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Chairperson: Mr. Lamine (Vice-Chairperson) . . . . . (Algeria)

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08-58023 (E)

In the absence of Mr. Al Bayati (Iraq) Mr. Lamine (Algeria) Vice-Chairman, took the Chair.

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

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

1. **Ms. Escobar Hernández** (Spain), referring to the working methods and future activities of the International Law Commission, said her delegation greatly appreciated that the Commission had celebrated its sixtieth anniversary by taking stock of its work and its relations with the Sixth Committee, as evidenced by the May 2008 meeting in Geneva and the interactive dialogue with legal advisers, which had identified problems while envisaging possible windows of opportunity for enhancing the work of the Commission from a practical perspective. In that regard, her delegation welcomed the Commission's proposal to continue holding periodic meetings with the legal advisers of the ministries for foreign affairs and its decision to increase contacts with different international legal institutions that were relevant for its work. Furthermore, the topics chosen by the Commission for the current five-year period, including the two new topics, "Treaties over time" and "The most-favoured-nation clause", were adapted to the needs that had arisen from practice in recent years; nevertheless, examination of the new topics should not jeopardize ongoing work.

2. On the topic of reservations to treaties, she noted that interpretative declarations were of special interest to States, particularly in view of the silence of the Vienna Conventions in that regard. Her delegation had reservations concerning the distinction between the two categories of interpretative declarations contained in draft guidelines 1.2 and 1.2.1. Although some of the reasons that had led the Special Rapporteur to establish the distinction were clear, the category of "conditional interpretative declaration" was contrived, appearing to be a *tertium genus* between an authentic interpretative declaration and a reservation. That conceptual option entailed certain risks and methodological consequences; for example, how could the same rules be applied to both types of interpretative declarations with regard to the procedure for formulating them, their duration and the meaning of the silence of third parties when the definitions contained in draft guidelines 1.2 and 1.2.1 revealed that they each had a different purpose and were intended to produce different effects on the treaty regime?

3. It was also important to consider the case where a State, on acceding to or ratifying a treaty, issued a declaration that contained elements of a predominantly political nature, which were often followed by similar declarations in response by interested third States. Her delegation wondered whether that type of declaration constituted a third category of interpretative declaration that had not been contemplated in the Guide to Practice, despite its frequent utilization. The "conditional interpretative declaration", whether or not it was a "disguised reservation", introduced distorting elements and therefore called for further consideration by the Commission.

4. The effects of silence as a reaction to an interpretative declaration could only be determined in connection with the interpretative nature of that type of declaration. Consequently, instead of generating effects for the silent State, a reaction of silence to a specific declaration would only undermine the interpretative effects of the declaration, which would be unilateral and therefore difficult to assert against third parties. Nevertheless, under certain circumstances, the interaction between the interpretative declaration, silence and the resulting mutual expectations of the declaring State and the silent State, and of third States, could result in attributing an effect to the silence that, coupled with acquiescence, was difficult to assess and would fall between an acceptance of the interpretative declaration and a waiver of the position that the silent State might have held up until that time. It would be difficult and possibly futile to enumerate the circumstances in which that effect would result from silence. Such circumstances should be decided case-by-case, based on the content of the interpretative declaration, the specific situation in which the silence occurred and the previous position of both States on the issue. In any event, maintaining a distinction between "interpretative declaration" and "conditional interpretative declaration" complicated the response provided by the Guide to the effects of silence. The Commission should therefore consider examining the relationship between the two elements.

5. With regard to the responsibility of international organizations and, in particular, to the proposed inclusion of countermeasures, her delegation shared the Special Rapporteur's general approach as well as his specific considerations on the possible scope of

countermeasures, the conditions for exercising them and the rules for terminating them. The development of the topic should, however, take into account the internal rules of each international organization. As the Special Rapporteur had pointed out, caution was needed when analysing the possible adoption of countermeasures within that framework. Nevertheless, her delegation did not share the opinion of those who classified the sanctions adopted by the Security Council under Chapter VII of the Charter as countermeasures. Such sanctions, which were measures adopted in accordance with the rules governing the United Nations, should be excluded from the approach to countermeasures adopted in the draft articles.

6. **Mr. Sheeran** (New Zealand), referring to the draft guidelines on reservations to treaties, said that New Zealand supported the approach to the formulation of objections set out in draft guideline 2.6.5, because it was important that States and international organizations could object to reservations when they were not yet a party to a treaty, provided they were entitled to become a party at a later date. It also supported draft guideline 2.6.11 and agreed that a party should not be required to re-lodge an objection to a reservation after the reservation had been formally confirmed, since the key factor to consider was the reserving State's awareness of the objecting State's intention regarding the reservation.

