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Chairman: Mr. Böhlke (Vice-Chairman). . . . . (Brazil)

Contents

09-58700 (E)

The meeting was called to order at 3.15 p.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. **Ms. Hlaing** (Myanmar) said that the Commission's work on the topic of protection of persons in the event of disasters was timely as natural disasters were occurring with increasing frequency in various parts of the world; her own country had suffered greatly from Cyclone Nargis in May 2008.

2. In discussing draft article 1 (Scope), the Commission should take into account the burden of work and other problems faced by the affected State and the victims both during and after a disaster. It would be preferable to take a needs-based rather than a rights-based approach to the topic in order to avoid undesirable consequences such as delays in the provision of assistance and authorization of forced humanitarian intervention. The principle of non-intervention in the internal affairs of States, enshrined in the Charter of the United Nations, should be fully respected.

3. As the Special Rapporteur had noted, cooperation among affected States, other States and regional and international organizations was essential; her Government had followed that approach in the wake of the cyclone. However, the affected State should have sole competence to decide whether to request or accept international assistance. The suggestion that it should be made compulsory for it to cooperate with any particular organization was counterproductive and should be avoided.

4. On the topic of shared natural resources, her delegation believed that the Commission should take into account the complexity and sensitivity of the issue of oil and gas located near boundaries. Where an offshore oil or gas deposit was situated beneath the seabed in an area under negotiation by States, it would be difficult to regard the deposit as a shared resource. The United Nations Convention on the Law of the Sea established the underlying principle and mechanism for maritime boundary delimitation, but it did not suggest that oil and gas deposits should be regulated as a shared natural resource. While State practice in that area varied, no one could deny that the State had the sovereign right to explore and exploit the natural resources, including oil and gas, that were located within its land and maritime territory. Many questions would arise if the Commission decided to consider that sensitive issue in the context of shared natural resources, and it would be premature for it to do so.

5. **Ms. Nguyen Thuy Hang** (Viet Nam) said that in light of the growing demand for natural resources for development, the codification of legal regimes on shared natural resources, including transboundary oil and gas, would contribute to the maintenance of peace and security and to the optimum use of such resources for the benefit of humankind. Her delegation supported codification based on the principles of equality and sustainable development, taking into account the particular conditions and needs of developing countries such as her own.

6. Owing to the great sensitivity of the issue of the supply, exploration and exploitation of transboundary oil and gas, her delegation supported the cautious approach taken by the Commission and was in favour of treating the subject of transboundary aquifers independently of any future work on oil and gas. In addition to the fundamental differences between the two types of resources, as seen from the fourth report of the Special Rapporteur (A/CN.4/580), the variety of State practice in the form of agreements or arrangements for the exploration and exploitation of transboundary oil and gas were an important source of information that would need to be taken into account.

7. In studying such agreements and arrangements, the Commission should distinguish between provisional instruments regulating the joint development of oil and gas resources in a disputed area pending final delimitation of the boundary in the disputed area, and instruments that dealt with the exploitation and management of oil and gas reserves that lay across an established boundary between States. While those two cases might have common legal principles designed to ensure equality of benefits, good neighbourliness and cooperation, they required different legal rules concerning the delimitation or management of the boundary in question. Her own Government was a party to both types of agreements and stood ready to share its experience with the Commission.

8. **Mr. Delgado Sánchez** (Cuba) said that his Government had replied to the Commission's questionnaire on State practice regarding oil and gas on 2 April 2009. Owing to their scarcity, natural resources, and particularly oil and gas, were of great importance to humankind. The major Powers' attempt

to control those resources gave rise to armed conflicts and posed a constant threat to international peace and security. Discussion of the issue should be based on respect for the sovereignty of States with regard to the use and exploitation of transboundary resources located in their territory, as established in General Assembly resolution 1803 (XVII) of 14 December 1962 ("Permanent sovereignty over natural resources"), and on the principle of cooperation on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith with a view to the equitable and reasonable use and appropriate protection of all natural resources.

9. His delegation welcomed the Commission's work on the topic of protection of persons in the event of disasters; such disasters had become more destructive in recent years and had caused untold loss of life and harm to the economies of affected countries. Careful study of the relationship between protection and the principles of sovereignty and non-intervention was needed in order to ensure that affected States preserved their sovereign right to decide how to respond to a natural disaster.

10. The complex and recent concept of the "responsibility to protect", on which there was a lack of consensus, required further discussion by all Member States. In matters relating to protection of the victims of natural disasters, the principle of respect for the sovereignty and self-determination of States must prevail. Cuba was under constant threat from hurricanes and other climatic phenomena detrimental to its economy. However, its civil defence system and the firm will of its Government to preserve the nation's assets, and particularly the lives of its people, had minimized losses during such disasters.

11. Concerning the topic of reservations to treaties, his delegation considered that the guide to practice would be useful in informing States and international organizations of existing provisions. However, the draft guidelines should complement and in no way modify the regime established in the 1969 Vienna Convention; instead, they should identify the differences among the various legal institutions regulated by that instrument. Despite the similarities between reservations to international treaties and interpretative declarations, they represented two different legal concepts that were established in international standards, doctrine and jurisprudence. There was insufficient clarity on two issues: acceptance of an impermissible reservation to which no State had objected, and the relationship between reservations and interpretative declarations that could be viewed as reservations. Further study of those matters by the Commission was required.

12. The expulsion of aliens was a topic which raised complex legal issues and for which it would be extremely difficult to establish customary law standards that took into account the tendency of States to recognize dual or multiple nationality. The draft articles should reflect the diversity of States' domestic law in that area and, to that end, greater interaction between the Commission and Member States was needed.

13. **Mr. Niyomrerks** (Thailand) said that the topic of protection of persons in the event of disasters was of interest to his delegation because South-East Asia had experienced a series of natural disasters that had killed or displaced many people, and caused extensive property damage. A well-defined legal framework for the timely, effective provision of relief and rehabilitation and for cooperation among States was needed.

