United Nations A/C.6/63/SR.23

General Assembly
Sixty-third session

Official Records

Distr.: General
21 November 2008

Original: English

Sixth Committee

Summary record of the 23rd meeting
Held at Headquarters, New York, on Monday, 3 November 2008, at 10 a.m.

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

Contents

08-58301 (E)

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

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

1. **Ms. Holten** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that in order to keep abreast of legal developments with regard to the immunity of State officials from foreign criminal jurisdiction, the International Law Commission should study the Judgment of 4 June 2008 of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), as it clarified a number of issues.

2. Her delegation disagreed with the view that immunity constituted a limitation of jurisdiction which foreign courts were under a duty to observe ex officio and held instead that immunity was a limitation of the exercise of jurisdiction. A point which deserved closer examination was the Court's apparent presumption in the above-mentioned case that immunity for State officials other than Heads of State, Heads of Government or ministers for foreign affairs had to be claimed actively by the official's home State and that, by doing so, that State assumed responsibility for any wrongful act committed by that person.

3. The Special Rapporteur's preliminary report (A/CN.4/601) cast the net widely with respect to the persons covered by State immunity and the conditions on which that immunity could be invoked, whereas the above-mentioned Judgment appeared to narrow the categories of persons entitled to immunity. The Commission should therefore give further consideration to the question.

4. Although it might have been a valid initial assumption that the Special Rapporteur's mandate precluded any study of immunity from international criminal jurisdiction, the interface between different types of criminal jurisdiction was such that the rules governing immunity from international criminal jurisdiction could not be entirely ignored. A more specific question was whether provisions on international crimes punishable by international criminal justice might have a bearing on the general law of immunities.

5. In order to arrive at a consistent approach to cases which were referred from an international tribunal to a national court, it would be necessary to take account of the law governing immunity applicable to the international tribunal and that applicable in the forum State. Article 98 of the Rome Statute might be relevant when determining the limits of immunity per se. Since immunity from national and international criminal jurisdiction were clearly linked issues, the Special Rapporteur should devote some attention to the question of immunity from international criminal jurisdiction in his next report.

6. The purpose of immunity, namely, to keep communication channels open between States and to ensure that States were able to perform their functions, might provide the key to identifying consistent rules. For that reason, the State's primary functions should have a central place in the analysis of immunity but should be balanced against the need for accountability and the prevention of impunity.

7. **Mr. Bühler** (Austria) said that determination of the situations to be covered by the topic "Protection of persons in the event of disasters" was of particular importance. The definition of the scope *ratione materiae* should refer to "disasters of natural origin" rather than "natural disasters" and should include man-made disasters which had an impact on the natural environment. The two decisive criteria were the nature of a disaster and its origin. Disasters resulting from armed conflicts should be excluded.

8. When determining the scope *ratione personae*, the main concern should be to protect natural persons who were victims of such disasters; the inclusion of legal persons was a question which should not be contemplated until a later stage. Although difficult legal questions such as third party liability and compensation for damage caused in the course of assistance arose in connection with the status of assisting parties, that issue would have to be addressed.

9. With regard to scope *ratione temporis* the Commission should initially focus on response measures; all questions relating to early warning systems and the prevention of natural disasters or accidents should be scrutinized at a later stage only if a decision were taken to extend the topic to them. Since the effects of disasters were rarely confined to one State, it would be wise for the scope *ratione loci* to encompass disasters with transboundary effects, even though that would entail consideration of additional

aspects such as the coordination of response measures and cooperation among affected States.

10. Since the topic was closely related to human rights law, certain rights, such as the right to life or the right to food, enshrined in human rights conventions and generally recognized would have a bearing on the matter under consideration. As far as the right to humanitarian assistance was concerned, the 2003 resolution on humanitarian assistance of the Institute of International Law reflected a consensus that States were permitted to offer such assistance, but could not render it without the consent of the affected State. That State's duty not to reject the offer of help arbitrarily and to allow access to victims could be deduced from human rights law, irrespective of any responsibility to protect.

11. The decision to take up the topic "Immunity of State officials from foreign criminal jurisdiction" was a logical extension of the Commission's work on the jurisdictional immunities of States and their property which had culminated in the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property. That Convention applied only to States, with the result that State organs fell within the ambit of the Convention only when they acted on behalf of the State, whereas the new topic contemplated circumstances where State officials themselves would enjoy immunity as individuals.

12. His delegation concurred with the Special Rapporteur that the immunity in question was primarily procedural in nature. The rule of immunity had been developed only in respect of the proceedings of domestic courts, not those of international courts or tribunals. The definition of immunity did not imply that States had positive duties, but only that they should abstain from exercising jurisdiction. In diplomatic law, that distinction was quite clear, since positive duties were reflected in the provisions on the inviolability of the person of a diplomatic agent contained in article 29 of the Vienna Convention on Diplomatic Relations, whereas the question of a diplomatic agent's immunity was regulated separately in article 31.

13. Confusion could arise because of the different kinds of immunity enjoyed by State organs. The topic related to both the official and the private acts of State officials, and it would be necessary to address exceptions from any immunity granted to State officials by international law, including the immunity of diplomatic and consular officials. It would therefore seem advisable, first, to identify the different categories of persons to be included in the topic; secondly, to classify the kinds of immunities enjoyed by them; and lastly to study the exceptions to those immunities.

14. Immunity *ratione materiae* was predicated on State sovereignty and extended only to acts performed in an official capacity, whereas immunity *ratione personae* was enjoyed only by some State organs, as well as by diplomats and persons covered by the Convention on Special Missions. The greatest difficulty lay in defining the persons enjoying personal immunity under customary international law. Interesting conclusions in that connection could be drawn from the Judgment of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, where the Court had found that neither the *procureur de la République* nor the Head of National Security of Djibouti had immunity *ratione personae* under either treaty or customary law.

