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## Sixth Committee

### Summary record of the 24th meeting

Held at Headquarters, New York, on Tuesday, 4 November 2008, at 10 a.m.

*Chairperson:* Mr. Al Bayati . . . . . (Iraq)  
*later:* Ms. Rodríguez-Pineda (Vice-Chairperson) . . . . . (Guatemala)

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*The meeting was called to order at 10.10 a.m.*

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

1. **Ms. Dascalopoulou-Livada** (Greece) said that, on the topic of reservations to treaties, interpretative declarations deserved thorough consideration by the Commission in view of their wide use in international practice in recent times, particularly in the case of treaties that prohibited reservations. The draft guidelines should therefore address the question of the legal status and effect of such declarations, which her delegation considered to be unilateral interpretations. They should be seen in the context of the general rules governing the interpretation of treaties, in particular article 32 of the Vienna Convention on the Law of Treaties, and not regarded as reservations under its article 2, paragraph 1 (d).

2. Silence in response to a reservation entailed its acceptance, whereas silence in respect of declarations could not be interpreted one way or the other. Indeed, in view of the scarcity of State practice as to the circumstances under which silence might be taken to signify acquiescence, it would be advisable to delete the second part of draft guideline 2.9.9. Interpretative declarations were binding only on the author State and had no legally binding effects on other parties in the absence of their agreement thereto. Such “approval” should not be confused with the regime of acceptance of reservations established by the Vienna Convention. That being said, her delegation supported draft guideline 2.9.1. The Commission should, however, look further at State practice and consider in particular whether acceptance could also be deduced by other means. Her delegation likewise agreed with draft guideline 2.9.2, on the understanding that the opposition expressed to the declaration could not be confused with an objection to a reservation, which aimed to render the whole treaty inapplicable between the parties.

3. As for the issue of “conditional” or “qualified” interpretative declarations, it should be ascertained whether such declarations had a modifying effect and must therefore be treated as reservations. An authentic interpretation by a treaty-monitoring body or judicial organ would be useful in determining the author’s real intention. Her delegation was concerned about draft guideline 2.9.3, considering that there was no need for

further categorization, particularly since determination of whether an interpretative declaration constituted a reservation was based on an objective definition of the term “reservations”. If the interpretative declaration had a modifying or excluding effect, States might object to it, on the grounds that it was a disguised reservation.

4. On the topic of expulsion of aliens, any exceptions to the well-enshrined prohibition of the expulsion of nationals must be carefully drafted and narrowly construed, including in cases of dual or multiple citizenship. In Greece, as in many other countries, nationals having one or more other nationalities were not regarded by law as aliens and therefore could not be expelled. Irrespective of the notion of dominant or effective nationality, draft article 4 covered such persons. The topic was expulsion of aliens and not the legal regime of nationality. It was therefore inadvisable to engage in a study of issues relating to the regime of nationality unless absolutely necessary for resolving specific questions relating to the expulsion of aliens. The same approach should be adopted towards other issues not central to the topic, such as protection of the property rights of expelled persons.

5. Similarly, her delegation fully supported the Special Rapporteur’s decision not to study the conditions for acquisition of nationality or to draw up a draft article on denationalization. A number of domestic legislations provided for that possibility, which was not per se contrary to international law. Since, however, appropriate restrictions or safeguards needed to be provided, draft article 4 should pertain more to the expulsion of aliens than to the broader issue of loss or deprivation of nationality. The Special Rapporteur was therefore right to conclude that it would not be advisable to prepare draft articles dealing specifically with the issues addressed in his fourth report.

6. Turning to the topic of protection of persons in the event of disasters, she said that the notion of disaster should comprise not only natural but also man-made disasters. The main beneficiaries of the protection were natural persons, while its content was based primarily on the core human rights conventions. The Guiding Principles on Internal Displacement might also be valuable, while the 1951 Geneva Convention on the Status of Refugees was less relevant since, under that instrument, a disaster was not a ground for providing refugee status. The Commission could

usefully include in its consideration of the topic a review, based on available State practice, of such provisions as might help to ensure the timely and unhampered delivery of humanitarian assistance; that would also provide valuable guidance in establishing the necessary legal framework for the provision of emergency relief.

7. **Mr. Šturma** (Czech Republic) said that one of the contentious issues in the debates on the topic of immunity of State officials from foreign criminal jurisdiction would be how to define the category of high-ranking State officials who should enjoy immunity *ratione personae* from such jurisdiction. A useful initial step might be to distinguish for that purpose between official visits abroad and private visits abroad or situations in the home State where a foreign State was seeking to exercise universal criminal jurisdiction over those officials. The Commission should examine more closely the extent to which, during official visits, State officials were granted immunity by customary international law. In the case of universal immunity *ratione personae*, his delegation agreed that it should be extended to the Head of State, the Head of Government and the Minister for Foreign Affairs; it was, however, questionable whether any other high-ranking State officials enjoyed the same immunity under international law. The Commission should examine that issue closely and prudently and support any proposals with evidence of relevant general State practice.

8. Another key issue was the existence and scope of exception to the rule of immunity of State officials in cases where they had committed crimes under international law, and the connection between such exception and peremptory norms of general international law prohibiting those crimes. It would be helpful to look at the distinction between immunity *ratione personae* enjoyed only by some State officials while occupying their posts and immunity *ratione materiae* extending to acts performed by State officials in their official capacity and continuing to protect them even after they had left their posts. There was sufficient justification for an exception to immunity *ratione materiae* for acts performed by State officials in their official capacity, but that did not affect the immunity *ratione personae* enjoyed by them as long as they occupied their post.

