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Chairman: Mr. Stastoli (Vice-Chairman) . . . . . (Albania)

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In the absence of Mr. Benmehidi (Algeria), Mr. Stastoli (Albania), Vice-Chairman, took the Chair.

The meeting was called to order at 3.15 p.m.

Agenda item 81: Report of the International Law Commission on the work of its sixty-first session (*continued*) (A/64/10 and A/64/283)

1. **Mr. Czapliński** (Poland), referring to the topic of reservations to treaties, said that, although his delegation supported the Commission's efforts to cover all the issues that could cause problems in practice, it considered that the growing number of guidelines and their detailed nature could decrease the practical usefulness of the document. The right balance should be maintained between comprehensiveness and the need to complete work on the topic. The Commission should focus on matters of practical importance and devote less time to issues on which there was little practice, such as approval of an interpretative declaration.

2. Draft guideline 3.4.2 (Substantive validity of an objection to a reservation) appeared to authorize objections with "intermediate effect" if they fulfilled certain conditions; however, that hypothesis appeared premature since the Commission had not yet analysed the specific legal effects of objections. The Special Rapporteur's position that the 1969 Vienna Convention on the Law of Treaties, while not expressly authorizing objections with "intermediate effect", did not prohibit them, could be supported, but raised many questions that required further study. The intended legal effects of such objections were, in fact, the same as the legal effects of reservations, since the draft guideline addressed the case in which the objecting State sought to exclude in its relations with the author of the reservation the application of provisions of the treaty not affected by the reservation. Therefore such objections would constitute "counter-reservations". According to the fundamental principle, reflected in article 38 of the Statute of the International Court of Justice, that international conventions established rules expressly recognized by the contracting States, the consent, albeit tacit, of the author of the reservation might be necessary for an objection with "intermediate effect" to produce its purported effects. If the Commission decided to adopt draft guideline 3.4.2 as proposed, it should add the word "and" between subparagraphs (1) and (2), to indicate that both conditions for validity must be fulfilled. As for the question of the substantive validity of interpretative declarations, perhaps the additional requirement that they must comply with the object and purpose of the respective treaty could be included in draft guideline 3.5.

3. The possibility of recharacterizing interpretative declarations, something that occurred quite frequently, enabled States to apply the rules contained in guideline 1.3.1 for distinguishing reservations from interpretative declarations. Moreover, recharacterization was the only way for States to assess the interpretative declarations made by other parties to a treaty, when such declarations should be considered reservations according to guidelines 1.3, 1.3.1, 1.3.2 and 1.3.3.

4. His delegation agreed, in general, with the wording of draft guidelines 3.4.1 and 3.6; however, further study was required on the legal effects of the recharacterization of interpretative declarations. The wording of guideline 2.9.3, whereby a State "treats" the declaration formulated by another State as a reservation, gave the impression that each State could determine whether the declaration of another State was an interpretation or a reservation. It would be important to ascertain whether such unilateral statements could produce such far-reaching legal effects. It was also necessary to consider whether the State or international organization that had formulated an interpretative declaration recharacterized by another State as a reservation could react to the recharacterization and what legal effects that reaction could produce.

5. Regarding the topic of expulsion of aliens, although the Special Rapporteur acknowledged the need to maintain a balance between the right of States to expel aliens and the need to respect human rights, the wording of some of the draft articles raised concerns. Draft article 8 referred to the need to respect the "fundamental rights" of persons being expelled and "all other rights the implementation of which was required by the specific circumstances". However, it might be difficult to determine the content of those two categories of rights in practice, since various national and international legal instruments used the term "fundamental rights" with significantly different meanings. The Special Rapporteur admitted that there was no legal definition of the concept; hence it did not seem a sound basis for the general obligation to respect the human rights of persons being expelled.

6. Draft article 14 referred to both sides of the obligation not to discriminate: the obligation incumbent upon the State exercising its right of expulsion not to discriminate against the person concerned and the right of the person being expelled not to be discriminated against in the enjoyment of his or her rights and freedoms. It was not yet clear how the concept of non-discrimination should be treated in relation to the right of expulsion, in view of the rights and freedoms provided for under international human rights law. In that light, the Special Rapporteur had been wise to restructure his workplan and reformulate some of the proposed draft articles.

7. **Mr. Yee** (Singapore) said that the complexity of the topic of reservations to treaties related to the basic juridical structure of international law, and it would be rare to find a single actor or body that had the ultimate authority to pronounce on the permissibility of a reservation or an interpretative declaration, which, in essence, qualified an expression of State consent.

8. With regard to the topic of expulsion of aliens, it was necessary to strike the right balance between a State's sovereign right to expel aliens and the need to respect the human rights of the affected individuals. His delegation could not accept the wording of the second sentence of draft article 9, which suggested that a State that had abolished the death penalty had an automatic and positive obligation under general international law not to expel a person who had been sentenced to death to a State in which that person might be executed, without first obtaining a guarantee that the death penalty would not be carried out. The draft article also suggested that such an obligation was an aspect of the right to life. There was no such obligation under general international law and the right to life did not imply the prohibition of the death penalty. A State that had abolished the death penalty was not bound by customary law to prohibit the transfer of a person to another State where the death penalty might be imposed. If a State chose to bind itself in that way by undertaking specific treaty obligations, it was a different matter.

9. Draft article 8 stated that any person who had been expelled was entitled to respect for his or her fundamental rights and all other rights required by his or her specific circumstances; it was unclear why a distinction had been made between different sets of human rights. An attempt to establish a list of applicable rights, or even the use of the term "fundamental rights" in the text of the draft articles, would only prompt a long and perhaps unproductive discussion about what those rights were. When a State decided to expel a person, it was required to respect all the human rights that applied to that person. The rights applicable to that situation were necessarily contextual and could evolve over time with the development of general norms of international law. A practical approach should be taken, by means of a text that made a general reference simply to the broader and more inclusive term "human rights".

