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Summary record of the 20th meeting
Held at Headquarters, New York, on Tuesday, 28 October 2014, at 10 a.m.

Chair:	Mr. Gharibi (Vice-Chair)	(Islamic Republic of Iran)
later:	Mr. Pašić (Vice-Chair)	(Bosnia and Herzegovina)
later:	Mr. Gharibi (Vice-Chair)	(Islamic Republic of Iran)

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14-63471 (E)

The meeting was called to order at 10.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its sixty-sixth session (*continued*) (A/69/10)

1. **The Chair** invited the Committee to continue its consideration of chapters I to V and XIV of the report of the International Law Commission on the work of its sixty-sixth session (A/69/10).

2. **Mr. Tupouniua** (Tonga), speaking on behalf of the 12 Pacific small island developing States that were also Members of the United Nations, namely Fiji, Kiribati, the Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tuvalu, Vanuatu and his own country Tonga, welcomed the adoption on first reading of the draft articles on the topic of protection of persons in the event of disasters, and the commentaries thereto. Specifically referring to draft article 18 (Protection of relief personnel, equipment and goods), he said the protections thereunder were crucial for providing relief to those in need during a natural disaster, and to encourage States and other entities to provide assistance generously.

3. The focus on prevention was particularly important in the Pacific region, where rising sea levels and increasingly frequent and intense tropical storms were having profound adverse effects. Ocean acidification was also expected to have an impact on the reefs in the region by 2030. The issue of loss and damage that could eventually result from natural disasters caused by climate change should be addressed at the United Nations Climate Change Conference to be held in Paris in 2015.

4. The Pacific small island developing States were working together to minimize the detrimental effects of any natural disaster through preparation and relief to the affected communities. The group had, for instance, implemented joint national action plans on climate change adaptation and disaster risk management. As reaffirmed at the recently held third International Conference on Small Island Developing States, the priorities of small island developing States, including disaster risk reduction, must be given due consideration in the elaboration of the post-2015 development agenda. He looked forward to a positive outcome of the Third World Conference on Disaster Risk Reduction, to be held in Sendai, Japan, in March 2015, with an ambitious renewed international framework for post-2015 disaster risk reduction. Specifically, it was hoped that the outcome document of the third International Conference on Small Island Developing States would serve as a blueprint for immediate action, and not just as a reference document.

5. The responsibility for mitigating the risk of disaster resulting from climate change should not be borne solely by those developing countries most affected. All States must work together to reduce the initial risks, and to address known factors that might contribute to increased fatalities as a result of natural disasters in the future. The responsibility of the affected State to seek assistance where its national response capacity was exceeded was in line with that view. Furthermore, in providing that a State's consent to external assistance should not be withheld arbitrarily, draft article 14 (Consent of the affected State to external assistance) supported State sovereignty while highlighting the duties that accompanied the obligation to consent to external assistance during natural disasters. The obligation in draft article 18 to protect the personnel providing the external assistance, as well as the equipment and goods provided, could bring greater accord between those providing relief and the State that had suffered significant damage.

6. He welcomed the commentaries to draft article 12, which asserted the primary role of the affected State to protect persons under its jurisdiction. States and the entities supporting disaster recovery in affected States should coordinate disaster recovery and relief operations directly with the affected States rather than through international non-governmental organizations (NGOs). He also welcomed the commentaries to draft article 13, which delineated the duty of the affected State to seek external assistance. However, paragraph (c) of draft article 4 (Role of the affected State) was problematic vis-à-vis draft articles 12 and 13 as it made explicit reference to intergovernmental organizations and NGOs, but failed to mention other entities or individuals that might fall under the category "other assisting actors". Moreover, the Commission should further clarify the interaction between all actors and the affected State; set out the rights and obligations when providing assistance to an affected State; and indicate the way in which said rights and obligations should be framed in national legal disaster-relief mechanisms.

7. He looked forward to the second report of the Special Rapporteur in relation to the substance of the responsibilities of States with regard to protection of the atmosphere, as discussed in Chapter VIII of the Commission's report. It was hoped that the report would address the substance of State responsibility in the light of the increasing risk of natural disasters, especially in relation to action that States could take to mitigate the effects of climate change.

8. **Mr. Válek** (Czech Republic) said that his delegation welcomed the final draft articles on the topic of expulsion of aliens as balanced and contributing meaningfully to the codification and development of international law; he was grateful that its previous observations, especially in respect of the relationship between the expulsion and the extradition proceedings as laid down in draft article 12 (Prohibition of resort to expulsion in order to circumvent an ongoing extradition procedure), had been taken into consideration, and stressed the importance of draft articles 22 (State of destination of aliens subject to expulsion) and 29 (Readmission to the expelling State). His delegation did not consider it necessary to elaborate a convention on the basis of the draft articles.

9. Turning to the topic of protection of persons in the event of disasters, he said it was important that in drafting the entire set of draft articles the Commission had emphasized human dignity, human rights and the principles of humanity, neutrality and impartiality as guiding principles for both negative and positive obligations of the affected State and other actors involved in providing assistance to affected persons. Specifically, draft article 13 and draft article 14, paragraph 2, helped to consolidate the rules in that area of international law by confirming that the provision of assistance should be guided by the interests and needs of persons affected by disasters as well as by the need to protect their basic human rights.

10. Referring to Chapter XIV of the report, he commended the Commission on the inclusion in its programme of work of the topic of crimes against humanity. His delegation looked forward to the Commission's filling some of the major gaps in the current international legal framework governing the prosecution of crimes under international law. In doing so, it would undoubtedly reflect and build on the current framework, including the Rome Statute of the International Criminal Court and other relevant conventions together with the Commission's prior work on the topic of the obligation to extradite or prosecute and on the draft code of crimes against the peace and security of mankind. In addition, it was expected that the Commission would take into account significant initiatives introduced in other governmental and non-governmental forums, namely a proposal by the Governments of Argentina, Belgium, the Netherlands, Senegal and Slovenia to elaborate a multilateral treaty for mutual legal assistance and extradition in domestic prosecution of atrocity crimes, as well as the Crimes against Humanity Initiative of the Whitney R. Harris World Law Institute.

11. **Ms. Lijnzaad** (Netherlands), referring to the topic of expulsion of aliens, said that while the draft articles as adopted by the Commission included many essential standards, they regrettably were not merely a codification of State practice but went beyond the currently applicable rules of international law on expulsion of aliens. Her Government had consistently objected to such progressive development of international law and continued to have serious concerns. Echoing the statement of the European Union in respect of its disappointment with the draft articles, she said her delegation could not support the Commission's recommendations to the General Assembly, nor did it support the elaboration of a convention on the basis of the draft articles.

12. Turning to the topic of protection of persons in the event of disasters, she said her Government saw merit in the inclusion of article 4 (Use of terms), as it enhanced the clarity and common understanding of the draft articles. As had been previously suggested, it would be useful to merge article 4 with article 3 (Definition of disaster), so as to give the meaning of all the terms used in the draft articles in a single provision. Her delegation welcomed the inclusion of draft article 18, as the protection of relief personnel, equipment and goods was clearly an issue of concern in contemporary disaster situations. It also supported the rewording of the draft article to take into account the concerns raised by a number of delegations, including her own, in relation to the nature of the "obligation to protect". Indeed, that obligation should be an obligation of conduct, not of result. Despite some initial doubts about article 20 (Relationship to special or other rules of international law, her delegation supported the article as currently drafted. Indeed, it was important to bear in mind that while the draft

articles could be seen as an authoritative reflection of contemporary international law, or as an attempt to progressively develop the law, they were not legally binding and should not pretend to be so.

