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Chairperson: Mr. Al Bayati (Iraq)

Contents

Agenda item 75: Report of the International Law Commission on the work of its
sixtieth session (*continued*)

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The meeting was called to order at 3.10 p.m.

Agenda item 75: Report of the International Law Commission on the work of its sixtieth session
(*continued*) (A/63/10)

1. **Mr. Winkler** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), and referring to the topic “Responsibility of international organizations”, said the Nordic countries were broadly in agreement with draft articles 46 to 60, which provided a good basis for future work. Draft article 48 correctly addressed the issue of admissibility of claims, against international organizations to which the requirement of exhaustion of local remedies could and should apply, with the proviso that the local remedies of international organizations should be considered exhausted only insofar as they were available and effective. The modalities of exhaustion would clearly be different from those obtaining at the national level and, as noted by the Commission, would include the various internal tribunals and bodies competent to address the relevant issues. Regarding draft articles 54 to 60, on countermeasures, the Nordic countries agreed with the Drafting Committee’s approach: the organization’s rules should take precedence as *lex specialis* over general international law on countermeasures when the dispute was between the organization and one of its Member States.

2. On the topic “Expulsion of aliens”, there was no need to include in the discussion matters of nationality and citizenship, notably the denationalization of citizens, since they tended to shift the focus away from the core issue, namely the right of States to expel aliens. In that regard, the Nordic countries would prefer the development of a set of general principles taking into account all the relevant rules rather than the drafting of articles purporting to codify customary law that would fill possible gaps in existing treaty law. Such draft articles tended to lead to an unfortunate convergence of different areas of law, some of which were ripe for international codification while others pertained to areas, such as labour migration, where no apparent need existed.

3. The right of a State to expel aliens was inherent in State sovereignty, but it must be exercised in accordance with international law, with all due regard for current challenges to the international legal order. That right entailed the corresponding obligation of

States to readmit their own nationals, which was currently one of the main problems arising in connection with the expulsion of aliens, on which a substantial amount of international law already existed. The Nordic countries therefore urged the Commission to concentrate on the principles applicable in situations where aliens were expelled, rather than attempt to draft additional articles.

4. **Mr. Hernández** (Mexico) referring to the topic “Reservations to treaties”, said that the Special Rapporteur’s thirteenth report (A/CN.4/600) dealt comprehensively with the complex legal issues involved. It highlighted the procedural parallels between the formulation of interpretative declarations and objections thereto and the formulation of reservations and objections to reservations, taking into account the significant differences between their respective purposes and legal effects. With regard to draft guideline 2.9.3, on reclassification of an interpretative declaration, his delegation agreed with the Special Rapporteur that the legal effect of such a “reclassification” was to change the legal status of the unilateral statement in the relationship between the State or organization having submitted the statement and the “reclassifying” State or organization. Similarly, the Special Rapporteur was right to note that the procedural rules and time periods applicable to reclassification of and objection of an interpretative declaration were covered by article 20, paragraph 5, of the Vienna Convention on the Law of Treaties. After that time period, the reclassification as a reservation, and therefore an objection thereto, could not produce all of their legal effects, and the interpretative declaration, although reclassified as a reservation, must nevertheless be regarded as having been accepted. However, taking into account the Special Rapporteur’s proposal in draft guidelines 2.9.8 and 2.9.9 concerning the impossibility of presuming acceptance of an interpretative declaration and the significance of silence in that regard, the current wording of the draft guidelines on reclassification and acceptance of unilateral statements classified as interpretative declarations laid a particularly heavy burden on other States parties to the instrument. The capacity of those States to “reclassify” what the State having made the unilateral statement had originally classified as a mere interpretative declaration would be limited by the fact of their being subject, for the purposes of reclassification or objection, to the time frame applicable to observations to reservations. What some

members of the Commission referred to as “disguised reservations” might consequently pass unnoticed by the other States parties. The Special Rapporteur had noted that late objections to a reservation did not produce all the effects of a true objection; they should not be regarded as objections per se, but as interpretative declarations.

