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Chairperson: Ms. Šurkova (Vice-Chairperson) . . . . . (Slovakia)
later: Ms. Picco . . . . . (Monaco)

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In the absence of Ms. Picco, Ms. Šurkova (Slovakia), Vice-Chairperson, took the Chair.

The meeting was called to order at 3 p.m.

Agenda item 75: Responsibility of States for internationally wrongful acts (*continued*) (A/65/76 and A/65/96 and Add.1; A/C.6/65/L.8)

1. **Mr. Nega** (Ethiopia), Chairperson of the Working Group on responsibility of States for internationally wrongful acts, reported that the Working Group had met on 19 October 2010. A general exchange of views had been held on the possibility of negotiating an international convention on the basis of the articles on responsibility of States for internationally wrongful acts. The discussion had revealed that divergences of opinion continued to exist.

2. The Working Group had then held a preliminary exchange of views regarding a draft resolution that could be considered by the Committee. It had had before it a preliminary text prepared by the Coordinator on the basis of General Assembly resolution 62/61. A number of suggestions had been made, and the views of Member States had been canvassed. The exchange had formed a basis for subsequent bilateral consultations outside the Working Group.

3. Introducing draft resolution A/C.6/65/L.8, he said that the text was based on that of General Assembly resolution 62/61 with some technical changes. By the draft resolution, the Assembly would notably decide to include the item in the provisional agenda of its sixty-eighth session and to further examine the question of a convention.

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)

4. **Mr. Rodiles Bretón** (Mexico) said that the topic "Protection of persons in the event of disasters" was particularly relevant for Latin America and the Caribbean in view of the recent disasters in Chile and Haiti. Mexico agreed that it was appropriate not to include human dignity among the principles set forth in draft article 6, as it was already expressly mentioned in draft article 7. Human dignity was not a human right as such, but rather the ultimate goal which the vital principles of humanity, neutrality and impartiality were intended to protect.

5. Any cooperative action in the event of a disaster should be based on the principles of neutrality and non-intervention enshrined in the Charter of the United Nations. It should take place with the consent of the affected State and solely in the interests of its people.

6. His delegation agreed that in accordance with draft article 9, paragraph 2, the affected State had the primary role in the direction, control, coordination and supervision of relief and assistance. The responsibility of the international community was secondary and subsidiary. The disaster in Haiti had highlighted the need to reflect on how to balance respect for sovereignty and the primary responsibility of the affected State, on the one hand, with the need to guarantee the protection and dignity of the population on the other hand. Mexico called on the Commission to give particular attention to the question.

7. **Mr. Simonoff** (United States of America), referring to the topic "Expulsion of aliens", said that his delegation appreciated the diligent and dedicated work of the Special Rapporteur on the topic. The draft articles required careful review; they could unduly restrain the sovereign right of States to control admission to their territories and enforce their immigration laws. They should not seek to codify new rights, or to import concepts from such regional bodies as the European Commission or the European Court of Human Rights. Instead, they should reflect established principles of law set forth in widely ratified international human rights conventions.

8. Extradition should be excluded from the scope of the draft articles. It should not be treated in the same manner as expulsion, but rather as the transfer of an individual, whether alien or national, for a specific law enforcement purpose. Many of the proposals, particularly the new draft articles concerning disguised expulsion and extradition disguised as expulsion, might not be consistent with the settled practices and obligations of States under bilateral and multilateral extradition treaties.

9. Various references to the rights of expelled persons also gave cause for concern. In accordance with international human rights treaties, the draft articles should apply to individuals within the territory of a State who were subject to a State's jurisdiction. Failure to limit States' obligations accordingly would make them responsible for anticipating the conduct of

third parties, which they might not be able to foresee or control.

10. The obligation not to discriminate, which was set forth in revised draft article 10, was an important one. It should apply, however, only to the process afforded to aliens in expulsion proceedings. It should not be formulated in a manner that would unduly restrain the discretion of States to control admission to their territory and to establish grounds for expulsion of aliens.

11. His delegation was concerned at the incorporation of non-refoulement obligations into the draft articles. Such obligations were set forth explicitly in draft articles 14 and 15, and indirectly in various provisions extending protection to persons who had been expelled. Those provisions relied on non-binding opinions of the Human Rights Committee and on jurisprudence of the European Court of Human Rights, and interpreted a non-refoulement obligation and a requirement for assurances against the death penalty as rights. However, no such rights were expressly provided for in articles 6 or 7 of the International Covenant on Civil and Political Rights or in any other United Nations instrument.

12. The term "personal liberty" in revised draft article 14 was undefined, and went beyond existing non-refoulement obligations. Revised draft article 15, paragraph 2 extended non-refoulement protection to risks emanating from persons or groups of persons acting in a private capacity. In so doing, it went beyond even the non-refoulement protection in respect of torture expressly set forth in article 3 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Punishment.

13. Turning to the topic "Effects of armed conflict on treaties", he said that his delegation was pleased that the new Special Rapporteur on the topic had retained the broad outlines of the draft articles adopted on first reading. He noted the proposed new definition of armed conflict in draft article 2 (b), but believed that any attempt to define the term was likely to be confusing and counterproductive. The formulation contained in the *Tadić* decision might be a useful reference point in certain circumstances. However, the standard had evolved and could continue to do so; its crystallization was a matter for States to deal with. It would have been preferable to state clearly that "armed conflict" referred to the set of conflicts covered by common articles 2 and 3 of the Geneva Conventions. That approach would cover the entire range of armed conflicts in a manner readily acceptable to States. Another problem was that the draft article conflated the distinct concepts of occupation and armed conflict.

