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## Sixth Committee

### Summary record of the 19th meeting

Held at Headquarters, New York, on Monday, 27 October 2014, at 10 a.m.

*Chair:* Mr. Manongi. . . . . (United Republic of Tanzania)

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

**Agenda item 78: Report of the International Law Commission on the work of its sixty-sixth session (A/69/10)**

1. The Chair invited the Committee to begin its consideration of the report of the International Law Commission on the work of its sixty-sixth session (A/69/10). The Committee would consider the Commission's report in three parts. The first part consisted of chapters I to III (the introductory chapters), chapter XIV (Other decisions and conclusions of the Commission), chapter IV (Expulsion of aliens) and chapter V (Protection of persons in the event of disasters). The second part was devoted to chapter VI (The obligation to extradite or prosecute (*aut dedere aut judicare*)), chapter VII (Subsequent agreements and subsequent practice in relation to the interpretation of treaties), chapter VIII (Protection of the atmosphere) and chapter IX (Immunity of State officials from foreign criminal jurisdiction). The third part would address the remaining chapters of the 2014 report (chapter X: Identification of customary international law; chapter XI: Protection of the environment in relation to armed conflicts; chapter XII: Provisional application of treaties; and chapter XIII: The Most-Favoured-Nation clause).

2. **Mr. Gevorgian** (Chairman of the International Law Commission) said that, with its current session, the Commission had passed the mid-point of the current quinquennium. As chapter II showed, the Commission had completed on second reading a set of draft articles, together with commentaries, on the expulsion of aliens. As intimated in 2013, it had also completed on first reading a set of draft articles, together with commentaries, on the protection of persons in the event of disasters, and it had adopted its final report on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", bringing to a close its consideration.

3. The Commission had also continued its substantive consideration of the topics "Immunity of State officials from foreign criminal jurisdiction"; "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and the "Identification of customary international law". In the process, it had provisionally adopted some draft articles, together with commentaries, on the first-

mentioned topic and some draft conclusions, together with commentaries, on the two other topics.

4. The Commission, through its Study Group, had also continued to make further progress on the topic "The Most-Favoured-Nation clause". It might be feasible for a final report on the topic to be completed by 2015. Further discussion had continued on the topic "Provisional application of treaties". Moreover, the Commission had been able to receive and consider the preliminary report on the topics "Protection of the environment in relation to armed conflicts", on which an exchange of views had already been held in 2013, and "Protection of the Atmosphere". Those two topics had been placed on the Commission's current programme of work in 2013.

5. During the 2014 session, the Commission had decided to include in its current programme of work the topic "Crimes against humanity" and to appoint Mr. Sean D. Murphy as Special Rapporteur. Moreover, it had included the topic, "*Jus cogens*" in its long-term programme of work on the basis of the syllabus which appeared in the annex to the Commission's report. The Commission's Working Group on the Long-term Programme of Work continued to consider further proposals for future topics. Meanwhile, the Commission, in view of the need identified by the Working Group to conduct a systematic review of the Commission's work and a survey of possible future topics for its consideration, had requested the Secretariat to review the illustrative general scheme of topics last elaborated in 1996 in the light of subsequent developments and to prepare a list of potential topics ("survey"), accompanied by brief explanatory notes, by the end of the current quinquennium.

6. In chapter III of the report, the attention of Governments was drawn to information on practice whose provision would be particularly useful to the Commission as it continued its consideration of the various topics. Information on State practice that Governments submitted on the various topics under consideration was an essential part of the working methods of the Commission. It was important for the Commission to receive information from as many States as possible, representing all regions of the world.

7. The Commission had continued its traditional exchanges with the International Court of Justice, as well as its cooperation with other bodies engaged in

the progressive development of international law and its codification. The visit of the President of the Court in 2014 had coincided with the convening of a commemorative meeting of the fiftieth anniversary of the International Law Seminar. The theme of the meeting had been “International law as a profession”. All speakers, among them President Tomka, who had once been a participant of the Seminar, had borne living testimony to the value of the seminar in the growth of international law as a vibrant profession that helped to connect young professionals across cultures and civilizations in the service of humanity.

8. As the seminar began the first year towards the century mark, it was worth remembering that its continued sustainability depended on the generosity of States. The Commission expressed its gratitude to all States that had contributed towards the convening of the seminar over the years.

9. He expressed appreciation for the work of the Commission’s Secretariat: the Codification Division of the Office of Legal Affairs. The Commission was most appreciative of the Division’s valuable assistance in its servicing of the Commission and its involvement in research projects on the Commission’s work.

10. Introducing chapter IV of the report (Expulsion of aliens), he said that in 2014 the Commission had undertaken and completed the second reading of the draft articles on the topic, on the basis of the ninth report of the Special Rapporteur, Mr. Maurice Kamto, as well as written comments and observations on the first reading text of 2012 received from Governments. The topic had been the subject of the Commission’s attention for nearly 60 years and had been on its agenda since 2004. The draft articles, together with commentaries thereto, were to be found in paragraphs 44 and 45 of the report. The basic structure of the draft articles, as adopted on first reading, had been retained. Some provisions had been reformulated, and one article had been deleted. A number of changes had also been introduced to the commentaries. The draft articles on the expulsion of aliens were structured in five parts. Part One (General Provisions) contained five draft articles.

11. Draft article 1 pertained to the scope of the draft articles, which paragraph 1 defined in general terms. For the sake of clarity and in order to address concerns expressed by some Governments, the paragraph did not refer explicitly to aliens present “lawfully or

unlawfully” on the territory of a State. That amendment did not imply any modification as to the scope *ratione personae* of the draft articles. Rather, it had been made to avoid giving the misleading impression that each provision of the draft articles applied to both categories of aliens, when some provisions distinguished between them. Paragraph 2 excluded certain categories of individuals who would otherwise be covered under paragraph 1.

12. Draft article 2 constituted the traditional provision on use of terms. It provided the definitions, for the purposes of the draft articles, of the two central concepts of the topic, namely “expulsion” and “alien”.

13. Draft article 3 (Right of expulsion) was the core provision of the draft articles that balanced the uncontested right of the State to expel an alien from its territory with the limitations to that right under international law. It recognized the right of the State to expel an alien from its territory, while noting that the exercise of that right was regulated by the current draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.

14. Draft article 4 (Requirement for conformity with law) confirmed that the exercise by the State of the right to expel was conditioned by the adoption of a decision reached in accordance with law.

15. Draft article 5 dealt with the different aspects of the question of the grounds for expulsion. Paragraph 1 stipulated that any expulsion decision must state the ground on which it was based. Paragraph 2 specified the obligation of the State to expel an alien only on a ground that was provided for by law. The explicit mention of the grounds of national security and public order had been deleted, since such grounds concerned exceptional circumstances and were referred to in the commentary. Paragraph 3 had been amended for similar reasons. Pursuant to paragraph 4, a State must not expel an alien on a ground that was contrary to “its obligations under international law”.

16. Part Two, which addressed various cases of prohibited expulsion, consisted of six draft articles. Draft article 6 dealt with the expulsion of refugees, which was subject to restrictive conditions by virtue of the relevant rules of international law. In order to address possible discrepancies between the draft articles and the international law and practice on refugees and at the same time emphasize the special

protection against expulsion they enjoyed under international law, it had been decided to reformulate draft article 6, which stated that the draft articles were “without prejudice to the rules of international law relating to refugees, as well as to any more favourable rules or practice on refugee protection”. It also referred to specific rules on the international law of refugees of particular importance for the topic.

17. The same approach had been followed regarding draft article 7, which concerned the rules relating to the expulsion of stateless persons. It had been reformulated as a “without prejudice” clause in order to avoid possible discrepancies between the draft articles and the existing regime on stateless persons. Draft article 7 also shed light on the specific rule prohibiting the expulsion of a stateless person lawfully in the territory of the State save on grounds of national security or public order.

18. Draft article 8 set forth the prohibition of the deprivation of nationality for the sole purpose of expulsion.

19. Draft article 9 addressed the specific question of the prohibition of collective expulsion. Paragraph 1 contained a definition of collective expulsion for the purpose of the draft article, while paragraph 2 set out the prohibition of the collective expulsion of aliens. Paragraph 3 specified the conditions on the basis of which the members of a group of aliens could be expelled concomitantly, without such measure being regarded as a collective expulsion within the meaning of the draft articles. Paragraph 4 contained a “without prejudice” clause referring to situations of armed conflicts.

20. Draft article 10 related to the prohibition of disguised expulsion. Its purpose was to indicate that a State did not have the right to utilize disguised or indirect means or techniques in order to bring about the same result that it could obtain through the adoption of a formal expulsion decision. The article involved cases in which the disguised expulsion was carried out by the State itself, as well as cases in which it tolerated acts by national or other persons with the same objective. Paragraph 1 set out the principle of the prohibition. The definition of disguised expulsion contained in paragraph 2 had been refined with a view to presenting more clearly the two elements characterizing it, namely that the alien was compelled to leave the territory as

the intentional result of an action or omission attributable to the State.

