In the area of investment law, numerous rules and mechanisms already existed in relation to the topic "The fair and equitable treatment in international investment law", and it would therefore appear preferable for the Commission to deepen its work on the most-favoured-nation clause before delving into other matters.

92. Her delegation welcomed the inclusion of the topic "Formation and evidence of customary international law" in the programme of work. The

Commission's efforts in that regard would provide useful observations that would enable judges, particularly at the national level, to recognize rules of customary international law more easily. Care should be exercised, however, as there seemed to be a tendency to use the Commission's work to argue in support of the existence of international rules in various forums, even where the views expressed by States had indicated a lack of consensus. Her delegation therefore believed that work on the topic should not be oriented towards progressive development of law.

93. Regarding the Commission's current work, it was important to maintain the separation between the topics of universal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*). Her delegation reiterated doubts as to whether the latter topic should remain on the agenda.

94. Turning to the topic of protection of persons in the event of disasters, she said that it was important to bear in mind that humanitarian assistance could only be effective when provided and received willingly. Respect for the consent of States and recognition of the needs of affected persons were also essential in order to ensure the effectiveness of aid. It was also important to recall that work on the topic had been undertaken with a view to identifying and consolidating relevant customary rules, not in order to create new obligations for States.

95. Her delegation had taken note of the draft articles provisionally adopted by the Commission thus far and continued to hold the same views that it had expressed during the previous session. Those draft articles should be discussed again when the text was submitted for a second reading. With regard to the five new draft articles provisionally adopted by the Drafting Committee, draft articles 12 (Offers of assistance), 14 (Facilitation of external assistance) and 15 (Termination of external assistance) were all satisfactory. As for draft article 5 bis (Forms of cooperation), her delegation shared the Commission's desire to highlight the importance of such cooperation, which would ensure effective action on the ground. Regarding draft article 13 (Conditions on the provision of external assistance), it was important in humanitarian assistance matters to respect both the domestic law of the affected State and applicable international law. In order to improve the effectiveness

of the assistance provided, the needs of the affected State should be clearly identified in advance.

96. Her Government welcomed the resumption of work on the topic of immunity of State officials from foreign criminal jurisdiction.

97. Concerning the topic of expulsion of aliens, it was helpful to recall that the aim of the Commission's work was not to create norms that did not reflect the practice or intention of States. Her delegation was pleased with several of the draft articles submitted for consideration, as they took account of concerns or observations expressed by States, particularly draft articles 3 (Right of expulsion), 10 (Prohibition of collective expulsion), 14 (Obligation to respect the human dignity and human rights of aliens subject to expulsion) and 19 (Detention conditions of an alien subject to expulsion). The current wording of those draft articles accurately reflected the state of law on the subject.

98. However, she wished to raise some points in relation to several of the other draft articles. First, a clear-cut definition of "expulsion" was needed in order to ensure the coherence of the whole set of draft articles. Extending the definition of the term to encompass a State's conduct and not merely a formal act, as in draft article 2 (Use of terms), was unclear and inappropriate; State conduct was not relevant to the matter of expulsion and should not be included as a self-sufficient element in the definition of the term. The current wording of draft article 5 (Grounds for expulsion) was also unsatisfactory, as it might be read as excluding the unlawful presence of an alien as an authorized ground for expulsion.

99. The overall structure of draft article 26 (Procedural rights of aliens subject to expulsion) posed a problem, as it did not allow for a distinction to be made between procedural rights relating to the administrative phase of expulsion and those relating to the judicial phase; the two sets of rights were not the same and should be distinguished. The new wording of paragraph 3, relating to the right of an alien to seek consular assistance, was satisfactory, but that of paragraph 4 was not. It was unacceptable that an alien unlawfully present in a State for six months — a period fixed arbitrarily — should not enjoy any procedural rights. The expelling State should respect certain minimum procedural rights regardless of the alien's situation.

100. Her delegation also firmly opposed the blanket provision of draft article 27 (Suspensive effect of an appeal against an expulsion decision). Suspensive effect could not be allowed systematically in all appeals, irrespective of their nature, and could not apply in certain highly sensitive situations, especially where expulsion was justified on grounds of national security.

101. There was a lack of coherence between draft article 6 (Prohibition of the expulsion of refugees) and paragraph 1 of draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened). The two articles should be harmonized in order to ensure that the expulsion of an alien to a State where his or her life would be threatened was prohibited in all cases. Lastly, her delegation regretted the disappearance from the draft articles of the principle whereby a State could not expel its own nationals. The prohibition on deprivation of nationality for the purpose of expulsion would be negated if the expelling State was no longer prohibited from expelling its nationals. That inconsistency should be corrected. Her delegation intended to propose new wording for several articles, including draft articles 14, 19, 21 and 29.