7. He agreed that, in general, owing to the nature of interpretative declarations, consent should not be inferred from the silence of a State or an international organization in response to them. Nevertheless, in circumstances where silence would constitute consent, the relevant factors should be clearly identified from State practice and explained. The second paragraph of draft guideline 2.9.9 merely noted that an exception would apply in "certain specific circumstances", without guidance as to what constituted such circumstances. The lack of clarity could create an administrative burden on States by obliging them to consider each interpretative declaration and provide a response in order to protect their position. In addition, uncertainty about the effect of silence on a specific interpretative declaration could lead to the undesirable result that States would increasingly lodge and object to interpretative declarations. The lack of precision could also obscure the obvious intention of the draft guideline, which was to establish a rule whereby, in general, States would not have to react to an interpretative declaration in order to avoid being bound by it. Therefore, the wording of the draft guideline required further consideration before it was adopted.

8. With regard to the draft articles on countermeasures, he said that the topic was difficult enough in relation to State responsibility, but even more complex in the context of the responsibilities of international organizations. The relationship between an international organization and its members should be regulated by the organization's constituent instrument; paragraphs 4 and 5 of draft article 52 made that clear. Regarding the general principle, his delegation had some reservations about the notion that an international organization could take countermeasures against a State that was not a member of that organization; moreover, a State subject to mandatory measures imposed by the Security Council would not have the right to take countermeasures in relation to such measures.

9. Referring to the expulsion of aliens, he noted the sovereign right of States to expel aliens from their territory and to exercise discretion when regulating nationality; nevertheless, such sovereign powers were not unlimited, but subject to specific substantive and procedural requirements that protected the individual against arbitrary acts of the State. In view of the difficulty of balancing such rights and obligations, it did not appear worthwhile for the Commission to prepare draft articles on the issues dealt with in his fourth report at the present time. In order to draft definitions, it was first necessary to identify the key general principles specifically related to the expulsion of aliens, and then to assess how those principles related to other legal and policy considerations; that exercise should be conducted without prejudging the eventual form of the final product.

10. **Mr. Troncoso** (Chile), referring to the recent meeting between the Commission and legal advisers of Governments, said that his delegation supported the Commission's proposal to hold such meetings at least once every five years and welcomed the fact that the Commission was opening up to external activities that would contribute to the codification and progressive development of international law.

11. Referring to the legal regime applicable to transboundary aquifers, he said that the draft articles were balanced and established general principles for the equitable and reasonable utilization of aquifers by

States. Moreover, the draft articles were in harmony with trends in international environmental law because they established the obligation of States to take appropriate measures to prevent, eliminate or mitigate the causing of significant harm to another State as a result of their utilization.

12. Turning to the draft articles on effects of armed conflicts on treaties, he noted that they were based on the principle of the need to safeguard the stability and continuity of treaty relations and, consequently, established that an outbreak of armed conflict did not necessarily entail the termination of a treaty or the suspension of its application. The decision to include an indicative list of categories of treaties that would continue in operation, in whole or in part, during armed conflict offered certain advantages, but could also be a source of difficulties. Almost all the treaties listed by the Commission had been adopted to continue in operation even in case of armed conflict, which raised the question of what would happen in the case of those that were not on the list and whether it would be necessary to demonstrate by other means that they should also continue to operate in those circumstances. A complete list of treaties would be neither desirable nor possible; nevertheless, if a list were to be prepared, it should include all those treaties that, owing to their importance, could and should continue to be applied during armed conflict. The Commission should therefore give further consideration to the matter on second reading.

13. In general, his delegation supported the draft articles, considering that they encompassed both international treaty law and the customary law applicable to the effects of armed conflict on treaties. However, once the Commission had received the observations requested from Governments, some of the draft articles might be modified or eliminated, such as draft article 7 on express provisions on the operation of treaties, which was superfluous. Lastly, it was significant that many of the draft articles were based on the Vienna Convention on the Law of Treaties and safeguarded the legal effects of some of the fundamental provisions of international law, including those of the Charter of the United Nations.

14. On the topic of protection of persons in the event of disasters, his delegation's comments were preliminary in nature and did not necessarily reflect his Government's final position. Contrary to most topics examined by the Commission, elements *de lege ferenda* predominated over those of *lex lata* in the case of protection of persons in the event of disasters. The Commission would first have to define the concept of protection and then determine the rights and obligations of the different actors involved in disaster situations. The draft articles should cover both natural and man-made disasters. However, they should not apply to situations that already had a legal status, such as international humanitarian law or the norms established in environmental treaties.

15. The draft articles should take a holistic approach, focusing on the various phases of a disaster: prevention, response and rehabilitation. Furthermore, the Commission should take into account all pertinent sources of law, including international human rights law, international humanitarian law and international law on refugees and internally displaced persons. The most important and possibly the most complex issue was to determine the rights and responsibilities of the different actors involved in a disaster situation with some degree of precision, taking into account both obligations *erga omnes* and the protection of fundamental human rights. International human rights law authorized certain rights to be suspended temporarily in exceptional circumstances. The Special Rapporteur should analyse that issue and inform the Committee which rights he considered could be suspended in case of disaster, and which rights could never be suspended.