15. It was, however, possible to argue that all State agents enjoyed immunity *ratione materiae*, unless they were spies or foreign agents carrying out unlawful acts in the territory of a State, in which case international law recognized the right of the receiving State to prosecute. It would be interesting to see whether an analysis of the arbitral award in the *Rainbow Warrior* case could shed new light on that matter. In such cases, the distinction was based on the lawfulness or otherwise of a given activity according to the receiving State's law. There were, of course, persons such as diplomats, who enjoyed absolute immunity and could not prima facie be made subject to the exercise of jurisdiction by the receiving State even if they performed unlawful acts. Nevertheless, it would be necessary to examine whether there might be some exceptions to absolute immunity.

16. The Special Rapporteur was correct in saying that there was no need to address the issue of jurisdiction in the context of the topic under consideration, since the question of the denial of immunity could arise only if there was jurisdiction. Whether a case was subject to the jurisdiction of a State, or whether international law permitted a State to extend its jurisdiction to a certain act were quite different matters which lay outside the scope of the topic. Similarly there was no merit in

examining the question of the effects of not recognizing an entity as a State.

17. On the other hand, the issue of whether immunity *ratione personae* or *ratione materiae* could be invoked in cases concerning international crimes should be resolved as a matter of urgency, in view of its potential repercussions on international relations.

18. **Mr. Shukla** (India) said that all State officials should be included within the topic "Immunity of State officials from foreign criminal jurisdiction". It would be useful to identify criteria for determining whether State officials in addition to Heads of State, Heads of Government and ministers for foreign affairs enjoyed personal immunity. The Commission should confine itself to examining the immunity of State officials from prosecution by foreign criminal jurisdiction, leaving aside immunity from proceedings before international criminal tribunals or the domestic courts of the official's State of nationality. Since the source of State officials' immunity from foreign criminal jurisdiction was not international comity, but international law, the Commission should focus on immunity under international law. It did not, however, need to examine the immunities of diplomatic agents, consular officials, members of special missions or representatives of States to international organizations, which had already been codified. The Judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) accurately depicted the current state of international law in that field.

19. Under the topic "Protection of persons in the event of disasters" the Commission should concentrate on natural disasters, as specific regimes already existed for dealing with the environmental damage caused by man-made disasters such as oil spills and nuclear accidents. The effects of armed conflicts should also be excluded as the matter was covered by international humanitarian law.

20. The concept "Responsibility to protect" was not relevant to the topic, as the State concerned bore primary responsibility for the protection of persons in its territory or within its jurisdiction. The primary role of the affected State had been recognized in several General Assembly resolutions, which had reaffirmed the sovereignty of States. The pertinent sources of law were based on the principles of humanity, impartiality, neutrality and non-discrimination, as well as solidarity and non-intervention. Although the main focus of the topic should remain the protection of persons, in some circumstances it might be necessary to protect property in order to assist persons stricken by a disaster.

21. As for scope *ratione personae* and in response to the question regarding the possible existence of a right of initiative in offering assistance, it was essential to emphasize that any international assistance to persons in the territory of the affected State in the context of international solidarity and cooperation could be provided only with that State's consent and under its supervision. While it was still premature to decide on the final form the Commission's work should take, it would probably be more realistic to prepare guidelines rather than a convention on the subject.

22. The draft articles on the responsibility of international organizations basically followed the general pattern of the articles on State responsibility. The Commission should adopt a cautious approach to countermeasures by or against international organizations on account of the limited practice in that regard, the uncertainty surrounding their legal regime and the risk of abuse that they might entail. Whenever possible, disputes between an international organization and its members should be settled in accordance with the rules and internal procedures of the organization. The rules of the organization determined whether an organization could resort to countermeasures against its members or be the target of countermeasures by them.

23. As far as the topic "Expulsion of aliens" was concerned, his delegation believed that persons holding dual or multiple nationality should not be treated differently from other nationals and that the principle of non-expulsion of nationals should likewise apply to persons holding dual or multiple nationality. There was no justification for depriving persons of their nationality in order to facilitate their expulsion.

24. **Mr. Shin** Boo-nam (Republic of Korea) commended the Commission's timely decision to include the topic "Protection of persons in the event of disasters" in its programme of work. Although many disasters gave rise to complex emergencies where it was hard to determine whether the cause was natural or man-made, it would be more feasible initially to focus on natural disasters. The term "disasters" should not be construed as encompassing armed conflict, since that was the subject of well-defined *lex specialis*, namely,

international humanitarian law. The Commissions should devote its attention initially to the response to the immediate aftermath of the disaster, although it might study prevention, mitigation and rehabilitation at a later stage. Since the affected State bore the primary responsibility for assisting the victims of disasters, its consent was the sine qua non for the provision of international assistance. While it was premature to made any decision as to the final form of the Commission's work on the topic, any draft articles it might formulate should be as pragmatic as possible and should be drawn up in consultation with major stakeholders, such as the United Nations and the International Federation of Red Cross and Red Crescent Societies.

25. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", the Commission should examine only immunity from foreign criminal jurisdiction and should leave aside questions relating to immunity from prosecution by international criminal tribunals and the domestic courts of the official's own State, or immunity in civil or administrative proceedings before foreign courts. The Commission should focus on immunity under international law, rather than immunity under domestic legislation. It was obvious from the Judgment of the International Court of Justice in the *Arrest Warrant* case that Heads of State, Heads of Government and ministers for foreign affairs enjoyed immunity from foreign criminal jurisdiction.

