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Chairperson: Ms. Picco ..... (Monaco)
later: Mr. Park Chull-joo (Vice-Chairperson) ..... (Republic of Korea)
later: Mr. Nega (Vice-Chairperson) ..... (Ethiopia)

Contents

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The meeting was called to order at 10 a.m.

Statement by the President of the International Court of Justice

1. **The Chairperson**, welcoming the President of the International Court of Justice, said that the members of the Committee were keen observers of the Court's activities, to which they attached the utmost importance.

2. **Mr. Owada** (President of the International Court of Justice) said that the Court greatly appreciated the opportunity to strengthen its ties to the Legal Committee of the General Assembly through an exchange of views. The heavy caseload the Court was currently experiencing was gratifying in that it reflected the trust and confidence of States in the Court's impartiality and objectivity. But informally he could admit that it had placed a considerable burden on the judges. In that context he wished to convey the gratitude of the Court and all its judges to the General Assembly for the decision taken at its previous session to increase the number of posts so that all judges could have their own research assistants. The six additional Legal Assistants had been chosen from among an overwhelming number of applicants.

3. Since the work of the Court was explained in detail in its annual report (A/65/4), he would like to focus on a subject of widespread interest within and outside the United Nations system, namely, the rule of law in the international community. More specifically he would like to talk about the issue of compliance with and implementation of the decisions of the International Court of Justice, an aspect of the rule of law that had not garnered as much attention as it deserved.

4. It was axiomatic that the decision of the Court in a contentious case was binding; that was provided for in a straightforward manner in Article 94, paragraph 1, of the Charter of the United Nations and more indirectly in Articles 59 and 60 of the Statute of the Court. There was therefore no doubt that a decision of the Court was as binding as a decision of a domestic court. However, when one looked at how compliance with the decision was secured, the difference was apparent. In the domestic sphere, compliance was enforced by the State, but the International Court of Justice operated within the framework of the Westphalian principles of sovereign equality of States and of voluntary submission of States to the international legal order.

5. Article 94, paragraph 2 of the Charter provided that if any party to a case failed to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party could have recourse to the Security Council, which could, if it deemed necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. There were two major differences between that mechanism and the mechanisms for domestic enforcement. First, the initiative for enforcement was left in the hands of one of the parties. Second, the Security Council had discretion as to whether or not to take measures to give effect to the judgment. In other words, the framers of the Charter at San Francisco had established a system whereby compliance with a specific decision of the Court was handled, not as an issue of legal enforcement in the strict sense, but rather as an issue of enforcement of the obligations of States under the Charter, which was left in the hands of the Security Council as a political organ. The mechanism differed from the League of Nations structure, under which the Council, without the initiative of a party to the dispute, could act with respect to any decision that had come before the Permanent Court of International Justice which the Council felt had not been fully implemented.

6. In the long history of the United Nations, the only time that a State had invoked Article 94 and brought a question of compliance before the Security Council was the initiative taken by Nicaragua to obtain enforcement of the judgment of the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*). That had not been an ideal test case for the effectiveness of the Charter provision, since the party against which Nicaragua was seeking enforcement of the judgment was a permanent member of the Security Council and was able to veto any action. A party might also seek to enforce a judgment by recourse to the General Assembly under Article 10 of the Charter, as Nicaragua had then done, but once again the initiative had to be taken by a party to the case.

7. It might be added that the system provided for under the Charter and the Statute did not envisage a systematic procedure for monitoring compliance with and implementation of the Court's judgments. There was thus very little information available with respect

to the state of compliance with the Court's decisions. As an aside, he might note that the terms compliance, enforcement and implementation were overlapping to a great extent but implied a different perspective.

8. Despite the somewhat weak mechanism provided in the Charter, the overall picture that emerged was one of general compliance by the parties with a final judgment of the Court. An author who had made a special study of the issue had concluded that there had been just four cases of genuine non-compliance, in the sense of wilful disregard of the decision, in the history of the Court. Although that conclusion might represent too rosy an assessment of the record, the compliance ratio was nonetheless very high: there were extremely few examples of non-compliance in that sense in the Court's history and none at all in recent years. That in itself was quite significant: it showed that States recognized that they were under an obligation to comply with the Court's decisions and that they intended to comply with that obligation in good faith.

9. In general, the most difficult aspect of compliance was not acceptance of the judgment of the Court when it was rendered; at that initial stage States generally declared their intention to comply in good faith with the decision of the Court. Instead, problems often arose at the stage of meaningful performance, with the result that the objective aimed at by the judgment was not achieved. The recent case of *Avena and Other Mexican Nationals* (*Mexico v. United States of America*) illustrated the issue of non-compliance with the judgment of the Court because of difficulties at the stage of its implementation in the domestic legal order. In its 2004 judgment the Court had concluded that the appropriate reparation consisted in review and reconsideration of the convictions and sentences of the Mexican nationals concerned. One of the individuals in question had brought a *habeas corpus* petition in a United States federal court on the basis of the failure by the courts of Texas to implement the *Avena* judgment. The United States federal court had denied the petition on the grounds of procedural default. The issue had eventually gone to the United States Supreme Court, which in its decision in *Medellín v. Texas* had held, primarily on constitutional grounds, that the *Avena* judgment was not directly enforceable in a state court. The Supreme Court had acknowledged that the *Avena* judgment had created an international law obligation on the part of the United States, but it had concluded that that obligation did not constitute automatically enforceable domestic law because none of the relevant treaty provisions were self-executing under the United States Constitution. It thus found that, in the absence of implementing legislation, the judgment of the International Court of Justice did not create a binding obligation that United States courts were required to follow.