13. Noting the Commission's decision to include the topic of *jus cogens* in its long-term programme of work, she recalled that the selection of topics should be based in part on the needs of States in respect of the progressive development and codification of international law. While the annex to the Commission's report (A/69/10) clarified the origin of the idea for the topic's inclusion, her delegation continued to have doubts, in particular on the remit of a study of *jus cogens*. It was hard to determine a specific need among States with regard to the codification or progressive development of the notion of *jus cogens*. The relevant language contained in the Vienna Convention on the Law of Treaties might not have constituted codification at the time of drafting but would now appear satisfactory. While the Convention contained express references to *jus cogens*, it appeared in the shape of customary law. Her delegation was similarly reluctant to consider *jus cogens* in the form of rules of customary international law. The subject had been excluded from the identification of customary international law project, and it seemed logical not to begin work on the topic before the conclusion of the current Commission's work on customary law, indeed, if at all.

14. It might be justifiable to conduct a descriptive, analytical study on the understanding of *jus cogens* in contemporary practice, on the way in which it was established and the legal consequences to be drawn from the conclusion that a particular rule had a *jus cogens* character. There might be merit in providing a broad overview of the way in which it was determined that *jus cogens* was conferred on a particular rule, without the intention to codify or progressively develop the law. It would first be necessary to clarify which issues concerning *jus cogens* would require progressive development.

15. On the topic of crimes against humanity, her delegation believed that the prevention and prosecution of such crimes was of the utmost importance and required the constant vigilance of the international community. It appreciated the Commission's efforts to determine the desirability of formulating a specific instrument on crimes against humanity but considered that the issue was to a large extent already addressed in the Rome Statute of the International Court of Justice. Specifically, Article 7 of the Rome Statute, which was applicable to both States parties to the Statute and to non-States parties, had greatly contributed to specifying and defining crimes against humanity. The definition contained therein was part of the jurisprudence of, among others, the International Criminal Tribunal for the Former Yugoslavia, and reflected existing customary international law.

16. The principle of complementarity required States to facilitate cooperation between their respective judicial authorities in order to strengthen the investigation and prosecution of crimes against humanity at the national level, and also to strengthen mutual legal cooperation. Therefore, at the present stage, what was most needed in order to prevent and prosecute crimes against humanity was a renewed focus on improving the capacity to prosecute such crimes at the domestic level.

17. Noting the Commission's request for information on domestic approaches to the criminalization of crimes against humanity, she said her Government would respond in due course; it was regrettable, however, that no information had been requested on the aspect of mutual legal assistance in the prosecution of such crimes. Cooperation of States was often crucial in prosecuting international crimes, and preparatory steps to that effect must be taken. The international community needed an international instrument on mutual legal cooperation that would cover all the major international crimes, including crimes against humanity, and would provide for an operational approach to ensuring prosecution for abhorrent crimes. Together with the Governments of Argentina, Belgium and Slovenia, her Government had proposed the opening of negotiations for a multilateral treaty for mutual legal assistance and extradition in the domestic prosecution of atrocity crimes and invited other States to join in that effort.

18. Referring to the Commission's website, she deplored that despite containing a wealth of valuable information, the website was difficult to navigate. She suggested that the Secretariat should make improvements to the website so as to make information more readily accessible, for the benefit of practitioners and academics alike.

19. *Mr. Pašić (Bosnia and Herzegovina), Vice-Chair, took the Chair.*

20. **Mr. Xu** Hong (China), speaking on the topic of expulsion of aliens, said that his delegation considered the expulsion of aliens as an inherent sovereign right of a State to exercise legitimate and effective control over its territory. At the same time, any such expulsion must be done in compliance with international treaties and customary international law, as well as domestic legislation. A reasonable balance must be struck between maintaining State sovereignty and protecting the basic human rights of aliens subject to expulsion.

21. The set of draft articles as adopted on second reading remained somewhat unbalanced. For instance, paragraph 2 (b) of article 19 (Detention of an alien for the purpose of expulsion), in providing that the extension of the duration of detention could be decided only by a court or, subject to judicial review, by another competent authority, attempted to impose a one-size-fits-all approach on States in the absence of relevant rules and regulations. Indeed, the competent authorities on such an extension varied from State to State, and it was the State's prerogative to decide to protect the rights of expelled aliens either through judicial reviews or other means. Paragraph 2 of draft article 23 (Obligation not to expel an alien to a State where his or her life would be threatened) was similarly problematic. There was no international consensus on abolition of the death penalty, nor did international law prohibit the death penalty: consequently, every State was entitled to opt for or against it in the light of its need for judicial justice, its level of economic development and its historical and cultural background.

22. While the draft articles as a whole helped to strengthen the protection of human rights, some of them overemphasized individual rights. They lacked the support of general State practice and exceeded State obligations under treaty law: thus, they were likely to hamper relevant international cooperation and to result in impunity of criminals. Because they might cause harm to the public interest, the draft articles should not, at the present stage, become the basis of negotiations for an international convention, although the General Assembly could adopt a resolution taking note of them.

23. Turning to the topic of protection of persons in the event of disaster, he said that the draft articles and the commentaries thereto, adopted on first reading, would clarify the international rules applicable to disaster relief and effectively promote and coordinate international disaster relief operations. The draft articles clearly aimed to strike a balance between enhancing international cooperation and respecting State sovereignty, notably in article 12 (Role of the affected State) and paragraph 1 of article 14 (Consent of the affected State to external assistance). Nonetheless, there existed imbalances between codification and development.

24. The progressive development and the codification of international law — the two purposes of the Commission — should take as their basis existing international law and State practice. The draft articles were regrettably short on *lex lata* and long on *lex ferenda*, some of them lacking the support of solid general State practice. For instance, article 13 (Duty of the affected State to seek external assistance) provided that the affected State had the duty to seek external assistance, and paragraph 2 of article 14 provided that consent to external assistance should not be withheld arbitrarily. At the same time, in the related commentaries, there were many citations of soft legal documents adopted by the United Nations and other international organizations, but few supporting excerpts of legally binding international treaties, customary international law and case law.

25. Furthermore, there was an abundance of regulations on the obligations of affected States that exceeded the scope of existing laws and State practices and that might affect State sovereignty. The duty of a State, by virtue of its sovereignty, to provide relief and assistance in the event of a disaster, as referenced in paragraph 1 of article 12, did not mean that a State was also obliged to seek external assistance. A State did not have the duty or obligation to accept external assistance whether by customary international law or State practice. Noting that in article 13, the word "duty" had been used instead of the word "obligation" in order to accommodate the concern expressed by a number of countries that a legal obligation was a stronger notion than duty, he said that the legal connotations of the word "duty" were ambiguous and that it would be advisable, therefore, to avoid using it. Moreover, articles 13 and 14 set out the duties and obligations of affected States, while article 16 (Offers of external assistance) provided for the right of other States and international organizations to offer assistance to affected States, thus putting the affected State in a defensive and disadvantageous position with regard to the seeking and accepting of external

assistance. Such a situation undermined the principle of consent of concerned States and State sovereignty, as well as the principle of the parity of rights and duties.

26. Peaceful coexistence and harmonious development of humankind required the strengthening of cooperation in providing international disaster relief and joint response to natural disasters. It was hoped that the Commission, in continuing its work on the topic of protection of persons in the event of disaster, would adopt a cautious approach in considering relevant articles on second reading and make necessary amendments in the light of the actual needs of affected States and peoples, in order to achieve better results in international disaster relief cooperation.

27. The topic of the identification of customary international law entailed controversial issues in the practice and theory of international law. The two constituent elements of rules of customary international law, "a general practice" and "accepted as law", or *opinio juris*, must be considered in a balanced manner. The argument that, in the fields of international human rights law and international humanitarian law, the element of *opinio juris* alone sufficed to establish rules of customary international law was not supported by international practice, and the formation of rules of customary international law was not possible without practice. In the previously debated "instant" customary international law in specific fields, the duration of relevant elements might not be a decisive factor in the formation of rules, but the formation of such law nevertheless required both opinio juris and State practice.

28. The identification of customary international law called for not only the study of the practice of legal systems and States with significant influence in international law, but also the comprehensive study of the practice of States representing other major civilizations and legal systems of the world. At the same time, in some specific fields, due importance should be given to "specially affected States", not just major powers.

29. State practice could take a wide range of forms: in principle, there was no hierarchy among the various forms of practice and all should be considered in a balanced manner. In particular, when a conflict arose between the physical acts of some States and the verbal acts of other States, it was necessary to study those two forms of practice holistically in order to identify general practice and its corresponding *opinio juris*, rather than give more weight to physical acts than to verbal acts.