14. Concerning draft article 1 (Scope), his delegation endorsed the rights-based approach which placed the individual at the centre of relief efforts. In reality, however, there was no dichotomy between the rights- and needs-based approaches since, while the victims' physical safety and basic needs were relevant, the State also had an obligation to ensure the exercise of their economic, social and cultural rights.

15. The definition of "disaster" proposed in draft article 2, which excluded armed conflict in order to preserve the *lex specialis* of international humanitarian law, was adequate. In any event, the primary objective of the topic required a focus on the actual consequences that affected individuals, regardless of whether the disaster was natural or man-made.

16. With regard to draft article 3, affected States had the primary responsibility for the protection of their population in the event of a disaster. However, the State should consider seeking the cooperation of other States and competent international organizations, where appropriate, in order to ensure effective protection of the victims. While stressing that such cooperation should respect the established principles of sovereignty, neutrality, non-discrimination and non-intervention, his delegation agreed with the Secretary-General (A/63/677, para. 10 (b)) that the responsibility to

protect did not apply to disaster response. Owing to the lack of clarity regarding that emerging concept, it should be applied with caution.

17. The development of effective prevention, relief, mitigation and rehabilitation measures in South-East Asia might serve as a case study for the Commission. The 2005 Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response, which was expected to enter into force by the end of 2009 and to be implemented in full by 2015, attested to the Association's commitment to the Hyogo Framework for Action 2005-2015: Building the resilience of nations and communities to disasters. The Agreement aimed to provide a legal framework for the promotion of regional cooperation in reducing disaster losses and joint emergency response to disasters in the region.

18. **Ms. Belliard** (France), speaking on the topic of protection of persons in the event of disasters, said that she would follow, in her statement, the text and numbering of draft articles 1 to 5 as provisionally adopted by the Drafting Committee (A/CN.4/L.758) rather than the three-article text contained in the second report of the Special Rapporteur (A/CN.4/615 and Corr.1) and in the report of the Commission on its sixty-first session (A/64/10).

19. Draft articles 1 to 4, which would determine the scope of the Commission's future work on the topic, had been worded carefully in order not to prejudice discussion of substantive issues; in some cases, however, their content had been watered down in the process. For example, draft article 1, which established the scope *ratione personae* of the topic, should focus more clearly on the rights and duties of the State in respect of both its own people, and third States and international organizations in a position to cooperate in the provision of protection. It would then be necessary to mention the rights of disaster victims, which would be consistent with the rights-based approach advocated by the Special Rapporteur in his preliminary report (A/CN.4/598) and would have the advantage of establishing a link between the topic and the underlying body of international law and avoiding any confusion with the duties incumbent on national entities in the event of a disaster.

20. Study of the topic should focus, *ratione temporis*, on disaster response since any attempt to codify the duty to prevent disasters would pose a daunting challenge. While it would be possible to identify States' duty to prevent and the primary measures that should be taken in order to facilitate the protection of persons in the event of a disaster, which might include the establishment of a legislative and regulatory framework for the provision of relief and assistance, little more could be done in that area since the type of prevention needed would vary according to the situation.

21. Draft article 2 referred to "the essential needs of the persons concerned, with full respect for their rights". Since the term "essential needs" was not a legal category, it might be unproductive to discuss how it related to the concept of human rights. She welcomed the text of draft article 2 as provisionally adopted by the Drafting Committee because it did not establish a hierarchy between needs and rights. However, the statement that the response should meet the essential needs of the persons concerned would guide future work on the topic, which must not be defined too broadly by including a set of rules that had no direct relationship to humanitarian assistance and disaster relief.

22. In light of the general nature of draft article 2, it did not seem unreasonable to state that the response envisaged must be not only adequate but effective, although the question of what that response should be could not be answered in the abstract. Similarly, while there was no need to explain, at the current stage of work on the topic, what was meant by "full respect for their rights", the usefulness of the draft articles would depend on the extent to which they ensured respect for those rights.

23. The definition of "disaster" provided in draft article 3 was sufficiently general, although it should be specified that it was provided only for the purposes of the draft articles. It was also clear that for the purposes of the topic, "disaster" meant a relatively massive and serious event. While she welcomed the exclusion of armed conflicts, it might be stated more clearly in the commentary that the mere existence of such a conflict did not necessarily preclude application of the draft articles even though, under the relevant *lex specialis*, the protection of persons during armed conflicts would be governed first and foremost by the applicable rules of international humanitarian law.

24. The duty to cooperate was a fundamental principle of international affairs that was embodied not only in international humanitarian law instruments, but

in general international law. However, it was difficult to identify the scope of that duty in a situation where other principles or obligations also played an important role; the wording of draft article 5 thus merited close study. While the statement that States should, as appropriate, cooperate with the various organizations mentioned was important, it might not adequately convey that the duty to cooperate was not necessarily the same in respect of all the entities mentioned. The reference to relevant non-governmental organizations was preferable to the more general mention of civil society proposed by the Special Rapporteur. Lastly, she wondered why the original wording of the first sentence — "For the purposes of the present draft articles" — had been changed by the Drafting Group to read "In accordance with the present draft articles". She would prefer to restore the original text since the objective was to remind States of their existing obligation to cooperate under international customary or treaty law, not to establish a new obligation through the progressive development of international law.

25. Turning to the topic of shared natural resources, she said that her Government's replies to the Commission's questionnaire on State practice regarding oil and gas would be provided as soon as possible. Her delegation shared the general view that the issue of oil and gas did not fall within the scope of international customary law but should be addressed through cooperation and negotiation between the States concerned and that its codification would be neither timely nor realistic.

26. **Mr. Kessel** (Canada), speaking on the topic of shared natural resources, said that in September 2007, Canada had hosted an Internationally Shared Aquifer Resources Management (ISARM) coordination workshop organized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Organization of American States (OAS).

27. As Canada shared a land boundary only with the United States of America, it dealt with issues involving transboundary waters on an exclusively bilateral basis. Its relations with its southern neighbour on matters relating to groundwater were governed by the 1909 International Boundary Waters Treaty and, specifically, by the 1978 Great Lakes Water Quality Agreement as amended in 1987. The two agreements were interconnected through the International Joint Commission, a bilateral institution created under the Treaty and given additional responsibility by the Agreement. Although the Treaty had no explicit provisions dealing with groundwater, the 1987 amendment to the Agreement included an annex addressing pollution to the Great Lakes from contaminated groundwater. Furthermore, a 2005 agreement on diversions out of the Great Lakes Basin, which included consideration of groundwater use and quality, had been adopted by the United States Congress and signed into law in 2008.