21. Draft article 11 prohibited confiscatory expulsion, i.e. expulsion with the aim of unlawfully depriving an alien of his or her assets.

22. Draft article 12 set out in general terms the prohibition against resorting to expulsion in order to circumvent an ongoing extradition procedure.

23. Part Three addressed the question of protection of the rights of aliens subject to expulsion, first from a general standpoint (chapter I), and then by dealing more specifically with the protection required in the expelling State (chapter II), protection in relation to the State of destination (chapter III) and protection in the transit State (chapter IV).

24. Chapter I (General provisions) was composed of three draft articles. Draft article 13 concerned the obligation of States to respect the human dignity and human rights of aliens subject to expulsion. Paragraph 1 set out the obligation of the expelling State to treat all aliens subject to expulsion with humanity and respect for the inherent dignity of the human person at all stages of the expulsion process. Paragraph 2 simply recalled that all aliens subject to expulsion were entitled to respect for their human rights.

25. Draft article 14 concerned the prohibition of discrimination in the context of the expulsion of aliens. It had been refined in order to address the concerns expressed by some Governments regarding the very general prohibition set out in the text adopted on first reading. The new formulation referred more directly to the rule that the expelling State was permitted to make certain distinctions, but that it had the obligation to respect the rights of the alien subject to expulsion without discrimination of any kind on grounds impermissible under international law.

26. Draft article 15 set out the particular requirements concerning the expulsion of vulnerable persons, such as children, older persons, persons with disabilities and pregnant women. Paragraph 1 stated the principle and provided a non-exhaustive list of vulnerable persons. Paragraph 2 dealt with the specific case of children.

27. Chapter II was composed of five draft articles. Draft article 16 enunciated the obligation of the expelling State to protect the right to life of an alien

subject to expulsion, while draft article 17 set out the general prohibition, in the context of expulsion, of torture or cruel, inhuman or degrading treatment or punishment.

28. Draft article 18 established the obligation of the expelling State to respect the right to family life of an alien subject to expulsion. The Commission had redrafted the text adopted in 2012 by using the terms of the International Covenant on Civil and Political Rights, which were also used in the other regional instruments on protection of human rights. Draft article 18 therefore specified that the expelling State must not interfere arbitrarily or unlawfully with the exercise of the right to family life.

29. Draft article 19 set out the specific rules relating to the detention of an alien for the purpose of expulsion. It had been amended in order to establish clearly that its scope was limited to detention for the purpose of expulsion and did not cover detention for any other reason. Subparagraph (a) had been refined in order to make it clear that the principle of the non-punitive nature of the detention must not be arbitrary. Subparagraph (b) provided that, save in exceptional circumstances, an alien who was detained in the course of an expulsion procedure must be held separately from persons sentenced to penalties involving deprivation of liberty.

30. Draft article 19, paragraph 2 (a), was general in scope and enshrined the principle that the detention of an alien with a view to his or her expulsion was subject to time limits. Subparagraph (b) had been amended in order to focus on the principle, explained in the commentary, that the decision to extend the duration of the detention of an alien for the purpose of expulsion could be taken only by a court or by another authority, subject to judicial review. Paragraph 3 (a) set out the requirement of regular review of the detention of an alien for the purpose of expulsion on the basis of specific criteria established by law. Subparagraph (b) related to the principle that detention for the purpose of expulsion must end when the expulsion could not be carried out, except where the reasons were attributable to the alien concerned.

31. Draft article 20 (Protection of the property of an alien subject to expulsion) established two obligations for the expelling State. The first pertained to the adoption of measures to protect the property of the

alien in question, while the second concerned the free disposal by an alien of his or her property.

32. Chapter III was composed of four draft articles. Draft article 21 concerned the general protection that an expelling State must accord to an alien subject to expulsion in relation to his or her departure to a State of destination. It covered the possibility of both voluntary departure and forcible implementation of the expulsion decision. Paragraph 1 provided that the expelling State must take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion. Paragraph 2 concerned cases of forcible implementation of an expulsion decision. Paragraph 3 required the expelling State to give the alien a reasonable period of time to prepare for his or her departure.

33. Draft article 22 concerned the determination of the State of destination of aliens subject to expulsion. Paragraph 1 identified the State of destination as the State of nationality of the alien subject to expulsion or any other State that had the obligation to receive the alien under international law, or any other State willing to receive the alien at the request of the expelling State or of the alien in question. Paragraph 2 addressed the situation in which it had not been possible to identify the State of nationality or another State to which the alien could be expelled under paragraph 1.

34. Draft article 23 dealt with the question of the protection of the life of an alien subject to expulsion in relation to the situation in the State of destination. The Commission had considered it more appropriate to delete from paragraph 1, and from the title of draft article 23, the prior reference to “freedom”, which had been interpreted by Governments as going beyond the scope of the 1951 Convention relating to the Status of Refugees. Paragraph 2 concerned the prohibition on expelling an alien to a State where his or her life would be threatened by the imposition or execution of the death penalty, unless an assurance had previously been obtained that the death penalty would not be imposed or, if already imposed, would not be carried out. The language of paragraph 2 had been refined in order to specify that the expelling State which did not apply the death penalty must not expel an alien to a State where he or she had been sentenced to the death penalty or where there was a real risk that he or she would be sentenced to death.

35. Draft article 24 required the expelling State not to expel an alien to a State where there were substantial grounds for believing that he or she might be subjected to torture or to cruel, inhuman and degrading treatment. It drew upon article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, in view of a number of developments at the universal level and in certain regional systems, draft article 24 broadened the scope of the protection afforded by that provision of the Convention, since the obligation not to expel contained in the draft article covered not only torture, but also cruel, inhuman or degrading treatment or punishment.

36. Chapter IV, which consisted of a single draft article, concerned the protection in the transit State of an alien subject to expulsion. Draft article 25 set out the obligation of the States through which an expelled alien might transit to protect the human rights of that alien in conformity with their obligations under international law.

37. Part Four addressed the specific procedural rules applicable in the context of the expulsion of an alien. It was composed of three draft articles. Draft article 26 set out the procedural rights of aliens subject to expulsion. Paragraph 1 contained a list of procedural rights which any alien subject to expulsion must enjoy, irrespective of whether that person was lawfully or unlawfully present in the territory of the expelling State. Paragraph 2 specified that the procedural rights listed in paragraph 1 were without prejudice to other procedural rights or guarantees provided by law. Paragraph 3 referred to the alien's right to seek consular assistance, which was not synonymous with a right to obtain that assistance. In paragraph 4, the Commission had considered it appropriate to replace the six-month threshold, in view of comments from Governments, by a more flexible reference to "a brief duration".

38. Draft article 27 recognized the suspensive effect of an appeal lodged against an expulsion decision by an alien lawfully present in the territory of the expelling State. That provision, which constituted progressive development of international law, had given rise to many comments from Governments concerned about its broad scope. The Commission had considered that the suspensive effect would apply only to situations where the absence of such an effect could entail serious irreversible harm for the alien subject to

expulsion who was lawfully present in the territory of the expelling State. Draft article 27 had therefore been amended accordingly.

39. The purpose of draft article 28 was to make clear that aliens subject to expulsion might, in some cases, be entitled to individual recourse to a competent international body.

40. Part Five (Legal consequences of expulsion) contained three draft articles. Draft article 29 stated, as an exercise in progressive development, that an alien who had had to leave the territory of a State owing to an unlawful expulsion had the right to re-enter the territory of the expelling State. That provision concerned solely the case of an alien lawfully present in the territory of the State in question who had been expelled unlawfully and applied only when certain conditions were met.

41. Draft article 30 set out the principle that an expulsion in violation of a rule of international law entailed the international responsibility of the expelling State for an internationally wrongful act, and draft article 31 referred to the institution of diplomatic protection, for which the legal regime was well-established in international law.

42. Upon adopting the draft articles and commentaries thereto, the Commission had decided, in accordance with its Statute, to recommend to the General Assembly that it take note of the draft articles in a resolution, annex them to the resolution and encourage their widest possible dissemination, and that it consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

43. The Commission had considered the topic "Protection of persons in the event of disasters" on the basis of the seventh report of the Special Rapporteur, which dealt with the protection of relief personnel and their equipment and goods, as well as the relationship of the draft articles with other rules. The report had also included a proposal for the use of terms.

44. Following the conclusion of its consideration of the seventh report, the Commission had adopted, on first reading, a set of 21 draft articles. The Commission had reordered several draft articles adopted in previous years, with a view to improving the overall coherence of the text. For ease of reference, the prior numbers of draft articles adopted at earlier sessions appeared in square brackets. The Commission had decided to leave

for consideration, on second reading, the question of merging draft articles, of introducing chapter headings and of drafting a preamble.

45. Draft articles 1 to 4 contained general provisions dealing with the scope of the draft articles, their purpose, the definition of disaster as understood in the draft articles, as well as definitions of several terms found in the draft articles. Draft articles 5 [7] to 7 [6] provided the general orientation for the entire set of draft articles, namely that the inherent dignity of the human person, as well as the human rights of persons affected by disasters, should be respected, and that the response to disasters should take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination.