16. Another issue concerned the rights and obligation of third States in relation to the alleged right to assistance and the obligation to protect. Under existing international law, in line with the reasoning of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the provision of strictly humanitarian assistance to persons or forces in another country, whatever their political affiliations or objectives, could not be regarded as unlawful intervention or as in any other way contrary to international law. Moreover, in disaster situations and subject to certain limitations, particularly in relation to the financial situation of the State providing assistance, a State might be under the obligation to provide assistance to another State; there was also the problem arising from imposing assistance that had not been requested. The rights of disaster victims were the fundamental human rights of the right to life, food, potable water, housing, health and non-discrimination. His delegation supported the

Special Rapporteur's approach to the topic and shared his view that humanitarian assistance efforts should be based on principles such as of humanity, impartiality, neutrality and non-discrimination, as well as the principles of sovereignty and non-intervention.

17. Turning to the topic of expulsion of aliens, he said that the comments on the draft articles should expressly confirm that nationals, whatever the origin of their nationality and whether they possessed one or more nationalities, could never be expelled from their country of nationality; furthermore, denationalization of a person with a view to facilitating his or her expulsion should not be permitted.

18. **Mr. Murai** (Japan) said that a parallel should be drawn between draft articles 46 to 53 on responsibility of international organizations and articles 42 to 48 on responsibility of States for internationally wrongful acts. The Commission should study further the concept of local remedies within international organizations, particularly the scope of individuals' entitlement thereto. His delegation welcomed the Commission's decision to include draft articles on countermeasures in order to limit the scope of their application. With regard to the topic of expulsion of aliens, relevant State practices should be taken into account, particularly those put in place after the Second World War, so as to ensure that the discussion continued to move forward. Moreover, in order to strike a balance between a State's right to decide upon the admission of an alien, which seemed to be inherent in its sovereignty, and fundamental human rights, it was necessary to consider relevant treaties as well as declarations.

19. **Mr. Hetsch** (European Commission), speaking on behalf of the European Community, said that while good progress had been made in the work on the responsibility of international organizations, it was questionable whether all international organizations could be subsumed under that term in the draft articles, in view of their highly diverse nature; the European Community itself was an example.

20. Draft articles 46 to 51 deserved to be supported generally. The rule set out in draft article 46, which provided that a State or an international organization was entitled as an injured party to invoke the responsibility of another international organization under certain circumstances, was well founded. The International Court of Justice had held that any international organization with legal personality had the capacity to bring claims against another international organization, in particular if the international organization in question was in breach of an international obligation under the conditions stated. Likewise, draft article 47 satisfactorily applied to international organizations the rules laid down for States, since the situation in regard to notice of claims was the same in both cases.

21. He pointed out the European Community should not be equated with the European Union, as it was in two examples cited in the Special Rapporteur's report, owing to the important legal differences between the two. Moreover, the two cases referred to were not wholly relevant to the issue of diplomatic protection; they had been found to have no link with the exhaustion of local remedies within that context. Nevertheless, he supported the inclusion in draft article 48 of the requirement that local remedies should be exhausted for claims against an international organization in the area of diplomatic protection. A similar provision was contained in article 288, paragraph 2, of the Treaty establishing the European Community, which laid down that claims could be brought against the Community "in accordance with the general principles common to the laws of the Member States".

22. Draft article 49 mirrored the relevant provision in the articles on State responsibility and deserved support. Draft article 50 addressed the issue of plurality of injured entities, which might arise as a result of the breach of a treaty by a partner to a mixed agreement, as for instance between the European Community and its Member States on the one hand, and one or more States or organizations on the other. However, the extent to which, if at all, each of the partners might separately invoke the responsibility of another partner depended on the extent of the competences transferred by the member States to the Community and the specific obligations by which they were bound. Accordingly, the Committee might suitably stress in its commentary the need to support good-faith solutions on a case-by-case basis that would avert the risk of concurrent claims by several injured entities.

23. On the issue of plurality of responsible entities, addressed by draft article 51, the case of mixed agreements again could mean that, as noted by the Special Rapporteur with reference to the European Community, the obligations for the Community and its

members might not be separated. The point needed to be further elaborated. When, as increasingly occurred, the Community and its member States became parties to the same multilateral convention, the Community usually made a declaration of competence in regard to particular areas covered by the convention. It could thus be inferred that it was the intention of the parties that there should be no scope for a plurality of responsibility. In the absence of such a declaration, the intention of the parties to assume distinct roles in implementation, as expressed by other means, must be carefully examined. The relevant responsibilities could then also be clarified on an ad hoc basis with a view to assignment of liability following the entry into force of the convention. In conclusion on the issue of invocation of responsibility, the Community recognized that a State or an international organization might invoke the responsibility of another international organization even if they were not directly injured; it therefore endorsed, in particular, the careful wording of draft article 52, paragraph 3.

