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(translation)

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At the 69th Session of the UN General Assembly

On Agenda Item 78

**Report of the 66th Session of the International Law Commission
(Part 1)**

New York, 27-29 October 2014

Mr. Chairman,

Since this is the first time I take the floor in the 6th Committee at the 69th session of the GA in my capacity as the representative of China, please allow me to congratulate you on your election as chairman. I am confident that you will steer this session to a successful conclusion. I also wish to thank the ILC for the succinct introduction of the report on its work at the 66th session. It is a very good basis for the discussions at the 6th committee.

We are pleased to see that significant progress and fruitful results have been achieved on all the topics of the 66th session of the ILC. The Chinese delegation is by and large satisfied with the work of the Commission and will, as always, support the work of the Commission in all its aspects.

Mr. Chairman,

I would like to begin by stating the Chinese delegation's views on the topic "Expulsion of Aliens." The 66th session of the ILC discussed the 9th report of the special rapporteur Mr. Kamto and adopted 31 draft articles at second reading. The Chinese delegation congratulates the ILC on the outcome of its work and appreciates the excellent work of Mr. Kamto.

The Chinese delegation believes that the basis of the expulsion of aliens as a rule of international law is the maintenance of the right of expulsion as an inherent sovereign right of a state. It embodies a state's legitimate and effective control of its territory and is born out of the need to maintain order. At the same time, exercises of the right of expulsion must comply with international treaties and customary international law as well as domestic laws. Appropriate measures must be taken to protect the basic human rights, dignity and humane treatment of aliens subject to expulsion, and strike a reasonable balance between state sovereignty and the basic human rights of aliens subject to expulsion. The Commission made unremitting efforts in this regard, but this set of draft articles adopted at second reading remains imbalanced in some aspects.

Let me cite a few examples: paragraph 2 of Article 19 says, “The extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority.” In practice, competent authorities on the extension of detention duration vary from state to state, and it is up to the state to decide whether to protect the rights of expelled aliens through judicial reviews or other means. In the absence of relevant rules and regulations in customary international law, it is not advisable to adopt a “one-size-fits-all” approach.

Paragraph 2 of Article 23 rules against expelling an alien to a state where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death. Given the fact that there is no international consensus on abolition of the death penalty, nor does international law prohibit the death penalty, every state is entitled to opt for or against the death penalty in the light of its need of judicial justice, its level of economic development, and its historical and cultural background. On the issue of the expulsion of aliens, it should be up to each state to make decisions vis-a-vis the death penalty.

In general, these draft articles are of positive significance to enhancing the protection of human rights. However, some of the articles overemphasize individual rights. They lack the support of general state practice and exceed state obligations under treaty law, and are thus likely to result in hampering relevant international cooperation and in impunity of criminals. Rather than leading to the ultimate realization of judicial justice, this may cause damage to public interests. Therefore, the Chinese delegation believes that the draft articles are not yet ready to become the basis of negotiations for an international convention. The UNGA may adopt a resolution to take note of them.

Mr. Chairman,

With regard to the “Protection of Persons in the Event of Disaster,” the Chinese delegation noted that the 66th session of the ILC adopted at first reading a

set of 21 draft articles and their commentaries. This marks a major progress at this stage of its work. The Chinese delegation appreciates the painstaking efforts undertaken by the special rapporteur Mr. Valencia-Ospina and other members of the Commission. We believe that this will help clarify the international rules applicable to disaster relief and further effectively promote and coordinate international disaster relief operations.

After a preliminary study of the draft articles, we noted that the draft strives to reach a balance between enhancing international cooperation and respecting state sovereignty. For example, Article 12 specifies that the affected state has the primary role in disaster relief. Paragraph 1 of Article 14 says that the provision of external assistance requires the consent of the affected state. We agree with these articles. At the same time, we also believe that the draft has drawbacks in the following two aspects.

First, in general, there exist imbalances between codification and development. The purpose of the Commission is the progressive development and codification of international law. Both endeavors should be based on existing principles and rules of international law as well as state practice. A salient characteristic of this draft is that it is short on *Lex Lata* but long on *Lex Ferenda*. Some of the articles lack the support of solid-based general state practice. For example, Article 13 says that the affected state has the duty to seek external assistance and Paragraph 2 of Article 14 says that consent to external assistance shall not be withheld arbitrarily. At the same time, in the related commentaries, there is an abundance of quotations from soft legal documents adopted by the UN and other international organizations but a paucity of supporting excerpts from legally binding international treaties, customary international law and case law.

