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Chair: Mr. Salinas Burgos. . . . . (Chile)

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11-57211 (E)

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

Statement by the President of the General Assembly

1. **The Chair** invited the President of the General Assembly to address the Committee.

2. **Mr. Al-Nasser** (Qatar), President of the General Assembly, said that the Committee considered a wide and deep, traditional and innovative spectrum of topics, many of them complex, and it was difficult to make progress at the pace that most delegations would have wanted. Both customary and new topics required continuous effort and a spirit of cooperation. A forward-looking approach, that balanced the importance of the matters at hand with the different views that naturally accompanied them, had tested the Committee's ability to understand and address many of the challenges before it.

3. There was a growing need to make tangible progress in narrowing the gap on some elements of the draft comprehensive convention on terrorism, which would be a significant contribution to the international legal framework and would strengthen the international counter-terrorism effort.

4. The Committee was also working to ensure fairness and due process in the administration of justice within the United Nations, reflecting the needs of a twenty-first-century institution. Universal jurisdiction had also been the subject of anticipated debate, with all parties committed to combating impunity in the service of justice.

5. The rule of law was essential for building a prosperous and stable society, and the same was true of the global community. The Committee was the best place in which to debate that item, and its efforts to lay the foundations for a successful high-level meeting on the rule of law was highly appreciated. He would complement and support those efforts to make the event a building block in strengthening the rule of law at all levels.

Agenda item 81: Report of the International Law Commission on the work of its sixty-third session (*continued*) (A/66/10 and Add.1[1])

6. **Mr.** Shair Bahadur **Khan** (Pakistan), reiterating his delegation's position with regard to the draft articles on the protection of persons in the event of disaster, said that the primacy of the affected State in the provision of disaster relief assistance was based on the 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.

7. Any provision that created a legal right to provide assistance should be avoided. Historically, the provision of assistance had been based on international cooperation and solidarity, not assertions of legal rights and obligations. The assumption made in draft articles 10 (Duty of the affected State to seek assistance) and 11 (Consent of the affected State to external assistance) that in the event of an overwhelming disaster, States would not seek assistance from the international community would undermine the current practice of international cooperation. The Commission should also consider whether States, the United Nations and other competent intergovernmental and non-governmental organizations should be placed on the same juridical footing in draft article 12 (Right to offer assistance).

8. **Ms. Millicay** (Argentina), referring to the draft articles on the effects of armed conflicts on treaties, 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. Her delegation therefore reiterated its reservations concerning the comments on the topic received from the European Union (A/CN.4/592). 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

[1] To be issued.

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. Her delegation agreed with the Commission's proposal that the General Assembly should take note of the draft articles in a resolution, annexing them thereto, with a view to considering them in the future since State practice was not, at present, sufficiently widespread and consistent to justify a convention.

9. With regard to the expulsion of aliens, her Government would report at a later date on its practices with respect to the suspensive effects of remedies and on the possibility of distinguishing between aliens lawfully or unlawfully present in the territory of the expelling State, as requested in paragraphs 40 and 42 of the Commission's report (A/66/10).

10. On the topic of the protection of persons in the event of disasters, her delegation believed that the focus should be on the need for full respect for the principle of State sovereignty, which included the duty of the State to provide relief and assistance to persons in its territory. Draft article 9 (Role of the affected State) recognized, to some extent, that the affected State had exclusive competence unless it was expressly delegated. Her delegation doubted whether it was appropriate to place non-State actors on an equal footing with States in draft article 10 (Duty of the affected State to seek assistance). With regard to paragraph 2 of draft article 11 (Consent of the affected State to external assistance), it was necessary to identify specific criteria for the determination of arbitrary denial.

11. **Mr. Sharma** (India), referring to the effects of armed conflicts on treaties, said that his delegation supported the general proposition that treaties were not automatically terminated or suspended as a result of an armed conflict. Such action should be determined in accordance with the law on treaties, taking into account the specifics of the treaty in question and those of the armed conflict. He therefore welcomed draft article 4 (Provisions on the operation of treaties).

12. With respect to the indicative list of treaties annexed to the draft articles, his delegation was of the view that treaties which were permanent in nature and scope, such as those concerning land and maritime boundaries, should be listed separately from treaties that depended on the intention of the States parties. Furthermore, the scope of the topic should be limited to treaties concluded between States and the definition of "armed conflict" should be limited to conflicts between States; it should not include internal conflicts, which did not directly affect treaty relationships. The General Assembly should take note of the draft articles in a resolution, annexing them thereto, and consider the elaboration of a convention at a later stage, after a detailed examination by States.

13. With regard to the draft articles on the protection of persons in the event of disasters, his delegation supported draft article 10 (Duty of the affected State to seek assistance) in principle. In accordance with General Assembly resolution 46/182, draft article 9 (Role of the affected State) recognized the duty of the affected State to ensure the protection of persons and its primary coordinating role in the provision of relief and assistance. His delegation also endorsed draft article 11 (Consent of the affected State to external assistance) and believed that the sovereignty, territorial integrity and national unity of the affected State must be fully respected, in accordance with the Charter of the United Nations, while assistance was being provided within its territory.

14. Concerning the draft articles on the expulsion of aliens, his delegation had reservations with regard to draft article 8 (Expulsion in connection with extradition). Although both expulsion and extradition led to a person leaving the territory of one State for another, the legal basis for and the laws governing the process and the procedure involved were altogether different, and one could not be used as an alternate for the other.