102. **Mr. Song** (Singapore), speaking on the topic of expulsion of aliens, recalled that two years earlier, during consideration of the Commission's report on the work of its sixty-second session (A/65/10), his delegation had objected to what was then proposed by the Special Rapporteur as revised draft article 14 (Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled), because it implied that the obligation for a State that had abolished the death penalty not to expel a person sentenced to death to a State in which that person might be executed was an automatic and positive obligation under general international law and also that it was one aspect of the right to life. His delegation was pleased to note that the current wording of draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened) corrected the latter misconception. There was no global consensus on the abolition or retention of the death penalty, much less any agreement that prohibition of the death penalty was part of the right to life.

103. However, whereas the former draft article 14 had applied only to States that had already abolished the

death penalty, the new draft article 23 extended the scope to States that had not done so but were not imposing the death penalty in practice. In that regard, he recalled the concern expressed by the representative of the Republic of Korea. Indeed, it was difficult to find any legal or principled basis for imposing on a State that continued to retain the death penalty as a lawful sanction the obligation to interfere with the rights of another State to carry out its laws in relation to the death penalty.

104. Moreover, the scope of the new draft article 23 was broader than that of the former draft article 14 in that paragraph 2 of the latter applied only if the alien was “under a death sentence”, whereas paragraph 2 of the new draft article 23 applied if the alien “would be threatened with the death penalty”. That provision was so broad and open-ended that it appeared to be designed to ensure that abolitionist States would never be allowed to expel an alien to any retentionist State under any circumstances. His delegation was unable to accept such a provision, whether in its broader form in the current draft article 23 or in its less ambitious form in the former draft article 14. There was simply no customary international law obligation stating that a State that had abolished the death penalty was then ipso facto bound to prohibit the transfer of a person to another State where the death penalty might be imposed without seeking the relevant assurance. Whether a State in that position chose to bind itself in that manner by undertaking specific treaty obligations was another matter, distinct from a decision not to apply the death penalty at the domestic level.

105. While some States had expressed concerns as to whether the topic of expulsion of aliens was suitable for codification, his delegation was of the view that all options should be kept open, including the possibility that the Commission’s work would take the form of guiding principles rather than draft articles.

106. Regarding the protection of persons in the event of disasters, his delegation was heartened by the Commission’s receptiveness to the views of Member States, as reflected, *inter alia*, in the emphasis placed on “duties” rather than “rights” in draft article A (Elaboration of the duty to cooperate) as proposed by the Special Rapporteur. That approach was in line with his delegation’s view that the emphasis should be on the duty of the State receiving offers of assistance to give serious consideration to such offers, rather than on the right of States and other actors to offer assistance.

107. **Ms. Che Meh** (Malaysia), noting that a full statement of her Government’s views on the topic of expulsion of aliens and protection of persons in the event of disasters had been made available on the PaperSmart portal, said that in the interests of time she would highlight only the main points in that statement. Her delegation’s prior comments relating to the expulsion of aliens had been based on the Banishment Act of 1959, which had been repealed with effect from 31 December 2011. The legislation currently regulating the removal of prohibited immigrants, illegal immigrants and persons unlawfully remaining in Malaysia was the Immigration Act of 1959/63 and the Immigration Regulations of 1963.

108. It was premature to decide on the final form of the Commission’s work on the topic, as many issues required clarification and reconsideration. A number of the draft articles adopted by the Commission on first reading did not reflect Malaysia’s legal framework and current practices with regard to expulsion of aliens or the views that it had expressed in previous sessions. Her delegation had profound reservations about the formulation of draft article 3 (Right of expulsion) and reiterated its view that a State should only be obliged to observe and implement domestic laws and international rules governing the human rights of aliens arising from instruments to which it was a party. With regard to draft article 6 (Prohibition of the expulsion of refugees), her Government did not recognize refugee status, as Malaysia was not a party to the Convention relating to the Status of Refugees or the Protocol relating to the Status of Refugees. Nevertheless, it had dealt on humanitarian grounds through special arrangements with the Office of the United Nations High Commissioner for Refugees with successive influxes of illegal immigrants claiming to be refugees and asylum seekers.

109. Draft article 20 (Obligation to respect the right to family life) did not reflect Malaysia’s current legal framework and practice, and her delegation was therefore unable to agree with its current formulation. Malaysia’s Immigration Act of 1959 made no distinction between refugees, asylum seekers, stateless persons and illegal immigrants. It did, however, provide that no immigrant who was a member of the prohibited class as defined under the law could enter or remain in Malaysia, unless the individual was exempted under section 55 of the Act or was in possession of a valid pass. The family and dependants

of a prohibited immigrant were also considered to be members of the prohibited class and would generally be deported to their country of origin on the basis of the Act's provisions without being prosecuted, unless they had committed other unlawful acts.