30. **Mr. Stańczyk** (Poland) proposed for inclusion in the Commission's programme of work a topic entitled "Duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law". The duty of non-recognition was expressly referred to in article 41 (Particular consequences of a serious breach of an obligation under this chapter) of the articles on the responsibility of States for internationally wrongful acts, adopted by the Commission in 2001. The Commission's conclusion, at that time, that the existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms found support in international practice and in decisions of the International Court of Justice continued to be supported, for instance, by the Court's advisory opinion relating to the construction of a wall in the Occupied Palestinian Territory, and by numerous Security Council and General Assembly resolutions. Although the articles on the responsibility of States referred to the obligation of non-recognition mainly in the context of violations of *jus cogens*, the issue could be considered in a broader framework, so that it might apply to every internationally wrongful act.

31. The duty of non-recognition should be considered an essential legal instrument of the international community in preserving the rule of law. It could and should promote compliance, in particular with peremptory norms, and hence envisage clear consequences in the event that such norms were breached, especially if the Security Council was unable to take a decision on the matter.

32. Despite the wide acceptance of the duty of non-recognition in principle, it was difficult to pinpoint the legal consequences of its application. In particular, more detailed guidelines were needed as regarded its scope; its influence on the application of bilateral and multilateral treaties; the means of providing consular and humanitarian assistance; and the relation between the duty of non-recognition and the protection of the human rights of the concerned individuals. Even if most such measures were governed by domestic law, the international community urgently needed to coordinate its efforts to enforce international law.

33. His delegation considered that the duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law met the criteria set by the Commission for the selection of new topics, and could quickly result in practical guidelines for States. The proposed topic should be treated separately from and as a matter of priority over the very broad, theoretical topic of *jus cogens*, which had already been included in the Commission's long-term programme of work.

34. Turning to the topic of expulsion of aliens, he said that in December 2013, his Government had enacted a new Act on Aliens, which reconciled the right of States to expel aliens with the limits imposed on that right by international law, particularly human rights law. In the light of that Act, his delegation had several concerns with regard to the draft articles. Specifically, article 7 (Rules relating to the expulsion of stateless persons) seemed to impose, based on the commentary, obligations stemming from the Convention relating to the Status of Stateless Persons of 28 September 1954, despite the fact that Poland and several other States were not parties to that treaty. Furthermore, with regard to article 27 (Suspensive effect of an appeal against an expulsion decision), Polish law provided that an expulsion decision was immediately enforceable if the continued residence of the alien in question constituted a threat to State security, defence or public order, or if was contrary to the interests of Poland.

35. In fact, the draft articles were an attempt to codify a set of rules in an area in which States already had long-standing, well-developed regulations. In Europe, those regulations had been produced by regional organizations and the practice of regional courts. Therefore, the draft articles might create confusion regarding the obligations of States under international law, particularly where the two regimes differed.

36. He welcomed the Commission's decision to include in its programme of work the topic of crimes against humanity, a study of which would be essential to combating impunity and ensuring the rule of law. In its work, the Commission should use the definition of crimes against humanity as provided in Article 7 of the Rome Statute, so as to ensure the coherence and unity of international law. Furthermore, as indicated in annex B to the Commission's report on its sixty-fifth session (A/68/10), the other key elements to consider were: the requirement to criminalize the offence in national legislation; imposition of an *aut dedere aut judicare* obligation; and the necessity of international cooperation for investigation, prosecution and punishment of the offence. His delegation would suggest adopting a victim-oriented approach, paying special attention to the most vulnerable category of victims, children. The Commission could draw on the most recently drafted human rights instruments, such as the International Convention for the Protection of All Persons from Enforced Disappearance.

37. **Ms. Morris-Sharma** (Singapore), referring to the draft articles on the expulsion of aliens, said that her delegation welcomed the amendments that had been made to draft article 3 (Right of expulsion), as it supported any efforts aimed at making the law and its application clear, predictable and transparent, particularly where human rights were involved. However, her delegation continued to have concerns regarding the Commission's attempt to introduce progressive development in respect of the expulsion of aliens. There was a complex and sensitive interplay between the rights and obligations of expelling States, receiving States and individuals. Progressive development in that area should therefore be approached with caution. Indeed, her delegation was concerned that the draft articles and the commentaries thereto did not distinguish between codification and progressive development. One example was paragraph 2 of draft article 23, which contained an obligation to the effect that a State that had abolished the death penalty was automatically bound not to expel a person to another State where the death penalty might be imposed. That provision was presented in part as codification, but did not in fact reflect an existing obligation under customary international law. Rather, the provision was based in part on a single decision of the Human Rights Committee. That limited precedent was an inadequate basis for codification, especially given that the decision in question had been the subject of criticism, as there remained a divergence of views regarding its underlying principles. Moreover, the paragraph attempted to expand the principle of non-refoulement even further, first, to States that had retained the death penalty in their legislation but did not apply it in practice, and second, to situations where the death penalty had yet to be pronounced. Her delegation believed that the draft articles would be best adopted as guiding principles.

38. Turning to the topic "Protection of persons in the event of disasters", she said that her delegation remained concerned at draft article 16 (Offers of external assistance), which provided that States, the United Nations and other competent intergovernmental organizations had the right to offer assistance to the affected State. The commentary to the draft article explained that it was concerned only with offers of assistance, not with the actual provision thereof, and that an offer of assistance did not create for the affected State a corresponding obligation to accept it. It stated that the Commission had opted for the phrasing "have the right to offer assistance" for reasons of emphasis. However, her delegation did not believe that the phrase achieved its stated intention, and doubted whether that intention could be expressed as a right. Because the interest of the international community in the protection of persons in the event of disasters was implicit in the draft articles, one option could be to omit draft article 16 entirely.

39. Her delegation welcomed the inclusion of draft article 18 (Protection of relief personnel, equipment and goods), which tackled an important issue that was provided for in many international and regional treaties, such as the 2005 Association of Southeast Asian Nations Agreement on Disaster Management and Emergency Response.

40. **Mr. Mahnič** (Slovenia) said that his delegation fully supported the draft articles on the topic "Protection of persons in the event of disasters" and the commentaries thereto. The text struck the proper balance between protection of the victims and the principles of State sovereignty and non-intervention. Such an innovative and balanced approach was the only guarantee that the rules would be recognized. Although the top-down approach to developing a universal legal framework on the topic had thus far failed, the Commission's work had already had a significant impact. The involvement of the Sixth Committee would help to confer global credibility and acceptability on the work of the Commission. The latter's mandate under its Statute to engage in progressive development of international law was a vital element in establishing the rules and principles governing the protection of persons in the event of disasters.

41. The second report of the Special Rapporteur on the identification of customary international law (A/CN.4/672) had focused on a "two-element approach", assessing both general practice and *opinio juris*. By highlighting the challenge of distinguishing between the two elements, and drawing attention to connections between the topic and other areas of international law, the Special Rapporteur had made it possible to formulate practical draft conclusions. It would have been useful, however, to further examine the interplay between the two elements, including the relevance, if any, of the order in which they occurred. Since the conclusions were intended for practitioners, including the domestic judiciary, it would be helpful to include examples of existing international rules. In a similar vein, his delegation welcomed the idea of compiling information on digests and other publications containing relevant State practice.

42. Members of the Commission had expressed a range of views as to whether the practice of international organizations should be taken into account when identifying rules of customary international law. Given the increasing importance of international organizations, including in international law, his delegation believed that their role should be fully addressed, without prejudice to the primacy of the practice of States. An examination of regional customary international law could also be relevant.

43. In draft article 6, language from the draft articles regarding responsibility of States for internationally wrongful acts had been applied to the attribution of conduct. His delegation agreed with those members of the Commission who felt that a more nuanced approach was needed, and that additional analysis would be beneficial. While agreeing with the Special Rapporteur that every act of State was potentially a legislative act for the purposes of identifying customary international law, his delegation believed that the hierarchy of State bodies and their mandates should also be taken into account.