26. On the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", his delegation was of the opinion that international treaties were basically the recognized source of the obligation. However, special attention should be paid to the source of that obligation when persons were accused of the most serious breaches of international law, namely genocide, crimes against humanity and war crimes. Although the obligation to extradite or prosecute and the concept of universal jurisdiction were interrelated in some cases, they should be considered separately, because they belonged to different areas of international law. Lastly, because of the serious nature of the crimes falling under the jurisdiction of the International Criminal Court, the mechanism for surrendering persons charged with those crimes was sui generis.

27. **Mr. Liu** Zhenmin (China) said the question of how to enhance and coordinate international relief efforts and help countries respond better to natural disasters had become a matter of global significance. Many countries, especially developing countries, had limited relief capacity and could not respond effectively. In China, extensive human and material losses had resulted from the massive earthquake which had occurred in Wenchuan, in Sichuan province, on 12 May 2008. The Government had mobilized resources from all sectors of society, including the Red Cross and non-governmental organizations, and was also most grateful for the timely support provided by the international community.

28. With regard to the scope of the topic, it was true that in some cases no clear distinction could be drawn between natural and man-made disasters, because human activities were sometimes responsible for natural disasters. However, it was not necessary for the Commission to revisit the issue, especially in the case of human activities already governed by the rules of international law. Given that disaster preparedness, disaster response and post-disaster reconstruction had their own distinct characteristics, the Commission should focus on natural disasters and give priority consideration to disaster response.

29. His delegation doubted whether a rights-based approach to the topic was feasible. Disaster relief was first and foremost the responsibility of the State and in many countries was covered by domestic law. There was no provision in international law for a victim's "right to assistance", which was an ambiguous concept and lacked clarity with regard to the range of rights entailed, the conditions for achieving them and the parties responsible for securing them. The protection of persons in the event of disasters should be achieved through the efforts of the affected country and through international cooperation. The Commission should therefore seek to bring clarity to the legal issues involved in international cooperation in disaster relief.

30. As the primary responsibility for disaster response and for the protection of victims lay with the affected country, the international community must, in its relief operations, respect the principles of sovereignty of States and non-interference in internal affairs. The affected State had the right to coordinate its own relief activities and to decide, on the basis of its own relief capacity, whether to accept outside assistance. Before delivering any assistance, the international community must obtain the consent of the country concerned. The arrangements for international

assistance would then be worked out between the recipient country and assistance providers. The affected country could make requests to assisting parties, but whether they could be met depended on the capacity of those parties. International assistance should be based solely on humanitarian considerations and should not have inappropriate political or other conditions attached to it.

31. "Responsibility to protect" was a new concept, surrounded by uncertainty. It would not be helpful to introduce that concept into the area of disaster relief.

32. The topic "Immunity of State officials from foreign criminal jurisdiction" was an important one, in view of the need to maintain the international legal order and the stability of inter-State relations. The report of the Special Rapporteur (A/CN.4/596) provided a sound basis for its further consideration of the topic. Concerning the source of the immunity, his delegation agreed with the Special Rapporteur that it lay, not in international comity or domestic law, but in international law, and especially customary international law, as reflected in the Judgment of the International Court of Justice in the *Arrest Warrant* case. The rationale for the immunity was a combination of representative and functional necessity. Granting immunity to foreign State officials from domestic criminal jurisdiction was a demonstration of the principle of sovereign equality, and was also a necessity, in that it facilitated the performance of official functions and helped to maintain friendly relations among States.

33. With regard to the scope of persons covered, his delegation agreed that the persons enjoying immunity should include all State officials. In addition, Heads of State and Government, ministers for foreign affairs and other persons of the same rank enjoyed immunity, *ratione personae*, regardless of whether they were on official duty or not. The Commission should study further the question whether personal immunity should extend to other officials, and should focus on establishing relevant criteria in that regard.

34. Immunity was effective throughout the course of criminal proceedings, including during the stage of criminal investigation preceding the trial stage. Legal disputes arising from the investigation stage tended to cast uncertainty on normal inter-State relations. The issue of recognition and immunity, although connected, fell into different categories. While it was true that recognition or non-recognition of the sending State would affect the legal status of foreign State officials in criminal proceedings, his delegation was not in favour of including in the draft specific provisions on that subject; a "without prejudice" clause would suffice.

35. As for possible exceptions to immunity, a cautious approach was needed, so as to avoid undermining the principle itself. Immunity from the criminal jurisdiction of a foreign State was not the same as immunity from international criminal jurisdiction such as that of the International Criminal Court, and the two should not be linked. A foreign State official did not automatically lose immunity from prosecution for certain crimes under international law merely because the State where he or she worked had established jurisdiction over such crimes. Moreover, exceptions to immunity could readily be abused and could become a tool for politically motivated prosecutions, which could have a serious effect on stable relations among States.

36. **Ms. Escobar Hernández** (Spain) said that the preliminary report of the Special Rapporteur on protection of persons in the event of disasters (A/CN.4/598) provided a good basis for future work on a topic of prime importance, one that would certainly require lengthy consideration in the Commission. Although the topic was broad and difficult to define and touched upon basic principles and categories of international law, the frequent occurrence of disaster situations made it important to address in legal terms the needs and rights of victims of disasters, the principles that should underlie the response of the international community and the cooperative and institutional dimensions necessary for effective protection of persons in such circumstances. It would also be necessary to take into account the rights of the States, international organizations and non-State actors involved.

37. Her delegation agreed with the rights-based approach suggested by the Special Rapporteur. The concept of the protection of persons in the event of disaster could only be properly understood from the standpoint of guaranteeing basic human rights. However, it would also be necessary to define the limits of such an approach to ensure its practical applicability. Initially, the Special Rapporteur should focus on natural disasters and immediate response to the situation of victims of natural disasters, leaving aside for the moment consideration of other types of

disasters and the preventive dimension of protection. Disasters caused by armed conflict should be excluded from the topic. It was premature to consider the final form the work should take.

