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Chair: Mr. Manongi . . . . . (United Republic of Tanzania)
later: Ms. Millicay (Vice-Chair) . . . . . (Argentina)

Contents

14-63552 (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. **Mr. Belaid** (Algeria), having commended the Commission's work on the draft articles on the expulsion of aliens, said that his delegation was concerned about draft article 22, in particular paragraph 2, which was not the subject of general agreement and did not reflect commonly accepted practice or the state of international law. The international law principle that a State was not required to receive expelled aliens in its territory unless it was proved beyond doubt that they held the nationality of that State was uncontested. In addition, unless States had agreed otherwise under specific bilateral or multilateral agreements, they were not obliged and could not be forced, under current international standards and practice, to accept expelled aliens in their territory if they were not citizens of the State concerned.

2. Paragraph 2 of the draft article stated that, where it had not been possible to identify either the State of nationality or another State that had the obligation to receive the alien under international law, such an alien might be expelled to any State where he or she had a right of entry or stay or, where applicable, to the State from where he or she had entered the expelling State. That provision had been the subject of intense debate in the Commission and among States, and had never been generally accepted. It also had no basis in international law, including customary international law, and could not be recognized as a new development in international practice in that field. Furthermore, as stated in the commentary to draft article 22 in the report on the Commission's sixty-fourth session (A/67/10), the Commission had been divided on the issue of whether certain States, such as the State of embarkation, would have an obligation to receive the alien under international law, and the view had been expressed that the State of embarkation had no such obligation. Lastly, it was well established in international law that the expelling State had a duty to indicate the grounds for an expulsion and that an act ordering expulsion must be reasoned in fact and in law.

3. **Mr. Adamhar** (Indonesia), having welcomed the adoption of the draft articles on the expulsion of aliens, said that the text achieved a balance between the rights of the State on the basis of sovereignty and the rights of aliens present in the territory of that State. However, several States had observed that draft articles 6 (Prohibition of the expulsion of refugees), 23 (Obligation not to expel an alien to a State where his or her life would be threatened) and 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment) had expanded the scope of non-refoulement protections, which would unduly limit State sovereignty and thus diverge from the provisions of widely accepted human rights treaties and national laws and jurisprudence. The Commission should review those draft articles and the commentaries thereto and consider the necessary adjustments.

4. In his delegation's view, the draft articles contained not only provisions reflecting the progressive development of international law on the topic of expulsion of aliens but also a considerable number of provisions reflecting the codification of well-established State practice, supplemented by extensive case law. His delegation encouraged the Commission to continue to review certain draft articles representing progressive development that might be subject to criticism from some States, since such criticism would be beneficial to further deliberations on and development of the draft articles.

5. There were still divergent opinions on the final form of the draft articles. Of the States that had expressed their views on the text adopted by the Commission on first reading, only a few had stated their position as to the final form. It would therefore be premature to suggest that States preferred either a convention or a soft law.

6. The Commission must make every effort to accommodate the relevant comments and suggestions from States by making the necessary amendments to the text and providing further clarification in the commentaries to certain draft articles in order to ensure that the text adopted on second reading would be more acceptable to States.

7. Turning to the topic "Protection of persons in the event of disasters", he welcomed the adoption on first reading of the draft articles and the commentaries thereto. As a country that was familiar with disaster, Indonesia continued to strengthen its national capacity to manage and mitigate it, including through the establishment of the National Agency for Disaster

Relief and the promulgation of a law in 2007 on the management of disaster relief, which governed, among other things, international cooperation in that regard. At the regional level, Indonesia hosted the Coordinating Centre for Humanitarian Assistance on Disaster Management of the Association of Southeast Asian Nations (ASEAN), established under the ASEAN Agreement on Disaster Management and Emergency Response as part of the Association's commitment to strengthening the collective response to disasters. The Centre aimed to be the regional hub for information and knowledge on disaster management and for the mobilization of resources for disaster-affected areas.

8. As stipulated in draft article 14, paragraph 1, the provision of external assistance in the event of a disaster required the consent of the affected State. Furthermore, the affected State had the primary role in the direction, coordination and supervision of assistance and relief operations undertaken both by assisting States and by non-State actors, including international organizations. Indeed, in dealing with the protection of persons in the event of disasters, it must be recognized that disasters occurred in the territory of a sovereign State; therefore, respect for the basic principles set out in the Charter of the United Nations, including the principles of sovereignty, non-interference and the sovereign equality of States, were of paramount importance.

9. His delegation shared the concern expressed by others about draft article 13 (Duty of the affected State to seek external assistance). The imposition of such a duty in the event that a disaster exceeded the national capacity of the affected State would undermine the principles of sovereignty, non-intervention and the requirement for the consent of the affected State, and also the balance that needed to be struck between those principles and the responsibility of the affected State. There was also no legal basis in State practice for the obligation to seek external assistance. Furthermore, the imposition of such an obligation would diminish the principle of international cooperation in mitigating disasters and would disrupt such cooperation if, for instance, a State could incur State responsibility by refusing to seek external assistance. The right of the affected State to decide whether or not to seek such assistance in accordance with its own judgement must be respected. Legal provisions on the matter should not be based on one or two incidents in which a State had refused external assistance. The Commission should therefore make the necessary amendments to draft article 13 on second reading so that seeking external assistance was not an obligation but rather a non-binding recommendation addressed to the affected State.

10. His delegation supported the inclusion of draft article 18 on the obligation to protect disaster relief personnel and their equipment and goods. That obligation was an obligation of conduct and not of result, meaning that measures should be adopted by the affected State with a view to preventing criminal activities that were harmful to relief personnel and their goods and equipment. An obligation that required a result would constitute an onerous burden on the affected State, and failure to achieve the desired result could entail State responsibility.

11. Lastly, his delegation favoured more intensive engagement between the Commission and the Committee.

12. **Ms. Telalian** (Greece) said that the text of the draft articles on the expulsion of aliens had progressively improved in a number of respects. Her delegation was pleased to note that the final text took account of the fact that distinctions might be drawn, with regard to expulsion, between aliens living lawfully in a country and those illegally present. Likewise, it was pleased that draft article 26, paragraph 4, had been made more flexible by stating merely that the legislation of the expelling State concerning the expulsion of aliens unlawfully present in its territory could be applied to aliens who had been unlawfully present for a brief duration, rather than referring to a specific period of less than six months. The "without prejudice" clauses that had been added to a number of provisions were a useful tool for avoiding potential discrepancies with other relevant international law regimes.

13. Her delegation welcomed the general reference to the prohibition of the collective expulsion of aliens, without mention of a specific category of foreigners. The amendments made to the text clarified the scope of the relevant provisions and allowed for a degree of flexibility, which was necessary in view of the diversity of State legislation and practice and addressed the concerns expressed by several delegations. Her delegation also noted with interest the new version of draft article 27 on the suspensive effect of an appeal against an expulsion decision, which was perhaps less ambitious than before but appeared to be more in line

with State practice and international jurisprudence. Her delegation welcomed draft article 22, paragraph 1, which explicitly recalled that an alien subject to expulsion must be expelled to his or her State of nationality, but it would have preferred a stronger emphasis on voluntary departure, a solution promoted by States and international organizations, and on the important role of readmission agreements.

14. The topic of the expulsion of aliens remained of critical importance, in particular for States that were facing mixed migration flows of unprecedented dimensions or a rise in irregular migration, and those that were transit countries. In fact, such States were striving to ensure humane conditions of reception and screening of foreign nationals illegally entering their territory, to identify and protect vulnerable persons and to improve the conditions of detention of aliens subject to expulsion. A paramount obligation for States was to fully respect international human rights law and refugee law while exercising their right to expel an alien from their territory.

15. The draft articles covered most of the substantive and procedural aspects of expulsion and identified in a comprehensive manner the obligations of States and the rights of those subject to expulsion. However, her delegation remained of the opinion that the elaboration of an international convention on the basis of the draft articles would not be beneficial. At the national and regional levels, different sets of rules had progressively emerged, addressing the specific challenges faced by the States concerned. A telling example was the legislation of the European Union, transposed by Member States into their domestic legal order, which contained stronger provisions on the protection of human rights than those in the draft articles. Furthermore, at the regional level, the European Court of Human Rights had over the years developed an important body of case law interpreting, in particular, the provisions of the European Convention on Human Rights concerning procedural rights and the prohibition of ill-treatment and providing specific criteria for achieving a fair balance between the right of a State to expel an alien and its obligation to respect the human rights of persons subject to expulsion.