24. Turning to the issue of countermeasures, he said that account should be taken of the Community's extensive practice. An injured international organization was in principle empowered to take countermeasures in response to the breach of one of its rights under international law. For example, as a member of the World Trade Organization, the European Community had the right of retaliation against another member that had breached one of its obligations towards the Community.

25. **Ms. Ioannou** (Cyprus) said that her delegation was convinced of the need to elaborate rules on the topic of responsibility of international organizations, despite the limited practice available. Because of the large number and wide variety of such organizations and their ever more important role in the international arena, as well as their interaction with civil society and their increasing association with the United Nations, it was essential to codify general rules that would apply to them all. International organizations must assume responsibility for the consequences of any international wrongful act they might commit, in cases not only of a serious breach of an obligation under peremptory norms of general international law but also where any act committed resulted in violation of rights or injury. It was paramount to codify the conditions of engagement of responsibility as well as the corresponding obligations, as in draft article 45, paragraph 2. Wrongful acts must be viewed objectively, without exceptions to accountability based on an organization's specificities or internal rules; the core concern must remain the nature and gravity of the wrongful act committed.

26. Her delegation welcomed the adoption, mutatis mutandis, of the relevant provisions of the articles on State responsibility: the same considerations and legal rationale applied to the topic of responsibility of international organizations, which was an extension of and corollary to the former topic. It was also commendable to provide in draft articles 46 and 52 for the invocation of responsibility of an international organization in cases where the obligation breached was owed to the international community as a whole; it would likewise be desirable to provide for an international organization's invocation of the responsibility of a State, especially when the State was likewise in breach of such obligations.

27. It was clear that an international organization could not evade its responsibility by invoking the positions of its member States: the connection between the acts of an organization and its responsibility and the possible consequences for its membership would need to be explored with a view to establishing legal certainty. The aim should be to find an effective and appropriate legal methodology to deal with wrongful acts resulting from the actions or omission of entities other than States possessing an international legal personality, as part of the broader effort to ensure the accountability of all international actors for wrongful acts. Lastly, she stressed that the notion of countermeasures was an archaism and urged the Commission to proceed with the utmost caution in that regard, with due attention to what constituted a countermeasure and the conditions under which it might be imposed by or on an international organization.

28. **Mr. Gaja** (Special Rapporteur of the International Law Commission on responsibility of international organizations) noted that some speakers had regretted that neither the current draft articles nor the articles on State responsibility addressed the issue of the invocation by an international organization of the international responsibility of States, which they had considered to constitute a lacuna in the overall regime of international responsibility. That lacuna together with other gaps, notably the content of international responsibility, would have to be filled, if

deemed necessary, in the articles on State responsibility, which referred to those matters only in the context of inter-State relations (art. 33). The scope of the draft articles under consideration was limited to the responsibility of international organizations.

29. The one exception resulted from draft article 1, paragraph 2, which stipulated that the international responsibility of States was also covered to the extent that it arose "for the international wrongful act of an international organization". That provision reflected article 57 on State responsibility, which stated that the articles in question were "without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization". The view was thus confirmed that it did not come within the current mandate to fill the lacunae noted, except within the context of draft article 19 on countermeasures or the commentary thereto.

30. **Mr. Vargas Carreño** (Chairman of the International Law Commission), introducing chapters IX, X and XI of the Commission's report (A/63/10), said that the protection of persons in the event of disasters was dealt with in chapter IX. The Commission had had before it the preliminary report of the Special Rapporteur (A/CN.4/598), which had traced the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic and considering previous efforts towards codification and development of the law in the area. The most recent development was the adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance at the 30th International Conference of the Red Cross and Red Crescent.

31. The Special Rapporteur had also presented in broad outlines the various aspects of the general scope of the topic with a view to identifying the main legal questions to be covered and had advanced tentative conclusions without prejudice to the outcome of the discussion in the Commission. In particular, he had extrapolated from the Commission's choice of the title of the topic the possibility of a broader concept of protection, involving a rights-based approach that would encompass a broad range of disaster situations. The Commission had also had before it a comprehensive memorandum by the Secretariat (A/CN.4/590 and Add.1-3), which focused primarily on natural disasters and provided an overview of existing legal instruments applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

32. In its debate, the Commission had generally recognized that the topic presented a range of complex issues. Despite the topic's Vattelian origins, there was still a paucity of relevant State practice, and the challenge was to identify and project from the relevant sources suitable principles to enable the Commission to perform its statutory function of the codification and progressive development of international law. Several aspects of the Commission's exercise on the topic were likely to be based more on *lex ferenda* than on *lex lata*. Accordingly, it had been essential to proceed deliberatively in the process of systematization, including, where appropriate, to analyse the practice of non-State actors so as to identify best practices.

