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## Sixth Committee

### Summary record of the 18th meeting

Held at Headquarters, New York, on Thursday, 1 November 2012, at 3 p.m.

*Chair:* Mr. Sergeyev ..... (Ukraine)

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Agenda item 79: Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions

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

**Agenda item 79: Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions** (A/66/10 and Add.1 and A/67/10)

1. **The Chair** expressed condolences on behalf of the Committee to those in New York and neighbouring states who had been affected by Hurricane Sandy over the past few days.

2. He said that the richness of the report of the Commission on the work of its sixty-fourth session (A/67/10) attested to the unique role it continued to play in the codification and progressive development of international law. The Bureau had recommended that the Committee should consider the Commission's report in two parts, the first part to consist of chapters I to V and XII, and the second part chapters VI to XI. In the light of the disruption caused to the Organization's work by the hurricane, the Bureau had further recommended that the Committee should defer its consideration of reservations to treaties (A/66/10, chap. IV, and A/66/10/Add.1) to the sixty-eighth session of the General Assembly. He took it that the Committee wished to proceed on that basis.

3. *It was so decided.*

4. **The Chair** urged delegations, in view of the time lost over the past few days, to make their statements as concise as possible and reminded them that written statements could be made available in full on the PaperSmart portal.

5. **Mr. Caflisch** (Chair of the International Law Commission), introducing the Commission's report on the work of its sixty-fourth session (A/67/10), said that during the session — the first of the new quinquennium — the Commission had adopted on first reading a set of 32 draft articles, with commentaries thereto, on the expulsion of aliens, and had made progress on the topics of protection of persons in the event of disasters and immunity of State officials from foreign criminal jurisdiction. It had attempted to clarify a number of aspects of the obligation to extradite or prosecute (*aut dedere aut judicare*) and had also made progress, in two study groups, on the topics of the most-favoured-nation clause and treaties over time.

6. He wished to stress the vital contribution of the special rapporteurs to the work of the Commission, not only during the Commission's sessions but the rest of

the year as well. With the new quinquennium it had been necessary to appoint a new Special Rapporteur for the topic of immunity of State officials from foreign criminal jurisdiction. In addition, the Commission had decided to change the format of its work on the topic of treaties over time with effect from its next session and had accordingly renamed the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and appointed a rapporteur. Of the five topics which the Commission had decided at the end of the previous quinquennium to include in its long-term programme of work, two had been moved to its current programme of work — formation and evidence of customary international law and provisional application of treaties — and Special Rapporteurs had been appointed.

7. As was customary at the beginning of a quinquennium, the Commission had prepared a tentative work programme, contained in paragraph 273 of its report, setting out the anticipated development of each topic on its agenda for the remainder of the quinquennium. The Commission hoped to make substantial progress on the various topics by the end of the quinquennium and to complete its consideration of some of them. In addition, as indicated in chapter III of the report, the Commission would like to receive information from States on specific aspects of two topics, the immunity of State officials from foreign criminal jurisdiction and the formation and evidence of customary international law.

8. The Commission had welcomed the General Assembly's decision to hold a High-level Meeting on the Rule of Law at the National and International Levels, since the promotion of the rule of law was the essence of its work.

9. Turning to chapter IV of the report, on the expulsion of aliens, he said that the Commission had had before it the eighth report of the Special Rapporteur (A/CN.4/651), which provided an overview of comments made by States and by the European Union on the topic during the Sixth Committee's debate on the report of the Commission at the sixty-sixth session of the General Assembly. It also contained a number of final observations by the Special Rapporteur. During the Commission's session, the Drafting Committee had finalized all the draft articles referred to it since 2007, and the Commission had subsequently adopted on first reading a set of 32 draft articles on the expulsion of aliens with

commentaries thereto. In accordance with articles 16 to 21 of its Statute, the Commission had decided to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations should be submitted to the Secretary-General by 1 January 2014.

10. The draft articles on the expulsion of aliens were structured in five parts. Part one (General provisions) contained five draft articles. Draft article 1 defined the scope of the draft articles. Paragraph 1 stated that the draft articles applied to the expulsion by a State of aliens who were lawfully or unlawfully present in its territory. It thus established the scope of the draft articles both *ratione personae* (the concept of “aliens”) and *ratione materiae* (the concept of “expulsion”). As stated in that paragraph, the draft articles covered not only aliens lawfully present in the territory of the expelling State but also those unlawfully present. As explained in the commentary, the second category — aliens unlawfully present in the territory of the expelling State — covered aliens who had entered the territory unlawfully and aliens whose lawful presence in the territory had subsequently become unlawful, primarily because of a violation of the laws of the expelling State governing conditions of stay.

11. Draft article 2 defined the terms “expulsion” and “alien” for the purposes of the draft articles. “Expulsion”, defined in subparagraph (a), meant a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien was compelled to leave the territory of that State. The key element of the definition was that the alien was “compelled” — whether by a formal act or by conduct of the State intended to produce the same result — to leave the territory of that State. The second phrase of subparagraph (a) stated that the definition did not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State. The term “alien” was defined in subparagraph (b) as an individual who did not have the nationality of the State in whose territory that individual was present.

12. Draft article 3 (Right of expulsion) set out the uncontested principle that a State had the right to expel an alien from its territory. It also stated that expulsion must be in accordance with the draft articles and other applicable rules of international law, in particular those relating to human rights.

13. Draft article 4 set out the fundamental rule that an alien could be expelled only in pursuance of a decision reached in accordance with law. In the Commission’s view that general rule was applicable irrespective of whether the presence of the alien in question in the territory of the expelling State was lawful or not and governed both the adoption of an expulsion decision and the implementation of that decision by the authorities of the expelling State.

14. In draft article 5 (Grounds for expulsion), paragraph 1, provided that any expulsion decision must state the ground on which it was based, while paragraph 2 provided that the ground for expulsion must be provided for by law. Particular mention was made of public order and national security, since they were recognized as valid grounds for expulsion in the national legislation of most countries. Paragraph 3 set out the criteria for assessing the ground for expulsion, while paragraph 4 recalled that States could not expel aliens on grounds that were contrary to international law, such as discriminatory grounds or as an act of reprisal.

15. Part two (Cases of prohibited expulsion) contained eight draft articles. Draft articles 6 to 8 concerned refugees and stateless persons. Draft article 6, paragraph 1, which reproduced article 32, paragraph 1, of the 1951 Convention relating to the Status of Refugees, provided that a State could not expel a refugee lawfully in its territory save on grounds of national security or public order. Paragraph 2 of the draft article went beyond the 1951 Convention by extending the protection recognized in paragraph 1 to a person unlawfully present in the territory of the State who had applied for recognition of refugee status, while such application was pending. Paragraph 3 of the draft article, which combined paragraphs 1 and 2 of article 33 of the 1951 Convention, set forth the prohibition against return (*refoulement*). Unlike the other provisions of the draft articles, which did not cover the non-admission of an alien to the territory of a State, draft article 6, paragraph 3, did address that situation with respect to refugees, and unlike the protection stipulated in paragraph 1, the protection provided for in paragraph 3 applied to all refugees, regardless of whether their presence in the expelling State was lawful or unlawful.

16. Draft article 7 provided that a State must not expel a stateless person lawfully in its territory save on grounds of national security or public order; it thus

reproduced article 31, paragraph 1, of the 1954 Convention relating to the Status of Stateless Persons. Draft article 8 was a “without prejudice” clause designed to ensure the application of other rules on the expulsion of refugees and stateless persons provided for by law but not mentioned in draft articles 6 and 7.