16. Her delegation therefore believed that the issue of the expulsion of aliens was best addressed through regional instruments tailored to the needs of the countries involved and the case law of international judicial and quasi-judicial bodies, rather than through the adoption of uniform rules at the universal level. The draft articles adopted by the Commission could serve as a pertinent set of guidelines to assist States in designing and implementing legislative frameworks and developing practices with regard to the expulsion of aliens, in compliance with their obligations under international law.

17. The Commission's work on the topic of the protection of persons in the event of disasters constituted a valuable contribution to resolving a number of complications that could affect the everyday activities of relief workers around the world. On draft article 20, concerning the relationship of the draft articles to special or other rules of international law, her delegation would welcome a clearer statement in the commentary regarding the application of the draft articles in conjunction with any specific treaty provisions applicable in the event of disasters. Her delegation also concurred with the understanding, stated in the commentary, that any treaty provisions dealing directly or indirectly with relief assistance would be applicable hand in hand with the draft articles. However, the reference to the *lex specialis* rule seemed to suggest that the application of the draft articles and the application of any specific treaty regime on relief assistance in the event of disasters might also be, in some cases, mutually exclusive. Her delegation took the view that, notwithstanding the degree of specificity of any treaty regime, the draft articles had an added value per se and should remain applicable, filling relevant legal gaps, which seemed to be unavoidable, even where detailed treaty regimes were already in place. In fact, her delegation would favour a "notwithstanding" clause rather than the "without prejudice" wording currently used.

18. Draft article 21 was intended to give the rules of international humanitarian law precedence over the draft articles in times of armed conflict. While her delegation agreed in principle with that approach, it would be in favour of parallel application of the two sets of provisions where appropriate. It would welcome a clearer statement in that direction from the Commission and a more straightforward "without prejudice" clause, so that the draft articles remained applicable in complex situations of both armed conflict and natural or environmental disasters.

19. The draft articles on the protection of persons in the event of disasters were not only a well-balanced and useful legal tool regarding future treaty regimes on

relief assistance but also a valuable set of provisions that could assist States in the interpretation of existing international instruments.

20. **Mr. Khoubkar** (Islamic Republic of Iran), having welcomed the adoption on second reading of the draft articles on the expulsion of aliens, said that it was an inherent right of sovereign States to expel aliens on the basis of their own law, provided that the grounds for expulsion did not violate the treaty obligations of the State concerned. Nonetheless, those obligations were not absolute in nature, and divergence in practice was possible in certain emergency situations, provided that it was consistent with peremptory norms of international law. Those draft articles that were not supported by sufficient State practice should be considered in the light of that observation.

21. It was his delegation's understanding that the Special Rapporteur recognized that not all the provisions of the draft articles had a foundation in customary international law or treaty law and that in certain respects State practice was still limited. For that reason, the draft articles involved both the codification and the progressive development of international law. However, international realities required that the provisions should be based on the predominant State practice in the field, which was not the case for some of the draft articles.

22. His delegation appreciated the careful consideration of refugee matters in the draft articles, but the approach set out in the commentary to draft article 6 was not underpinned by sufficient State practice. According to the commentary, the term "refugee" should be understood not only in the light of the general definition set out in article 1 of the 1951 Convention relating to the Status of Refugees but also in accordance with subsequent developments in the matter, including the practice of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the definition adopted by the Organization of African Unity in its Convention Governing the Specific Aspects of Refugee Problems in Africa. However, the practice of UNHCR did not necessarily reflect State practice, and even within the Executive Committee of the High Commissioner's Programme, many States were of the view that refugee status should be determined strictly in accordance with the parameters outlined in the 1951 Convention. Accordingly, the Commission's conclusion on subsequent practice with regard to the status of refugees should be based first and foremost on the actual practice of States rather than the practice of UNHCR.

23. Turning to the topic of the protection of persons in the event of disasters, he welcomed the adoption of the draft articles on first reading. His delegation took the view that the affected State had the exclusive right to establish the threshold for a disaster and to affirm that a disaster had disrupted the functioning of society. Therefore, the Commission, in its consideration of the topic, should avoid any ambiguity in that regard. Humanitarian assistance should be provided in principle on the basis of an appeal by the affected State.

24. The humanitarian principles outlined in draft article 7 must be observed in parallel with the principles of respect for the sovereignty, territorial integrity and national unity of the affected State. The guiding principles set out in the annex to General Assembly resolution 46/182 on strengthening of the coordination of humanitarian emergency assistance of the United Nations should be properly reflected in the draft articles.

25. The wording of draft article 8 (Duty to cooperate) should not indirectly allude to the notion of the responsibility to protect. The core element should be international cooperation among States, which should be properly reflected in the title of the draft article. Furthermore, the reference to cooperation had been expanded to include a non-governmental organization that had a unique role in dealing with situations under international humanitarian law. Even the primacy of international humanitarian law in the event of complex emergencies did not justify highlighting the name of that entity. The explanation in the commentary to draft article 8 concerning the existence of complex emergencies, meaning a disaster occurring in an area where there was an armed conflict, did not comply with draft article 21 concerning the relationship of the draft articles to international humanitarian law. Even if the Special Rapporteur's explanation was accepted, the obligation to cooperate in situations of armed conflict could not, in his delegation's view, extend to non-governmental organizations other than the International Committee of the Red Cross (ICRC).

26. By the same token, draft article 13 raised some concerns in that it obliged the affected State to seek

assistance from other States, the United Nations and relevant intergovernmental and non-governmental organizations. International law as it currently stood did not recognize such a duty, as affirmed by some members of the Commission.

27. His delegation supported the Special Rapporteur's proposal that the draft articles should include a provision specifying their relationship to the Charter of the United Nations. Such a provision, worded in the light of Article 103 of the Charter, would have merit in that it could highlight the cardinal role of the principles of the sovereignty and territorial integrity of the affected State enshrined in the Charter. The ASEAN Agreement on Disaster Management and Emergency Response contained such a provision.

28. **Ms. Ridings** (New Zealand) said that the commentary to the draft articles on the expulsion of aliens usefully clarified on numerous occasions that substantial parts of the text represented progressive development of international law rather than a reflection of the law as it currently stood. The draft articles addressed issues that went to the heart of sovereignty, national security and human rights and required States to strike a careful balance between all three in the light of their national circumstances. In that context, her delegation encouraged the Commission to be cautious about moving too far ahead of State practice.

29. As had been mentioned on previous occasions, the draft articles did not distinguish between the expulsion of aliens who entered the territory of a State lawfully and those who entered unlawfully. That approach was at odds with State practice, which often did distinguish between those two circumstances. A related issue arose in draft article 26 concerning the procedural rights of aliens subject to expulsion. Her delegation was pleased that the Commission had recognized that national laws often provided for simplified procedures for the expulsion of aliens unlawfully present in their territory for a short duration. While paragraph 4 of the draft article recognized the particularities of State practice, her delegation recommended greater clarity concerning that point in the commentary.

30. In the light of those issues, her delegation would counsel against the elaboration of a binding document on the basis of the draft articles. Instead, the text would best be used as guidance that States could consider and apply in a manner most appropriate to their situation.

31. The draft articles on the protection of persons in the event of disasters adopted by the Commission on first reading placed emphasis on the response to a disaster and the recovery of the affected State. Her delegation supported the inclusion of protection of relief personnel and their equipment as an essential condition for any relief operation, as set out in draft article 18. By including the phrase "appropriate measures", the draft article took the right approach, allowing the affected State flexibility depending on a range of factors, including the potential threats and the actors involved. Her delegation also welcomed the balance which the draft articles sought to achieve between the sovereignty of the affected State and the need to assist affected populations following a disaster. From its own experience, New Zealand knew all too well the importance of external assistance in such circumstances.

32. Turning to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", she said that her delegation strongly supported the practical application of subsequent agreements and subsequent practice in order to allow for the evolving relationship between parties on the basis of mutual acceptance and the shared intentions of the parties. Her delegation was particularly encouraged by the Special Rapporteur's intention to address subsequent agreements and subsequent practice in relation to constituent treaties of international organizations. New Zealand had experienced some practical problems where the constituent treaties of certain international organizations had not kept up with evolving realities. Identifying best practice and providing guidance on implementation would be a key factor in producing a useful piece of work for international organizations.