9. In the light of the ruling handed down by the House of Lords in the Pinochet case in 1999, it might also be useful to examine the relationship between a potential exception to immunity *ratione materiae* under customary international law in cases of crimes under international law and a potential exception to immunity *ratione materiae* implicit in international treaties punishing other violations of peremptory norms, in particular the crime of torture. A related question that would merit consideration was the immunity of States and State officials from foreign civil jurisdiction.

10. For the purposes of the topic, the term “State official” needed to be defined, since it had rightly been concluded that the Commission should examine the immunities of all persons acting in that capacity. Moreover, the question of the immunities extended to the family members of all State officials enjoying immunity *ratione personae* should be included in the topic because of the similarities between immunity *ratione personae* of diplomatic agents and immunities *ratione personae* enjoyed by all other categories of eligible State officials. His delegation was not convinced, however, that the question of recognition of States and Governments should form part of the topic, as that would limit it; the relationship between such recognition and privileges and immunities was important and might merit examination under a separate topic.

11. **Mr. Kennedy** (New Zealand), commenting on the protection of persons in the event of disasters, said his country had understood the Commission’s original intention to be essentially practical, focusing on the law and principles which applied immediately after a disaster. If a pragmatic approach was adopted to the topic, rather than a “rights-based” one, there would be greater emphasis on States’ obligations in the event of natural disasters and on the principles and guidelines to be followed by international and non-governmental organizations. If, however, the Commission opted for a rights-based approach, it would be important to focus on the consequences of those rights, including their implementation and enforcement. He agreed with the Special Rapporteur that the initial focus of the topic should be on natural disasters and on the framing of clear legal rules, guidelines or mechanisms to facilitate practical international cooperation in disaster response. It might be useful, however, to adopt a step-by-step approach to the topic, because to cover all phases of a

disaster, including mitigation and prevention, might be too ambitious.

12. Turning to the immunity of State officials from foreign criminal jurisdiction, he said that, in assessing the scope of the immunity, regard must be had to the fundamental principles of sovereign equality, non-interference in internal affairs, the stability of international relations and the independent performance of State activities. Other principles and values to be considered included individual accountability and the international community's commitment to ending impunity for serious international crimes. Immunity *ratione personae* was much broader than immunity *ratione materiae*, and in the past had only applied to a small class of officials. Its extension to officials other than Heads of State or Government and ministers for foreign affairs could go well beyond an exercise in codification and would have to be clearly justified in the light of customary international law and State practice. He supported the more restrictive approach taken by the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. The Special Rapporteur should focus on the central question of whether State officials enjoyed immunity when accused of crimes under international law, especially those breaching a norm of *jus cogens*. The 1996 draft Code of Crimes Against the Peace and Security of Mankind provided for an exception in such cases.

13. Commenting on the topic of the obligation to extradite or prosecute, he said the first question was whether there was such an obligation in customary international law. He urged the Special Rapporteur to continue reviewing State practice and *opinio juris* in the matter, to enable him to reach a conclusion. When a more detailed understanding had been gained of the scope of the obligation, he would welcome guidance as to when States could be considered to have exhausted the obligation.

14. **Mr. Bichet** (Switzerland) said that the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction would be very useful to States and would have significant legal and practical repercussions. The discussion should start from the principle, enshrined in the Vienna Conventions on Diplomatic and Consular Relations, that the purpose of immunities was not to benefit individuals but to allow the representatives of States to

perform their duties effectively. That principle should guide the Commission in its search for a definition of criminal immunities enjoyed by State officials. His delegation supported the Special Rapporteur's proposal to leave aside the question of immunity with respect to international criminal tribunals and the domestic courts of the State of nationality of the official. He agreed that only the highest-ranking State officials should enjoy immunity *ratione personae*. Since their main function was to represent their country abroad, they should benefit from absolute criminal immunity, unlike those who were not inherently vested with that function.

15. In view of the important procedural dimension of criminal immunity, which should protect the beneficiary from any criminal proceedings, the discussion should also include the question of personal inviolability in international law, which was legally distinct from criminal immunity, although closely linked to it. Regarding the term "State officials", he said that if, as stated in the Commission's report, they all enjoyed immunity *ratione materiae*, it would be important to define it, since the term could cover a wide variety of persons, ranging from the Head of State to a State tourism employee. Six groups of officials might be identified for that purpose, namely: (i) Heads of State, Heads of Government and ministers for foreign affairs, who enjoyed absolute personal immunity under customary law; (ii) high-ranking State officials, who could be said to benefit from criminal immunity *ratione materiae*; (iii) diplomatic and consular representatives to whom immunity was extended under the 1961 and 1963 Vienna Conventions; (iv) officials of international organizations whose immunities were regulated by headquarters agreements or similar instruments; (v) members of the armed forces whose immunities were generally laid down in force status agreements, although it still remained to be established whether such agreements were, in customary law, the expression of a presumption in favour of criminal immunity for acts committed by members of the armed forces in the performance of their duties; and (vi) all other State employees, a category which, in the view of his delegation, did not enjoy criminal immunity, except by virtue of a specific international agreement between the sending State and the accrediting State.

16. It would be wise to determine, on the basis of a categorization, which officials enjoyed criminal immunity *ratione personae* and which, *ratione*

*materiae*. The Commission should also think about how to define for the purposes of criminal immunity a State official's function or presence abroad. While it was logical that a State official should enjoy criminal immunity and personal inviolability in the territory of the host country, it was not clear whether that also applied to private or semi-official events to which foreign officials were increasingly invited.