15. **Ms. Mezdrea** (Romania), referring to the draft articles on the effects of armed conflicts on treaties, said that her delegation was pleased by the inclusion of non-international armed conflicts within the scope of the draft articles. It would, however, be useful to include a reference to the 1949 Geneva Conventions on the Protection of War Victims and the Additional Protocols thereto. She agreed that the possible inclusion of relations arising under treaties concluded between international organizations or between States and international organizations within the scope of the draft articles, while adding additional complexity, merited the Commission's analysis.

16. Concerning the draft articles on the expulsion of aliens, her delegation proposed deleting from paragraph 2 of draft article D1 (Return to the receiving State of the alien being expelled) the expression “as far as possible”, which gave the impression that in certain cases, there was no need to abide by international law.

17. Turning to the topic of the protection of persons in the event of disasters, she noted that the current effects of disasters were on a scale that had seldom been faced in the past. Development of the law in that area would help improve the quality of assistance and mitigate the consequences of such disaster. Faced with forces beyond human control, the international community had an essential obligation to cooperate, as set out in draft article 5 (Duty to cooperate). Draft article 9 (Role of the affected State) rightly reflected the primary role of the affected State in ensuring the protection of persons on its territory and its duty to do so. It would be appropriate to consider the addition of a third paragraph on the affected State’s duty towards the international community as a whole since inaction could have terrible effects not only on its own territory, but on that of its neighbours.

18. In the context of draft article 10 (Duty of the affected State to seek assistance), she noted that when an affected State did not have the resources to respond, it had a legal duty to seek assistance, but only to the extent that the disaster exceeded its own response capacity. Disasters of the scale envisaged in draft article 3 (Definition of disaster) exceeded the national response capacity of even the most affluent States. Her delegation fully shared the Commission’s view that in such cases, cooperation with and assistance from international actors would ensure a much more adequate and rapid response.

19. With regard to draft article 11 (Consent of the affected State to external assistance), her delegation believed that the consent of the affected State was the best guarantee of non-interference in its internal affairs. Finally, draft article 12 (Right to offer assistance) was necessary; the right in question was not only a practical manifestation of solidarity but an important part of the principle of cooperation. The draft article did not, however, imply that permission to interfere in the internal affairs of the affected State was thereby given.

20. **Ms. Ní Mhuircheartaigh** (Ireland) said that the topic of the protection of persons in the event of disaster was a matter of direct concern and had drawn the work of the Commission to the attention of a number of national assistance agencies. Reiterating the view that her delegation had expressed at the sixty-fifth session of the General Assembly, she said that the overarching principles of human dignity and human rights evoked in draft articles 7 and 8, respectively, would be better addressed in a preamble; the draft articles themselves should focus on operational matters.

21. Concerning the Commission’s question as to whether the duty to cooperate included a duty on States to provide assistance when requested by the affected State, her delegation strongly supported international cooperation and assistance but was firmly of the view that there was no legal duty to provide assistance under customary international law. Her delegation agreed with the emphasis, in draft article 9 (Role of the affected State), on the duty of the affected State to ensure the protection of persons and provision of disaster relief on its territory. It followed that the affected State had the primary role in that process. While her delegation agreed with the view, expressed in the commentary to draft article 10, that the duty to seek assistance could be an element of fulfilment of an affected State’s primary responsibilities where its national response capacity was exceeded, it would be preferable to refer to a responsibility to “seek”, rather than a more direct duty to “request”, assistance.

22. Draft article 11 (Consent of the affected State to external assistance) was consistent both with draft article 9 and with general international law. However, it was not clear how the statement in paragraph 2 that consent to external assistance must not be withheld arbitrarily would translate into practice. The Commission had stated, in paragraphs (7) and (8) of the commentary, that the determination of arbitrariness must be made on a case-by-case basis and that an absence of reasons for refusal might support an inference that the withholding of consent was arbitrary. But it was not clear who was to make such an assessment or what the effect of an assessment that consent had been arbitrarily withheld would be. The Commission should elaborate on the situation under existing international law by identifying treaties or practice relevant to consent and to the arbitrary refusal of assistance.

23. **Mr. Mikami** (Japan), referring to the topic on the expulsion of aliens, said that, in view of the debate on the issue of the return to the receiving State of the alien

being expelled and the available remedies against an expulsion decision, the Commission should study State practice and international instruments and jurisprudence and should respond to the criticism that the topic was not ripe for codification.

24. On the topic of the protection of persons in the event of disasters, his delegation wished to express its sincere gratitude, on behalf of the Japanese people, to all delegations for the encouragement and support provided following the massive earthquake that had struck Japan in March 2011.

25. As stated at previous sessions, his delegation expected the Commission to codify and elaborate rules and norms relating to disaster relief in order to facilitate the flow of international assistance. He was aware of the profound division of views as to whether the affected State had the right or the duty to seek assistance (draft article 8) and whether other States had the "right" or "duty" to offer assistance (draft article 10). His delegation believed that the primary responsibility to protect the victims lay with the affected State; however, the Commission should consider whether it was justifiable to characterize seeking assistance as a duty of the affected State and offering assistance as a right of other States. He noted that some members of the Commission had emphasized the importance of international solidarity in the event of a disaster.

26. His delegation agreed with the Special Rapporteur that the draft articles should not be confused with the concept of the "responsibility to protect", which applied only to genocide, war crimes, ethnic cleansing and crimes against humanity.

