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Summary record of the 20th meeting
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Chairman: Mr. Hamaneh (Vice-Chairman) . . . . . (Islamic Republic of Iran)
later: Mr. Benmehidi (Chairman) . . . . . (Algeria)

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In the absence of Mr. Benmehidi, Mr. Hamaneh (Islamic Republic of Iran), Vice-Chairman, took the Chair.

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

Agenda item 81: Report of the International Law Commission on the work of its sixty-first session (*continued*) (A/64/10 and A/64/283)

1. **Mr. Pellet** (Special Rapporteur) said he was somewhat discouraged that only a limited number of delegations had expressed their views on the topic of reservations to treaties, given the many hours of arduous work that the Special Rapporteur, the International Law Commission and the Drafting Committee had devoted to the task of fine-tuning the draft guidelines. He reassured those delegations that had expressed their concerns that he had taken into account the comments made in the Sixth Committee. Those comments could not have specific effect, however, until the second reading took place.

2. A number of delegations had seemed concerned that the Commission had decided to draft guidelines not only on the definition of interpretative declarations, but also on their legal regime. In the lengthy debate on reservations, it had been understood that the Guide to Practice would concern both reservations and interpretative declarations. Throughout its consideration of the subject, the Commission had emphasized that the absence of provisions on interpretative declarations in the 1969 and 1986 Vienna Conventions on the Law of Treaties was one of the most serious shortcomings in the law of treaties. That point had been addressed by special rapporteurs, by the Commission and by numerous speakers within the Sixth Committee itself. He did not think it would be appropriate to reverse course and avoid displaying any interest in interpretative declarations. Reservations and interpretative declarations posed very different legal problems; it might therefore be preferable, during the second reading or perhaps in the final preparatory work for the first reading, to regroup the draft guidelines concerning interpretative declarations into a specific section of the Guide to Practice.

3. A number of delegations had said that conditional interpretative declarations were subject to different rules than those that applied to reservations. The Commission had decided to leave the question pending until 2010, after the conclusion of its study of the effects of reservations. In general, however, the Commission members, including the Special Rapporteur, had been in favour of aligning the regime of conditional interpretative declarations with the regime of reservations. In the light of the divergent views that had been expressed on the subject, the issue should be reconsidered in order to allow the Sixth Committee to put forward a definitive position to the Commission in 2010.

4. He was surprised by the position taken by the delegation of the United Kingdom with regard to the term “permissibility”. Where the French text used the term *validité substantielle*, it had in fact been the United Kingdom delegation which had insisted, some 12 years earlier, that the term “permissibility” should be used. The delegation now appeared to be reviewing the choice of English terms. The English speakers needed to reach a decision on the matter.

5. A number of delegations had complained about the excessively broad scope of the Guide to Practice and the large number of draft guidelines. The topic was highly complex and had to be developed in considerable detail. It was contradictory to complain about the excessive number of guidelines while at the same time criticizing the guidelines because they were not detailed or specific enough. The purpose of the Guide to Practice was to provide answers for every issue that had arisen or that might arise. Consideration might be given to improving the presentation of the Guide to make it more user-friendly. He would appreciate suggestions in that regard.

6. He was confident that, if the Commission was able to examine at its sixty-second session all of the draft guidelines that he had submitted, as well as those that he would be submitting in his next report, the first reading of the Guide to Practice could be concluded in 2010. His next report would address, among other questions, that of reservations to treaties in the context of the succession of States. Contrary to what had been said by one delegation, it had always been understood that the matter of succession would be included in the Guide to Practice. He hoped that the second reading could be concluded in one year instead of two, so that the Commission could finish its work on the topic before the end of the current quinquennium and thus allow him to leave the Commission with the sense of having accomplished his duty.

7. **Ms. Kaukoranta** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said, with reference to the topic of protection of persons in the event of disasters, that the Nordic delegations endorsed the language of draft articles 1 (Scope) and 3 (Definition of disaster) as provisionally adopted by the Drafting Committee (A/CN.4/L.758). They agreed that a strict distinction between natural and man-made disasters would not be reasonable from the point of view of the affected individual; such a distinction could be artificial and difficult to make in practice in view of the complex interaction of different causes leading to disasters. A holistic approach was warranted.

8. The Nordic delegations also agreed that situations of armed conflict should be excluded from the scope by way of reference to the rules of international humanitarian law in draft article 4 as provisionally adopted by the Drafting Committee. That approach would avoid the difficulty of differentiating between armed conflicts and other types of disasters, while also safeguarding the integrity of the rules of international humanitarian law as *lex specialis* applicable in situations of armed conflict. Although the Nordic delegations appreciated the validity of a rights-based approach to the topic, they could also support the wording of draft article 2 as provisionally adopted by the Drafting Committee, which took into account not only the rights but also the needs of the affected persons.

9. It was appropriate to examine the rights and obligations of the affected State or States and of other relevant actors in addition to the rights and needs of the victims. The starting point for discussion should be the principles of solidarity and cooperation. The affected State had primary responsibility for the protection of persons on its territory or subject to its jurisdiction during a disaster. However, effective international cooperation among nations, international organizations and individuals was also essential.