10. Another example where a State had found it difficult to implement a judgment of the Court because of its federal structure was the 2002 judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*. In that case, the Court had determined that the Bakassi Peninsula in the Gulf of Guinea formed part of the territory of Cameroon. However, all land and territory comprising the nation was specified in the Nigerian Constitution, and the federal Government could not give up any part of it unless the constitution was amended. The President, while acknowledging the State's obligation to comply with the Court's judgment, had professed himself unable to do so for political and jurisdictional reasons. Through the intervention of the Secretary-General of the United Nations, a commission had been created to resolve the issue and demarcate the border in accordance with the Court's judgment, and the two States had eventually entered into an agreement for full implementation of the judgment.

11. Other cases could be cited in which full compliance with a judgment had been found to be difficult, despite the intention of the parties to comply, such as the *Corfu Channel* case, the *Temple of Preah Vihear* case, the case concerning a *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* and the case concerning *United States Diplomatic and Consular Staff in Tehran*. However, in all those cases the judgment was eventually complied with in one way or another. Even though compliance had come about through the assistance of powers outside the Court, what was important was that the object and purpose of the judgment — to achieve a peaceful settlement of the dispute — had ultimately been achieved. The assessment of compliance with the Court's judgments should be seen in the broader context of the Court's role under the Charter as a principal organ of the United Nations.

12. To sum up, the record of compliance with the Court's decisions could be said in general to have been positive and encouraging. The Court had been particularly effective in settling disputes concerning

border and maritime delimitations and questions of State responsibility. In situations in which it appeared that States would not comply with the Court's decisions, such perceptions were not always accurate over the long term. Most importantly, the Court offered an effective means of resolving international conflicts or preventing their escalation; even in instances of non-compliance or situations in which cases had been brought but later withdrawn, the degree of cooperation and dialogue between States that had come about as a result of the process had been improved, which showed that the Court was making a positive contribution to the maintenance of international peace and security.

13. By contrast, non-compliance resulting from the impossibility of implementing a judgment of the Court owing to domestic legal and structural hurdles was a more serious problem for the rule of law. The conflict between the international and domestic legal orders was bound to increase because of the growing integration of the international legal order into the domestic legal order in such areas as human rights, environmental protection and judicial cooperation, which traditionally had been the exclusive domain of sovereign States but were increasingly the subject of international regulation. When a dispute arose between States relating to the interpretation or application of an international convention that constituted part of the domestic legal order because of that penetration of international regulation, compliance with the Court's judgment could only be effected through implementation in the domestic legal order. Non-implementation in that sense of the judgments of international courts and tribunals was a new type of compliance issue to which the international community needed to pay greater attention.

14. **Mr. Appreku** (Ghana) suggested that the framers of the Charter had not wanted the International Court of Justice to descend into the political arena and had protected the Court's dignity by making it the responsibility of a party to the dispute to bring the matter before the Security Council. Since the Court did not deal with the criminal responsibility of States, its position was analogous to that of a civil law court in the domestic legal context, where the party that won the case had to take the initiative to call attention to non-compliance. By contrast, the position of the International Criminal Court, which could report non-compliance directly to the Security Council, was similar to that of a criminal court in the domestic context, which enforced its own decisions.

15. **Mr. Tichy** (Austria) asked whether the President was satisfied with the implementation of the judgments of the Court or wished to propose changes. In the case of the European Court of Human Rights, for example, a separate body of States parties saw to the implementation of that Court's judgments.

16. **Mr. Charles** (Trinidad and Tobago) said that under article 27 of the Vienna Convention on the Law of Treaties and customary international law, a State could not invoke its internal law as justification for its failure to comply with its international legal obligations. He wished to clarify whether, in citing the *Avena* case, the President of the Court was implying that a State could cite failure to enact domestic legislation as a means for non-compliance.

17. **Mr. Owada** (President of the International Court of Justice) said he had not meant to suggest that the present system was defective or that it needed to be changed. Rather, he had wished to draw a sharp contrast between the mechanisms of compliance in the international and the domestic legal systems. In the domestic legal order, the power to enforce was in the hands of the State and could be exercised effectively. In the international legal order, Article 94 of the Charter had created a "division of labour", whereby the International Court of Justice focused only on the legal aspect and enforcement was in the hands of a political organ, the Security Council. Although he was not suggesting that the Security Council should assume the role of enforcement officer, it was the organ with discretionary power to ensure compliance. In exercising that power, the Security Council needed to take into account a variety of other factors for the peaceful settlement of disputes. As in the resolution of the border dispute between Nigeria and Cameroon, the entire mechanism of the United Nations, including the Secretary-General, might need to be mobilized to bring about a solution. Thus, while many academic articles criticized the lack of enforcement of the judgments of the Court as the most serious defect of the present system, the situation was not as bad as they led one to believe.

18. In *Medellín v. Texas*, the United States Supreme Court had found that the judgment of the International Court of Justice was unenforceable on constitutional grounds, because the process of implementation of

International Court of Justice decisions in the domestic legal order was incomplete. That problem could be expected to become more common, because issues such as human rights and the environment that used to be exclusively under domestic jurisdiction had entered the sphere of international legal norms through international treaties. The international and domestic legal orders formed a whole that ensured the rule of law in the international community. A State's domestic legal order needed to be prepared to absorb international norms by whatever means available to it.

19. **Mr. Kittichaisaree** (Thailand) thanked the President for his role in making the Asian Society of International Law a reality. Referring to recent criticism voiced in academic circles of perceived judicial activism on the part of the Court, he enquired whether it was true that the Court was more willing than in the past to take up requests for advisory opinions from the General Assembly and the Security Council. He also wondered whether it would be useful to increase the number of judges on the Court, in a manner analogous to the suggested reform of the membership of the Security Council, in order to better reflect the geographic distribution of States and the principal legal systems of the world.