28. Since those instruments effectively covered all groundwater issues between Canada and its neighbour and formed the basis on which any consideration of other instruments must rest, his delegation saw the draft articles as a set of model principles and encouraged the Commission to work on developing a database on the issues, problems and modes of approach to enhancing the protection and sustainable use of groundwaters.

29. His delegation continued to believe that the oil and gas issue was essentially bilateral, political and highly technical and that it encompassed diverse regional situations. It was not convinced of the need for the Commission to proceed with any codification process on that issue, including the development of universal rules, and would be concerned if the Commission broadened the topic to include matters relating to offshore boundary delimitation. It could be useful, however, for the Commission to analyze approaches taken in existing arrangements in order to outline common principles and best practices that could guide States in negotiating bilateral agreements on oil and gas.

30. **Ms. Syed Mohamed** (Malaysia), speaking on the topic of the responsibility of international organizations, noted that the Commission had not examined the conditions for countermeasures to be lawful when they were taken by an injured international organization against a responsible State and it had suggested that it might be possible to apply by analogy the conditions set out for countermeasures taken by a State against another State in articles 49 to 54 on the responsibility of States for internationally wrongful acts. Her delegation disagreed; such restrictions or conditions should not be applied by analogy and the Commission should give careful consideration to the special nature of international organizations.

31. There was also a need for further clarification with respect to countermeasures taken by international organizations, owing to the scarcity of practice, the uncertainty surrounding the relevant legal regime and the risk of abuse. The Commission should explain how countermeasures differed from sanctions, retaliations, reprisals and other measures taken in the event of a material breach of a treaty obligation.

32. The outstanding issues could be dealt with either by modifying the draft articles adopted on first reading or in a comprehensive report, which might provide examples of situations in which the conduct of an organ of an international organization placed at the disposal of a State had been deemed attributable to the latter under international law.

33. As to the question of when consent given by an international organization to the commission of a given act by a State was a circumstance precluding wrongfulness of that State's conduct, the Commission should consider the validity of the consent given by the organization or its agent and, perhaps more importantly, whether international organizations could give such consent to a State; article 20 of the articles on State responsibility would be useful in making that determination.

34. On the topic of reservations to treaties, her delegation supported the contention that an approval of, or an opposition to, an interpretative declaration should not be presumed (guideline 2.9.8). However, paragraph 2 of the guideline should be reworded in order to provide further guidance as to the "exceptional cases" and "relevant circumstances" in which such approval might be inferred.

35. Concerning guideline 2.9.9, her delegation agreed that as a general rule, approval of an interpretative declaration should not be inferred from the mere silence of a State. Nevertheless, as indicated in the second paragraph, such silence might be relevant to determining whether the State had approved an interpretative declaration. Further clarification of the words "through its conduct and taking account of the circumstances" was needed.

36. With respect to guideline 3.2.1, while it was generally felt that allowing treaty monitoring bodies to assess the permissibility of reservations formulated by a State could ensure certainty as to the reservation's validity and permissibility and minimize the likelihood that it would be contested in the future, the extent of the legal effect of the treaty monitoring body's conclusions should be explained. States should be able to make public statements without fear that they might inadvertently be creating binding obligations under international law and should be bound by unilateral public declarations only when they intended to be so bound.

37. Her delegation supported the intention of the drafters of guideline 3.3.1 to remove any remaining ambiguity as to the effects of the invalidity of a reservation. However, there was a need to clarify the question of whether the law on State responsibility was applicable to the obligations imposed by the law of treaties, particularly as treaty law related to reservations and internationally wrongful acts. Owing to the different nature of international organizations, they should be dealt with separately from States.

38. Turning to the topic of protection of persons in the event of disasters, she suggested that the term "disaster" should include, by implication, the pre-disaster phase and that the applicability of draft article 3 to that phase should be clarified. In draft article 2, it should be made clear that the needs of individuals took precedence over their rights during a disaster. The wording of draft article 1 should be reviewed with a view to clarity and consensus on the applicable threshold for "adequate and effective response". Her delegation would prefer to limit the definition of "disaster" to natural disasters that caused loss of life, property damage or environmental degradation. With respect to international humanitarian law, it would be useful to have illustrations of different scenarios in which the draft articles would apply. Lastly, clarification of the duty to cooperate was needed; her delegation considered that the principle of non-intervention should be respected and that it should be for States to decide whether to receive humanitarian assistance.

39. On the topic of shared natural resources, she welcomed the decision to adopt the draft articles on the law of transboundary aquifers on second reading without prejudice to the final form of the text; that two-step approach was appropriate in light of the differing views expressed by delegations. Lastly, the issue of transboundary oil and gas, which involved highly technical data, politically sensitive issues and questions relating to the sovereignty of States, was best dealt with through bilateral or regional arrangements; it

would not be desirable for the Commission to attempt codification in that area.

40. **Ms. Cabello de Daboin** (Bolivarian Republic of Venezuela), speaking on the topic of protection of persons in the event of disasters, said that the Commission's emphasis on the rights and obligations of States with regard to both persons in need of protection and other States, was consistent with the relevant principles of international law.

41. Concerning the definition of "disaster", she noted that the drafters of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations had rightly rejected the element of causality since the causes of disasters were sometimes complex and it was difficult to distinguish between environmental and human factors. The scope of the Convention also excluded armed conflict and included not only events that resulted in loss of life, but also those which caused material and environmental loss. However, while the Convention's definition was a useful basis for discussion, it failed to note that in order for an event to be considered a disaster, its impact must exceed the State's response capacity. Her delegation did not think that the term "responsibility to protect" should be included in the draft articles since the 2005 World Summit Outcome document (A/RES/60/1) limited the scope of that responsibility to genocide, war crimes, ethnic cleansing and crimes against humanity and the General Assembly had not established modalities for continued discussion of the matter.