10. **Mr. Kowalski** (Portugal) said that, while acknowledging the quality and value of the work undertaken on reservations to treaties, his delegation considered that the results went too far without a sufficient basis in the Vienna Conventions on the Law of Treaties on State practice. Reservations and interpretative declarations were two different legal concepts: the former had direct legal effects, while the latter related mostly to the question of interpretation. The Vienna Conventions did not deal with interpretative declarations, and his delegation recommended a cautious approach since the issues at stake were beyond the scope of the Conventions.

11. On the subject of the permissibility of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations, although his delegation understood the reasons behind the Commission's wish to qualify reservations as valid or invalid, it considered that to do so was premature and the qualification could be overly broad. The provisions of the Vienna Conventions were probably adequate for clarifying the issue of validity. Consequently, the emphasis should be on the effects of reactions to reservations and to interpretative declarations.

12. While agreeing with the Special Rapporteur's proposal to divide the resulting draft guideline 3.4 (Substantive validity of acceptances and objections) into two separate provisions, in the case of the resulting draft guideline 3.4.2 (Substantive validity of an objection to a reservation), whenever the intention was to modify or exclude the legal effects of certain treaty provisions not covered by the initial reservation, his delegation questioned whether the objection was not in fact a reservation and to be dealt with as such.

13. With reference to draft guidelines 3.5.2 and 3.5.3 on conditional interpretative declarations, uncertainty about the legal nature of such declarations could harm

the "reservations dialogue", which should be carefully preserved. Further comprehensive analysis was required in order to establish clearly the legal nature of conditional interpretative declarations, identify their legal effects and decide whether to deal with them in the current context.

14. Regarding draft guideline 3.6 (Substantive validity of an approval, opposition or recharacterization), his delegation had already expressed the view in connection with guideline 2.9.1 that the word "approval" had a specific legal meaning that was not appropriate in the context and could even mislead by suggesting that an interpretative declaration might have to fulfil the same domestic legal requirements as the formulation of a reservation. A clearer explanation of the use of the term should be included in the commentary to guideline 2.9.1. On the other hand, the term "recharacterization" was an improvement over "reclassification". It dispelled any doubts that a "disguised reservation" was a reservation from the outset, not an interpretative declaration and would help prevent a voluntarist approach to the matter.

15. Despite the relevance of the issue of reservations to treaties in the context of succession of States, the Commission did not have a mandate to enter into the development of international law in that context and should concentrate on finishing the Guide to Practice as soon as possible.

16. With regard to the topic of expulsion of aliens, the limits imposed on the right of expulsion were highly relevant; individual rights must be respected in expulsion situations. Study of the question should be comprehensive and not limited to a list of specific rights. Some fundamental issues appeared to have been overlooked in the report, such as the question of what constituted an adequate assurance that the death penalty would not be carried out in the receiving State. The question of adequate assurances also applied to torture or inhuman or degrading treatment. Those issues were of major concern to his delegation, since the Portuguese constitution prohibited expulsion of aliens to countries where they faced a real risk of being subjected to torture or inhuman or degrading treatment or the death penalty. Regarding the death penalty, it remained unclear whether the issue involved was expulsion or extradition. That aspect required further clarification, and a clearer line between the two legal concepts should be established. Lastly, Portugal doubted whether international law established an absolute prohibition against discrimination on the grounds of nationality with regard to expulsion.

17. **Mr. Dufek** (Czech Republic), referring to the permissibility of reactions to reservations, said that the real question was less whether an act was permissible or not than whether it could produce the desired legal effects. The Commission should therefore focus on the effects of reactions to reservations to treaties.

18. Regarding draft guideline 3.4.1, it was unclear why there should be one regime for the permissibility of explicit acceptance and another for tacit acceptance, contrary to the 1969 and 1986 Vienna Conventions. The Special Rapporteur had concluded that it would be unwise to speak of the permissibility of reactions to reservations, regardless of whether the reservation was permissible or not, and that could be one way to resolve the question. Otherwise, it could be clarified by noting that articles 20 and 21 of the Vienna Conventions concerning acceptance of and objection to reservations were applicable only to permissible reservations.

19. His delegation had similar doubts with respect to draft guideline 3.4.2 concerning the permissibility of objections with "intermediate effect". As indicated in the Special Rapporteur's report, such objections were rare and limited to highly specific contexts, and they had no explicit legal basis in the Vienna Conventions. Hence the question arose whether there was any justification for creating special rules for the permissibility of that type of objection. Moreover, draft guideline 3.4.2 distinguished between permissible and impermissible objections with "intermediate effect"; it was unclear what the practical consequences of that differentiation might be and whether the two categories of objections had different legal effects.

20. The central issue was the effects of objections to reservations, rather than their permissibility. The key to assessing objections with "intermediate effect" was the interpretation of article 21, paragraph 3, of the Vienna Conventions concerning the legal effects of objections to reservations, in particular the phrase "the provisions to which the reservation relates". In that regard, objections with "intermediate effect" were similar in their legal effects to reservations limited *ratione personae*, to the extent that they exceeded the scope of the original reservation to which they were a reaction. In view of the possible legal effects of objections as provided for in the Vienna Conventions, it was

reasonable that an objection with "intermediate effect", or any other objection to a reservation, could not render the treaty incompatible with a peremptory norm of international law. As noted in the Special Rapporteur's report, an objection could only exclude the application of one or more provisions of the treaty, or the application of the treaty as a whole, in bilateral relations between the author of the objection and the author of the reservation. Those relations continued to be governed by general international law, including *jus cogens* norms.

21. Under the topic of expulsion of aliens, the relationship between expulsion and human rights was an issue of great importance requiring thorough consideration, including analysis of a broader range of legal literature on migration and human rights and an in-depth study of the case law of international bodies competent to review the observance of human rights by States in the expulsion process. In that respect, greater use should be made of the work of the Human Rights Committee. His delegation welcomed the revised workplan and was pleased that due process guarantees for persons who had been or were being expelled were slated for consideration in the near future.