20. **Mr. Rietjens** (Belgium) said that non-compliance with the Court's decisions undermined the system of peaceful resolution of disputes. Citing the example of the European Court of Human Rights, which could impose a fine on a non-compliant party, he asked whether the International Court of Justice would consider such a solution to non-compliance or whether that would run counter to Article 94 of the Charter.

21. **Mr. Hernández Garcia** (Mexico) said that non-compliance with Court decisions was a challenge for the Court and the international community. Given the growing number of cases in international law bearing more directly on individuals, non-compliance with Court decisions, beyond threatening relations between States, could also violate the rights of individuals. He asked whether the international legal system was prepared to address that situation.

22. **Mr. Owada** (President of the International Court of Justice) said that the Court's response to recent requests for advisory opinions had been strictly consistent with its jurisprudence. With respect to the request for an advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, for instance, the Court, after analysing Articles 10 and 12 of the Charter, had concluded that it had jurisdiction. As a principal organ of the United Nations the Court had consistently held that it should exercise its jurisdiction to respond to requests for advisory opinions from other United Nations bodies unless there was a compelling reason not to do so. That same rationale had been followed in its decision to respond to the request for an advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

23. The Court as such had no opinion on the question of the number of judges, which was prescribed by the Charter of the United Nations and the Statute of the Court. Speaking in his personal capacity, however, he considered the argument that the composition of the Court should reflect that of the Security Council unconvincing. The issues of the composition of the two bodies should be examined separately on their own merits. However, the Court as a whole did need to represent the major civilizations and the principal legal systems of the world, and the jurists elected to the Court must be qualified to serve in the highest court in their country. Those factors needed to be taken into account by the General Assembly and the Security Council during the elections process.

24. While noting the interest of the example of the European Court of Human Rights, the International Court of Justice could not emulate a model that worked in a national or a quasi-national system, owing to the clear distinction between such systems and the intergovernmental system in which the Court operated.

25. Responding to questions about the *Avena* case, he agreed that such cases posed a new challenge. Inter-State disputes, such as territorial disputes, had once involved only States per se. Since currently a large number of international agreements addressed the rights of the individual, the settlement of disputes concerning them increasingly entailed the implementation of a particular judgment in the domestic legal order. While the Court had to face the new reality and analyse the situation from the standpoint of international law, it was primarily the task of the international community and the States to decide how to address the problem.

26. **Mr. Gouider** (Libyan Arab Jamahiriya) remarked that the mission of the International Court of Justice

was, above all, to issue judgments on disputes under international law. The enforcement of the judgment was another phase, conducted under other principles by other institutions, primarily the Security Council. However, information on compliance was insufficient.

27. **Mr. Owada** (President of the International Court of Justice) agreed that the Court passed judgments at the international level and the disputes it handled were always issues of international law. The International Court of Justice expected its judgments to be implemented, but left the question of how to bring about compliance to the State itself. The Court was not an appeal court for the domestic legal order. Nevertheless, it could point out a specific violation, such as the violation of article 36 of the Vienna Convention on Consular Relations in the *Avena* case, while leaving rectification in the hands of the State. If, following the judgment, there were situations of non-compliance, the matter would be handled by the political organ under Article 94 of the Charter of the United Nations.

28. *Mr. Park Chull-joo (Republic of Korea), Vice-Chairperson, took the Chair.*

Agenda item 79: Report of the International Law Commission on the work of its sixty-second session (*continued*) (A/65/10 and A/65/186)

29. **Mr. Momtaz** (Islamic Republic of Iran), referring to the topic of expulsion of aliens, said that every State had the right to expel aliens living on its territory if they posed a threat to its national security or public order. It would be pointless to try to list the grounds that could be invoked by a State to justify the expulsion of aliens.

30. Nonetheless, two limitations existed on the sovereign right of the State to expel aliens, namely, collective expulsion and disguised expulsion. Regarding the first scenario, the only possible exception was during an armed conflict when aliens had shown hostility against the host State, an issue that his delegation felt should be excluded from the draft. Disguised expulsion, to be distinguished from expulsion carried out by means of incentives, covered situations where a State abetted or acquiesced in acts committed by its citizens to provoke the forced departure of aliens. Such acts were generally targeted at persons belonging to ethnic or religious minorities and were characterized by discrimination against them. That conduct was contrary to the obligations of the host State and violated international human rights law.

31. Once decided, expulsion should be conducted in such a manner that fundamental human rights were fully respected. The Commission should base its work on the provisions of universally accepted human rights instruments, such as the International Covenant on Civil and Political Rights, in order to identify the general principles applicable to the matter, without prejudice to the concepts and solutions admitted at the regional level. Even aliens awaiting deportation must be protected against any inhuman and degrading treatment. In all cases, the property rights of deportees should also be respected and guaranteed by the authorities of the host State.

32. With regard to the draft articles on the effect of armed conflicts on treaties, his delegation noted with satisfaction that the Special Rapporteur on the topic had taken into account the comments of Member States, made during the debate or in writing. The Islamic Republic of Iran had submitted written comments, which were contained in document A/CN.4/627/Add.1. His delegation continued to deem it inappropriate to include non-international armed conflicts within the scope of the topic. The possible effects of that category of conflicts on treaties were addressed in the provisions on circumstances precluding wrongfulness in the articles on responsibility of States for internationally wrongful acts. Moreover, article 73 of the Vienna Convention on the Law of Treaties referred exclusively to the effects on treaties of the outbreak of hostilities between States.

33. The Special Rapporteur had considered it necessary to avoid a fragmentation of international law by revising the definition of “armed conflict” adopted on first reading. Unfortunately, the Commission had not followed the wording of article 2 common to the Geneva Conventions of 1949 and, consequently, had lost the advantage of applying the same definition of “armed conflict” in treaty law as in international humanitarian law.