33. With regard to other decisions and conclusions of the Commission, her delegation supported the inclusion of the topic "Crimes against humanity" in the Commission's programme of work and encouraged the Special Rapporteur to draw on the definition of such crimes set out in the Rome Statute of the International Criminal Court rather than elaborating a new definition. Her delegation also supported the inclusion of the topic of *jus cogens* in the long-term programme of work. It would be useful to identify the nature of *jus cogens* and the requirements for the identification of a

norm as *jus cogens*. Such work could form the basis for consideration of whether it would be productive to undertake the even more difficult task of developing an illustrative list of norms that had achieved the status of *jus cogens*. Her delegation noted the observations on the interaction between *jus cogens* and customary law, obligations *erga omnes*, international rules outside the realm of treaties and subsequent norms of a similar character, and would welcome a careful and detailed analysis by the Commission that took into account and appropriately weighed the international legal guidance on those issues.

34. Her delegation also strongly supported the Commission's cooperation in sharing knowledge of international law and providing opportunities to build relationships among international lawyers. To that end, her delegation joined others that had stressed the value of greater engagement between New York-based delegates to the Committee and members of the Commission and was pleased that the Commission continued to consider the possibility of holding a part of its future sessions in New York, although it recognized the resource constraints on such a move. In the meantime, her delegation encouraged the members and secretariat of the Commission to find opportunities for informal interactions and engagements that would contribute to the dialogue between Member States and the Commission.

35. **Mr. Martín y Pérez de Nanclares** (Spain) said that the expulsion of aliens was a particularly thorny issue. In general, his delegation was satisfied that the draft articles on the topic reflected the necessary balance between an appropriate level of rights and guarantees for the person subject to expulsion and a realistic approach that would ensure that the demands placed on States were feasible. It was also pleased that the draft articles reflected one of the three proposals it had submitted in 2012, specifically regarding the procedural rights set out in draft article 26. However, it still had reservations about other issues such as the suspensive effect of an appeal against an expulsion decision under draft article 27, and even some specific aspects of draft articles 2, 10, 14 and 18.

36. Nonetheless, given the advanced stage of work on the topic, it was appropriate to focus on its final form. His delegation had previously stated that it favoured guidelines and guiding principles rather than draft articles. Despite the valuable work carried out by the Commission, the draft articles did not reflect customary international law and were therefore not an appropriate basis for the elaboration of a convention. Moreover, of 22 delegations that had delivered statements before the Committee at the sixty-seventh session, 16 had opposed the submission of a set of draft articles, and two had even proposed that the Commission should bring its work on the topic to an end. Furthermore, highly regarded international scholars such as Mr. Christian Tomuschat, a former member of the Commission, had for some time expressed reservations in that regard.

37. Nonetheless, the Commission had decided to retain the draft articles on second reading and was now submitting them to the Committee with a recommendation that the General Assembly should consider, at a later stage, the elaboration of a convention on the basis of the draft articles. His delegation agreed with the view expressed by some members of the Commission that it was a mistake to retain the draft articles against the majority view of States, particularly given that a set of guidelines and guiding principles would not be an inferior outcome. On the contrary, an instrument of that type that was widely recognized might be more effective than a convention that gained only limited support from the international community.

38. On the topic of the protection of persons in the event of disasters, his delegation fully supported the attention paid by the Special Rapporteur to the necessary balance between the need to preserve the national sovereignty of the affected States and the requirement for international cooperation to ensure the protection of persons. His delegation therefore continued to believe that the will of the territorial State must be respected in the provision of assistance, but that account must be taken of the fact that the territorial State had not only the right but also the duty to provide assistance to its population in the event of a disaster. Draft articles 13 and 14 were therefore satisfactory in that they governed, respectively, the duty of the affected State to seek external assistance to the extent that a disaster exceeded its national response capacity and the requirement that the State's consent to external assistance must not be withheld arbitrarily. That approach was fully consistent with the 1989 resolution of the Institute of International Law on the matter.

39. His delegation also agreed with the general approach of the draft articles, which was to focus on the protection of persons, as was made clear in draft

article 1. In addition, it seemed clear that the wording of draft article 18, which now referred to "appropriate measures" rather than "necessary measures", was more in keeping with the obligation of conduct rather than of result envisaged in the provision. Nonetheless, it would not always be easy in practice to assess the appropriateness of the measures adopted.

40. His delegation supported the European Union's position with regard to draft articles 4 to 8, 18 and 20, including its proposal that the commentary to draft article 4, subparagraph (c), should state explicitly that the term "competent intergovernmental organization" included regional intergovernmental organizations.

41. Since the function of draft article 3 was to define the term "disaster" rather than to establish the scope of the draft articles, his delegation saw no reason not to merge draft articles 3 and 4 by adding "disaster" to the list of terms in draft article 4; it could be placed first in the list in order to underline its importance. With regard to draft article 21 concerning the relationship of the draft articles to international humanitarian law, a "without prejudice" formulation similar to that used in draft article 20 might be more appropriate than the current wording. Further analysis of that point was required. Given that work on the topic was currently at a very early stage, his delegation had not yet taken a firm view with regard to its final form.

42. His delegation welcomed the Commission's decision to include in its programme of work the topic of crimes against humanity, which, unlike war crimes and genocide, were not the subject of an international treaty obliging States to prevent and punish them and to cooperate to that end. Nonetheless, it would be necessary to consider carefully what specific elements would be included in any such treaty and, more particularly, its precise relationship with the Rome Statute and the International Criminal Court. With regard to the recommendation of the Working Group on the Long-term Programme of Work that the Commission should take up the topic of *jus cogens*, his delegation shared the view that practice relating to *jus cogens* had developed since the time of drafting of articles 53 and 64 of the Vienna Convention on the Law of Treaties. Moreover, the topic was of great importance for States, and it might be useful to study its precise contours, content and effects and also to specify the process through which international legal norms could become *jus cogens*. Nonetheless, his delegation had some doubts about the exercise, one of which was the potential risk involved in any attempt to produce a list of *jus cogens* norms. Even if such a list was identified as merely illustrative, it would almost inevitably be seen as a kind of *numerus clausus*, which would run counter to the very essence of the formation of *jus cogens* as an open process.

43. **Mr. Han** Sung-ho (Republic of Korea), referring to the topic of the expulsion of aliens, said that, compared with the draft articles adopted on first reading, the text adopted on second reading struck an appropriate balance between two conflicting interests, namely State sovereignty and the protection of human rights. His delegation was pleased that the version of draft article 8 adopted on first reading (Other rules specific to the expulsion of refugees and stateless persons) had been deleted and that a clearer definition of "alien" had been adopted. However, it still had reservations about the fact that some of the draft articles, such as draft article 23 (Obligation not to expel an alien to a State where his or her life would be threatened), constituted progressive development of international law. In the same vein, draft article 27, concerning the suspensive effect of an appeal against an expulsion decision, should be deleted because it would unduly limit State sovereignty. Draft article 29 (Readmission to the expelling State) should also be deleted because allowing or denying readmission was a matter of national sovereignty for the expelling State, even if a competent authority established that the expulsion had been unlawful. Lastly, the final form of the text should be draft guidelines rather than a convention, since the text represented progressive development rather than codification of international law.

44. His delegation welcomed the adoption on first reading of the draft articles on the protection of persons in the event of disasters and hoped that they would be useful in encouraging cooperation among States and humanitarian relief activities. Referring to the seventh report of the Special Rapporteur on the topic (A/CN.4/668 and Corr.1 and Add.1), he noted that draft articles 17, 18 and 19 as proposed by the Special Rapporteur had been deleted or changed substantially after the discussion in the Drafting Committee and, among the eight definitions in draft article 3 bis as proposed by the Special Rapporteur, "relevant non-governmental organization" and "risk of disasters" had been deleted. The Commission's report did not provide sufficient information concerning those modifications and the process of deliberation. His

delegation hoped that in future more detailed information would be provided.

45. His delegation welcomed the Commission's decision to include the topic of crimes against humanity in its programme of work. As commonly acknowledged, there were universal treaties pertaining to war crimes and genocide but no such treaty on crimes against humanity. The international community needed to send a clear message that the perpetrators of such crimes would be punished unequivocally, irrespective of their domestic legal status. In considering the topic, the Commission should ensure that the concept of crimes against humanity was based on the Rome Statute as far as possible. Common elements established in international jurisprudence, such as cases before the international criminal tribunals for the former Yugoslavia and Rwanda, should also be considered. The Commission should also ensure that the substance of any work on crimes against humanity was acceptable to all States, whether or not they were parties to the Rome Statute. In addition, since certain States had already enacted domestic laws on crimes against humanity, care should be taken to avoid potential conflicts between those laws and international law. Important procedural issues should also be considered, such as which States could prosecute in a given case and how prosecutions of individuals would be conducted. Those issues were directly linked to the principle of universal jurisdiction and the obligation to extradite or prosecute.