38. The topic "Immunity of State officials from foreign criminal jurisdiction" was particularly suitable for consideration by the Commission in view of its legal dimensions and practical importance and the diversity of State practice on the matter. The Special Rapporteur correctly distinguished between jurisdiction and immunity and between immunity *ratione personae* and immunity *ratione materiae*. Her delegation shared the view that the topic should be limited to immunity from foreign criminal jurisdiction, but thought that the study should take into account the principle that immunity could not be invoked before international criminal tribunals in relation to serious international crimes. Since such crimes could also be prosecuted in national courts, the rules relating to immunity before international criminal tribunals could provide a useful basis for determining the scope of immunity to foreign criminal jurisdiction. It could also be useful to consider the implications of universal jurisdiction with regard to the scope of immunity.

39. Lastly, it would be necessary to define precisely the categories of persons who enjoyed immunity from foreign criminal jurisdiction by reason of their office or function. The term "*funcionarios*" used in Spanish as an equivalent of "official" was overly broad and imprecise; it would be preferable to use the term "*órganos*" or "*altos cargos*" of the State, particularly if the view prevailed that all State officials were covered by the topic. Her delegation thought that position excessive, especially in view of the vagueness of the terms used.

40. With regard to the obligation to extradite or prosecute, apparently no decision had been taken whether to address the issues of universal jurisdiction and the so-called "triple alternative" under the topic. Although there was a clear conceptual distinction between universal jurisdiction and the obligation to extradite or prosecute, in practice they frequently coincided. It would therefore be useful to study universal jurisdiction in order to differentiate the two regimes and identify how they interacted. Moreover, the "triple alternative", consisting of the surrender of the alleged offender to a competent international criminal tribunal, should not be excluded without further thought, since the establishment of such tribunals concurrently with national criminal jurisdictions had created a new dimension to the obligation *aut dedere aut judicare* that should not be ignored.

41. **Mr**. Nobuyuki **Murai** (Japan) said that, since the scope of the topic "Protection of persons in the event of disasters" was very broad, his delegation was in favour of a step-by-step approach commencing with natural disasters; man-made disasters, chiefly industrial accidents, could be addressed at a later stage. Armed conflict should be excluded from the scope of the study, even though there might be cases of natural disasters or industrial accidents triggered by armed conflict.

42. The key to response to disaster lay in international cooperation, and the Commission should work out the principles underlying the procedures and mechanisms of such cooperation. In addition, it should formulate the basic principles relating to the rights and obligations of affected persons and States. The affected State had the primary responsibility to provide assistance to its affected people, and its consent was essential for the provision of humanitarian assistance. The emerging concept of responsibility to protect was confined to extreme circumstances, for example, where there were persistent and gross violations of human rights, such as genocide, and it should not automatically be applied to the topic of disaster relief. His delegation hoped that the Special Rapporteur would propose a comprehensive list of the relevant rights and obligations of the actors concerned in his next report and would elaborate draft articles without prejudice to the final form of the product.

43. On the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", his delegation, while noting the many questions raised by the Special Rapporteur, including universal jurisdiction, felt that the Commission should accelerate its examination of the crucial question of whether and to what extent the obligation to extradite had become customary international law. The establishment of the Working Group on the topic would contribute to a significant outcome.

44. Under the topic "Immunity of State officials from foreign criminal jurisdiction", his delegation was particularly interested in defining the scope of persons who enjoyed immunity *ratione personae* and identifying possible exceptions to immunity. The

Commission would no doubt seek to balance the concern to preserve the principles of immunity against the need to combat impunity, and would cautiously analyse the developing customary international law on that controversial point with reference to State practice.

45. In response to the questions posed by the Commission concerning reactions to interpretative declarations under the topic "Reservations to treaties", his delegation would like to make some preliminary comments. In most cases, silence in response to an interpretative declaration denoted indifference rather than approval or opposition. Since States did not usually explain the reasons for their silence, it was difficult to know whether it resulted from indifference or was an intentional choice despite concerns with the declaration. Therefore, in principle, silence in response to an interpretative declaration should not be construed as approval or acquiescence. In that light, paragraph 2 of draft guideline 2.9.9, which referred to "certain specific circumstances" in which a party might be considered as having acquiesced to an interpretative declaration by reason of its silence, should be looked at carefully to determine which circumstances fell into that category.

46. Japan had objected to some interpretative declarations that it considered to constitute reservations incompatible with the object and purpose of the treaty concerned, explicitly stating that it considered the declaration in each case to be an incompatible reservation and that it objected to the reservation. Examples were Japan's objections to certain declarations on the International Convention for the Suppression of Terrorist Bombings and on article 2, paragraph 1 (b), of the International Convention for the Suppression of the Financing of Terrorism. On the other hand, it had responded to an interpretative declaration by a certain State on the International Convention against the Taking of Hostages with a declaration stating that the Government of Japan did not consider that the interpretative declaration purported to exclude or modify the legal effect of certain provisions of the Convention in their application to that State and thus regarded the declaration as having no effect on the application of the Convention between the two countries.

47. Many States would react to interpretative declarations in a similar manner, but that practice did not answer the cardinal question, particularly relevant in the case of so-called "simple" interpretative declarations, namely, in what situations might silence constitute consent to the declaration concerned.