17. Concerning the ultimate result of the Commission's work on the topic, the scope of criminal immunity should first be clarified with a view to codification, while the form that should be taken by such clarification or codification could be discussed at a later stage. It was important for the Commission to define rules of law, not only for legal reasons but also for reasons of foreign policy, for the sake of harmonious inter-State relations. Draft articles should accordingly be elaborated with a view to the subsequent establishment of an international legal instrument that would codify the relevant customary law. Such articles might, if necessary, provide for an opting-in or opting-out mechanism whereby the States parties could choose between criminal immunity for all the State officials mentioned or only some of them. States should be able to know with certainty which State officials could enjoy what degree of criminal immunity abroad and what exceptions existed to such immunity.

18. **Ms. Hamed** (Australia), commenting on the immunity of State officials from foreign criminal jurisdiction, said that the rules in the matter should be derived from the relevant norms of customary international law. The Commission should endeavour to strike an appropriate balance between immunity and the need to avoid impunity. Immunity from jurisdiction did not entail impunity, as shown by the judgment of the International Court of Justice in the *Arrest Warrant* case. The Commission should also consider the extent and nature of the immunity enjoyed by different categories of State officials.

19. On the obligation to extradite or prosecute, she welcomed the Commission's statement that future work on the topic would address the scope of the principle and the question of when the obligation arose. She hoped the Working Group would consider how an obligation to extradite or prosecute might interact with other aspects of extradition arrangements, such as grounds of refusal to extradite, which might be found in either international or national law. It might also be

useful to consider the potential limitations, in the legal systems of many countries, on their ability to assume broad obligations to extradite or prosecute. The "triple alternative", consisting of surrendering a fugitive to an international criminal court or tribunal, was distinct from the Commission's study but could provide useful background to it. The International Criminal Court, for instance, operated under a treaty framework in which States parties were bound to criminalize and prosecute certain crimes, and to assist the Court in exercising its complementary jurisdiction.

20. **Mr. Nesi** (Italy), referring to the topic "Protection of persons in the event of disasters", said that it would be impractical to single out natural disasters, since they often posed similar problems to other kinds of catastrophes. The scope of the topic should therefore be defined widely enough to encompass all disasters calling for an international relief effort.

21. The purpose of the Commission's work on the topic should be to facilitate the provision of humanitarian assistance through better coordination of the efforts of intergovernmental organizations, the competent authorities of the State where the disaster had occurred and any other entities that were willing to help. The aim should be to design a rapid-response mechanism free of political obstacles. A study of States' possible obligations in that regard or of victims' potential right of assistance would not serve that aim as effectively.

22. On the topic of immunity of State officials from foreign criminal jurisdiction, he commented that such officials also enjoyed functional immunity, or immunity *ratione materiae*, from civil jurisdiction. Any study of immunity from foreign criminal jurisdiction should therefore investigate practice relating to officials' immunity from civil jurisdiction. Even if the State did not possess immunity from civil jurisdiction for a particular act, if a State official's conduct had been undertaken in the exercise of his or her functions, he or she did enjoy immunity from such jurisdiction. For that reason, an official's functional immunity was not necessarily conditional upon the existence of State immunity from civil jurisdiction for the same act.

23. Noting the progress made on the topic of the obligation to extradite or prosecute, he urged the Commission to define the scope of the subject matter. Since many treaties concerning international crimes

contained *aut dedere aut judicare* clauses, it would seem reasonable first to identify those treaty clauses and the crimes to which they applied, and then to examine their interpretation in the light of the relevant practice. Although the actual wording of those clauses might vary, they generally spelled out the conditions triggering the custodial State's obligation to prosecute and the judicial assistance implied by those treaty provisions. Such a survey might form the basis for some useful guidelines. At a later stage, the Commission could then consider whether an obligation to extradite or prosecute existed under general international law.

24. **Mr. Fundora** (Cuba), referring first to the topic of shared natural resources, drew attention to the scarcity of groundwater resources, for which no substitute existed. In view of the fact that General Assembly resolution 1803 (XVII) of 14 December 1962 had already established the basic principle that States had sovereignty over the utilization and exploitation of transboundary aquifers in their territory, his delegation supported the contents of draft article 7. As for the final form of the draft articles, they could be annexed to a General Assembly resolution.

25. The point of departure for any work on the subject of reservations to treaties must be the 1969 Vienna Convention on the Law of Treaties. If the Guide to Practice were to be really useful to States and international organizations, it must not modify in any way the rules contained in the Convention, but must complement them.

26. Since most of the draft articles on responsibility of international organizations were of a very general nature, it would be necessary to scrutinize the meaning and scope of some of them. While his delegation agreed with the general principle that, although international organizations were required to provide reparation for their internationally wrongful acts, no additional obligation should be envisaged for member States, both member States and international organizations responsible for an internationally wrongful act were duty-bound to offer reparation. International organizations, like States, were under an obligation to cooperate in order to put an end to a serious violation committed by another organization. Of course organizations must always act in accordance with their founding instruments.

27. Turning to the topic of the expulsion of aliens, he expressed the opinion that the rule prohibiting the expulsion of nationals did not apply to persons with dual or multiple nationality, unless expulsion would result in statelessness. In order to avoid a situation where citizens could fall into that category, it was vital to clarify what was meant by effective nationality, because even though the practice of holding dual or multiple nationality was spreading, there did not appear to be any customary law norms on the matter. It was equally vital to ensure that the loss of nationality did not lead to statelessness. For that reason, it would be useful to have some draft articles on the subject.

28. In dealing with the topic of the obligation to extradite or prosecute, it was necessary to respect States' sovereign right to determine, in accordance with their domestic law and the principle of reciprocity, whether extradition was appropriate. If it was not, that State was under an international obligation to prosecute the accused. The obligation to extradite or prosecute was laid down in the Cuban Constitution, Criminal Code, Criminal Procedure Act and counter-terrorism legislation. The basic principle governing extradition in his country was that no Cuban citizen could be extradited to another country, even if due process were guaranteed there.