17. Draft article 9 provided that a State must not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her. The Commission was of the view that such a deprivation of nationality, insofar as it had no other justification than the State’s desire to expel the individual, would be abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights. The draft article should not be interpreted as affecting a State’s right to deprive an individual of its nationality on a ground provided for in its legislation. Furthermore, it did not address the expulsion by a State of its own nationals, which fell outside the scope of the draft articles.

18. Draft article 10, paragraph 2, set out the prohibition of the collective expulsion of aliens, defined in paragraph 1 as the “expulsion of aliens as a group”. That definition should be read in the light of paragraph 3, which specified the conditions on the basis of which the members of a group of aliens could be expelled concomitantly without such a measure being regarded as a collective expulsion within the meaning of the draft articles. The criterion adopted for that purpose, informed by the case law of the European Court of Human Rights, was the reasonable and objective examination of the particular case of each member of the group. On reflection, the Commission had decided not to address the issue of collective expulsion in situations of armed conflict; the “without prejudice” clause in paragraph 4 of the draft article was formulated broadly so as to cover any rules of international law that might be applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

19. Draft article 11, paragraph 1, set out the prohibition of any form of disguised expulsion of an alien. The Commission emphasized in its commentary that disguised expulsion infringed the rights of the alien in question, including the procedural rights referred to in part four of the draft articles. Disguised expulsion was defined in draft article 11, paragraph 2, as the forcible departure of an alien from a State resulting indirectly from actions or omissions of the

State, including situations where the State supported or tolerated acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory. In essence, such cases were examples of expulsion by “conduct”, as referred to in the definition of expulsion contained in draft article 2, subparagraph (a).

20. Draft article 12 prohibited expulsion for purposes of confiscation of assets. The Commission considered that such expulsions were unlawful from the perspective of contemporary international law, partly because the grounds appeared invalid and partly because such expulsions infringed the right to property recognized in various human rights instruments.

21. Draft article 13 set out in general terms the prohibition against resorting to expulsion in order to circumvent an extradition procedure. It covered situations that could be described as “disguised extradition”. The commentary explained the substance of the prohibition.

22. Part three (Protection of the rights of aliens subject to expulsion) comprised four chapters. Chapter I contained general provisions dealing with the obligation to respect the human dignity and human rights of aliens subject to expulsion (draft article 14), the obligation not to discriminate (draft article 15) and the protection of vulnerable persons (draft article 16).

23. Chapter II (Protection required in the expelling State) contained four draft articles concerning, respectively, the obligation to protect the right to life of an alien subject to expulsion (draft article 17), the prohibition of torture or cruel, inhuman or degrading treatment or punishment (draft article 18), the detention conditions of an alien subject to expulsion (draft article 19) and the obligation to respect the right to family life (draft article 20). The commentary explained that the inclusion of draft articles specifically mentioning certain rights should not be understood as implying that those rights were more important than other rights. Draft article 14 also made it clear that aliens subject to expulsion were entitled to respect for the whole range of human rights.

24. Part three, chapter III, concerned the protection of an alien subject to expulsion in relation to the State of destination and comprised four provisions. Draft article 21 dealt with the implementation of the expulsion decision, whether forcible implementation or implementation by voluntary departure of the alien in

question. Paragraph 1, the purpose of which was to encourage voluntary departure, was not to be interpreted as authorizing the expelling State to exert undue pressure on the alien to opt for voluntary departure rather than forcible implementation of an expulsion decision; the commentary emphasized that point. Paragraph 2 dealt specifically with cases of forcible implementation of an expulsion decision. By providing that the State must take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law, the paragraph aimed to ensure both the protection of the rights of the alien concerned and, if necessary, the safety of other persons, for example the passengers on an aeroplane or other means of transport taken by the alien to leave the territory of the expelling State. Paragraph 3 provided that the expelling State must give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

25. Draft article 22 concerned the determination of the State of destination of aliens subject to expulsion. Paragraph 1 established a distinction between States that had an obligation to receive the alien in question under international law (first of all his or her State of nationality) and any other State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question. Paragraph 2 addressed the situation where it had not been possible to identify either the State of nationality or any other State that had the obligation to receive the alien under international law or that was willing to accept the alien. In such cases, the alien could be expelled to any State where he or she had a right of entry or stay or, where applicable, to the State from which he or she had entered the expelling State. It should be noted that opinion within the Commission had been divided on the issue of whether certain States, such as a State that had issued the alien in question with a travel document, entry permit or residence permit, or the State of embarkation, would have an obligation to receive the alien under international law.

26. Determination of the State of destination of the alien subject to expulsion under draft article 22 must be done in compliance with draft articles 23 and 24, which prohibited, respectively, expulsion of an alien to a State where his or her life or freedom would be threatened or to a State where the alien could be

subjected to torture or to cruel, inhuman or degrading treatment or punishment. Draft article 23, paragraph 2, provided that a State that did not apply the death penalty could not expel an alien to a State where the life of that alien would be threatened with the death penalty, unless it had previously obtained an assurance that the death penalty would not be imposed or, if already imposed, would not be carried out. The commentary indicated that paragraph 2 constituted progressive development of international law; it went beyond the position taken by the Human Rights Committee with regard to article 6 of the International Covenant on Civil and Political Rights in two respects. First, the prohibition established in paragraph 2 covered not only States that had abolished the death penalty, but also States that retained the penalty in their legislation but did not apply it in practice: that was the meaning of the phrase “a State that did not apply the death penalty”. Second, the scope of protection had been extended to cover not only situations where the death penalty had already been imposed but also those where there was a real risk that it would be imposed.

27. Part three, chapter IV, contained a single provision, draft article 25, concerning the protection in the transit State of the human rights of an alien subject to expulsion.

28. Part four (Specific procedural rules) consisted of three draft articles. Draft article 26, paragraph 1, set out a list of procedural rights enjoyed by any alien subject to expulsion, irrespective of whether that person was lawfully or unlawfully present in the territory of the expelling State. As stated in paragraph 2, the rights listed in paragraph 1 were without prejudice to other procedural rights or guarantees provided by law. The commentary explained that paragraph 2 referred both to the rights guaranteed by the expelling State’s legislation and to the rights recognized under treaties by which that State was bound. Paragraph 3 referred to consular assistance and set out both the alien’s right to seek such assistance and the obligation of the expelling State not to impede the exercise of that right or the provision of such assistance. Although the procedural rights set out in paragraph 1 applied irrespective of whether the alien in question was lawfully or unlawfully present in the territory of the expelling State, paragraph 4 contained a saving clause which sought to preserve the application of any legislation of the expelling State concerning the expulsion of aliens who had been unlawfully present in

the territory of that State for less than six months. As the commentary explained, the Commission had deemed it necessary to follow a realistic approach, since several States' national laws made provision for simplified procedures for the expulsion of aliens who had recently entered their territory.

29. Draft article 27 recognized the suspensive effect of an appeal lodged against an expulsion decision by an alien lawfully present in the territory of the expelling State. As indicated in the commentary, the Commission considered that the provision constituted progressive development of international law, given that State practice in the matter was not sufficiently convergent to form the basis of a rule of general international law. One of the arguments for a suspensive effect was that, unless the execution of the expulsion decision was stayed, an appeal might well be ineffective in view of the potential obstacles to return, including those of an economic nature, which might be faced by an alien who in the intervening period had had to leave the territory of the expelling State as a result of an expulsion decision the unlawfulness of which was determined only after his or her departure.

30. Draft article 28 simply recalled that aliens subject to expulsion had access to any available procedure involving individual recourse to a competent international body. The individual recourse procedures in question were mainly those established under various universal and regional human rights instruments.