27. **Mr. Tchiloemba Tchitembo** (Congo), referring to the topic of the expulsion of aliens, said that revised draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State) and draft articles D1 (Return to the receiving State of the alien being expelled), G1 (Protecting the property of aliens facing expulsion), H1 (Right of return to the expelling State) and I1 (The responsibility of States in cases of unlawful expulsion) reflected the subtle balance between the sovereign rights of the expelling State, the human rights of the person subject to expulsion and the responsibilities of the transit and receiving States. However, it would have been useful to clarify frequently used terms such as extradition, refoulement and removal (*reconduite à la frontière*) and their administrative and legal consequences for aliens subject to expulsion.

28. The Commission had not provided an unequivocal answer to the question of whether appeals lodged by aliens subject to expulsion had suspensive effect on the proceedings. The responses provided, which varied even among States of the same region; some were based on national legislation while others were based on general international law applicable on a case-by-case basis. There was, however, agreement that the expulsion of aliens was an important and pressing issue that involved both domestic and international public and private law and that human rights instruments did not cover all aspects of the issue. Its timeliness and the divergence of national legislation were reasons to pursue codification.

29. **Mr. Dahmane** (Algeria) said that his delegation supported inclusion of the topic on the formation and evidence of customary international law in the Commission's long-term programme of work.

30. His delegation believed that treaties between States and international organizations should be included in the scope of the draft articles on the effects of armed conflicts on treaties. Excluding them would limit the topic artificially and make the Commission's work less comprehensive. However, the inclusion of non-international armed conflicts was complicated by the absence of an agreed definition of such conflicts, particularly with regard to their threshold, size and intensity. The differences between conflicts between States and non-international conflicts, and the divergent resulting obligations, indicated a need for two separate categories in the draft articles.

31. Concerning the topic of the protection of persons in the event of disasters, his delegation endorsed the Commission's use of the term "duty" rather than "responsibility" in draft article 9 (Role of the affected State) since the latter could lead to confusion with its meaning in other areas of international law. His delegation agreed with the Commission that it was not necessary to determine whether the three humanitarian principles of humanity, neutrality and impartiality in draft article 6 (Humanitarian principles in disaster response) were also general principles of international law.

32. The wording of draft article 8 (Human rights) was too general and vague in the context of disasters and raised questions regarding its scope and interpretation,

whereas draft article 7 (Human dignity) expressly stated that it was States, intergovernmental and non-governmental organizations that must protect human dignity.

33. Draft article 10 (Duty of the affected State to seek assistance) raised questions as to the manner in which national response capacity was assessed, particularly in emergency situations when decisions had to be taken quickly and assistance could come too late. The duty of the State and the notion of a reasonable time frame to be used in determining arbitrariness, introduced in the commentary to draft article 11, should be examined further.

34. His delegation reserved the right to comment on the expulsion of aliens at a later point. In the future, the Commission's report should be provided to delegations several weeks prior to its consideration by the Committee in order to ensure sufficient time for consultations.

35. **Mr. Salem** (Egypt) said that his delegation welcomed the conclusion of the Commission's work on the topic of reservations to treaties and the adoption of the Guide to Practice on Reservations to Treaties, which was becoming increasingly important in State practice. Because the Guide to Practice could prove unwieldy, however, it might have been appropriate to prepare a concise version for ease of reference. His delegation took note of the Commission's recommendation on mechanisms of assistance in relation to reservations to treaties (A/66/10, para. 73), a topic that was of particular importance for developing States.

36. The Commission had also made progress on the topic of the protection of persons in the event of disasters, particularly with regard to the duty of the affected State to seek assistance (draft article 10) and not to arbitrarily withhold its consent to external assistance (draft article 11) and the right to offer assistance (draft article 12). The principle of respect for States' sovereignty must be preserved in any provisions adopted.

37. In exercising their right to the expulsion of aliens, States must respect the fundamental principles of international law and human rights norms, yet they increasingly failed to do so, citing international counter-terrorism efforts and the need to confront rising clandestine immigration and refugee flows. Expulsion, particularly collective expulsion, should not be practical without objective reasons grounded in established international legal principles, not on the basis of discrimination against the citizens of another State or against a specific religion, culture or race. His Government complied with the provisions of the 1951 Geneva Convention relating to the Status of Refugees and coordinated with the Office of the United Nations High Commissioner for Refugees when taking steps to expel refugees from its territory.

38. The Commission had rightly shown caution in applying the principles established in the articles on State responsibility to the draft articles on the responsibility of international organizations. The obligation of an international organization responsible for an internationally wrongful act to pay compensation for the damage caused thereby should be clearly distinguished from the responsibility of its members.

39. Appropriate attention should be given to improving the methods of work of the Commission, taking into consideration the recommendations of the Working Group on the topic. Improved working methods would enable the Commission to address a greater number of topics and to do so more swiftly, thereby keeping pace with the rapid development of international law. It might consider taking up current topics such as Internet and satellite technology, an area that required legal codification in view of its growing importance.

40. The Commission should continue its work on its existing topics, continue to coordinate closely with the Committee and intensify cooperation with other regional and international legal organizations, such as the Afro-Asian Legal Consultative Organization, in order to uphold the truly global nature of international law.

41. **Ms. Cooper** (Observer for the International Federation of Red Cross and Red Crescent Societies), speaking on the topic of the protection of persons in the event of disaster, said that her organization strongly supported the Commission's conclusion that affected States had a duty to seek international support if their domestic capacity was exceeded, as set out in draft article 10. However, States were not required under general human rights law to seek assistance from any specific actor. The draft article should be reworded to make it clear that States were free to request assistance from any of the enumerated actors or from others not mentioned.