22. **Mr. Liu** Zhenmin (China), referring to reservations to treaties, said that although guidelines 2.9.8 (Non-presumption of approval or opposition) and 2.9.9 (Silence with respect to an interpretative declaration), as provisionally adopted, had been harmonized to some extent, there was still room for improvement. For example, the exceptional cases in which approval of an interpretative declaration or opposition thereto could be inferred were not clearly explained, and the provisions failed to clarify in what manner and to what extent silence could be considered tacit approval.

23. Dispute settlement bodies and treaty bodies were competent to assess the permissibility of reservations when so mandated by the contracting parties; however, the assessment by the contracting parties should have priority. The guidelines should make it clear that when a reservation was found to be impermissible, the author of the reservation should be given the option of withdrawing it or denouncing the treaty.

24. Regarding the validity of interpretative declarations and of reactions to reservations or interpretative declarations, the meaning of the phrase "affected by the reservation" and "a sufficient link with the provisions in respect of which the reservation was formulated" in draft guideline 3.4.2 required clarification. The reference to "a peremptory norm of general international law" should be deleted from draft guideline 3.5, because there were significant differences of opinion as to the scope of such norms and who should determine it; the incorporation of the concept in the draft guidelines could give rise to disputes in practice. The implications of draft guideline 3.5.1 also required further clarification, in particular the questions of who should determine whether a unilateral statement constituted a reservation and how differences should be resolved if contracting parties had divergent views on whether an interpretative declaration constituted a reservation.

25. While his delegation looked forward to the finalization of the draft guidelines, it was concerned that their value in guiding State practice could be compromised as they were not sufficiently grounded in State practice, the texts were too long and the contents too detailed. It hoped that the Commission and the Special Rapporteur would recognize those problems and take appropriate measures to address them.

26. In the study of the topic of expulsion of aliens, care should be taken to find a balance between the right of States to expel aliens and their obligation to respect the human rights of the persons being expelled. Draft article 10 (Obligation to respect the dignity of persons being expelled) deserved special mention because it would have positive significance in practice. However, he doubted that paragraph 2 of draft article 13 (Obligation to respect the right to private and family life), which indicated that a State "shall strike a fair balance between the interests of the State and those of the person in question", would be operable as, in practice, it would be extremely difficult to determine whether that balance had been achieved.

27. The revised draft articles proposed by the Special Rapporteur (A/CN.4/617) were clearer and better structured. The overall framework of the new draft workplan (A/CN.4/618) was sound; however, chapter 8 (Rights of expelled persons) should be moved to Part 1 (General rules), and a new chapter entitled "Conditions for legitimate expulsion" should be added to that part. Under Part 2 (Expulsion procedures), the Commission should conduct an in-depth study on relevant State practice with a view to producing reasonable and feasible articles that all States could accept.

28. **Mr. Panahiazar** (Islamic Republic of Iran), commenting on the draft guidelines to reservations to treaties, said that the guidelines should not go beyond their original rationale, which was to provide practical guidance for applying the relevant provisions of the 1969 Vienna Convention on the Law of Treaties. Interpretative declarations were often used by States to circumvent formal limitations relating to reservations, thereby facilitating accession to international treaties. To introduce detailed guidelines on interpretative declarations might not only undermine that role but create problems for their application in practice, while also making the Guide to Practice less useful for applying the provisions of the Vienna Convention. Reservations and interpretative declarations were two different legal institutions, and should be governed by different legal regimes. Therefore it was not advisable to extend to interpretative declarations, mutatis mutandis, the same procedural and substantive requirements applicable to reservations.

29. As for the question of the permissibility of reactions to reservations, not all reactions were necessarily permissible or effective. In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice had concluded that "the object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them". The Commission's decision in 1966 not to establish conditions for the permissibility of objections should not prevent it from doing so now, given the many instances of objections to reservations in recent years. An objection to a reservation should be formulated in conformity with the principle that States were bound by treaty obligations only when they had expressed their consent, and that no State could bind another against its will. In addition, objections must not undermine the object and purpose of a treaty, or be incompatible with a peremptory norm of international law.

30. On the question of the permissibility of reservations with "intermediate effect", objections that sought to exclude the application of provisions of a treaty to which the reservation itself did not relate would seriously undermine the stability of treaty relations and might be contrary to the object and purpose of a treaty. In draft guideline 3.4.2, the condition of a "sufficient link" between provisions was not clear, and the second requirement, that the objection should not result in depriving the treaty of its object and purpose as between the author of the reservation and the author of the objection, undermined the intention of the Vienna Conventions to ensure respect for the object and purpose of a treaty as a whole. The draft guidelines should not alter the general regime of the Vienna Conventions, or depart from the general practice of States.

31. On the topic of expulsion of aliens, his delegation reiterated its position that the right to expel aliens was inherent in State sovereignty, although the exercise of that right must be in accordance with established principles of general international law. An alien being expelled should enjoy the protection accorded by international human rights law, and specifically those rules that were relevant, applicable and non-derogable. That approach would be more beneficial to aliens than a reference to the concept of "fundamental rights", the content of which was vague and controversial. Protection should not be made subject to the implementation of all human rights instruments, which would confuse the situation. The approach should be one of codification, rather than progressive development, of international law. Draft article 8 should be revised to reflect that approach.

32. There was no need for draft articles 9 to 14, since the rules necessary for the respect of human rights were already clearly stated in the many international human rights instruments. If, however, the Commission decided to retain those articles, they should be kept short. In draft article 9 on the right to life, paragraph 1 and the second part of paragraph 2 could be deleted. Since respect for the dignity of persons was a basic principle underlying all human rights, paragraph 2 of draft article 10 could be included in draft article 8; paragraph 1 was superfluous. Draft article 12 on the protection of children, in particular paragraph 2, took insufficient account of the integrity of the family. As for draft article 13, if the Commission considered it necessary to have a separate article on the right to private and family life, paragraph 1 would be sufficient. The language of paragraph 2 was controversial and vague. With regard to draft article 14, the obligation not to discriminate was a basic principle, rather than a right. If the Commission wished to maintain the principle, it could be included in a separate paragraph in draft article 8, expressed in a simpler form and omitting controversial points that went beyond codification.