48. **Ms. Escobar** (El Salvador) said that the topic "Expulsion of aliens" was sensitive, complex and fundamental. A balance must be struck between the right of a State to expel and respect for the relevant norms of international law relating to human rights and the treatment of aliens. The two questions currently under consideration regarding the expulsion of persons having dual or multiple nationality and denationalization in relation to expulsion were highly sensitive: if not handled carefully, they could lead to violations of human rights. Her delegation was extremely pleased by the Commission's conclusions that the principle of non-expulsion of nationals applied also to persons who had legally acquired one or several other nationalities and that States should not use denationalization as a means of circumventing their obligations under the principle of non-expulsion of nationals.

49. Article 5 of the Constitution of El Salvador provided that no Salvadoran could be expatriated. The same right was enshrined in a number of human rights instruments to which El Salvador was a party, including the American Convention on Human Rights, which stated in article 22, paragraph 5, that "no one can be expelled from the territory of the state of which he is the national". Therefore it would be difficult for her delegation to agree that there could be exceptions to the rule prohibiting expulsion of nationals, regardless of whether they held dual or multiple nationality.

50. As for denationalization in relation to expulsion, article 91 of the Constitution stated that a Salvadoran by birth could only lose that status by expressly renouncing it before a competent authority. Whereas the law of some States provided that loss of nationality would be the consequence of acquiring the nationality of another State, article 91 of the Salvadoran Constitution specifically allowed Salvadorans by birth to possess dual or multiple nationality.

51. The obligation to extradite or prosecute was an essential legal principle underpinning the effort to combat impunity and transnational organized crime, and an increasing number of treaties included it. Article 28 of the Salvadoran Constitution had been amended in 2000 to allow for extradition of nationals if the relevant treaty expressly provided for it, enshrined

the principle of reciprocity and granted Salvadoran nationals the penal and procedural safeguards provided by the Salvadoran Constitution. El Salvador was a party to a number of international instruments that included the obligation to extradite or prosecute. In accordance with article 144 of the Constitution, treaties concluded by El Salvador became the law of the Republic upon entering into force; in case of conflict, their provisions prevailed over secondary legislation. There had been cases in which, notwithstanding the existence of an extradition treaty, it had been necessary to refuse an extradition request because the requesting State could not guarantee the individual due process or applied penalties not permitted under Salvadoran law for the alleged crime. In such cases, the accused had been prosecuted in national courts.

52. Priority should be accorded to domestic prosecution of an alleged offender when an extradition treaty did not provide otherwise. The obligation to extradite or prosecute, in addition to being a right of States, was also a way in which national courts could strengthen the administration of justice. The alternative of surrendering the alleged offender to an international tribunal would limit that right to some extent.

53. The preliminary report of the Special Rapporteur (A/CN.4/601) on the topic "Immunity of State officials from foreign criminal jurisdiction" provided a sound basis for further work. Her delegation agreed with most of the Special Rapporteur's concluding remarks following the debate in the Commission. The basic source of immunity of State offices for foreign criminal jurisdiction was to be found in customary international law, so that the work would be chiefly one of codification. The concept of immunity implied a legal relationship involving rights and corresponding obligations and was procedural in nature. With regard to the scope of the topic, the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations should be excluded, since they were governed by other international instruments.

54. With respect to the persons covered, the legal situation of all State officials should be considered. While supporting the use of the term "State officials" (*funcionarios del Estado*), her delegation was in favour of the identification of criteria rather than an enumerative approach, since there might be an official not included on the list who in a given situation was representing the Head of State or Government or the minister for foreign affairs. Her delegation urged caution in considering the sensitive question of possible exceptions to immunity.

55. The topic "Protection of persons in the event of disasters" was important not only because of the human lives involved but also because of the swift succession of disasters in recent years, from which her own country had not been spared. Her delegation agreed with the Commission's conclusions as to the procedure to be followed, namely, to take a rights-based approach; to consider the topic from a broad perspective, but to focus initially on natural disasters, without losing sight of other types of disasters, and on response, without excluding the study at a later stage of other phases of protection; and to elaborate draft articles without prejudice to the final form.

56. In response to the Commission's request for State practice, she should mention that El Salvador had promulgated the Act on Civil Protection and Prevention and Mitigation of Disasters, together with implementing regulations and an action plan. The preamble to the Act reiterated the constitutional principle that the human person was the source and end of the activity of the State, which was constituted to provide for the common good; the State therefore had the duty to provide the inhabitants of the Republic with effective civil protection in the event of disasters. Article 1 of the Act stated that its purpose was to prevent, mitigate and respond effectively to natural and man-made disasters in the country and in case of need to ensure civil protection in an impartial, obligatory, ongoing and appropriate manner, in order to safeguard the lives and physical integrity of persons and the safety of public and private property. The Act also established the principle that prevention through ecological risk management was the best means of mitigating the effects of disasters and the principle of impartiality, which stated that all persons without discrimination should have equal access to help and assistance and protection of property in the event of disaster.

57. El Salvador had also assumed commitments at the regional and international levels on dealing with natural disasters. Under the Hyogo Framework for Action it was seeking to incorporate risk reduction in its national planning at all levels.

58. **Mr. Alday González** (Mexico), commenting on the obligation to extradite or prosecute, said he was

pleased that it was no longer presented as an "alternative" obligation in draft article 1. It remained to be decided whether the obligation, in addition to being a principle of international criminal law, was a customary rule. Mexico considered it an obligation under customary law to extradite or prosecute perpetrators of international crimes. If that was also the Commission's conclusion, it would be useful to include in the draft a list of the crimes to which the obligation applied. As the Special Rapporteur had suggested, the wording of draft article 2 should not become definitive until the study had been completed and the meaning of the terms was clear. His delegation also agreed with the proposed wording of draft article 3, but it should not be understood as excluding the possibility that the obligation might be a customary one.