33. The key considerations in the debate on the topic had pertained to its scope *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci*. Central to the elaboration of the topic would be the definition of "protection" and the possibility of an all-encompassing definition of "disaster", which would, however, exclude "armed conflict", primarily because there was already a well-defined regime that governed such conflicts, as *lex specialis*. Paragraphs 230 to 240 of the report reflected the Commission's debate on the scope of the topic.

34. The Commission had also considered the balance to be struck between the rights of individuals affected by the disaster and the rights of the State affected. The Commission had debated whether or not a rights-based approach included the right of victims to humanitarian assistance; to what extent the rights of the affected State should be accommodated, in particular its sovereignty and, consistent with the principle of subsidiarity, its primary role in the initiation, organization, coordination and implementation of humanitarian assistance; and what the basis would be for the provision of assistance to persons affected by disaster.

35. A rights-based approach to the topic had been perceived as solidly grounded in positive law, in particular international humanitarian law, international human rights law, international refugee law and the law relating to internally displaced persons. However, in view of the imperative need to care for victims of disasters in a timely manner, concern had also been

expressed as to whether a rights-based approach would be the best way to provide victims of disasters with full protection. There had also been extensive debate about the relevance of sovereignty, territorial integrity, humanity, impartiality, neutrality, non-discrimination, solidarity and international cooperation as guiding principles in humanitarian relief efforts, and whether the responsibility to protect should underpin the topic. The Commission's debate on those questions was reflected in paragraphs 227 to 229 of the report, as read with paragraphs 241 to 250.

36. The Commission had discussed the matter of the final form of its work on the topic, and some members had concurred with the Special Rapporteur that it would be desirable to take a decision at a relatively early stage. Given that the Commission's work would largely be in the area of progressive development rather than codification, the pragmatic goal would be to lay down a framework of legal rules, guidelines or mechanisms that would facilitate practical international cooperation in disaster response. In that regard, some members had expressed a general preference for a framework convention setting out general principles that could serve as a point of reference in the elaboration of special or regional agreements. Others had favoured non-binding guidelines, which they perceived as a more realistic outcome. Some members had stated that it was premature to take a decision on the final form. In the meantime, draft articles should be presented for consideration.

37. With regard to the future course of action, the Special Rapporteur had stated that he would focus initially on natural disasters, without losing sight of other types of disaster. He recalled that the Commission, in the 2006 syllabus, had already anticipated that approach, and had requested the Secretariat in 2007 to prepare a study initially limited to natural disasters. He had taken the view that the Commission's task would be to elaborate draft articles, without prejudice to the final form, that would serve as a legal framework for the conduct of international disaster relief activities, clarifying the core legal principles and concepts in order to place disaster relief work on a secure legal footing.

38. Obviously, completion of the work on the topic would require consultations with multiple actors, including the United Nations and the International Federation of Red Cross and Red Crescent Societies, to whom particular questions had been addressed in chapter III of the report. The Special Rapporteur had already initiated contact in order to facilitate a better appreciation of the practical problems encountered. The Commission would also welcome information on State practice relating to the topic, including examples of domestic legislation, and information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters. The frequency, magnitude and devastating character of contemporary disasters, in particular natural disasters, made the consideration of the topic timely. The Commission hoped that Governments would assist it in providing the necessary comments and information to enable it to proceed with its work expeditiously.

39. Turning to chapter X of the report, which dealt with the topic of immunity of State officials from foreign criminal jurisdiction, he said that the Commission had had before it the preliminary report of the Special Rapporteur (A/CN.4/601) and a memorandum by the Secretariat (A/CN.4/596). The Special Rapporteur's report had aimed at briefly describing the history of the consideration of the subject by the Commission and the Institute of International Law and at outlining the issues which the Commission should analyse. The report examined only some of those issues; the remainder, including the scope of immunity of State officials from foreign criminal jurisdiction and some procedural questions, would be covered in his subsequent report.

40. The Commission's debate on the topic was summarized in paragraphs 278 to 299 of the report. There had been general support for the Special Rapporteur's proposal that the Commission should not consider the question of immunity before international criminal tribunals or before the courts of the State of nationality of the official. Some members had emphasized that the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations had already been codified and did not need to be addressed in the context of the current topic. The Commission had agreed with the Special Rapporteur that the immunity of State officials from foreign criminal jurisdiction was based on international law, particularly customary international law, and not merely on international comity. However, in the view of some members, there was also room for progressive development of international law in that field.

41. Commission members had commented on the basic concepts examined in the Special Rapporteur's preliminary report, including the notions of "jurisdiction" and "immunity", as well as the rationale for granting immunity and the effect of the principle of universal jurisdiction on immunity. Members had also agreed with the Special Rapporteur that a distinction could be drawn between two types of immunity of State officials, namely immunity *ratione personae* and immunity *ratione materiae*. With respect to the terminology to be employed for the persons covered by immunity, some members had supported the Special Rapporteur's proposal to continue to use the expression "State officials" for the time being, while others had suggested that a term such as "agents" or "representatives" would be preferable. In any event, it should be determined precisely which persons were covered by those terms.