34. In determining the possibility of termination, withdrawal or suspension of the application of a treaty, the intention of the parties was of paramount importance. However, introducing the criterion of the “nature and extent” of armed conflict in determining the status of a treaty could contradict and negate the effect of the intention of the parties and undermine the

principle of stability of treaty relations. That reference should therefore be deleted from the text.

35. His delegation welcomed the inclusion in the list of treaties that remained applicable during armed conflict those which established or modified land and maritime boundaries, and interpreted the category as including treaties establishing river boundaries. However, the provision dealing with notification of intention to terminate, withdraw from or suspend the operation of a treaty appeared to apply to all treaties, including those establishing boundaries and could be interpreted as a kind of invitation to a State engaged in an armed conflict to invoke the facility provided by the provision as a basis for changing its borders. It would be more appropriate to restrict the scope of the provision so that it would not apply during hostilities.

36. With regard to the topic of protection of persons in the event of disasters, his delegation supported the Special Rapporteur's conclusion regarding the irrelevance of the new notion of "responsibility to protect" to the work on the topic. The debate in the Commission, however, seemed to have deviated from that conclusion, and the "rights-based approach" continued to have adherents among Commission members. Such an approach implied that persons affected by natural disasters were entitled to request international relief, a position that contravened the principles of State sovereignty and non-interference in the internal affairs of States. His delegation felt that the Commission should focus only on the rights and obligations of States. It did not share the view that the refusal of a State to accept international aid could be characterized as an "internationally wrongful act" if such a refusal jeopardized the rights of victims of the disaster. It was for the affected State to determine whether receiving external assistance was appropriate or not, without its refusal triggering its international responsibility. Any suggestion to penalize the affected State would not only be expressly contrary to international law but also constitute an unprecedented step which could have adverse consequences for international relations and justify interventionism.

37. There was little doubt that a State affected by natural disasters was required to cooperate with other States and relevant intergovernmental organizations under international law. Such an obligation to cooperate, however, applied only to the subjects of international law, excluding non-governmental organizations. The provision of humanitarian aid by other States and international organizations remained subject to the consent of the affected State. Once such consent was granted, the affected State should retain, in accordance with its domestic law, the right to direct, control, supervise and coordinate the assistance provided in its territory. Moreover, the humanitarian assistance should be provided in accordance with the principles of humanity, neutrality and impartiality. All principles identified by the Red Cross and Red Crescent Movement, which had been referred to by the International Court of Justice, and in the relevant resolutions of the United Nations General Assembly could be applicable.

38. **Ms. Telalian** (Greece), referring to the topic "Effects of armed conflict on treaties", said that her delegation concurred with the view of the Special Rapporteur regarding draft article 1 (Scope): the draft articles should not apply to treaty relations between States and international organizations. Accordingly, it supported the Special Rapporteur's proposal to include a saving clause reading "[t]he present draft articles are without prejudice to any rules of international law that regulate the treaty relations of international organizations in the context of armed conflict". However, the status of an international organization as a party to an international treaty could in some cases have an overwhelming impact on treaty relations between the States parties. That was the case of the European Union, for example, because the competences attributed to the Union by its member States were so significant.

39. Concerning draft article 2 (Use of terms), her delegation preferred the definition of the term "armed conflict" contained in the text adopted by the Commission on first reading, which was based on the Geneva Conventions of 1949 and the Additional Protocols of 1977. That definition was balanced and accurately reflected the state of law as embodied in widely accepted treaty instruments. Her delegation also supported retention of the term "ipso facto" in draft article 3 (Absence of ipso facto termination or suspension), as it accurately reflected the principle that the outbreak of armed conflict could not, in and of itself, terminate or suspend a treaty. With regard to draft article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties), the reference to "subject matter", which had been included in the text adopted on first reading, should be reintroduced as one of the indicia as it provided guidance on the content of

treaties susceptible to termination under the draft article. The list of treaties not susceptible to termination during armed conflict should be maintained as an annex to draft article 5 (The operation of treaties on the basis of implication from their subject matter) and the new categories of treaties proposed by the Special Rapporteur should be included.

40. Draft article 8 (Notification of intention to terminate, withdraw from or suspend the operation of a treaty) seemed to represent progressive development of international law, and it was therefore necessary to proceed with caution. The right balance must be struck between the interests of the States involved in an armed conflict and those of the international community. Draft article 8 should avoid excessive formalism, because in cases of armed conflict it might be too cumbersome to require the belligerents to follow a formal notification procedure. On the other hand, legal certainty in treaty relations required a formal act on the basis of which other States parties could assess the treaty's susceptibility to termination. Since the outbreak of armed conflict did not ipso facto suspend or terminate a treaty, the Commission might wish to provide in draft article 8 a renvoi to the mechanism of suspension or termination provided for by the treaty itself, rather than to set up a new mechanism that would supersede such provisions. The Commission might also wish to exclude explicitly from the ambit of draft article 8 those treaties covered under draft article 5, the operation of which would continue during armed conflict. Such a provision had been included in the text adopted on first reading.

41. Her delegation supported the inclusion of the specific provisions proposed by the Special Rapporteur on the settlement of disputes, not only in relation to the interpretation and application of draft article 8 but also in relation to draft articles 4 to 7. Her delegation also supported the inclusion in draft article 15 of a prohibition on the threat or use of force in accordance with Article 2 of the Charter of the United Nations.

42. **Ms. Orosan** (Romania), referring to the draft articles on the expulsion of aliens, said that more careful consideration of State practice was required. In relation to revised draft article 9, her delegation agreed that human dignity was a general principle and not a specific human right, and favoured a wording similar to that in the International Covenant on Civil and Political Rights. It was her understanding that in revised draft article 8 the Special Rapporteur was emphasizing certain human rights that were relevant to the topic, without implying that others did not apply.