44. The second report of the Special Rapporteur on the provisional application of treaties (A/CN.4/675) did not take into account the provisional application of treaties as regulated by the Vienna Convention on Succession of States in respect of Treaties. However, an examination of the *travaux préparatoires* of that Convention and potential practice and doctrine in relation to it could contribute to an understanding of article 25 of the Vienna Convention on the Law of Treaties and to the analysis of provisional application in general. Moreover, such an approach would correspond to that adopted in relation to reservations to

treaties, where the question of succession of States had been taken into consideration. Failing that, any reasons for refraining from examining that aspect of the question should be explained.

45. In summarizing the Commission's discussion on the topic, the Special Rapporteur had stated that there had been general agreement on the basic premise that the rights and obligations of a State which had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State. His delegation understood that conclusion to be substantially similar to that of the Commission in 1966. However, the latter referred to the "provisional entry into force" of treaties, a term which the first report of the Special Rapporteur (A/CN.4/664) had defined as distinct from "provisional application". It was generally accepted that the two terms did not differ in their legal effect. His delegation therefore proposed that the Special Rapporteur should analyse the reasons why the legal effects were the same, how that conclusion was supported by the *travaux préparatoires* of the Vienna Convention on the Law of Treaties, and what — if any — were the differences between the two concepts. One example worth considering was the framework of international commodity agreements, in which the terms were used interchangeably.

46. **Mr. Hanami** (Japan) said that given the paramount importance of upholding the rule of law, his delegation fully supported the Commission's activities, which were aimed at the codification and progressive development of international law. It also welcomed the convening of the fiftieth session of the International Law Seminar, which had enabled young lawyers and scholars to gain a deeper understanding of developments in international law.

47. At the previous session of the General Assembly, his delegation had argued before the Sixth Committee that the conventional way of selecting new topics for the Commission should be re-examined in order to give States more time for reflection, and that the Commission should consider the possibility of gathering ideas and opinions from Member States. His delegation therefore welcomed the Commission's decision that the 1996 list of topics should be reviewed and a list of potential topics prepared by the end of the current quinquennium. That process would enhance the transparency, and hence the legitimacy, of the Commission's work.

48. The Commission had also discussed the possibility of holding some of its future sessions in New York. That course of action would create further opportunities for the Commission to interact with Member States. It must not, however, generate any need for additional resources.

49. Referring to the Commission's decision to include the topic "Crimes against humanity" in its programme of work, he said that Japan, as a State party to the Rome Statute of the International Criminal Court, believed that the fight against impunity should be one of the major goals of international society and expected the topic to contribute significantly to the development of international criminal law.

50. His delegation noted that the topic "*Jus cogens*" had been included in the long-term programme of work. The substantial elements of *jus cogens* remained very unclear, and there was little shared understanding of it among Member States. The Commission should therefore proceed prudently and on solid bases. His delegation had a strong interest in the topic and would follow it closely.

51. Turning to the topic "Expulsion of aliens", he complimented the Special Rapporteur on his earnest efforts to finalize the draft articles and commentaries thereto. Members of the Committee and of the Commission alike had raised criticisms and concerns regarding the topic. Some had questioned whether the outcome of the Commission's work on the topic should take the form of draft articles. Moreover, the diversity of States' practices made it doubtful whether it was appropriate for the Commission to adopt generalized international norms in that area. Parts of the draft articles might also be inconsistent with existing international law, including the 1951 Convention relating to the Status of Refugees.

52. Some members of the Commission were concerned that certain draft articles could deviate from State practice and introduce new principles. His own delegation shared that concern, particularly with regard to draft articles 19, 26, 27 and 29. The discussion in the Commission had raised the longstanding question of the relationship between codification and progressive development of international law, and the Special Rapporteur had explained that some of the draft articles fell into the latter category. The Committee and the Commission should work together to determine the ideal balance between codification

and progressive development. In the light of all of the concerns that had been raised, his delegation took a cautious position regarding how the topic should be addressed within the General Assembly.

53. Referring to the topic "Protection of persons in the event of disasters", he said that Japan had received overseas assistance in the wake of the earthquake and tsunami of March 2011. The operation had raised a number of legal issues, such as immigration procedures for members of foreign rescue units, quarantine of rescue dogs and the status of troops from countries with which Japan had no status-of-forces agreement. In emergency situations, such issues tended to be determined on a case-by-case basis. The Commission's work could thus contribute to the progressive development of international law in that area. The draft articles struck a good balance between the national sovereignty of the affected State and its duty to protect persons, provide assistance and coordinate relief efforts. The Special Rapporteur had shown flexibility in taking into account the advice and observations of concerned States.

54. His delegation believed that relief personnel should be granted a definite legal status; otherwise, States would hesitate to provide assistance owing to the risk that personnel could be held accountable for their actions. His delegation therefore welcomed draft article 17 (Facilitation of external assistance), which provided that the affected State should take the necessary measures to facilitate external assistance, including in fields such as privileges and immunities for civilian and military relief personnel.

55. **Mr. Troncoso** (Chile) said that the draft articles on the expulsion of aliens gathered State and inter-State practices, national legislation and relevant provisions of international law. In addition, it included elements of *lex ferenda* that had been developed progressively with much caution and while seeking the greatest possible consensus. The topic had traditionally been seen as a matter for States' internal jurisdiction. However, the development of international human rights law meant that the power of national authorities to expel aliens was no longer absolute. For example, the Supreme Court of Chile had recently ruled that an alien could not be expelled because he would thereby be separated from his sons, something that would violate the principle of family protection enshrined in international instruments. While reaffirming the right of States to expel aliens, the draft articles rightly recognized the applicability of international human rights standards.

56. The first five draft articles displayed great precision and rigour. Draft article 4 (Requirement for conformity with law) provided that an alien may be expelled only in pursuance of a decision reached in accordance with the law, a provision that had already been established in article 13 of the International Covenant on Civil and Political Rights and in regional instruments, including article 22, paragraph 6, of the American Convention on Human Rights. Another welcome inclusion was draft article 5 (Grounds for expulsion), which provided detailed grounds that could prove important for national courts.

57. His delegation believed that the cases of prohibited expulsion set forth in draft articles 6 through 12 were well-founded. However, it had some doubts concerning draft article 8 (Deprivation of nationality for the purposes of expulsion): deprivation of nationality did not automatically make the individual an alien, but rather stateless, unless a second or multiple nationality was involved. His delegation would have preferred the previous wording of the draft article. Moreover, dictatorial regimes had usually dispensed with the step of deprivation of nationality, preferring to expel the individual outright, without due process. It was perhaps for that reason that the Special Rapporteur had included in his earlier reports a draft article expressly prohibiting the expulsion of nationals, an idea that Chile had supported.

58. The proposal contained in draft article 9 (Prohibition of collective expulsion) was reasonable and appropriate.

59. Most of the rights set out in part three of the draft articles (Protection of the rights of aliens subject to expulsion) constituted a development of the human rights already established in the relevant international instruments and therefore should not create difficulties. Nevertheless, his delegation wished to make some comments on draft articles 14 (Prohibition of discrimination) and 18 (Obligation to respect the right to family life).

60. Draft article 14 prohibited discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law. The latter phrase could allow those States that did not

accept discrimination according to sexual orientation, such as Chile, to regard such discrimination as impermissible. That point was important, as national authorities would be called upon to rule on the expulsion of aliens.

61. With regard to draft article 18, his delegation would have preferred a more explicit text recognizing the importance of family considerations as a restriction on the expulsion of aliens, a principle that had been recognized by the legal systems and courts of several States. The draft article could nevertheless be of assistance to administrative or judicial authorities.

62. The specific procedural rules set out in part four of the draft articles were also important. In particular, the rights set out in article 26 (Procedural rights of aliens subject to expulsion) were appropriate and consistent with recognized due process rules.