5. His delegation therefore held, like some members of the Commission, that practitioners and depositaries needed guidance on the form, timing and legal effects of reactions to “disguised reservations”. In view of the 12-month limit set for the formulation of an objection, the time frame set for cases of “disguised reservations” should take into account the fact that the reservation in question had not been submitted as such but as an interpretative declaration. The second part of draft guideline 2.6.13 could offer a basis for a solution to such an exceptional situation in that it stipulated that, in cases where the consent of a State or an international organization to be bound by a treaty was expressed more than 12 months after being notified of the reservation, the time limit would take effect from the date of the notification of such willingness to be thus bound. The resulting extension of the 12-month time limit could be adapted to cases of “disguised reservations”: the period for formulating objections in such cases would run from the time that the reservation, having been formulated as such, would have entered into force for States parties to the treaty, thus allowing 24 months for the formulation of objections. That extra time would thus guard against the possibility that a “disguised reservation”, by passing unnoticed as an interpretative declaration, would benefit from the same time limits as a reservation formulated as such. In addition, it would establish legal certainty and thus ensure that the validity or entry into force of a reservation did not remain in limbo.

6. Turning to draft guideline 2.6.8, he said that a consequence of the insertion of the word “before” was that the intent referred to could not be expressed through the same instrument whereby the objection had been made, since it could only be expressed before the time when, in accordance with article 24 of the Vienna Convention, the treaty entered into force between the parties concerned. He therefore welcomed the establishment of a period during which the parties to a treaty would be able to enter into consultations so as to avoid the making of a declaration that would prevent

the entry into force of all the rules laid down in a treaty, by virtue of a reservation to a specific rule.

7. On the topic “Expulsion of aliens”, a clear list of the applicable legal rules could ensure respect for human rights. Since, as had been noted by the Special Rapporteur, each State had exclusive competence to grant or withdraw nationality, the Commission’s analysis would be useful only insofar as it served to determine when a person had the status of an alien, so as to be able to ascertain whether or not a person’s expulsion would be prohibited by international law. Article 31, paragraph 2, of the Convention relating to the Status of Stateless Persons provided that stateless persons could only be expelled in pursuance of a decision reached in accordance with due process of law. The Special Rapporteur was therefore right in not considering it necessary to include a draft article reflecting that rule. His delegation also agreed with several members of the Commission that the situation of persons having dual or multiple nationality had specific features that needed to be analysed in detail. He hoped that, in his next report, the Special Rapporteur would begin studying the limits on expulsion in relation to human rights.

8. **Ms. Lijnzaad** (Netherlands), referring to the topic “Reservations to treaties”, said her delegation was not convinced that the concept of “conditional interpretative declaration” served a useful purpose. When such conditional declarations had consequences that were largely similar to those of reservations, they should be considered and called reservations. She also disagreed with the Special Rapporteur’s view that the time frame for objecting to a reclassified interpretative declaration was the same as that for objecting to a reservation. It was a fundamental mistake to use the analogy of reservations and objections when dealing with interpretative declarations, particularly when both reservations and interpretative declarations had been formulated by the same State. The onus of clarifying the intention behind a unilateral statement was on the author of the statement; other States parties had a legitimate expectation that the author State would label its statement appropriately. Only when the statement was called a reservation could the author State rely on the proper understanding by other States of the scope of the statement. The Special Rapporteur’s logic seemed to work in favour of the State that had mislabelled its statement, at the expense of the other State.

9. The meaning of silence was both a philosophical question and a complicated issue in international law. With regard to the consequences of silence as a response to an interpretative declaration, particularly in situations where a State had made both reservations and interpretative declarations, silence just meant silence. No conclusion could be drawn from it and no acquiescence could be inferred. To think otherwise would mean, again, drawing an inappropriate analogy with reservations and objections and ignoring the choice made by the author State not to label its unilateral statement properly as a reservation. Her delegation would provide more detailed comments on those points at a later stage.