14. His delegation was concerned at the incorporation into article 15 of the definition of aggression set forth in General Assembly resolution 3314 (XXIX). That provision failed to properly recognize the process described in the Charter for making an authoritative determination of aggression. It might also be unnecessarily limited in scope, in that it did not address the illicit use of force not amounting to aggression. His delegation therefore urged the Commission to reconsider those issues at a later time.

15. Turning to the topic "Protection of persons in the event of disasters", he said that the current draft articles made important progress in a number of areas. His delegation had in the past expressed reservations regarding a rights-based approach to the topic. At the same time, it continued to believe that the Commission could contribute to States' efforts to plan for disaster relief by providing practical guidance to countries offering or requiring assistance.

16. His delegation commended the Special Rapporteur on the topic for addressing the core principles of neutrality, impartiality and independence, and encouraged him to continue to consider the possible ways in which those principles related to and shaped the context of disaster relief.

17. The reference in draft article 8 to the primary responsibility of the affected State was also welcome. According to the report, there had been some debate in the Commission as to whether such responsibility was exclusive. In order to facilitate the development of a product of practical value, the Commission could perhaps structure its work in such a manner as to avoid the need for a definitive pronouncement on the issue. His country appreciated the efforts of the Special Rapporteur to ensure that the duty of States to cooperate, as set forth in draft article 5, was understood in the context of the primary responsibility of the affected State.

18. **Mr. Yee** (Singapore) said, with regard to the topic "Expulsion of aliens", that replacement of the expression "fundamental rights" with a reference to "human rights" in the revised version of draft article 8 was welcome; given the varied circumstances in which

expulsion could occur, it had seemed imprudent to use an expression of such limited ambit as “fundamental rights”. The more inclusive term of “human rights” better captured the full range of applicable rights in each situation. He nonetheless suggested that the phrase “in particular those mentioned” should be amended to read “including those mentioned” in order to make it clear that all relevant human rights of the persons concerned were to be respected, regardless of whether those rights were articulated in the draft articles. His suggested wording would also be more consistent with the fact, emphasized in paragraph 117 of the Commission’s report, that the phrase was not intended to establish a hierarchy among the human rights to be respected in the context of expulsion.

19. Concerning revised draft article 14, he reiterated his delegation’s position that it was unable to agree with or accept the wording now contained in paragraph 2 insofar as it suggested that a State having abolished the death penalty had an automatic and positive obligation under general international law not to expel a person sentenced to death to a State in which that person might be executed, unless it had first obtained a guarantee that the death penalty would not be carried out. The wording of paragraph 2 also suggested that that so-called obligation was one aspect of the right to life. No such obligation existed under general international law, however; as indeed observed by the Special Rapporteur when introducing his fifth report (A/CN.4/611 and Corr.1), the right to life did not imply prohibition of the death penalty. Moreover, as similarly demonstrated by the divisive nature of discussions in the General Assembly, there was no global consensus concerning the abolition or retention of that penalty, much less any agreement that its prohibition was part of the right to life.

20. While some domestic or regional tribunals might have made certain pronouncements concerning treaty obligations that they had been asked to interpret, there was likewise no customary international law obligation to the effect that a State having abolished the death penalty was then ipso facto bound to prohibit the transfer of a person to another State where the death penalty could be imposed without the relevant guarantee being sought. Whether a State in that position chose to bind itself in that manner by undertaking specific treaty obligations was another matter distinct from a decision not to apply the death penalty at the domestic level.

21. His delegation welcomed the revised version of draft article 8, on prohibition of extradition disguised as expulsion; the earlier version would have given rise to substantial practical difficulties in that the requirement of consent on the part of the person being expelled would have almost always resulted in non-expulsion, given the likelihood that such consent would be withheld. More significantly, it would to all intents and purposes have altogether barred expulsion to a State seeking extradition in the absence of such consent, whereas extradition in and of itself could not be an absolute bar to expulsion. The real issue was whether the act of expulsion was such as to circumvent safeguards pertaining to the extradition of the person. The revised version did away with the element of consent while also safeguarding the rights of the person being expelled, therefore striking the right balance in ensuring that such expulsion was subject to the more general requirement of being “in accordance with international law”.

22. *Ms. Picco (Monaco) took the Chair.*

23. **Mr. Martinsen** (Argentina), referring to the topic “Expulsion of aliens”, said that his delegation understood the view expressed by some delegations that it would be redundant to make a specific reference to human rights standards in the draft articles, as those were fundamental norms which must be applicable in any case. If, however, by repeating the obvious, States were able to properly educate their migration officials to duly implement the standards for human rights protection, then situations that endangered the lives and physical and mental well-being of persons might be avoided.