63. Draft articles 30 (Responsibility of States in cases of unlawful expulsion) and 31 (Diplomatic protection) contained provisions that had already been enshrined in international law. For instance, the provision that the expulsion of an alien in violation of a norm of international law entailed the international responsibility of that State had already been established by various international courts, most recently the International Court of Justice in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*.

64. His delegation strongly supported the recommendation of the Commission that the General Assembly should take note of the draft articles on the expulsion of aliens in a resolution, annex the articles to that resolution and encourage their widest possible dissemination.

65. **Ms. Weiss Ma'udi** (Israel) said that the way forward on the topic "Expulsion of aliens" should be revisited. The issue was extremely complex and politically sensitive, and called for a delicate balance between States' sovereign prerogatives and the protection of fundamental human rights. That goal would be best achieved by focusing strictly on settled principles of law, as reflected in widely established State practice. Along with several other delegations, her delegation had found discrepancies between State practice and the draft articles in their current form. Certain elements in the draft articles had proved particularly controversial; examples included, on the one hand the scope of application with respect to aliens in transit and, on the other hand, the interplay between the topic and other fields of international law, such as extradition, diplomatic protection and State responsibility. Concerns regarding the interpretation and application of the draft articles were compounded by such issues as migration and national security. Her delegation therefore believed that the final form of the Commission's work should be determined at a later stage.

66. Turning to the topic "Protection of persons in the event of disasters", she said that Israel was firmly committed to providing swift disaster relief; the current effort to help West African Governments tackle and contain Ebola virus disease was a case in point. While attaching great importance to the protection of relief personnel and their equipment and goods, her Government also believed that due consideration should be given to avoiding bureaucratic hurdles and undue delays. Efforts to incorporate protection undertakings into domestic law also created complexities that required attention. The topic should be considered not in terms of rights and duties, but rather in terms of guiding international voluntary cooperation efforts. The draft articles should make it clear that the affected State retained primary responsibility for the protection of persons.

67. Her delegation welcomed the inclusion on the Commission's agenda of the topic "Crimes against humanity". The issue was of particular significance for her Government, given the genocide and barbaric crimes perpetrated against the Jewish people by the Nazi regime. The absence of a comprehensive, global treaty on the topic should be a source of concern for the entire international community. The codification of crimes against humanity in a new treaty would therefore be an important achievement. At the same time, her delegation urged States to be cautious when considering the establishment of institutional mechanisms to enforce the treaty. Such mechanisms could potentially be abused by States and other actors in order to advance political goals, rather than to protect the rights of victims.

68. **Mr. Sirikul** (Thailand) said that the draft articles on the topic "Expulsion of aliens" effectively captured the principles of international law on sovereign rights of States, the rights of an alien subject to expulsion and the rights of the expelling State in relation to the State of destination. However, they did not entirely reflect universal practices. In particular, they were not entirely

consistent with the practices of Thailand and other Asian States. They involved the progressive development of international law in respect of the sovereign rights of States, something that could prove sensitive.

69. Referring to the draft articles on the topic "Protection of persons in the event of disasters", he noted that draft article 4 (Use of terms) defined "external assistance" as relief personnel, equipment and goods, and services provided to an affected State by assisting States or other assisting actors. His delegation's position was that those "other assisting actors" should not include any domestic actors.

70. Draft article 20 (Relationship to special or other rules of international law) referred to both "special rules", which dealt with the same subject matter as the draft articles, and "other rules", which were not directly concerned with disasters, but which nonetheless might be applied in the event of disasters. It would be useful for paragraph 5 of the commentary to that draft article to give more detailed examples of "other rules".

71. His delegation appreciated the convening of the fiftieth session of the International Law Seminar, which had been particularly valuable for the new generation of legal scholars.

72. **Ms. Illková** (Slovak Republic), speaking on the topic "Expulsion of aliens", said that it would have been appropriate for the Commission to take into consideration the observations made by the European Union regarding the protection of human rights. The draft articles would best serve as guidelines; she doubted whether there was sufficient consensus among Member States for the adoption of a convention.

73. The draft articles on the topic "Protection of persons in the event of disasters" struck a good balance between State sovereignty and the protection of affected persons.

74. Her delegation was grateful to the working group on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" for taking into consideration the observations made by the members of the Sixth Committee at the sixty-eighth session of the General Assembly.

75. Her delegation was pleased that the Commission had requested the Secretariat to review the 1996 list of topics in the light of subsequent developments and prepare a list of potential topics. By identifying new and interesting topics, the Commission could make the progressive development of international law more dynamic.

76. The addition of the topic "*Jus cogens*" to the Commission's long-term programme of work marked another welcome development. The task would be a difficult one, as the nature and legal effects of *jus cogens* remained ill-defined. Her delegation looked forward to seeing *jus cogens* norms identified and situated in the context of general international law.

77. **Mr. Popkov** (Belarus) said that his delegation welcomed the draft articles on the topic of expulsion of aliens, which it was hoped would serve as a basis for the elaboration of a related international instrument. The draft articles established important international legal standards on the treatment of aliens, in particular for those subject to expulsion from their host country. It was noteworthy that the draft articles did not call into question the right of States to independently address issues of stay of aliens in their territory, nor did they seek to impose unjustified limitations on their implementation, including on the basis of considerations of State and public security.

78. A number of clarifications were nonetheless needed. It seemed redundant to articulate the status of refugees in draft article 6 (Rules relating to the expulsion of refugees), given that the draft articles were stated to be without prejudice to the rules of international law relating to refugees. Any changes to refugee law should be carried out as part of the legal regime under the Convention relating to the Status of Refugees and its Protocol. The same was true for stateless persons, whose legal status was sufficiently regulated by the Convention relating to the Status of Stateless Persons in those States that were parties to it, as well as common human rights law in other States.

79. Noting the progressive nature of draft articles 9 (Prohibition of collective expulsion) and 10 (Prohibition of disguised expulsion), he said that, with a view to strengthening the regime of legal protections for aliens and the responsibility of States, an addition could be made to article 10 providing for the unequivocal commitment of host states to adopt measures consistent with international law to prevent or combat attempts by their own citizens or other persons to precipitate the departure of aliens from their territory.

80. Referring to article 11 (Prohibition of expulsion for the purpose of confiscation of assets) and article 20 (Protection of the property of an alien subject to expulsion), he said further detail should be provided with regard to the protection of the property of aliens subject to expulsion. For instance, there should be legal guarantee of a fair and impartial procedure in all cases of confiscation or expropriation of property from expelled aliens, as well as payment of compensation in accordance with generally accepted methods of damage assessment if such actions were found to be unlawful.

81. In article 18 (Obligation to respect the right to family life), it would be wise to formulate in greater detail the principle prohibiting the separation of families in the process of expulsion. It would contribute to the progressive development of the legal protection of the institution of the family and would moreover complement article 15 (Vulnerable persons). In the light of the general principle of the rule of law, and the need for legal protection of the rights of aliens, his delegation believed that the right of aliens to challenge an expulsion decision, as enshrined in paragraph 1(b) of draft article 26 (Procedural rights of aliens subject to expulsion), should be unconditional. However, that did not preclude a streamlined procedure for considering such appeals if required by national security. In article 28 (International procedures for individual recourse), it might be stated more clearly that recourse of the expelled alien to international procedures arose out of the international commitment of States to recognize the jurisdiction of the relevant international organs.

82. On the topic of protection of persons in the event of disasters, he suggested merging draft articles 5 (Human dignity) and 6 (Human rights), given the inextricable link between the protection of human dignity and that of human rights. Moreover, draft article 6 was better formulated, whereas draft article 5 remained declarative and somewhat vague. Draft article 11 (Duty to reduce the risk of disasters) should be amended to better reflect the economic and other constraints on the capacity of a number of States to minimize natural disasters and should stress the importance of technical and other forms of assistance to States. In draft article 17 (Facilitation of external assistance), he proposed that the commitment of all States, and not just those directly affected, to promptly adopt appropriate legislative measures might be enshrined in the procedure of progressive development of international law. Those steps could be considered in the context of measures provided for in draft article 11.