31. Part five (Legal consequences of expulsion) consisted of four draft articles. Draft article 29 (Readmission to the expelling State) recognized that, under certain conditions, an alien who had had to leave the territory of a State owing to an unlawful expulsion had the right to re-enter the expelling State. The Commission considered the provision to be another example of progressive development, since practice did not appear to converge enough to affirm the existence in positive law of a right to readmission. The right set out in draft article 29 was subject to several conditions. First, it was accorded only to an alien who at the time of the expulsion decision had been lawfully present in the expelling State. Second, the right was recognized only when a competent authority — either an authority of the expelling State or an international body such as a court or a tribunal which was competent to do so — had established that the expulsion was unlawful. Third, the right existed only when the expelling State could not

validly invoke one of the reasons mentioned in the draft article as grounds for refusing to readmit the alien in question, for example, where readmission constituted a threat to national security or public order or where the alien otherwise no longer fulfilled the conditions for admission under the law of the expelling State. Paragraph 2 stated that in no case could the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

32. Draft article 30 provided that the expelling State must take appropriate measures to protect the property of an alien subject to expulsion, and must, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

33. Lastly, draft articles 31 and 32 should be understood simply as references to the rules concerning the responsibility of States for internationally wrongful acts and the legal institution of diplomatic protection, respectively. The commentary to draft article 31 provided several illustrations of the manner in which the rules on State responsibility — in particular those relating to reparation — had been applied by arbitral tribunals or courts in cases of expulsion deemed unlawful.

34. Turning to chapter V of the report, on the protection of persons in the event of disasters, he said that the Commission had had before it the fifth report of the Special Rapporteur (A/CN.4/652), which contained a summary of the views of States on the work undertaken by the Commission thus far; a brief discussion of the Special Rapporteur's position on the question posed by the Commission in chapter III.C of its 2011 report (A/66/10), concerning whether the duty of States to cooperate with the affected State included a duty to provide assistance when so requested by the affected State; and proposals for three further draft articles: A (Elaboration of the duty to cooperate), 13 (Conditions on the provisions of assistance) and 14 (Termination of assistance). All three draft articles had been referred to the Drafting Committee, and the Commission had subsequently taken note of that Committee's report containing the texts of several new draft articles provisionally adopted by the Committee (A/CN.4/L.812). The Commission would consider the Drafting Committee's proposals for new draft articles and commentaries thereto at its next session, with a view to their being included in the Commission's report to the General Assembly at its sixty-eighth session.

35. In the proposed draft article A, the Special Rapporteur, at the suggestion of Member States, had sought to elaborate on the duty to cooperate set out in draft article 5 by requiring States and other actors mentioned in draft article 5 to provide to an affected State scientific, technical, logistical and other cooperation, as appropriate. Such cooperation could include coordination of international relief actions and communications, making available relief personnel, relief equipment and supplies, scientific and technical expertise and humanitarian assistance. The provision was modelled on draft article 17, paragraph 4, of the 2008 draft articles on the law of transboundary aquifers, dealing with cooperation in the case of emergencies, which was, in turn, modelled on article 28 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.

36. Draft article 13 as proposed by the Special Rapporteur dealt with the conditions that an affected State might impose on the provision of assistance. The issue was considered from three concurrent perspectives: compliance with national laws; identifiable needs and quality control; and limitations on conditions under international law and national law. Underlying those three perspectives was the fundamental principle set out in draft article 11, paragraph 1, according to which the provision of external assistance required the consent of the affected State. Furthermore, the power of that State to establish the conditions which the offer of assistance must meet was the corollary to the basic role of the affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory, in accordance with draft article 9. While it followed that assisting actors were required to comply with the national law of the affected State, it was the Special Rapporteur's view that the right to make the provision of assistance conditional on compliance with national law was not absolute. The affected State had a duty to facilitate the provision of prompt and effective assistance, by virtue of its sovereign obligations to its population. States had an obligation to assist in ensuring compliance with national law and an obligation to examine whether the applicability of certain provisions of national law must be waived in the event of a disaster. The latter element related, *inter alia*, to the grant of privileges and immunities; visa and entry requirements, customs requirements and tariffs; and questions of quality and freedom of movement.

37. Draft article 14 as proposed by the Special Rapporteur provided a further elaboration of the duty to cooperate, namely the duty of the affected State and that of the assisting actors to consult each other with a view to determining the duration of the period of assistance, including its termination. Such consultation could take place before the assistance was provided or during the period of the provision of assistance, at the initiative of one or the other party.

38. **The Chair** recalled that, in paragraph 9 of General Assembly resolution 66/98, the Secretary-General had been requested to continue his efforts to identify concrete options for support for the work of special rapporteurs, additional to those provided under General Assembly resolution 56/272. He noted that the text of the report by the Director of the Codification Division concerning that matter was available on the PaperSmart portal.

39. **Mr. Errázuriz** (Chile), speaking on behalf of the Community of Latin American and Caribbean States (CELAC), said that CELAC attached great importance to the Commission's contribution to the progressive development of international law and its codification and its support for the work of the General Assembly, in particular the Sixth Committee. In return, comments and observations by Member States could assist the Commission in discharging its functions more effectively, while taking account of national perspectives and opinions on the legal issues on its agenda.

40. CELAC appreciated receiving an advance copy of chapters II and III of the Commission's report, but States would benefit from receiving the entire report in good time, so that delegations could consider it in depth. CELAC welcomed the practice of posting the Commission's provisional summary records, which enabled States to be fully aware of the substance of the debates.

41. In view of the burden of research placed on the special rapporteurs, it was important to find alternative ways of supporting their work. While the Commission should be encouraged to continue taking cost-saving measures, such measures should not prejudice the quality of its studies and documentation.

42. A fluid interaction between the Commission and Member States was critical to the success of the mutual endeavour. Questionnaires elaborated by the special rapporteurs should focus more on the main aspects of

the topic under consideration and be drafted in such a way that more States would be able to furnish replies in a timely manner. The differences in size and infrastructure between legal departments of various States should not have the result that the views of States able to participate more actively in the discussions were the only ones taken into account. Efforts must be made to encourage more States to contribute to discussions on the Commission's work, including new topics that might be proposed by the Committee.

43. In order to enhance direct dialogue between the Commission and Member States, at least one session each quinquennium should be held in New York. Austerity measures should not be allowed to affect the quality of work expected of the Commission, and ways should be explored of ensuring the full participation by special rapporteurs in meetings of the Sixth Committee, so as to enable delegations to ask questions and comment on their work in a more informal setting. The "thematic dialogue" between the Commission and the Committee should be scheduled close in time to the meeting of legal advisers and should not overlap with relevant meetings of the General Assembly. There should be a short list of topics for the thematic dialogue, announced well in advance so as to allow for better preparation.

44. CELAC welcomed the voluntary contributions from States to the trust funds used to facilitate publications by the Commission and participation in the International Law Seminar, and invited States to continue their contributions. The participation in the Seminar of the legal advisers who represented their Governments in the Sixth Committee, especially those from developing countries, could make a valuable contribution to the Seminar while also enhancing dialogue between the Committee and the Commission.

45. **Mr. Winkler** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Nordic countries remained unconvinced of the usefulness of the Commission's efforts to identify general rules of international law on the expulsion of aliens, since it was an area of law covered by detailed regional rules. Nonetheless, the draft articles on the topic contained some useful elements of guidance.

46. In general, the draft articles and the commentaries thereto contained a useful description of

the challenges with regard to the topic and of the different relevant bodies of international and regional rules and practices. The clear distinction drawn between expulsion and extradition, for example in draft article 2, subparagraph (a), was welcome. It was also useful and legally correct to confirm in draft article 22, paragraph 1, that States had the obligation to receive their own nationals.