59. It would be useful to consider the question of the rights of States in connection with the obligation to extradite or prosecute. Although a requested State was not free to choose between extraditing or prosecuting, it did have rights in the matter; for example, it could advance arguments against extradition. That issue should be further examined. So should the rights of the alleged offender, for example, whether his due process rights prevented his being prosecuted or extradited by the State in which he was being held. A study of the internal practice of States in that regard would make a useful contribution.

60. As for universal jurisdiction and the surrender of alleged offenders to an international tribunal, it had to be assumed for both purposes that the custodial State was unable to exercise its criminal jurisdiction and that extradition to another State with jurisdiction had been refused on legal grounds. In such case, the custodial State could consider surrender to an international tribunal, or entertain a request for extradition from a State claiming to exercise universal jurisdiction. Both universal jurisdiction and the "triple alternative" should be analysed and incorporated in the draft articles, as both might be key elements in complying with the obligation.

61. The legal rules relevant to the topic "Protection of persons in the event of disasters", were dispersed among a variety of legal regimes both domestic and international. The Commission's work on the topic should be divided into two parts, natural and man-made disasters, taking first the natural disasters. A number of preliminary issues had to be taken into consideration: the concept of protection and its relationship to the principles of State sovereignty and non-intervention; the sources of the law on protection; collective interests, especially those of vulnerable groups; emergency situations giving rise to derogation; the obligations to be assumed in exercising protection; the rights and obligations of providers of relief and assistance, including States, international and non-governmental organizations; matters relating to prevention, assistance and rehabilitation in the different stages of a disaster; and the final form of the Commission's text.

62. **Ms. Gladstone** (United Kingdom), commenting on the protection of persons in the event of disasters, said that the needs of affected persons were best addressed when those providing relief and assistance, whether States, international organizations, non-governmental organizations or commercial entities, operated in accordance with appropriate agreed principles and practices. Her country would welcome the identification of areas of common understanding on preventive measures, readiness and capacity-building, the coordination of relief and assistance, the provision of technical assistance and expertise to meet immediate humanitarian needs, and appropriate cost-sharing arrangements between States providing and receiving disaster assistance. The United Kingdom endorsed the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, adopted by the International Conference of the Red Cross and Red Crescent in November 2007, and hoped the Commission would take account of them.

63. There was no reason in principle for the Commission to restrict the scope of the topic to natural disasters, which were hard to distinguish from those caused by human activity. It should take account of factors such as the nature, magnitude, imminence and duration of the threat posed by the disaster, the needs of those affected, the capacity of the affected State to deal with it, and the role and coordination of providers of relief. There was some relevant existing work in the nuclear and maritime fields. The protection of persons in armed conflict should be left outside the scope of the topic, and care should be taken not to undermine existing regimes for responding to certain kinds of disasters or aspects of them. Assistance provided by States to their nationals abroad should also be kept separate from humanitarian relief and assistance.

64. The term “protection” in the title of the topic should be regarded as synonymous with “relief” and “assistance”. The notion of a right to humanitarian assistance should be approached with caution, given the need to respect the principles of humanity, sovereignty and non-intervention. As for the form of the Commission’s work on the topic, codification or progressive development would probably be unsuitable, given the scarcity of applicable treaties and the absence of rules of customary international law in the matter. It would be of more practical value, for the sake of winning widespread support, to develop non-binding guidelines or a set of principles for States and others engaged in disaster relief.

65. Under the topic “Immunity of State officials from foreign criminal jurisdiction”, her delegation supported the expressed aim of the Special Rapporteur to work on the basis of existing international law and agreed with the view that the decision of the International Court of Justice in the *Arrest Warrant* case was a sound basis on which to proceed. It was, however, necessary to be cautious when considering immunity from foreign civil jurisdiction, because very different considerations came into play.

66. As for the persons to be covered by the topic, it was broadly accepted that a limited category of officials enjoyed immunity *ratione personae*: a serving Head of State or Government and a minister for foreign affairs. It was less clear which other high-ranking officials might enjoy such immunity, although the United Kingdom courts had been willing to recognize the personal immunity of a foreign minister of defence and a foreign trade minister. The Commission could usefully work to identify the criteria for such immunity. In doing so, it should bear in mind the existence of separate rules of customary international law, especially those relating to special missions, under which State officials might be entitled to immunity. The topic should in principle cover all State officials who enjoyed immunity *ratione materiae*. It should also cover those who retained immunity after leaving office. It would be useful to study the limits of such immunity, especially where criminal acts had been committed in the territory of the forum State, and also the distinction between public and private acts.

67. The subject of recognition was a separate and preliminary question of international law and should not be included in the topic. As for the immunity of family members, which might be relevant to the limited category of Heads of State, the Commission might consider a savings clause in that regard. Military personnel could be included except where they were the subject of specific agreement between States, as they sometimes were when stationed abroad.

68. With regard to the obligation to extradite or prosecute, her delegation’s position was that any such obligation arose from treaties and could not yet be regarded as a principle of customary international law. The terms of the international agreements giving rise to the obligation must govern both the crimes concerned and the question whether the custodial State had discretion to decide to give priority to either extradition or prosecution. If the Commission believed that there was nevertheless an obligation under customary international law to extradite or prosecute, that could only be true of a very limited category of offences. There was a need for a systematic survey of international treaties, national legislation and judicial decisions on the matter before proceeding with the topic.

69. The existence of universal jurisdiction was not a necessary precondition for the obligation to extradite or prosecute. States concluding a bilateral extradition treaty could specify that the obligation should arise in relation to any offence subject to concurrent jurisdiction, such as where the crime had a territorial link to both States. Her delegation held to the view that the Commission should avoid examining the issue of universal criminal jurisdiction. Moreover, it should not give further consideration to the so-called “triple alternative” of transfer to an international tribunal, because there were specific rules governing such transfers.