29. In view of the fact that no convincing replies had been given to the questions that had been raised in connection with the topic since 2006, it would be wise to analyse in greater depth treaties, *travaux préparatoires*, jurisprudence, national legislation and legal writings on the matter.

30. The purpose of the *aut dedere aut judicare* obligation was plainly to combat impunity by denying safe haven to persons accused of what were regarded by customary international law as serious international crimes and ensuring that the perpetrators were tried for their criminal acts. The obligation should be treaty-based and should apply to genocide, war crimes, crimes against humanity and torture, corruption and terrorism, including State terrorism. Cuba had passed a law against acts of terrorism, which established the obligation to extradite or prosecute for the crime of terrorism, and it was ready to cooperate with all countries to prevent and suppress terrorist acts.

31. Referring lastly to the topic "Protection of persons in the event of disasters", he said that the Commission should pay particular heed to the

relationship between protection and the principles of sovereignty and non-interference. The affected State must retain the right to decide what action should be taken to contend with a natural disaster. For example, in 2008, his Government had been able to provide an adequate response to the onslaught of two devastating hurricanes thereby keeping the loss of life and economic resources to the minimum.

32. **Mr. Panahi-Azar** (Islamic Republic of Iran) said that the draft guidelines proposed in the thirteenth report of the Special Rapporteur on reservations to treaties (A/CN.4/600), some of which addressed reactions to interpretative declarations and conditional interpretative declarations, went beyond the original rationale of the exercise, namely to develop a practical guide to the application of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties. Interpretative declarations were often used by States to circumvent certain formal limitations connected with reservations and therefore facilitated States' accession to international treaties. The introduction of detailed guidelines on interpretative declarations might not only affect the role of those declarations but might render the guidelines themselves hard to apply and of less use as a guide to the application of the Vienna Convention.

33. On the topic of the responsibility of international organizations, including countermeasures against such organizations, he said that, although the Commission continued to replicate the general pattern of the articles on the responsibility of States for internationally wrongful acts, it was necessary to distinguish between States' responsibility and that of international organizations. The issue of countermeasures by or against international organizations called for an extremely cautious approach. The different nature of States' responsibility and that of international organizations made a word-for-word transposition of the corresponding articles on State responsibility inappropriate.

34. If several entities were injured by the same internationally wrongful act of an international organization, it would be necessary to determine which of the injured parties had priority in taking legal action against the responsible organization. In that connection he drew attention to the reply of the International Court of Justice to question II in its advisory opinion in the case concerning *Reparations for Injuries Suffered in the Service of the United Nations*.

35. A differentiation should be made between cases where an international organization authorized its member States to adopt a particular measure and those where it requested them to take a similar action. If an organization authorized a member State to undertake an action, it conferred a right and not an obligation on that member State. By engaging in that action, the member State was exercising its right, and consequently its action should be deemed to be its own and not that of the organization.

36. It would be advisable for the Commission to consider the issue of illegal or *ultra vires* measures adopted by an organization, or its organs, under the influence of a limited number of member States. While in such cases the organization, as a legal person, bore some responsibility to compensate for the injurious consequences of its act or omission, the member States that had contributed to the injurious act on account of their policy-making role, or their position in the overall structure of the organization, bore most of the responsibility.

37. Turning to the topic of the expulsion of aliens, he said that the decision to expel aliens was a State's sovereign right, which must be exercised in conformity with the established principles of international law, especially human rights law. Expulsion should be based on legitimate grounds, as defined in the domestic law of the expelling State. Collective expulsion was contrary to international human rights law and the principle of non-discrimination. While a State had the discretion to grant nationality to non-nationals, denationalization and a State's expulsion of its own nationals was prohibited by international law. In that connection, he drew attention to article 41 of the Iranian Constitution, which enshrined that principle.

38. Since the notion of dominant or effective nationality had no role to play in the context of the expulsion of persons possessing dual or multiple nationality, he disagreed with the opinion expressed by the Special Rapporteur in paragraph 21 of his fourth report (A/CN.4/594). Nationals with dual or multiple nationality should not be regarded as aliens; consequently, the State could not use the criterion of dominant or effective nationality as justification for their expulsion.

39. His delegation did not think it necessary or useful to propose one or more articles on the issues dealt with in the aforementioned report. It concurred with the

argument that granting nationality and introducing national provisions on the loss of nationality or the denationalization of nationals were unconnected with the topic of the expulsion of aliens.

40. Commenting on the topic “Protection of persons in the event of disasters”, he commended the Commission for embarking upon the task of codifying the norms and standards applicable to disasters of natural origin. The relevant body of law which, might be termed the “international law of intervention during disasters”, encompassed all the rules governing the provision of goods and services of a purely humanitarian nature which were necessary for the survival of the victims of such disasters. The purpose of the international law of intervention was also to prevent catastrophes and reduce the human suffering they caused.

41. The affected State was under an obligation to care for the victims and to organize and distribute humanitarian assistance. Recent practice had demonstrated that other States, international organizations and non-governmental humanitarian organizations were entitled to offer their assistance to the affected State, but the right to humanitarian assistance was an exception to the principle of the exclusive territorial jurisdiction of the disaster-stricken State and could be exercised only subject to the consent of that State.