46. Draft articles 8 [5] to 10 [5 ter] dealt with the duty to cooperate and the forms of such cooperation. Draft article 11 [16] concerned the duty to reduce the risk of disasters. Draft articles 12 [9] to 15 [13] and 17 [14] related to the position of the affected State, including: its role; its duty to seek external assistance; its right to grant or withhold consent to such assistance; its right to place conditions on the provision of external assistance; and its duty to facilitate external assistance. Draft article 16 [12] concerned offers of external assistance. Draft article 18 dealt with the protection of relief personnel, equipment and goods. Draft article 19 [15] addressed the issue of termination of external assistance. Draft articles 20 and 21 [4] concerned the relationship of the draft articles to other rules, including international humanitarian law.

47. Other than minor technical adjustments, the Commission had not introduced any substantive changes to the draft articles previously adopted. Accordingly, he would focus on the three new draft articles adopted by the Commission at the 2014 session: draft articles 4, 18 and 20.

48. Draft article 4 provided terms used for the purposes of the draft articles. Subparagraph (a), which defined “affected State”, reflected the fact that the draft articles were primarily addressed to States. It also established the scope of the draft articles to include not only disasters occurring in the territory of the affected State, but also disasters in territories or areas under the jurisdiction or control of that State. The definition further reflected the focus of the draft articles on the effect on persons. Accordingly, the formulation of the phrase “affected by a disaster” reflected the

contemporary view that the focus of attention was on the effects of a disaster on persons and property, as opposed to the disaster itself.

49. Under subparagraph (b), a State was considered an “assisting State” once the assistance was being or had been provided. The phrase “a State providing assistance” was a reference to the concept of “external assistance”, which was defined in subparagraph (d).

50. Subparagraph (c) defined “other assisting actor” in terms which included those entities or individuals which typically provided assistance to affected States, which included but were not limited to the United Nations and other international organizations as well as non-governmental organizations and other entities and even individuals. Such reference to other organizations and entities was intended to be without prejudice to their different legal status under international law. The purpose of the phrase “external to the affected State” was to make it clear that the draft articles did not regulate the activities of actors internal to the affected State, such as domestic non-governmental organizations.

51. Subparagraph (d), on “external assistance”, defined the type of assistance which assisting States or other assisting actors provided to the affected State, as a form of cooperation anticipated in draft articles 9 [5 bis] and 10 [5 ter]. The concluding clause sought to clarify the purpose for which external assistance ought to be provided, namely “for disaster relief assistance or disaster risk reduction”, and was intended as a reference to the overall purpose of the draft articles as set out in draft article 2 [2], namely to “facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights”.

52. Subparagraph (e) defined the personnel component of external assistance provided by assisting States or other assisting actors. The definition referred to the two types of personnel which were typically sent for the purpose of providing disaster relief assistance or disaster risk reduction, as alluded to in draft article 17 [14], subparagraph 1 (a), namely “civilian” or “military” personnel. The Commission had understood that such personnel were typically “specialized” personnel, as referred to in the annex to General Assembly resolution 46/182, in that what was expected were personnel which enjoyed the necessary skill set and were provided with the necessary equipment and

goods, as defined in subparagraph (f), to perform the functions in question.

53. Subparagraph (f), in turn, defined “equipment and goods” for the purposes of the draft articles. Two types of material were envisaged: the technical equipment required by the disaster relief personnel to perform their functions, both in terms of their own sustenance and in terms of what they required to provide relief, such as supplies, tools and machines; and the goods necessary for the survival and the fulfilment of the essential needs of the victims of disasters, such as foodstuffs, drinking water, medical supplies, means of shelter, clothing and bedding.

54. Draft article 18 established the obligation for the affected State to take the measures which would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods involved in the provision of external assistance. It complemented draft article 17 [14] in establishing a coherent set of obligations whereby the affected State was expected to perform a series of activities which were necessary in order to guarantee to assisting States and other assisting actors the possibility to deliver efficient and prompt assistance. The measures to be adopted by the affected State could vary in content and could imply different forms of State conduct due to the context-driven nature of the obligation concerned. In particular, the flexibility inherent in the concept of “appropriate measures” suggested that the affected State might assume different obligations depending on the actors involved in potential threats to relief personnel, equipment and goods.

55. The envisaged obligation operated in different ways. It included the requirement for the affected State to prevent its organs from adversely affecting relief activities. In that case, the obligation was one of result, with a clear content that imposed the duty on the affected State not to cause harm to the personnel, equipment and goods involved in external assistance. At the same time, draft article 18 contemplated a series of measures to be adopted to prevent detrimental activities caused by non-State actors aimed, for instance, at profiting from the volatile security conditions that might ensue from disasters in order to obtain illicit gains from criminal activities directed against disaster relief personnel, equipment and goods. In that respect, the draft article envisaged an obligation of conduct instead of one of result. The affected State was not expected to succeed, whatever the

circumstances, in preventing the commission of harmful acts but rather to endeavour to attain the objective sought by the relevant obligation. The wording “appropriate measures” thus also served to provide a margin of discretion to the affected State in deciding what actions to take. Those were considered more fully in the commentary to the provision. It should also be noted that international humanitarian actors could themselves contribute to the realization of the goal sought by adopting, in their own planning and undertaking of operations, a series of mitigation measures geared to reducing their vulnerability to security threats.

56. Draft article 20 dealt with the relationship between the draft articles and special or other rules of international law. It sought to clarify the way in which the draft articles interacted with certain rules of international law which dealt with the same subject matter of the draft articles, or were not directly concerned with disasters but would nonetheless apply in situations covered by the draft articles. Accordingly, treaties or other rules of international law that set out obligations having a higher degree of specificity than the current draft articles were not displaced by them. That approach reflected the *lex specialis* principle and aimed at safeguarding the continued application of existing obligations regarding matters covered by the draft articles. Draft article 20 covered different forms of special rules, which might include more detailed rules enshrined in treaties whose scope *ratione materiae* fell within that of the current draft articles (for example regional or bilateral treaties on mutual assistance in case of disasters), as well as those included in treaties devoted to other matters but which contained specific rules addressing disaster situations.

57. The draft article also covered the relationship with “other rules”, which was a reference to the interaction between the draft articles and rules of international law which were not directly concerned with disasters, but which nonetheless might be applied in the event of disasters (such as those concerning the law of treaties). That category of rules was also not displaced by the draft articles.

58. Draft article 20 also applied to the rules of customary international law. Since the draft articles did not cover all the issues which might be relevant in the event of disasters, they did not preclude the further development of customary international rules in the field.

59. The Commission had recommended, in accordance with articles 16 to 21 of its Statute, that the draft articles should be transmitted, through the Secretary-General, to Governments, competent international organizations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2016. The Commission had also indicated that it would welcome comments and observations on the draft articles from the United Nations, including the Office for the Coordination of Humanitarian Affairs and the United Nations Office for Disaster Risk Reduction, by the same date.

60. **Ms. Guillén-Grillo** (Costa Rica), speaking on behalf of the Community of Latin American and Caribbean States (CELAC), recalled that the Community, at its second Presidential Summit, held in Havana in January 2014, had reiterated its unrestricted respect for international law and its commitment to the purposes and principles set forth in the Charter of the United Nations and in international law.

61. CELAC acknowledged the leading role played by the International Law Commission in the progressive development of international law and its codification. In pursuance of its functions, the Commission required doctrinal material, case law and examples of State practice in the area of international law. The contribution of Member States was therefore critical. The contribution of international, regional and subregional organizations, international tribunals and academic institutions was also key to that process. The Community highlighted the need for all Member States to continue providing strong support for the Commission's work.

62. The Community underscored the difficulties faced by many States and their legal departments in providing comments on specific issues concerning items on the Commission's agenda, owing to disparities in resources among teams of international lawyers in different countries, rather than a lack of interest. In order to enhance the legitimacy of the progressive development of international law, it was extremely important to ensure that all States effectively participated in the discussions. More frequent interaction between the Commission and the Sixth Committee in New York would improve the possibilities for all States to participate in the debates,

since the delegations to the Sixth Committee were the natural link between the Commission and the legal offices in States' capitals.

63. CELAC reiterated its call for some — ideally, half — of the Commission's sessions to be held at United Nations Headquarters in New York. That simple measure would enable Sixth Committee delegates to attend the deliberations as observers, thereby fostering an early engagement in the topics even before the Commission's report was circulated, which in turn would promote the timely and effective participation of their capitals.

64. While recognizing and appreciating the efforts made in recent years, the Community believed that more could be done to strengthen cooperation and dialogue between the Commission and Member States. It was regrettable, for example, that owing to budgetary constraints not all special rapporteurs on topics under discussion could come to New York to interact with Sixth Committee delegates. Their participation was essential to the effectiveness of "thematic debates" in the Sixth Committee; it should always be scheduled at a date close to the meeting of legal advisers and should not overlap with other relevant meetings of the General Assembly that could prevent their attendance. Topics should be contained in a short list announced sufficiently in advance so that delegations could prepare properly.