33. **Ms. Telalian** (Greece), speaking on the topic of reservations to treaties, said that her delegation supported the inclusion of guidelines 2.4.0 and 2.4.3 *bis*, concerning the form and the communication of interpretative declarations, respectively, in the form of recommendations. She also agreed with the Special Rapporteur that guideline 2.4.3 *bis* should not mention guideline 2.1.8, as the question of the permissibility of an interpretative declaration should be distinguished from that of an impermissible reservation or conditional interpretative declaration. Similarly, since States were typically unwilling to set forth their positions concerning the meaning of a treaty provision, it was unnecessary to require them to state the reasons for their interpretative declarations. It would, however, be useful to have a statement of the reasons for a State's reaction to an interpretative direction, as provided in guideline 2.9.6.

34. Her delegation's position on the permissibility of reactions to reservations had been stated in previous years: since the provisions of articles 20 and 21 of the Vienna Convention were not applicable in the case of reservations that were contrary to the object and purpose of a treaty, acceptance of or objection to such reservations produced no legal effect. Furthermore, the absence of an objection to an impermissible reservation did not, in her delegation's view, imply acceptance since article 20, paragraph 5, of the Convention related only to permissible reservations. Any other interpretation would mean that silence on the part of other States parties to the treaty should be viewed as their tacit consent to the impermissible reservation. Such a position was not in line with existing practice and, in the case of human rights treaties, would deprive their monitoring bodies of an opportunity to make a determination of the reservation's compatibility with the object and purpose of the treaty at a later stage. She welcomed the Special Rapporteur's decision to divide draft guideline 3.4 into two separate provisions, draft guidelines 3.4.1 and 3.4.2, which reflected those concerns. The conditions set out in draft guideline 3.4.2 regarding the permissibility of objections with "intermediate effect" offered clarity in that area.

35. Her delegation agreed with the criteria for the permissibility of an interpretative declaration set out in draft guideline 3.5.1; a declaration that purported to exclude or modify the legal effect of the provisions of a treaty should be treated as a reservation under article 2, paragraph 1 (d), of the Vienna Convention and should therefore be assessed in accordance with guidelines 3.1 to 3.1.13 (not 3.1.15 as stated in the draft guideline). Conversely, an interpretative declaration that was not considered a reservation should not be subject to the permissibility and validity regime for reservations established in the Vienna Convention; such declarations were binding only on the author State and did not produce legally binding effects for other States parties unless they had accepted the declaration in question. Her delegation could therefore accept either the language initially proposed by the Special Rapporteur in draft guideline 3.5 or his revised text, which introduced an additional condition for the validity of such declarations: their compatibility with a *jus cogens* norm.

36. Her delegation could also accept the revised text of draft guideline 3.6, although, as with draft guideline 3.5, there were very few cases in which an interpretative declaration was expressly prohibited by a treaty. It would be useful to have examples of treaties that contained implicit prohibitions of such declarations.

37. As the Special Rapporteur had rightly stated, a conditional interpretative declaration potentially constituted a reservation and as such should be subject to the same conditions for permissibility. Draft guideline 3.5.2 dealt with that issue, but it was important to note that not all conditioned interpretative declarations could be considered reservations. It might be unwise to align the regime applicable to conditional interpretative declarations too closely with that of reservations. If the Commission ultimately decided to make a distinction between simple interpretative declarations and conditional interpretative declarations, draft guideline 3.5.2 could be acceptable for reasons of legal security.

38. On to the topic of the expulsion of aliens the new draft workplan presented by the Special Rapporteur (A/CN.4/618) though provisional, was useful in that it provided a complete picture of the issues to be addressed in the draft articles. In her statement, she would comment on the draft articles on protection of the human rights of persons who had been or were being expelled as revised and restructured by the Special Rapporteur (A/CN.4/617).

39. The right to expel foreign nationals was inherent in State sovereignty, and international human rights treaties did not explicitly guarantee an alien's right to

enter, reside in or establish family life in a particular country. Control over the entry and residence of aliens was closely linked to the right and responsibility of States to maintain public order, as well as to pursue other legitimate aims such as the economic well-being of the country. States were, however, bound to respect the substantive and procedural limits deriving from international law, including international human rights law. The issue was a delicate one and should be approached in a cautious, balanced manner on the basis of existing practice, rather than by trying to set new standards; the Special Rapporteur should also clarify certain concepts before embarking on a more detailed examination of the issue.

40. With regard to draft article 8 (General obligation to respect the human rights of persons who have been or are being expelled), her delegation firmly believed that the establishment of a hierarchy among such rights should be avoided and that it would be extremely difficult to set out an exhaustive list of rights to be protected in the context of expulsion. It would be more realistic to identify a number of more general rights that were of particular relevance to the topic.

41. A reference to possible restrictions of the human rights of persons undergoing expulsion could be considered, in which case it should be complemented with an enumeration of the conditions (such as lawfulness, pursuit of a legitimate aim and proportionality) under which such restrictions were permissible under international law.

42. Concerning draft article 9 (Obligation to respect the dignity of persons who have been or are being expelled), her delegation agreed that human dignity was the foundation of human rights and a fundamental value to be respected and protected in all circumstances. However, it was not clear which specific individual entitlements and corresponding State obligations, if any, stemmed from the need to respect the dignity of persons undergoing expulsion. While several human rights treaties, as well as other, non-binding, texts made explicit mention of human dignity, most of them did so only in their preambular paragraphs.