24. Turning to the effects of armed conflicts on treaties, he said that any study of State practice must be based on consultations with Governments. When two or more States were involved, however, observations on State practice could be considered impartial and useful only if they were adequately supported by all the States concerned. The analysis of the effect of armed conflict on the termination or suspension of certain treaties should be sharply differentiated from the analysis of the factual or legal situations that were recognized by the parties at the time the treaty was concluded and could not be affected by armed conflict. The continuity of treaties was a fundamental principle that should be stated clearly in the draft articles. Moreover, the cardinal principle of *pacta sunt servanda* remained operational even in case of armed

conflict. The existence of an armed conflict involving a State party to a treaty should not be recognized as a stand-alone cause to justify non-compliance with the treaty. His delegation encouraged the Commission to continue its work on the topic along those lines and to approach the law of treaties in the light of the prohibition enshrined in the Charter of the United Nations against recourse to the threat or use of force.

25. Consideration of the topic of the treatment and protection of persons in case of disasters would lead to the elaboration of draft articles or provisions which would establish the legal framework for disaster relief efforts and contribute to the codification and progressive development of international law. That would help clarify the core principles and concepts of law in order to put disaster relief work on a secure legal footing, without losing sight of the need for a pragmatic approach to the real problems confronting individuals in disaster situations. It was appropriate for the Special Rapporteur to focus on the application of the fundamental principle of consent of the affected State and on the principles of humanity, neutrality and impartiality. It was also appropriate to establish a linkage between that topic and the need to respect the principles of State sovereignty and non-intervention.

26. Lastly, his delegation considered it useful for the Commission to continue to address the topic of the treatment and protection of persons in case of disasters, in view of the fragmented nature of the relevant international legal regime. It supported the Special Rapporteur's suggestion that the draft articles, regardless of their final form, could serve as a basic reference framework for a host of agreements between the various actors in the area, including, but not limited to, the United Nations.

27. **Mr. Shin** Boonam (Republic of Korea), speaking on the topic "Expulsion of aliens", said that while all States had the right to expel aliens on grounds of violating domestic regulations or damaging national interests, the human rights of such aliens must be respected in accordance with domestic and national legislation. In his country, expulsion measures were applicable only to non-nationals and non-residents, in conformity with the well-established international legal principle evidenced by numerous international human rights instruments that a State's expulsion of its own nationals was absolutely prohibited. All persons in the Republic of Korea, including aliens, were moreover assured of human rights and dignity.

28. Emphasizing the principle of non-refoulement incorporated in paragraph 1 of revised draft article 14, his delegation proposed that the Commission should consider measures that might be taken by a State to which a person was expelled or returned in order to ensure respect for the right to life or personal liberty of such person.

29. Concerning the topic "Protection of persons in the event of disasters", his delegation agreed with the stipulation contained in draft article 8 that the affected State had the primary responsibility to provide assistance to affected persons. The consent of the affected State should moreover be a sine qua non for the protection of persons and the provision of humanitarian assistance in its territory. It was unclear, however, from which country persons affected by disasters were able to request assistance. Furthermore, the draft article was silent as to whose responsibility it was to decide that an affected State had failed to provide disaster relief assistance, and with whom the secondary responsibility lay for providing assistance. The Commission should discuss those unresolved questions with a view to developing appropriate guidelines.

30. "Effect of armed conflicts on treaties" was an important topic, in that armed conflicts made it difficult or impossible for parties to fulfil certain treaty obligations. The fact that States could invoke armed conflicts in which they were involved as a ground for the suspension, termination or withdrawal of treaties impaired both the stability of treaties and relations between the parties thereto. His delegation therefore supported draft article 5, on the operation of treaties on the basis of implication from their subject matter, and the inclusion of an annexed indicative list of categories of those treaties that should continue in operation during armed conflicts.

31. **Mr. Beg** (India) said that his delegation supported the reorganization of the draft articles on expulsion of aliens into five parts and the general approach to the topic adopted by the Special Rapporteur; the right of States to expel aliens must be exercised in accordance with the relevant rules of international law, including those relating to the protection of human rights and to the minimum standards for the treatment of aliens.

32. Concerning the topic "Effects of armed conflicts on treaties", his delegation continued to maintain that its scope should be limited to treaties concluded

between States and exclude those concluded by international organizations. Furthermore, the definition of "armed conflict" should be considered independently of the effects of such conflict on treaties and limited in scope to inter-State conflicts insofar as it was States that entered into treaties, and treaty relations were not directly affected by internal conflicts. The principle of non-automatic termination or suspension enunciated in draft article 3 was useful to encouraging the stability and continuity of treaty relations. Draft article 15 on prohibition of benefit to an aggressor State also had the support of his delegation.

33. As to draft article 5, general criteria should be identified for determining the type of treaties that would continue to apply during an armed conflict. On that score, treaties that were in no circumstances affected by armed conflict, such as international humanitarian law treaties and treaties on maritime and land boundaries, should be listed separately from treaties that continued to exist only if the parties thereto so intended.

34. With regard to the topic "Protection of persons in the event of disasters", of the five draft articles thus far provisionally adopted by the Commission he particularly welcomed draft article 4, on the relationship of the articles with international humanitarian law, and the inclusion of a reference in draft article 3 to a "calamitous event", which emphasized the grave and exceptional situations to which the draft articles would apply.

35. Concerning draft article 6, on humanitarian principles in disaster response, the cited principle of neutrality was irrelevant and would be more appropriately replaced by a reference to the principle of non-discrimination, which had also been emphasized by the International Court of Justice in the context of a case (*Nicaragua v. United States of America*) involving humanitarian assistance.