10. The duty to cooperate was correctly reflected in draft article 5 as provisionally adopted by the Drafting Committee. If, in the event of disaster, the territorial State was unable to protect individuals under its jurisdiction or to ensure the availability of essential goods and services, it had a duty to cooperate with other States and organizations willing and able to provide the required assistance. International organizations such as the United Nations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross were important partners in such cooperation. A number of other core principles of international law, such as humanity, neutrality, impartiality, sovereignty and non-intervention, were also relevant and should be addressed in the further development of the topic. The Nordic delegations wished to encourage the Special Rapporteur to focus his further work, as he had proposed, on the operational aspects of disaster relief and assistance.

11. **Mr. Hafner** (Austria), referring to the topic of protection of persons in the event of disasters, said that the rights-based approach, combined with the needs-based approach, was appropriate for dealing with the matter of providing remedies for individuals who suffered as a result of disasters. However, those approaches would not cover all the problems arising in such situations; issues of State-to-State relations would also have to be addressed.

12. Draft article 1 as proposed by the Special Rapporteur dealt with two separate issues. It would therefore be useful to divide it into two separate provisions, as proposed, one dealing with scope *stricto sensu*, the other with the objective of the legal regime to be created.

13. The definition of "disasters" should not encompass armed conflicts for the purpose of the draft articles. Nevertheless, difficulties could occur in defining armed conflict, although the 1977 Protocols Additional to the Geneva Conventions of 1949 provided a good starting point. However, those instruments did not address conflicts below a certain threshold of non-international armed conflicts as defined in Protocol II. If a situation of conflict became aggravated without reaching that threshold, the question could arise as to whether it was to be classified as an armed conflict or a man-made disaster. For the time being, it seemed wiser not to distinguish between man-made and natural disasters in view of the difficulty of determining causation in the event of disasters. However, the need for such a distinction could arise in connection with the possible obligations resulting from unlawful acts that caused disasters. At a later stage of its work the Commission could decide whether it was necessary to distinguish between man-made and natural disasters.

14. The definition of disasters in draft article 2 as proposed by the Special Rapporteur included three

elements, namely, “serious disruption of the functioning of society, excluding armed conflict”; “significant, widespread human, material or environmental loss”; and the link of causation. Although that definition was largely based on the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998, the first element, the disruption of the functioning of society, might not be appropriate. A society might furnish the best proof of its functioning in a disaster situation if appropriate relief measures were taken in accordance with well-prepared emergency plans. In that case the situation would not be covered by the definition because there was no dysfunction of society.

15. It was also questionable whether an earthquake, an avalanche, a flood or a tsunami as such always met the threshold of a “serious disruption of society”. If the current definition was taken literally, situations as frequent as those mentioned might not be classified as disasters for the purposes of the draft articles. It would therefore be worthwhile to review the definition of disasters so as to include all disasters, even if they did not seriously disrupt the society of an entire State. It would perhaps be better to speak of a “situation of great distress”, as in article I of the International Charter on Space and Major Disasters of October 2000. Another possibility would be to refer to “a sudden event” resulting in significant, widespread human, material or environmental loss, borrowing the term from the Agreement Establishing the Caribbean Disaster Emergency Response Agency.

16. As to the second element, his delegation shared the view that not only human loss, but also material and environmental losses should be encompassed by the legal regime. The Commission should also discuss whether the different types of effects of disasters could imply different types of obligations. A further problem was the element of causation. It was not clear why the Special Rapporteur had said that his definition omitted any requirement of causation, as his proposed draft article 2 referred to a serious disruption “causing” various losses. Causation formed an element of the definition, serving as a criterion to determine which situations fell within that definition, and therefore required particular attention. In any case, the proposed definition permitted the conclusion that disasters with a transboundary effect as well as those without such an effect were comprised by the draft articles, and his delegation endorsed that approach.

17. As to the duty to cooperate, the Special Rapporteur’s proposed draft article 3 was too general to permit evaluation. It was true that various actors were involved in disaster situations, ranging from States and international organizations to non-State actors. Since the legal meaning of the term “civil society” was difficult to ascertain, the term should be replaced by “non-State actors”. Moreover, before a duty to cooperate could be formulated, it was necessary to define the general structure of the legal regime of disaster relief. In particular, the relationship between the obligation of the affected State to protect its population and the possible duty of other States to provide assistance should be determined. A duty to cooperate and the extent of such a duty depended to a large extent on the transboundary effect of a disaster and the relief capacity of the affected State. Undesired implications, including a duty to accept assistance from other States even in situations where the affected State was capable of providing sufficient protection, could be avoided by formulating a general structure first. Such a structure should then provide the basis on which a general obligation could be founded.