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

71. **Ms. Kamal** (Malaysia), referring to the topic “Immunity of State officials from foreign criminal jurisdiction”, said that the Commission’s study of the matter should focus only on the immunity of State officials from the criminal jurisdiction of States other than the State of nationality of the official concerned, leaving aside the question of international criminal tribunals. It should take into account the immunities accorded under international law, in particular customary international law, not under domestic legislation. Any attempt at progressive development of international law in the field should, however, be

undertaken in the light of the current trend of relevant judicial decisions, including those of the International Court of Justice. As decisions on the invocation or waiver of immunity usually occurred at the pretrial stage and were resolved through the diplomatic channel, the Special Rapporteur was correct in saying that the issue of criminal jurisdiction also covered executive actions taken to determine the claim to jurisdiction.

72. Her delegation fully supported the view that immunity from foreign criminal jurisdiction under international law in no way absolved State officials from the general obligation to abide by the laws of the foreign host State or from criminal responsibility should they breach that law. It also concurred with the Special Rapporteur's conceptual clarification that the issue under study was actually immunity from certain legal measures of criminal procedure, such as search or arrest, or criminal prosecution, not that of immunity from foreign criminal jurisdiction. Concerning the Special Rapporteur's intention to consider existing practice in relation to immunities of State officials and of the State itself from foreign civil jurisdiction, her delegation was of the view that civil immunities were too different in nature for the relevant practice to be relied upon in relation to the question of immunity of State officials from foreign criminal jurisdiction.

73. The distinction between immunity *ratione materiae* and immunity *ratione personae* should be borne in mind in determining the scope of the persons to be covered; both were distinct from the immunity of the State itself. With regard to terminology, at the current stage it would appear sufficient to use the term "State officials", and it would also appear appropriate for all State officials to be covered, in keeping with the principle of immunity *ratione materiae*. However, defining "State official" with reference to national notions of "public service" might lead to a definition that was either too wide or too narrow. As an example, article 132 of the Federal Constitution of Malaysia provided that the "public services" encompassed the armed forces, judicial and legal services, the general public service of Malaysia, the police force, specific joint federal-state services, the State-level public services and the education service.

74. A related issue that warranted consideration was that of contractors such as private military security companies and whether they would fall within the category of "State official", especially where they undertook State functions previously reserved for military officials of a State. The immunity of military personnel deployed abroad in times of peace should also be considered. Further, if the Commission was not to re-examine previously codified areas, the immunities of diplomatic agents and consular officials, members of special missions and representatives of States to international organizations should be excluded from the definition of "State officials" for the purposes of the topic. It would appear settled that Heads of State, Heads of Government and ministers for foreign affairs enjoyed immunity *ratione personae* while they held office, and Malaysia would not favour expanding that category without a strong basis of need and State practice and without further detailed study and discussion.

75. The Commission should examine the consequences of the non-recognition of an entity as a State on the immunity of that entity's officials. Cases in point would be Israel and the Palestinian National Authority in certain countries. However, the Commission should not address the issue of the immunity of family members of State officials unless it was established that there was a legal basis for such immunity other than international comity.

76. With regard to possible exceptions to immunity, Malaysia viewed it as established international law that there should be no immunity for the international crimes of genocide, war crimes, crimes against humanity and crimes of aggression. Further consideration was warranted regarding exceptions to immunity for other crimes of international concern, such as piracy, drug trafficking, trafficking in persons, corruption, money-laundering, as well as sabotage, kidnapping and murder by foreign secret service agents, aerial and maritime intrusion or espionage.

77. On the topic "Protection of persons in the event of disasters", her delegation welcomed the Commission's decision to present draft articles for further consideration without prejudice to the final form of its work. With regard to the adoption of a rights-based approach, at least three perspectives would need to be accommodated: that of the victim, that of donor States or non-State actors, and that of the affected State. In her Government's view, all three were pertinent and further study should be undertaken in order to identify the proper balance among them.

78. Regarding the scope of the topic, her delegation would favour a focused study of the areas of highest priority aimed at identifying and addressing gaps in the existing body of international disaster response law. It might be preferable to focus on natural disasters for the time being and on the response and assistance required and provided in the immediate aftermath of a disaster, together with prevention during the pre-disaster phase. The multilateral and bilateral instruments identified in the Memorandum of the Secretary-General on the subject (A/CN.4/590/Add.2) — among them the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response — would provide useful guidance.

79. With regard to the "right to provide/impose assistance", the principles of sovereignty and non-intervention must not be violated. A sovereign State and its Government should be the sole determiner of when and to what extent external assistance was required and of when such assistance could be terminated. The apparent ambiguity with respect to the understanding of the phrase "right to humanitarian assistance" should be resolved, with due regard for the International Court of Justice decision in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

80. On the question of the existence of a "responsibility to protect", the concept as formulated in the 2005 World Summit Outcome related to the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Further discussion would be required in order to determine whether action taken by the Security Council under Chapter VII of the Charter could be invoked as authorization for humanitarian intervention. In its future work on the topic, the Commission should focus on identifying the law that currently existed, whatever its shortcomings, before attempting to develop new law.

81. With regard to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", her delegation reiterated its position that the obligation arose from treaties and was not a general obligation under customary international law. In draft article 1, three alternative wordings following the words "... the legal obligation of States to extradite or prosecute persons" had been suggested. Her delegation's understanding of the first option ("under their jurisdiction") was that the requested State should be allowed to decide whether to extradite or prosecute a fugitive offender if the subject was under the jurisdiction of that State. That scope of jurisdiction would be acceptable provided it was applied in accordance with the territorial principle generally accepted by States. However, the phrase "under their jurisdiction" could create controversy where States exercised extraterritorial jurisdiction: for example, a country that applied the principle of universal jurisdiction might claim jurisdiction even though the subject might not be present in its territory.