10. As host State to some 30 international organizations, the Netherlands took a special interest in the topic "Responsibility of international organizations". The frequent criticism of the Commission for relying too heavily on the articles on State responsibility when elaborating the draft articles on responsibility of international organizations was unfounded. The articles on State responsibility were sufficiently general to be applicable to other international legal persons, and the Commission had adjusted them and introduced new articles where necessary in order to ensure that the text was appropriate in the case of international organizations.

11. The need for specific articles on the responsibility of international organizations had been questioned because there was limited practice, as indicated in the reports of the Special Rapporteur, and because only a few of the hundreds of international organizations in existence had sent comments on the topic, some of which were extremely brief. However, her delegation believed that such articles were necessary. The number of international organizations had increased greatly and their activities affected both international relations and the daily lives of private individuals. It was generally agreed, with good reason, that international organizations had the capacity to commit internationally wrongful acts. It was therefore necessary to have a system in place for dealing with such acts, even if there was not extensive practice: it was preferable for courts to be able to apply general rules on the responsibility of international organizations rather than for each court to apply its own interpretation of the analogy with State responsibility.

12. She supported the suggestion that a meeting should be organized between the Commission and the legal advisers of international organizations so as to ensure that the Commission was familiar with existing practice. Her delegation would be providing more extensive comments in writing, including some observations with regard to countermeasures.

13. On the topic "Expulsion of aliens", her delegation agreed with the view that international law did not allow a State to regard its nationals having one or several other nationalities as aliens, particularly in the light of article 17 of the European Convention on Nationality, which stated that nationals of a State party in possession of another nationality had, in the territory of that State party in which they resided, the same rights and duties as other nationals of that State party. Moreover, the prohibition of expulsion of nationals applied also to persons with dual or multiple nationality.

14. The notion of dominant or effective nationality was usually applied only in cases of conflict of nationality arising from multiple nationality, such as in the context of diplomatic protection. Since such situations were very different from the issue of expulsion of aliens, her delegation shared the Commission's view that the criterion of dominant or effective nationality could not justify a State treating its nationals having one or several other nationalities as aliens for the purposes of expulsion.

15. On the question of loss of nationality, denationalization and expulsion, under international law a State could provide in its domestic law for the loss of nationality in some cases. Netherlands legislation contained such provisions: for example, nationals of the Netherlands could lose their nationality if they voluntarily accepted the nationality of another country. However, she fully agreed that denationalization could be allowed only in exceptional circumstances and must not lead to statelessness.

16. Lastly, while it was necessary to clarify that draft article 4 applied equally to nationals with dual or multiple nationality, she supported the view that there was no need for draft articles dealing specifically with the issues covered in the fourth report of the Special Rapporteur (A/CN.4/594).

17. **Mr. Tavares** (Portugal), referring to the topic "Reservations to treaties", said that, since "reservation" and "interpretative declaration" were

different legal concepts, they should be treated separately except where they were related. Since the Vienna Convention on the Law of Treaties did not deal with interpretative declarations, his delegation advocated a cautious approach to that issue.

18. With regard to draft guideline 2.9.1, the word “approval” had a strong legal connotation that was not appropriate in relation to interpretative declarations. The word “consent” should be used instead, as in draft guideline 2.9.9. With regard to draft guideline 2.9.2, on opposition to an interpretative declaration, his delegation shared the view that the expression “excluding or limiting its effect” could be misleading when trying to make a clear distinction between reservations and interpretative declarations. Furthermore, the proposal of another interpretation might in fact constitute a new interpretative declaration with the effect of rejection rather than mere opposition.

19. With regard to draft guideline 2.9.3, on reclassification of an interpretative declaration, his delegation believed that States and international organizations should not have the right to reclassify an interpretative declaration made by another State or international organization. Moreover, since a “disguised reservation” was a reservation and not an interpretative declaration, the Commission should reflect further as to the appropriate place for such a provision in the Guide to Practice.