46. While welcoming the inclusion of the topic of *jus cogens* in the Commission's long-term programme of work, his delegation took a cautious position on it. Although there were mechanisms for dealing with violations of *jus cogens*, such as article 53 of the Vienna Convention on the Law of Treaties, it was not clear how such violations could be sanctioned in international relations outside the sphere of the law of treaties. The International Court of Justice had found violations of *jus cogens* in some specific cases, but most cases were political rather than legal conflicts. In other words, even if clear legal effects of a State's violation of *jus cogens* were determined, it remained questionable whether effective enforcement was possible and what entity would be capable of achieving it. Recently, certain States had fallen victim to armed attacks in violation of Article 2, paragraph 4, of the Charter of the United Nations — in other words, in violation of a *jus cogens* norm — yet those cases served as a reminder that no appropriate sanctions were available. His delegation therefore requested that the Commission should take a cautious approach to the topic.

47. **Ms. Wan Sulaiman** (Malaysia) said that her delegation greatly appreciated the work done by the Special Rapporteur on the draft articles on the expulsion of aliens. It was pleased that the Special Rapporteur had duly noted that Malaysia did not recognize refugee status, as it was not a party to the Convention relating to the Status of Refugees or the Protocol relating to the Status of Refugees. In respect of its request that the former draft article 20 (Obligation to respect the right to family life) should be rejected, her delegation noted the Special Rapporteur's view that the request was based on national considerations and not on arguments from positive international law or trends confirmed by practice. She expressed support for the new formulation of the draft article, which addressed her delegation's concerns. Given that the issue of expulsion of aliens was a complex one and was mainly governed by national laws, her delegation maintained its position that the final form of the draft articles should be determined at a later stage.

48. With regard to the topic "Protection of persons in the event of disasters", her delegation reiterated its position concerning the draft articles provisionally adopted by the Commission at its sixty-second, sixty-third and sixty-fifth sessions. Former draft article 11, now renumbered as draft article 14, focused on the consent of the affected State to the provision of external assistance, which was in line with the international law principle of the sovereignty of States. However, the Drafting Committee had identified two situations in which, in its view, consent was implied or a lack of consent would not bar the provision of assistance: first, where there was no functioning government to grant consent and, second, where consent was being refused arbitrarily in the face of a manifest need for external assistance. In her delegation's view, the draft article should not allow for consent to be implied or for the need for consent to be dispensed with completely. In the absence of a functioning government, it might be acceptable from a humanitarian standpoint for consent to be implied, since no consent could be given in that situation. However, it was not clear who was to determine whether a government was actually in existence and

whether or not it was functioning. In the case of arbitrary refusal of consent, clarification was needed as to how the article was to be applied and, in particular, who was to determine the seriousness of the situation requiring assistance and whether consent was indeed being refused arbitrarily.

49. Her delegation welcomed the inclusion of the former draft article 3 bis, now renumbered as draft article 4, since it was vital to ensure a clear and consistent interpretation of the terms used in any international legal instrument. Her delegation endorsed subparagraphs (a), (b), (c), (d) and (f) of the draft article. However, it had reservations about the inclusion of military personnel in the definition of "relief personnel" in subparagraph (e), since an armed presence in a State might be interpreted as an encroachment on that State's sovereignty, which would be a violation of international law. At the same time, her delegation understood that in certain situations of ongoing armed conflict in a location struck by disasters, a military presence would be essential for the safety and security of the victims, relief personnel and even equipment and goods. It also took note of draft article 17, under which the affected State must take the necessary measures, within its national law, to facilitate the prompt and effective provision of relief personnel, including military personnel, and other legislative, executive or administrative measures. The affected State must have overall direction, control, coordination and supervision of assistance within its territory.

50. In draft article 18, the replacement of the phrase "all necessary measures" with the phrase "appropriate measures" allowed the affected State a margin of discretion in deciding what action to take. Her delegation proposed that the words "subject to the available resources and capabilities" should be inserted after the words "the affected State shall", as the standard of care or due diligence might vary depending on circumstances such as the economic situation of the affected State, the availability of technical expertise and resources and the magnitude of the disaster.

51. Draft article 20 (Relationship to special or other rules of international law) incorporated the ideas expressed in former draft articles 17 and 18 but took a simpler approach. Her delegation was in favour of the draft article, as it upheld the general principles of international law governing the sovereignty, territorial integrity and political independence of the affected State.

52. **Mr. Pírez Pérez** (Cuba) said that, bearing in mind the Commission's mandate concerning the codification of international law, it was important to ensure that texts were discussed and brought to a successful conclusion after they had been adopted by the Commission. The articles on responsibility of States for internationally wrongful acts and on diplomatic protection, on which the Commission had worked for a number of years, still awaited the consent of Member States in order to become conventions that would make a positive contribution to the codification of international law.

53. His delegation welcomed the Commission's work on the topic of the protection of persons in the event of disasters. Any proposed set of rules of international law must focus on questions of a general nature and respect the spirit of the Charter of the United Nations. The phase of disaster prevention was especially important for the preservation of human life, particularly in developing countries. His delegation was pleased to note that the consent of the affected State to assistance in the event of natural disasters was an essential element of the draft articles. The provision of such assistance must always be based on respect for the principles of sovereignty and self-determination.

54. The draft articles produced by the Commission should not, under any circumstances, give rise to interpretations that could undermine the principle of non-interference in the internal affairs of States. Every affected State had the sovereign right to decide whether to request or accept the assistance offered by international organizations or other countries in the event of a disaster.

55. Cuba had had extensive experience with large-scale natural disasters and had a comprehensive response system based on the fundamental principle of safeguarding human life and protecting the population. It also attached great importance to the protection of relief personnel and their goods and equipment. His delegation favoured the future elaboration of a draft convention on the topic, provided that it took account of the principles of international law and those enshrined in the Charter, particularly respect for State sovereignty. Despite the economic, commercial and financial embargo imposed on Cuba for more than 50 years, the country was expanding its cooperation

with many countries facing natural disasters. His delegation therefore urged the Commission to continue its work on a topic of great importance for the international community.

56. With regard to the draft articles on the expulsion of aliens, his delegation believed that the codification of the human rights of persons who had been or were being expelled was a useful exercise, provided that it was guided by the principle of comprehensive protection of those rights and did not infringe on the sovereignty of States. His delegation recommended including an article that provided for the State of destination to be notified before an expulsion was carried out and also a reference to the right of persons who had been or were being expelled to communicate with representatives of the relevant consulate.

57. In draft article 2 (Use of terms), subparagraph (b), his delegation recommended that the term "citizenship" should be used instead of "nationality", given that citizenship was what linked an individual politically and legally to a State. Nationality, on the other hand, was an attribute that defined each individual's lifelong distinctive features on the basis of culture, idiosyncrasies and traditions. Draft article 3 (Right of expulsion) should include a reference to respect for domestic law and the maintenance of each State's public security. Draft article 7 provided that a stateless person could be expelled only on grounds of national security or public order, but in order to be consistent with draft article 5, paragraph 2, it should include a reference to any ground provided for under the domestic law of the expelling State.

58. In draft article 15 (Vulnerable persons), the concepts of "children" and "older persons" should be defined. The provision as it stood was imprecise and ambiguous, since in neither case was an age range given that could serve as a basis for evaluating the vulnerability of such persons. In addition, the protection of pregnant women provided for in the draft article should be extended to all women and girls, and should cover the entire expulsion process. His delegation proposed the following wording for the first part of paragraph 1 of the draft article: "Boys and girls, women, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion or are being expelled shall…". A reference to girls should also be added to paragraph 2 of the draft article.

59. Draft article 19, paragraph 1 (b), stated that an alien detained for the purpose of expulsion must, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty. In his delegation's view, such aliens should be separated not only from convicted persons but also from persons who were held in custody as a precautionary measure for alleged crimes. In draft article 18, the term "family life" should be defined, given the impact that the term had on the application of the draft article.

60. Draft article 22, paragraph 2, stated that an alien could be expelled to any State where he or she had a right of entry or stay. That matter did not need to be included in that paragraph, as it was covered in paragraph 1, which referred to any State willing to accept the alien at the request of the expelling State or of the alien in question. Indeed, even if a State had granted an alien permission to enter or stay in its territory, it was not obliged to accept the alien again if it invoked the grounds of public order or security.

61. Draft article 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment) should include the obligation to demonstrate real risk to the alien, as the reference to "substantial grounds" for believing that an alien was in danger was inadequate and was liable to subjective interpretation.

