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Summary record of the 25th meeting
Held at Headquarters, New York, on Wednesday, 5 November 2008, at 10 a.m.

Chairman: Mr. Sheeran (Vice-Chairperson) . . . . . (New Zealand)

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08-58816 (E)

In the absence of Mr. Al Bayati (Iraq), Mr. Sheeran (New Zealand), Vice-Chairperson, took the Chair.

The meeting was called to order at 10.15 a.m.

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

1. **Ms. Tezikova** (Russian Federation), commenting on the topic of "Immunity of State officials from foreign criminal jurisdiction", said that as well as being hotly debated by jurists, the topic often had to be addressed by national courts and administrative authorities. It was also of interest to the International Court of Justice, as in the recently completed *Arrest Warrant* case and also in the pending case *Certain Criminal Proceedings in France* (*Republic of the Congo v France*). It would be appropriate to codify the rules of customary international law in the matter, drawing upon the jurisprudence of the International Court.

2. Her country took the view that customary law conferred immunity *ratione personae* not only on Heads of State or Government and ministers for foreign affairs, but also on high-ranking officials of comparable status. It was important to determine which "other" officials enjoyed such immunity, the limitations to which were a very sensitive aspect of the problem. That question should be answered on the basis of the decisions of the International Court of Justice in the *Arrest Warrant* case and in the *Case Concerning Mutual Assistance in Criminal Matters* (*Djibouti v France*). It should, however, be borne in mind that the immunity of officials was an important guarantee of stability in international and inter-State relations, which could be damaged if the integrity of the institution was undermined. At the same time, human rights represented a standard to be observed by States and by their officials in their conduct, and unlawful acts committed by those officials, especially grave international crimes, must not go unpunished. However, an official enjoying immunity from foreign criminal jurisdiction did bear responsibility for his or her acts, irrespective of their gravity. The existing arrangements for prosecuting an official enjoying personal immunity from foreign criminal jurisdiction had been spelled out by the International Court in the *Arrest Warrant* case (para. 61). Accordingly, there were means by which impunity could be resisted, regardless of the existence or otherwise of exceptions to the rule of personal immunity.

3. Turning to the obligation to extradite or prosecute (*aut dedere aut judicare*), she welcomed the Commission's decision to establish a working group on the topic. However, future work on the topic should not be conditional upon answering the question whether the obligation derived from customary international law, a question which had no ready answer. Instead, the Commission should focus on how the obligation was performed in practice in both its aspects, how it came into being and how it ceased. Extradition was often complicated by political considerations, but the task of the Commission was to identify the objective legal rules by which it was governed. It should therefore focus on analysing the grounds for refusing an extradition request: situations in which there were competing requests for extradition; guarantees in the event of extradition; and the problem of extraditing a person who was not in the territory of the requested State. For that purpose, it would be useful to examine bilateral and multilateral treaties embodying the obligation, together with national administrative and judicial practice. Work on the procedural aspects of the topic might well serve to elucidate the source and nature of the obligation, the crimes to which it applied and the link to universal jurisdiction. It was too early to consider on their merits the draft articles contained in the third report of the Special Rapporteur. They might prove to be unnecessary, and indeed draft article 3 was merely a restatement of the principle *pacta sunt servanda*. The so-called "triple alternative" should not feature in the Commission's consideration of the topic.

4. Commenting on the protection of persons in the event of disasters, she said the study of the topic should cover both natural and man-made disasters, although it was not always possible to distinguish between the two categories. However, the various categories and phases of disasters were best considered at a later stage. Armed conflicts were already governed by international law and should be excluded from the scope of the topic. It was not necessary for the Commission to duplicate work already being done by other international organizations, such as the International Committee of the Red Cross and the Red Cross and Red Crescent Societies, or to engage with an existing regime for eliminating the consequences of certain kinds of disasters, such as oil spills or nuclear accidents. She welcomed the attention paid by the

Commission to the principles of sovereignty and non-interference in the internal affairs of States. The rights and obligations of States arising from their sovereignty did not give rise to a right on the part of other States to force assistance on them, or to compel a State to fulfil an obligation. There was as yet no basis in international law for a duty to provide humanitarian assistance, and such assistance could not be provided without the consent of the receiving State.