20. His delegation had some concerns about draft guideline 2.9.4. A State or international organization should not be able to formulate an interpretative declaration in respect of a treaty or certain of its provisions in the context of a dispute settlement process involving the interpretation of the treaty or provisions in question. A reference to the principle of good faith would be a prudent solution. In addition, he would like to know why the term “protest” was used in the title of the draft guideline while the term “opposition” was used in the body of the text.

21. Draft guidelines 2.9.8, on non-presumption of approval or opposition, and 2.9.9, on silence in response to an interpretative declaration, dealt with two different but related questions. In contrast to the situation regarding reservations, neither approval of nor opposition to an interpretative declaration could be presumed. Furthermore, it was a principle of law that silence could not be considered a means of making a declaration unless it was clearly possible to infer

otherwise. With regard to interpretative declarations, there was no general rule on the value of silence as a means of reacting, nor was there a general legitimate expectation of an express reaction. In the case of such declarations, silence should have a meaning only when its value could be clearly inferred from a treaty provision. In that context, the second paragraph of draft guideline 2.9.9 should be refined in order to clarify the meaning of the phrase “certain specific circumstances”.

22. With regard to draft guideline 2.9.10, on reactions to conditional interpretative declarations, his delegation shared the view that such declarations were different from simple interpretative declarations. However, they could not be regarded as reservations either, since they made participation in the treaty in question subject to a particular interpretation, whereas reservations were intended to exclude or modify the legal effects of the treaty. Further analysis should be carried out in order to establish clearly the legal nature of conditional interpretative declarations, to identify the legal effects and procedures associated with them and to decide on the appropriate way to deal with them.

23. The Guide to Practice would be extremely useful both to States and to international organizations in dealing with the complex issue of reservations to treaties. He encouraged the Commission to finish it as soon as possible.

24. Turning to the topic “Responsibility of international organizations”, he reiterated his delegation’s concern that the draft articles followed the articles on State responsibility too closely. A more focused approach to the specific problems raised by the responsibility of international organizations was required. In addition, the Commission’s analysis should reflect the differences between States and international organizations and the fact that the competences and powers of international organizations, as well as the relations between organizations and their members, varied considerably from one organization to another.

25. The subject of countermeasures, controversial in relation to States, was even more problematic in relation to international organizations. His delegation had concerns about the conditions under which international organizations could be the target of, or resort to, countermeasures. Moreover, the use of examples based on the experience of the European

Union and the World Trade Organization was not necessarily appropriate and indicated the lack of relevant practice and the difficulty of elaborating appropriate, general and abstract legal solutions. Care should also be taken to distinguish between countermeasures and other similar measures, taking into account the source, legal basis, nature and purpose of the measure. Measures taken by an international organization, in accordance with its internal rules, against one of its members, such as sanctions imposed by the Security Council, could not be regarded as countermeasures. In view of the complexity of the issues surrounding countermeasures, a cautious approach was advisable.

26. Caution was also required with regard to the two issues discussed in the fourth report of the Special Rapporteur on the expulsion of aliens (A/CN.4/594), namely persons with dual or multiple nationality and denationalization. The Universal Declaration of Human Rights stated that everyone had the right to a nationality and that no one could be arbitrarily deprived of his nationality nor denied the right to change his nationality. Nationality must be seen as an inherent right of the individual and not as a power of the State. In that context, the prohibition of the expulsion by a State of its own nationals was an absolute rule to which there should be no exceptions, including in the case of persons having dual or multiple nationality. The prohibition with regard to such persons could not be restricted to cases in which statelessness might result; nor could the status of such persons be used as grounds for a State to circumvent the prohibition. Furthermore, a person with dual or multiple nationality could not be regarded as an alien by the States whose nationality he or she held. His delegation was also not convinced that the notion of dominant or effective nationality was relevant to the expulsion of aliens.

27. States should not be able to use denationalization as a means of circumventing the prohibition of the expulsion of nationals, even in the case of persons having dual or multiple nationality. Moreover, his delegation did not agree with the view that denationalization was permissible provided that it did not lead to statelessness, that it was neither discriminatory nor arbitrary and that certain procedural guarantees were respected.