65. The Community also highlighted the relevance of the International Law Seminar, which enabled young international lawyers and university teachers specializing in international law from developing countries to familiarize themselves with the Commission's work. In the same vein, participation in the International Law Seminar by legal advisers from all regions could contribute significantly to the Sixth Committee's work and its interaction with the Commission. The Community welcomed the voluntary contributions made to the Trust Fund for the International Law Seminar and invited States to consider making additional contributions.

66. CELAC noted with appreciation the Commission's endorsement of the recommendation for the inclusion of the topic of *jus cogens* in its long-term programme of work.

67. The Commission's productivity must be matched by adequate funding so that documents that were of considerable relevance for the progressive

development and codification of international law had the necessary publicity. CELAC could not accept that periodic publications by the Codification Division of the Office of Legal Affairs might be endangered for financial reasons. It supported the continuation of the legal publications prepared by the Codification Division (as referred to in paragraph 282 of the report), in particular *The Work of the International Law Commission*. It welcomed the dissemination activities carried out by the Codification Division and the Division of Conference Management and the voluntary contributions to the Trust Fund to eliminate the backlog in the publication of the *Yearbook of the International Law Commission*, and it invited States to consider making additional contributions.

68. CELAC welcomed the significant progress being made in the Commission's work. However, its relations with the Sixth Committee must continue to be improved so that the General Assembly could better process and utilize the Commission's invaluable work. The Community reiterated its firm commitment to contributing to that process and to working towards the common goal of progressively developing and codifying international law.

69. **Mr. Gussetti** (Observer for the European Union), speaking also on behalf of the candidate countries Albania and Serbia and the stabilization and association process country Bosnia and Herzegovina, took note of the adoption on second reading by the Commission of the entire set of draft articles on the expulsion of aliens and the decision to submit the draft articles to the General Assembly, and it reiterated its view that elaboration of a convention on expulsion of aliens was not appropriate at the current stage.

70. The European Union also noted that, according to the Commission, its conclusions on the topic had been inspired by the European Union's own policy and legislation. As the Special Rapporteur had pointed out in his eighth report (A/CN.4/651), the European Union Return Directive "contains extremely progressive provisions on such matters that are far more advanced than the norms found in other regions of the world".

71. However, the European Union regretted that the final outcome of the topic did not reflect some of the suggestions it had made in that respect. Considering that a number of those suggestions had a strong human rights character (such as the inclusion of sexual orientation as a ground for non-discrimination, the

right to a speedy judicial review of the lawfulness of detention, the right to receive a written decision and the right to information about available legal remedies), the European Union called on all Member States to take appropriate actions in order to guarantee those rights in cases of expulsion of aliens.

72. Turning to the topic "Protection of persons in the event of disasters", and speaking on behalf of the European Union, the candidate country Serbia and associated process country Bosnia and Herzegovina, he said that the European Union was pleased that the draft articles had struck a balance between the need to safeguard the national sovereignty of the affected State and the need for international cooperation on the protection of such persons. It was also pleased that the draft articles had focused on persons in need and had taken a rights-based approach, and it welcomed in particular draft articles 18 and 20.

73. With regard to the provision of external assistance, the European Union was pleased that draft articles 4 and 8 not only covered States but also encompassed the broader concept of "assisting actors".

74. At the European Union level, a supranational mechanism of disaster response had been established; it was framed by the principles that guided the Union's external action pursuant to article 21 of the Treaty on European Union. Internally, a reformed Union Civil Protection Mechanism had been adopted in 2013. Externally, the EU Aid Volunteers initiative had been established, which allowed the European Union to deploy volunteers in third countries in order to support and complement humanitarian aid there.

75. Against the background of its disaster response activities, the European Union had suggested in earlier statements that an express reference to regional integration organizations should be included in the draft texts or a clarification to that effect in the commentary. It therefore suggested that the commentary to draft article 4, subparagraph (c), should specify that the term "competent intergovernmental organization" also included regional international organizations.

76. **Ms. Kaukoranta** (Finland), speaking on behalf of Denmark, Iceland, Norway, Sweden and her own country, said with reference to the topic "Expulsion of aliens" that the Nordic countries had participated actively in the Sixth Committee debate on the subject in recent years and had submitted written comments on

the draft articles on 12 June 2014. One of the key points had been that the draft articles should not undermine important principles of international refugee law, including the prohibition of refoulement and the obligation of States to readmit their own nationals who did not have a legal residence in another country. The Nordic countries had also stressed that the provisions on non-discrimination should expressly include discrimination on grounds of sexual orientation.

77. From the outset of the Commission's consideration of the topic, the Nordic countries had questioned the added value of draft articles in a field where detailed global and regional legal regimes already regulated the rights and obligations of States. They recognized that over the past few years the topic had given rise to interesting debates and information about practice, and in that sense the considerations had been fruitful. However, they did not believe that the topic lent itself to incorporation into a convention.

78. With regard to the topic "Protection of persons in the event of disasters", the Nordic countries were pleased that the Commission had brought to a successful conclusion its first reading of the set of 21 draft articles. With regard to draft articles 4 and 18, the Nordic countries agreed with the use of the term "affected State", which enshrined the principal role and responsibility of a State to protect persons as well as property and the environment when disasters occurred on its territory or otherwise under its jurisdiction.

79. They also shared the view that a State could be qualified as an "assisting State" once the assistance was being or had been provided. It was also important to recognize the role of diverse types of "other assisting actors" in providing assistance in the present-day world, meaning competent intergovernmental, regional and relevant non-governmental organizations or any other individuals or entities, such as the International Red Cross and Red Crescent Movement. The Nordic countries underlined the duty of a State to seek external assistance if its national response capacity was not sufficient to cope with a disaster.

80. The protection of relief personnel, equipment and goods was an essential condition for any relief operation to be carried out. Draft article 18 rightly set out the obligation for the affected State to take appropriate measures in that respect. The Nordic countries agreed with the term "appropriate measures" because it allowed a degree of flexibility and discretion

in matching the measures with the circumstances by observing due diligence. They understood the term "appropriate" as an obligation of conduct rather than of result, owing to several factors beyond the control of the affected State in a disaster situation.

81. The Nordic countries commended the decision to include the topic "Crimes against humanity" in its programme of work and were following the progress of work on the topic with great interest. It was important for the definition of crimes against humanity in article 7 of the Rome Statute to be retained as the material basis for any further work.

82. Robust inter-State cooperation for the purposes of investigation, prosecution and punishment of crimes against humanity was crucial, as was the obligation to extradite or prosecute alleged offenders, regardless of their nationality. Work could benefit from a legal analysis of the obligation to extradite or prosecute with a view to identifying its scope with regard to crimes against humanity. In that respect, the Commission's 2014 report on the topic "*Aut dedere aut judicare*" provided an excellent starting point.

83. The Nordic countries were of the opinion that international efforts to eliminate crimes against humanity could be successful only if sufficient attention was also given to preventing them. Accordingly, they encouraged the Commission to explore and articulate the relevant responsibilities and to consider innovative measures and mechanisms to ensure effective prevention. While welcoming developments towards further recognition of a duty of prevention and obligations of inter-State cooperation, the Nordic countries underlined that no such obligations could be construed so as to limit similar obligations in place *vis-à-vis* other crimes or existing legal obligations in the field.

84. The Nordic countries commended the important work carried out by the Commission on related topics and trusted that it would conduct its discussions on the basis of the widely available array of international case law regarding both crimes against humanity and particular minorities exposed to persecution.

85. The Nordic countries noted with interest the Commission's inclusion in its long-term programme of work of a new source-related topic, *jus cogens*, which would benefit from further clarification. In recent years, there had been a number of court decisions at the international and national levels referring to *jus*

*cogens* which might help shed light on the content of the concept. The jurisprudence of the International Court of Justice was of particular importance in that regard.

86. However, the Nordic countries agreed with the Commission that the precise nature of *jus cogens* norms and the requirements for the identification of such norms and legal consequences remained relatively unclear. The Commission's future work on the topic could thus contribute to clarifying the exact legal content of *jus cogens*, including the process by which international norms might qualify as peremptory norms.

87. Jurisprudence from the International Court of Justice in recent years referring to *jus cogens* had qualified a limited number of international norms as peremptory. Although it was not the Commission's intention, the elaboration of an exhaustive list of norms having achieved the status of *jus cogens*, as suggested in the annex to the Commission's report, even if merely illustrative, would entail a risk that other equally important rules of international law would in effect be given an inferior status. It would still be appropriate to address some of the concerns put forward by the Commission 20 years earlier when it had concluded that it would be premature for it to enter into such a study. In addition to the existing jurisprudence of the International Court of Justice and other relevant judicial bodies, any future jurisprudence might also prove to be beneficial for the elaboration of more detailed provisions on *jus cogens*. The right timing for addressing the topic would be of importance to the prospects of success.