47. Draft article 10 (Prohibition of collective expulsion) was a particularly important provision, but the commentary raised the question of whether the draft articles were an expression of current international law or an attempt to develop new international law. The Nordic countries in no way opposed the role of the Commission or the Sixth Committee in undertaking the latter, but it should be made clear when they were doing so. Draft article 20, paragraph 2, raised the same question.

48. The commentary to draft article 6, paragraph 3, on the expulsion or return of a refugee, noted that the draft article should be read in conjunction with draft articles 23 and 24 concerning States to which an alien could not be expelled. For the sake of clarity, those fundamental limitations should be reflected in draft article 6 itself.

49. The Nordic countries, as parties to the European Convention on Human Rights, welcomed the inclusion in draft article 20, paragraph 2, of the notion of a "fair balance between the interests of the State and those of the alien", which was inspired by the case law of the European Court of Human Rights. However, it would be useful to elaborate on the term in the draft article itself, for example by including some of the criteria listed by the European Court.

50. Draft article 23, paragraph 2, mentioned the issue of assurance that the death penalty would not be imposed or, if already imposed, would not be carried out. However, neither the draft article nor the commentary specified when or in what circumstances such an assurance would be legally sufficient and thus allow for the expulsion of an alien even to a State that employed the death penalty. The issue was legally complicated and politically sensitive; either it should be dealt with in more detail — which fell outside the scope of the topic — or the second part of the paragraph should be deleted and a short reference made in the commentary.



51. It was not feasible or desirable at the current stage to attempt to develop the draft articles into legally binding norms. The final form of the Commission's work on the topic should therefore be guidelines or guidelines and principles.

52. The provisional adoption by the Drafting Committee of a further five draft articles on the protection of persons in the event of disasters showed that good progress was being made on the topic. The affected State had the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory and had the primary role in initiating, organizing, coordinating and implementing humanitarian assistance. Where the affected State did not have the capacity or will to protect and provide assistance to persons affected by the disaster, it must not withhold consent to external assistance, and the conditions it imposed on that assistance should be in keeping with international human rights law and core humanitarian obligations. The Nordic countries shared the view that the proposed draft article 13 (Conditions on the provision of assistance) could benefit from further detail in order to have greater practical value. More emphasis should be placed on the basic role of the affected State to ensure the protection of persons and the provision of disaster relief and assistance on its territory, so as to achieve the right balance.

53. With regard to draft article A, the Nordic countries commended the Special Rapporteur's efforts to strike a balance between three important aspects of the duty to cooperate: the sovereignty of the affected State; the legal obligation of conduct imposed on assisting States; and the limitation of disaster relief assistance to the specific elements that normally made up cooperation on the matter. The Nordic countries shared the concerns raised about the use of the word "shall" in the draft article and about the feasibility of imposing obligations on non-State actors.

54. The Nordic countries welcomed draft article 14 (Termination of assistance) as proposed by the Special Rapporteur, although it might require further elaboration. They were open to the possibility of adding new language relating to the repatriation of goods and personnel.

55. The above comments were without prejudice to the final form of the draft articles. The Nordic countries welcomed the intention of the Special Rapporteur to propose a draft article on the use of

terms and to elaborate in his next report on disaster risk reduction, including the prevention and mitigation of disasters.

56. The Nordic countries reiterated their strong support for the topic of protection of the environment in relation to armed conflicts and hoped that it would be included in the Commission's current programme of work at its next session. History showed that the environment usually suffered extensive degradation during and in the aftermath of armed conflict, and there was a need to clarify obligations in that regard.

57. **Mr. Gussetti** (Observer for the European Union) said that, in the past, his delegation had felt that the Special Rapporteur on the expulsion of aliens had not sufficiently addressed European Union law on the subject. He was therefore pleased to note that a separate section of the Special Rapporteur's eighth report (A/CN.4/651) was devoted to a discussion of comments provided by the European Union. The current European legislation most relevant to the topic was Directive 2008/115/EC, known as the Return Directive, and more than 30 States in Europe had established legal standards corresponding to its provisions. The draft articles and commentaries adopted by the Commission on first reading served to underline an objective that was also pursued by European Union law: that individuals subject to expulsion should be treated with respect for their human dignity and in accordance with agreed minimum standards based on the rule of law. The European Union would expect those standards to be applied to its citizens if they were subject to expulsion from a third country, but it was in the interest of all States to promote them, since nationals of any country might find themselves in a situation of illegal stay in another country.

58. His delegation could accept most of the text of the draft articles, subject to some refinement. Draft article 8, which currently provided that the draft articles were without prejudice to other rules on the expulsion of refugees and stateless persons provided for by law, should make it clear that the rules referred to were those which were more favourable to the person subject to expulsion.

59. With regard to draft article 15 (Obligation not to discriminate), the European Union's basic legal texts expressly banned discrimination on grounds of sexual orientation. His delegation therefore proposed that the

words “sexual orientation” should be added after “birth or other status” as one of the grounds on which discrimination was impermissible listed in draft article 15, paragraph 1.

60. The standards set out in draft article 16 (Vulnerable persons) broadly corresponded to the basic principles set out in articles 5 and 14 of the Return Directive, but lacked a reference to health considerations. His delegation therefore proposed that the following wording should be added to the draft article as a new paragraph 3: “In all actions, the state of health of aliens who are subject to expulsion shall be taken into account.”

61. His delegation proposed that draft article 19 (Detention conditions of an alien subject to expulsion) should be split into two separate draft articles, one dealing with detention and the other with detention conditions. Some limitations should be added in order to prevent arbitrary detention, as under article 15, paragraph 1, of the Return Directive and guideline 6 of the Council of Europe’s Twenty Guidelines on Forced Return, and in line with the judgment of 30 November 2012 of the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. In addition, anyone detained should be entitled to a speedy judicial review of the lawfulness of detention, as provided for in article 15, paragraph 2, of the Return Directive, article 5, paragraph 4, of the European Convention on Human Rights and article 9, paragraph 4, of the International Covenant on Civil and Political Rights. The title of draft article 19 should be changed to “Detention of an alien subject to expulsion” and a new paragraph 1 should be inserted, to read as follows: “Detention may only be used if it is necessary to prepare and/or carry out the expulsion process, in particular where there is a risk of absconding or where the alien avoids or hampers expulsion. Detention may only be imposed if less coercive measures cannot be applied effectively in a specific case.” The current paragraph 1 (b) should be deleted and the current paragraph 2 (b) should be amended by the addition of the phrase “or by an administrative authority, whose decision is subject to an effective judicial review.”

62. A new draft article 19 bis, entitled “Conditions of detention of aliens subject to expulsion” should be added, to read as follows:

1. Aliens detained pending expulsion should normally be accommodated in facilities specifically designed for that purpose. Such facilities should provide accommodation which is clean and which offers sufficient living space for the numbers involved.

2. Detainees should not normally be held together with ordinary prisoners. Men and women should be separated from the opposite sex if they so wish; however, the principle of family life should be respected and families should therefore be accommodated accordingly.

3. Detainees shall have access to lawyers, doctors, non-governmental organizations, members of their families and the Office of the United Nations High Commissioner for Refugees, and should be able to communicate with the outside world, in accordance with the relevant national regulations.

4. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees.

5. Children shall only be detained as a measure of last resort and for the shortest appropriate period of time, respecting the child’s best interests.

6. Children shall have a right to education and a right to engage in play and recreational activities appropriate to their age. The provision of education may be made subject to the length of their stay. Separated children should be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

For the sake of coherence, draft article 20 should be moved before draft article 19.