28. **Mr. Horváth** (Hungary) said that the topic “Reservations to treaties” deserved all the effort that

had been put into it. Treaties were by far the most numerous sources of public international law and the international order depended on the ability of States to identify their rights and obligations under treaties. The draft Guide to Practice would provide States with a useful tool in that regard. Rigorous application of the guidelines would also discourage States from formulating invalid reservations, a development that would be of particular significance for human rights treaties. As for the specific issue of interpretative declarations, his delegation considered that draft guidelines 2.9.1 to 2.9.8 contained useful clarifications.

29. With regard to the topic “Responsibility of international organizations”, his delegation supported the proposal by the Special Rapporteur that the Commission, before proceeding further, should review texts that had been provisionally adopted in the light of the comments made by States and international organizations. The text would thus be made more coherent and questions about the desirability of including provisions on the invocation of responsibility of States by international organizations, for example, could be re-examined. In that connection, he noted that in view of the exceptional nature of the European Union any examples drawn from its practice should be used with great caution and only after careful consideration of whether general rules or principles could be extracted from a given case.

30. Turning to the topic “Expulsion of aliens”, he said that persons holding dual or multiple nationality could not be regarded as aliens in any of their States of nationality. Questions relating to loss of nationality and the permissibility of denationalization belonged rather to a discussion of nationality law, which traditionally came under the national jurisdiction of States. Article 12, paragraph 4, of the International Covenant on Civil and Political Rights, providing that “[n]o one shall be arbitrarily deprived of the right to enter his own country”, implicitly confirmed the principle of non-expulsion of nationals. A prohibition on expulsion featured in enough international agreements to be regarded as a basic human right. He agreed with those members of the Commission who had said prohibition of the expulsion of nationals, even those having dual or multiple nationality, was part of customary law. A similar point was made in paragraph 192 of the report. The Hungarian Constitution expressly prohibited both the arbitrary deprivation of the right of Hungarian citizens to enter Hungary and the expulsion of citizens,

regardless of whether they held dual or multiple nationality.

31. With regard to the topic “Protection of persons in the event of disaster”, his delegation would prefer that the proposed instrument should take the form of non-binding guidelines, in line with other relevant international instruments, such as the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted at the 30th International Red Cross and Red Crescent Conference. The focus should be on the right of the victims to humanitarian assistance. The principles of sovereignty and non-intervention were no excuse for a State affected by disaster to deny victims access to assistance. As for the scope of the topic, his delegation considered that it should be restricted to natural disasters, excluding man-made disasters and armed conflicts, both because regimes governing armed conflict already existed and because of the high risk to the personnel of the intervening State.

32. His delegation fully endorsed the guidelines followed by the Special Rapporteur on the topic “Immunity of State officials from foreign criminal jurisdiction”. It was significant that a number of national courts had in recent times reached divergent conclusions in cases involving the immunity of State officials. Clearly, international law needed greater precision in that regard. It would therefore be useful to compile a summary of the relevant treaties, rules of customary international law and decisions of the International Court of Justice.

33. With regard to the obligation of States to extradite or prosecute, his delegation believed that efforts to combat global criminal activity must themselves become global. Cooperation among States to that end was a prerequisite for the rule of law at both the national and international levels. Such cooperation was not restricted to traditional areas, such as the slave trade, piracy and apartheid, but extended to such activities as terrorism, crimes against humanity and war crimes. States were undoubtedly under an obligation to extradite or prosecute, whether or not international treaties to that effect existed. A comprehensive analysis of existing treaties and customary international law, as well as national legislation and State practice, would serve to identify the exact nature of that obligation.

34. **Ms. Mitchell** (Canada), referring to the topic of “Expulsion of aliens”, observed that, as the Special Rapporteur had said, it was for each sovereign State to establish through its domestic legislation the conditions for loss of nationality and that such rules were separate from rules governing the expulsion of aliens. Her delegation therefore welcomed the recommendation by the Special Rapporteur and the Working Group to the effect that draft articles on the issues dealt with in the Special Rapporteur’s fourth report were unnecessary. The Commission should adopt a similarly nuanced and prudent approach to other aspects of the topic.