18. *Mr. Benmehidi (Algeria) took the Chair.*

19. **Mr. Al-Otaibi** (Saudi Arabia), speaking on the topic of shared natural resources, said that he wished to draw attention to the comments and observations of his Government, contained in document A/CN.4/595, on the draft articles on the law of transboundary aquifers. As stated in those comments, the draft articles did not address the banning of directional, slant and horizontal drilling in aquifers and took no account of differences in the area, extent, thickness and other characteristics of an aquifer, direction of groundwater flow or differences in population from one country to the next. They also failed to mention the use of pollutants and their impact on aquifers or aquifer systems, nor did they adequately cover the issue of hidden groundwater resources, which posed a hazard owing to lack of accurate data and information and the large number of subsurface geological structures that could impede groundwater flow.

20. The draft articles should additionally make the important distinction between dry desert areas where rainfall was scarce and areas rich in groundwater. The use of transboundary groundwater for such purposes as the supply of drinking water in desert areas should also be prioritized and a mechanism established for the exchange of information on successful experiences in

transboundary aquifer management. Lastly, although the general concept underlying the draft articles included both aquifers and aquifer systems, certain articles, including article 6, paragraph 2, article 7, paragraph 1, and articles 8 and 9, mentioned only the former.

21. **Mr. Liu** Zhenmin (China) said that his delegation remained doubtful about the viability of a rights- or needs-based approach to the topic of protection of persons in the event of disasters. The approach was ambiguous in that the elements included in the concept of rights or needs were not clearly defined. It also failed to strike a balance between those two concepts and to address individual, collective and public-order interests in an integrated manner. Moreover, it implied that individuals were in a position to appeal for international disaster relief. In short, it not only lacked a legal basis in international law but might also contravene the principles of sovereignty and non-interference in internal affairs.

22. With regard to the scope of the topic *ratione materiae* the main focus of study should be the rights and obligations between States; *ratione personae* the subject of study should be States; and *ratione temporis* study should begin with the disaster response and post-disaster reconstruction phases. The question of whether to address pre-disaster prevention could be decided at a later stage. His delegation also concurred with the Special Rapporteur's view that the concept of responsibility to protect did not apply to disaster relief.

23. Concerning the definition of disasters, it was not only difficult to draw a strict distinction between natural and man-made disasters but also unnecessary, given the need to focus on the protection of persons. The Commission should, however, take into consideration the differences between disasters of various types and should mainly focus on natural disasters that struck without warning and caused serious damage. The standard of exceeding local capacity and resources for disaster relief could also be included as a specific criterion in the interest of a flexible definition that took into account the varying capacities of States for disaster relief.

24. With regard to the duty to cooperate, the draft articles should first establish the legal principles of humanity, equity, neutrality, non-discrimination, sovereignty and non-interference in internal affairs. Solidarity and cooperation could then be included as moral values, provided that their inclusion could in no way be construed as an obligation on the part of disaster-affected States to accept relief or on the part of States providing relief to satisfy requests for assistance, since that depended on their capacity. The primary responsibility for the protection of persons in the event of disasters lay with the affected State, which should also organize and coordinate any international relief efforts, in consultation with the providers. Such relief should be provided subject to its consent and for humanitarian purposes only, with no political strings attached. Those elements should be more clearly articulated in the draft articles, with due regard for the varying development levels and capacities of States, which were key factors influencing the response and the efficient protection of persons in the event of disasters.

25. **Mr. Troncoso** (Chile) said that, in principle, expulsion of aliens was governed by domestic law; clearly, however, some of the issues involved did not lie exclusively within domestic jurisdiction and might be governed by international law, notably the human rights of persons who had been or were being expelled. The first draft article on human rights in the context of expulsion should establish the obligation of a State that had expelled or was in the process of expelling an alien to respect that person's human rights as recognized in the relevant international instruments. It should be added that the general rule was without prejudice to specific rights to be established in subsequent provisions for specified categories of persons.

26. One essential right to which the draft articles should refer was the right to life. Although the death penalty had not been universally abolished, it should be expressly stated that an alien condemned to death in another State might not be expelled unless that State had first provided sufficient guarantees that the death penalty would not be imposed in that case. It was also important to have a draft article prohibiting the expulsion of a person to a State in which there was a real risk that the person might be tortured or subjected to cruel, inhuman or degrading treatment. Moreover, it was appropriate to include a provision establishing the obligation not to discriminate with regard to expulsion on the grounds of race, colour, sex, age, language, religion or political or other opinion, and to expressly prohibit expulsion of aliens solely on a basis that was discriminatory vis-à-vis other aliens. His delegation also supported inclusion of a provision that the expelling State must take into account the alien's

family ties with persons resident in that State as well as prolonged residence in the State. Lastly, provisions could be included concerning the protection, in the event of expulsion, of the rights of the most vulnerable persons, such as children, older persons, persons with disabilities and pregnant women. The principle of the best interests of the child, found in other international instruments, should be reaffirmed in the context of expulsion.

27. With regard to the topic of protection of persons in the event of disasters, the Special Rapporteur had not only done much valuable research on existing legal instruments and case law, but had wisely contacted representatives of international governmental and non-governmental organizations involved in dealing with disasters, so that his reports and draft articles reflected current practice and responded to social needs.