110. With regard to the five draft articles on protection of persons in the event of disasters provisionally adopted by the Drafting Committee, her delegation found the formulation of draft article 5 bis (Forms of cooperation) acceptable. In relation to draft article 12 (Offers of assistance), the offer of assistance to an affected State should not be regarded as an unfriendly act or as interference in its internal affairs; it was unnecessary to confer on any third State or any organization a legal right to offer assistance to an affected State. The guiding principle for the receipt of disaster aid must always be the consent of the affected State, which had a sovereign right to accept or decline assistance. In her written statement her delegation proposed amended wording emphasizing that principle for draft article 12.

111. Concerning draft article 13 (Conditions on the provision of external assistance), the Drafting Committee was to be commended for recognizing that an affected State could impose conditions on the provision of external assistance within its territory. Her delegation interpreted draft article 13 to mean that, when formulating such conditions, a State could take into account not only national legislation relating to disasters but also other relevant laws. Since affected States might address disasters by way not only of laws but also of its administrative framework and policies, the scope of draft article 13 should be broadened to mention those aspects as well as national law and international law.

112. With regard to draft article 14 (Facilitation of external assistance), she noted the Drafting Committee's understanding that the phrase "take the necessary measures, within its national law" referred, *inter alia*, to legislative, executive and administrative measures, which could include actions taken under emergency legislation. It might also extend to non-legal, practical, measures designed to facilitate assistance. Her delegation sought clarification as to whether the same understanding applied to the reference to "national law" in draft article 13.

113. Draft article 15 (Termination of external assistance) established the right of any of the States

concerned to terminate assistance, upon consultation with the other States or actors involved. In her delegation's view, although termination on a mutual basis might not always be possible, termination of external assistance should in all circumstances be preceded by consultations among all parties involved.

114. **Mr. Buchwald** (United States of America) said that, in view of time constraints, he would present an abbreviated version of his written statement, which had been made available on the PaperSmart portal. With respect to the topic of expulsion of aliens, the issues addressed in the 32 draft articles adopted by the Commission on first reading were highly technical and would require further review by relevant agencies and technical experts in his Government before it could provide detailed comments. In conducting that review, it would focus on the extent to which the draft articles were in conformity with widely adopted multilateral treaties and well-settled principles of international law and domestic law and practice.

115. His delegation commended the Commission's progress on the topic of protection of persons in the event of disasters and appreciated the Special Rapporteur's ongoing efforts to ensure that the duty of States to cooperate set forth in draft article 5 was understood in the context of the principle that the affected State had primary responsibility for protection of persons and provision of humanitarian assistance on its territory. The addition of draft article 5 bis (Forms of cooperation) helped to provide needed context to draft article 5 (Duty to cooperate) regarding the forms that cooperation might take.

116. His delegation appreciated the efforts made to accommodate its concerns regarding the adoption of a rights-based approach to the topic, particularly in respect of the relationship between the affected State and third States, intergovernmental organizations and non-governmental organizations. It seemed incongruous, in the light of those efforts, that draft article 12 should refer to the right of third States and others to offer assistance. A better formulation might be "may offer assistance". Similarly, use of the word "shall" in connection with the assistance categories elaborated in draft article A as proposed by the Special Rapporteur seemed inappropriate and contrary to the premise that no legal obligation existed to provide such assistance. An alternative might be to combine the additional categories of assistance listed in draft article

A with those in draft article 5 bis and thus avoid the obligatory term “shall”.

117. His delegation remained of the view that the Commission should proceed in a way that avoided the need for definitive pronouncements on the issue of rights and duties, so as to develop a product that would be of the most practical use to the international community in facilitating cooperation among all interested parties. The most recent draft articles made important progress in that direction. His delegation was pleased to learn that the Special Rapporteur intended to focus next on disaster risk reduction, including the prevention and mitigation of disasters, as well as on the very important issue of protecting humanitarian personnel. His Government strongly supported international cooperation and collaboration in providing disaster relief.

118. Commending the work of the Commission and its Planning Group in preparing the work programme for the remainder of the quinquennium, he said that his delegation welcomed the Commission’s decision not to place the topic “Protection of the Atmosphere” on its current agenda. An overarching legal framework for protection of the atmosphere was unnecessary, since various long-standing instruments already provided sufficient general guidance to States in their development, refinement and implementation of treaty regimes at the global, regional and subregional levels. Moreover, an effort to extract legal rules from existing treaties and assert that they legally operated in contexts well beyond their original scope would be unhelpful and potentially very harmful. If the Commission were to pursue the topic, it could severely complicate, rather than facilitate, sensitive ongoing negotiations in the field.

The meeting rose at 1 p.m.