88. **Ms. Zabolotskaya** (Russian Federation) said that her Government had always attached great importance to the work of the Commission as the key expert body of the United Nations devoted to the codification and progressive development of international law. The Commission had made a major contribution to the formation of contemporary international law.

89. Turning first to the topic "Expulsion of aliens", she said that the Commission had succeeded in greatly improving the set of draft articles in the light of comments from Governments compared to the draft articles adopted on first reading in 2012. That was the case in particular for draft article 1 (Scope). Her delegation had repeatedly stressed in its comments that rules must distinguish between aliens lawfully present

in the territory of a State and aliens unlawfully present. In that connection, her delegation was pleased that the commentary to draft article 1 noted that not all rules set out in the draft articles were applicable to the same extent to the various categories of aliens and that, in particular, a number of rules were not applicable to aliens unlawfully present in the territory of a State or aliens whose status was regulated by special regimes.

90. The definition of "expulsion" in draft article 2 (Use of terms) was appropriate. The wording rightly refrained from prejudging the question of the legality of an expulsion as a function of which a State body took the expulsion decision. Her delegation also welcomed the wording of draft articles 3 and 4, which correctly referred to the right of a State to expel an alien while at the same time limiting that right by requiring that it be implemented in accordance with the rules of international and domestic law concerning the conditions of expulsion and its procedural aspects. Of particular importance was the reference in paragraph (4) of the commentary to draft article 4 to the fact that the relevant provisions of the law were different depending on the lawful or unlawful nature of an alien's presence in the territory of the expelling State. That comment was also fully applicable to draft article 3.

91. Paragraph (7) of the commentary to draft article 4 contained a helpful reference to the effect that the interpretation of internal law on expulsion essentially fell within the competence of the State and that the competence of international mechanisms was limited in that regard. Such competence should concern the question of whether an applicable internal rule was in conformity with the State's international obligations. That approach followed from the judgment of the International Court of Justice of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, as well as a number of judgments by the European Court of Human Rights.

92. The Russian Federation welcomed the new wordings in Part Two (Cases of prohibited expulsion), which made a more precise distinction between the rules applicable to different categories of aliens. In her delegation's view, however, draft article 10 (Prohibition of disguised expulsion) should be interpreted in the light of the rules applicable to the attribution of conduct to a State formulated in the articles on responsibility of States for internationally

wrongful acts. In that connection, her delegation welcomed the important reference, in paragraph (4) of the commentary to draft article 10, to the decision of the Iran-United States Claims Tribunal.

93. Of importance for a proper interpretation of draft article 11 (Prohibition of expulsion for purposes of confiscation of assets) was the reference in paragraph (2) of the commentary thereto to the fact that that draft article did not extend to situations in which assets were confiscated as a sanction consistent with law for the commission of an offence. Such a reference should be included in the text of the draft article itself.

94. Her delegation welcomed the new wording of draft article 21, paragraph 1. The separate reference in the commentary to the effect that the provision could not be interpreted as authorizing the expelling State to exert undue pressure on the alien was useful. Some questions remained, however, about some of the wording in draft article 26, which extended the same procedural guarantees to both lawful and unlawful aliens present in the expelling State. The commentary to draft article 26 cited article 13 of the International Covenant on Civil and Political Rights and article 1, paragraph 1 (a), of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as sources for draft article 26, but those instruments were addressing the right to a review of an expulsion solely for aliens lawfully present in the territory of a State.

95. Her delegation endorsed the Commission's recommendation to submit the draft articles to the General Assembly for consideration, following which it might be possible to return to the question of the elaboration of an international legal instrument on that basis.

96. With regard to the topic "Protection of persons in the event of disasters", her delegation was of the view that the final product should be guidelines rather than draft articles. The Commission elaborated draft articles on subjects which, given the presence of well-developed State practice, offered prospects for the formulation of a legally binding instrument. Her delegation did not see such a possibility for the topic under consideration.

97. The rules formulated by the Commission constituted instructions which might guide the acts of States cooperating on the prevention and mitigation of the effects of natural disasters. Guidelines were also

more appropriate because the rules being elaborated by the Commission were meant to help States affected by disasters and their populations, and not to impose strict legal obligations which might further burden a State that was already in a difficult situation. The Commission should return to the question of the form of the final product during the second reading. The rules formulated in the draft articles must not be regarded as norms of customary international law, but as an example of the progressive development of law.

98. The first four draft articles did not pose any problems for her delegation. On the whole, the Russian Federation endorsed draft article 5 (Human dignity). However, the list of actors that must take action in accordance with that obligation was not entirely clear. In her delegation's view, all actors working to overcome a disaster should take action on the basis of respect for human dignity, and not just "States, competent intergovernmental organizations and relevant non-governmental organizations".

99. Her delegation did not quite understand the purpose of draft article 6 (Human rights), which contained a broad formulation specifying that persons affected by disasters were entitled to respect for their human rights. Neither in the draft article nor in the commentary thereto was there any mention of the most important questions in that context, namely whether any rights could be restricted in an emergency, and if so, which rights and under what circumstances. The practice of the Human Rights Committee, international tribunals and national courts would be of interest in that regard. It was obvious that in the event of a large-scale disaster it might not be possible to enjoy full exercise of certain human rights for objective reasons, and the question of how to strike a balance between the protection of those rights and the actual effects of the disaster was crucial. Close attention must be given to that question during the second reading and provisions elaborated accordingly.

100. The draft articles would also benefit from the inclusion not only of principles governing the protection of the dignity and rights of persons affected, but also of principles which in one form or another referred to the impossibility of fully protecting the interests, dignity and way of life of affected persons. That was particularly important, given that a disaster might cause damage to major social infrastructures, the restoration of which might be difficult to coordinate with the rights of a particular person but which in the

final analysis were essential for the normal realization of the rights and interests of all persons in a given area.

101. Her delegation endorsed draft article 7; the three principles of humanity, neutrality and impartiality were fundamental to the provision of humanitarian assistance. However, a provision should be added concerning respect for the fundamental principle of non-interference in the affairs of a State by other States or international organizations participating in the provision of assistance to disaster victims, since by definition such assistance was of a non-political nature.

102. Draft article 8 (Duty to cooperate), which was a key provision, must undergo major revision. As was rightly pointed out in the commentary, the duty to cooperate was a fundamental principle of international law. However, that duty extended to cooperation between States and was of a general nature. It was not entirely clear why a duty was imposed on States to cooperate with international organizations, non-governmental organizations or the International Committee of the Red Cross to the same extent as their duty to cooperate with each other. In her delegation's view, reference should be made to cooperation with a view to mitigating the effects of a disaster. The main point was that the draft article must specify that the affected State had the right to choose from whom it accepted assistance and with whom it cooperated on reducing the risk and effects of a disaster. That followed from the principle of the sovereign equality of States.

103. Draft article 10 (Cooperation for disaster risk reduction) should be made part of draft article 8. Her delegation proposed the following wording on cooperation: "States shall, as far as they are able, cooperate among themselves and, as appropriate, with international organizations to provide assistance to an affected State and to provide assistance among themselves on disaster risk reduction".

104. Draft article 9 (Forms of cooperation) actually had to do with the forms of assistance which the international community might provide to the affected State. The list contained in the draft article should not be exhaustive, but should be illustrative in nature. The draft article could hardly be regarded as establishing a legal obligation; rather, it was descriptive. It was important to make it clear that draft article 9 was unrelated to draft article 8. Moreover, the forms of assistance offered to an affected State must be based on

a request by that State. No one knew better than an affected State what forms of assistance it needed.

105. Draft article 11 (Duty to reduce the risk of disasters) was another example of the progressive development of law in the draft articles. That rule should be formulated as a recommendation, together with the qualifier "within their capabilities". Draft article 12 (Role of the affected State) raised a number of serious questions. It was not entirely clear what was meant by the phrase "to ensure the protection" in paragraph 1. A State could not be required to ensure protection from disasters. It would be preferable to require it "to take all necessary measures to provide assistance". The obligation to reduce the risk of disasters was already set out in draft article 11.

106. It was also not clear what the purpose was of the phrase "the primary role in the direction, control, coordination and supervision of such relief and assistance", which might imply that such a duty might shift to someone else without the consent of the State concerned. It would be preferable to speak of the "duty of the affected State" to perform those tasks.

107. Her delegation still did not see why draft article 13 (Duty of the affected State to seek external assistance) established such a requirement. Presenting the question in that fashion posed a number of legal problems. It was not clear who would be authorized to decide whether a disaster was taking place, whether the affected State was fulfilling its duty to seek assistance and whether a disaster exceeded a State's national response capacity. Moreover, the introduction of a strict legal duty implied that a State would bear international legal responsibility in the event of a failure to comply, which would in turn pose additional questions and problems. That difficulty might not become so critical if the format of the draft article was revisited and the relevant provision formulated as a recommendation.

108. Draft article 14 (Consent of the affected State to external assistance) followed the rather unclear overall logic of the draft articles, in accordance with which the whole process of providing assistance was launched not on the basis of a request by the affected State, but on that of a right of other parties to provide such assistance. In her delegation's view, the draft article did not deal with the request but with the consent of a State, an approach which was hardly justified.