42. Experience showed that significant problems had arisen during major disaster operations as a result of the involvement of foreign actors that lacked the requisite skills. States could and should be selective about the foreign assistance that they sought and accepted in the wake of a natural disaster and might wish to tailor their requests to specific types of assistance or particular actors in order to fill identified gaps in national capacity. That point was addressed in the International Federation of Red Cross and Red Crescent Societies (IFRC) Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance, which could inform discussion and preparation of the draft articles.

43. International assistance required the consent of the affected State as set out in draft article 11, but the wording did not make it clear that, as she had noted, affected States could be selective about the assistance that they accepted. Paragraph 3 of the draft article also raised concern with regard to who was expected to make a formal offer of assistance to the affected State. Neither IFRC nor its national societies made such offers to States; their assistance was provided according to the rules of the Red Cross and Red Crescent Movement, as endorsed by States through the Movement's International Conference. Foreign non-governmental organizations also tended not to make formal offers of assistance to States. Although paragraph 3 mentioned offers extended in accordance with the draft articles, no procedure for doing so was described. It was also unclear whether there was an implied temporal deadline for responding to offers of assistance. In view of the potentially urgent humanitarian needs, the notion that such decisions should be taken as quickly as possible should be included.

44. IFRC and its national societies did not fall within the categories mentioned in draft article 12 (Right to offer assistance). It was technically appropriate not to include them in that list since the Red Cross and Red Crescent Movement made its offer of support to the national society of the affected State, not to its Government. However, the wording of the provision could lead to confusion as to the right of the Movement to act in the event of a disaster. The commentary to the article should clarify that point.

45. One of the key conclusions of the recent International Dialogue on Strengthening Partnership in Disaster Response: Bridging national and international support, held in Geneva on 25 and 26 October 2011, was that States and humanitarian actors were placing greater importance on strong domestic laws for managing international disaster response. A number of States had adopted or were in the process of adopting new laws or regulations that were consistent with the IFRC Guidelines. The IFRC, together with other organizations, was developing model legislation that would be discussed at the thirty-first International Conference of the Red Cross and Red Crescent.

46. **Mr. Kamto** (Chairman of the International Law Commission), speaking as Special Rapporteur on the expulsion of aliens, said that the dialogue between the Commission and the Committee on the topic of the expulsion of aliens had been complicated by the fact that most of the draft articles before the Committee did not correspond to the Commission's latest version. The preliminary draft articles prepared by the Special Rapporteur had been examined at length by the Commission and the Drafting Committee, which had worked to incorporate States' views. The Drafting Committee had provisionally adopted the first set of draft articles, but further input from the Special Rapporteur was needed on a number of issues before the draft articles could be referred first to the Commission for consideration in plenary and then to the Committee.

47. Delegations had voiced legitimate concerns and expectations, particularly in view of the legal complexity and political sensitivity of the topic. The constructive debate had highlighted three major concerns: the feasibility of codification, the methodology to be used and the final form of the Commission's work.

48. The issue of the expulsion of aliens dated back to the nineteenth century and a wealth of international jurisprudence on the topic was available. Many of the judgements used for codification of the responsibility of States for internationally wrongful acts and of diplomatic protection had dealt with the expulsion of aliens and modern treaty law provided a solid basis for most of the rules formulated on the topic of the expulsion of aliens, including special regimes applicable to the expulsion of refugees, asylum-seekers and stateless persons. The jurisprudence of international and regional human rights bodies supported the few rules that had been proposed as part of the progressive development of law on the topic and while State practice diverged on certain aspects of the issue, it

converged on others; only in those cases had such practice been used as a basis for codification.

49. He drew attention to the first of two judgments of the International Court of Justice in the case concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), issued on 24 May 2007, which, for the first time, had established the Court's jurisdiction on a case dealing with diplomatic protection of an alien subject to expulsion from his State of residence. The second judgment in the Diallo case, issued on 30 November 2010, had been the first decision of the Court that dealt with the expulsion of aliens and had addressed seven legal questions raised by the issue, as discussed in the Special Rapporteur's seventh report on the topic (A/CN.4/642).

50. While the Commission was obliged to respect States' wishes, the facts indicated that the topic lent itself to codification and progressive development; in fact, since the Commission had concluded its work on the responsibility of States for internationally wrongful acts and on diplomatic protection, no topic had been found more ripe for codification. The right to expel was derived from the principle of State sovereignty and had gradually become customary international law. Without codification, States would have no more solid basis for expulsion until the relevant customary law crystallized as a norm of international law.

51. With regard to the methodology to be used, delegations had raised questions concerning sources of international law, special regimes and national legislations. While one delegation was understandably concerned that an outdated source had been included, a historical perspective was necessary in examining a practice that had existed for well over a century where a past practice was demonstrated irrelevant, it was abandoned but where such a practice continued to exist, it was an important element in the identification of customary law.

52. With regard to special regimes, despite the objection voiced by another delegation, the Commission had decided that it was impossible to ignore the practice of the European Union. However, delegations could rest assured that all practices that could improve the draft articles in their final form would be taken into consideration.

53. In response to one delegation's dissatisfaction with the analysis of national legislation provided in the seventh report, he noted that the materials included in the report did not include one piece of legislation that had been adopted after the analysis had been completed. Any shortcomings of the report were not due to ill will on the part of the Special Rapporteur or the Commission, whose common objective was to identify convergent practices.

54. Regarding the final form of the work, a number of delegations had indicated a preference for draft guidelines over draft articles, while others did not exclude the latter option. The Commission would examine those preferences in the light of past practice and of the final results of its work on the topic. He was convinced that once the full draft articles and commentary, integrating delegations' views, became available, they would be better understood.