42. The final form of the draft articles should be governed by the principles of respect for the sovereignty of States and non-interference in their internal affairs. Good-faith cooperation provided by the international community should be consistent with the interests of the concerned State and the principles of international law. The draft articles should respect the key role of States in planning, coordinating and executing their own humanitarian assistance measures; while the principles of sovereignty and non-intervention could not justify denial of the victims' access to assistance, such assistance should not be provided without the prior consent of the State in which the disaster had occurred. In no case should assistance be imposed on a State that did not wish to receive it because it had not exceeded its own response capacity.

43. On the topic of shared natural resources, she welcomed the inclusion in the draft articles on the law of transboundary aquifers (A/RES/63/124), at the request of delegations such as her own, of a reference to the principles adopted at the 1992 United Nations Conference on Environment and Development in the Rio Declaration on Environment and Development and Agenda 21 and, in draft article 3, to the sovereignty of States over their aquifers. As to the question of the final form of the draft articles, her delegation would prefer for them to be adopted as a non-legally binding instrument that would provide States with guidance in managing such resources at the bilateral or regional levels.

44. Lastly, her delegation agreed with the Special Rapporteur (A/CN.4/580, para. 15) that the issue of oil and gas should not be addressed under the topic; scientific and legal studies showed that it would be impossible to elaborate universal standards in that area.

45. **Ms. Daskalopoulou-Livada** (Greece), on the topic of protection of persons in the event of disasters, said that her delegation favoured a rights-based approach and that it would be premature to agree on a definition of "disaster", a task currently attempted in draft article 2, until the meaning of the term "legal rights of persons" had been established. In any event, the current definition should be broadened to include large-scale environmental damage in relation to a rights- and needs-based approach.

46. As to draft article 4 (concerning the relationship of the draft articles with international humanitarian law), although armed conflict should be excluded from the definition of disasters, that should not constitute a pretext for excluding application of the draft articles should a disaster occur at a time of armed conflict. The draft articles should be applicable without prejudice to the application of international humanitarian law; the two should exist in parallel.

47. As to draft article 5 (concerning the duty to cooperate), the general nature of the language used would weaken the thrust of the provision.

48. A State that was not in a position to provide assistance to and secure the rights of persons under its jurisdiction when a disaster occurred on its territory should not refuse adequate and effective humanitarian or other assistance from other States, subject to agreed modalities.

49. With regard to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", her delegation endorsed the list of questions and issues to be addressed concerning the legal bases of that obligation. Although counter-terrorism conventions were a typical example of treaties in which the principle was firmly embodied, that was not true in the case of piracy, which, under treaty law, was "inextricably linked" (A/64/10, para. 204 (a) (iv)) only with universal jurisdiction although States certainly had the obligation to cooperate in such cases. Although Greek legislation expressly included piracy among the crimes covered by universal jurisdiction, it did not specify that the principle of *aut dedere aut judicare* applied. However, piracy was implicitly included, usually by a reference to the gravity of the sentences imposed, as an extraditable offence under general domestic criminal law and in international conventions to which Greece was a party.

50. With regard to the list of questions and issues entitled "The material scope of the obligation to extradite or prosecute" (A/64/10, para. 204 (b)), although some multilateral conventions applied the obligation to grave crimes of international concern, the vast majority of applicable offences were far less grave and were usually identified by the sentence imposed rather than by the elements of the crime.

51. With respect to the list entitled: "Conditions for the triggering of the obligation to extradite or prosecute" (A/64/10, para. 204 (e)), the so-called *clause française* — whereby an extradition or prosecution was not allowed to go forward because there were valid grounds to believe that the alleged offender was in reality being sought for reasons other than those claimed by the requesting State, for example, on account of the person's race, religion, nationality or ethnic origin — was relevant. The Commission should discuss the issue further under paragraph 204 (f) (v), on guarantees in case of extradition, of the list entitled "The implementation of the obligation to extradite or prosecute".

52. **Mr. Kohona** (Sri Lanka), referring to the topic of protection of persons in the event of disasters, recalled the impressive humanitarian response to the devastating Indian Ocean tsunami of 26 December 2004 by the affected countries and the international community.

53. A broad international framework for disaster response that clearly articulated the rights and responsibilities of those involved was needed in order to facilitate greater cooperation and expedite relief efforts. The legal lacuna in the international legal response to natural disorders was in sharp contrast to the body of international law addressing other extreme peacetime events such as industrial accidents and epidemics and, in particular, to the extensive body of international humanitarian law applicable to disasters in the context of armed conflict, which had rightly been excluded from the topic as they were covered by a *lex specialis*.

54. A thorough examination of the existing body of law should be undertaken as a prerequisite for further work on the topic. The Commission should give priority to natural disasters; other types of disaster could be considered at a later stage. The fundamental principles of sovereignty and non-intervention in the internal affairs of States should guide the Commission in its consideration of the topic and in any future developments in the area of law in question. Accordingly, the affected State should have the primary responsibility for initiating, organizing, coordinating and implementing relief efforts within its territory, and assistance from other States and non-State actors should be provided only with the consent of the affected State. His delegation agreed with the Special Rapporteur that the concept of responsibility to protect did not apply to disaster response at the current stage as it was essentially political and had not yet acquired the status of an established legal principle.

55. Turning to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), he welcomed the fact that the Working Group established to address the subject had emphasized the importance of taking national legislation and decisions into account.

56. Although the obligation was generally treaty-based, it had already achieved the status of customary international law, at least with respect to serious international crimes such as genocide, crimes against humanity, war crimes and terrorist crimes. Nevertheless, further deliberation on whether and to what extent the obligation had a basis in customary international law would be welcome.

57. The question of the relationship between the obligation to extradite or prosecute and the surrender

of the alleged offender to a competent international criminal tribunal should not be dealt with in the study. The matter was governed by a distinct body of law and posed different problems from those arising from extradition between States. Given the complementary nature and interdependence of the obligation to extradite or prosecute and the principle of universal jurisdiction, further study of their relationship was warranted and should focus on the obligation.