28. As regards scope, the Chilean delegation agreed that draft article 1 should simply state that the draft articles applied to the protection of persons in the event of disasters, leaving it to draft article 2 to indicate the purpose of the draft articles. A rights-based approach should take into consideration all rights — civil and political as well as economic and social — and should mention rights relevant to particular groups of persons, such as refugees, persons with disabilities and minorities, who were most vulnerable when disasters occurred. It was also important to specify that protection should be provided to persons in all phases of a disaster: the preventive or preparatory phase, the disaster proper and the post-disaster phase, the latter being the most important.

29. The definition of disaster in draft article 2 as proposed by the Special Rapporteur was appropriate. It was not advisable or necessary in the definition to distinguish between natural and man-made disasters. However, his delegation did not agree on the exclusion of situations of armed conflict. True, the special rules on armed conflict constituting international humanitarian law should prevail over other rules. However, the 1949 Geneva Conventions and Additional Protocols thereto did not cover some aspects of disasters that could occur during or as a result of armed conflict, and it was precisely those aspects that the draft articles should cover, in particular in the post-disaster phase. Rather than excluding armed conflicts, the draft articles should state that they were without prejudice to the preferential application of the relevant norms of international humanitarian law in the event of armed conflict.

30. The Special Rapporteur had rightly identified the duty to cooperate as a fundamental principle of international law, enshrined in a number of instruments, including the Charter of the United Nations. Nevertheless, the commentary should clarify that the duty to cooperate was to be fulfilled within the framework of respect for international law, and that it was to be performed by States cooperating among themselves and, as appropriate, with competent international organizations, in particular the United Nations, and with international non-governmental organizations, a term more precise than the term “civil society” used by the Special Rapporteur in his draft article 3. In addition to the non-governmental organizations mentioned by the Special Rapporteur, reference should also be made to the International Committee of the Red Cross.

31. On the topic of shared natural resources, the Commission had been wise to defer work on the matter of transboundary oil and gas resources until it received responses from Governments to its questionnaire. The subject was so important that any attempt at codification and progressive development would have limited usefulness without support from the majority of States.

32. The Commission’s consideration of the obligation to extradite or prosecute (*aut dedere aut judicare*) could make an important contribution to efforts to combat impunity for serious crimes. The framework proposed by the Working Group on the topic covered practically all the issues and problems involved and provided excellent guidance to the Special Rapporteur.

33. The topic of the immunity of State officials from foreign criminal jurisdiction was a highly important one for the Commission to address. Few conventions referred explicitly to the immunity from foreign criminal jurisdiction of heads of State and Government and ministers for foreign affairs, and there was relevant international case law on the matter, even though it was embryonic. It was regrettable that the Commission had not been able to consider the topic at its most recent session.

34. His delegation noted that the Commission was preparing to consider two topics — the most-favoured-nation clause and treaties over time — with the goal of producing, not draft articles according to its usual methodology, but studies, specifically, eight papers on the most-favoured-nation clause and a “repertory of

practice" on treaties over time. Since the topics were important and the ability of the members of the Study Group was unquestioned, the result would undoubtedly be very valuable from an academic standpoint. But if the Commission considered that it could make an effective contribution to international law on those topics, it should take them up in the usual way with a view to codification and progressive development of the law and leave it to the Secretariat to continue the relevant studies.

35. When the Planning Group came to consider the methods of work of the Commission at the Commission's next session, it might be advisable to analyse the value, nature and advisability of such studies and their relationship to the tasks of codification and progressive development of international law. His delegation was also concerned about the heavy workload facing the Commission in the immediate future. The Planning Group might consider measures to permit greater progress in the consideration of certain topics experiencing delays or slow progress, such as the expulsion of aliens, the obligation to extradite or prosecute and the immunity of State officials from foreign criminal jurisdiction, all topics on which his Government was convinced that the Commission could make an effective contribution.

36. **Mr. Retzlaff** (Germany) said, with reference to the topic of shared natural resources, that the draft articles adopted on the law of transboundary aquifers would serve as an important guide for the prevention of future conflicts over groundwater and also promote improved use of that crucial resource. Germany fulfilled the requirements outlined in the draft articles in that it was bound by the European Union Water Framework Directive and its complementary Groundwater Directive. Water resources, including transboundary water resources, were managed on the basis of river basin districts.

37. On the subject of shared oil and gas resources, his delegation wished to reiterate the need for the cautious approach already advocated by his country, where such resources were essentially too limited to warrant global regulation. All related issues were instead appropriately and satisfactorily addressed through bilateral arrangements with such neighbouring countries as Poland and the Netherlands. European legislation on transboundary energy resources was non-existent.

38. **Mr. Clarke** (United Kingdom) said that, in addressing the topic of protection of persons in the event of disasters, it was vital to avoid any duplication of the valuable work undertaken in that same area by the International Federation of Red Cross and Red Crescent Societies (IFRC). Although other actors had a role to play, work on the topic should focus primarily on States and proceed from the basis that a right to humanitarian assistance did not imply a right to impose assistance on a State that did not want it. A needs-based approach was also preferable to a rights-based approach and would have the added benefit of consistency with the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.