35. **Ms. Alias** (Malaysia), after noting that the draft articles on responsibility of international organizations were modelled on the articles on State responsibility, said that the right to invoke the international responsibility of an international organization was acceptable, since the principles contained in the draft articles on State responsibility applied equally to international organizations.

36. With regard to countermeasures against international organizations, her delegation considered that the restrictions imposed on countermeasures in the articles on State responsibility should also be applied to international organizations. The Commission should, however, take due account of the differences between States and international organizations in that regard.

37. **Ms. Le Duc Hanh** (Viet Nam) said that the Commission’s work on responsibility of international organizations was timely and important, given the proliferation of international organizations in the modern world. Since such organizations differed greatly from one another in their nature, structure, membership and size, the draft articles should be of a general nature in order to cover as broad a range of organizations as possible.

38. Her delegation encouraged the Commission to continue its consideration of the use of countermeasures by international organizations. Caution was required, however, in view of the limited practice and the risk of abuse of countermeasures, which could jeopardize the functioning or even the existence of an international organization. Her delegation supported the proposal that a working group should be established to consider the question. The Commission should also take full account of comments by States and international organizations. Moreover, the issue of countermeasures could not be considered

similar to sanctions under the Charter of the United Nations, which had quite different scopes and objectives.

39. **Ms. Belliard** (France) said that the articles on State responsibility undoubtedly served as a useful model for the topic “Responsibility of international organizations”. In draft article 48 (“Admissibility of claims”), particularly paragraph 2, there was no harm in reiterating that any available and effective remedy provided by that organization must be exhausted before the responsibility of the organization could be invoked. In that connection, the term “local remedies” should be defined, because individuals could take action against a State before jurisdictions that were not national.

40. Countermeasures did not really belong with the so-called “secondary” rules on the responsibility of international organizations. It would be more appropriate to class them under the fulfilment of international obligations and they should be closely linked to the rules relating to the peaceful settlement of international disputes. As for countermeasures that might be used against international organizations, relevant practice was exceptionally limited, and the Commission should therefore be very cautious in dealing with the issue. As it was, the discussion within the Commission had shifted from the general responsibility of international organizations to specific questions concerning countermeasures that such organizations could use against States or even within the organization itself. As her delegation had observed in the past, the Commission could have covered the topic of countermeasures in a single study of the respective drafts regarding the responsibility of States, and of international organizations. Countermeasures could be considered only in the context of the legal relationship between a State and the international organizations in which it participated and the functions and rules of such organizations. Countermeasures by an international organization against a member State or by a member State against the organization were two separate issues. In both cases, however, the existence of rules specific to the organization meant that there were limits to the use of countermeasures by or against an international organization.

41. In other words, measures regarding a member State taken by an international organization while performing its functions should not be described as a “countermeasure”, as they sometimes had been in the Commission’s debates. Moreover, she had considerable

reservations as to whether member States of an international organization should be permitted to take countermeasures against that organization, particularly in view of the lack of any significant practice. A distinction should be drawn — as the Drafting Committee had done in draft article 55 [52 *bis*] (A/CN.4/L.725/Add.1) — between that possibility and the general issue of the object and limits of countermeasures against an international organization, which was dealt with in draft article 54 [52]. Draft article 55 [52 *bis*] was by no means clear, however. At the least, the text should clarify the meaning of the expression “reasonable means ... in accordance with the rules of the organization”, which would disallow the adoption of countermeasures against an organization. The draft article also implied that countermeasures should be regarded as a measure of last resort; but that was true of all countermeasures. Moreover, since the rules of an organization, however broadly understood, were inevitably a *lex specialis*, she questioned the benefit of that draft article, which, in a codification context, would merely sanction inappropriately what was essentially a hypothetical scenario. Lastly, she had doubts about the wording of draft article 54 [52], which, as it stood, was ambiguous. She trusted that the commentary would clarify the meaning of the provision.

The meeting rose at 4.30 p.m.