55. **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 Committee's discussions in the report that 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. He expressed his appreciation for the comments made by the European Union and by States in response to the Commission's request for information on their practice regarding the protection of persons in the event of disasters.

56. While most replies to the question of whether States had a duty to provide assistance when requested by an affected State had been negative, one delegation had suggested formulating such an obligation as a strong recommendation and another had pointed to the Agreement of the Association of Southeast Asian Nations on Disaster Management and Emergency Response, which obliged States parties not to provide assistance on request but to respond promptly to such a request.

57. Delegations has proposed a number of drafting changes in the first nine draft articles and had emphasized the importance of draft article 5 (Duty to cooperate) and draft article 7 (Human dignity), the latter being deemed especially significant as it was the first time that it had appeared as an autonomous provision in the body of a future international instrument.

58. The opinion had been expressed that the proposed scope of the draft articles was too narrow and should be extended to a wider range of pre-disaster activities. In that connection, it should be noted that the wording of draft article 1 (Scope) was all-encompassing; the Commission planned first to consider the response to disasters, followed by the pre-disaster phase.

59. Delegations had felt that it would be advisable to clarify the term "the particularly vulnerable" in draft article 6 (Humanitarian principles in disaster response). In that connection, it had been said that draft article 9 (Role of the affected State) would benefit from the inclusion of a specific reference to persons with disabilities and that draft article 8 (Human rights) should list the rights to be respected. Draft article 9 (Role of the affected State) had met with general approval.

60. Responding to a question put by the European Union regarding draft article 12 (Right to offer assistance), he said that the term "competent intergovernmental organizations" did indeed extend to regional integration organizations, as would be made clear in the commentary. He noted, moreover, the request by the International Federation of Red Cross and Red Crescent Societies for clarification of its status in the commentary.

61. While a number of delegations had supported the inclusion of draft article 12, which was still under consideration by the Drafting Committee, others had doubted its usefulness. For some, if it was to be retained, the text should not include the phrase "shall have the right", even though such a right was clearly limited to the offer of assistance and did not extend to the provision thereof. In that connection, it had been stressed that the focus should be on the duty of the affected State to give serious consideration to any offers of assistance that it received. For a number of delegations, moreover, the entities mentioned in the text should not all be placed on the same legal footing.

62. Linked to the discussion on draft article 12 but as a comment of general import, there had been widespread agreement with the position put forward by the Secretary-General on implementing the responsibility to protect (A/63/677, para. 10 (b)) that to extend the concept of that responsibility to include the response to natural disasters would stretch it beyond recognition or operational utility. Nevertheless, it had been pointed out that the Secretary-General's statement had been subject to the caveat "until Member States decide otherwise" and that the time had come to expand the concept of the responsibility to protect.

63. While many delegations had welcomed the inclusion of draft articles 10 and 11 as adopted by the Commission, others had taken the contrary view, expressed by some Commission members and recorded in the respective commentaries, that draft article 10 and draft article 11, paragraph 2, should be reworded in hortatory, rather than obligatory, terms to the effect that affected States should seek external assistance in cases where a disaster exceeded national response capacity and that consent to external assistance should not be withheld arbitrarily. According to those delegations, to allude to a legal duty of the affected State constituted infringement of the sovereignty of States and had no basis in customary international law or State practice.

64. It had been stressed that draft articles 10 to 12 constituted a reaffirmation, rather than an infringement, of the fundamental international law principles of sovereignty and of its corollary, non-intervention, which was explicitly enshrined in draft article 9 (Role of the affected State). The right of non-affected States was merely to offer, not to provide, assistance and the affected State remained free to accept in whole or in part any offer of assistance from States and non-State actors, whether made unilaterally or in answer to an appeal by the affected State in situations in which a disaster exceeded its national response capacity. A duty to seek, unlike a duty to request, did not imply that consent must be given in advance. Moreover, the affected State retained the right to determine whether a particular disaster exceeded its response capacity, in line with the principle of sovereignty of States. Such a notion should be expressly reflected in the text of article 10. Despite the opposite view held by some delegations, it was considered that draft articles 10 to 12 maintained the delicate equilibrium that the Commission had successfully achieved in the elaboration of its previous draft articles.

65. Additional suggestions in respect of article 10 had included a mention of the formulation of incentives when seeking assistance. The term "arbitrarily" in article 11, paragraph 2, had also been the subject of specific observations. While some delegations had been satisfied with the explanation of its meaning in the commentary, others had requested further clarification in both the commentary and the text. It had been suggested that the term "unreasonably"

should be used instead of “arbitrarily” and that the sentence “Consent is considered to be arbitrary in particular in contravention of article 8” should be inserted in the text.

66. The Commission had been criticized for adopting texts which, like draft article 10 and draft article 11, paragraph 2, did not reflect *lex lata* and thus constituted progressive development of the law; it had also been warned not to engage in the progressive development of a rule that did not enjoy sufficient State practice. At the same time, draft article 12 had been criticized for being simply a restatement of practice. In that respect, it was important to recall that the Commission had been established by the General Assembly as a means of performing the task imposed on it by Article 13, paragraph 1 (a) of the Charter of the United Nations — encouraging the progressive development of international law and its codification — as reflected in article 1 of the Commission’s statute. Under article 15 of its statute, the Commission’s main mission was not only to codify international law, but also to promote its progressive development on topics that were not sufficiently developed in State practice and, first and foremost, those that had not yet been regulated by international law.