43. Her delegation shared the view that the prohibition of discrimination on the grounds enumerated in paragraph 1 of draft article 10 (Obligation not to discriminate) was an important limitation on the State's exercise of its right to expel and that the principle of non-discrimination in that context persons who had been or were being expelled. However, in light of the approach adopted on the issue of a State's expulsion of its nationals, it was unnecessary to enunciate an obligation not to discriminate between nationals and aliens in that respect. She nevertheless understood that the principle of non-discrimination did not exclude all forms of differentiation among aliens; for example, the different treatment afforded to nationals of European Union member States in that respect constituted a legitimate differentiation.

44. Concerning draft article 12, originally entitled "Obligation to respect the right to private and family life", a reference to the obligation to respect the right to private life, a concept far more imprecise than the notion of family life, would raise a number of complex issues. It was correct, therefore, to limit the scope of the draft article to the right to family life, which was particularly relevant in the context of expulsion. Furthermore, the words "derogate from" should be replaced by "limit" or "restrict" in paragraph 2 since the term "derogation" had a specific meaning in international human rights law: it was associated with measures that were adopted by States during times of public emergency but that would constitute a treaty violation under normal circumstances, whereas "limitation" or "restriction" referred to an interference in the exercise of human rights that was permissible if certain conditions were met.

45. Also in paragraph 2, her delegation considered that the reference to "law" in the earlier version, rather than "international law", should be retained since restrictions on the exercise of human rights must be prescribed by law; moreover, compliance with the substantive and procedural requirements of the applicable domestic legislation, which in turn must be compatible with the provisions of human rights treaties, was a prerequisite for a permissible restriction of a right established under such a treaty. That approach had been followed in several articles of the International Covenant on Civil and Political Rights and was supported by its monitoring body, the Human Rights Committee.

46. The most important condition for the permissibility of a restriction on the right to family life was the need to strike a balance between the interests of the expelling State and those of the person undergoing expulsion. The outcome of that process was

often uncertain and context-specific; under international case law, States had a significant margin of appreciation in assessing the appropriateness of such restrictions, and it would be difficult, if not impossible, to elaborate general rules and criteria in that respect.

47. Her delegation supported the proposal to include in draft article 13 a reference to the "best interests of the child", which was the ultimate criterion for their treatment. While a number of States had adopted specific measures to protect the rights and well-being of children under expulsion, it would be difficult to compile a comprehensive list of other categories of vulnerable persons who should receive special treatment throughout that process in the absence of a relevant international normative framework.

48. **Mr. Shapoval** (Ukraine) said that an instrument on the expulsion of aliens was needed because, in the modern world, it was crucial to reconcile respect for the human rights of persons being expelled with the sovereign right of States to expel. Any attempt to regulate the topic must take into account customary international law, principles and norms. Above all, the Commission should bear in mind that States must respect the rights of all persons under expulsion and that the domestic legal regime on expulsion should distinguish between legal and illegal aliens. Persons with dual or multiple nationality should not be treated differently from other nationals and the principle of non-expulsion of nationals should therefore apply to them. The right of a State to expel was also limited by specific substantive and procedural requirements, including the rules on protection of refugees, stateless persons and other vulnerable categories of individuals.

49. The State had the sovereign right to expel aliens from its territory if they had committed a crime or an administrative offence; if their actions had violated its legislation on the legal status of aliens or threatened the security of State or public order; or if the expulsion was necessary for the protection of the life, health, rights or legitimate interests of its nationals. The Commission's further work on that issue should focus on clarifying and solidifying existing procedural regimes.

50. His delegation attached great importance to the topic of reservations to treaties and considered that the 1969 and 1986 Vienna Conventions comprised the core of the contemporary treaty law system and laid the foundations for the rules governing reservations to treaties. The Commission had clarified important issues related to the topic.

51. Regarding guideline 3.2 (Assessment of the permissibility of reservations), his delegation agreed that dispute settlement bodies and treaty bodies could also rule on the validity of a reservation. However, careful consideration should be given to the effects of an inadmissible reservation in the event of its withdrawal or modification by the reserving State. A State should not be permitted to accede to an international treaty while nullifying central provisions thereof through reservations; such reservations were inadmissible and should not influence the legal effect of the treaty. Another issue that merited review was that of interpretative declarations, which could, in some cases, constitute disguised reservations. Where all parties formally accepted a reservation that was invalid a priori, their acceptance could be deemed to constitute unanimous agreement to amend the treaty in the sense of article 39 of the Vienna Convention.

52. Guideline 3.2.4 enumerated the possible mechanisms for assessing the validity of reservations; his delegation agreed that they were not mutually exclusive, but mutually reinforcing. Nevertheless, assessment of the admissibility or inadmissibility of reservations to treaties should be the prerogative of the States parties thereto, and the power of assessment should remain between the reserving State and the other States parties to the treaty. According to the oldest principle of international law — *pacta sunt servanda* — by becoming a party to a treaty, States consented to the obligations that it entailed. Treaty monitoring bodies should have no powers except those assigned to them by the States parties and should exercise only the functions entrusted to them by the treaty in question. Disputes concerning the admissibility of reservations should be resolved only through a dispute settlement mechanism provided for either in the treaty or in a special agreement between the States parties.

53. **Ms. Negm** (Egypt) said that it was important to strike a legal balance between the obligations of the expelling State and the receiving State, in accordance with the principles of international law. Her delegation therefore agreed that the right of States to expel aliens must be balanced with the obligation to respect human rights, taking into account the situation in the receiving State. To require the expelling State to ascertain whether certain standards were met in the receiving

State, however, particularly in terms of respect for human rights, was controversial insofar as it was a violation of the principle of national sovereignty enshrined in the Charter of the United Nations and international law as a basis for cooperation among States.

54. It was consequently vital for all Member States to respect the fundamental principles of human rights, including respect for the dignity of the person being expelled, and to ensure that the expelling State did not discriminate among aliens subject to expulsion when taking measures in that regard. Fair legal and procedural rules should be elaborated in order to halt the unlawful expulsion of aliens in violation of the right to freedom of movement under international law. The Commission should make no attempt, however, to interpret the concept of respect for human rights, as to do so would bring to its work a political dimension that was to be avoided. It must instead identify legal standards acceptable to the majority of Member States and not rely on judicial precedents set in a particular region of the world.