36. His delegation welcomed the content of draft article 8, on primary responsibility of the affected State. Indeed, the latter's primacy in disaster response had been reaffirmed on numerous occasions by the General Assembly, including in the guiding principles annexed to its resolution 46/182 on strengthening of the coordination of humanitarian emergency assistance of the United Nations. Equally recognized in those same guiding principles was the relevance of the concepts of sovereignty and territorial integrity in the context of disaster response. Accordingly, at the same time as emphasizing the duty of cooperation with a view to encouraging assistance to affected persons and providing for essential human needs as a priority in emergency situations resulting from a natural disaster, the draft articles must recognize the sovereignty of the affected State, the responsibility of that State towards its own nationals and its right to decide whether it required international assistance. In short, the affected State was best placed to assess needs in such situation and its capacity to respond. It moreover had the right to direct, coordinate and control within its own territory any international assistance that it accepted.

37. **Mr. Murai** (Japan), speaking on the topic "Expulsion of aliens", said with respect to the procedural rules for such expulsion that the Commission should continue its scrutiny as to whether the distinction between aliens who were "lawfully" and "unlawfully" in the territory of a State was grounded in international instruments, international jurisprudence and national legislation and case law, as well as in the practice of the States and in their views as expressed in international forums. It should do the same in the case of procedural rights and should furthermore note that it was still expected to respond to the criticism that the topic was not yet ripe for codification. In addition, it should focus on the question of which obligations under international law prohibited a State from expelling aliens and then discuss whether, as part of the topic, it should take up the scope and content of human rights applicable to persons being expelled in an expelling State and to persons having been expelled in a receiving State. Lastly, in discussing the effects of the death penalty on the draft articles, it should bear in mind that the imposition of the death penalty in the national criminal justice system of a State was, in principle, a matter of policy for that particular State.

38. Turning to the topic "Effects of armed conflicts on treaties", he stressed the importance of remembering that the topic was an outgrowth of the 1969 Vienna Convention on the Law of Treaties while at the same time acknowledging the significant role played by international organizations in today's international community. The United Nations Convention on the Law of the Sea, for instance, should not be excluded from the scope of the draft articles on the topic. Those comments were equally applicable to non-international conflicts, of which the Vienna

Convention made no mention. On the other hand, a clear distinction between international and non-international armed conflicts was not always possible. If the latter were to be excluded, the draft articles would have only limited scope, thereby detracting considerably from their value.

39. As to the definition of "armed conflict", objective criteria should be used to determine when such a conflict began. On that score, the commentary should state that the application of the draft articles was not dependent on the discretionary judgement of the parties in question but was automatic on fulfilment of the material conditions for which they provided. Concerning the language of draft article 3, on absence of *ipso facto* termination or suspension of the operation of treaties, avoidance of the negative form was desirable in the case of such a core provision.

40. With regard to the topic "Protection of persons in the event of disasters", his country welcomed the Commission's continuous efforts at its most recent session to formulate draft articles aimed at codifying and elaborating rules and norms relating to disaster-relief activities in order to facilitate the flow of international assistance to those in need. It also looked forward, however, to future efforts by the Commission to improve the more abstract draft articles 6, which merely listed humanitarian principles, and 8, which contained no description of foundations for rights. The aim was that they should serve as useful guidelines in individual cases.

41. His country also supported the Special Rapporteur's position that the primary responsibility for the protection of disaster victims lay with the affected State, in view of its ability to gauge most accurately the situation and needs of the affected areas and people. Its decision-making role with regard to disaster-relief activities should therefore be respected by other States and also by non-State actors. That primary role of the affected State and the principle of respect for its sovereign rights should nonetheless be understood in the context of the purpose of protecting the affected people. The affected State might, for instance, be required to coordinate aid offered by other States and non-State actors. In the discussion to be based on the forthcoming fourth report of the Special Rapporteur on the topic, the Commission should continue its efforts to codify the current relevant rules of international law on the basis of the major premise of protection of people affected by disasters.

42. **Mr. Tricot** (Observer for the European Union) said that the candidate countries Croatia, and the former Yugoslav Republic of Macedonia; the stabilization and association process countries and potential candidates Albania, Bosnia and Herzegovina, Montenegro and Serbia; and, in addition, Georgia, the Republic of Moldova and Ukraine, aligned themselves with his statement. It was gratifying for the European Union that, in the Special Rapporteur's sixth report on the expulsion of aliens (A/CN.4/625 and Add.1), the level of substantial and procedural protection received by "aliens" under its law had been deemed appropriate to serve as an example for the international set of legal rules proposed by the Commission. Nevertheless, the report had first of all devoted insufficient attention to the fundamental distinction made in that law between provisions applicable to European Union citizens and those applicable to non-European Union nationals or "aliens". In accordance with that distinction, which was also apparent in the case law emanating from the Court of Justice of the European Union, standards applicable to European Union citizens in matters of expulsion could not automatically be transposed to "aliens". As used by the Special Rapporteur, moreover, that term corresponded only to non-European Union citizens.

43. In addition, the European Court of Human Rights had explicitly recognized that member States of the European Union were entitled to grant preferential treatment to nationals of their fellow member States, including in matters of expulsion. More specifically, it had recognized that those States were not in breach of international law in expelling non-nationals of European Union States in circumstances where their expulsion of nationals of fellow member States was prohibited. As far as third-country nationals were concerned, however, authorities were required under European Union law to adopt an individualized approach when ending the legal stay of such nationals, including for considerations relating to public policy or security.