67. That was precisely the task that the Commission had undertaken in when including the topic in its programme of work. To the extent that international disaster relief law might be said to exist as an autonomous branch of international law, it owed that character to the Commission’s work. Unlike other topics, it was truly novel, finding inspiration in three legal sources of present-day international disaster protection and assistance: international humanitarian law, international human rights law and international law on refugees and internally displaced persons. Moreover, legally relevant practice in that area was particularly scarce, consisting primarily of non-binding instruments adopted at the intergovernmental level and by private institutions and entities. In the preparation of his reports, he had had recourse to the those instruments, in particular those adopted by or under the auspices of the General Assembly; such texts were in themselves a distillation of practice.

68. The Committee had recognized that the Commission had, in comparatively little time, made substantial progress on the topic. The present pace of work could be maintained so as to enable the timely adoption by the Commission of a legal instrument that, having taken account of States’ observations, would meet a pressing concern of the international community as a whole.

69. **Mr. Kamto** (Chairman of the International Law Commission), introducing chapters VII, X, XI, XII and XIII of the report of the International Law Commission on the work of its sixty-third session (A/66/10), said that the topic of the immunity of State officials from foreign criminal jurisdiction (chapter VII) had enjoyed a rich debate at the sixty-third session of the Commission, which had had before it the second and third reports of the Special Rapporteur. Specifically, the second report, a continuation of issues raised in the preliminary report, presented a detailed overview of the scope of immunity of State officials from foreign criminal jurisdiction, including the concepts of immunity *ratione personae* and *ratione materiae*, and addressed the question of possible exceptions to immunity. While acknowledging the diverse opinions that existed in relation to the topic, the Special Rapporteur had emphasized in his report the importance of taking the current state of affairs as the starting point for the Commission’s consideration of the topic and had explained that he had prepared his report from the perspective of *lex lata*.

70. Whereas the preliminary and second reports by the Special Rapporteur had considered substantive aspects of the immunity of State officials, the third report dealt with procedural aspects, in particular the timing of consideration of immunity, as well as its invocation and waiver. Together, the three reports were intended to provide a complete picture of the issues involved. Unlike the preliminary and second reports, which were based on an assessment of State practice, the third report, while taking available practice into account, was largely deductive in nature.

71. The Commission’s debate on the second report was summarized in paragraphs 116 to 140 of its report and had addressed two major issues, namely the general orientation of the topic and the question of whether there were exceptions to immunity, in particular with regard to serious crimes under international law.

72. Diverse views had informed the debate on the general orientation of the topic, including with regard to the principle of sovereignty. Contemporary trends in international law, in particular on the issue of grave crimes under international law, had been taken into

account. It had been observed that consideration of the topic had highlighted the Commission's role in the progressive development of international law and its codification: not only did the topic highlight the dichotomy between *lex lata* and *de lege ferenda*, but, even within the scope of *lex lata*, the interpretation given to relevant State practice and judicial decisions on the subject could lead to different conclusions as to the existing law; moreover, any approach *de lege ferenda* was bound to invoke competing policy considerations. It had been further emphasized that the Commission should proceed with caution so as to strike the right balance between the need to ensure stability in international relations and the need to avoid impunity for grave crimes under international law. The establishment of a working group had been suggested in order to help chart the future orientation of the topic.

73. The debate on the question of possible exceptions to immunity had also produced varying opinions and, in many ways, had mirrored the essential question concerning the general orientation of the topic. It had been suggested that the whole question should not be perceived in terms of "rule" and "exception", with immunity being the rule; an alternative framing would allow for consideration of the issues in terms of the responsibility of the State and its representatives in the context of the most serious crimes and the question of whether any exceptions in the form of immunity might exist. It had also been suggested that the matter might be considered from the perspective of a hierarchy of norms or norms between which there existed some tension: the principle of non-impunity for grave crimes under international law, which was a core value of the international community, and the question of immunity. For other Commission members, who accepted the premise of "rule" and "exception", there was sufficient basis in State practice to affirm the existence of exceptions to the immunity of State officials when such officials had committed grave crimes under international law.

74. The Commission had also discussed the scope of immunity, drawing on the doctrinal distinction between immunity *ratione personae* and *ratione materiae*. Whether immunity *ratione personae* covered the so-called troika — incumbent heads of State and Government and ministers for foreign affairs — had given rise to divergent views within the Commission concerning, in particular, whether it included the Minister for Foreign Affairs and whether certain other high-level officials who exercised functions similar to the troika might also benefit from immunity *ratione personae* in order to carry out their tasks effectively. The discussion on immunity *ratione materiae* had brought to the fore the issue of attribution of conduct for the purpose of determining which acts were "official" and thus attributable to the State and, in particular, whether there was a necessary link between attribution of conduct for the purposes of State responsibility and for those of immunity, including with regard to acts *ultra vires*.

75. The Commission's discussion of the Special Rapporteur's third report, focusing on the procedural aspects of the question of immunity, had raised less contentious issues. Nevertheless, varying views with regard to his underlying approach to the topic persisted and some of his conclusions raised similar substantive problems. Some of the conclusions on the procedural aspects of immunity, including the timing of consideration and the means of notification of immunity, had found general agreement within the Commission. However, various views had been expressed regarding the proposals on the invocation of immunity for different categories of officials, which had echoed the discussions on the scope of immunity and the persons to be covered held during consideration of the second report. The central issues in the debate had concerned the overall approach to the topic and the need to find an acceptable balance between immunity and accountability.