5. The concept of a "responsibility to protect" had no place in the topic. That concept, which was reflected in the 2005 World Summit Outcome, was relevant only to protection from grave crimes such as genocide, ethnic cleansing, crimes against humanity and war crimes, not to protection from disasters.

6. **Mr. Tavares** (Portugal), commenting on the topic "Protection of persons in the event of disasters", said he was in favour of a rights-based approach to the topic. He also favoured taking as a starting point the relationship between the protection of persons affected by disasters and the rights and obligations of States. Human beings should be protected under any circumstances, as in the case of international humanitarian law, international human rights law and the law relating to refugees and internally displaced persons. Only in the case of great need should there be any exceptions to the principles of sovereignty, territorial integrity and non-interference in internal affairs. He agreed with the Special Rapporteur on taking a step-by-step approach to the elaboration of the topic, beginning with natural disasters. The scope of the topic should initially be limited to disaster response. Some aspects of disaster prevention might warrant consideration at a later stage, but the question of rehabilitation had no basis in international law. In dealing with the topic, the Commission should analyse the relations between individuals, States and the international community as a whole and should consider the necessary balance to be struck among the rights, obligations and legitimate interests that arose in the event of a disaster. The concept of "responsibility to protect" must also be taken into account.

7. On the topic "Immunity of State officials from foreign criminal jurisdiction", he observed that immunity allowed State officials to perform their duties in a proper manner, while the obligation to fight impunity took account of the rights of victims and went hand in hand with immunity. A careful balance must be struck between the two principles. He agreed with the Commission's view that questions of immunity before international criminal tribunals and before the courts of the State of nationality of the official concerned should not be considered within the scope of the topic. States that were parties to the Statutes of the International Criminal Court already had domestic legislation covering the most serious international crimes, resulting in two jurisdictions for the same crimes. As for the scope of the immunity, he took the view that Heads of State and Government and ministers for foreign affairs enjoyed immunity *ratione personae*, but he would welcome further study of the question whether such immunity might also extend to other high-ranking officials such as vice-presidents or deputy ministers. As for immunity *ratione materiae*, he hoped the Commission would study possible sources, State practice and other relevant materials. The grey areas in the concept of "State official" should be examined as part of the scope of the topic rather than on their own. It was important to avoid a multiplication of basic concepts which might overlap. The source of immunity was to be found mainly in international customary law. Immunity did not release a State official from the obligation to obey the law or from his criminal responsibility. The Commission's study should pay due attention to the various aspects of the exercise of criminal jurisdiction, especially the pretrial stage. Immunity did not, in his view, continue after the expiration of an official's period of service.

8. With regard to the topic on the "Obligation to extradite or prosecute (*aut dedere aut judicare*)", he welcomed the revision to the title of draft article 1 contained in the third report of the Special Rapporteur (A/CN.4/603). The term "legal" was unnecessary to qualify the obligation. He also preferred to maintain the expression "[under their jurisdiction]" to refer to the persons affected by the obligation. The terms "persons", "persons under jurisdiction" and "universal jurisdiction" should have a place in draft article 2. Paragraph 2 of that article appeared to be redundant. He hoped for further progress on the questions raised in the earlier reports, such as the source of the obligation, the elements composing it and their relative importance, the relationship of the obligation to universal jurisdiction and to the so-called "triple alternative".

9. **Ms. Kasyanju** (United Republic of Tanzania) said that in its 60 years of existence the Commission had successfully concluded consideration of a number

of very important topics, including the law of the sea, the law of treaties, the law of diplomatic and consular relations and the law of State responsibility. That was a monumental achievement. Nonetheless, challenging times called for a dynamic and innovative response, and the Commission's future success would depend on the selection of topics relevant to the needs of the international community. Therefore, the Commission should not restrict itself to traditional topics but should take into consideration new developments in international law and the pressing concerns of the international community.