44. The second point about the sixth report was that it had tended to focus on relatively dated European Union documents, including European Union legislation that had been repealed and/or replaced. The current legislation most relevant to the topic was Directive 2008/115/EC on common standards and procedures in member States for returning illegally staying third-country nationals, the minimum

provisions of which had been or soon would be incorporated into the legislation of over 30 of those States. Indeed, with the exception of certain provisions for which the required incorporation date was 24 December 2011, all member States bound by that Directive were required to do the same by 24 December 2010.

45. Insofar as the 14 draft articles on expulsion of aliens referred to the Drafting Committee purported to express general principles, they appeared to correspond to the general principles set out in Directive 2008/115/EC, which offered a high level of protection to all migrants subject to return procedures. In particular, those principles included: non-refoulement; the right to an effective legal remedy against all decisions relating to return and the possibility of recourse to legal aid; the enjoyment of an inalienable set of minimum rights; use of detention for removal under specific conditions only; the speedy judicial review of any such detention; and the right to human and dignified conditions of detention. In brief, the draft articles contained positive aspects, but further reflection would be necessary as to the direction they should take, including with respect to proposed standards and principles that might not be supported by current State practice.

46. **Ms. Mosquini** (International Federation of Red Cross and Red Crescent Societies (IFRC)), commenting on the draft articles on protection of persons in the event of disasters, said the deferral of a decision on the instrument's final form presented problems even at the current early stage of work. If the Commission intended to produce a new set of non-binding guidelines, then it should avoid reinventing similar instruments, such as the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IDRL Guidelines). If, on the other hand, the draft was to be the basis for a treaty, then key aspects of existing international instruments should be reflected in the new text.

47. In addition, treating the role of civil society actors in disaster response only in a secondary manner, as paragraph (3) of the commentary to draft article 1 indicated, would leave a critical gap. One of the key findings of the International Federation's programme of research and global consultations was that the lack of clearly articulated rules for the involvement of civil society actors was a major problem in international disaster relief. The Haiti earthquake operation, having attracted hundreds of foreign non-governmental organizations (NGOs), was a case in point.

48. Also problematic in the work on the draft articles was the fact that no distinction was drawn between domestic and international disaster response. Draft article 5 clearly affirmed the duty to cooperate with IFRC and other international actors, but it neglected to mention national Red Cross and Red Crescent societies. The problem could easily be resolved by replacing the phrase "the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross" with the words "the components of the International Red Cross and Red Crescent Movement".

49. Draft article 4 now appropriately avoided potential conflict among legal provisions by excluding situations to which international humanitarian law applied from the scope of the draft articles, although the final sentence of paragraph (3) of the commentary to draft article 4 and paragraph (7) of the commentary to draft article 5 seemed to muddy that clear line. There was also potential for confusion in draft article 6, which referred to three core humanitarian principles but singled out certain elements thereof: for example, non-discrimination, which was an element of the principle of impartiality, and persons with the greatest need, attention to whom was subsumed within the principle of humanity. To avoid confusion, the phrase "and in particular" might be added where appropriate.

50. **Mr. Valencia-Ospina** (Special Rapporteur on the protection of persons in the event of disasters) said that, in accordance with his usual practice, he intended to include an extensive summary of the discussions of the Sixth Committee in the report which he would submit to the Commission at its forthcoming session. The opinions expressed would continue to act as an effective guide, ensuring that the final product was viable and suited to the needs of the international community.

51. The Sixth Committee had recognized that the Commission had, in comparatively little time, made substantial progress on the topic of protection of persons in the event of disasters. The Commission hoped to formally adopt the four new articles at its forthcoming session, bearing in mind the Committee's comments. The Commission would provide clarifications regarding such issues as the relationship

between the principles of humanity and dignity and between those of neutrality and impartiality in draft article 6, and the modalities governing the consent of the affected State in light of the principle of cooperation set forth in draft article 5.

52. The consent of the affected State had already been established in draft article 8, paragraph 2, as proposed in paragraph 97 of his third report (A/CN.4/629). That article had been discussed by the Commission and submitted to the Drafting Committee. Owing to lack of time, the latter had decided to focus on paragraph 1, concerning primary responsibility of the affected State. It would consider paragraph 2 at its forthcoming session, in the light of new proposals which he would formulate in his fourth report. Draft article 8 as set forth in the commission's report was therefore only a work in progress, to be completed in 2011. He was grateful for the support of the Committee in spite of the difficulties raised by the topic.

53. **Mr. Wisnumurti** (Chairman of the International Law Commission), introducing chapters VIII, X, XI and XII of the Commission's report (A/65/10), recalled that in 2009, the Commission had established an open-ended Working Group to draw up a general framework for the Commission's consideration of the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", which was the subject of chapter VIII. Having agreed in 2009 upon a general framework, the Working Group had been reconstituted in 2010, at which time it had had before it a Secretariat survey of multilateral conventions that might be relevant to the work on the topic (A/CN.4/630) and a working paper by the Special Rapporteur (A/CN.4/L.774). The Special Rapporteur had drawn attention to issues concerning (a) the legal bases of the obligation to extradite or prosecute; (b) the material scope of the obligation; (c) the content of the obligation; and (d) the conditions for triggering the obligation.