76. It would be useful for the Commission to receive detailed comments from the Committee on the Commission's debate thus far, as well as information on State practice. In chapter III of the report, the Commission had drawn attention to specific issues on which comments would be of interest, concerning, in particular, the debate on the general orientation of and the Commission's approach to the topic, including in relation to the scope of immunity *ratione personae*. The Commission would also welcome comments on the question of exceptions to immunity in respect of grave crimes under international law and information on State practice in respect of all the issues covered in the three reports.

77. Turning to chapter X, he recalled that, between 2006 and 2008, the Commission had received and considered three reports of the Special Rapporteur on the obligation to extradite or prosecute (*aut dedere aut judicare*). At its sixty-third session, the Commission

had had before it the Special Rapporteur's fourth report (A/CN.4/648), which, building upon previous reports, sought to address the question of sources of the obligation to extradite or prosecute, focusing on treaties and custom. The Special Rapporteur had presented three draft articles on, respectively, the duty to cooperate; treaty as a source of the obligation to extradite or prosecute; and international custom as a source of the obligation *aut dedere aut judicare*. Paragraphs 294 to 309 of the report provided an overview of the issues addressed.

78. The debate in the Commission had focused mainly on the question of methodology and the general approach to be taken in addressing the issues raised by the topic. Attention had been drawn to the valuable work of the Working Group the topic in 2009 and 2010 and to the continuing relevance of the proposed 2009 general framework for the Commission's consideration of the topic, prepared by the Working Group.

79. It had been suggested that although the fourth report was useful in focusing on treaties and custom as sources of the obligation to extradite or prosecute, it had not examined the issues sufficiently to allow the Commission to draw informed conclusions on the direction to be taken on the topic. In particular, concerns had been expressed about the draft articles as proposed and the analysis on which they were based. It had been noted that the Special Rapporteur's methodology in dealing separately with the two main sources of international law — treaties and customary law — and therefore proposing two separate draft articles was conceptually problematic since there was no need for a draft article to demonstrate the existence of a rule in a treaty or under custom. On the contrary, the focus ought to be on the obligation to extradite or prosecute and on the way that treaties and custom evidenced the rule, rather than on treaties or custom as the source of the obligation. In that connection, so that the Commission might be guided in its future work, chapter III of the report posed a number of questions concerning State practice, in particular legislation or case law involving crimes or categories of crimes in respect of which the obligation to extradite or prosecute had come into play and whether a court or tribunal had relied, in that respect, on customary international law.

80. It had been observed that the present topic was inextricably linked to universal jurisdiction. For some, separation of the present topic from the broader subject of universal jurisdiction was artificial and, further work could not be done meaningfully without addressing universal jurisdiction and the crimes affected by it. In that context, it had been suggested that in future reports, the Special Rapporteur should consider more fully the relationship between *aut dedere aut judicare* and universal jurisdiction in order to assess whether that relationship had any bearing on the draft articles to be prepared on the topic. It had also been suggested that the topic should be expanded to include universal jurisdiction, taking into account the views of the Committee.

81. Specific comments had been made on the three draft articles proposed by the Special Rapporteur, a summary of which was contained in paragraphs 308 to 326 of the report. The expression of some concerns notwithstanding, the preponderant view within the Commission had been that the topic remained a viable and useful project for it to pursue.

82. A summary of the Special Rapporteur's concluding remarks was contained in paragraphs 328 to 332 of the report. On the question of the possible expansion of the topic to cover universal jurisdiction, the Special Rapporteur had recalled that in his preliminary report (A/CN.4/571, paras. 16-22), he had suggested continuing a joint analysis of the topic together with universal jurisdiction, but the Commission and the Committee had not supported the idea. Given the increasing attention focused on the issue of universal jurisdiction, he had noted that joint consideration might be inevitable in the future.

83. Turning to chapter XI ("Treaties over time"), he said that the Study Group on the topic, which had begun its work in 2009, had been reconstituted in 2011. At its sixty-third session, the Study Group had completed its consideration of the introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals, including a section on possible modification of a treaty by subsequent agreements and practice; the Chairman's second report, relating to jurisprudence under special regimes; and a paper on evolutionary interpretations by Mr. Murase.

84. In its consideration of its Chairman's second report, the Study Group had focused on certain of the general conclusions contained therein. In light of that discussion, the Chairman had subsequently reformulated nine of his preliminary conclusions,

which were reproduced in section B.3 of chapter XI of the report.

85. The Study Group had also discussed future work on the topic. It was expected that discussion of the second report prepared by the Chairman would be completed during the Commission's sixty-fourth session and would be followed by a third phase — analysis of the practice of States that was unrelated to judicial and quasi-judicial proceedings — based on a further report on the topic. The Study Group expected that work on the topic would be concluded, as originally envisaged, during the next quinquennium and would result in conclusions on the basis of a repertory of practice. It had also discussed the possibility of modifying the planned working method through the appointment of a Special Rapporteur and had concluded that such a possibility should be considered by the newly elected membership of the Commission at its next session.

86. The Study Group had reiterated that additional information from Governments, particularly with regard to subsequent practice and agreements that had not been the subject of a judicial or quasi-judicial pronouncement by an international body, would be useful.

87. Turning to chapter XII ("The most-favoured-nation clause"), he said that the Study Group on the topic, which had begun its work in 2009, had been reconstituted in 2011. On the basis of several papers reviewed at the Commission's previous session, the Study Group had decided to identify the normative content of most-favoured-nation clauses in the field of investment and to undertake further analysis of the case law, including the role of arbitrators, factors that explained different approaches to interpreting most-favoured-nation provisions, divergences, and steps taken by States in response to the case law.