43. Her delegation suggested revisiting the issue of jurisdiction in the context of revised draft article 11, as a State's obligation to ensure the protection of human rights to persons within its jurisdiction was not inherently territorial. Similarly, there was a need to reconsider the language in revised draft article 14 in order to ensure that aliens were not expelled to States where they ran the risk of being sentenced to death, without obtaining the necessary assurances that such a penalty would not be imposed, or, if prescribed, would not be carried out. Similar language was needed regarding the risk of being tortured or ill-treated.

44. Her delegation was in agreement with the inclusion of provisions on "disguised expulsion". The conduct of a State whose intended effect was to provoke the expulsion of an alien should be qualified as expulsion irrespective of its form. Her delegation was also in favour of a provision on extradition disguised as expulsion, to prevent a State from having recourse to expulsion when extradition was subject to legally prescribed limitations which the State intended to circumvent. However, the grounds for expulsion should not be limited to public order or national security. Discretion should be left to the States to stipulate the grounds for expulsion in their domestic laws. In any case, a State's expulsion decision based on such grounds as prescribed by law should not amount to a disregard of its international legal obligations.

45. With regard to the topic of the effects of armed conflicts on treaties, non-international conflicts should be included within the scope of the draft articles since most current armed conflicts were of that nature; otherwise, the applicability of the draft articles would be too narrow. With regard to treaties to which one or more intergovernmental organizations were parties, her delegation endorsed the distinction proposed by the Special Rapporteur between treaties that concerned international organizations and treaties to which international organizations were parties. Those issues deserved to be further analysed to allow for the possibility of widening the scope *ratione materiae* of the draft articles.

46. Pending further consideration of the definition of "armed conflict", a generally applicable definition would be preferable to a purpose-specific one. The definition suggested by the Special Rapporteur

answered that requirement and had the merit of reflecting in broad terms the general understanding of the concept. In order to ensure a consistent approach, however, it should include a reference to the essential documents concerning armed conflicts, namely the Geneva Conventions of 1949 and the Additional Protocols of 1977.

47. She would encourage the Special Rapporteur to reintroduce a reference to the subject matter of the treaty in draft article 4 as one of the indicia of susceptibility to termination, withdrawal or suspension of treaties. That criterion was relevant to determining whether a treaty would be terminated or suspended as a consequence of an armed conflict or whether a State involved in an armed conflict was likely to withdraw as a consequence. Including that reference in draft article 4 would also ensure consistency with draft article 5. Her delegation preferred the initial language of draft article 15, since widening the scope of the article to cover any unlawful use of force would not necessarily serve the purpose of the draft articles.

48. As for protection of persons in the event of disasters, her delegation welcomed draft article 9, which stressed the primary responsibility of the affected State for the protection of persons and provision of humanitarian assistance on its territory. That responsibility implied a "secondary" responsibility on the part of the international community. However, that "secondary" responsibility to provide humanitarian assistance should not undermine the sovereignty, independence and territorial integrity of States. In other words, there should be no right to intervene in the event of disasters, and any form of assistance to the affected State should be subject to the consent of that State. Pursuant to its duty under international law to protect the persons on its territory, however, a State presumably acted responsibly in considering the appropriateness of external offers of relief. A State should not deliberately act against the interests of its own citizens, causing even more distress and preventing a rapid recovery. The Special Rapporteur should further explore those issues.

49. With regard to the obligation to extradite or prosecute, her delegation looked forward to the initial draft articles on the topic on the basis of the agreed general framework and the discussions held so far in the Working Group. The Secretariat's survey of multilateral conventions (A/CN.4/630) would be very helpful in the orientation of the debates on that topic.

50. In considering the topic of treaties over time, consideration should be given to the Commission's work on the fragmentation of international law. In response to the Commission's request for examples of "subsequent agreements" or "subsequent practice", she could cite a situation in her country involving the interpretation of a bilateral treaty in the light of circumstances that had occurred after its conclusion. The situation had been complicated by the fact that a final and enforceable judgement had been handed down by the Romanian courts based on a particular interpretation of the provisions of the treaty. The main problem had stemmed from the difference in language between the two official texts, which were equally authentic. The two parties had agreed to conclude an exchange of notes on the interpretation of the treaty, and the possibility remained that the judgement could be revised.

51. With regard to the remaining topics, her delegation welcomed the initial studies on the most-favoured-nation clause. Under the topic of shared natural resources, her delegation shared the view that transboundary oil and gas issues were not ripe for codification; States could more easily negotiate the concrete details of the management of such resources on a bilateral basis.

52. **Mr. Kingston** (Ireland) said that his country placed great value on the work of the Commission and wished to ensure that conditions existed for a high-quality engagement between it and Member States. It would be helpful if future sessions of the Commission could be scheduled earlier in the year in order to facilitate earlier production of the Commission's report. His delegation was disappointed that the Commission had not considered the topic of immunity of State officials and hoped that the Commission would do so at its next session. It also hoped that the topic of obligation to extradite or prosecute could be given priority at the next session and looked forward to the Commission's planned discussion and working paper on the topic of settlement of disputes clauses.

53. The commentary to draft article 1 on the protection of persons in the event of disaster referred to the possibility of including legal persons within the scope *ratione personae* of the draft articles. His delegation preferred for the draft articles to remain

focused only on natural persons, since the framework involved a number of criteria that could not be applied to legal persons. As the draft articles were not limited *ratione loci* to activities in the arena of the disaster, it would be valuable to include draft articles providing for the various issues and responsibilities that could arise for assisting and transit States.

54. Regarding one of the criteria set out in draft article 3 (Definition of disaster), the test of "seriously disrupting the functioning of society", there might be unintended consequences to using the effects of a disaster on "society" as the key test for applicability of the framework; the point required further clarification. With respect to draft article 5, his delegation appreciated the reference to cooperation with international and non-governmental organizations and welcomed future provisions that would deal with the particular issues arising in respect of cooperation with such organizations.