10. Her delegation welcomed the proposal for the inclusion in the current programme of work of two new topics, "Treaties over time" and "The most-favoured-nation clause", and the establishment of study groups on those topics at the Commission's sixty-first session. However, under article 18, paragraph 3, of the Commission's statute, States, through the General Assembly, could initiate topics for consideration. States were therefore under the obligation to assist the Commission to explore areas where there was a need for the development of legal principles. Codification was possible, her delegation believed, even if State practice on a particular topic was sparse, vague or inconsistent.

11. Her delegation therefore wished to propose two important topics for consideration by the Commission. The first topic, "The law concerning migration", suggested in 1992, was an urgent issue in view of the increasing importance of migration globally. The second proposed topic, "Legal mechanisms necessary for the registration of sales or other transfer of arms, weapons and military equipment between States", would address the issue of proliferation and transfers of small arms, a matter of great concern to developing countries that were victims of civil strife fuelled by small arms. The proposed topics were crucial to the international community and should be included in the Commission's long-term programme of work. She urged the members of the Commission and in particular the members of the Working Group on the Long-term Programme of Work, to outline the nature of the topics and examine the extent to which they had already been dealt with in other arrangements, including treaties and private codification projects.

12. **Mr. Álvarez** (Uruguay) said that the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" was of particular importance, since the obligation was fundamental to the protection of human rights. The most important source of law in that area was the draft Code of Crimes against the Peace and Security of Mankind elaborated by the Commission and the Statute of the International Criminal Court, to which Uruguay was a party. In Uruguayan legislation, Act No. 18.026 on cooperation with the International Criminal Court in combating genocide, war crimes and crimes against humanity provided that, when a person suspected, on the basis of *semi-plena probatio*, of having committed one of the crimes identified in the Act was to be found in the territory of Uruguay or in a place under its jurisdiction, the State, in the absence of a request for surrender from the International Criminal Court or a request for extradition, was obliged to exercise its jurisdiction as if the crime had been committed within the national territory, regardless of where it was actually committed or the nationality of the alleged offender or of the victims of the crime. The Act also provided for cases in which the International Criminal Court did not have jurisdiction and for cases in which States that might have an interest in extradition, having been notified, did not respond. The provisions of the Act covered most of the points emphasized by the Special Rapporteur debated and in the Sixth Committee.

13. Notwithstanding the basis in legislation and treaties of the foregoing rules, his delegation considered that the *aut dedere aut judicare* rule was in itself a rule of customary law, at least for a certain number of crimes, including war crimes, crimes against humanity and genocide. The entry into force of the Rome Statute had in turn influenced the practice of States with respect to the most serious crimes, independent of the existence of specific treaties.

14. **Mr. Ajawin** (Sudan) said his delegation agreed that the source of immunity of State officials from foreign criminal jurisdiction was not international comity but international law, particularly customary international law. The notion of immunity was deeply anchored in international legal jurisprudence. Although criminal jurisdiction was not exercised over the State, criminal prosecution of a foreign State official could affect the sovereignty and security of that State and constitute interference in its internal affairs, especially in the case of senior officials.

15. Regarding the legal definition of immunity, his delegation agreed with the Special Rapporteur's analysis that immunity was a legal relationship which

implied the right of the State official not to be subject to foreign jurisdiction and a corresponding obligation incumbent upon the foreign State concerned. The scope of persons covered by immunity should be defined as including Government officials generally rather than being restricted to Heads of State, Heads of Government, ministers for foreign affairs and ministers of defence.

16. While agreeing that the topic should be limited to the immunity of State officials from foreign criminal jurisdiction, leaving aside the question of immunity with respect to international criminal tribunals, his delegation would suggest that a footnote should be inserted stating that the statutes of any future international courts should recognize the legally accepted notion of according immunity to State officials in conformity with customary international law. Moreover, in cases of alleged serious human rights violations, the person accused should be accorded a chance for proper investigation before charges were brought, and the victim or the person making the allegation on behalf of the victim should be questioned and the evidence corroborated before charges were filed.