58. As for the topic of the most-favoured-nation clause, with the inclusion of that clause in bilateral, regional and multilateral investment treaties, most-favoured-nation treatment had become a central tenet of international investment and trade policy and was particularly relevant to developing countries, such as his own, which were striving to attract foreign investment and were dedicated to making international trade both liberal and fair.

59. Significant developments since the Commission had begun consideration of the topic included the proliferation of bilateral and regional investment agreements incorporating most-favoured-nation clauses over the past two decades; the development of an extensive multilateral trading system under the auspices of the World Trade Organization (WTO), which had broadened the scope of most-favoured-nation treatment to include services, investment and intellectual property; the development of inconsistent jurisprudence as a result of arbitral decisions pertaining to the precise scope of application of the clause; and the emergence of new issues in the context of the current social and economic conditions.

60. The substantial new body of practice which had resulted from those developments should be taken into account in assessing how most-favoured-nation clauses operated in practice. The framework adopted by the Commission's Study Group on the Most-Favoured-Nation Clause, which would serve as a road map for future work on the topic, struck an appropriate balance by clarifying issues without prejudicing the earlier work of the Commission and developments in other forums. His delegation hoped that the Commission's work would yield broad guidelines that would bring greater coherence and consistency to the operation of the clause, for the benefit of both Member States and arbitral tribunals.

61. With regard to the topic "Treaties over time", taking subsequent practice into account when interpreting treaties not only ensured that they remained relevant over time, but also encouraged their practical application and longevity. His delegation looked forward to the report on subsequent agreement and practice as addressed in the jurisprudence of the International Court of Justice, and other international courts and tribunals, which the Chairman would submit to the Commission at its sixty-second session.

62. His delegation agreed with the Commission that General Assembly resolution 56/272, which had reduced the honoraria payable to members of the Commission, especially affected special rapporteurs as it compromised support for their research work. Special rapporteurs from developing countries were at a particular disadvantage, and his delegation hoped that the General Assembly would reconsider the issue.

63. **Ms. Drenik** (Slovenia) said that she welcomed the availability on the Commission's website of relevant documents, a summary of the Commission's report on the work of its sixty-first session, and the report itself, although the printed version of the report had been issued rather late. The website should, however, be improved and made more user-friendly.

64. With regard to the topic of reservations to treaties, her delegation would be open to simplifying the structure of the guidelines. The inclusion of interpretative declarations was welcome inasmuch as the 1969 Vienna Convention on the Law of Treaties did not deal with them. Moreover, such declarations were being formulated more frequently than in the past, even in respect of bilateral treaties, and conditional interpretative declarations and reactions to them presented particularly complex issues. Concerning section 1.5 on unilateral statements in respect of bilateral treaties, there was insufficient State practice to prove that the same rules applied to multilateral and bilateral interpretative declarations. Particularly in the case of bilateral treaties, a unilateral declaration formulated at any time during or after the conclusion of the treaty could not have legal effect unless it was accepted by the other party.

65. The topic "Expulsion of aliens", touching as it did on the sovereignty of States, was both legally and politically sensitive and her delegation seriously doubted that the Commission's work would lead to codification. It also appeared that certain core issues — such as the categories of aliens to whom the new rules would apply and the difference between expulsion and

deportation — were not being addressed, although they might have been discussed in the past.

66. As to the question of which human rights should be respected and protected during expulsion, it was not clear why a distinction was being drawn between human rights and fundamental rights or why it was necessary to list the so-called "hard core" of fundamental rights to which persons being expelled were entitled. Such persons should enjoy all human rights, and States were required to protect those rights. Although some rights might be more relevant to the case of expulsion, it was unwise to create different categories of human rights. The commentary was the appropriate place in which to refer to rights which were considered to be particularly at risk of violation in the event of expulsion.

67. Her delegation welcomed the emphasis, in draft articles 9, 10 and 11, on the obligation of the State to protect the right of persons being expelled to life, dignity, and protection from torture and cruel, inhuman or degrading treatment. However, as the prohibition of torture was absolute and must be respected in all circumstances, such a provision might not be necessary. When discussing the guarantees required of the State to which a person was being expelled, the Commission should give further thought to the prohibition of expulsion or return (*refoulement*) in article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as to relevant court decisions. The Commission should also take into account the definition of torture contained in article 7, paragraph (2) (e), of the Rome Statute of the International Criminal Court, which did not differentiate between official and unofficial acts of torture. The words "in its territory" should be deleted from paragraph 1 of draft article 11 since the obligation to protect was clearly established in the article and was not limited to the territory of the expelling State.

68. With regard to the topic of protection of persons in the event of disasters, her delegation supported a rights-based approach that incorporated the needs-based approach; the objective should be to ensure a sustainable solution. Any derogation from rights necessitated by a state of emergency must occur in strict compliance with the provisions of article 4 of the International Covenant on Civil and Political Rights.

69. The issue of international assistance in the event of disasters required further discussion in light of its relevance to State sovereignty and to the rights and needs of individuals; in that connection, she drew attention to draft articles 1 and 3 and paragraphs 173 and 162 of the Commission's report. Her delegation agreed that the Commission should address the sensitive issue of the reasons for the unwillingness of some States to resort to international assistance.

70. With regard to draft article 2, on the definition of disaster, the Commission should treat the exclusion of "armed conflicts" in a "without prejudice" clause dealing with the application of international humanitarian law. Further attention should also be given to the relationship between the draft articles and rules pertaining to internally displaced persons and refugees.

71. Her delegation was pleased with the workplans established for the topics of treaties over time and the most-favoured-nation clause and welcomed the establishment of a Working Group on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), which was closely related to the principle of universal jurisdiction. Her delegation also welcomed the list of questions and issues to be addressed by the Working Group.

72. Lastly, she encouraged the Commission to address new topics relating to outstanding issues affecting contemporary international relations and not to be restrained by the fact that some topics were both political and legal in nature.