62. In draft article 28 (International procedures for individual recourse), it should be made clear, from a *ratione materiae* and *ratione personae* standpoint, which international body would be competent to determine whether the grounds for expulsion listed in draft article 5 existed or not. The draft article should also specify whether the competent international body would be one recognized by the expelling State or by the expelled person. Draft article 29, which referred to the readmission of an alien to the expelling State if the expulsion had been unlawful, should specify that the competent authority that could revoke a decision handed down by a domestic body must be a competent authority of the expelling State.

63. His delegation had no objections or comments with regard to the remainder of the draft articles, except to reiterate its view that the protection of the human rights of persons who had been or were being expelled could not constitute a limit on the exercise of

a State's right to carry out expulsions. The Cuban Criminal Code provided for the expulsion of aliens as one of the additional sanctions that the sanctioning tribunal could impose on individuals. It also provided that the sanction of expulsion could be applied to an alien when a competent tribunal found that the nature of the offence, the circumstances of its commission or the personal character of the defendant indicated that his or her continued presence in Cuba would be harmful. It further provided that expulsion could be imposed as an additional measure once the principal sanction had been completed and granted the Ministry of Justice the discretion to decide to impose such expulsion while the alien was still serving his or her sentence.

64. Turning to chapter XIV of the report, on other decisions and conclusions of the Commission, he noted that the Commission bore in mind the principle of the rule of law in all its work and said that the topic should always be addressed in accordance with the mandate conferred by Member States. His delegation was pleased that, in its current work, the Commission was aware of the interrelationship between the rule of law and the three pillars of the United Nations, namely peace and security, development, and human rights, without emphasizing one at the expense of the other, and that it always acted in accordance with its mandate concerning the progressive development and codification of international law.

65. His delegation wished to recognize the Commission's important contribution to the training of future jurists from developing countries in international law through the International Law Seminar. Over many years, Cuba had demonstrated its unreserved respect for international law and its support for the Commission's work. In that connection, his delegation called on the Commission to take States' opinions and concerns into account in its work and not to submit to the Committee texts that could not be changed, as that would hamper the objective of codification. Closer interaction between the special rapporteurs and the Committee would be helpful to that end, as his delegation had been pointing out for a number of years.

66. Lastly, his delegation called on Member States to ensure that the Commission's important work continued to bear fruit through the birth of new international conventions that would undoubtedly make a positive contribution to the ordering of current international relations, compliance with international obligations and respect among all Member States.

67. **Ms. Chadha** (India), having welcomed the adoption on second reading of the draft articles on the expulsion of aliens, said that the approach taken to the right of a State to expel an alien and the rights and remedies available to a person subject to expulsion, including the legal consequences of unlawful expulsion, was in general acceptable to her delegation. With regard to draft article 3, her delegation recognized in principle the right of a State to expel an alien from its territory in accordance with the applicable rules of international law, particularly human rights law. The State concerned must also take into account the minimum standards for the treatment of aliens.

68. Draft article 12, which prohibited resort to expulsion in order to circumvent an extradition procedure, was a convincing provision. Although expulsion and extradition both resulted in the departure of a person from the territory of the State in question, the two procedures had entirely different legal bases and one could not be used as an alternative to the other.

69. Further clarification was required with regard to the suspensive effect of an appeal against an expulsion decision under draft article 27, recourse to a competent international body under draft article 28 and the readmission of aliens to the expelling State under draft article 29, since there was insufficient State practice in those areas. Recourse to an international body might raise issues relating to the competence of such bodies where the expelling State was not a party to the relevant international instrument.

70. The draft articles on the protection of persons in the event of disasters did not, in her delegation's view, represent the codification of international law. They could, however, be used as guidelines by the stakeholders concerned, especially assisting States and entities. Her delegation appreciated the fact that draft article 4, subparagraph (a), referred not only to the territory of the affected State but also to its de jure and de facto jurisdiction and control. However, the request or consent of the affected State should be the legal basis for the provision of external assistance in the form of equipment and goods by assisting States or entities pursuant to subparagraphs (d) and (f) of the draft article. With regard to subparagraph (e), her delegation recognized that, in the event of a disaster as

defined in draft article 3, relief personnel might need to include military personnel. However, the provision of military personnel or equipment as a form of external assistance required the prior, express and informed consent of the affected State. Such consent could not be presumed by assisting States or entities.

71. Her delegation was pleased to note that draft article 18 provided for the affected State's general responsibility to take appropriate measures for the protection of relief personnel, equipment and goods in its territory. The expression "all necessary measures" proposed by the Special Rapporteur in his seventh report would have placed an onerous burden on the affected State.

72. Her delegation would reserve comment on the other draft articles adopted by the Commission, including the meanings of the terms "other assisting actor", "competent intergovernmental organization", "relevant non-governmental organization" and "other entity" in draft article 4, subparagraph (c).

73. **Ms. Christensen** (Observer for the International Federation of Red Cross and Red Crescent Societies), having welcomed the Commission's work on the topic "Protection of persons in the event of disasters", said that her delegation had some concerns about the definition of relief personnel in draft article 4, subparagraph (e), which placed military personnel on exactly the same footing as civilian personnel for the purpose of disaster response operations. Similarly, and somewhat repetitively, draft article 17 required the affected State to facilitate the provision of civilian and military relief personnel in fields such as privileges and immunities, visa and entry requirements, work permits and freedom of movement. While foreign military personnel and assets could, in appropriate circumstances, add critical, life-saving value to international operations, the International Federation of Red Cross and Red Crescent Societies (IFRC) and many other humanitarian agencies had expressed concerns that an indiscriminate mixing of military and civilian relief efforts could pose significant risks to the acceptance and security of humanitarians, both in the country where they were used and in others, where the precedent would be noted. As a result, both humanitarians and States had embraced the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (the Oslo Guidelines).

74. The definition of relief personnel also equated persons sent to provide humanitarian relief with those sent to assist in the field of disaster risk reduction. In accordance with that definition, the measures required of States under draft articles 17 and 18 in order to facilitate the entry and ensure the protection of personnel would be required to exactly the same degree for disaster reduction advisers in a time of calm as for humanitarian personnel in the midst of a crisis. The particularity of humanitarian action should be maintained, and the measures expected in situations of humanitarian crisis should be confined to those situations in order to avoid unnecessary burdens on States' normal procedures and ensure their willingness to comply when needs were urgent.

75. With regard to the draft articles as a whole, her delegation aimed to respond to the Commission's request for written comments and urged all States to follow suit. In particular, they should ensure that their disaster management authorities were fully engaged, as the Commission would benefit greatly from their operational experience.

76. The draft articles had important strengths but there was still room for improvement in a number of respects. At the same time, it would soon become necessary to decide on their final form. In her delegation's view, it would not be advisable to present the draft articles as a set of guidelines, as they might be seen to compete with, and hamper progress in, the implementation of existing guidelines on very similar themes, in particular the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IDRL Guidelines) adopted by the States parties to the Geneva Conventions. On the other hand, a strengthened global legal framework would increase the potential to further enhance the work accomplished through soft instruments. The Commission's text could serve as a source for further reflection on that possibility.

77. The elaboration of a treaty was not a project to be taken lightly and her delegation would be happy to help promote the dialogue, sharing of experience and particularly the gathering of operational evidence necessary for States to take an informed decision in that regard. Through its disaster law programme, IFRC had supported national societies and national authorities in over 50 countries in their undertaking of formal processes to examine and strengthen their laws

and procedures for international disaster assistance. Its findings might be of use to the discussion.

78. In 2011, the thirty-first International Conference of the Red Cross and Red Crescent had reaffirmed its role as a key international forum for continued dialogue on the strengthening of disaster laws. Her delegation hoped and expected that the thirty-second conference at the end of 2015 would provide an opportunity to advance dialogue on that important topic. IFRC would be organizing regional dialogues on the future of international disaster response law in preparation for the Conference and hoped for the support of Member States in engaging the relevant officials.

79. **Mr. Gevorgian** (Chairman of the International Law Commission), introducing chapters VI to IX of the Commission's report on the work of its sixty-sixth session (A/69/10), said that, thanks to a concerted effort in recent years, the Commission had completed its work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)". Over the past three years, the Commission had been dealing with the topic primarily in the context of a Working Group. In 2013, the Commission had presented to the Committee a report of the Working Group, which had evaluated the Commission's progress on the topic and had generally been well received by the Committee. Accordingly, in 2014, the Working Group had focused on finalizing its work, taking into account the views of Governments, as expressed in the Committee, on the customary international law status of the obligation to extradite or prosecute; gaps in the existing conventional regime; the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; and other matters of continued relevance in the 2009 General Framework. The final report on the topic, which had been adopted by the Commission and was set out in paragraph 65 of its report, was thus an amalgamation of the 2013 report of the Working Group and an analysis of the additional issues that the Working Group had discussed in 2014.