42. More specifically, the Commission had supported the Special Rapporteur's view that all State officials should be covered by the topic, given that they all enjoyed immunity *ratione materiae*. Furthermore, some members had supported the view that the "troika" of the Head of State, Head of Government and minister for foreign affairs enjoyed immunity *ratione personae*. There had been some discussion as to whether the personal immunity of ministers for foreign affairs, which had been recognized by the International Court of Justice in the *Arrest Warrant* case, was warranted under customary international law. The Commission had also discussed whether personal immunity should be extended to other high-ranking officials, such as vice-presidents, cabinet ministers, heads of parliament, presidents of the highest national courts and heads of component entities of federal States. In addition, it had been suggested that the Commission should analyse the question of immunity of military personnel deployed abroad in times of peace, which was often the subject of multilateral or bilateral agreements, but which also raised issues of general international law.

43. Different views had been expressed on the role of recognition in the context of immunity. In the light of the debate, the Special Rapporteur had suggested that the Commission could examine the possible effects of non-recognition of an entity as a State on whether immunity was granted to its officials. Divergent opinions had also been expressed on the desirability of considering, in the context of the current topic, the immunity of family members of State officials, which the Special Rapporteur considered to be based on international comity.

44. A substantial part of the debate had focused on possible exceptions to immunity, particularly in the case of crimes under international law. Some members had expressed the view that there was sufficient basis both in State practice and in the Commission's previous work to affirm that an exception to immunity existed when a State official was accused of such crimes. Some members had further contended that the position of the International Court of Justice in the *Arrest Warrant* case ran against the general trend towards the condemnation of certain crimes by the international community as a whole, and that the Commission should not hesitate either to depart from that precedent or to pursue the matter as part of progressive development.

45. Other members had maintained that the Commission should hesitate to restrict immunity. In their opinion, the *Arrest Warrant* judgment reflected the current state of international law, which had been confirmed by subsequent developments in international and national jurisprudence and national legislation. Those members had maintained that, while the Commission should, as always, consider the possibility of making proposals *de lege ferenda*, it should do so on the basis of a careful and full analysis of the *lex lata* and the policy considerations underpinning it.

46. Lastly, some members had emphasized that the Commission should consider other possible exceptions to the immunity of State officials, namely in the case of official acts carried out in the territory of a foreign State without the authorization of that State, such as sabotage, kidnapping, murder committed by a foreign secret service agent, aerial and maritime intrusion, and espionage.

47. On the topic of the obligation to extradite or prosecute dealt with in chapter XI of the report, the Commission had had before it the third report of the Special Rapporteur (A/CN.4/603), as well as comments and information received from Governments (A/CN.4/599). In his report, the Special Rapporteur had continued the process of formulating questions addressed both to States and to members of the Commission on the central aspects of the topic, in particular whether the obligation to extradite or prosecute existed under customary international law. He had also proposed a revised version of draft

article 1, on the scope of application of the draft articles, and two new draft articles dealing respectively with the use of terms and a treaty as a source of the obligation to extradite or prosecute.

48. The Commission's debate was summarized in paragraphs 322 to 328 of the report; some members had reserved the right to comment in the following year on the issues raised. A substantial part of the debate had centred on the methodology used in the Special Rapporteur's report. Some members had encouraged the Special Rapporteur to analyse the main issues and to make specific proposals to the Commission on the basis of the relevant State practice and legal literature.

49. The Commission's comments on the revised version of draft article 1 were reflected in paragraph 324 of the report. With regard to draft article 2, on the use of terms, it had been suggested that the concepts of "persons" and "persons under jurisdiction" should be defined separately, and that the expression "universal jurisdiction" should also be included in the list of terms. On draft article 3, it had been noted that the idea that treaties constituted a source of the obligation to extradite or prosecute did not give rise to any controversy. According to one view, it was nevertheless important to state the principle explicitly in the draft articles so as to confirm that any treaty could constitute a direct source of the obligation without any need for additional legislative grounds.

50. Different views had been expressed as to the future work of the Commission on the topic. It had been suggested that the Special Rapporteur should continue to address general substantive issues and propose concrete articles relating to the obligation to extradite or prosecute, such as the question of its source, its relationship with universal jurisdiction, crimes that would be subject to the obligation and the "triple alternative". The Special Rapporteur could thereafter undertake an examination of procedural questions, such as possible grounds for denying extradition. According to another view, it might prove more expedient for the Commission to examine the elements of the obligation to extradite or prosecute independently from its source and to propose draft articles on the content of the obligation and the circumstances under which it would be triggered. That would provide States with a useful set of rules based on practice.

51. At the end of the debate, the Special Rapporteur had announced that his fourth report would focus on the main substantive aspects of the topic, such as the sources, content and scope of the obligation, and that he would refer to the Commission's previous work on the draft Code of Crimes against the Peace and Security of Mankind. The Commission had also decided to establish a working group on the topic, the mandate and membership of which would be determined at its next session.