73. **Mr. Henczel** (Poland) urged the Commission to proceed expeditiously with its work on the topic of protection of persons in the event of disasters and, in light of the complexities of the topic, to analyse national legislation, international agreements and the practice of States and non-State actors in order to identify the main legal and practical issues involved. His delegation advocated a comprehensive approach that would cover natural and man-made disasters; however, armed conflict should be excluded since the well-established regime of international humanitarian law already governed armed conflicts as a *lex specialis*. His delegation agreed that the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations provided the best guidance for future work on the topic. The Convention's definition considered both natural and

man-made phenomena and acknowledged the reality that disasters often resulted from a complex web of factors, where no single sufficient cause could be identified. In addition, the Convention's definition included events that threatened not only human life, but also property and the environment.

74. Since existing international human rights obligations lay at the core of protection in the context of disasters, a rights-based approach covering the rights of victims and affected States was desirable, although a reasonable, holistic approach to the topic seemed to require that both rights and needs should enter the equation, complementing each other when appropriate.

75. It was increasingly often recognized that prevention, mitigation and preparedness were crucial to disaster relief. Risk-reduction activities were needed in order to build resilience and to ensure that development efforts did not increase vulnerability to hazards.

76. The principles of sovereignty and non-intervention should not be interpreted as allowing a State affected by a disaster to deny the victims access to assistance if it was unable to provide the goods and services required for the survival of its population. In such cases, the affected State should cooperate with other States and organizations willing and able to do so. Accordingly, the concept of "responsibility to protect" should apply to disaster situations. The fact that, for the time being, the concept was generally understood as limited to the four most serious international crimes should not exclude its further development in the future.

77. The principles underlying the protection of persons in the event of disasters were solidarity and cooperation among both nations and individuals. International solidarity fostered cooperation in furtherance of the idea that justice and the common good were best served by policies that benefited all nations; the duty to cooperate referred to a formal framework for the protection of persons, while solidarity referred to the substance of such undertakings.

78. It would be premature at the current stage to address the final form which the work on the topic should assume. The Commission should continue work on the draft articles without prejudice to the final form. His delegation also saw merit in setting out general principles in a framework convention which could serve as a point of reference for the elaboration of bilateral or regional agreements.

79. As to the topic "Shared natural resources", his delegation fully supported the decision to establish a new Working Group mandated to consider, during the sixty-first session of the Commission, the feasibility of future work on the issue of transboundary oil and gas resources. It also welcomed the Commission's decisions, following that discussion in the Working Group, to defer action on any future work on oil and gas until 2010 and to recirculate the 2007 questionnaire on oil and gas to Governments. It was to be hoped that a sufficient number of responses would be received from Governments so that the Commission could take a final decision on whether to address the issue.

80. **Ms. Ashraf** (South Africa), referring to future work on the topic of shared natural resources, specifically in relation to oil and gas resources, said that energy demands continued to rise and that the primary energy demand would double by 2030. The sensitive nature and scarcity of such resources should encourage continued adherence to international law and cooperation when dealing with them. Moreover, the promotion of sustainable development should be at the core of attempts to regulate shared oil and gas resources.

81. Several factors could be taken into account when deciding whether the Commission should undertake a codification exercise on the topic. Scarcity and the growing demand for energy required the establishment of adequate rules to avoid transboundary conflicts, which suggested that the Commission should consider the issue further. However, room should be left for dealing with such issues bilaterally based on international law and cooperation. It was imperative to note that transboundary oil and gas issues were complicated by private and commercial interests that were not present in relation to transboundary aquifers, which suggested that the Commission should proceed with caution. Nevertheless, it might wish to consider surveying the practice of inter-State and private contracts in order to elucidate some general trends in practice under both public and private law and, if necessary, to propose guidelines in that area.

82. **Mr. de Serpa Soares** (Portugal), referring to the topic of protection of persons in the event of disasters, said that the main concern must always be the affected

individuals; hence, his delegation was in favour of a rights-based approach. It had been suggested that the Commission should take a two-stage approach to the issue, whereby it would begin by addressing the rights and obligations of States first towards each other and then towards affected persons. When examining the latter, the Commission should take into consideration the rights, obligations and legitimate interests of each actor involved in any disaster, whether natural or man-made, without prejudice to any subsequent analysis of the relations between States and other actors such as international organizations. His delegation was thus in favour of extending the scope of the draft articles to cover activities of non-State actors, particularly in view of draft article 3, as provisionally adopted by the Drafting Committee (A/CN.4/L.758), which established the duty to cooperate with international organizations and civil society. Nevertheless, it had some concerns about the priority given to studying inter-State rights and obligations before the rights and obligations of States towards affected persons and would prefer for the latter to be determined before the former were discussed.

83. He agreed that, initially, the study should focus on response to disasters which had occurred. Sovereignty and non-interference in domestic affairs were fundamental principles of public international law from which States could derogate only in exceptional cases of major humanitarian crises. Pre-disaster issues, including the questions of prevention and disaster reduction and mitigation, could be addressed at a later stage.

84. A definition of "disaster" based on the Tampere Convention might not be the best solution owing to the specific scope of that Convention. Since the main concern should be the individual, the definition should be as broad as possible in order to increase the State's responsibility in that regard. The Commission should also try to find a balance between international cooperation and international principles in order to establish derogations from the principles of sovereignty and non-intervention in international cooperation. Lastly, the draft article on the duty to cooperate should include a mention of non-governmental organizations.

85. On the topic of shared natural resources, his delegation considered that the draft articles on transboundary aquifers should be developed into an international framework convention. However, the question of oil and gas was particularly complex owing to the potential conflicts inherent in shared oil and gas, their economic and political importance and the corresponding environmental issues. His delegation strongly supported the Commission's decision to study the technical feasibility of future work on the topic since, from both a legal and a geological perspective, there were similarities between groundwater and oil and gas. The study should be predominantly technical and should take a multidisciplinary approach with assistance from the relevant international organizations and from scientific, technical, commercial and legal experts.