83. **Ms. Escobar Pacas** (El Salvador), speaking on the topic of expulsion of aliens, said that her delegation attached great importance to maintaining a meaningful dialogue between the Sixth Committee and the International Law Commission regarding the Commission's work at all of its sessions. Only through close cooperation between the two bodies could widespread agreement be reached and progress made on issues of international law. Given that Member States had not discussed the draft articles on the expulsion of aliens during the sixty-eighth session of the General Assembly and instead had been invited to submit written comments, it was regrettable that the draft articles had subsequently been presented by the Commission as a finished product. In fact, the written comments provided by many Governments, including her own, had not been incorporated into the draft articles or their commentary and no explanation had been given for such omission. Her delegation therefore questioned whether the status of the draft articles was indeed final, as further discussion of the fundamental issues and of the changes introduced into the latest draft was required before a definitive text could be formally adopted by the General Assembly in a resolution.

84. The text of draft article 19 was of particular concern, as it was based on the assumption that persons subject to expulsion would be detained. While her Government had previously expressed its concerns and offered an alternative text indicating that detention should not be the general rule, that proposal had been rejected on the grounds that the expelling State would then have to prove in each case that the detention was necessary. Her delegation believed that that reasoning was inconsistent with the demands of the rule of law, by which any limitation on a human right must be duly justified by the State, taking into account any specific circumstances. In that respect, at the regional level, the Inter-American Commission on Human Rights had repeatedly indicated that in order to fulfil the guarantees set out in articles I and XXV of the American Declaration of the Rights and Duties of Man and article 7 of the American Convention on Human Rights, States parties must implement immigration policies, laws, protocols and practices that were founded on the right to liberty, in other words on

migrants' right to personal liberty while immigration proceedings were pending, rather than on the assumption that such persons would be detained. As previously stated by the Commission itself, the principle of exceptionality in respect of deprivation of liberty must be held to even higher standards in cases of immigrant detention, given that immigration offences were not criminal in nature.

85. In a recent case, the Inter-American Court of Human Rights had found that those migratory policies whose central focus was the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures of achieving the same ends, were arbitrary. In addition, with regard to cases involving children, in its Advisory Opinion OC-21/14 of 19 August 2014, the Court had indicated that "States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents, as a precautionary measure in immigration proceedings [...] because States can and should have other less harmful alternatives". In his report on the promotion and protection of human rights, including ways and means to promote the human rights of migrants (A/69/277), the Secretary-General stated that detention should be a measure of last resort and the decision to detain a child or adolescent taken without individual and proper assessment was a matter of serious concern.

86. Her delegation was surprised at the Special Rapporteur's assertion in his ninth report (A/CN.4/670) that he could not find a basis for the rule whereby detention facilities should be clean, provide access to doctors and take into account the needs of children, as that rule was based on the basic concept of human dignity and should thus be given particular importance.

87. Draft article 26, on the procedural rights of aliens subject to expulsion, remained problematic, in particular its paragraph 4. It was unacceptable that an alien should be stripped of all procedural rights simply for having entered the territory of a State in an irregular manner. While the Commission had changed the period of time provided in paragraph 4 from six months to "a brief duration", the text still provided that a State could deny an individual his or her procedural rights for a given period of time, in disregard of all due process guarantees, which were enshrined in international law and were non-derogable. Without providing the minimum guarantees, extreme situations could arise, such as individuals being prevented from reporting violations of their human rights or demonstrating their refugee or stateless status or vulnerable condition simply for having been in a country only "for a brief duration". Her delegation proposed that the paragraph should be eliminated so as to ensure respect for procedural rights, which emanated from the principle of human dignity and not from an individual's migratory status nor the period of time he or she had spent in a territory.

88. With regard to the right to consular assistance, it was important to recall that it referred not only to the alien's right to "seek" such assistance, but also to the detaining State's duty to inform the person of that right. Draft article 26, paragraph 3, should therefore be reworded so that it recognized the "right of an alien to be informed about consular assistance". That right was recognized by the Inter-American Court of Human Rights in its advisory opinion on that important issue and reflected in article 36 of the Vienna Convention on Consular Relations.

89. She called for a reconsideration of the draft articles in the light of the major problems her delegation had raised, noting that the Commission's mandate of codification and progressive development of international law implied a commitment not to retreat from established aspects of international human rights law that had been recognized by the United Nations.

90. With regard to the topic of protection of persons in the event of disasters, her delegation welcomed the opportunity to consider the draft articles adopted on first reading and make relevant, concrete observations. In that respect, it suggested that the wording of draft article 9 [5 bis] should not place a limit on the types of cooperation. The phrase "cooperation includes" could be replaced with the phrase "cooperation may include" to indicate that the list was not exhaustive. With regard to draft article 16 [12], on offers of external assistance, the question of whether there existed a "right" to offer assistance or simply a "capacity" of States and other actors in the international arena to offer assistance merited further consideration. In that regard, she noted that the fact that international cooperation was not a duty did not necessarily imply that there was a right to offer assistance; that question merited further discussion and examination of the terminology used in other norms.

91. With respect to the other decisions and conclusions of the Commission, her delegation welcomed the Commission's inclusion of the topic of crimes against humanity in its programme of work and supported the proposal to include the topic of *jus cogens* in its long-term programme of work, which would provide needed clarification regarding its formation and effects.

92. **Mr. Rogač** (Croatia) said that his delegation welcomed the decision to move the topic of crimes against humanity from the Commission's long-term programme of work to its agenda. The topic was sufficiently advanced in terms of State practice to be included in the Commission's programme of work, and its consideration would fulfil a need for progressive development and codification of international law in that area. The proposed ambitious timetable, by which the Commission might adopt a full set of draft articles on first reading before the end of the current quinquennium, was also welcome.

93. Unlike genocide and war crimes, crimes against humanity did not necessarily form part of every State's national legislation and were not subject to an international agreement requiring States to investigate, prosecute and punish such crimes, and to cooperate in that regard. That was despite the fact that crimes against humanity had been indirectly introduced into international law by the Hague conventions of 1899 and 1907 and expressly recognized in the Charter of the International Military Tribunal at Nuremberg, the Protocols additional to the Geneva Conventions of 1949 and the statutes of the international criminal tribunals and the International Criminal Court. Crimes against humanity were also more prevalent than genocide and war crimes. Croatia therefore fully supported efforts to develop an international instrument on the matter.

94. The Commission's most important task was to clearly identify and define the legal concept and scope of crimes against humanity. In that regard, it should, to the greatest extent possible, draw from the foundation laid by the international criminal tribunals, including their jurisprudence; the definition of crimes against humanity established by the International Criminal Court; and customary international law. Other valuable resources included the practice and comments of the International Committee of the Red Cross and the definition of the term contained in the Commission's draft Code of Crimes against the Peace and Security of Mankind. The process should also clarify any differences among States regarding the concept and scope of crimes against humanity, the harmonization of national legislation and the further strengthening of international and criminal law, and would hopefully result in the wide acceptance of the Commission's proposed definition, despite the fact that crimes against humanity were not included in the penal codes of many Member States.

95. The question of jurisdiction would also be critical. Taking into account the recent developments in Syria and Iraq and the prevalent role of non-State actors in contemporary armed conflicts, his delegation supported an approach that would integrate the concept of universal jurisdiction into the draft articles. Specifically, they should incorporate a general obligation for States to cooperate in the investigation and prosecution of the most serious international crimes on the basis of the *aut dedere aut judicare* principle, thereby facilitating the prosecution and punishment of all perpetrators of major international crimes, regardless of their nationality or the location of the crimes, and preventing impunity. That had been the approach taken in the Croatian Penal Code of 2013 in respect of crimes against humanity and human dignity. Universal jurisdiction must be established and implemented according to universally recognized international criminal law standards and appropriate procedures, including full cooperation between the States concerned.

96. The draft articles should be applicable to both international and internal armed conflicts. By extending the scope of the draft articles to non-international armed conflicts, the Commission would uphold the basic principles underlying the concept of crimes against humanity, including the fundamental understanding that there were certain rules of basic humanity that should be respected in all conflicts, at all times, and by all parties, without exception, irrespective of the nature of a conflict or its participants. Those rules had been flagrantly violated in recent conflicts.