42. At the same time, a State affected by a disaster had a duty not to refuse, in an arbitrary and unjustified manner, offers of assistance made in good faith. The concept of the responsibility to protect was designed to secure the protection of the civilian population from genocide, war crimes and crimes against humanity, and was therefore a completely different topic. The right to humanitarian assistance certainly did not authorize other States to impose assistance on the affected State against its wishes. Any rule establishing the authorization to do so would conflict with the principles of State sovereignty and non-intervention. The Commission should, as a matter of priority, define the concept of protection, because such a definition would make it easier for the Commission to then determine the rights and obligations of different actors in emergencies.

43. All disaster relief operations must respect the fundamental principles of humanity, neutrality and impartiality as defined by the 20th International

Conference of the Red Cross and Red Crescent and endorsed by the International Court of Justice in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Account should also be taken of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted by the 30th International Conference of the Red Cross and Red Crescent, because they reflected existing practice. Any facilities made available to personnel participating in disaster relief operations were designed to improve the quality and effectiveness of those operations and could be granted only to organizations which observed minimum standards of quality and accountability in keeping with the interests of the national security, public order and public morals of the affected State. The Islamic Republic of Iran had concluded several bilateral agreements on relief in the event of natural disasters which would ensure the provision of timely and effective aid in emergencies.

44. Referring to chapter X of the report, he said that it was imperative to proceed with the utmost caution when examining possible exemptions to the immunity of State officials from foreign criminal jurisdiction, because such immunity played a critical role in securing the stability of inter-State relations. Domestic legislation incorporating a State's treaty-based obligations to honour the immunity of State officials from foreign criminal jurisdiction should not introduce any derogations from their obligations under customary international law. His delegation endorsed the view expressed by the 11th Ordinary Session of the Assembly of the African Union that the abuse of the principle of universal jurisdiction was a development that could endanger international law, order and security. All State officials, including vice-presidents and cabinet ministers, should be covered by the topic on the grounds that they enjoyed immunity *ratione materiae*.

45. The Special Rapporteur should likewise consider the status of former State officials in the light of the *Pinochet* case and the judgment of the International Court of Justice in the *Arrest Warrant* case, and he should devise criteria based on the representative character and functional necessity theories, while bearing in mind the judgments of the Court in the *Arrest Warrant* case and the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.



His delegation supported the distinction drawn by the Special Rapporteur between international and national jurisdiction and agreed that the Commission could examine whether the non-recognition of an entity as a State might affect the granting of immunity to its officials.

46. With respect to the topic “The obligation to extradite or prosecute”, he stated that the decision to extradite an alleged offender, or to prosecute him or her in national courts, was a sovereign right of the territorial State. In view of the fact that the *aut dedere aut judicare* obligation was treaty-based, it was a moot point whether States were bound to extradite or prosecute when there was no international agreement to that effect, or whether they had that option when no specific provision was made for it in the relevant extradition agreement.

47. His delegation did not see any direct relationship between universal jurisdiction and the obligation to extradite or prosecute. That obligation under customary international law applied only to piracy and might not even extend to serious international crimes, a view which was supported by the findings of the majority of judges of the International Court of Justice in the *Arrest Warrant* case and by its judgment of 26 February 2007 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.

48. The Iranian Extradition Act of 1960 provided that cooperation in the extradition of alleged offenders and/or convicts should be conducted on the basis of bilateral extradition treaties or, when there was no such treaty, on the basis of reciprocity. His country was a party to a number of international instruments containing the *aut dedere aut judicare* obligation.

49. **Mr. Makarewicz** (Poland) said that the relatively new topics dealt with in chapters IX, X and XI of the Commission’s report presented difficulties in codification and would require close cooperation between Governments and the Commission, whose work, to be effective, depended on receiving the appropriate information from States.

50. His delegation welcomed the far-sighted decision to take up the topic “Protection of persons in the event of disasters” and supported the broad approach taken by the Special Rapporteur in his preliminary report (A/CN.4/598). The topic was timely and of great

practical significance to humankind in view of the vast numbers of those affected by natural disasters just in the past few years, but it would represent an extraordinary challenge for the Commission in its task of progressive development of international law.

51. The challenge for the Commission in undertaking such a human-focused topic would be to help lay the sustainable foundations of a new world order by shaping a new understanding of such important concepts and principles of international law and international relations as human security, responsibility to protect and solidarity. Those concepts and principles would create the indispensable basis on which theoretical and practical arrangements for the protection of persons in the event of disasters could be built. Other principles, such as impartiality, neutrality and non-discrimination, on which humanitarian actions were already predicated, were generally non-controversial and should continue to be applied. There was also a need to underline the primary role of the affected State and the contributory and subsidiary roles of other actors as part of an overarching umbrella of international cooperation and solidarity.

52. Looking more closely at the three core concepts, his delegation believed that existing and emerging threats were causing a shift of emphasis from State security to human security. The concept of human security, articulated in the final report of the Commission on Human Security and understood as the right of people to live in freedom and dignity, free from poverty and despair, had found a place in the 2005 World Summit Outcome, and States had committed themselves to discussing and defining the notion.

53. The emerging concept of responsibility to protect was closely connected to the changing understanding of the principle of sovereignty, as encompassing not only rights but also responsibilities towards all persons under the State’s jurisdiction to ensure that they were free from fear and want, and not only from acts of aggression by other States. That line of thought, presented in the report of the High-level Panel on Threats, Challenges and Change (A/59/565), had also found expression in the 2005 World Summit Outcome as the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. His delegation saw no compelling reason why the responsibility to protect could not be extended to disaster situations.