17. **Mr. Valencia-Ospina** (Special Rapporteur for the topic "protection of persons in the event of disasters") said that the work in the Committee had reflected the intense and constructive discussions within the international law community on the topic assigned to him and had helped to identify the main legal issues involved. He had taken due note of the points made, which would guide him in his future work. All the speakers had recognized the importance of the topic and approved of the Commission's decision to study it. They had agreed that draft articles should continue to be elaborated without prejudice to their final form and that armed conflicts, which were covered by a clearly defined legal regime, should be excluded from the topic and they had stressed the need to cooperate with non-State actors who had an essential part to play in the provision of humanitarian assistance to victims. He welcomed recognition by the International Federation of Red Cross and Red Crescent Societies of the crucial cooperation established with United Nations bodies and looked forward to receiving from delegations information on current practice.

Agenda item 156: Granting of observer status for the International Fund for Saving the Aral Sea in the General Assembly (A/63/234, A/C.6/63/1/Add.1 and A/C.6/63/L.13)

18. **Mr. Aslov** (Tajikistan), introducing draft resolution A/C.6/63/L.13 on observer status for the International Fund for Saving the Aral Sea in the General Assembly on behalf of the States members of the Fund, drew attention to the information contained in the explanatory memorandum annexed to document A/63/234. The Aral environmental crisis was the result of overuse of natural resources, which had led to the shrinking of the Aral Sea and created a number of ecological and socio-economic problems, compounded by the effects of global climate change. The five Heads of State of the countries of Central Asia had therefore decided to address those problems by setting up the Fund as an intergovernmental organization and to seek the support and cooperation of other international bodies, particularly within the United Nations system. Its activities were fully in line with the purposes and principles of the United Nations and granting it observer status in the General Assembly would enable it to strengthen its relations with States Members of the United Nations, and regional organizations under the Organization's auspices. It was prepared to share its regional capacity and practical experience and cooperate constructively in accordance with Chapter VIII of the Charter. He hoped that the draft resolution would be adopted by consensus.

Agenda item 72: Nationality of natural persons in relation to the succession of States (*continued*) (A/C.6/63/L.14)

19. **Mr. Mukongo Ngay** (Democratic Republic of the Congo), introducing draft resolution A/C.6/63/L.14 on behalf of the Bureau, said that, in recent discussions on the topic, delegations had recognized that States had a duty to do all they could to prevent statelessness in the interests of stable international relations and individual welfare. Different views had been expressed, however, about the final form of the codification exercise as well as about the date for referring the matter to the General Assembly.

20. The text of the draft resolution contained only a small number of changes in relation to General Assembly resolution 59/34, to which a reference had been introduced in the fourth preambular paragraph. Other changes consisted of updates to take account of

the progress of work, particularly in regard to the advisability of elaborating a legal instrument on the question, mentioned in the fifth preambular paragraph. The wording of paragraph 4, including the reference to the sixty-sixth session and the decision to examine at that time the question of the form that might be given to the draft articles, was a compromise. He hoped that that spirit would prevail and that the draft resolution would be adopted by consensus.

Agenda item 77: Consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives (*continued*) (A/C.6/63/L.12)

21. **Mr. Haapea** (Finland), introducing draft resolution A/C.6/63/L.12 on behalf of the Bureau, said that Bulgaria, China, the former Yugoslav Republic of Macedonia, Turkey and Ukraine had joined the sponsors. By the end of September 2008, 30 States had reported incidents involving their diplomatic or consular missions or their representatives. The continued occurrence of such attacks showed that Member States must demonstrate a resolve to end violations of the security and safety of diplomatic and consular missions and representatives. It was incumbent upon all States to adopt the requisite preventive measures and to comply with the reporting procedures set out in paragraph 10 of the draft resolution. The text of the new draft resolution was the same as that of General Assembly resolution 6/31 of 4 December 2006, the previous resolution on the subject, apart from technical updates in footnote 1 and in paragraphs 13 and 15. He hoped that the draft resolution could be adopted without a vote.