Second, in specific terms, there is an abundance of regulations on the obligations of affected states which exceed the scope of existing laws and state practices and may affect state sovereignty. By virtue of internal sovereignty, a state has the duty to provide relief and assistance in the event of a disaster. This is

clearly stated in Paragraph 1 of Article 12. But this domestic duty does not mean that a sovereign state is also obligated to seek external assistance. A state does not have the duty or obligation to accept external assistance whether by customary international law or in state practice. China has noted that Article 13 uses the word “duty” rather than “obligation”—as in “duty of the affected State to seek external assistance.” It is meant to accommodate the concern of many countries since it is a weaker term than the “legal obligation” to seek external assistance. However, the legal connotations of the word “duty” are ambiguous and therefore it would be advisable to avoid its use. At the same time, Articles 13 and 14 spell out the duties and obligations of affected states while Article 16 lays down “the right of other states and international organizations to offer assistance to the affected state,” thus putting the affected state in a defensive and disadvantageous position as far as seeking and accepting external assistance are concerned. This runs in contravention of the principle of consent of concerned states and state sovereignty as well as the principle of the parity of rights and duties. As such, it is not conducive to international cooperation in disaster relief. In view of the above, China proposes to make appropriate adjustments to the language of Article 13, for example, to replace “has the duty to seek assistance” with “the affected state may seek assistance.”

Peaceful coexistence and harmonious development of humankind call for strengthening cooperation in providing international disaster relief and jointly responding to natural disasters. We hope that, when continuing its work on this topic, the Commission will adopt a cautious approach in considering relevant articles at the second reading and make necessary amendments in the light of the actual needs of affected states and peoples, in order to achieve better results in international disaster relief cooperation.

Mr. Chairman,

Because I won't be able to participate in our committee's deliberations next week due to prior engagements, please allow me to avail myself of this

opportunity to state the Chinese delegation's views on "The identification of customary international law."

As is known to all, customary international law is an important source of international law and plays an important role in the adjustments of interstate relations and the formation of international law. The identification and determination of rules of customary international law are controversial issues in the practice and theory of international law. The 66th session of the Commission discussed the second report submitted by the special rapporteur, Mr. Wood, including its 11 draft conclusions. We appreciate the excellent work of the Commission and the special rapporteur, and wish to make three points on this topic.

First, a balanced approach to the relationship between "general practice" and "*opinio juris*". General practice and *opinio juris*, or "accepted as law," are two constituent elements in the identification of customary international law and, as such, must be given balanced consideration without neglecting either one. Some argue that in the fields of international human rights law and international humanitarian law, the element of *opinio juris* alone suffices to establish rules of customary international law. This view is not supported by international practice, and formation of rules of customary international law is not possible without practice. We recall from the past the issue of "instant customary international law" in specific fields, but such "instantly" formed customary laws need both *opinio juris* and state practice. It's just that the duration of relevant elements may not be a decisive factor in the formation of rules.

Second, a balanced approach to the relationship between generality and specificity. State practice must be general. This means that the identification of customary international law calls for not only the study of the practice of legal systems and states with important influence in international law, but also the comprehensive study of the practice of states representing other major civilizations and legal systems of the world. At the same time, in some specific fields, due

importance should be assigned to “specially affected states”—not just major powers but all states, big or small, rich or poor, strong or weak. As long as a state has specific interests and real influence in these fields, its practice must be given full importance.

Third, a balanced approach to the relationship between “physical acts” and “verbal acts.” State practice may take a wide range of forms. Judicial precedents, diplomatic acts and other external actions can all be regarded as practice. White papers on state policies, diplomatic pronouncements and other verbal acts also constitute state practice. In principle, there is no hierarchy among the various forms of practice, and some forms must not be accorded more weight than others. They should all be given balanced consideration. In particular, when a conflict arises between the physical acts of some states and the verbal acts of other states, it is necessary to study these two forms of practice in a holistic manner in the identification of general practice and its corresponding *opinio juris*, rather than give more weight to “physical acts” than to “verbal acts.”

Thank you, Mr. Chairman.