54. The principle of solidarity constituted the indispensable basis on which States could unite in common action for the common good, such as protection of persons in the event of disasters, on both moral and practical grounds. International solidarity should be conceived not as charity but as an understanding between formally equal partners, who possessed common but differentiated responsibilities and who in their own interests acted for the good of the entire international community. Although the word “solidarity” did not appear in it, the Charter of the United Nations enshrined the principle by committing all Member States to cooperate in promoting peace, well-being and human rights. The President of the General Assembly, in his opening statement at the 1st meeting of the sixty-third session, had called for the logic of solidarity to defeat the culture of selfishness. Poland, which had been transformed by the great socio-political movement “Solidarity” (*Solidarność*), firmly believed in that logic.

55. For the above reasons, his delegation supported an approach that was rights-based and holistic, since the need for protection was equally compelling in all situations and at all stages. It agreed, however, that armed conflict per se should be excluded from the topic because it was governed by a well-defined regime or *lex specialis*, which should not be undermined.

56. Draft articles should be elaborated, but it was premature to decide whether they would take the form of a framework convention or non-binding guidelines.

57. On another of the new topics, “Immunity of State officials from foreign criminal jurisdiction”, his delegation generally agreed with the Special Rapporteur’s suggestions as to the extent of the analysis but was not fully convinced that the Commission should not consider the parallel question of immunity with respect to international criminal tribunals — in recent decades the jurisdictions of States and international tribunals had become to a great extent linked and often figured as alternative jurisdictions, so that the elimination of parallel consideration of the immunity of State officials before foreign State courts and before international criminal tribunals could create a false and incomplete picture of current practice. Another question requiring further careful consideration was the extent of possible exceptions to the immunity of State officials, given the diversity of views expressed by members of the Commission as well as the variation in State practice.

58. On the obligation to extradite or prosecute, his delegation agreed with the Special Rapporteur that the Commission would require cooperation from Governments in providing pertinent information on legislation and practice. Poland had already transmitted a comprehensive review of its legislation, treaties and judicial decisions connected with the obligation to extradite or prosecute and hoped that other States had already done so or would soon do so. Given the complexity of the issue, there was a need to identify State practice carefully and avoid premature proposals that did not reflect that practice. However, the presentation of specific draft articles in the Special Rapporteur’s next report might motivate States to reveal more details of their practice. It was evident that there was growing interest among States in the obligation to extradite or prosecute and greater development of that obligation in domestic legislation, but the question remained open as to whether there was a sufficient basis to establish an international customary rule.

59. **Mr. Kendrick** (Canada) said that in May 2008 his Government had responded in detail to the request for information on legislation and practice related to the obligation to extradite or prosecute and was following the topic with great interest. Canada consistently supported principles and initiatives that would combat impunity, particularly for the most serious criminal acts, and had been a staunch supporter of the International Criminal Court and other international criminal tribunals, such as the Special Court for Sierra Leone and the Special Tribunal for Lebanon.

60. Nonetheless, his delegation cautioned against the adoption of an overly broad concept of the obligation to extradite or prosecute, which did not and should not apply to the vast majority of crimes. Where it did apply, the scope of the obligation should be defined by treaty. Canada supported the inclusion of such provisions in multilateral treaties as part of the international community’s collective efforts to deny a safe haven to terrorists and other criminals, and it was a party to 28 multilateral treaties containing the obligation to extradite or prosecute, as well as 51 bilateral extradition treaties.

61. *Ms. Rodríguez-Pineda* (Guatemala), *Vice-Chairperson*, took the Chair.

62. **Mr. García Moritán** (Argentina) said his delegation was confident that draft articles could be elaborated on the topic “Protection of persons in the event of disasters” that would serve as an appropriate legal framework for international disaster relief activities. The Commission had an opportunity to clarify the core principles and concepts in order to put disaster relief work on a secure footing, without losing sight of the need for a pragmatic approach to the real problems confronting individuals in disaster situations.

63. In determining the scope of the protection of persons in the event of disasters, there appeared to be two key questions to be answered: the scope of the concept of “protection” and the meaning of the concept of “disaster”. The first would require analysing the rights and obligations of the different actors in a disaster situation and striking a balance between the rights of persons in the event of disasters and the rights of the affected State, in particular in the light of the principles of sovereignty, non-intervention and international cooperation. The relationship to other areas of international law — international humanitarian law, human rights law and the law relating to refugees and internally displaced persons — should be borne in mind in order to avoid overlap or incursion into areas with highly developed legal regimes.

64. In defining “disaster” for the purposes of the topic, it would be necessary to decide whether to include only natural disasters and eliminate from consideration those where there was human intervention (such as nuclear and industrial accidents or oil spills), even though it was not always possible to draw a sharp line between the two. It was significant that the concept of disaster as such did not distinguish between events involving one State or several; a transboundary effect was not an essential part of the definition.

65. His delegation considered it useful for the Commission to address the topic, in view of the fragmented nature of the relevant international law. It supported the Special Rapporteur’s suggestion that draft articles, without prejudice to their final form, could serve as a basic reference framework for a host of specific agreements between the various actors in the area, including, but not limited to, the United Nations.

66. The topic “Immunity of State officials from foreign criminal jurisdiction” raised questions to which

there were not always uniform answers, owing to a lack of codification. A first step would be to define the term “State official” in order to delimit the personal scope of the topic. It should cover not only the traditional triad of Heads of State, Heads of Government and ministers for foreign affairs, but all State officials, both officials in office and former officials. In a globalized world, many other officials represented their State in specialized areas of international relations. The issue deserved comprehensive study.

67. Unlike the immunity of diplomatic agents, consular officials, representatives to international organizations and members of special missions, which was governed by treaty instruments, the immunity of other State officials derived from customary international law, and in some cases it could not be said that a norm of international law contemplating such immunity even existed. The Special Rapporteur’s study would be extremely useful in determining the content of existing customary law norms in that regard. There was extensive international and national jurisprudence on the matter, as well as national legislation. His delegation would encourage the Special Rapporteur to solicit such information from States.