52. **Ms. Schroderus-Fox** (Finland), speaking on behalf of the Nordic countries, said that the Commission's work on the protection of persons in the event of disasters was extremely timely. Increasing numbers of people were affected by disasters, partly owing to the inability of States to provide effective protection. Despite efforts to strengthen the relevant legal regimes — with the adoption, for example, of the Guidelines for Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance at the 30th International Red Cross and Red Crescent Conference — and an impressive body of legal texts relating to disaster preparedness and response, there was clearly room for further normative work. Consultation with the International Federation of Red Cross and Red Crescent Societies, and other key actors, would undoubtedly facilitate the Commission's work and ensure that it did not duplicate that of other bodies.

53. The Nordic countries endorsed the rights-based approach adopted by the Special Rapporteur, which should cover the rights both of the victims and of affected States. The right to humanitarian assistance should be complemented by rules governing humanitarian access: if the affected State was unable to provide the goods and services required for the survival of the population, it must cooperate with other States or organizations willing and able to do so.

54. As for the scope of the topic, to draw a sharp distinction between natural and man-made disasters would not make sense for the affected individual and, indeed, would be difficult in practice, in view of the complex interaction of the various causes of a disaster. The scope should therefore be broad, along the lines of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, focusing on significant, widespread threats to persons and perhaps also to

property and the environment. Situations of armed conflict should, however, be excluded.

55. The Commission had been right to devote attention to the responsibility to protect, which was central to the topic. It's aim must be to codify the existing obligations assumed by States and the corresponding right to protection, but it should also feel free to consider any aspect of protection and explore the connections between various areas of international law.

56. With regard to the obligation to extradite or prosecute, the Nordic countries would make every effort to provide the Special Rapporteur with examples of their practices, thereby enabling him to research the issue in greater depth. A perceived lack of information from States should not, however, be allowed to delay his work.

57. There was a close link between *aut dedere aut judicare* and universal jurisdiction with regard to international crimes. There was a network of treaties linking the two, seeking to ensure that serious crimes of concern to the entire international community did not benefit from impunity. Further work should be done on the links between the various treaty provisions and on their status under general international law. In particular, there should be further research into whether the obligation *aut dedere aut judicare* was evolving into an obligation under customary law and, if so, to what extent and in what form.

58. **Mr. Retzlaff** (Germany) said that, as suggested by the Special Rapporteur on the obligation to extradite or prosecute, a number of States considered that there might well be a customary basis for the principle *aut dedere aut judicare* and that, in any case, the growing number of treaties establishing or confirming the obligation to extradite or prosecute might lead to the establishment of a customary norm. In his delegation's view, however, while universal jurisdiction and the right of every State to prosecute crimes of genocide, war crimes, crimes against humanity, slavery and piracy were undoubtedly features of customary international law, there was not yet sufficient evidence of State practice to assess whether the obligation to extradite or prosecute existed in cases not covered by international agreements. The existence of such treaties was in itself insufficient proof of the existence of a customary rule of law.

59. That view might be verified by further research into recent judgements by national and international courts. It was, however, very difficult to determine the reason for a particular practice. For example, States might appear to be complying with the principle *aut dedere aut judicare*, when they were in fact applying the principle of reciprocity, which had been identified as one of the main historical roots of the obligation. Moreover, it was doubtful whether a customary rule to extradite and prosecute could be inferred from the existence of customary rules prohibiting specific crimes affecting the international community as a whole. Even in the case of genocide, State practice was not unambiguous as to whether a customary obligation to extradite existed for all States, although it generally deprived persons accused of genocide of safe havens. Notwithstanding his delegation's doubts, however, Germany had incorporated the principle *aut dedere aut judicare* into its Penal Code.

60. With regard to the topic "Protection of persons in the event of disasters", the right approach would be for the Commission to draft non-binding rules that would be complementary to but not duplicate the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance. The Commission and the International Committee of the Red Cross should share experiences and identify problem areas to which the Commission could contribute. A comprehensive approach, taking in natural as well as man-made disasters, should be adopted, since it would be impossible to make a clear distinction between the two.

61. The Special Rapporteur was right to take all stages of a disaster into consideration. It would be short-sighted to focus on the response and assistance phase in the immediate aftermath of a disaster. Comprehensive protection must begin with prevention. His country's domestic legislation on the protection of persons already reflected the Guidelines. Germany was also involved in numerous humanitarian assistance measures worldwide. In that connection, he suggested that measures should be considered to improve the security of humanitarian aid workers, who had recently faced an upsurge in direct attacks. Aid organizations should be consulted on the form that such measures should take.