80. The final report placed the topic within the broader framework of efforts to combat impunity while respecting the rule of law. It had been produced against the background of the 2010 study by the Secretariat, "Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'" (A/CN.4/630), which provided an analysis of the typology of provisions containing the obligation in multilateral instruments, and the judgment of the International Court of Justice of 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. The Commission had taken the view that the scope of the obligation to extradite or prosecute under the relevant treaty regimes should be analysed on a case-by-case basis.

81. Given the diversity in the formulation, content and scope of the obligation in conventional practice, it was considered of doubtful utility to seek to harmonize the various treaty clauses containing the obligation, as each would have been negotiated within the context of a particular treaty regime. However, there were some general trends and common features concerning the obligation, particularly in more recent instruments modelled on article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague formula"). Accordingly, the report, following an analysis of the typology of treaty provisions concerning the obligation and predominantly drawing upon *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, offered a set of considerations regarding the implementation of the obligation, concerning in particular the criminalization of the relevant offences at the national level and the consequences of delay, the establishment of jurisdiction, the obligation to investigate, the obligation to prosecute, the obligation to extradite and the consequences of non-compliance.

82. When the Commission had adopted the draft code of crimes against the peace and security of mankind in 1996, article 9 of the draft code, which provided for an obligation to extradite or prosecute with respect to genocide, crimes against humanity, war crimes and crimes against United Nations and associated personnel, had been presented as a matter of progressive development of international law. Further developments in international law since then reflected State practice and *opinio juris* in that respect. However, since the Commission had decided to present the outcome of its work on the topic in the form of a report, it had considered it unnecessary to engage in an analysis of the customary law character of the obligation. That did not, however, imply that the

Commission had found that the obligation had not become or was not yet crystallizing into a rule of customary international law, whether a general or regional one. It should also be recalled that in the *Belgium v. Senegal* case the International Court of Justice had refrained from addressing that issue. The Commission hoped that the report would be useful for States, particularly with regard to appreciating the kinds of obligations they might assume when they became parties to particular conventional regimes containing the obligation to extradite or prosecute.

83. On the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", the Commission had had before it the second report of the Special Rapporteur (A/CN.4/671), containing six draft conclusions. Following the debate in the plenary, the six draft conclusions had been referred to the Drafting Committee. The Drafting Committee had decided to reformulate them into five draft conclusions, which had then been provisionally adopted by the Commission. The text of the provisionally adopted draft conclusions, together with commentaries, could be found in paragraph 76 of the Commission's report.

84. The purpose of draft conclusion 6 was to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified. Paragraph 1 reminded the interpreter that the identification of subsequent agreements and subsequent practice for the purposes of article 31, paragraph 3, of the Vienna Convention on the Law of Treaties required particular consideration of the question whether the parties, by an agreement or a practice, had taken a position regarding the interpretation of a treaty or whether their conduct had been motivated by other considerations. The purpose of paragraph 2 was to acknowledge the variety of forms that subsequent agreements and subsequent practice could take under article 31, paragraph 3 (a) and (b). It was intended to reflect the fact that the Vienna Convention had recognized that the treaties within its scope must also be interpreted by taking into account less formal agreements and practice. Paragraph 3 of the draft conclusion provided that, in identifying subsequent practice under article 32 of the Vienna Convention, the interpreter was required to determine whether, in particular, conduct by one or more parties was in the application of the treaty.

85. Draft conclusion 7 dealt with the possible effects of subsequent agreements and subsequent practice in interpretation. It sought to indicate how subsequent agreements and subsequent practice might contribute to the clarification of the meaning of a treaty. Paragraph 1 emphasized that subsequent agreements and subsequent practice must be seen in their interaction with other means of interpretation. It indicated further that the taking into account of subsequent agreements and subsequent practice under article 31, paragraph 3, of the Vienna Convention might help to clarify the meaning of a treaty in the sense of a narrowing down of possible meanings of a particular term or provision, or of the scope of the treaty as a whole. Alternatively, such taking into account might contribute to a clarification in the sense of confirming a wider interpretation.

86. Paragraph 2 of draft conclusion 7 concerned possible effects of subsequent practice in the context of article 32 of the Vienna Convention that did not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, could confirm the interpretation that the interpreter had reached in the application of article 31 of the Vienna Convention or determine the meaning when the interpretation in accordance with article 31 left the meaning ambiguous or obscure or led to a result that was manifestly absurd or unreasonable.

87. Paragraph 3 of the draft conclusion addressed the question of how far the interpretation of a treaty could be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what was considered interpretation under article 31, paragraph 3 (a) and (b), of the Vienna Convention. The paragraph reminded the interpreter that agreements subsequently arrived at might serve to amend or modify a treaty, but that such subsequent agreements were subject to article 39 of the Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3 (a). While acknowledging that there were examples to the contrary in case law and diverging opinions in the literature, paragraph 3 of the draft conclusion stipulated that the possibility of amending or modifying a treaty by subsequent practice of the parties had not been generally recognized.

88. Draft conclusion 8 identified some criteria that might be helpful for determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. Paragraph 1 specified

that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depended, inter alia, on its clarity and specificity. The use of the term "inter alia" indicated to the interpreter that the provision should not be seen as exhaustive. Paragraph 2 dealt only with subsequent practice under article 31, paragraph 3 (b), of the Vienna Convention and specified that the weight of subsequent practice also depended on whether and how it was repeated. Paragraph 3 addressed the weight that should be accorded to "other subsequent practice" under article 32 of the Vienna Convention.

89. In draft conclusion 9, entitled "Agreement of the parties regarding the interpretation of a treaty", paragraph 1 was intended to capture the common element of subparagraphs (a) and (b) of article 31, paragraph 3, of the Vienna Convention, which was the agreement between the parties, in substance, regarding the interpretation of the treaty. It set forth the principle that an "agreement" under article 31, paragraph 3 (a) and (b), required a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept it. The aim of the second sentence of paragraph 1 was to reaffirm that "agreement", for the purpose of article 31, paragraph 3, need not, as such, be legally binding. Paragraph 2 of the draft conclusion confirmed the principle that not all the parties must engage in a particular practice in order to constitute agreement under article 31, paragraph 3 (b). It clarified that acceptance of such practice by those parties not engaged in the practice could indeed be brought about by silence. Nonetheless, the draft conclusion took into consideration the fact that agreement by way of silence was not easily established and depended to a large extent on the circumstances of the specific case.

90. Draft conclusion 10 addressed a particular form of action by States that might result in a subsequent agreement or subsequent practice under article 31, paragraph 3, of the Vienna Convention or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of States Parties. In order to acknowledge the wide diversity of such Conferences and the rules under which they operated, paragraph 1 provided a broad definition of the term "Conference of States Parties" for the purpose of the draft conclusions, which only excluded action of States as members of an organ of an international organization.

91. Paragraph 2 provided that the legal effect of a decision adopted within the framework of a Conference of States Parties depended primarily on the treaty in question and any applicable rules of procedure. It recognized that decisions of Conferences of States Parties might, under certain circumstances, constitute subsequent agreement or subsequent practice for treaty interpretation under articles 31 and 32 of the Vienna Convention. That conclusion was limited by the acknowledgement that decisions of Conferences of States Parties often provided a range of practical options for implementing the treaty that might not necessarily embody a subsequent agreement and subsequent practice for the purpose of treaty interpretation.

92. Paragraph 3 set forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, of the Vienna Convention must relate to the content of the treaty. Thus, what was important was the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision was reached.

93. On the topic "Protection of the atmosphere", the Commission had had before it a detailed first report by the Special Rapporteur (A/CN.4/667), which addressed the general objective of the project by, among other things, providing the rationale for work on the topic, delineating its general scope, identifying the applicable sources of law and relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject. In the report, the Special Rapporteur had also presented three draft guidelines concerning the definition of the term "atmosphere", the scope of the draft guidelines and the legal status of the atmosphere.

94. The introduction of the debate by the Special Rapporteur was summarized in paragraphs 80 to 84 of the report. In particular, he had recalled the background to the inclusion of the topic in the Commission's agenda, the debate in the Committee the previous year and the highly technical nature of the subject. In view of the deteriorating state of the atmosphere, the Special Rapporteur had also noted that the topic was a pressing concern for the international community and highlighted the need for the Commission to address it from the perspective of general international law. He

had noted that the contemporary challenges to the atmosphere concerned three areas, namely tropospheric transboundary air pollution, stratospheric ozone depletion and climate change. He had also introduced the three draft guidelines proposed in his report.