Agenda item 74: Report of the United Nations Commission on International Trade Law on the work of its resumed fortieth and forty-first sessions (*continued*) (A/C.6/63/L.4, L.5 and L.6)

22. **Mr. Bühler** (Austria), introducing draft resolution A/C.6/63/L.4 on behalf of the Bureau, announced that Egypt and the former Yugoslav Republic of Macedonia had joined the sponsors of what constituted the annual omnibus resolution on the report of the United Nations Commission on International Trade Law on its work.

23. The preamble to the new draft resolution stressed the importance of international trade law and outlined the Commission's mandate, work and coordinating role. Paragraphs 1 to 5 described the progress made in 2008, in particular the completion and adoption of the *Legislative Guide on Secured Transactions*, the completion and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea and the revision of its Model Law on Procurement of Goods, Construction and Services and its Arbitration Rules. Paragraph 6 endorsed the efforts of the Commission, as the core legal body within the United Nations system in the field of international trade law, to increase coordination and cooperation in that field and promote the rule of law at the national and international levels. Paragraph 7 reaffirmed the importance, in particular for developing countries, of the Commission's work concerning technical assistance and cooperation in the field of international trade law reform and development. Paragraphs 8 and 9 concerned the trust fund to provide travel assistance to developing and least developed countries. Paragraph 10 welcomed the comprehensive review of its working methods undertaken by the Commission with a view to ensuring the high quality of its work and the international acceptability of its instruments. Paragraph 11 welcomed the Commission's discussion of its role in promoting the rule of law at the national and international levels and the Commission's conviction that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to enhance the rule of law. Paragraph 12 referred to the Commission's consideration of the proposed strategic framework for the period 2010-2011, to its review of the proposed biennial programme plan for the progressive harmonization, modernization and unification of international trade law and to its concerns that the resources allotted to the Secretariat under subprogramme 5 were insufficient to meet the increased demand for technical assistance from developing countries. Paragraph 19 took note with appreciation of conferences celebrating the fiftieth anniversary of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and of the Commission's efforts to monitor the Convention's implementation and promote its uniform interpretation and application. The last paragraph of the draft resolution expressed appreciation of the contribution made by Jernej Sekolec, the former Secretary of the Commission, to the advancement of international trade law.

24. Introducing draft resolution A/C.6/63/L.5 on behalf of the Bureau, he said that it expressed appreciation of the Commission's completion and adoption of the *Legislative Guide on Secured Transactions*. It requested the Secretary-General to disseminate the text and to transmit it to Governments and other interested bodies. It also recommended that all States should give favourable consideration to the *Guide* when revising or adopting the relevant legislation.

25. Introducing draft resolution A/C.6/63/L.6 on behalf of the Bureau, he explained that it referred to the completion of a draft convention on contracts for the international carriage of goods wholly or partly by sea. Paragraph 1 commended the Commission on its preparation of the draft convention. Under paragraph 2, the General Assembly would adopt the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Paragraph 3 authorized the holding of a signing ceremony in the Netherlands in 2009 and recommended that the rules in the Convention should thereafter be known as the "Rotterdam Rules". Paragraph 4 called upon all Governments to consider becoming parties to the Convention. He was confident that all three draft resolutions could be adopted without a vote.

Agenda item 151: Observer status for the South Centre in the General Assembly (*continued*)
(A/C.6/63/L.3)

26. **Ms. Kasyanju** (United Republic of Tanzania) announced that Madagascar and Mali had joined the sponsors of draft resolution A/C.6/63/L.3.

27. *Draft resolution A/C.6/63/L.3 was adopted.*

Agenda item 153: Observer status for the University for Peace in the General Assembly (*continued*)
(A/C.6/63/L.2)

28. **Ms. Solano** (Costa Rica) announced that Croatia, Cuba, Egypt, El Salvador, the former Yugoslav Republic of Macedonia, Guatemala, Jordan, Mexico, Montenegro, Pakistan, Paraguay, the Russian Federation, Slovenia and Spain had joined the sponsors of draft resolution A/C.6/63/L.2. She hoped that the draft resolution would be adopted without a vote.

29. *Draft resolution A/C.6/63/L.2 was adopted.*

The meeting rose at 11.45 a.m.