55. With respect to the draft articles provisionally adopted by the Drafting Committee, it would be helpful for the Commission to identify the legal bases for the principles involved, so that delegations could more readily distinguish between issues on which the Commission was engaged in codification and those on which it was engaged in the progressive development of international law. Draft article 6 (Humanitarian principles), which was context-specific, could usefully be included. The standard of non-discrimination was appropriate in delivery of relief. However, the principle of neutrality, more familiar from the context of international humanitarian law, might cause confusion and unnecessary complications. The issues addressed in draft articles 7 (Human dignity) and 8 (Human rights) would be more appropriately addressed in a preamble to the draft articles.

56. With regard to the linked questions of the primary responsibility of the affected State and its consent to assistance, clarification of the scope and limitations of the exercise by the affected State of its primary responsibility was crucial. The relevant draft articles should seek to codify, rather than develop, international law. The Commission might usefully consider the legal rules applicable where a State lacked either the capacity or the will to exercise its responsibility. Regarding the requirement of consent, Ireland was of the view that assisting States required consent, whereas non-governmental organizations and other bodies needed simply to comply with the internal laws of the affected State. It would be useful to consider whether current international law prevented unreasonable or unfounded withdrawal of consent, to the detriment of affected persons.

57. **Mr**. Asad Majeed **Khan** (Pakistan) said that his delegation was pleased to note the Commission's progress on the topic "Protection of persons in the event of disasters". The Commission had rightly focused on the core principles of humanity, neutrality and impartiality in the response to disasters and on the primary responsibility of the affected State in the provision and coordination of relief assistance. The reference to the principle of neutrality in draft article 6 highlighted the apolitical nature of disaster relief and the obligation of foreign actors, organizations and the international community involved in disaster response to respect the sovereignty of the affected State and not to commit any act that might amount to interference in its internal affairs. The principle of impartiality excluded political considerations from the provision of humanitarian aid and implied that needs-based criteria should be used to distinguish and prioritize among individuals in the distribution of resources and relief efforts. With regard to draft article 7, his delegation agreed that human dignity might not be a human right per se, but rather a foundational principle on which the edifice of all human rights was built.

58. Concerning draft article 8 (Primary responsibility of the affected State), his delegation supported the Commission's focus on the rights and obligations of affected States vis-à-vis external actors. The primacy of the affected State in the provision of disaster relief assistance under the draft articles was based on a central principle of international law, namely, State sovereignty, and flowed from the State's obligation towards its own citizens. The affected State should take the lead in evaluating its need for international assistance and in facilitating, coordinating, directing, controlling and supervising relief operations on its territory. Such operations should be carried out only with its consent. His delegation viewed the affirmation of the primary role of the affected State as the most essential provision of the draft articles and appreciated the preference given to domestic law in stressing the primacy of the affected State in coordinating relief efforts.

59. **Mr. Minogue** (United Kingdom) said that his delegation continued to maintain that the topic of expulsion of aliens raised many difficult and complex

issues that intruded directly into the domestic sphere of States and was not suitable for codification or consolidation at the present time.

60. With regard to the effects of armed conflict on treaties, under draft article 1 (Scope), it should be clarified why and how armed conflict would affect the operation of a treaty where only one party to the treaty was involved in an armed conflict. Concerning the effects of armed conflicts on treaties to which international organizations were parties, his delegation agreed with the analysis of the Special Rapporteur set out in paragraphs 202 and 203 of the Commission's report. As to draft article 2 (Use of terms), his delegation considered it important to include a definition of the term "armed conflict" in the draft articles and favoured the one used by the International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor v. Duško Tadić* case, excluding the phrase relating to armed violence between organized armed groups within a State, since the draft articles only applied to situations involving at least one contracting State participating in the armed conflict. The word "protracted" should be retained with reference to armed violence between governmental authorities and organized armed groups.

61. His delegation found the current version of draft article 3 (Absence of *ipso facto* termination or suspension) to be satisfactory and was pleased to see a reference to the intention of the parties in draft article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties). In draft article 5 (Operation of treaties on the basis of implication from their subject matter), his delegation would prefer to see an indicative list of treaties set out in an annex rather than in a second paragraph in the article. Such an approach would represent a good compromise between incorporating the list in the draft articles and reflecting it in the commentary. As to draft article 6 (Conclusion of treaties during armed conflict), the word "lawful" qualifying the reference to "agreements" in paragraph 2 was inappropriate; the phrase should be replaced by "agreements under international law" or "agreements in accordance with international law".

62. Draft article 7 (Express provisions on the operation of treaties) was acceptable to his delegation, which agreed with the Special Rapporteur's suggestion to locate it as new draft article 3 bis. While his delegation was sympathetic to the intention underlying draft article 8 (Notification of intention to terminate, withdraw from or suspend the operation of a treaty), it might be impractical to require a State party to a treaty to provide such notification if it was engaged in an armed conflict with another party or other parties to the treaty. Draft articles 9, 10, 11 and 12 appeared acceptable. The merging of earlier draft articles 12 and 18 seemed useful, as the new draft article 12 covered both revival and resumption of treaty relations.

63. Draft article 13, by including the phrase "subject to the provisions of article 5", might lead to a situation in which a State's exercise of its right to self-defence was subject to continuing treaty obligations which might be inconsistent with that right. For example, a State party to a treaty concerning an international watercourse might need to breach provisions of that treaty by damming the watercourse in order to exercise its right of self-defence. In draft article 15, it would be preferable to avoid referring to aggression, since the Charter of the United Nations did not define the term and General Assembly resolution 3314 (XXIX) was controversial. His delegation favoured the language that appeared in brackets in the text of the draft article. As to draft article 17 (Other cases of termination, withdrawal or suspension), he saw no need for a general and abstract formulation, but it might be useful to include a new subparagraph consistent with article 57, paragraph (a) of the Vienna Convention on the Law of Treaties.