39. His delegation agreed with the suggestion that a draft article on objectives should be prepared, and for that purpose the words "adequate and effective" in draft article 1 as proposed by the Special Rapporteur should be replaced by "timely and effective". It might also be helpful to revise the terminology relating to the "protection" of persons to refer instead to assistance and relief. Consideration of the stages of disasters to be included in the topic would be a welcome step, as would work on the definition of disaster, which was currently very broad and should take into account existing definitions. Further work was also needed on delimitation of the topic, including avoidance of overlap with the responsibility to protect (perhaps by excluding it from the definition) and clarification of consular assistance as a separate area.

40. Since, on completion of the text, it would be necessary to revisit the issues covered in the draft articles proposed by the Special Rapporteur, all three should be considered in greater detail once the Commission had a better idea of the future scope and direction of its work on the topic. On that score, his delegation believed that the development of non-binding guidelines or a framework of principles for States and others engaged in disaster relief was likely to be of more practical value and enjoy more widespread support than the codification or progressive development of comprehensive and detailed rules.

41. On the topic of shared natural resources, he would like to recall his delegation's previously expressed doubts on the usefulness of codifying or developing draft articles or guidelines relating to shared oil and gas resources. In common with other States, the United Kingdom's experience of agreements

in that area was that they were largely negotiated on the basis of practical and technical considerations, which inevitably differed in accordance with the specificities of each case. His Government therefore believed that the Commission's efforts would be more profitably directed towards projects that were liable to yield genuinely useful results for States. It was nevertheless willing to answer the Commission's questionnaire on oil and gas.

42. **Mr. Dufek** (Czech Republic), commenting on the topic of protection of persons in the event of disasters, said that his delegation agreed with the choice of a rights-based approach, supported by a needs-based approach, in the five draft articles provisionally adopted by the Drafting Committee (A/CN.4/L.758). In draft article 5 (Duty to cooperate), however, the primary responsibility of States should be underlined and a distinction made between the duty to cooperate with the United Nations as opposed to other organizations. Moreover, it was necessary to differentiate between the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, since the former operated largely on the basis of international humanitarian law, which was apparently excluded under draft article 4.

43. His delegation welcomed the exclusion of responsibility to protect from the scope of the topic and looked forward to new draft articles on other relevant principles and on access to humanitarian aid in the event of disasters. The draft articles should ultimately take the form of non-binding guidelines supplementing existing documents on humanitarian assistance.

44. With regard to the topic of shared natural resources, his Government had completed the questionnaire on oil and gas and encouraged others to provide similar information in order to assist the Commission in deciding whether to continue its work in that area. Although the development of universal rules was unnecessary, the Commission could nevertheless elaborate indications useful to States when negotiating bilateral agreements on shared transboundary oil and gas reserves. It might also produce a summary of State practice, including agreements and arrangements with national oil and gas companies. It should, however, avoid tackling questions of maritime delimitation, which were better addressed in the light of the United Nations Convention on the Law of the Sea by the States concerned and/or by competent judicial bodies, including the International Court of Justice.

45. **Ms. Tezikova** (Russian Federation) said that her delegation generally supported the draft articles as provisionally adopted by the Drafting Committee on the protection of persons in the event of disasters. Draft article 2 (Purpose) in its current wording represented a good compromise between the rights-based and the needs-based approaches; both approaches were relevant, and there was no contradiction between them. The Commission was wise not to focus on particular categories of rights but to refer to human rights in general. Her delegation supported the Special Rapporteur's plan to consider first the rights and obligations of States vis-à-vis each other and to leave the question of rights and obligations of States vis-à-vis affected persons to a later stage.

46. With regard to the scope of the draft articles *ratione materiae*, the decision not to make a distinction between natural and man-made disasters was sound. However, the use of the term "effective" modifying "response to disaster" in draft article 2 should not be taken as a criterion implying that an affected State was obligated to accept assistance from other actors in the international community. As to the scope *ratione temporis*, her delegation wished to underscore the importance of the expression "in all phases of a disaster" in draft article 1, as proposed by the Special Rapporteur, which would allow the Commission to address the important phase of disaster prevention. The Commission's task was to address the legal relations arising at that stage between States and between a State and its population. With respect to the scope *ratione personae*, her delegation agreed with the Special Rapporteur that the Commission should focus primarily on the role of States in protecting persons in the event of disasters and postpone consideration of the role of non-State actors to a later stage. In addition, it supported the Commission's decision that the concept of responsibility to protect should not extend to protection of persons in the event of disasters .

47. The definition of "disaster" in draft article 3 as provisionally adopted by the Drafting Committee was balanced and acceptable as a starting point. The definition recognized that a disaster could involve either a single event or a complex series of events, and it stressed the consequences rather than the causes of a disaster. Draft article 4 took into account the opinions

expressed by a number of States, including the Russian Federation, that armed conflict should be excluded from the scope of the draft articles. Draft article 5 was generally appropriate. However, it would be advisable to consider it in depth only after draft articles regarding other principles (aside from the duty to cooperate) had been elaborated and to take into account the results of the deliberations on the role of non-State actors.