55. Egypt therefore supported the inclusion of draft articles providing procedural guarantees for persons who had been or were being expelled, in particular the right to contest the legality of the expulsion, the right to be heard and the right to the assistance of a lawyer. The right to property should also be covered, particularly in connection with the problem of the confiscation of an expelled alien's property, as should the right to compensation for unlawful expulsion. Reference to such obligations in the commentary alone was insufficient.

56. As interpreted in draft article 9, paragraph 2, the obligation to protect the life of persons being expelled, both in the expelling State and in relation to the situation in the receiving State, was entirely incompatible with the established principles of international customary law whereby States had the right to determine the appropriate penalty for crimes occurring in their territory. Her delegation opposed the inclusion of an obligation not to extradite a person who would face the death penalty in the receiving State, particularly since such matters were subject not only to political considerations but also to standards of reciprocity. Even if based on case law in certain States or regions of the world, those concepts continued to stir controversy among Member States. Caution should therefore be exercised in drafting articles postulating such obligations.

57. **Mr. Horváth** (Hungary) said that his delegation had supported the Commission's work on the topic of reservations to treaties since its inception. Guideline 3.2 (Assessment of the permissibility of reservations) would clear up certain unresolved issues arising between contracting States. The guidelines on treaty monitoring bodies filled the gap resulting from the unsuccessful attempts to include such provisions in the 1969 Vienna Convention.

58. The purpose of the Guide to Practice was to identify a set of rules on the most significant aspects of reservations to treaties in order to make States' practice more uniform. In order to achieve that goal, a balance must be found between comprehensiveness and a reasonable time frame for completion. His delegation reiterated its call for conclusion of work on the topic by 2011.

59. He looked forward to the Commission's discussion of the revised draft articles on the expulsion of aliens at its next session and agreed with the delegations that would prefer for the draft articles to contain only a reference to the general obligation of States to respect the human rights of persons being expelled. The idea of making a distinction between human rights and fundamental rights, as applicable especially to persons subject to expulsion, was controversial and required careful scrutiny. His delegation would submit a written reply to the Commission's questions on the topic in due course.

60. On the topic of protection of persons in the event of disasters, his delegation considered that the text of the draft articles met its overall expectations and agreed with the proposal to divide draft article 1 into two draft articles on the scope and purpose of the document, respectively. It also welcomed the proposal to exclude "armed conflicts" from the definition of disasters, although it could accept some alternate formulation that would prevent overlap with international humanitarian law.

61. With respect to the topic of shared natural resources, while his Government had submitted its replies to the 2007 questionnaire on oil and gas resources, his delegation did not see any urgent need to place that issue on the Commission's agenda.

62. His delegation welcomed the Commission's work on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) because it was important to have a holistic view of the various means of combating crime at the national and international levels. His Government was a party to several international treaties and bilateral agreements containing an *aut dedere aut judicare* provision and would soon send the Commission information on its relevant legislation and practice.

63. Although the Special Rapporteur had submitted three reports on the topic, there was still a sense of vagueness regarding its purpose and scope. The questions addressed to Member States concerning their existing obligations and relevant laws had enabled the Special Rapporteur to point out, in his third report (A/CN.4/603), some of the standard elements of and limits to the application of the principle, but the bulk of the report consisted of a compilation of national regulations with no conclusions drawn. The draft articles discussed thus far were of an introductory nature and the final outcome of the work was still unclear.

64. Concerning draft articles 1 and 2, he welcomed the intention to define some elements of the *aut dedere aut judicare* principle, such as extradition, prosecution and jurisdiction. However, draft article 3 was a mere repetition of existing legally binding obligations. The general framework elaborated by the open-ended Working Group on the topic seemed useful for identifying potential aspects of the issue; however, as it did not establish an order of priority, it was unlikely to speed up the work of the Special Rapporteur significantly.

65. Further examination of the topic should focus on pragmatic issues. It was clear from the cases heard by national and international courts that there were discrepancies in interpretation of the principle, including the understanding of the term "under jurisdiction" and of the rights of the territorial State. Section (d) of the general framework raised several questions concerning principles that might affect or prevent extradition. Since many of those questions (such as torture and the death penalty) had been considered in the past, it would be preferable to focus on controversial issues such as the misuse of those principles in an effort to secure impunity. The Special Rapporteur might also identify links with other topics on the Commission's agenda, such as the immunity of state officials from foreign criminal jurisdiction. The work might take the final form of guidelines containing generally agreed interpretations of the controversial questions.

66. The work on the most-favoured-nation clause could be of practical value in view of developments since the Commission's earlier consideration of the topic. The topic of treaties over time was more theoretical, and the study of it might be time-consuming; he hoped that it would avoid the fate of the draft guidelines on reservations to treaties, which, after 16 years, had yet to be completed.

67. **Mr. Hernández García** (Mexico) said that the fourteenth report of the Special Rapporteur on reservations to treaties (A/CN.4/614 and Corr.1 and Add.1) reflected the many years' consideration of the topic by the Commission and the Special Rapporteur.

68. With regard to guideline 2.9.3 (Recharacterization of an interpretative declaration), his delegation agreed with the Special Rapporteur that the effect of recharacterization was to change the legal status of the unilateral statement in the relationship between the State or organization having submitted the statement and the "recharacterizing" State or organization and that the permissibility of such statements was determined prima facie by the criteria for the permissibility of simple interpretative declarations, although, as the Special Rapporteur had noted, if the effect of an "interpretative declaration" was to undermine the legal effect of one of the provisions of the treaty or of the treaty as a whole, it was not an interpretative declaration but a reservation, which should be treated as such and should therefore meet the conditions for the permissibility and formal validity of reservations. Without denying the accuracy of that position, his delegation considered that it posed practical problems arising from the different stages that the Special Rapporteur envisaged for the process: the declaration must first be characterized; only then would it be possible to apply to it the conditions for permissibility of reservations.