109. A crucial sentence in paragraph (2) of the commentary to draft article 19 should be added to draft article 15 (Conditions on the provision of external assistance), namely: "When an affected State accepts an offer of assistance, it retains control over the duration for which that assistance will be provided."

110. **Mr. Reinisch** (Austria) said that his Government took note of the Commission's decision to include the topic "*jus cogens*" in its long-term programme of work. While the concept of *jus cogens* as such had become generally accepted, the precise scope of international norms that had such a character remained unclear. Similarly, the process by which some legal norms acquired the status of *jus cogens* was not fully determined. Since the Commission had decided to exclude issues relating to *jus cogens* from the topic "Identification of customary international law", it was appropriate to address the topic of *jus cogens* separately. His delegation thus supported Mr. Tladi's proposal, annexed to the Commission's report, that the Commission should study a number of issues, such as the nature of *jus cogens* and the requirements for the identification of a norm as *jus cogens*, and that it should establish an illustrative list of norms which had achieved the status of *jus cogens* and look into the consequences or effects of violations thereof.

111. In its 2013 statement, his delegation had expressed its support for the inclusion of the topic "Crimes against humanity" in the Commission's agenda. Emphasis should be placed on the need for cooperation and adequate domestic legislation rather than the elaboration of new definitions of such crimes that might differ, for example, from those contained in the Rome Statute and might create problems for combating impunity. The Commission should also take into account the joint initiative of Argentina, Belgium, the Netherlands, Senegal and Slovenia on mutual legal assistance with regard to atrocity crimes.

112. Austria was in the process of finalizing legislation on crimes against humanity as part of its Criminal Code. The definition of the proposed crime would largely follow the one contained in the Rome Statute. In the past, crimes that could qualify as crimes against humanity could be prosecuted as ordinary crimes only on the basis of the existing provisions of the Criminal Code. The bill envisaged jurisdiction for crimes against humanity if either the perpetrator or the victim was Austrian, if the crime affected other Austrian interests or if the perpetrator was a foreigner

who was present in Austria and could not be extradited. The public consultation procedure for the bill had been completed a few days earlier, and it was hoped that the Government would soon be able to submit the bill to parliament.

113. His delegation thanked the Commission for the final elaboration on second reading of the complete set of draft articles on the topic "Expulsion of aliens". Generally speaking, Austria's practice was largely in conformity with the draft articles. For instance, in line with draft article 19, paragraph 2 (b), relating to the separation of aliens detained for the purpose of expulsion from persons sentenced to penalties involving deprivation of liberty, Austria had constructed detention facilities for the exclusive purpose of such separation.

114. As to draft article 6, subparagraph (a), concerning the prohibition of expulsion of refugees, he said that Austria, as a member of the European Union, applied the relevant legislation, namely the Dublin Regulation (Council Regulation (EC) No. 343/2003) establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the member States by a third-country national. That Regulation guided Austria's practice relating to the expulsion of refugees to those States members of the European Union where they had entered the European Union for the first time. The application of the Regulation was monitored by the European Court of Human Rights.

115. His delegation had no objection to the wording of draft article 8 (Deprivation of nationality for the purpose of expulsion). It shared the understanding expressed in the commentary that the draft article did not affect a State's right to deprive an individual of his or her nationality on a ground that was provided for in its legislation. That might be the case if legislation provided for the deprivation of nationality of persons who took part as fighters in foreign armed conflicts. Such deprivation would not be contrary to draft article 8, which prohibited the deprivation of nationality for the sole purpose of expulsion. In that connection, Austria would have welcomed an obligation incumbent upon foreign States to recognize the nationality as indicated by the person being subject to expulsion. That obligation of transparency also required that States which did not provide for the withdrawal of nationality should make that fact known.

116. On draft article 18 (Obligation to respect the right to family life), his delegation shared the view confirmed by the practice of the European Court of Human Rights and reflected in the commentary that that right did not accord an alien absolute protection against expulsion.

117. With regard to draft article 22 (State of destination of aliens subject to expulsion), an obligation existed to receive one's own nationals, but cases could occur in which States other than the national State were required to receive individuals. Those situations mostly resulted from particular treaty obligations.

118. Following the adoption by the Commission of the draft articles on first reading, Austria had submitted a comment in which it had raised concerns regarding some of the draft articles. Regrettably, some of those concerns had not been reflected in the current text, without any explanation in the commentary. For instance, the redundancy of draft articles 30 and 31 had not been addressed or the need to retain those draft articles explained.

119. His delegation endorsed the submission of the draft articles to the General Assembly to enable it to take note of them. That would make it possible to assess how acceptable they were to States.

120. Austria commended the Commission for the elaboration of the set of draft articles and commentaries on the topic "Protection of persons in the event of disasters" on first reading. Recent events illustrated the importance of the subject in international relations, especially with regard to the conditions under which external assistance should be accepted or could be refused.

121. His delegation agreed with the decision not to include in the text adopted on first reading the draft articles formerly proposed as draft article 18 (Matters related to disaster situations not regulated by the present draft articles) and draft article 19 (Relationship to the Charter of the United Nations), since they would be redundant.

122. The definitions contained in draft article 4 (Use of terms) were acceptable on the whole. However, the qualifier "at its request or with its consent" in the definitions of "assisting State" and "other assisting actor" in subparagraphs (b) and (c) seemed unnecessary, since those particular conditions were the

result of the substantive provisions of the draft articles and did not need to be included in the definitions. The comment on subparagraph (e) on the definition of relief personnel must be reconciled with State practice, since military personnel remained under the full command of the assisting State, irrespective of the operational control of the affected State. Accordingly, such relief operations remained attributable to the assisting State. Draft article 12 should also reflect that understanding.

123. Draft article 21 (Relationship to international humanitarian law) limited the scope of the draft articles, insofar as it stipulated that they did not apply to situations to which the rules of international humanitarian law were applicable. Thus, they did not apply to disasters connected with international and non-international armed conflicts, whereas disasters connected with internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, would be covered. However, the commentary presented a different understanding, because it stated that the draft articles "can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply". According to the commentary, the draft articles would also apply to disasters connected with armed conflicts to the extent that the rules of international humanitarian law did not address that particular disaster situation. The discrepancy between the draft articles and the commentary did not permit a clear understanding of what the Commission had envisaged. In his delegation's view, the draft articles should also apply to situations of armed conflict, but only insofar as they did not contradict the particular rules of international humanitarian law.

124. **Ms. Carnal** (Switzerland) said she welcomed the adoption on second reading of the set of draft articles on the expulsion of aliens, an important area of international law that had yet to be codified. The draft was the result of a careful effort to strike a balance between national sovereignty and the rights of aliens. Her delegation supported the Commission's recommendation to the General Assembly to take note of the draft articles in a resolution, annex them to the resolution, and encourage their widest possible dissemination, and to consider preparing a convention at a later stage.

125. Her delegation was pleased that draft article 14 prohibited discrimination against aliens. It regretted, however, that sexual orientation had not been specifically included in the list of grounds for discrimination prohibited in draft article 14. The commentary merely stated that the question remained controversial.

126. With regard to draft article 19 (Detention of an alien for the purpose of expulsion), her delegation was pleased that that paragraph 2, subparagraph (b), continued to require a judicial review to extend the duration of detention. However, the draft article failed to mention the right of an alien to appeal to a court of law so that the latter could issue a prompt ruling on the legality of the detention and order the person's release if the detention was illegal. In her delegation's view, the right to ask a court to review the legality of the detention, including the legality of the detention decision itself, was the very essence of human rights.

127. Her delegation regretted that draft article 26, paragraph 4, still allowed the expelling State to restrict the procedural rights of aliens who had been unlawfully present in its territory for a "brief duration" instead of for a period of six months, as formerly stipulated. The reference to an indefinite timespan increased legal uncertainty. The term "brief duration" should therefore be interpreted narrowly.

128. With regard to draft article 27 (Suspensive effect of an appeal against an expulsion decision), she was pleased that the suspensive effect on the expulsion decision was only to be accorded when there was a real risk of serious irreversible harm. The same principle should apply to individual appeal procedures before an international body provided for in draft article 28.

129. Her delegation welcomed the Commission's suggestion to include a draft article concerning the protection of personnel and their equipment and goods. Given the risks faced by relief personnel, such an article was essential. She had noted that article 4, subparagraph (e), included the aspect of disaster risk reduction, which in itself was a good thing. However, it was problematic that draft article 17 (Facilitation of external assistance) and draft article 18 (Protection of relief personnel, equipment and goods) failed to distinguish between emergency means with the potential to expedite the entry of relief personnel in a humanitarian crisis and development-related disaster preparedness.

130. Her delegation was concerned about the definition of the concept of "relief personnel" which, as set out in draft article 4, subparagraph (e), was understood to mean military as well as civilian personnel, although according to the Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief of November 2007, military resources should be requested only as a last resort, meaning where there was no comparable civilian alternative and only the use of military resources could meet a critical humanitarian need. Draft article 17 approached the term "relief personnel" in the same manner, without distinguishing between civilian and military personnel.