48. **Ms. Escobar Hernández** (Spain) said that, in general terms, her delegation endorsed the pragmatic approach adopted by the Special Rapporteur in his second report, in particular with regard to excluding armed conflict from the topic, limiting the scope of the study to the rights and obligations of States and excluding the phase of prevention. Moreover, in defining the scope of his study, the Special Rapporteur had explicitly acknowledged the limits of the responsibility to protect defined by the Secretary-General in his report on implementing the responsibility to protect (A/63/677). Her delegation also agreed with the Special Rapporteur's pragmatic approach to the scope of his future work, including an analysis of the operational aspects of disaster relief and assistance.

49. The rights-based approach was a valid one, and it had been enhanced by the inclusion of the needs dimension, without which it was impossible to provide a holistic response to the protection of persons in the event of disasters. Her delegation also supported the Special Rapporteur's plan to consider the question of the protection of persons in the event of disasters from two different standpoints: that of relations between States and that of relations between States and persons in need of protection. Although the Commission should focus initially on the first aspect, the second aspect was equally important and was essential in order to ensure full treatment of the subject.

50. Her delegation had reservations about the reference in the Special Rapporteur's report to solidarity as "an international legal principle" (A/C.6/615, para. 54). Clearly, solidarity was a political and social value that could inspire international relations. It was an emerging concept on which any system for the protection of persons in the event of disasters should eventually be built. However, it had not attained the status of a legal principle. That conclusion could be derived, in fact, from the Special Rapporteur's discussion of the difference in the treatment accorded in international texts to the concept of international solidarity and the concept of international cooperation.

51. Further thought should be given to the use of the term "civil society" to refer to one category of actors with which a State should cooperate to ensure the protection of persons in the event of disasters. Although the term was familiar in a sociological context, it was too broad and vague to be used a legal context. It would be preferable to use terminology that could be more clearly identified with organizational categories that were already well established in both international and domestic law.

The meeting was suspended at 11.45 a.m. to enable the Committee to continue its interactive dialogue with members of the International Law Commission and resumed at noon.

Statement by the President of the International Court of Justice

52. **The Chairman**, welcoming the President of the International Court of Justice, said that members of the Committee were keen observers of the activities of the Court, the principal judicial organ of the United Nations. President Owada had at one time served on the Committee, which was pleased to welcome him back in his new capacity.

53. **Mr. Owada** (President of the International Court of Justice) said that the Court greatly appreciated the annual opportunity to strengthen ties to the Legal Committee of the General Assembly through an exchange of views. Rather than rehearsing the detailed information on the activities for the period 1 August 2008 to 31 July 2009 contained in the report of the International Court of Justice (A/64/4) and presented at length to the General Assembly (A/64/PV.30), he would like to discuss more informally with the Committee three salient issues relating to the future work of the Court, which had a bearing on the question of whether the Court was adequately equipped, legally and institutionally, to be able to fulfil the expectations of the international community.

54. The first issue involved the implications of the expansion in the Court's caseload. The steady increase in the number of cases brought before the Court by States from all continents and the widening range of issues that the Court had to deal with were, of course, satisfying to the Court and to the international community, since they were evidence of a steadily

mounting confidence on the part of Member States in the work of the Court and the growing conviction of the international community that the rule of law should prevail in the conduct of international relations. The change had been particularly significant over the past several years. The number of pending cases had increased exponentially from an average of three cases during the 1960s to over 20 cases each year during the past decade. The last five years had been among the most active in the history of the Court. The Court currently had 15 cases in its docket, none of which were similar in legal or factual terms.

55. However, the increase in cases meant a proportional increase in the number of judges ad hoc. Twenty-five judges ad hoc had been chosen by States parties during the period under review. The utilization of judges ad hoc had increased from an average of less than two each year throughout the 1970s to nearly 30 during the past decade. Each additional judge ad hoc must be provided with appropriate resources and materials on an equal footing with the permanent judges, and that naturally had budgetary implications: the expenditures for judges ad hoc had nearly doubled over the past three bienniums.

56. Moreover, the Court was also faced with the globalization of international relations and the internationalization of many issues through the proliferation of multilateral instruments in such areas as international human rights law, international humanitarian law, international criminal jurisdiction and environmental law. Even in classical areas of international law, in which the Court had long-established jurisprudence, such as the law on the delimitation of land and maritime boundaries, sovereign immunity, international responsibility of States and diplomatic protection, the sizeable change in the international environment had made the task of the Court in ascertaining the law much more complex. The docket reflected a pressing need on the part of States for the judicial settlement of legal disputes arising as a result of the rapid process of integration of the international community in spheres in which States had previously not tended to submit disagreements to international third-party adjudication.