86. **Ms. Lijnzaad** (Netherlands) said that while admiring the perseverance of the Special Rapporteur on reservations to treaties, her delegation wished to reiterate its concern about the scope of the work. Nevertheless, the study had made a significant contribution to the understanding of the law in relation to interpretative declarations and, in particular, their recharacterization. Hitherto, that step in the process of reacting to interpretative declarations had not been identified as a specific stage or properly understood; the Commission's work had clarified the issue. Nevertheless, the rules concerning interpretative declarations (guidelines 2.9.4 to 2.9.7) raised some concern from a methodological point of view since they referred to the "approval, opposition or recharacterization" of such declarations. In practice, that wording associated fundamentally different elements from more than one stage of the procedure; whereas recharacterization tended to occur only in situations where a State intended to oppose a specific declaration.

87. Her delegation was concerned that the amount of attention devoted to interpretative declarations might suggest that they were becoming an acceptable form of expressing the intention to exclude or restrict a State's obligations under a treaty and could be perceived as validating the use of interpretative declarations instead of reservations. Clarity was key in issues relating to reservations and their legal effect. Use of the label "interpretative declaration" could suggest that a mere interpretation was presented, rather than a specific condition for expressing consent to be bound. States whose aim was to exclude or modify their obligations under a treaty should use reservations rather than interpretative declarations.

88. Over the years that the Commission had been working on the question of the permissibility of reservations, its understanding of the matter, and especially of the role of the human rights treaty bodies, had improved. Nevertheless, the guidelines and the commentary seemed to suggest that there was a risk that treaty bodies might exceed their mandate by considering permissibility and to ignore the authoritative nature of an interpretation given by such a body. There was an underlying and unwarranted sense of hesitation regarding the role of treaty bodies, which seemed to ignore their key role in ensuring full implementation of human rights law. The treaty bodies should be invited to comment on the rules pertaining to their work.

89. On the topic of the expulsion of aliens, her delegation had concerns about the approach taken by the Special Rapporteur in seeking to establish a list of "inviolable rights". First, that list would vary over time, and also from one continent to another; second, the meaning of the "right to dignity", which, according to the Special Rapporteur, was the "overarching human right", was unclear and third, the list of "inviolable rights" differed from the set of non-derogable rights established in human rights instruments such as the International Covenant on Civil and Political Rights. The important point was to identify the relevant rights in the context of the expulsion of aliens, not to determine whether a specific right was fundamental. In light of the diversity of States' laws and policies on the matter, it would be preferable simply to indicate that expelling States had a general obligation to respect the human rights of persons being expelled. Any mention of "inviolable rights" should be consistent with the list of non-derogable rights contained in human rights treaties.

90. Turning to the topic of protection of persons in the event of disasters, she said that a clear emphasis on areas where the relevant law required codification or further development would enhance the added value of the study with respect to existing instruments and initiatives. Draft article 1, as proposed by the Special Rapporteur, provided a useful outline of the scope of the topic; however, while agreeing that the primary focus should be on the individual who must be protected, her delegation wondered whether a needs-based approach might not achieve that more pragmatically than a rights-based approach. If the reference to "realization of the rights of persons" was retained, a more specific indication of those rights should be incorporated.

91. Her delegation endorsed the proposed definition of the term "disaster" (draft art. 2) and agreed that situations covered by international humanitarian law, such as armed conflicts, should be excluded from the draft articles. However, it wondered whether the draft article was the proper place to establish that exclusion; it would be preferable to include a separate "without prejudice" clause on the application of international humanitarian law as the *lex specialis* in such situations. Further reflection on draft article 3 and, specifically, on the precise nature and scope of the suggested "duty to cooperate", was also needed.

92. On the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), her delegation wished to reiterate its recommendation that the Special Rapporteur should address substantive, rather than procedural, issues, propose specific articles, begin by examining the source of the obligation and then address its relationship to the principle of universal jurisdiction, identify the crimes to which the obligation applied and consider the issue of the surrender of offenders to a competent international criminal tribunal. Her delegation hoped that the Working Group on the topic would specifically consider those points. It regretted that the Commission had made little progress in its work on the topic, which was timely and relevant and had a direct link to contemporary practice in the field of international criminal law. It was thus an area where the Commission's expert, in-depth analysis of complex legal issues would be welcome. The formulation of the questions to be addressed appeared to be a good starting point.

93. Lastly, on the topic of treaties over time, it would be worthwhile to elaborate on the interpretation of ageing treaties, which was a philosophical issue of great practical importance. While the actual text of such treaties could seem somewhat antiquated, international courts and tribunals had developed methods by which to ascertain whether and how they could still play a role in international relations. Her delegation welcomed the Commission's intention to elaborate a repertory of practice to provide practical guidance for States. It favoured a focused approach to the issue of subsequent agreement and practice, with a clear timetable, so that the work would be organized rationally.

94. **Mr. Simonoff** (United States of America), referring to reservations to treaties, said that while the Special Rapporteur's report was excellent, his delegation remained sceptical regarding the usefulness of the formal framework adopted for interpretative declarations. It continued to have particular concerns regarding the suggestion that conditional interpretative declarations should be treated as reservations and disagreed with the view that an interpretative declaration that merely sought to clarify the meaning of a provision should be considered a reservation merely because the declarant made its consent to be bound by the treaty subject to the proposed interpretation. Subjecting conditional interpretative declarations to a reservations framework, regardless of whether they were in fact reservations, could lead to an overly restrictive treatment of issues such as temporal limits for formulation, conditions of form and subsequent reactions to such declarations.

95. Regarding the validity of reservations, his delegation associated itself with the consensus view, expressed at the meeting between the Commission and representatives of United Nations and regional human rights treaty bodies, that it was pertinent to apply the rules regarding reservations to all types of treaties and that reservations to human rights treaties did not require a special regime. On the subject of the role of treaty bodies in examining reservations, it was a long-standing principle of customary international law that treaties were authoritatively interpreted by the parties themselves, although they could also be so interpreted by an international body if the parties so agreed, either in the treaty itself or in a separate agreement. Thus, guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations) rightly stated that any conclusion formulated by a treaty body regarding a reservation would "have the same legal effect as that deriving from the performance of its monitoring role" as established in the treaty itself.