54. The Working Group had acknowledged that the Secretariat's survey had helped to elucidate aspects of the general framework relating to the typology of treaty provisions and differences and similarities in the formulation of the obligation to extradite or prosecute. However, it had noted the need for detailed consideration of other aspects of State practice, such as national legislation, case law and official statements of governmental representatives. It had reaffirmed that the general orientation of future reports by the Special Rapporteur should be towards presenting draft articles.

55. With regard to chapter X, on the topic "Treaties over time", he recalled that a Study Group had been established in 2009; having been reconstituted in 2010, it had begun its work on aspects of the topic relating to subsequent agreements and practice, on the basis of a report by its Chairman on the jurisprudence of the International Court of Justice and of arbitral tribunals of ad hoc jurisdiction. That report had been complemented by an addendum dealing with the preparatory work for the provisions on the interpretation or modification of treaties set out in the 1969 Vienna Convention on the Law of Treaties and with the question of inter-temporal law.

56. A variety of issues relating to the role of subsequent agreements and practice in the interpretation of treaties had been touched on in the Working Group's discussions: to name just a few, there was the potential role of silence and the attribution of conduct to the State; the weight given by judicial or quasi-judicial bodies to subsequent agreements and practice; and the relevance of factors such as the age or nature of the treaty.

57. The Study Group considered that information from Governments on instances of subsequent practice and agreements that had not been the subject of judicial or quasi-judicial pronouncements by international bodies, together with instances of interpretation that involved taking into account factual or legal developments arising after the entry into force of a treaty, would be particularly useful.

58. Turning to chapter XI, on the topic "The most-favoured-nation clause", he said that the Study Group, which had begun its work in 2009, had been reconstituted in 2010. It had reviewed a number of papers, summarized in paragraphs 360 to 368 of the Commission's report. Its central focus remained to determine how most-favoured-nation clauses were being interpreted, particularly in the context of investment, and whether common underlying approaches could be formulated to serve as interpretative tools or to assure some stability and certainty in the investment field. On the basis of the papers before it, other background materials and developments elsewhere, notably within the South American Common Market (MERCOSUR), the Study Group had held a wide-ranging discussion. The general sense of the Group was that it was premature to consider preparing draft articles or revising the 1978 draft articles. However, it could further study issues

relating to trade in services and intellectual property, identify the normative content of most-favoured-nation clauses in investment and undertake a further analysis of the case law.

59. Lastly, with regard to chapter XII, on the topic "Shared natural resources", he said the Working Group established in 2007 and reconstituted in 2010 had had before it a working paper on the feasibility of future work on oil and gas (A/CN.4/621). On the basis of analysis of comments from Governments, the paper's essential recommendation was that the transboundary oil and gas aspects of the topic should not be pursued further. Most States were of the view that such issues were bilateral in nature, highly political or technical, or involved diverse regional situations. Any attempt at generalization might only increase complexity and confusion in an area that could be adequately addressed bilaterally. Since transboundary oil and gas reserves were often located on the continental shelf, there was also a concern that the topic had a bearing on maritime delimitation issues. The Commission had endorsed the Working Group's recommendation that it should not take up the consideration of the oil and gas aspects of the topic "Shared natural resources".

60. **Mr. Tichy** (Austria), referring to the obligation to extradite or prosecute, said that the work on the topic had undoubtedly benefited from the analysis of State practice; hence the usefulness of the Secretariat's survey of the relevant multilateral treaties.

61. The issue of treaties over time had gained particular relevance for Austria when it had joined the European Union in 1995, since the provisions of European law often superseded those of Austrian treaties with other members of the European Union or other States in general. In response to the Commission's request that States provide examples of subsequent agreements or practice relevant to the interpretation of their treaties, he gave a short overview of the relevant Austrian practice.

62. The 1946 Paris Agreement between Italy and Austria, which granted autonomy to the South Tyrol and special rights to its German-speaking inhabitants, had been the subject of extensive subsequent arrangements and practice. The Austrian State Treaty of 15 May 1955 had likewise been the subject of subsequent practice, notably with regard to the obsolescence of its military and aviation provisions and the interpretation of its article 26 concerning the return of property confiscated by the Nazis.

63. He cited the jurisprudence of the Austrian Constitutional Court with regard to treaty practice, under which earlier treaties had been invalidated through desuetude, and noted that some provisions of treaties signed between Switzerland and Austria had been rendered inapplicable owing to obsolescence, mutual non-application or because of having been breached.

64. Turning to the most-favoured-nation clause, he endorsed the Study Group's view that it would be helpful to formulate guidelines for the interpretation of such clauses in order to ensure stability and certainty in international investment law. To that end, an analysis of the relevant practice and case law seemed the right way forward.

65. Lastly, he said that Austria was aware of the difficulties relating to the transboundary oil and gas aspects of the topic of shared natural resources and accordingly had doubts about the possibility of arriving at a generally acceptable text.

66. **Ms. Ryan** (New Zealand) welcomed the Secretariat's survey of multilateral instruments containing provisions on extradition and prosecution. New Zealand supported further examination of whether an obligation to extradite or prosecute existed under customary international law; of the nature of any customary obligation concerning specific crimes; and of the duty to cooperate in the fight against impunity, underpinning the obligation to extradite or prosecute. It would also be helpful to study when the obligation to extradite or prosecute might be regarded as satisfied in situations where it proved difficult to implement: for example, for evidential reasons.