97. The Commission should closely monitor two recent developments that had attracted international attention and support: the international initiative by several States to open negotiations on a multilateral treaty for mutual legal assistance and extradition in the domestic prosecution of atrocity crimes and the proposal by Mexico and France to place limits on veto

rights in the Security Council in situations of genocide, war crimes and crimes against humanity. For its part, Croatia intended to join the initiative on the multilateral treaty. His delegation hoped that the work of the Commission would take into account its work on related topics, such as *aut dedere aut judicare* and the immunity of State officials from foreign criminal jurisdiction, with a view to developing the foundation for a new convention on crimes against humanity, thus strengthening the framework for the prevention, prosecution and punishment of the most serious international crimes.

98. **Mr. Stemmet** (South Africa), speaking on the topic of expulsion of aliens, said that in a relatively short time, the Special Rapporteur and the Commission had set out clear and concise draft articles to serve as a firm foundation for the elaboration of a convention. The expulsion of foreign nationals by States must be done within the parameters of a proper international and domestic legal framework. In that respect, the draft articles were generally in line with South African law, in particular the 1996 Constitution, the Immigration Act, the Extradition Act and the Refugees Act. In addition, the values of respect for human dignity and the human rights of aliens set out in draft article 13 and the prohibition of discrimination established in draft article 14 were pillars of South Africa's Bill of Rights.

99. His delegation welcomed the approach whereby persons who enjoyed special protection under international law, such as refugees and stateless persons, were included within the scope of the draft articles, but without prejudice to the special rules and regimes in international law that might govern their relationship with the State where they were present. It had also taken note of the provision in draft article 23, paragraph 2, which held that a State that did not apply the death penalty must not expel an alien to a State where the alien had been or might be sentenced to death, unless assurance had been given that the death penalty would not be carried out. That provision had been interpreted as an obligation under South African law in the decision by the Constitutional Court in the 2001 case *Mohamed and Another v. President of the Republic of South Africa and Others* and subsequent cases before the courts.

100. Draft article 31, on the right of a State to exercise diplomatic protection, and draft article 30, on the responsibility of States in case of unlawful protection, could be omitted, as they essentially restated provisions contained in the articles on diplomatic protection adopted by the Commission in 2006 (General Assembly resolution 62/67, annex) and the articles on the responsibility of States for internationally wrongful acts, respectively. However, that matter could be addressed when negotiation of a convention commenced. His delegation had taken note of the Commission's recurring references to progressive development and was of the view that its new approach of making a strict distinction between progressive development and codification was unfortunate.

101. Turning to the topic of protection of persons in the event of disasters, he recalled that many States had previously expressed concerns regarding the adoption of a right/duty approach instead of a more cooperative approach. The draft articles set out provisions that created specific rights and duties with respect to the affected State on the one hand, and the assisting States and assisting actors, on the other. That holistic approach obliged both the State affected by disaster and those offering assistance to fully respect the basic rights of all persons affected.

102. As envisaged in draft article 12 [9], the affected State bore the primary responsibility and duty to protect its population and those persons within its territory in the event of disasters by taking appropriate measures, including seeking external assistance, in line with the principle of State sovereignty. The affected State had the right to determine, within its discretion, whether or not its internal capacity was sufficient to protect persons who were within its jurisdiction in the event of disasters and should not be obliged or compelled to seek such assistance.

103. His delegation emphasized that the primary intention of the draft articles was not to confer rights, which could be exercised at will, to Member States, the United Nations or other external actors, but rather to place a mandatory duty, responsibility or obligation on States and other actors to provide assistance to the affected State when requested to do so.

104. A cooperative approach between affected States, assisting States and other assisting actors was of paramount importance within the context of disaster relief. All assisting actors had a fundamental duty to cooperate in disaster relief operations. The duty to cooperate was a well-established principle of international law and was enshrined in numerous

international instruments. Such cooperation, however, was subject to the decision of the affected State in its role as primary facilitator of cooperation efforts. References to cooperation should therefore not be interpreted as diminishing the role of a sovereign State affected by disaster, as its consent was required in order to receiving any form of assistance. In order to give effect to the rights and duties of affected States, assisting States and other assisting actors as set out in the draft articles, cooperation on all aspects of disaster relief and assistance was imperative. Without cooperation, the objectives of the draft articles would not be achieved.

105. South Africa's Disaster Management Act of 2002 was a comprehensive, legally binding instrument that set out mandatory provisions for government at the national, provincial and local level. The Act focused on disaster risk reduction through prevention, mitigation and preparedness measures as well as provisions on effective response and post-disaster recovery.

106. The Commission should consider incorporating a stronger right/duty approach between States and populations affected by disasters by, for example, strongly encouraging States to enter into national, multilateral, regional and bilateral agreements that would ensure that in the event that an affected State was unable to provide adequate relief and assistance to its population owing to a lack of resources, States parties to the agreements would have a legally binding duty to provide assistance. Such an approach would obviate the need to delve into issues such as the right/duty to seek assistance or the right/duty to offer assistance.

107. The phrase "appropriate measures" in draft article 18 should be retained, as the affected State should have a right to exercise its discretion when determining what actions needed to be taken. Furthermore, an affected State might be unable to take all necessary measures to meet its obligation as it might have limited resources at its disposal. The term "consent", used in draft article 4, should also be retained, as no form of external assistance should be merely tolerated, or acquiesced to, by the affected State, but should instead depend on its unequivocal consent. While commending the Commission's work on the topic, his delegation stressed that it must take into account the views expressed by Member States, including on the previously adopted versions of the draft articles, when it finalized the draft articles on second reading.

108. Turning to the other decisions and conclusions of the Commission, he expressed his delegation's support for the inclusion of the topic of *jus cogens* in the Commission's long-term programme of work. In the light of the new guidance that had become available, a study of the topic was well in line with the Commission's mandate to promote the progressive development and codification of international law.

109. Beyond a few undisputed norms, such as the prohibition of torture, the prohibition of slavery, the prohibition of genocide and the prohibition of racial discrimination, the concept of *jus cogens* norms remained nebulous. Greater clarity on the functioning, content and consequences of *jus cogens* norms would benefit Member States, international organizations and other parties interested in the international legal order. The greatest contribution the Commission could offer through its study of *jus cogens* would be the identification of the requirements for a norm to reach the status of *jus cogens* and the effects of *jus cogens* norms on international obligations. That would bring much-needed certainty to the field; as *jus cogens* norms were being invoked more frequently in international legal disputes, States, judges and lawyers at both international and national levels needed the tools to determine which norms had or had not reached the status of *jus cogens*.

110. His delegation was interested in the Commission's views on the relationship between customary international law and *jus cogens*. Specifically, it hoped that the Commission would address whether a norm had to rise to the level of customary international law before it could rise to the level of *jus cogens* and whether it was possible for a norm to become *jus cogens* without having been accepted as customary international law. Recalling that the International Court of Justice, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, had stated that the prohibition against torture was a *jus cogens* norm based on "widespread international practice and on the *opinio juris* of States", his delegation also requested the Commission to explore how such criteria differed from the criteria used by the Court in the *North Sea Continental Shelf* cases, where it also examined State practice and *opinio juris* to determine whether a rule could be considered as customary international law. If there was no difference between the two sets of criteria, how could norms with

customary international law status be distinguished from *jus cogens* norms? Or would the difference between *jus cogens* norms and customary international law norms lie in the consequences of acting in breach of the relevant norm?

111. While customary international law norms could be superseded by a subsequent treaty, according to the Vienna Convention on the Law of Treaties, *jus cogens* norms could only be superseded by subsequent *jus cogens* norms. A treaty provision for an act that was in conflict with a *jus cogens* norm would be null and void. However, there were exceptions to that rule. For example, while it was generally accepted that the prohibition on the use of force was *jus cogens* in nature, it was technically possible for a State to consent to force being used, presumably through a treaty provision. Was that example merely the exception that proved the rule?