64. On the topic of protection of persons in the event of disasters, his delegation was of the view that the codification or progressive development of comprehensive and detailed rules was likely to be unsuitable. The development of non-binding guidelines or a framework of principles for States and others engaged in disaster relief would probably be of more practical value and enjoy more widespread support and acceptance. That view had been reinforced by the further draft articles provisionally adopted by the Drafting Committee. For example, although the draft articles rightly removed international humanitarian law from the scope of the topic, draft article 6 referred to concepts of international humanitarian law such as neutrality, which was potentially confusing.

65. Draft article 9 (Role of the affected State) as provisionally adopted by the Drafting Committee referred to a "duty" to ensure protection rather than a "responsibility" but did not make clear what the content of that duty would be in legal terms, to whom it would be owed and what it would entail in practice.

The concepts covered in draft articles 6 and 9 would need to be revisited in due course, as would the scope and definition of "disaster" and the scope of the duty to cooperate.

66. **Mr. Kleib** (Indonesia), speaking on the topic "Expulsion of aliens", observed that international human rights law placed some restrictions on when and how a State might exercise its power to expel persons from its territory and afforded three types of protection to such persons: substantive protection against return if the person would face grave violations of human rights, procedural safeguards during deportation procedures and protection with regard to the methods of expulsion. In addition to the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant workers, might be afforded additional protection against expulsion and/or benefit from additional procedural guarantees.

67. With regard to the topic "Effects of armed conflicts on treaties", his delegation was of the view that the scope of the draft articles should be limited to armed conflicts of an international character. Internal conflicts did not necessarily affect treaties concluded between two sovereign States, and each such conflict, and the circumstances surrounding it, would have to be evaluated in order to determine its impact on a particular treaty.

68. His Government attached great importance to the topic of protection of persons in the event of disasters, particularly in the light of Indonesia's experience following the tsunami of 2004. Humanitarian assistance should be undertaken only with the consent of the affected country and with respect for national sovereignty, territorial integrity, national unity and the principle of non-intervention in the domestic affairs of States. His delegation viewed draft article 6 (Humanitarian principles in disaster response) as a key provision of the draft articles, and considered neutrality, impartiality and humanity to be core principles in humanitarian assistance efforts. It was also important to respect the principle of non-discrimination and to take into account the needs of the particularly vulnerable, but those concerns must be seen as complementing the three core principles.

69. With regard to draft article 7, his delegation concurred with the Commission's decision not to dwell on establishing human dignity as a right. As to the issue of primary responsibility of the affected State in draft article 8 as proposed by the Special Rapporteur, the Commission must uphold the principles of sovereignty and non-intervention. It was indisputable that the affected State had the primary duty to protect individuals in its territory. In addition to exploring the right of the international community to provide lawful humanitarian assistance, without characterizing it as a secondary responsibility, it was important to explore ways and means of improving the coordination, effectiveness and efficiency of such assistance, particularly by strengthening partnerships between affected States and the international community and developing proactive approaches to disaster management.

70. *Mr. Nega (Ethiopia), Vice-Chairperson, took the Chair.*

71. **Mr. Appreku** (Ghana) said that his delegation joined in the call for the early submission of the Commission's reports. Reliance on the website editions of the reports was not always convenient for delegations that had problems accessing them electronically.

72. His delegation had spoken extensively during the sixty-fourth session of the General Assembly on the topic of expulsion of aliens and was grateful to note that attempts had been made in the draft articles to address some of its concerns, in particular those relating to the need to ensure procedural guarantees and due process. Draft article C l could be strengthened, with the addition of a paragraph (i) requiring the expelling State to allow reasonable time and opportunity for the alien facing the prospect of expulsion to gather the personal belongings that he or she might have lawfully acquired while sojourning, lawfully or unlawfully, in the territory of the expelling State.

73. Under the general rules of international law, an alien was entitled to minimum national treatment, and the right to such treatment was not linked to the legal status of the alien. Thus, any strenuous attempt to draw distinctions between aliens legally resident and those who were not, or those who had been resident for some time and those who had just arrived, in the application of procedural guarantees might result in unfair discrimination. In many cases, whether or not a person was lawfully resident in the jurisdiction was itself the crux of the challenge by the alien to his or her expulsion. Any artificial time frame or threshold for determining whether aliens were entitled to exhaustion of local remedies could lead to situations where the host authorities would resort to hasty expulsions in

order to prevent the aliens from being entitled to more favourable expulsion procedures by virtue of the length of their stay.

74. In revised draft article 10, the wording "among persons who have been or are being expelled" in paragraph 2 could also be inserted in paragraph 1 for the sake of consistency and the removal of ambiguity.

75. The draft articles would undermine the essence of due process if the expelling State was accorded the prerogative to expel an alien while his or her challenge against the expulsion decision was pending. The reference to "humanity" in draft article B could easily be read as mere "compassion", and not a legal obligation to respect the dignity of the person. The draft articles should make it more explicit that the expelling State was not to subject the alien to cruel, inhumane or degrading treatment.

76. To safeguard the interests of the receiving State, the draft articles should make it clear that the mere possession, by the expelled alien, of travel documents purported to have been issued by the receiving State was only prima facie and not conclusive evidence of nationality. Thus, the expelling State must adhere to more rigorous standards in determining the nationality of an expelled alien who was challenging his presumed nationality with the full cooperation of the receiving State.

77. The draft articles should also make it clear that in certain grey areas where the grounds for expulsion were not covered under the draft articles and some discretionary power was thereby conferred on the expelling State, such power must not be exercised arbitrarily but in a reasonable and judicious manner and in good faith. States could be assured that the draft articles were not intended to take away their sovereign right under international law to determine who would enter or stay in their territory by the introduction of a saving clause to that effect.