95. The summary of the debate, containing general comments and specific comments on the draft guidelines, was reflected in paragraphs 85 to 115 of the report. The debate had been wide-ranging, reflecting the legally, politically, and technically and scientifically complex nature of the subject. The topic had been included in the Commission's programme the previous year on the understanding that work would proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution. It had also been understood that the topic would not deal with, but was also without prejudice to, questions such as liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights.

96. The topic would also not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which were the subject of negotiations among States, or seek to "fill" gaps in the treaty regimes. It had been understood that questions relating to outer space, including its delimitation, were not part of the topic, and that the outcome of the work on the topic would be draft guidelines that did not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

97. Given that it had also been understood that the Special Rapporteur's reports would be based on those considerations, there had been a wide-ranging debate as to whether or not the terms of the understanding had been complied with in the preparation of the first report. Comments had also been made on the methodological approach taken by the Special Rapporteur, which had sought to focus on the atmosphere per se as a single composite unit, rather than taking into account State practice and practical realities. A focus on the rights and obligations of States and non-State actors in the field had been viewed by some members as the best guarantee of the protection and conservation of the atmosphere.

98. In his concluding remarks, reflected in paragraphs 116 to 122 of the report, the Special Rapporteur had advocated a middle-of-the road approach that involved maintaining the 2013 understanding, since it had been the basis for the Commission's decision to take up the topic, while appealing for flexibility in identifying relevant issues in a manner that would help the Commission to make progress in its consideration of the topic. He had stressed the importance of viewing the atmosphere as a comprehensive single unit, not subject to division along State lines. It was fluid and dynamic, such that it would be impractical, if not impossible, for the purposes of the project, to divide it into the air that was under the territorial jurisdiction and control of one State and the air that was outside that jurisdiction.

99. He had also welcomed the helpful comments, suggestions and constructive criticisms made by members. He had noted that he was inclined to defer referral of the draft guidelines to the Drafting Committee until the following year, as in that way he would be afforded an opportunity to reformulate parts thereof in the light of the comments made. It was also expected that the following year the Commission would have the benefit of holding consultations with members of the scientific community. A similar approach had been taken by the Commission when it had dealt with the law of transboundary aquifers.

100. The further development of the topic would require information on State practice. In that connection, as noted in chapter III of the report, the Commission requested States to provide relevant information by 31 January 2015 on domestic legislation and the judicial decisions of domestic courts.

101. Work on the topic "Immunity of State officials from foreign criminal jurisdiction" had been proceeding at an encouraging pace since the Commission had provisionally adopted draft articles on it the previous year. In 2014, the Commission had had before it the third report of the Special Rapporteur (A/CN.4/673), which focused on the subjective normative elements of immunity *ratione materiae*, leaving aside for future consideration its material and temporal scope. In other words, it sought to deal with the question of who enjoyed such immunity, while the meaning of the phrases "official acts" and "acts performed in an official capacity", and the fact that immunity *ratione materiae* was not time-limited since it continued after an official left office, would be the

subject of separate treatment the following year. In its analysis of the subjective scope of such immunity, the report addressed in particular the concept of an "official", some terminological issues and substantive criteria that could be used to identify persons who might be covered by such immunity.

102. The Special Rapporteur had proposed draft article 2, subparagraph (e), which contained a definition of the term "State official" for the purposes of the draft articles, to be included in Part One of the text, and draft article 5 concerning the subjective scope of immunity *ratione materiae*, for inclusion in Part Three. Following consideration of draft article 2, subparagraph (e), and draft article 5 by the Drafting Committee, the Commission had provisionally adopted them; they were set out, together with commentaries, in paragraphs 131 and 132 of the Commission's report. Four further definitions for eventual inclusion in draft article 2 had been proposed by the Special Rapporteur in her second report (A/CN.4/661) in 2013 and remained in the Drafting Committee.

103. General international law did not provide a definition of "State official". The Commission considered the formulation of such a definition for the purposes of the draft articles to be advisable and feasible, even though some members considered it unnecessary, since in their view the essence of immunity *ratione materiae* was the nature of the acts and not the individual who carried them out on behalf of the State.

104. As currently formulated in draft article 2, subparagraph (e), the definition of "State official" was broad enough to cover the troika of Head of State, Head of Government and Minister for Foreign Affairs and those individuals who exercised a range of other State-related functions in a variety of capacities. It had been considered unnecessary to refer expressly in the definition to the Head of State, Head of Government and Minister for Foreign Affairs, as their position as State officials was self-evident. In the commentaries to the draft articles provisionally adopted in 2013, immunity was justified on representational and functional grounds. The current definition thus combined those two elements. The use of the present tense of the verbs "represent" and "exercise" was without prejudice to the application of immunity *ratione materiae* to former State officials.

105. The definition employed the word "individual" as opposed to "person" in order to underscore the fact that legal persons were excluded from its scope. It did not address the nature of the acts performed. The discussion on the material scope of immunity *ratione materiae* in 2015 was expected to determine the substance of any limits on the scope of such immunity.

106. The term "State functions" was not a term of art. In general, international law did not govern the structure of the State and the functions of its organs. It was up to each State to determine how it structured, internally, its administration and the functions that might be assumed by its government. That suggested the need to view State functions broadly; what constituted them would depend on the circumstances of each case, and might bear on procedural aspects concerning the invocation of immunity. Both internal law and practice and international law had a bearing on determining whether the functions in question appertained to the State or to the exercise of the functions of government. Some members of the Commission considered the reference to State functions imprecise.

107. Draft article 5 (Persons enjoying immunity *ratione materiae*) corresponded to draft article 3 (Persons enjoying immunity *ratione personae*), which had been provisionally adopted the previous year and appeared in Part Two of the draft articles. Focusing on the subjective scope, draft article 5 was the first of the draft articles envisaged in Part Three. Subsequent articles would seek to address the material and temporal scope of immunity *ratione materiae*.

108. It was widely acknowledged that State officials enjoyed immunity *ratione materiae* for their official acts or for acts performed in an official capacity. However, an individual had to be regarded as a State official in order to enjoy such immunity. Conversely, the fact that an individual was a State official did not necessarily mean that he or she would enjoy immunity *ratione materiae* for acts that might be performed in a private capacity.

109. As currently formulated, draft article 5 provided that State officials acting as such enjoyed immunity *ratione materiae* from the exercise of foreign criminal jurisdiction. Even though the draft article focused on the subjective scope, the phrase "acting as such" sought to flag the importance of a link between the official and the State, even though the precise nature of

such link would be addressed as part of the material scope of immunity. It was intended to refer to the State official as an individual who represented the State or who exercised State functions. Once the question of whether or not an act had been performed in an official capacity was addressed, the reference to acting "as such" could be reviewed.

110. Paragraph 3 of draft article 4 (Scope of immunity *ratione personae*), provisionally adopted in 2013, provided that the cessation of immunity *ratione personae* was without prejudice to the rules of international law concerning immunity *ratione materiae*. When the material scope of immunity *ratione materiae* was addressed, the question of the immunity *ratione materiae* of former Heads of States, Heads of Government and Ministers for Foreign Affairs would be one of the issues to be taken into account.

111. The Commission was grateful to all those Governments that had responded to its request the previous year for information on practice regarding immunity *ratione materiae*. It sought information from as many States as possible and therefore reiterated its request in Chapter III of the report; more specifically, it requested States to provide information on their domestic law and their practice, in particular judicial practice, with reference to the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction. The Commission had also added a request for similar information with respect to exceptions to the immunity of State officials from foreign criminal jurisdiction. It would be appreciated if such information could be received by 31 January 2015.

112. *Ms. Millicay (Argentina), Vice-Chair, took the Chair.*

113. **Mr. Popkov** (Belarus), referring to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", said that the presentation of the Commission's proposals in the form of practical guidance would foster the further enhancement of States' practice with regard to law enforcement and international treaties in the field of criminal law. For his delegation, one of the key aspects of the implementation of the obligation to extradite or prosecute was the establishment of an international legal basis for ensuring that those who had committed criminal offences were punished.

114. A decision by a State not to extradite an individual even when there were serious legal and other grounds for doing so must not result in impunity. It was important to take a balanced approach so as to overcome difficulties in relations between States connected with potential refusals to extradite persons suspected of ordinary offences of a serious nature. In particular, it would be useful, on the basis of the Commission's conclusions, to clarify or expand the standard conditions for extradition in certain international treaties and to provide for guarantees of their implementation that could be offered by interested States.