68. The question of recognition in the context of immunity should be included in the topic, since there had been cases involving officials of States not recognized by the forum State, and jurisprudence on the matter was not uniform. The question of the immunity of family members of State officials should also be dealt with, owing to the practical problems the issue posed to tribunals.

69. On the topic of *aut dedere aut judicare*, the main question posed so far was whether the obligation was part of customary international law. Despite some doubts expressed about the customary nature of the obligation, there appeared to be a generally positive attitude on the part of States towards moving forward with the study in order to draw some conclusions on that point. Although his delegation agreed that the work should continue, he considered that it was premature to draw up draft articles without clear concepts about the obligation or uniform criteria among States. It would be advisable to wait for responses from more States as to their relevant practice and legislation in order to have more concrete information on the degree of acceptance and the scope of the obligation in national legal systems. The Special

Rapporteur had noted that an increasing number of treaties containing the obligation to extradite or prosecute could be an indication of State practice and lead to the creation of a customary norm. Nonetheless, the number of treaties and their level of ratification could not be considered the only evidence of uniform and general State practice. It would be essential to examine and compare national legislation and practice in the matter. Argentina had recently provided the information requested in that regard and encouraged other States to do so.

70. Although the concept of universal jurisdiction was not central to the topic, it would be necessary to examine it tangentially because it bore a relationship to the obligation to extradite or prosecute. Similarly, consideration of the “triple alternative” could not be omitted, because in practice there were situations in which the alternative of surrender to an international tribunal must be weighed against the other two options of extraditing or prosecuting. As the Special Rapporteur had mentioned in his third report (A/CN.4/603, para. 129), the act implementing the Rome Statute in Argentina included a provision on the *aut dedere aut judicare* obligation in connection with the International Criminal Court.

71. His delegation wished to reiterate its commitment to the topic, as a full understanding of the content, operation and effects of the obligation to extradite or prosecute would strengthen the administration of justice and prevent impunity.

72. **Ms. Schonmann** (Israel) said that, in her country’s view, the immunity of State officials from foreign criminal jurisdiction stemmed primarily from international law, particularly customary international law, and was based on the fundamental principles of sovereign equality of States and non-interference in internal affairs, as well as the need to ensure the stability of international relations. The judgment of the International Court of Justice in the *Arrest Warrant* case reflected the current state of international law, and that had been confirmed by subsequent developments in international and national jurisprudence and in national legislation. She supported the Special Rapporteur’s proposal to include all State officials in the scope of the study, given that they enjoyed immunity *ratione materiae*. In the light of the *Arrest Warrant* case it was clear that Heads of Government and ministers for foreign affairs enjoyed immunity *ratione personae*, but it was not clear whether other

senior officials did so. The Commission should seek to identify criteria for the officials entitled to such immunity, such as the representative nature of the posts they held and the importance of the functions they performed. The concept of immunity from criminal jurisdiction covered all procedural stages, whether executive or judicial, and special attention should be paid to the pretrial stage. The scope of the topic did not extend to the jurisdiction of international criminal tribunals, and the question of immunity from civil jurisdiction should be dealt with later, if at all.

73. Given the sensitivity of the topic, the Commission should carefully consider its unique aspects, such as whether simultaneous or multiple proceedings on the same issue should take place in national courts, and what measures were needed to avoid abuse of process towards State officials. As for the sensitive issue of universal jurisdiction, the Commission should consider the need for procedural clarity. Under Israeli law, for instance, all indictments based on extraterritorial jurisdiction had to be approved by the Attorney General.

74. Turning to the obligation to extradite or prosecute, she reiterated her country’s view that its source lay entirely in treaty-based obligations. Despite widespread adherence to the conventions on counter-terrorism, in practice the extradition or prosecution of terrorists was predominantly based on bilateral treaties. She remained doubtful whether the issue of universal jurisdiction should be considered within the scope of the topic, since it was quite distinct from the principle of *aut dedere aut judicare*. She welcomed the Special Rapporteur’s decision not to consider further the so-called “triple alternative”.

75. On the question of responsibility of international organizations, she supported the view that the appropriate time frame for a claim to be treated as having lapsed needed further clarification. It was also unclear whether a non-injured member of a group should be allowed to invoke responsibility for injury to the group if the group as a whole did not wish it. By way of compromise, a non-injured party could be allowed to do so if there was a consensus among the non-injured members of the group on the need for an invocation of responsibility. As for the object and limits of countermeasures, given the inherent differences between States and international organizations she doubted whether the articles on State responsibility were a suitable model for articles on the

responsibility of international organizations. Moreover, countermeasures could hamper the proper functioning of an international organization. She urged the Commission to proceed with caution.

76. On the topic of expulsion of aliens, she agreed with other delegations that the proposed definition of “territory” in the draft articles was imprecise. As for the term “conduct”, no separate definition such as proposed by the Special Rapporteur was needed. While supporting the general rule that a State could not expel its own nationals, she saw no reason why a State should necessarily be prohibited in all cases from depriving a national of his or her nationality. In exceptional cases, a State might be entitled to do so, in a non-arbitrary manner. It was for States to decide on the conditions for loss of nationality and for non-admission. However, there was no need to introduce such matters as nationality and citizenship into the draft articles. Nor should the topic cover the status of refugees and related matters, such as non-refoulement and movement of populations, or issues regulated by the law of armed conflict.