96. On the issue of the legal effect of invalid reservations, his delegation did not agree that a State that made a prohibited reservation was bound by the treaty without the benefit of that reservation. Treaty law was premised on the voluntary assumption of obligations; an attempt to assign an obligation that a country had not expressly assumed was inconsistent with that fundamental principle. Instead, the objecting State must decide whether it wished to remain in a treaty relationship with the reserving State, despite the existence of what it viewed as an impermissible reservation. Alternatively, if the objecting State rejected a treaty relationship with the reserving State based on a reservation that it considered unacceptable, the reserving State could always withdraw its reservation. For practical reasons, it might be preferable to maintain a treaty relationship with a State despite the existence of an impermissible reservation; that option should not be ruled out.

97. With the expansion of the scope of the topic of expulsion of aliens, his delegation's concerns that the draft articles could unduly restrict the sovereign right of States to control admission to their territories and to enforce their immigration laws had become more acute. Rather than attempting to articulate new rights specific to expulsion and importing concepts from regional jurisprudence, reference should be made to established principles of law reflected in the texts of broadly ratified United Nations human rights conventions. In addition, the scope of the draft articles should be further refined; decisions to deny entry did not properly fall within their scope and they should not apply to matters governed by specialized bodies of law, such as extradition and other transfers for law enforcement purposes, or to the expulsion of aliens in situations of armed conflict. Far from codifying rules of relevant customary international law, many of the proposals sought to amend established State practice and obligations under bilateral and multilateral extradition treaty regimes. Also, more thought should be given to how the rules would apply in situations of armed conflict.

98. Concerns also existed regarding the rights of persons who had been expelled; in his delegation's opinion, the draft articles should apply to individuals within the territory of a State and subject to its jurisdiction. States should not be held responsible for anticipating the conduct of third parties that they could neither foresee nor control. While his delegation recognized the importance of including a draft article on the obligation not to discriminate, it should be clear that it applied only to the process afforded to aliens in expulsion proceedings and should not unduly restrict the discretion enjoyed by States as a result of their sovereign right to control admission to their territory and to establish grounds for the expulsion of aliens under their immigration laws.

99. On the subject of family unity, the draft articles appeared to be based on the emerging jurisprudence of the European Court of Human Rights. In that and other areas, it would be preferable to refer to the text of the International Covenant on Civil and Political Rights and to State practice in deciding how to articulate the scope of States' obligations. His delegation was particularly troubled by the incorporation of non-refoulement obligations into numerous provisions. On the basis of non-binding opinions of the Human Rights Committee and of the jurisprudence of the European Court of Human Rights, the Special Rapporteur had sought to establish non-refoulement and assurances against the death penalty as rights, despite the absence of any explicit statement to that effect in articles 6 and 7 of the Covenant or in any other United Nations convention.

100. A further cause for concern was the proposed establishment of an obligation to ensure respect for the personal liberty in the receiving State of persons who had been or were being expelled (A/CN.4/617, p. 6); that term was not defined and exceeded existing non-refoulement obligations assumed by States as parties to international conventions. Lastly, the extension of the non-refoulement protection to include risks emanating "from persons or groups of persons acting in a private capacity", in the draft article on the obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment, went far beyond even the express non-refoulement protection in relation to torture contained in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

101. On the topic of protection of persons in the event of disasters, his delegation had expressed reservations regarding the adoption of a rights-based approach and continued to believe that the Commission should focus on providing countries that required or provided disaster relief with guidance on, inter alia, the myriad agreements entered into by relief providers and affected States. Consequently, it welcomed the fact that draft article 2, as provisionally adopted by the Drafting Committee (A/CN.4/L.758), emphasized that the purpose of the draft articles was to facilitate a response that met the "essential needs" of persons affected by disasters. In his ongoing work, the Special Rapporteur should consider how the project could give shape to the core humanitarian principles of neutrality, impartiality and independence in the context of disaster relief.

102. While his delegation was pleased that the draft articles would not apply to situations of armed conflict, the provisionally adopted text of draft article 4, on relationship with international humanitarian law, required further consideration in order to clarify the situations in which the draft articles would or would not apply. It would welcome the Special Rapporteur's views on the option of including in the draft article a specific exclusion of cases of armed conflict. His delegation strongly supported international cooperation in providing disaster relief and would welcome the Special Rapporteur's views on whether the provisionally adopted draft article 5, on the duty to cooperate, should have an identified goal and whether it was necessary to specify the factors that would trigger the duty to cooperate on the part of States.

103. His delegation had been constructively engaged in the discussions on the topic of shared natural resources and had indicated that it did not support the inclusion of oil and gas issues since State practice was varied, essentially bilateral and relatively sparse; the subject matter was highly technical; and specific resource conditions varied widely. Given the political and economic stakes in oil and gas resources, States were well aware of the relevant issues and did not require much instruction by the Commission. Consequently, it would not be productive for the Commission to attempt to extrapolate customary international law, common principles or best practices in that area.

104. **Mr. Emmerson** (Australia), on the topic of shared natural resources, said that as an island continent, Australia did not share aquifers with other countries. However, his delegation considered that it was for the States concerned to determine whether the proper management of transboundary aquifers was best enabled through a global instrument or by context-specific regional and local agreements.

105. The decision to treat the topic of shared oil and gas resources independently was sound; the codification and progressive development of general principles of international law should be approached with caution when fundamental bilateral interests, such as the management and exploitation of shared oil and gas reserves, were concerned and the States involved were best able to negotiate agreements that reflected their sovereign rights, as Australia had done. The complexity of such agreements testified to the unique challenges arising with regard to each oil and gas

deposit; it was therefore imperative that States continue to have flexibility to create cooperative frameworks on a case-by-case basis.

106. If the Commission proceeded with its consideration of shared oil and gas resources, it should abstain from examining matters relating to offshore boundary delimitation since the 1982 United Nations Convention on the Law of the Sea left no doubt that maritime delimitation was a matter for the States concerned. In areas where States had not resolved maritime claims, the question of whether and how oil and gas resources were shared was inextricably linked to their settlement. The existing bilateral mechanisms were the best way for States to manage shared oil and gas reserves.

The meeting rose at 5.55 p.m.