63. Draft article 21 should be amended in order to promote voluntary departure more clearly, since it was widely recognized that voluntary departure had advantages over forced return, both for the returnee and for the expelling State, and entailed fewer risks with regard to respect for human rights. Paragraph 3 should be deleted and a new paragraph 1 should be added, inspired by guideline 1 of the Twenty Guidelines on Forced Return:

Where there are no reasons to believe that this would undermine the purpose of an expulsion procedure, voluntary departure should be preferred over forced return and a reasonable period for voluntary departure should be granted, taking into account the specific circumstances of an individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

64. Draft article 22, paragraph 1, should be amended to place greater emphasis on the duty of a State to readmit its citizens or aliens towards whom it had such an obligation, as follows: “An alien subject to expulsion shall be expelled to and readmitted by his or her State of nationality or any other State that has the obligation to receive the alien under international law.”

65. His delegation fully agreed with the rationale behind draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened). However, paragraph 2 should be rendered more precise so as to avoid the impression that expulsions to countries exercising the death penalty were generally banned. What was required was an individualized assessment of the risk of the death penalty, in line with the case law of the European Court of Human Rights. His delegation accordingly proposed that draft article 23, paragraph 2 should begin as follows: “A State that does not apply the death penalty shall not expel an alien to a State where the circumstances point to the probability that the life of that alien would be threatened with the death penalty on his or her return, ...”.

66. Draft article 26, paragraph 1 (a), which provided for the right to receive notice of an expulsion decision, should be amended to provide the right to receive written notice and also information about the available legal remedies. With regard to paragraph 1 (c), his delegation agreed with the view expressed in the commentary that the right to be heard by a competent authority did not necessarily imply the right to be heard in person, but that an alien must be furnished with an opportunity to explain his or her situation and submit his or her own reasons before the competent authority, and that in some circumstances, written proceedings might satisfy the requirements of international law. With regard to draft article 26, paragraph 4, his delegation was concerned that allowing States to exclude from the scope of procedural rights aliens who had been unlawfully

present for less than six months risked undermining in practice the minimum standards offered by the draft article. It therefore proposed that the derogation should be limited to aliens apprehended in connection with irregular border crossing.

67. European Union law did not currently provide that an appeal against an expulsion decision had a suspensive effect of the type set out in draft article 27. Pursuant to article 13 of the Return Directive, third-country nationals were to be afforded an effective remedy to appeal against or seek review of decisions relating to return, and the appeals body had the power to review decisions relating to return, including the possibility of temporarily suspending their enforcement; guideline 5 of the Twenty Guidelines on Forced Return contained a similar provision. Recognition of a suspensive effect could be seen as an incentive to abuse appeal procedures. Draft article 29, paragraph 1, should be amended to make it clear that the competent authority referred to was an authority of the expelling State.

68. With regard to the final form of the draft articles, his delegation continued to share the doubts of certain Commission members as to whether the topic lent itself to incorporation in a convention. The ongoing work should focus on transforming the draft articles into framework principles; progressive development would not be beneficial.

69. With regard to the protection of persons in the event of disasters, his delegation welcomed the Commission’s efforts to balance the need to safeguard the national sovereignty of the affected States with the need for international cooperation. However, in humanitarian emergencies, humanitarian principles and human rights should be fully respected. A proposal for the establishment of a body of European Union aid volunteers that would boost capacity to provide international humanitarian assistance was currently under consideration.

70. Draft article 12 (Offers of assistance) reflected the Special Rapporteur’s view, based on input received from States, that there was no positive duty in international law for a State to render assistance. Nonetheless, the Special Rapporteur noted in his report (A/CN.4/652, para. 69) that by means of mutual arrangements States could accept the imposition of such a duty as between the parties thereto, and he referred in that context to article 222, paragraph 2, of

the Treaty on the Functioning of the European Union. Declaration No. 37, annexed to the Treaty, stressed the latitude given to European Union member States in deciding how they would provide such assistance. Discussions on arrangements for the implementation of article 222 were currently ongoing.

71. His delegation welcomed the draft article 5 bis (Forms of cooperation); the new wording clarified its relationship to draft article 5 (Duty to cooperate). However, it should be made clear in the draft articles or in the commentary that cooperation should take place not only with the affected State, or between States, or between States and international actors, but among all international actors rendering assistance, in particular with regard to needs assessments, situation overview and delivery of assistance. Concerning the scientific and technical resources referred to in draft article 5 bis, specific reference should be made in the commentary to the use of satellite imagery as an important means of delivering technical assistance during emergency response. Satellite imagery products such as damage assessment maps were available through the European Earth monitoring programme known as Global Monitoring for Environment and Security (GMES), not only to European Union actors but also to other international actors.

72. Draft article 13 (Conditions on the provision of external assistance), as provisionally adopted by the Drafting Committee, could be further refined so as to better reflect the need to respect both the affected State's right to sovereignty and the principles of humanity, neutrality, impartiality and independence that governed humanitarian assistance. Recognized standards of humanitarian assistance should be adequately reflected, in particular the needs-based approach; thus, the conditions referred to in the draft article should actually reflect the identified needs of the affected persons rather than simply taking them into account. The draft article would also benefit from the addition of a reference to the special needs of women and vulnerable or disadvantaged groups, including children, the elderly and persons with disabilities. Draft article 15 should cover not only the procedural aspects of the termination of external assistance but also adequate consideration of the needs of the affected persons in consultations with the affected State.

73. The Special Rapporteur had noted in his report (A/CN.4/652, para. 14) that it was unclear whether the

term "assisting actors" included regional integration organizations, such as the European Union. His delegation therefore reiterated its previous suggestion that regional integration organizations should be expressly mentioned in the draft articles or that their inclusion should be made clear in the commentaries. Lastly, the European Union considered that the final form of the Commission's work on the protection of persons in the event of disasters should be framework principles.

74. **Mr. Stuerchler Gonzenbach** (Switzerland), noting that further detailed comments could be found in his delegation's written statement, said that expulsion of aliens was an important area of international law that had not yet been codified. His delegation therefore welcomed the adoption on first reading of the draft articles on the expulsion of aliens and the commentaries thereto. It was pleased to note that draft article 10 did not provide for any exceptions to the prohibition on collective expulsion. In accordance with the principle of non-refoulement, States must always examine each case of expulsion individually and make certain that the person whose expulsion was being considered would not be subjected to torture or to inhuman or degrading treatment. International law prohibited the collective expulsion of aliens both in times of peace and in times of war. His delegation was therefore not certain whether it was necessary to include the "without prejudice" clause in draft article 10, paragraph 4, referring to the rules applicable in the event of an armed conflict.

75. His delegation welcomed the mention in draft article 19 and the commentary thereto of the criterion of necessity in relation to the detention of an alien subject to expulsion. An alien could be detained only where less intrusive measures were not available and, of course, not for a longer period than necessary. The draft article provided that extension of the duration of the detention could be decided upon only by a judicial authority but did not specify whether the regular review of detention must also be of a judicial nature. It thus made no mention of the right of an alien to take proceedings by which the lawfulness of his or her detention would be decided speedily by a court and his or her release ordered if the detention was not lawful. Such a right was enshrined in article 9, paragraph 4, of the International Covenant on Civil and Political Rights and article 5, paragraph 4, of the European

Convention on Human Rights, and it should therefore be included in draft article 19.

76. Draft article 26, paragraph 4, which permitted the expelling State to restrict the procedural rights of aliens who had been unlawfully present in its territory for less than six months, was problematic on a number of counts. First, there was no justification for different treatment of aliens lawfully or unlawfully present as far as their minimum procedural rights were concerned; indeed, draft article 14 provided that the human dignity and human rights of all aliens must be respected. Second, the decision to fix the duration of the minimum period at six months was not based on any objective consideration. Lastly, it would be difficult in practice to verify whether the six-month minimum period had expired, since the date from which the alien had been illegally present in the expelling State was not known, in principle, to anyone but that alien. All aliens should therefore be accorded the procedural rights provided for in draft article 26, irrespective of whether or not their presence in the territory of the expelling State was lawful. In conjunction with more detailed rules with regard to the suspensive effect of appeals, that would be a more balanced approach.