69. Furthermore, the Special Rapporteur seemed to imply that only a competent body could definitively recharacterize an interpretative declaration as a reservation; thus, up to that point, the rules on the permissibility of such declarations would seem to be those applicable to simple interpretative declarations — in other words, they would be, in principle,

permissible. And if, as the Special Rapporteur had pointed out, the author of a recharacterization was simply expressing an opinion on the matter, since the permissibility of any interpretation of a treaty could be determined only by a competent body, it was unclear what the consequences of a State's unilateral recharacterization would be. Since, according to the Special Rapporteur, with the exception of treaty-based prohibitions of interpretative declarations, it would seem impossible to identify any other criterion for the permissibility of an interpretative declaration, an interpretative declaration, which, owing to the nature of its object, was in reality a reservation might pass unnoticed by the parties to the instrument since, unlike reservations, there were no requirements governing the form of interpretative declarations or their communication to contracting States.

70. Thus, unless a contracting State was prepared to consult a competent body in order to establish the accuracy of its recharacterization, it appeared that the latter would have no effect on the permissibility of an interpretative declaration that was, in fact, a reservation. Furthermore, while it was clear that, once the interpretative declaration had been recharacterized as a reservation, the provisions governing reservations would apply to it, it was not clear how that was to be communicated to the contracting States pursuant to article 23 of the Vienna Convention; although that might seem a minor issue, it was important to bear in mind the procedures established in article 20, paragraph 5, of the Convention.

71. His delegation welcomed draft guideline 3.4.2 which, unlike the original draft guideline 3.4, established conditions for the permissibility of objections based on the effects intended by the objecting State. It shared the Special Rapporteur's doubts about the wisdom of stating that a tacit acceptance of an impermissible reservation was impermissible. Lastly, his delegation's comments regarding recharacterization were also applicable to draft guideline 3.5.1 (Conditions of validity applicable to interpretative declarations recharacterized as reservations).

72. **Mr. Spinelli** (Italy), commenting on reservations to treaties, said that the Commission was approaching one of the most controversial questions, namely, the legal consequences of a reservation that was prohibited under article 19 (c) of the Vienna Convention, for incompatibility with the object and purpose of the treaty. Guideline 3.3 appeared to be based on the assumption that such reservations were invalid and could not be made good by an absence of reaction on the part of the other contracting parties. However, draft guideline 2.8.1, on tacit acceptance of reservations, did not expressly exclude its application to invalid reservations. The Commission should make it clear, in a future guideline, that if a contracting State or international organization did not object to an invalid reservation within the time period provided for, it could not be assumed that the invalid reservation was accepted.

73. The draft guidelines on interpretative declarations were somewhat out of place. By definition, such declarations could not be considered reservations, and their legal effects raised difficult issues relating to the interpretation of treaties which should be examined in a different context. The Commission should simply state that interpretative declarations could not be regarded as reservations. On the other hand, what the Commission called "conditional interpretative declarations" might well fall within the definition of reservations in article 2, subparagraph (d), of the Vienna Convention.

74. With regard to the expulsion of aliens, the scope of the analysis should be restricted to examining those rights of aliens that were especially relevant in the event of expulsion. The draft articles should specify which State was responsible for ensuring the protection of those rights. As for the risk that rights might be infringed by the State of destination, it would be useful to examine the role of assurances given by the State of destination concerning respect for those rights.

75. **Mr. Dinescu** (Romania), referring to reservations to treaties, said that his delegation would welcome some simplification of the structure of the Guide to Practice once work had been completed on the effects of reservations and interpretative declarations and of reactions to them. He agreed with the Special Rapporteur that interpretative declarations and reactions to them should be widely publicized and therefore should preferably be formulated in writing. In general, he agreed with the Special Rapporteur's conclusions expressed in guidelines 2.9.8 (non-presumption of approval or opposition) and 2.9.9 (silence with respect to an interpretative declaration). However, the effects to be attributed to a State's silence towards an interpretative declaration should always be determined according to the circumstances of each

particular case. It would be unwise to establish a presumption that silence had no effect and that relevant circumstances should only be taken into account "in exceptional cases", as proposed in guideline 2.9.9.

76. His delegation shared the view that formulation of an impermissible reservation by a State or an international organization did not in itself engage the international responsibility of its author. The words "in itself" in guideline 3.3.1 were sufficient to leave open the possibility that responsibility might be incurred under certain circumstances.

77. Regarding the topic of expulsion of aliens, the distinction drawn in the draft articles between "fundamental" and "other" rights failed to reflect the obligations of States to respect all human rights, whether treaty-based or customary. To postulate that if certain rights were to be respected more carefully than others would conflict with the duty of State to fulfil in good faith all their obligations under international law. Moreover, some of the draft provisions merely reiterated, in a non-exhaustive manner, norms already established in international law. That approach ran the risk of duplicating treaty instruments in force and creating a hierarchy among them and should be reconsidered.

78. Expulsion could be viewed from a double perspective: as a process and as a measure entailing the restriction of the exercise of certain rights. As a process, the rules demarcating the discretionary power of the State were important: the rights of persons subject to expulsion must be respected at all stages of the process of arriving at and carrying out the decision to expel. Seen as a restriction on the exercise of certain rights, expulsion must conform to the rules established in international law for such cases: it must serve a legitimate purpose and satisfy the criterion of proportionality between the interest of the State and that of the individual. The distinction need not be followed slavishly, but keeping it in mind could help to clarify the difference between the legality of the measure and its proportionality.