112. There were further questions on the consequences of acting in breach of a *jus cogens* norm. For example, if a single treaty provision was in conflict with a *jus cogens* norm, would only that treaty provision be null and void or would the whole treaty be null and void? Would the rules on the consequences of acting in breach of a *jus cogens* norm also prevent an actor from benefiting from its acts? For example, would an aggressor State still be able to claim the benefit of the rule that belligerents were not responsible for damage caused to subjects of neutral states in military operations?

113. With regard to the objectives set out by the Commission, his delegation considered a study on the nature of *jus cogens*, the requirements for its identification and the consequences or effects of *jus cogens* to be a greater priority than the development of an illustrative list of norms that had achieved the status of *jus cogens*. While such a list would be instructive, even if it were reliable at the time of its publication it would eventually become incomplete. The Commission could make a greater contribution by offering international lawyers the tools to determine for themselves which norms had probably achieved the status of *jus cogens*.

114. His delegation had noted that the topic of crimes against humanity had been added to the Commission's long-term programme of work. While it had previously expressed hesitation regarding the need to consider the topic, it would remain attentive to the Commission's work. South Africa was a party to the Rome Statute of the International Criminal Court and had given effect to the principle of complementarity underlying the Statute by incorporating the international crimes defined therein, including crimes against humanity, into its domestic law. Specifically, section 4 of Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, concerning the jurisdiction of South African courts, provided that despite anything to the contrary in any other law of the Republic, any person who committed such crimes was guilty of an offence and was liable on conviction to a fine or imprisonment. Another provision in that section progressively provided for the extra-territorial jurisdiction of South African courts. The text of the Act and relevant cases would be transmitted to the Commission as requested.

115. **Ms. McLeod** (United States of America), referring to the topic of expulsion of aliens, said that her delegation was pleased that the draft articles reflected several of the suggestions offered by Governments. It also appreciated the Commission's express acknowledgement in the commentary to the articles that the topic did not have a foundation in customary international law or in the provisions of international conventions and that much of the project in fact reflected progressive development. Nevertheless, there were still a number of issues of concern, and, overall, the draft articles did not strike a proper balance between the goal of protecting aliens and the imperative of respecting States' sovereign prerogative, responsibility and ability to control admission to their territory and to enforce immigration laws.

116. Her delegation disagreed with assertions made in respect of the term "disguised expulsion", as contained in the commentary to draft articles 2 and 10. For example, it did not believe that a State's "tolerance" of the actions of non-State actors generally gave rise to state responsibility. Draft article 12 on the prohibition of expulsion in order to circumvent an extradition procedure was too vague and did not account for a State's prerogative to use a variety of legal mechanisms to effect transfers of criminals wanted by a foreign country. In addition, draft articles 23 and 24 extended non-refoulement protections to situations that were beyond those reflected in established international law and beyond what the United States viewed as desirable law.

117. While the Commission had improved the text of draft article 14 on non-discrimination, the commentary thereto still suggested an overly broad limitation on States' ability to treat groups differently with respect to expulsion where there was a rational basis for doing so. Additionally, although, in draft article 23, the Commission had decided to limit the non-refoulement obligation to threats to life and no longer include threats to freedom, the list of grounds on which such threats could be based went far beyond those contained in the 1951 Convention relating to the Status of Refugees and its Protocol, without any clear justification in law or practice.

118. The Commission had addressed concerns that many of the draft articles appeared to conflict with widely adopted conventions by adding text stating that those draft articles were "without prejudice to" various rules of international law. That solution highlighted the extent to which existing treaties already covered many of the subjects addressed in the draft articles, which cast doubt on the need for an additional international instrument. Many of the Commission's proposals for progressive development were controversial and would need to be subjected to thorough governmental negotiation before being recognized as a rule of international law. Two such proposals were reflected in draft article 27, on the suspensive effect of an appeal against an expulsion decision, and draft article 29, which would create an unprecedented right to admission.

119. Given all of those concerns, and in the light of Governments' previous comments, her delegation would have preferred for the Commission to have issued the draft articles in a different form, such as guidelines or principles. The draft articles should not be considered as the basis for negotiation of a new convention, as there were already several multilateral treaties on the topic. Instead, the draft articles should be brought to the attention of Member States for their further consideration.

120. With regard to the topic of protection of persons in the event of disasters, the United States would provide written comments in response to the Commission's request. Her delegation remained concerned that several draft articles appeared to be attempts to progressively develop the law but were not identified as such. For example, it did not accept the assertion made in draft article 11, on the duty to reduce the risk of disasters, that each State had an obligation under international law to take the necessary and appropriate measures to prevent, mitigate and prepare for disasters. While the individual and multilateral measures taken by States to reduce the risk of disasters, as documented by the Commission, were laudable, those efforts did not establish widespread State practice undertaken out of a sense of legal obligation.

121. Concerning the other decisions and conclusions of the Commission, her delegation welcomed the addition of the topic of crimes against humanity to the Commission's agenda. The widespread adoption of multilateral treaties on serious international crimes, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, had contributed to international law by promoting the repression of such offences and creating a basis for accountability. Given that crimes against humanity had been perpetrated throughout the world, careful consideration of draft articles to serve as the basis for a convention on the prevention and punishment of crimes against humanity could be valuable. The topic would involve many difficult legal issues, which deserved to be thoroughly discussed in the light of States' views.

122. With regard to the addition of the topic of *jus cogens* to the Commission's long-term work programme, she recalled that in 1993, the Commission had decided not to address the topic of *jus cogens* owing to the insufficient practice that existed on the topic; her delegation affirmed that it was still not an appropriate time for it to do so. Furthermore, the Commission was currently working on two topics that would be relevant to the consideration of *jus cogens*: subsequent agreements and subsequent practice in relation to the interpretation of treaties and the identification of customary international law. Specific relevant questions under consideration included whether and how silence by a treaty party could constitute practice for the purposes of establishing acceptance of an interpretation of a treaty; what actions constituted practice for the purposes of customary international law; how to word the rule that such practice must be "general"; whether any particular duration of practice was required to form a customary rule; and the relationship between practice and *opinio juris*. Indeed, such issues were so closely related to *jus cogens* that the original proposal for consideration of the topic of customary international law left open whether *jus cogens* would be included; the Commission had decided not to include it only after

launching the project. The first report of the Special Rapporteur on customary international law (A/CN.4/663) had indicated that "one's view as to the relationship between *jus cogens* and customary international law depends, essentially, on the conception that one has of the latter".

123. Her delegation was therefore concerned that the consideration of three overlapping projects that involved similar sources of international law would risk confusion, inconsistency and inefficiency in the Commission's work. While the syllabus for the topic presented a helpful discussion, including an overview of the treatment of *jus cogens* by the International Court of Justice, it referenced few examples of State practice demonstrating that the situation had changed since 1993 and that the topic thus merited consideration. Accordingly, her delegation did not believe it would be productive for the Commission to add the topic of *jus cogens* to its agenda.

Agenda item 144: Administration of justice at the United Nations (*continued*)

124. **The Chair** said that informal consultations on the agenda item had centred on the proposals and observations contained in the report of the Secretary-General on administration of justice at the United Nations (A/69/227), the report of the Internal Justice Council on administration of justice at the United Nations (A/69/205) and the report of the Secretary-General on activities of the Office of the United Nations Ombudsman and Mediation Services (A/69/126). A fruitful question-and-answer session had been held with staff members from the Office of Legal Affairs, the Office of Administration of Justice, the Office of the United Nations Ombudsman and Mediation Services and the Internal Justice Council. Owing to the success of the dialogue, it was recommended that the exercise should be repeated at the next session.

125. A draft letter from the Chair of the Sixth Committee, addressed to the President of the General Assembly, had been negotiated during the informal consultations. The letter drew attention to issues relating to the legal aspects of the reports discussed and contained a request that it should be brought to the attention of the Chair of the Fifth Committee. If he heard no objection, he would take it that the Committee wished to authorize him to sign and send the draft letter to the President of the General Assembly.

126. *It was so decided.*

The meeting rose at 1.10 p.m.