67. Concerning treaties over time, she said it was true that the practical and legal significance of subsequent agreements and practice was a worthy area for further analysis by the Commission. New Zealand supported the proposal by the Chairman of the Working Group to derive conclusions or guidelines from a representative repertory of State practice.

68. The papers on the most-favoured-nation clause provided an excellent basis for analysing common elements that could be formulated to serve as interpretative tools and guidance. New Zealand supported the proposal to conduct further analysis of

the subtopics highlighted by the Study Group, namely the most-favoured-nation clause in the context of trade in services and intellectual property; investment treaties; the relevant case law; and the response by States to case law. The handling of the most-favoured-nation clause by MERCOSUR was of particular interest, and common elements in the way it was dealt with by other regional trade agreements should be given further consideration. As to the most appropriate form for the final product of the work on the topic, her delegation was encouraged by the Study Group's approach, aiming to provide practical guidance to States.

69. On the topic of shared natural resources, she expressed appreciation for the report on the feasibility of covering transboundary oil and gas aspects and acknowledged the Commission's endorsement of the Working Group's recommendation not to pursue the consideration of those aspects.

70. **Mr. Retzlaff** (Germany) said that his delegation welcomed both the inclusion of the topic "Treaties over time" in the Commission's programme of work and the progress thus far achieved by the Study Group established in that connection. The topic was of considerable practical importance in that subsequent practice in the application of a treaty not only reflected the possibly evolving understanding of the parties thereto as to its meaning but was also vital to the interpretation of the treaty as a whole. Indeed, given that the majority of treaties were intended to govern the relationship between those parties over a long period of time, it was essential to adapt that interpretation to changing circumstances and subsequent developments in order to ensure the continuing flexibility of treaties as instruments of international law.

71. While significant guidance was provided by the jurisprudence of international tribunals, it was first and foremost States that entered into treaties and made decisions with regard to their day-to-day application. Subsequent practice, however, would not even come to the attention of such tribunals in cases where it was agreed and gave rise to no controversy. That being so, the work of the Study Group was a fundamental step towards the establishment of manageable and predictable criteria for interpretation with a view to fulfilling the parties' need for legal certainty when executing a treaty.

72. **Mr. Serpa Soares** (Portugal), referring to chapter VIII, on the obligation to extradite or prosecute said that the Secretariat's survey of multilateral conventions (A/CN.4/630) should be expanded to include other aspects such as national legislation. In that regard, the comments made by States at the request of the International Law Commission in 2006 (A/CN.4/579) could serve as a starting point. For future work, the draft articles should be based on the general framework presented by the Working Group on the topic in 2009.

73. On the topic of treaties over time, he said that treaties should be regarded not as words carved in stone, but as dynamic instruments to be interpreted in a specific legal and social context, a view confirmed by some jurisprudence on the matter. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice had held that "the treaty is not static" and in the case of *Mamatkulov and Askarov v. Turkey*, the European Court of Human Rights had stated that the European Convention on Human Rights was a "living instrument which must be interpreted in the light of present-day conditions". The Commission would have to strike a difficult balance between the *pacta sunt servanda* principle and the need to interpret and apply treaty provisions in context.

74. It should also examine the intricate relationship between treaty law and customary law, which was more dynamic than treaty law and interacted with it. Members of the Study Group should be encouraged to make contributions on other issues related to the topic. The Commission might adopt the method followed for the most-favoured-nation clause by having Study Group members present papers dealing with different aspects of the topic. Nonetheless, the Commission should not seek to develop law outside the scope of the Vienna Conventions on the Law of Treaties; it should take a cautious approach with the aim of providing clarification and guidance to States and international organizations. His delegation would submit detailed comments in due course on the specific issues identified as being of particular relevance for the future work of the Commission on that topic.

75. Turning to the topic "Most-favoured-nation clause", he said that his delegation still had doubts as to whether that topic had been sufficiently debated to allow for the codification or progressive development of international law. Carrying out work that might lead to a forced uniformization of practice and

jurisprudence might prove impractical. Nonetheless, the Commission should base its conclusions on solid and coherent findings, following a step-by-step approach. The Commission should start by determining the real economic relevance of most-favoured-nation clauses in contemporary society, given the absence of such clauses from many global trading arrangements and the existing quantitative research suggesting that they were relatively unimportant. The Commission should then shed additional light on questions concerning the scope, interpretation and application of such clauses. Only then could the Commission carry on its study on the interpretation and application of most-favoured-nation clauses, in order to guide States and international organizations and thus contribute to certainty and stability in the field of investment law.

76. It was important to establish clearly the need and viability of adopting uniform guidelines, with inference from current practice and developments in jurisprudence. If that was achieved, the study could prove to be a very useful guide in a highly complex field. As the *Emilio Agustín Maffezini v. Kingdom of Spain* case had shown, the most-favoured-nation clause could become unpredictably broad and could open up a Pandora's box whereby an investor, for example, could pick and choose provisions from bilateral investment treaties to which his own State was not a party, creating a patchwork of the best available clauses. His delegation would encourage the Commission to proceed further with the topic.