77. With regard to draft article 27, his delegation took the view that international law did not require an appeal against an expulsion decision to have a suspensive effect, except where the principle of non-refoulement so required. The draft article should therefore provide that suspensive effect was to be recognized only for appeals lodged by aliens who could reasonably invoke a risk to their life or liberty or a risk of ill-treatment in the State of destination. The same principles should apply to procedures involving individual recourse to a competent international body pursuant to draft article 28. Such procedures did not, as a rule, have suspensive effect; however, where the principle of non-refoulement so required, States were prohibited from carrying out expulsions while the procedure was still pending before the body in question.

78. With regard to the protection of persons in the event of disasters, his delegation welcomed the care taken by the Special Rapporteur to seek balanced solutions to often thorny questions. Draft article 5, which referred to the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, should also mention

the national Red Cross and Red Crescent societies, which were components of the International Red Cross and Red Crescent Movement.

79. With respect to draft article 13 as provisionally adopted by the Drafting Committee, his delegation agreed that the conditions that the affected State imposed on the provision of assistance must be in compliance with international rules and the national law of the affected State, and thus also with the humanitarian principles referred to in draft article 6. Draft article 14 as provisionally adopted by the Drafting Committee might be difficult for States to accept, since it appeared not to make any distinction between military aid and civilian aid.

80. Switzerland had concluded agreements on mutual assistance in the event of disaster or serious accidents with its five neighbouring States, which designated the competent authorities for issuing and receiving requests for assistance. The draft articles should encourage States to conclude such agreements, and the Commission should seek information from States and from the United Nations on such international treaties already in existence.

81. **Mr. Tichy** (Austria), referring to the question posed by the Commission in chapter III of its report with regard to the topic of the formation and evidence of customary international law, said that the Austrian Supreme Court in *Dralle v. Czechoslovakia* had found that it could no longer be said that, under customary international law, *acta jure gestionis* were exempt from municipal jurisdiction.

82. With regard to the topic of the expulsion of aliens, his delegation was pleased to note that some of its concerns had been addressed in the set of draft articles adopted by the Commission on first reading. Draft article 26, paragraph 3, on consular assistance to aliens subject to expulsion, which reflected article 36 of the Vienna Convention on Consular Relations, had to be read in the light of the latter provision as interpreted by the International Court of Justice. Regrettably, the important clarification by the Court that article 36, paragraph 1 (b), of the Convention obliged the receiving State to inform the competent consular post if the detainee so requested and to inform the detainee of his or her rights in that respect was reflected only in paragraph (10) of the commentary and not in the draft article itself.

83. Draft article 27 (Suspensive effect of an appeal against an expulsion decision) should be seen only as a principle to which exceptions were possible, even if only in specific situations, such as for public order or safety reasons. Even in such cases, suspensive effect must be granted if that was necessary in order to respect the principle of non-refoulement.

84. Draft articles 31 (Responsibility of States in cases of unlawful expulsion) and 32 (Diplomatic protection) seemed redundant as there could be no doubt, in the former case, that any breach of an international obligation entailed international responsibility and, in the latter, that any State could exercise the right of diplomatic protection in respect of its nationals. Those obligations and rights derived from other sources of international law and did not need to be repeated in the draft articles.

85. With regard to the protection of persons in the event of disasters, draft article 13 should reflect the rules on cooperation outlined in draft article 5. An affected State was not free to impose conditions unilaterally; rather, such conditions should be the result of consultations between the affected State and the assisting actors, taking into account the general principles governing such assistance and the capacities of the assisting actors.

86. Draft article 14 as provisionally adopted by the Drafting Committee required the affected State to take the necessary legislative measures to facilitate the provision of external assistance. However, practice showed that such legislation needed to address a number of issues in addition to those mentioned in the draft article, such as confidentiality, liability, the reimbursement of costs, privileges and immunities, control and competent authorities.

87. Draft article 15 did not specify when the duty of consultation regarding the termination of assistance arose. It was often difficult to determine, at the start of the provision of assistance, when it would be possible to terminate it; nonetheless, it would be helpful to provide for consultations to take place as early as possible, subject to such adjustments as might be necessary.

88. Draft article A proposed by the Special Rapporteur implied an international obligation to provide cooperation. However, in his delegation's view, such a general obligation did not exist and should not be established, since it would contradict the basic

principle of voluntariness in international disaster relief.

89. **Mr. Bonifaz** (Peru) said that the title of the topic "expulsion of aliens" had a negative connotation, since it distracted attention from the fact that human beings were involved.

90. Draft articles 6 and 7, which dealt with refugees and stateless persons respectively, should mention the concept of asylum, since it was relevant to many persons, particularly in his region. In addition, a safeguard clause of the type set out in draft article 6, paragraph 2, should be added to draft article 7 so that stateless persons who were unlawfully present when they first entered a State had an opportunity to regularize their situation. Draft article 6, paragraph 3, was not consistent with article 22, paragraph 8, of the American Convention on Human Rights; moreover, as the draft article established exceptions to the prohibition of expulsion, it was also inconsistent with draft articles 23 and 24.

91. Draft article 19, paragraph 2 (a), on the duration of detention of an alien subject to expulsion, stated only that such duration must not be unrestricted or last longer than reasonably necessary for the expulsion to be carried out. The Commission should consider establishing a maximum period so as to give States more specific guidance when they established their domestic procedures. Moreover, it should be specified whether the person in question could be detained only after the adoption of an expulsion decision (initial or final if challenged pursuant to draft article 26), until such time as the decision was implemented, or whether the person could also be detained during the proceedings leading to the expulsion decision.

92. With regard to cases of forcible implementation of an expulsion decision, draft article 21, paragraph 2, provided that the expelling State should ensure "as far as possible" the safe transportation to the State of destination of the person subject to expulsion. That wording was not acceptable to his delegation because it left open the possibility of transporting the person in question in an unsafe manner.

93. Draft article 22 did not refer to the financial implications of transportation or specify which party would bear the cost of expulsion; nor did it mention the possible limits on the right of the expelled person to choose a State of destination, although the phrase "where appropriate" created the impression that it was

primarily the prerogative of the expelling State to determine the State of destination. In fact, the State of destination should be determined first and foremost by the person in question and only secondarily by the expelling State, provided in both cases that the intended State of destination was able to receive the person in question.

94. Draft article 23 referred to an assurance given by a State that the death penalty would not be imposed or carried out in respect of a person expelled to that State. That wording was not sufficient to safeguard the life of the expelled person, as the State in question might not abide by the assurance given. The draft article should aim to establish an international obligation and responsibility for failure to fulfil that obligation.

95. His delegation was pleased to note that the prohibition of expulsion set out in draft article 24 applied not only in cases where the expelled person would be in danger of being subjected to torture but also in cases where there was a risk of cruel, inhuman or degrading treatment or punishment.

96. Draft article 26, paragraph 3, provided that an alien subject to expulsion had the right to seek consular assistance. It should also place an obligation on the State in question to inform the alien that he or she had that right, in line with the Vienna Convention on Consular Relations.

97. With regard to draft article 32 (Diplomatic protection), it was important to consider a provision on the settlement of disputes arising from the interpretation and implementation of the draft article and to emphasize in that regard the role of the International Court of Justice. The need to enhance cooperation among States should also be addressed, since the draft articles assumed the existence of such cooperation.