57. A conspicuous example related to the emerging conception of the international community as a community of individuals. That paradigm was reflected in the increasing prominence of cases involving, not diplomatic protection per se, but specifically the rights of individuals, such as the *LaGrand (Germany v. United States of America)* and *Avena and Other Mexican Nationals (Mexico v. United States of America)* cases. Even more pertinent was the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, in which the Court had upheld the importance of the rule of law for the protection of individual rights of private persons as derived from international humanitarian and human rights law. A more recent case was the one concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, which had involved an alleged infringement of the rights of individuals. Another example was the 2007 judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, in which the Court had held that article I of the Convention imposed on States parties the obligation not to commit acts of genocide.

58. Environmental issues had also assumed a significant place in the Court's jurisprudence. The Court had just completed oral hearings and was at the stage of deliberations in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. It expected to take up another environmental issue soon in the case concerning *Aerial Herbicide Spraying (Ecuador v. Colombia)*.

59. A practical implication of these new developments was the need for an adequate support system, particularly in the form of research assistance and document services, to enable the Court to handle the increase in its workload and the widening range of subjects to be dealt with. The Court, of course, through its Rules Committee, was continually examining ways to rationalize its procedures. Nonetheless, there were limits to what could be achieved through internal rationalization; there was also a need for adequate external support, a view that appeared to be shared by many delegations in the General Assembly.

60. In that context, the Court had asked to have law clerks assigned to individual judges, as was the case in national supreme courts in many countries and in many international judicial institutions, such as the International Tribunal for the Law of the Sea, the International Tribunal for the Former Yugoslavia and the International Criminal Court. It had been suggested

that having a pool of associate legal officers available in the Department of Legal Matters of the Registry, rather than assigning them to individual judges, would be a more efficient way of utilizing resources, but that approach would not suit the way the Court worked. In arriving at a judgment, each individual judge was expected to form his or her own views separately and independently and to present them individually, orally and in writing in the form of notes. During the course of deliberations, the judges engaged in a collegial debate in order to arrive at a majority judgment, and the Statute of the Court allowed judges to write separate dissenting opinions. If the information, materials and issues a judge wished to pursue were researched by a pool of legal officers and the results were coordinated within the Department of Legal Matters, the process would tend to create an institutional filter before each judge had had the opportunity to develop his or her independent position and present it to the full membership of the Court. That was the difference between the formulation of a judgment by a court and of a policy position by the legal department of a Government; in a Government a unified view was essential, but in justice the independence of the judges guaranteed the fairness and impartiality of the judgment. Moreover, different judges might wish research to be focused on different issues. In summary, the Court continued to consider that making a dedicated law clerk available to each judge was the best way to ensure that the principal judicial organ of the United Nations reflected the independence and individuality of each judge.

61. Another fundamental issue that the Court must face in order to respond to contemporary challenges involved the jurisdictional basis of the cases brought before it. Historically, because third-party settlement of disputes had developed in the form of arbitration, the judicial settlement of disputes had also developed on the basis of consensual rather than compulsory jurisdiction. That weakness in the Court's jurisdiction did not meet the needs of the contemporary world, which sought to establish the rule of law in the international community. The historically created juridico-institutional framework was inadequate to address the socio-economic reality of the convergence of the international community as a global society.

62. The weakness in the Court's jurisdiction had originated with the establishment of the Permanent Court of International Justice in 1920. The debate at that time had ended in a compromise whereby the jurisdiction of the Permanent Court would be voluntary, but a State could declare its acceptance of the Court's compulsory jurisdiction under an optional clause. Efforts of the majority of States at the San Francisco Conference in 1945 to introduce compulsory jurisdiction in the regime of the International Court of Justice had failed owing to strong objections by some major countries, so that an optional clause had been maintained in the Statute of the International Court of Justice as well.

63. An interesting development was the increasing number of cases being brought before the Court based on compromissory clauses in multilateral conventions. Such clauses were a useful way of creating compulsory jurisdiction, although, of course, they were limited to the resolution of disputes concerning the application and interpretation of the instruments in question. The proportion of cases brought on the basis of a compromissory clause in a convention had increased from 15 per cent in the 1980s to more than 50 per cent in the past decade.

64. In contrast, only 66 States out of 192 had made declarations recognizing the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute. That represented a lower ratio of acceptance than in the case of the Permanent Court of International Justice (42 of the 58 States members of the League of Nations). Those figures explained why the decline of the optional clause had been lamented by scholars and practitioners — and by many delegations in the General Assembly.

65. The third issue involved the fragmentation of international law. Equality before the law was fundamental to the establishment of the rule of law in society. The proliferation of newly created international judicial or quasi-judicial bodies endowed with certain jurisdictional limits gave rise to a frequently expressed concern over the fragmentation of jurisprudence and the resulting potential for uncertainty in the law. In his own view, that risk was somewhat exaggerated, inasmuch as the divergence of views formulated in different forums was superficial and stemmed from differences in the objective aimed at and the legal methodology to be employed to that end.