115. In the event that extradition was refused, the obligation to prosecute should be more categorical in nature and should include cooperation between the law enforcement agencies of each of the States involved. In order to make the obligation more effective where there were reasons for refusing extradition, it was important not to rule out the possibility of States establishing jurisdiction under their domestic law over crimes committed outside their territory or extending foreign jurisdiction to such acts on other grounds.

116. The Commission could continue to work on the topic with a view to preparing clear guiding principles and recommendations.

117. With regard to the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", his delegation supported the Special Rapporteur's approach and his general view that subsequent conduct by a State party was a proper basis for interpreting a treaty only if it occurred in the process of implementing the treaty and was taken into account by the other parties. However, the everyday conduct of a State in connection with the application of a treaty did not always imply interpretation. Interpretation occurred only when questions arose as to the precise content of an international legal norm and the original intent of the parties in relation to it.

118. His delegation fully agreed with draft conclusion 6 (Identification of subsequent agreements and subsequent practice) in its current formulation. With regard to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), judicial and quasi-judicial practice were attractive in that they were easy to access, identify and study and because of the quality of the legal arguments used in judicial records. However, such practice had

certain shortcomings. There were sometimes inconsistencies, even within the practice of a single judicial body, and practice was somewhat fragmentary and was not always the result of proper interaction between a judicial institution and all the interested parties to a treaty on the question of interpretation. The real content of a norm could not be established without taking full account of the opinions of States, which played a key role in the interpretation of treaties.

119. The commentary to draft conclusion 6 should specify that the practice of non-State actors with respect to the application of a treaty could not be used for the purposes of interpretation in isolation from the relevant State's views on such practice. At the same time, such practice was valuable for helping a State to understand fully its international legal obligations.

120. With regard to the question of how frequently subsequent practice was repeated and how uniform it was, a clear distinction should be drawn, at least in the commentary to draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation), between repeated practice as a means of interpreting an international treaty and practice that led to the formation of a norm of customary international law and, accordingly, to a change in the international treaty regime.

121. Clarification was needed with respect to the view set out in draft conclusion 9, paragraph 2, that silence on the part of one or more parties could constitute acceptance of the subsequent practice when the circumstances called for some reaction. Specifically, it was necessary to provide that a party that accepted a practice by way of silence should be able to obtain information about such practice and its implications for interpretation and should have the opportunity to contest it.

122. In draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties), the phrase "under these draft conclusions" should be replaced with "for the purposes of these draft conclusions", as that would limit the scope of the text as defined by the Commission and avoid conflict with other international instruments. In paragraph 3 of the draft conclusion, it would be more correct to state that the authority of an agreement in substance between the parties regarding the interpretation of a treaty directly depended, inter alia, on the form and the procedure by which the decision had been adopted, including the participation of all interested States in the preparation and adoption of the decision.

123. His delegation fully supported draft conclusion 11 (Scope for interpretation by subsequent agreements and subsequent practice) as proposed by the Special Rapporteur. Interpretation in good faith in any form should not replace the existing procedure for amending a treaty, when that followed logically from the treaty itself.

124. Noting the Special Rapporteur's decision to address subsequent agreements and subsequent practice in relation to constituent treaties of international organizations and also the practice of treaty bodies in his third report, which would be submitted to the Commission at its sixty-seventh session in 2015, his delegation called on the Special Rapporteur to take into account not only the opinions of such organizations themselves concerning their own powers but primarily the views of States as parties to international treaties, including the constituent treaties of relevant international institutions.

125. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, his delegation attached great importance to the work done on the criteria that could be used to determine whether a person could be considered an official for the purposes of the draft articles. The outcome of that work would also be useful in discussing, as a matter of the progressive development of international law, the question of expanding the troika that enjoyed immunity *ratione personae*. In his delegation's view, the establishment of an exhaustive list of persons who could be added to the troika would be not only problematic but also detrimental for practical reasons. At the same time, the identification of general criteria characterizing the legal status of such persons and their significance for the representation of the State in international relations might in itself bring greater clarity to the issue.

126. His delegation supported the Commission's use of the concept of an "official", since as a general rule criminal jurisdiction was exercised in respect of natural persons, not legal persons. At the same time, the definition of the term "official" in draft article 2 might unduly narrow the categories of persons and situations in respect of which immunity in a foreign State constituted a guarantee of the independent exercise by such persons of important State functions at the

national and international levels. In that connection, his delegation called on the Commission to consider replacing the phrase "who represents the State" with the phrase "who holds State office" or otherwise to broaden the category of persons enjoying immunity by virtue of the office they held.

127. With regard to draft article 5 and the commentary thereto, it would be useful to develop the concept of "elements of governmental authority", as that would facilitate future work on the topic.

128. Lastly, in the course of work on the topic, it was important to draw not only on national and international judicial practice, treaty practice and the Commission's previous work, but also on States' domestic law concerning immunity.

129. **Ms. Zabolotskaya** (Russian Federation) said that, given the increasing importance of issues relating to the interpretation of international treaties, her delegation welcomed the Commission's work on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. The five draft conclusions provisionally adopted by the Commission were, in general, balanced and were in line with the final objective of the work on the topic. Their practical value was not in doubt. Together with the previous draft conclusions adopted at the Commission's sixty-fifth session, they would provide guidance for those whose everyday work involved the interpretation and application of international treaties.

130. With regard to draft conclusion 7, paragraph 1, it was legitimate to narrow, widen or otherwise determine the range of possible interpretations of a treaty in the light of subsequent agreements and practice, provided that that did not contradict the original intent of the parties; otherwise the draft conclusion would offer excessive freedom of interpretation, which could border on violation of the treaty. The 1969 Vienna Convention on the Law of Treaties was based on the principle that the genuine intentions of the parties to an international treaty were expressed first and foremost in the treaty itself and that identifying them was the main task of the interpreter. International judicial bodies, including the International Court of Justice, had stated on many occasions that the interpreter's task was not to review treaties or to identify in them anything that was not there, either overtly or indirectly.

131. With regard to draft conclusion 7, paragraph 3, her delegation called for the utmost caution with regard to the possibility of amending or modifying a treaty by subsequent practice, since that possibility was not generally recognized by judicial bodies. The position taken in the draft conclusion was justified to a large extent, since to provide otherwise would disrupt the stability of the treaty and would also create additional difficulties from the point of view of the parties' domestic law. If, in the process of applying a treaty, there arose a broad need for evolutive interpretation through subsequent agreements and practice, that was a sign that the treaty needed to be reviewed. The updating of a treaty through formal amendments to the text made it more precise and was a means of directly enshrining changes that had taken place in the parties' understanding of their obligations since they had signed the treaty.

132. Draft conclusion 8, paragraph 2, which provided that the weight of subsequent practice under article 31, paragraph 3 (b), of the Vienna Convention depended on whether it was repeated, gave rise to questions. The term "practice" in itself implied repetition; it was unlikely that a one-off practice would be sufficient to establish an agreement between the parties on the interpretation of the treaty. Accordingly, it would be more correct to state that consistent and agreed repeated practice of the parties was not an evaluation criterion but rather the necessary minimum for the recognition of a subsequent practice as an authentic means of interpretation, together with clearly expressed agreements, as referred to in article 31, paragraph 3 (a), of the Vienna Convention. In that sense, a parallel could be drawn between the use of subsequent practice as a means of interpreting a treaty and the principle of the formation of customary norms of international law.

133. Turning to the topic of immunity of State officials from foreign criminal jurisdiction, she said that her delegation fully supported draft article 2, subparagraph (e), as provisionally adopted by the Commission. Defining the term "official" by reference to the exercise of State functions or the representation of the State was the right approach. Her delegation also fully endorsed draft article 5, which provided that State officials acting as such enjoyed immunity from the criminal jurisdiction of a foreign State.

134. On the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", her delegation welcomed the choice of a report as the final form of the Commission's work. The report accurately

described States' views and, together with the study prepared by the Secretariat, would be useful for States in the interpretation, application and formulation of treaty provisions concerning the obligation.

135. With regard to the topic "Protection of the atmosphere", the difficulties pointed out by her delegation had been fully confirmed during the Commission's discussion of the first report of the Special Rapporteur. It was no easy task to find the right approach, given that many of the relevant issues were governed to a large extent by existing international legal instruments that were the product of difficult compromises. It was important not to upset the balance achieved. The Commission should therefore proceed cautiously and in full compliance with the understanding it had adopted when it had decided to include the topic in its agenda. Her delegation welcomed the Special Rapporteur's decision to postpone referral of the draft guidelines to the Drafting Committee so that they could be considered again in the light of comments from States and members of the Commission and the outcome of consultations with the scientific community.

The meeting rose at 1 p.m.