98. With regard to the final form of the Commission's work on the topic, his delegation did not rule out the possibility of establishing a convention on the basis of the draft articles. However, the draft articles should not result in a regulatory system that was inferior to the existing system of human rights protection or that required States to reduce their current levels of protection.

99. **Mr. Ney** (Germany) said that the draft articles on the expulsion of aliens circulated by the Commission made the state of its deliberations more transparent.

With regard to the final form of the Commission's work on the topic, his delegation agreed with those Commission members who had expressed doubts as to whether the topic lent itself to incorporation in a convention. The ongoing work should focus on transforming the draft articles into framework principles; progressive development would not be beneficial.

100. With regard to draft article 1, it was not appropriate to include in the scope of the draft articles both aliens lawfully present in a State's territory and those unlawfully present; the rights accorded to each group with regard to expulsion were too divergent for a distinction to be made between the two groups in only one or two instances. The prohibition of the collective expulsion of aliens set out in draft article 10, paragraph 2, was a general rule applicable to all aliens; therefore, no mention should be made of any specific group, such as migrant workers.

101. The definition of disguised expulsion in draft article 11, paragraph 2, left room for an overly broad interpretation. His delegation therefore proposed an amended version of the paragraph, which could be found in its statement on the PaperSmart portal. It also proposed that a new paragraph should be added to the draft article stipulating that acts which States undertook in accordance with their national laws and which were reasonable could not be interpreted as actions leading to disguised expulsion. Since draft article 2, subparagraph (a), was closely related to draft article 11, the meaning of the word "omission" should be made more precise in draft article 2 in order to narrow the scope of the term in draft article 11.

102. The commentary to draft article 19, paragraph 1 (b), should be reworded so as to specify a general requirement that aliens should be detained separately from criminal detainees without prescribing specific measures to attain that goal. In particular, the requirement to place aliens in a separate section of a detention facility might be difficult to apply in practice.

103. The commentary to draft article 27 (Suspensive effect of an appeal against an expulsion decision) stated that the draft article constituted progressive development of international law. While his delegation supported the general concept of a suspensive effect, it did not see a need to develop existing law further. The reason for a suspensive effect was aptly stated in the

commentary: an appeal might well be ineffective unless the execution of the expulsion decision was stayed. Germany's own national law, which had been described in detail to the Commission, provided for the suspensive effect of a broad range of appeals against administrative decisions for the same reason. However, the wording of draft article 27 left no room for exceptions, which were necessary in order to ensure that the rule was not used to prevent a perfectly sound expulsion decision. The draft article should therefore be amended to include certain exceptions, provided that such exceptions respected every person's right to an effective remedy.

104. **Mr. Popkov** (Belarus) said that the draft articles on the expulsion of aliens struck an appropriate balance between the sovereign right of States to expel aliens and their obligations under international law and human rights instruments with regard to the treatment of aliens. His delegation hoped that the draft articles would become an effective means of preventing undue haste and arbitrariness or abuses in the adoption and implementation of expulsion decisions by State authorities.

105. Although it was generally recognized that aliens did not have an unlimited right to stay in another State, under international law there must be adequate grounds for expulsion. Draft article 5 provided for the possibility of expulsion on a ground provided for by the law of a State, in particular national security and public order. Since national laws varied widely, that provision allowed States a broad measure of discretion with regard to the expulsion of aliens, but also carried a risk of disputes between States on the question of adequate grounds for expulsion. In addition, there was no common understanding of the concept of public order. In order to reduce the risk of disputes, draft article 5 or the commentary thereto should include a list of grounds for the expulsion of aliens that were known in international practice, such as protection of the morals and health of the population and the rights and freedoms of citizens of the expelling State and other persons lawfully present in its territory.

106. Draft article 5, paragraph 1, set out the requirement for any expulsion decision to state the ground on which it was based, but gave no guidance as to the quantity of information to be provided. The draft article should establish the right of the State of nationality and the State of destination of persons subject to expulsion to request additional information

about the grounds for expulsion. Such requests should not be regarded as an infringement of a State's right to expel aliens or as the initiation of the diplomatic protection procedure. The main purpose of obtaining such information would be to assist a State that had the obligation to receive an expelled person in assessing the grounds for expulsion in the light of the rules of international law regarding the treatment of aliens and international human rights instruments. In addition, States had a responsibility to protect their nationals abroad, who would legitimately expect the State to assist them where necessary on the basis of an objective assessment of the circumstances surrounding the expulsion. The provision of additional information would also help minimize unverified international claims of violations of the rights of aliens and help curb abuse by the expelling State of its right to expel aliens.

107. The expulsion of stateless persons on grounds of national security or public order, as referred to in draft article 7, should be conditional primarily on there being a State that had the obligation to receive the person in question under domestic or international law.

108. One of the most complex issues addressed in the draft articles was the prohibition of disguised (constructive) expulsion, set out in draft article 11. His delegation could accept the current wording of the provision in principle, but wished to propose an alternative: the concept of the State "supporting" or "tolerating" acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory, should be replaced with the concept of the failure of the State in question to exercise due diligence with regard to protecting aliens in the event of infringements of their rights by individuals that made it impossible for the aliens to stay in that State. Such an amendment would emphasize the need for States to protect the rights of aliens in accordance with their obligations under international law.

109. The commentary to draft article 11 should state that disguised expulsion was not only unlawful but could also entail the international responsibility of the expelling State for its actions or omissions. The commentaries to the articles on both disguised expulsion and collective expulsion should also distinguish those types of unlawful expulsion from a government policy of intolerance towards aliens that forced them to leave the State in question en masse.



Any such policy should be assessed in the light of other rules of international law relating to the treatment of aliens, human rights protection and, in general, the regulation of friendly relations between States.

110. Draft article 28 should specify whether individual recourse to a competent international body had a suspensive effect similar to that of an appeal against an expulsion decision at the national level pursuant to draft article 27. The time frame for individual recourse procedures, which could be quite lengthy, and the consequences of decisions in such cases, should also be specified.

111. With regard to the final form of the Commission's work on the topic, the draft articles, once further refined, could be used as the basis for an international treaty.

112. **Mr. Pérez de Nanclares** (Spain) said that, while his delegation supported the general approach taken by the Commission in the draft articles on the expulsion of aliens, further reflection was needed on a number of specific issues, particularly the provisions relating to procedural rights, which needed to strike a balance between the appropriate level of rights and guarantees for the person subject to expulsion and a realistic approach that would ensure that the requirements imposed on States were feasible.

113. With regard to draft article 27 (Suspensive effect of an appeal against an expulsion decision), the complexity of the issue and the disparities between the regulations and practices of different States gave rise to doubts as to whether there was a sufficient legal basis for retaining the draft article. Effective means of ensuring the judicial review of expulsion decisions were certainly needed; however, a provision stating that appeals invariably had a suspensive effect could leave the way open for abuse that would undermine the importance and purpose of such appeals. The laws of some countries, such as Spain, left the decision on suspensive effect to the judge hearing the case.

114. Draft article 26, paragraph 1 (a), should specify whether notice of an expulsion decision had to be given in writing or whether oral notification would suffice. It might also be appropriate to specify whether such notice should have any particular minimum content, such as explicit information regarding appeals that could be lodged against the decision in question. With regard to the procedural rights of aliens who had been in the territory of the expelling State for less than

six months, his delegation acknowledged the realistic approach taken by the Commission in formulating draft article 26, paragraph 4, as a "without prejudice" clause. However, it might be advisable to consider whether time was the only possible criterion in that context. More thought should also be given to the appropriate balance to be struck between the risk of undermining the procedural rights of an alien subject to expulsion and the understandable desire of many States to provide in their national laws for simplified procedures for the expulsion of aliens unlawfully present in their territory.