78. In brief, the draft articles must aim at providing for more humane standards of treatment of aliens facing expulsion and require all States concerned, whether expelling, transit or receiving States, to refrain from treating such persons in an inhumane, degrading and cruel manner and to respect procedural guarantees and due process. Achieving that end could entail both progressive development and codification of international law to address any lacunae in the existing corpus of international law and State practice. It should not be permissible for bilateral agreements to be concluded that directly or indirectly took away or derogated from those procedural safeguards.

79. The draft articles referred many times to the standard phrase "in accordance with the law". Given that the life of the law was experience and not logic, the draft articles, or at least the commentary thereto, should perhaps indicate that such laws were reasonable and necessary in a democratic society.

80. With regard to the topic of protection of persons in the event of disasters, it was high time to consider codification of the many soft law principles that had been developed in General Assembly resolutions and other United Nations forums. The definition of disaster should focus on both the event and the consequences. The question of the primary responsibility of States in the event of a disaster should be interpreted not just as a right to allow or refuse assistance but as a duty to respect the right of victims, both citizens and foreign nationals, to receive assistance. That right should not be unreasonably withheld on any grounds, political or otherwise. The draft article should also emphasize the duties of neighbouring States in the event of a disaster affecting more than one State, which might involve the movement of displaced persons across borders.

81. With respect to the effect of armed conflict on treaties, his delegation would be grateful if the Commission could address the question of the effect of armed conflict on the evolution of the Charter of the United Nations itself, including the emergence of the concept of peacekeeping, which had developed in response to certain conflicts and had become one of the flagship activities of the Organization.

82. **Ms. Escobar Hernández** (Spain) said that the way in which the draft articles on expulsion of aliens had been presented was hindering a comprehensive understanding of the issues involved and the proposals put forward. In order to facilitate future work on the topic, an outline of the final structure for the draft articles should be adopted and the draft articles falling within each section should then be systematically presented, avoiding the overlap and repetition that currently characterized some of them.

83. Her delegation wished to point out that some of the information presented in the sixth report of the Special Rapporteur (A/CN.4/625) on Spanish legislation relating to the expulsion of aliens was somewhat inaccurate and out of date. It was surprising that the

source of some of the information included had been a single non-governmental organization. Any information relating to the legislation and practice of States in respect of the topic should by verified by official sources.

84. While her delegation endorsed the notion of "disguised expulsion" and agreed on the need to identify and prohibit any State practice that amounted to unlawful expulsion of an alien who had the right to reside in the territory of the State concerned, it had serious reservations regarding some of the purported examples of the practice cited by the Special Rapporteur in his sixth report. Those from Spain had nothing to do with disguised expulsion; they were voluntary return mechanisms that were entirely permissible under international law. Furthermore, her Government provided assistance to voluntary returnees, although it had no obligation to do so under any international legal framework. Her delegation also had reservations concerning paragraph 2 of draft article A (Prohibition of disguised expulsion), which was vague and did not provide an adequate definition of the term "disguised expulsion". Further work on the definition was needed. Her delegation did not support the inclusion of draft article 8 (Prohibition of extradition disguised as expulsion) as proposed by the Special Rapporteur. Extradition and expulsion were distinct legal concepts, and the introduction of a reference to extradition was confusing and not relevant to the topic of expulsion of aliens.

85. Her delegation would reserve comment on the other draft articles, but did wish to express its approval of the distinction drawn between aliens lawfully and unlawfully present in the territory of a State and the focus on protection of and respect for the human rights of aliens throughout the expulsion process. Her Government interpreted the list of rights accorded to aliens being expelled as a statement of the specific rights applicable in such situations, but under no circumstances should it be seen as limiting the generally recognized rights of aliens.

86. With regard to the topic "Effects of armed conflict on treaties", her delegation supported the inclusion of non-international conflicts within the scope of the draft articles in order to reflect both international practice and the reality that the majority of armed conflicts were not international. Also with a view to reflecting contemporary practice and situations, her delegation favoured the definition of "armed conflict" used in the *Tadić* case. However, it had misgivings about the proposal to include as an annex to the draft articles an indicative list of treaties that would remain in operation in the event of armed conflict. While such a list would enhance legal certainty, drawing up the list could be problematic. Her delegation was therefore in favour of exploring the option of including a single paragraph of general scope which could be applied on a case-by-case basis. It saw no reason to exclude treaties to which international organizations were parties from the scope of the draft articles, since practice indicated that such treaties could be affected by armed conflict. With regard to draft article 15 (Prohibition of benefit to an aggressor State), her delegation preferred the inclusion of a general reference to Article 2, paragraph 4, of the Charter of the United Nations.

87. Spain supported a human-rights-based approach to the topic "Protection of persons in the event of disasters". However, that approach needed to be balanced in order to ensure that fundamental principles of international law, such as national sovereignty, territorial integrity and non-intervention, were respected whenever the international community responded to a disaster. Her delegation agreed that the principles that should inform the protection of persons in the event of disasters were humanity, neutrality, impartiality and non-discrimination, and that human dignity was the central principle to be borne in mind in all decision-making relating to disaster response. Existing practice provided a sufficient basis for the proposed draft articles on all those principles. Her delegation also agreed that the State had the primary responsibility for assisting the affected population and that, consequently, the consent of the State concerned must be obtained for the implementation of any assistance or relief operation. Draft article 8 as proposed by the Special Rapporteur provided a balance between a human rights approach and respect for other relevant principles of international law. Nevertheless, her delegation considered that the assertion of the absolute primacy of the will of the affected State might conflict with other fundamental norms of contemporary international law and with the principle of protection of human rights that was also part of international law. It therefore believed that further reflection was needed on the provision that had become draft article 9 (Role of the affected State) and looked forward to receiving the clarifications to which the Special Rapporteur had alluded.

The meeting rose at 1.05 p.m.