131. In November 2007, the thirtieth International Conference of the Red Cross and Red Crescent had adopted its Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IDRL Guidelines). Her delegation encouraged the Committee and the International Federation of Red Cross and Red Crescent Societies to work together to ensure the greatest possible complementarity of their efforts.

132. **Mr. Crosbie** (Canada) said that, as noted by the Special Rapporteur in his eighth report on expulsion of aliens (A/CN.4/651), there existed a "considerable body of international legal instruments, international jurisprudence from a wide variety of sources, an abundance of national legislation and jurisprudence, and well-developed doctrine" governing the expulsion of aliens. The Special Rapporteur had also commented that States appeared to have rather contradictory opinions on the topic.

133. While certain principles, such as non-refoulement, were well-developed and widely accepted, the draft articles also contained standards drawn from a wide array of international and regional instruments that did not enjoy universal adherence, as well as from domestic legislation and regional jurisprudence. It was important to maintain the careful balance struck in international law between promoting and protecting human rights, for example between the right to seek asylum and States' sovereignty over their borders. Following a careful review, Canada had concluded that the draft articles did not maintain that balance, and that no further work on them was warranted.

134. His delegation looked forward to continued cooperation with the Commission on other important topics.

135. **Mr. Meza-Cuadra** (Peru) said that his delegation attached great importance to the Commission's work in promoting the codification and progressive development of international law and was pleased that the Commission had reiterated its commitment to furthering the rule of law at the national and international levels. His delegation took note of the specific issues on which comments would be of particular interest to the Commission, especially identification of customary international law, protection of the environment in relation to armed conflicts, and crimes against humanity, as well as of the deadline for submission of written comments.

136. His delegation took note of the approval on second reading of the topic "Expulsion of aliens", and it welcomed the Commission's adoption on first reading of the set of draft articles on protection of persons in the event of disasters, a subject to which Peru attached great importance. His delegation also welcomed the Working Group's recommendation to include a topic on *jus cogens* in the long-term programme of work. That would make a major contribution to the Commission's work on sources of international law. In that connection, he welcomed the Commission's decision to request the Secretariat to review the list of possible topics on the basis of the 1996 illustrative general scheme of topics.

137. The intensification of relations between the Commission and the Sixth Committee had been a constant concern of the General Assembly, and in order to improve the consideration of the Commission's reports, the Sixth Committee had asked the Commission to request a Special Rapporteur to attend the General Assembly, in particular on topics on which the Commission submitted a complete set of draft articles adopted on first reading. Discussion in the Sixth Committee was the last opportunity for a Special Rapporteur to hold a constructive dialogue with delegations so as to ensure that the final draft properly reflected Governments' views.

138. His delegation shared the Commission's deep concern about the financial situation, which continued to threaten the continuity and development of the United Nations Audiovisual Library of International Law. His delegation welcomed the Commission's

cooperation with other bodies, including the Inter-American Juridical Committee, and it underscored the importance of the International Law Seminar.

139. **Mr. Zaharia** (Romania) said that the topic "Expulsion of aliens" was important and controversial and required in-depth and careful consideration on the part of States. The draft articles brought important added value and contained elements of both codification and progressive development. The suggestion to consider the elaboration of a convention should be regarded with the greatest care. Leaving the draft articles in their current form might be a better solution for the moment and would allow the practice of States to develop and consolidate.

140. The draft articles recognized a general right of States to expel aliens from their territory, in line with other generally recognized norms of international law, in particular those related to human rights and, in a narrower sense, refugee law. From the outset, the draft articles should have made a more careful distinction between the different categories of aliens, namely refugees, asylum seekers, migrants, and victims of human smuggling and trafficking. Displacement was a human condition, and people had always moved from their original homes in search of employment, shelter and protection from danger. It was commendable that the Commission had given the draft articles a broad scope, which covered aliens who were not lawfully present in the territory of a State and at the same time provided for specific exceptions in draft article 26, paragraph 4, and in draft article 27.

141. He noted the explanation in the commentary that the phrase "in accordance with law" or "provided for by law" in draft articles 4 and 5 essentially covered the domestic law of the expelling State. His delegation took it that the term "law" had been used in order to allow international law standards to apply, as in the case of human rights, refugees or stateless persons. Nevertheless, States had an obligation to provide, in their domestic law, reasons and procedures for expulsion, which must be applied in good faith.

142. His delegation appreciated the value of the draft articles on collective expulsion and disguised expulsion, which reflected the general duty of the State to act in good faith while applying its legislation. He endorsed the Commission's proposal to include aliens subject to expulsion in the scope of the procedural guarantees, irrespective of whether they were lawfully

or unlawfully present in the territory of the State. His delegation understood the sensitive nature of that proposal of progressive development, which had led to the introduction of draft article 26, paragraph 4. However, the paragraph was problematic for two reasons: it left open the question of the extent to which a State might not apply any guarantees in case of aliens unlawfully present in its territory for a brief duration; and although the commentary provided some guidance, the concept of “brief duration” remained subject to interpretation.

143. The inclusion of sexual orientation as a ground for non-discrimination, the right to a speedy judicial review of the lawfulness of detention, the right to receive a written decision, the right to information about available legal remedies and the facilitation of access to medical treatment were pertinent suggestions that should have been taken into consideration in the draft articles.

144. With regard to the topic “Protection of persons in the event of disasters”, his delegation favoured the approach taken by the draft articles and the emphasis they placed on the importance of the protection of persons in disaster situations through the adoption of preventive measures and imperative disaster relief and assistance measures.

145. The draft articles stressed the duty of the affected State to take the necessary measures to ensure the protection of persons and to provide disaster relief and assistance on its territory; such assistance should not exclude external assistance if available and acceptable to the affected State. The draft articles also made it compulsory for a State to have recourse to external assistance should its national response capacity be exceeded. That duty was exceptional in nature and was only relevant in serious circumstances. In either case, the affected State had the primary role in the direction, control, coordination and supervision of such relief and assistance, and external assistance was subject to the consent of the affected State and possible conditions.

146. His delegation welcomed the introductory report on the topic of *jus cogens* and endorsed its inclusion in the International Law Commission’s programme of work. Clarification of the topic would benefit domestic and international judges, as well as States themselves in their practice. He also endorsed the proposals as to the four elements that could represent the focus of future work in that regard.

147. The topic “Crimes against humanity” should be treated with great caution. A definition of such crimes should be avoided, as existing international law already contained sufficient guidance in that respect. The purpose of the Commission’s work on the subject should be clearly defined, and careful consideration should be given to developments in the International Criminal Court and other initiatives in the field.

148. **Ms. Faden** (Portugal) said that her Government welcomed the inclusion in the Commission’s programme of work of the new topic of *jus cogens*, which was of the utmost importance. International peremptory norms dealt with basic values of international society which were instrumental for the structural political goals of the present. However, the content of *jus cogens* and its relationship with other norms and principles of international law continued to be somewhat mysterious and controversial.

149. With regard to the combined work of the General Assembly and the Commission, her delegation believed that surveying the repetition of international facts should not be overrated as a working method. It should also be borne in mind that only a minority of Members of the United Nations reported their State practice to the Commission on a given subject. That might lead the Commission to base its work on the practice of those States which were willing to produce such a report of practice and had the resources to do so.

150. On the other hand, her delegation encouraged the Commission to embark on an exercise of progressive development of international law whenever necessary to address new trends in contemporary international relations. In that regard, it cautioned against an autonomous reading of each of the sources of international law, which could be a formalist device designed to validate a substantive argument regarding a pre-defined result.

151. Only a small minority of United Nations Member States spoke during the debate in the Sixth Committee on the Commission’s report or in the deliberations on resolutions. That was due to a lack of human resources on the part of most delegations following the work of the Sixth Committee rather than indifference to the Commission’s work. From the perspective of the legitimacy of international law, it was not possible to strive for universality in such law without broad participation in its formation.

152. Therefore, in the context of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, and following the high-level meeting of the General Assembly on the rule of law at the national and international levels and its outcome, priority should be given to aiding the development of national legal services with trained human resources in order to enhance broader participation in the process of codification and progressive development.

153. Other challenges also deserved consideration. For example, the election of the Commission's members should be based not only on the criteria of merit or the representation of different legal systems of the world, but also on different doctrinal approaches to international law; more interaction between the General Assembly and the Commission should be encouraged; there should be greater openness to the participation of civil society movements, not only at the United Nations level but also at the national level; and there should be less insistence on the dogma of consensus, which often enabled a minority of Members to paralyse action, thus undermining a democratic approach to the process. Article 18 of the Charter of the United Nations established clear voting rules for the General Assembly.