115. With regard to draft article 24, on the obligation not to expel an alien to a State where he or she might be subjected to torture or to cruel, inhuman or degrading treatment or punishment, consideration should be given to the possibility of applying the provision not only where the risk of such treatment emanated from a public official or other person acting in an official capacity, but also where it emanated from persons or groups of persons acting in a private capacity. Such a suggestion might be viewed as controversial, but the case law of the European Court of Human Rights provided a useful example of a balanced approach to the issue: it established that the relevant provision of the European Convention on Human Rights covered cases where the danger emanated from persons or groups of persons who were not public officials only where the authorities of the receiving State were unable to control the actions of such groups or to guarantee adequate protection.

116. In view of the divergent views and practices relating to the expulsion of aliens, the most appropriate final form of the Commission's work on the topic would be guidelines and guiding principles rather than draft articles.

117. With regard to the protection of persons in the event of disasters, his delegation welcomed the Special Rapporteur's efforts to balance the need to safeguard the national sovereignty of the affected State with the need for international cooperation in order to protect the affected persons. The will of the affected State must be respected in the provision of assistance; at the same time, that State had not only a right but a duty to provide assistance to its population in the event of a disaster. Draft article 13 was therefore entirely appropriate in that it recognized the right of the affected State to impose conditions on the provision of assistance but also provided that those conditions must

comply with its national law and international law. However, its wording could be made even more specific, along the lines suggested by the Observer for the European Union.

118. While it was still premature to decide on the final form of the Commission's work on the topic, his delegation took the view that guidelines and guiding principles would be the most appropriate form.

119. **Mr. Sul** Kyung-hoon (Republic of Korea) said that his delegation welcomed the revision and reorganization of the draft articles on the expulsion of aliens and the Commission's efforts to find an appropriate balance between the State's right of expulsion and the human rights of aliens. For example, the former draft article H1 (Right of return to the expelling State) had been the subject of controversy because it did not distinguish between aliens lawfully present in the territory of a State and those unlawfully present. It was therefore right to limit the scope of draft article 29 (Readmission to the expelling State) to aliens lawfully present in the territory of the State in question.

120. With regard to protection of the property of an alien subject to expulsion, it should be noted that a corporation established in the expelling State by an alien subsequently expelled could not be provided with diplomatic protection by the alien's State of nationality because the corporation had been established in accordance with the domestic law of the expelling State. Draft articles 11, 12, 30 and 32 should be further elaborated with regard to protection of the property of expelled aliens.

121. Under draft article 23, a State that did not apply the death penalty could not expel an alien to a State where the life of that alien would be threatened with the death penalty; States that did not apply the death penalty included not only States that had abolished the death penalty but also States that retained the penalty in their legislation but did not apply it in practice. That extended definition might unnecessarily restrict the State's right of expulsion.

122. The topic of the protection of persons in the event of disasters merited thorough discussion in the light of the increasing frequency and intensity of natural disasters. Draft articles 13 (Conditions on the provision of external assistance) and 14 (Facilitation of external assistance), as provisionally adopted by the Drafting Committee, were important from a practical point of

view but might be difficult to implement in the case of a small State affected by a major disaster whose disaster management systems had shut down. In order to avoid such situations, every State should adopt appropriate domestic measures and legislation with an emphasis on prevention. In that context, his delegation looked forward to the Special Rapporteur's sixth report, in which he intended to focus on disaster risk reduction, including the prevention and mitigation of disasters.

123. **Mr. Válek** (Czech Republic), referring to the topic of the expulsion of aliens, said that his delegation had some concerns about draft article 13, which prohibited the resort to expulsion in order to circumvent an extradition procedure. Although his Government did not employ such practices, its position, supported by decisions of the European Court of Human Rights, was that, where a person subject to extradition proceedings was also an illegal immigrant, the decision on how to deal with the situation should be an internal matter for the State in question. Furthermore, it was unclear what exactly was meant by an "ongoing" extradition procedure: did the procedure begin at the time when an alien was taken into custody, at the time of delivery of an extradition request, or at the time of issuance of the "authority to proceed" frequently used in common law countries? The different approaches taken under different legal systems around the world gave rise to uncertainty in that regard. Since the issue was adequately covered in part three of the text, draft article 13 should be deleted or limited to cases of legal immigrants.

124. **Mr. Kojc** (Slovenia) said that his delegation welcomed the Commission's decision to include the topics of the provisional application of treaties and the formation and evidence of customary international law in its programme of work and supported the discussions on working methods aimed at making the Commission's work as efficient and productive as possible.

125. The protection of persons in the event of disasters deserved the immediate attention of the international community, given the rising loss of life as a result of natural disasters around the world. Through legal certainty at the international level, the efficiency and quality of humanitarian assistance and the protection of victims could be improved. Draft articles 1 to 12, taken as a whole, struck an important balance between the need to protect the lives and dignity of disaster victims

and the basic international legal principles of State sovereignty and non-interference. That balance must be retained if the Commission's work on the issue was to be completed successfully. Any reopening of contentious issues that had already been agreed upon would be contrary to that aim.

126. His delegation welcomed the elaboration of forms of cooperation contained in draft article 5 bis; however, the draft article should not be taken to imply that States had a duty to provide assistance. The Committee had expressed the unanimous view at the sixty-sixth session of the Assembly that such a duty had no basis in existing international law and practice.

127. With regard to draft article 13, any conditions placed on the provision of external assistance should be reasonable and should comply with the duty of States to protect persons on their territory. They must also not contravene the principles of humanity, neutrality, impartiality and non-discrimination or the basic human rights applicable in disaster situations. Rapid and accurate identification of the scope and type of assistance needed could contribute significantly to the effectiveness of disaster relief. The affected State should therefore undertake a needs assessment, preferably in cooperation with the relevant humanitarian agencies and assisting States.

128. His delegation fully supported draft article 14 as provisionally adopted by the Drafting Committee and considered that draft article 15 on the termination of external assistance was fully in accordance with the fundamental premise of the topic, namely the duty of cooperation between all parties concerned. However, it was not clear what happened if the consultations between the parties concerned were not successful. In such cases, it seemed that the primary role of the affected State in the direction, control, coordination and supervision of relief and assistance should be respected. At the same time, the termination of external assistance should not compromise the needs of disaster victims. Draft article 11 established the principle that the affected State should not withhold consent to external assistance arbitrarily; a similar principle should apply to the termination of assistance.

129. Although it was neither necessary nor wise to make a decision yet on the final form of the Commission's work on the topic, a number of factors should be taken into consideration. Numerous non-binding guidelines, sets of rules and model

agreements had already been adopted by various organizations and entities, and regional binding conventions and bilateral treaties on disaster relief were in force in almost all regions of the world. However, a global legal document on the subject was still lacking. In his delegation's view, the Commission should establish a set of principles and rules underpinning international disaster relief based on recognition of the rights and obligations of the States involved. It was also the function of international law to regulate situations involving possible violations of accepted rules and principles. In the past, there had been cases of affected States refusing external assistance, despite their inability to provide assistance to their own disaster-stricken populations. In that context, it would be advisable for the Commission to study in more detail the consequences of the failure of States to carry out the duties established in the relevant draft articles.

130. The topic of the provisional application of treaties deserved further examination, given that such provisional application had been part of State practice since the adoption of the Vienna Convention on the Law of Treaties. His delegation hoped that in-depth analysis of the topic would contribute to a better understanding of it, so that it was no longer an ambiguous notion, as some authors had maintained.

*The meeting rose at 6 p.m.*