66. The function of a judge in both domestic and international jurisdictions was to seek and achieve "justice". What justice was in a concrete case was not

necessarily obvious in the international context, especially for a judicial organ with general subject-matter jurisdiction such as the International Court of Justice. In that regard, the three sorts of difficulties encountered in rendering justice in international disputes were those of identifying justice in the context of the pluralism of values in international society; applying justice in the context of a tension between justice and stability in the delivery of international legal judgments; and characterizing justice in international relations in the context of the dichotomy between justice viewed in human terms and justice viewed in sovereign terms. Judged by that yardstick and on the basis of his own personal experience at the International Court of Justice, it was his conviction that the Court, with its general jurisdiction, was remarkably united in its collegial quest for and realization of justice in the concrete context of the cases before it. In that regard, it differed somewhat from the so-called functional international tribunals, which had an identified objective to pursue and thus were less likely to encounter the three difficulties mentioned above. Hence the impression was created that the Court pursued a different approach from the functional tribunals, but the differences were superficial.

67. A related aspect of fragmentation was the need to intensify the implicit dialogue among judges of different international judicial bodies. As a result of rapid globalization, a greater convergence in the juristic way of looking at the world was in fact under way among judges. Indeed, it was his impression that courts and tribunals operating in different fields were scrutinizing their respective decisions and arriving at a largely common understanding of the function of the law in such value-specific areas as human rights law, humanitarian law and environmental law to protect and promote the public interest of the world community.

68. In that setting, the International Court of Justice occupied a unique place as the principal judicial organ of the United Nations and the only universal international judicial body with general jurisdiction in matters of international law. It consequently sought to address the disputes brought before it within the overall framework of the general rule of international law. Its authority derived from comprehensive perspective of the uniformity of international law as the common law of the global community. Even in the absence of an artificially created hierarchy, the special respect afforded to the jurisprudence of the Court essentially lay in that rationale. In short, the Court could serve as the centre point of harmonized judicial institutions in the global community.

69. **Mr. Hafner** (Austria) asked whether the chamber system provided for under the Statute of the International Court of Justice might alleviate the mounting workload and budgetary constraints mentioned by the President. He wondered, however, why parties to the Statute had proved somewhat reluctant to avail themselves of that system.

70. **Mr. Owada** (President of the International Court of Justice) said that the workload issue would not be resolved by the chamber system in that the preparatory case work to be completed by the Registry of the Court would remain unaltered. On that score, the available time saving had already been maximized through the introduction of a system permitting work on cases to run in parallel under certain conditions. More importantly, however, the legitimacy and credibility of judgments delivered by the Court resided in their impartiality and fairness. Being representative of the major forms of civilization and principal legal systems of the world, the 15 judges of the Court approached their deliberations from a variety of historical and cultural perspectives. The view of the Court was that the consensus or quasi-consensus of the international legal community thus obtained would not come about if those judges were divided among chambers. It was for the parties to the Statute, however, to comment as to why they should choose not to make use of chambers.

71. **Mr. Khan** (Pakistan) asked whether the jurisdiction of the Court provided for in the case of a dispute under a bilateral agreement would continue to stand if one of the parties to the agreement had withdrawn its acceptance of the Court’s compulsory jurisdiction.

72. **Mr. Owada** (President of the International Court of Justice) responded that, in accordance with the jurisprudence of the Court, competing claims of jurisdiction in such cases were not regarded as mutually exclusive but parallel. In the event that an optional clause declaration was subsequently withdrawn by a party to a bilateral agreement, the jurisdiction of the Court could be invoked on the basis of the relevant compromissory clause. In more recent cases of overlapping jurisdiction, the established position of the Court was that the instruments

concerned were supplementary to each other. The Court could therefore exercise jurisdiction in the case of a dispute that fell within the scope of only one of those instruments.

73. **Mr. Liu** Zhenmin (China) remarked that, in the various aspects of its work, the Court traditionally relied upon information provided by the literature available in its two working languages of English and French, which could potentially influence its thinking. Perhaps the Court might consider diversifying that information by acquiring literature in other languages. Secondly, could the President clarify whether each judge had a special assistant or law clerk to facilitate his or her workload. If not, Member States should ensure that adequate support was provided for that purpose.

74. **Mr. Owada** (President of the International Court of Justice) said that language issues already posed working difficulties for the Court. Notes were prepared for judges on the basis of their first working language and translated into the second, while all oral discussions were simultaneously interpreted. A perennial problem, however, was the confusion that could sometimes arise in the event of an unavoidably imperfect translation or interpretation. The Court took great pride in ensuring the accuracy and concordance of its translated texts, which was a resource-intensive exercise, particularly in the case of judgments. It would therefore be nearly impossible, both financially and administratively, for the Court to expand its work into other languages.

75. He appreciated the support voiced by the Chinese Government, including in the General Assembly, in connection with facilitating the Court's workload. The Court now had eight junior legal officers at its disposal. Even that number, however, was insufficient to cope with the workload of 15 judges, each of which should ideally have his or her own clerk.

The meeting rose at 1 p.m.