62. **Ms. Lijnzaad** (Netherlands) said that the Commission's work on the protection of persons in the event of disasters might help to build a coherent

international legal framework on the topic. Care must be taken, however, that it was not overambitious, encompassing every kind of disaster and every aspect of disaster prevention, preparedness, response and rehabilitation. The Special Rapporteur should define the focus of the study more clearly, particularly the terms "protection" and "disaster". A narrower scope would improve the possibility of identifying possible gaps in the current legal system, such as the protection of persons affected by non-international armed conflict. It was also necessary to avoid duplication with existing norms and guidelines. There was already a degree of overlap with the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, which, while non-binding, were drawn from many existing international instruments. The Special Rapporteur should indicate in greater detail how the Guidelines and their legal framework related to the Commission's study of the topic. He might even explore the possibility of codifying the right both to receive and to provide humanitarian assistance, although her delegation had some doubts about the rights-based approach, since it might not be realistic in the light of the current state of international law. There was a danger of duplicating existing human rights instruments.

63. The topic of immunity of State officials from foreign criminal jurisdiction was of great practical relevance. The Commission should therefore consider whether, under customary international law, immunity *ratione personae* applied to high-ranking officials other than incumbent Heads of State or Government and ministers for foreign affairs. When looking at a broader group of potential beneficiaries, it was necessary first to analyse the rationale justifying such immunity. Consideration should also be given to the possible exceptions to immunity, both *ratione personae* and *ratione materiae*, for crimes under international law, such as genocide, crimes against humanity, war crimes and torture. Her delegation shared the view that the Commission should consider the effects on immunity of the implementation of universal jurisdiction for international crimes. In that connection, she noted that, while the Netherlands had universal jurisdiction for crimes under international law, so long as the suspect was located in the Netherlands, Dutch law gave immunity from criminal prosecution to incumbent Heads of State or Government and ministers for foreign affairs, and other persons who enjoyed immunity under customary international law or any applicable treaty.

64. The Commission should also tackle the question of international criminal courts and tribunals, owing to their proliferation and the immunities that arose in connection with their functioning. Lastly, it should consider the distinction between, and the meaning of, "official" and "private" acts. The question of whether international crimes could be said to be committed in a non-official or private capacity was particularly germane.

65. The obligation *aut dedere aut judicare* was instrumental in achieving a global justice system in which perpetrators had no safe havens. The Special Rapporteur should therefore address substantive issues and draft a set of articles. He should begin by considering the source of the obligation *aut dedere aut judicare* and its relationship with universal jurisdiction. He should also consider what crimes would be subject to the obligation to prosecute or extradite and give some thought to the third alternative, consisting of the surrender of alleged offenders to a competent international criminal tribunal. For its part, her Government intended to intensify its efforts to investigate and prosecute international crimes. It was interested in sharing experiences with other States and welcomed such initiatives as the European Union Network of contact points in respect of persons responsible for genocide and crimes against humanity and the international expert meetings on genocide, war crimes and crimes against humanity of the International Criminal Police Organization (INTERPOL).

66. **Mr. Schulz** (Observer for the International Federation of Red Cross and Red Crescent Societies) said, with regard to the topic "Protection of persons in the event of disasters", that the experience of his Federation — the world's oldest and largest humanitarian network, representing tens of millions of volunteers — had given it an acute awareness of the importance of normative frameworks for disaster response at both the domestic and the international level. It had therefore begun a systematic programme of research in 2001, involving over two dozen case studies and discussions with Governments and humanitarian bodies to identify the relevant laws and legal issues. In 2007, following consultations with over 140 Governments, over 140 national Red Cross and Red Crescent Societies and several dozen United

Nations agencies and non-governmental organizations, the process had culminated in the adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance. A number of Governments had already begun to use the Guidelines, which were not binding, to gauge the strengths and weaknesses of their legislation. The Federation and its members were currently working to help Governments benefit from the Guidelines with technical assistance projects, the development of educational materials and training.

67. While it welcomed the positive response to the Guidelines, the Federation was aware that they would not solve all the regulatory problems associated with disaster management, focusing as they did on practical issues. Important questions remained concerning the protection of disaster-affected persons, the right to humanitarian assistance and the obligation of States to reduce risks and respond to disaster. The Commission's work on such issues, and its assessment of the development of customary law, would therefore be a valuable complement to the Guidelines. He was grateful to the Special Rapporteur for his willingness to engage with the Federation and other bodies and his quick understanding of the many practical issues involved.

68. Since the Commission's work was at a preliminary stage, he would note only that a crucial point was to determine the scope of the right to humanitarian assistance. In his Federation's view, it was a fundamental right of all people both to offer and to receive humanitarian assistance, as plainly implied in numerous human rights instruments. Much depended, however, on the nature of such assistance and the form that it took. An international actor did not have carte blanche to respond to a natural disaster without regard to domestic authorities and laws. Moreover, not only human rights were involved. His Federation's approach, for example, was needs-based but informed by rights. The Commission would need to take all the different perspectives into account.

The meeting rose at 5.40 p.m.