88. Accordingly, at the most recent session, the Study Group had had before it an informal document identifying the arbitrators and counsel in investment cases involving most-favoured-nation clauses and the type of most-favoured-nation provision interpreted, as well as a working paper on the "Interpretation and Application of Most-Favoured-Nation Clauses in Investment Agreements" prepared by Study Group co-Chair Donald McRae. The working paper built on the prior study by Rohan Perera, "The Most-Favoured-Nation Clause and the *Maffezini* case", by attempting to identify the factors considered by tribunals in reaching their decisions in order to shed light on any divergences in the case law. The issues addressed in the working paper and by the Study Group were covered in paragraphs 349-360 of the Commission's report.

89. The wide-ranging discussion had taken into account recent developments, including the International Centre for Settlement of Investment Disputes decision in *Impregilo S.p.A. v. Argentine Republic*. The concurring and dissenting opinion of Professor Brigitte Stern in that decision had provided a possible framework for extrapolating ways in which the *ejusdem generis* question ought to be approached, namely by first addressing whether the fundamental preconditions for invocation of access to the rights granted in the bilateral investment treaty — conditions *ratione personae*, *ratione materiae* and *ratione temporis* — had been met.

90. As to its future work, the Study Group had reaffirmed the need to study further the question of most-favoured-nation clauses in relation to trade in services and investment agreements, as well as the relationship between most-favoured-nation clauses, fair and equitable treatment, and national treatment standards. It was also necessary to further examine other areas of international law in order to identify other instances of the application of most-favoured-nation clauses. It was envisaged that work on the topic would be concluded in 2013.

91. Lastly, chapter XIII ("Other decisions and conclusions of the Commission") focused on the programme, procedure and working methods of the Commission and on documentation. At its sixty-third session, the Commission had reviewed its working methods and adopted recommendations focusing on the special rapporteurs, the study groups, the Drafting Committee, the Planning Group and relations with the Committee. In implementation of one such recommendation, his present introduction was shorter than had been the case in the past. The intention was to focus on the main points of discussion, including accomplishments of the Commission, issues on which it particularly wished to hear views of Member States and any proposals for new topics.

92. As a result of the work of its Working Group on the Long-Term Programme of Work, which was to submit its final report at the end of the quinquennium, the Commission had endorsed the inclusion of five new topics in its long-term programme: "Formation and

evidence of customary international law", "Protection of the atmosphere", "Provisional application of treaties", "The fair and equitable treatment standard in international investment law" and "Protection of the environment in relation to armed conflicts". The syllabuses appeared in the annex to the report.

93. In selecting new topics, the Commission was guided by the criteria agreed in 1998, namely that a topic, taking into account new developments in international law and pressing concerns of the international community as a whole, should reflect the needs of States, be sufficiently advanced in stage in terms of State practice to permit progressive development and codification, and be feasible for progressive development and codification. The Commission would welcome States' views on the new topics, as well any proposals for other topics to be included in its long-term programme of work. Such proposals should be accompanied by a statement of reasons, taking into account the aforementioned criteria.

94. In that connection, he recalled that at its sixtieth session, the Commission had decided to include under "Other matters" the question of the peaceful settlement of disputes. Following its sixty-second session, it had requested Michael Wood to prepare a working paper (A/CN.4/641), which contained, inter alia, suggestions for topics, including a possible study of ways to improve procedures for dispute settlement involving international organizations, that could be further developed within the Working Group on the long-term programme of work.

95. Chapter XIII also dealt with a number of other administrative and related issues crucial to the functioning of the Commission and its outreach in the teaching, study and wider dissemination of international law. Central to that effort was the Yearbook of the International Law Commission, which, since its inception in 1956, had become an authoritative international legal publication critical to the understanding of the Commission's work in the progressive development and codification of international law and the strengthening of the rule of law in international relations. The Yearbook, an indispensable tool for preservation of the legislative history of documents produced by the Commission, was published only after an elaborate process of referencing and editing. Its scientific value and long-term interest for governments, practitioners, academics and courts could not be overemphasized.

96. The Commission had decided to convene its sixth-fourth session in Geneva from 7 May to 1 June and 2 July to 3 August 2012.

Agenda item 79: Report of the United Nations Commission on International Trade Law on the work of its forty-fourth session (*continued*) (A/66/17; A/C.6/66/L.10-12)

Draft resolution A/C.6/66/L.10

97. **Ms. Quidenus** (Austria) announced that Malaysia, the former Yugoslav Republic of Macedonia, Turkey and the United States of America had become sponsors of the draft resolution.

98. *Draft resolution A/C.6/66/L.10 was adopted.*

Draft resolution A/C.6/66/L.11

99. *Draft resolution A/C.6/66/L.11 was adopted.*

Draft resolution A/C.6/66/L.12

100. *Draft resolution A/C.6/66/L.12 was adopted.*

Agenda item 143: Administration of justice at the United Nations (*continued*) (A/66/86 and Add.1, A/66/158, A/66/224, A/66/275, A/66/399 and A/66/507; A/C.6/66/L.13 and L.14)

101. **Mr. AlFarhan** (Saudi Arabia) introduced draft resolution A/C.6/66/L.13, on the code of conduct for the judges of the United Nations Dispute Tribunal, and draft resolution A/C.6/66/L.14, on amendments to the rules of procedure of the United Nations Appeals Tribunal.

The meeting rose at 1.05 p.m.