79. **Mr. Hetsch** (European Commission), speaking on behalf of the European Community, said that the Special Rapporteur's fifth report on the expulsion of aliens (A/CN.4/611 and Corr.1) presented a number of problems. It was doubtful whether an absolute prohibition against discrimination based on nationality could be regarded as an integral part of the international law concerning expulsion. The European Court of Human Rights had upheld the right of States members of the European Community to give preferential treatment to nationals of other member States, including in matters relating to expulsion. The European Community had its own legal order and its own form of citizenship. That States might in any case apply different rules to aliens than to their own nationals was evident from the practice of international treaties, such as the Community's association agreements with third States. Nationals of States which had not concluded such agreements could rely on readmission agreements or on legislation enacted on the basis of the provisions of the Treaty establishing the European Community relating to visas, asylum, immigration and other policies concerning aliens. Article 12 of the Treaty, which prohibited discrimination on grounds of nationality within the scope of application of the Treaty, could only be invoked by and between nationals of the European Community. He called for more reflection by the Commission on the standards and principles proposed in the draft articles, which did not necessarily reflect State practice.

80. **Mr. Petrič** (Chairman of the International Law Commission), introducing chapter VII of the Commission's report on the topic "Protection of persons in the event of disasters", said that the Commission had considered the second report of the Special Rapporteur (A/CN.4/598), but had merely taken note of draft articles 1 to 5 as provisionally adopted by the Drafting Committee (A/CN.4/758). In his report the Special Rapporteur analysed the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*. His proposed draft article 1, on scope, emphasized the action of States and their ability to realize the rights of persons in the event of disasters by providing an adequate response to their needs. A balance was struck in the draft between the "rights" and "needs" approaches, on the basis that they were two sides of the same coin. Some members of the Commission had supported a more distinctly rights-based approach, while others had expressed concern over the equation of the two approaches and the practical applicability of a human-rights-based approach in situations of extreme crisis. Most members had agreed with the Special Rapporteur that the concept of "responsibility to protect", as currently understood, did not extend to the protection of persons in the context of disasters.

81. As for the scope of *ratione materiae*, the prevailing view had been that no strict distinction was needed between natural and man-made causes of a disaster. Members had also agreed that the focus of the draft should initially be on State actors, leaving non-State actors for consideration at a later stage, and that the Commission should at first focus on the response phase of a disaster, leaving prevention and risk reduction to be considered later.

82. The definition of "disaster" in the Special Rapporteur's proposed draft article 2 was based on the definition used in the 1998 Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations. In that Convention, "disaster" was defined as a "serious disruption of the functioning of society", thus in terms of its effects, whereas a preference was expressed within the Commission for the more traditional approach of defining disaster in terms of the event itself. The Special Rapporteur had proposed excluding armed conflict from the definition, in order to preserve the integrity of international humanitarian law. In the view of some members, that could best be done in the context of the provision on scope, or in a separate "without prejudice" clause. It had been pointed out that it might not always be easy to separate situations of armed conflict from those of a disaster, and that what was important was to ensure that international humanitarian law continued to apply in any armed conflict.

83. In his proposed draft article 3 the Special Rapporteur sought to reaffirm the basic legal duty of States to cooperate with one another, as the cornerstone for disaster relief activities. While there had been agreement in the Commission on that point, the view had also been expressed that international assistance should supplement, not replace, the actions of the affected State; that the provision should be balanced by recognition of the primacy of the role of the affected State; and that the scope of the obligation to cooperate needed further discussion. The Commission had also dealt with the duty of the affected State to cooperate with international organizations, including the United Nations.

84. Introducing chapter VIII on the topic "Shared natural resources", he recalled that in 2008 the Commission had completed on second reading a set of 19 draft articles with a preamble on the law of transboundary aquifers, as the first outcome of a step-by-step approach to the topic. As early as 2007 it had begun preliminary discussion, in the context of a working group, on shared oil and gas resources on the basis of the Special Rapporteur's fourth report (A/CN.4/580). At its session in 2009 the Commission had established a Working Group, which had held one meeting, at which it had had before it a working paper on oil and gas (A/CN.4/608), prepared by the Special Rapporteur prior to his resignation, together with a questionnaire on oil and gas circulated to Governments in 2007 and the comments and observations received from Governments in reply (A/CN.4/607 and Corr.1 and Add.1). Views had been exchanged on the feasibility of any future work by the Commission on the question of transboundary oil and gas resources, including the practical need for such work; the sensitivity of the issues to be addressed; the relationship between that question and the question of boundary delimitations, including maritime boundaries; and the difficulty of collecting information on practice.

85. The Group had decided to defer any decision on future work on oil and gas until the 2010 session of the Commission, meanwhile entrusting to Mr. Shinya Murase the preparation of a study, with the assistance of the Secretariat, analysing the written replies received from Governments, their comments and observations in the Sixth Committee, and other relevant elements. The 2007 questionnaire had been circulated once more to Governments. The Commission, which had endorsed the course of action proposed by the Working Group, would particularly welcome comments from Governments on whether it should address the oil and gas aspects of the topic of shared natural resources.

Agenda item 78: Criminal accountability of United Nations officials and experts on mission (*continued*) (A/C.6/64/L.8)

86. **Ms. Telalian** (Greece), Coordinator, introducing draft resolution A/C.6/64/L.8 on behalf of the Bureau, said that it had been discussed in detail in informal consultations and in bilateral contacts. The text largely recapitulated that of General Assembly resolution 63/119, but certain changes and additions had been made. The reference in paragraph 1 to the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission had been deleted, since the Ad Hoc Committee had not met in

2009. Paragraph 8 now stated that consideration of the report of the Group of Legal Experts would be continued during the sixty-seventh, rather than the sixty-fourth, session of the Assembly. In paragraph 14, language had been added urging Governments to continue taking the necessary measures for the implementation of General Assembly resolutions 62/63 and 63/119, including their provisions addressing the establishment of jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials and experts on mission, as well as cooperation among States. Paragraph 15 reiterated the request to the Secretary-General to report to the General Assembly on the implementation of the resolution at its sixty-fifth session. According to new paragraph 17, his report should also include information on how the United Nations might support Member States, upon their request, to develop domestic criminal law relevant to crimes of a serious nature committed by their nationals while serving as United Nations officials and experts on mission. Under paragraph 18, the item would be included in the provisional agenda of the sixty-fifth session of the Assembly.

The meeting rose at 5.40 p.m.