77. With regard to the topic "Shared natural resources", his delegation did not endorse the Working Group's recommendation that the transboundary oil and gas aspects of the topic should not be pursued further by the Commission, because international regulation or guidance on the matter would make a major contribution to the prevention of conflicts. Recent research had shown that risks of armed conflicts might be exacerbated by distributional issues concerning prospective revenues and benefits of oil and gas exploitation, and quantitative studies had increasingly argued for qualified linkages between oil and gas and armed conflict. Despite their importance, bilateral regulatory efforts might not be sufficient to prevent conflicts related to oil and gas. In addition, there were both legal and geological similarities between groundwaters and oil and gas.

78. He recalled that the syllabus on shared natural resources adopted by the Commission in 2000 had stated clearly that the Commission should focus exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas. The current recommendation by the Working Group would be a step backward from that workplan. The question of sharing of oil and gas was extremely relevant and particularly complex in the modern world. The inherent potential for conflict, the economic and political importance and the environmental impact of shared oil and gas all militated in favour of international regulation and guidance on the topic.

79. Controversial issues such as maritime delimitation should not hamper the Commission's efforts to study the oil and gas topic further, as they could be resolved with the insertion of a "without prejudice" clause into the recommendation. Moreover, the Commission should make its decision based on a predominantly technical study, elaborated from a multidisciplinary perspective with the assistance of the relevant international organizations and scientific, technical, economic and legal experts.

80. **Mr. Minogue** (United Kingdom) said on the topic of treaties over time that his Government hoped to be in a position in the coming months to provide, as requested by the Commission, relevant examples of its practice with regard to the interpretation or modification of treaties by subsequent practice or agreement. While his delegation was as yet unconvinced that such practice could be readily generalized with a view to formulating a statement of general principle beyond that already embodied in the Vienna Convention on the Law of Treaties, it nonetheless recognized that the topic potentially embodied a number of interesting issues for consideration.

81. Concerning the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", his delegation welcomed the survey of multilateral conventions conducted by the Secretariat in that area but noted that little progress had otherwise been made. Its continuing position was that such obligation arose out of a treaty obligation and could not yet be regarded as a rule or principle of customary international law. Accordingly, the terms of international agreements must necessarily govern both the crimes in respect of which that obligation arose and the question as to whether the custodial State had discretion to extradite or prosecute. The Working Group on the topic was assured of his

delegation's support in taking forward issues that might need to be addressed in the future work of the Special Rapporteur.

82. With regard to the topic of the most-favoured-nation clause, his delegation agreed with the Study Group that it would be premature at the present stage to prepare new draft articles or revise those formulated in 1978. It also agreed that the limited jurisprudence currently available on the interpretation of most-favoured-nation provisions under the agreements of the World Trade Organization and in fair trade agreements made it difficult to draw conclusions on the subject. Despite having generated a considerable amount of case law, the interpretation of most-favoured-nation clauses in the field of post-establishment investment was specific to that area and also depended on the precise wording of the clauses in question. Caution should therefore be exercised in drawing any universally applicable principles concerning the interpretation of such clauses in the light of the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties. The Study Group should therefore continue to focus on the issues raised by the use of those clauses in subject-specific areas, in particular that of investment.

83. On that score, the proposed study of the apparently different approaches of arbitral tribunals towards the interpretation of most-favoured-nation clauses in investment protection agreements should prove interesting, as should their examination in the light of the rules of treaty interpretation under the Vienna Convention. A consistent approach to the interpretation of those clauses and a clearer understanding of how specific wording produced differences in interpretation would assist States in drafting such clauses and tribunals in interpreting them.

84. His delegation continued to have serious doubts as to the usefulness of efforts to codify or develop a set of draft articles relating to the oil and gas aspects of the topic "Shared natural resources". Its own previously stated experience of negotiating agreements in that area was that while mutual cooperation among States should be encouraged, the content of such arrangements and the solutions reached were largely the result of practical considerations based on technical information, which inevitably varied in accordance with the specificities of each case. That experience having also been echoed by others, it welcomed the Commission's endorsement of the recommendation by the Working Group that the Commission should not take up the consideration of those oil and gas aspects. In the light of that endorsement and the absence of further outstanding work, the topic should cease to be part of the Commission's agenda.

Agenda item 77: Report of the United Nations Commission on International Trade Law on the work of its forty-third session (*continued*) (A/C.6/65/L.4, L.5, L.6 and L.7)

85. **Ms. Köhler** (Austria), introducing draft resolutions A/C.6/65/L.4, L.5, L.6 and L.7 on the report of the United Nations Commission on International Trade Law on the work of its forty-third session, said that over 60 Member States had sponsored the draft resolutions, and that the texts were based on the previous year's resolutions. Draft resolution A/C.6/65/L.4 was the omnibus resolution on the report of the Commission on the work of its forty-third session; draft resolution A/C.6/65/L.5 recommended the use of the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010; draft resolution A/C.6/65/L.6 concerned the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property and recommended that States should utilize the Supplement; while draft resolution A/C.6/65/L.7 referred to part three of the UNCITRAL Legislative Guide on Insolvency Law, requesting the Secretary-General to disseminate it broadly, including electronically.

86. **The Chairperson** said that the Committee would take action in due course on draft resolutions A/C.6/65/L.4, L.5, L.6 and L.7 on the report of the United Nations Commission on International Trade Law on the work of its forty-third session.

The meeting rose at 5.45 p.m.