77. **Mr. Al-Baker** (Qatar) said that the 19 draft articles of the law of transboundary aquifers would serve well as guidelines for a future convention. His delegation welcomed the adoption on first reading of the 18 draft articles on the effects of armed conflicts on treaties, which should take guidance from the Vienna Convention on the Law of Treaties. One area where the Vienna Convention was lacking was the issue of reservations to treaties, and the 23 draft guidelines dealing with formulation and withdrawal of acceptances and objections, as well as the procedure for acceptance of reservations, together with commentaries thereto would assist States and organizations in developing international practice in that regard. With respect to the effects of silence as a reaction to an interpretative declaration, silence in itself signified nothing, but silence where a response was required was itself a response, and there were situations in which it was customary to construe silence as acquiescence. Therefore, there were cases where silence in response to an interpretative declaration could be taken to constitute acquiescence. It was not advisable for the Commission to prepare draft articles on issues that pertained more to the nationality regime than to the expulsion of aliens, because nationality should be the province of national legislative entities, and there were exceptional cases

which called for the expulsion of citizens. With regard to the immunity of State officials from foreign criminal jurisdiction, he noted that some of the privileges enjoyed by State officials, such as tax exemptions, were matters of international comity, while others were the legal consequence of their not being subject to the authority of the foreign State.

78. **Ms. Walker** (Jamaica), commenting on the immunity of State officials from foreign criminal jurisdiction, said that, in her country’s view, high-ranking officials other than Heads of State or Government and ministers for foreign affairs could enjoy personal immunity. It would therefore be useful for the Commission to identify criteria on which to base that entitlement. The question of exceptions to personal immunity under general international law called for careful consideration. Impunity must be avoided, especially for the worst international crimes. However, a complete removal of immunity for high-ranking officials would cause difficulty and would affect friendly relations between States. In some countries, courts which assumed universal jurisdiction would be in a position to put leaders from weaker countries on trial, whereas the reverse would not apply, thus raising the issues of lack of equity and possible double standards. She did not support the removal of personal immunity from Heads of State or Government and ministers for foreign affairs. They should be subject to trial by an international criminal tribunal or by their own domestic courts. She agreed with the Special Rapporteur that the judgment of the International Court of Justice in the *Arrest Warrant* case represented the current state of international law in the matter, and welcomed his statement that his goal was not to formulate abstract proposals as to what the law might be, but to work on the basis of evidence of the existing law.

79. Commenting on the obligation to extradite or prosecute, she said that the entire legal basis of that obligation lay in the extensive network of international and regional agreements on extradition. She supported the suggestion that the Commission should consider examining elements of the obligation independently of its source. She was concerned that draft article 3 could be interpreted as indicating that an extradition treaty would be a direct source of a duty to extradite, without the need for additional legislation. That was not the practice in her country, where legislation was required

to implement all extradition agreements, and she urged the Commission to re-examine that interpretation.

80. **Mr. Cabouat** (France), speaking on behalf of the European Union, commented on the protection of persons in the event of disasters. The purpose of codification was to determine the exact status of the law on a subject. Disasters were exceptional events, but that did not warrant departing from the body of rules which already existed, *de lege lata*, for providing relief and assistance to victims. The topic could be codified by striking a reasonable balance between identifying the customary law principles in the matter and determining their consequences for the specific mechanisms for ensuring protection. The scope of the topic should not be limited in advance, nor should its title govern the Commission's method of study. The term "protection" certainly comprised both relief and assistance. He doubted, however, whether it should be extended to include disaster prevention, which was already covered by many bilateral or multilateral agreements in the environmental and industrial fields.

81. He agreed with the Special Rapporteur that the initial focus should be on natural disasters. The definition of "disaster" should be centred around the common effects of different kinds of disasters for people, the environment and property, avoiding the artificial distinction between natural and man-made causes. The "rights-based" approach was an interesting starting point, and did not exclude international legal considerations relating to humanitarian assistance and the rights and obligations of States in the matter. For the purposes of an eventual framework convention on the protection of persons in the event of disasters, the Commission should seek to identify the customary law principles governing the offer by States and international organizations of relief and assistance, and its acceptance by States, as well as the conditions for providing it. A close eye should be kept on the general practice of States and their own convictions as to their rights and obligations.

82. **Mr. Dinescu** (Romania) said that his delegation agreed with the Special Rapporteur on the protection of persons in the event of disasters that further work on the topic should tackle the meaning of a rights-based approach, giving balanced consideration to human rights and community interests. Within the wider context of emergency situations, future work should focus on natural disasters and the mechanisms for coordinating assistance among relief providers.

Pending a decision as to the final form of the rules to be proposed, it was important to conduct consultations with the United Nations, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organizations and to examine State practice in respect of cooperation in mitigating the consequences of disasters.

83. On the topic of immunity of State officials from foreign criminal jurisdiction, his delegation agreed with the Special Rapporteur's preliminary conclusions and his treatment of the topic and looked forward to contributing substantially to the discussions. On the topic of *aut dedere aut judicare*, he welcomed the progress made in developing draft articles, particularly in view of the increasing number of treaties providing for such an obligation. Such State practice could lead to the formulation of related customary norms that might be codified in the future. Accordingly, further draft articles should be proposed and the existing ones should be reviewed, while the ramifications of the topic, including the link between the obligation to prosecute or extradite and the principle of universal jurisdiction, as well as the "triple alternative", should continue to be addressed.

84. **Mr. Vargas Carreño** (Chairman of the International Law Commission) thanked delegations for their active participation in the debate on the Commission's report. Their observations had covered all the key topics in the report, making an essential contribution to the Commission's work at its next session. The process of interaction between the Commission and Governments was unique among the Commission's methods of work and in the general scheme of progressive development and codification of international law.

*The meeting rose at 1 p.m.*