154. Over the years, her delegation had stressed the relevance of the topic "Expulsion of aliens" and the issue of fundamental rights in that regard. The set of draft articles before the Sixth Committee provided a good framework for the protection and respect of individual rights in situations of expulsion and a balance between those rights and the sovereignty of a State over its territory. The draft articles reflected the discussions held in the Sixth Committee, and they provided solutions to some of the concerns that had been raised during those discussions. However, a number of issues could have been further clarified.

155. She endorsed the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution and encourage their dissemination. At the current stage, the set of draft articles should remain an overview of already existing legal norms, thus providing a general guide on legislation on the expulsion of aliens.

156. The draft articles on the topic "Protection of persons in the event of disasters" offered a good framework for working towards the protection of such

persons. Her delegation was pleased to note that the Commission had sought to maintain a rights-based approach throughout its work and that, when addressing cooperation, it had achieved a balance between State sovereignty and the need to protect human rights, an issue to which Portugal attached great importance.

157. On draft article 4 (Use of terms), the definition of "other assisting actor" in subparagraph (c) did not pose any problems. However, that subparagraph made an explicit reference to intergovernmental and non-governmental organizations but failed to include other entities or individuals. The Commission should further clarify the interaction between all actors and the affected State, as well as what their rights and obligations were when providing assistance to an affected State.

158. On draft article 14 (Consent of the affected State to external assistance), paragraph 3, the Commission had still not been able to explain clearly what would occur if it was not possible for the affected State to make a decision, in other words what the consequences for the protection of persons would be.

159. **Mr. MacLeod** (United Kingdom) noted, with regard to chapter XIV (Other decisions and conclusions of the Commission), that the Commission had decided to include the topic "Crimes against humanity" in its programme of work. Given that there was no current general multilateral framework governing crimes against humanity, there might be some benefit in investigating how an "extradite or prosecute" regime in respect of such crimes would operate.

160. His delegation welcomed the careful consideration that the Special Rapporteur had given to the interrelationship between the Commission's work on the topic and the Rome Statute, which already provided for the international prosecution of crimes against humanity. It was important that the work of the International Criminal Court in that area should not be affected, while recognizing that prosecutions before the Court should be complementary to the exercise of national jurisdiction. His delegation would not welcome the expansion of the scope of that investigation into issues such as civil jurisdiction and immunity.

161. On the topic "Expulsion of aliens", the United Kingdom welcomed the Commission's

acknowledgement that certain elements of the draft articles reflected proposed progressive development of the law and not the law as it currently stood. His delegation had concerns, however, about a number of issues. With regard to draft article 10 (Prohibition of disguised expulsion), it should be borne in mind that illegal migrant activity represented a growing challenge, and States must be able to respond credibly and flexibly. Using alternative enforcement methods to bring pressure to bear on those abusing immigration controls was key to tackling illegal migration. Draft article 10 was too broadly crafted and, if adopted, would potentially restrict legitimate alternative approaches to enforcement.

162. Regarding draft article 14 (Prohibition of discrimination), the United Kingdom supported the objective of eliminating unlawful discrimination, but was concerned that the blanket approach adopted would prevent States from responding legitimately to specific threats to the integrity of domestic borders and immigration systems.

163. Draft article 19 (Detention of an alien for the purpose of expulsion) specified that migrants should be detained separately from prisoners serving criminal sentences. Such a provision would hamper a State's effective management and control of illegal migrants who were a threat to the safety and well-being of other detainees. Moreover, the proposed prohibition on "detention of excessive duration" was unacceptably vague, particularly when compared with more specific obligations, such as that in article 5 of the European Convention on Human Rights.

164. The United Kingdom was increasingly seeing threats to its national security and activity to undermine the integrity of its borders, and it must be permitted to take measures in domestic legislation to ensure that it was able to protect its domestic population. More than ever, the world's population was moving between States, meaning that the latter must be able to manage migration for their benefit and secure their borders against those who would seek to undermine effective immigration control. Migrants were expected to comply with the laws of host States. If they did not, then the host State should be able to take appropriate, reasonable measures to promote compliance.

165. The United Kingdom's position had always been that the Commission should conclude its work on the

topic and should take it no further. His delegation continued to believe that the expulsion of aliens was not an area suitable for a convention: it did not accept that the draft articles reflected customary international law, and it did not agree with those draft articles which claimed to represent the progressive development of international law.

166. His delegation was in broad agreement with the substance of the draft articles on the topic "Protection of persons in the event of disasters". In particular, it supported draft article 14, paragraph 2, which provided that the consent of affected States to external humanitarian assistance should not be arbitrarily withheld. In the context of armed conflict, such a refusal could amount to a breach of international humanitarian law. On the form of the eventual product of the Commission's work, his delegation believed that guidelines to inform good practice, rather than a legally binding instrument, would be helpful for States.

167. **Mr. Fixson** (Germany) noted that "Expulsion of aliens" had been a sensitive and difficult topic since its inception. The latest revision of the draft articles in the light of comments and observations by States had been very beneficial. Of particular value were the repeated clarifications in the commentary that substantive parts of the draft articles constituted progressive development rather than codification of existing law.

168. Some members of the Commission had raised doubts as to whether the topic lent itself to incorporation into a convention. Those doubts merited attention. Although substantive progress had been made on the subject, it was still too early to consider the elaboration of a convention on the basis of the draft articles.

169. His delegation welcomed the adoption on first reading of the set of 21 draft articles on the topic "Protection of persons in the event of disasters". The approach to the concept of sovereignty set out in draft articles 12 to 15 was highly pertinent. In particular, Germany shared the perception that sovereignty entailed the duty of the affected State to ensure, within its jurisdiction, the protection of persons and the provision of disaster relief. It also concurred that, although the consent of the affected State must not be withheld arbitrarily, it was nevertheless an indispensable requirement for any provision of external assistance.

170. He welcomed the new draft article 18 (Protection of relief personnel, equipment and goods), since such protection was crucial to allow States and other actors to provide humanitarian assistance efficiently. All in all, the draft articles contained good recommendations supporting international practice and domestic legislation for the establishment of effective national systems of disaster prevention, mitigation, preparedness and response. Germany would continue to follow the project with great interest.

171. **Mr. Kingston** (Ireland), referring to the topic “Expulsion of Aliens”, said that, although the draft articles in many instances provided useful guidance to States, Ireland did not favour using them as the basis from which to elaborate a convention.

172. With respect to the topic “Protection of persons in the event of disasters”, his delegation was pleased that the draft articles had sought to balance both the sovereignty of the affected State with the need for international cooperation and a rights-based with a needs-based approach. It supported the adopted formulation, which emphasized the importance of a response which adequately and effectively met the needs of the persons affected in a manner that fully respected their rights.

173. His delegation welcomed the clarification in paragraph (3) of the commentary to draft article 1 that the scope *ratione personae* of the draft articles was limited to natural persons. It noted that the commentary confirmed that the draft articles were not limited, *ratione loci*, to activities in the arena of the disaster, but also covered those within assisting States and transit States. It would be useful for the draft articles to contain a provision dealing specifically with transit States. His delegation continued to believe that the commentary to draft article 1 would benefit from a brief explanation of the term “society” as used in the qualifier phrase “serious disruption of the functioning of society”.

174. His delegation welcomed the definitions provided in draft article 4 and, in particular, the extension of the definition of “affected State” to include the State under the jurisdiction or control of which persons, property or the environment were affected by a disaster. The explanation in the commentary as to the relationship between that definition and draft article 12, paragraph 1, was particularly useful.

175. His delegation had no difficulty with the general reference in draft article 8 to a duty to cooperate “as appropriate”, on the understanding that that was not intended to go beyond the concept as established in customary international law. That limitation could be made more explicit in the commentary to the draft article. Given the central role of the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, his delegation welcomed the reference to them in draft article 8.

176. On draft article 21, his delegation maintained its preference for a “without prejudice” clause in respect of the relationship to international humanitarian law.

177. With regard to other decisions and conclusions of the Commission (chapter XIV), he took note that the topic “Crimes against humanity” had been added to the Commission’s programme of work. He shared the concern expressed by other delegations that there was a lacuna in the area of operational tools in relation to the prosecution of international atrocity crimes and for that reason supported the international initiative to elaborate a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes. Such an instrument would facilitate the domestic prosecution of those crimes; in his delegation’s view, the Commission’s work on the topic of crimes against humanity should not detract from that initiative.

178. Ireland welcomed the decision to include *jus cogens* in the Commission’s long-term programme of work. It was timely for the Commission to continue its tradition of engaging with and promoting acceptance of *jus cogens* through a comprehensive examination of the concept as a topic in and of itself. His delegation endorsed the list of identified issues, which should provide an appropriate framework from which to proceed. The Commission’s work would help to elucidate what was — and, equally important, what was not — encompassed within the concept of *jus cogens*. It would be premature at the current stage to take a view on the future outcome of the Commission’s consideration of the topic.

179. The Working Group on the Long-Term Programme of Work was to be commended for its initiative in launching a systematic review of the Commission’s work and a consideration of the 1996 illustrative general scheme of topics. His delegation

looked forward to receiving the Secretariat's survey by the end of the quinquennium.

*The meeting rose at 1 p.m.*