82. The second proposed wording ("present in the territory of the custodial State") implied that the State would have the obligation to extradite or prosecute when the subject was both present in its territory and in its custody. Her delegation considered that wording less controversial, as a person who was in the custody of a requested State should be present in its territory. Those two requirements, "present in the territory of the State" and "in the custody of the State", complemented each other and connoted the application of the territorial principle. As to the third proposed wording ("under the control of the custodial State"), the word "control" was vague and could give rise to varying interpretations.

83. Malaysia had incorporated the obligation to extradite or prosecute into its Extradition Act of 1992, under which the relevant minister determined whether to grant an extradition request or refer the matter for prosecution. In making that determination, the minister would take into consideration the nationality of the offender and whether or not Malaysia had jurisdiction to try the offence.

84. With regard to draft article 2, the definitions of terms should be reviewed after all the draft articles had been completed in order to ensure their compatibility with the text as a whole. Malaysia did not have definitions of "extradition", "prosecution", "jurisdiction" and "persons under jurisdiction" in its domestic legislation; however, the Extradition Act did define the terms "extradition offence" and "extraditable offence", and while Malaysia's Criminal Procedure Code did not define "prosecution", it did include an explanation of the "conduct of prosecution".

85. With regard to draft article 3, for a dualist State like Malaysia, the obligation to extradite or prosecute arose from domestic law and from the bilateral and

multilateral treaties to which it was a party; her Government did not regard it as a general obligation under customary international law. Hence, Malaysia was in general agreement with proposed draft article 3.

86. **Mr. Simonoff** (United States of America) said that his delegation welcomed the Commission's decision to consider the important topic "Protection of persons in the event of disasters" and intended to submit comments on it during the coming year. He wished to note his Government's reservations about taking a rights-based approach to the topic and its objections to incorporating the concept of the responsibility to protect the Commission should focus on areas of the law that would have the most significant practical impact in mitigating the effects of disasters, including, for example, the development of practical tools to facilitate coordination among providers of disaster assistance or the drafting of model bilateral agreements to facilitate access of people and equipment to affected areas.

87. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", the assertion of criminal jurisdiction over the officials of other States involved some of the most basic principles of international law, notably the sovereign equality of States. A clear and comprehensive set of rules on the topic could prove of enormous benefit to the international community. However, such rules would be unlikely to receive wide support if they did not strike the right balance between a State's interest in having its officials fulfil their duties free from fear of subsequent prosecution for doing so and another State's interest in prosecuting those whose unlawful conduct caused harm to itself, its citizens or its territory, or, in the case of properly asserted universal jurisdiction, to the international community as a whole. His delegation therefore urged the Commission to proceed with great care.

88. As to the obligation to extradite or prosecute, the United States was a party to a number of international conventions that contained that obligation and considered such provisions to be an integral and vital aspect of collective efforts to deny terrorists and other criminals safe haven. However, its practice, and the practice of other States, reinforced the view that there was not a sufficient basis in customary international law or State practice to formulate draft articles that would extend an obligation to extradite or prosecute beyond binding international legal instruments containing such obligations. States undertook the obligation *aut dedere aut judicare* only by becoming parties to such instruments, and the obligation extended only to other States that were also parties and only to the extent of the terms of the instruments. Otherwise, States could be required to extradite or prosecute an individual under circumstances in which they lacked the necessary legal authority to do so, such as the necessary bilateral extradition relationship or jurisdiction over the alleged offence.

89. As the Commission had noted, a comprehensive view of State practice was essential to any consideration of whether there was a basis for inferring a customary international legal norm to extradite or prosecute, particularly as the State practice reported to date was largely confined to implementation of treaty-based obligations. While the lack of consistent and sustained State practice to extradite or prosecute in the absence of a treaty-based obligation might suffice to determine that there was not yet such a customary international law norm, any consideration that there might, in fact, be such a norm would necessitate broader reporting. His delegation understood the concerns of those who felt that the work on the topic was progressing too slowly, but maintained that an analysis of State practice was crucial for determining how the Commission should proceed. If the obligation to extradite or prosecute existed only under international treaties, draft articles on the topic might not be appropriate. His delegation therefore urged the Commission to allow sufficient time to receive and evaluate information from States. The United States had provided information on its legislation and practice and looked forward to receiving such information from other States.

90. **Ms. Kaewpanya** (Thailand) said that her delegation welcomed the inclusion of the topic "Protection of persons in the event of disasters" in the Commission's programme of work. A legal framework designed to help people cope with disasters and their aftermath was urgently needed. A rights-based approach would be a useful method for addressing the legal issues arising under the topic, but a clear and common understanding of what such an approach meant in relation to protection of persons in the event of disasters was essential. Her delegation understood that the rights-based approach as proposed by the Special Rapporteur was rooted in principles of international humanitarian law, international human

rights law and international refugee law. However, other relevant principles of international law, particularly those relating to sovereignty and non-intervention, were equally important and should not be disregarded.

91. These principles were reflected in the ASEAN Agreement on Disaster Management and Emergency Response, which was intended to provide effective mechanisms for reducing loss of life and social, economic and environmental assets in the event of disasters. It sought to establish a collective response to disaster emergencies through concerted national efforts and intensified regional and international cooperation. One of its guiding principles was respect for the sovereignty, territorial integrity and national unity of the States parties.

92. Concerning the scope of the topic, her delegation agreed that a broad approach would be most suitable and encouraged the Commission to keep an open mind when considering the scope *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci*.

93. With respect to the obligation to extradite or prosecute, the question of which of the two alternatives should take priority was complex. Under Thailand's newly amended Extradition Act, the obligation to extradite did not arise until an extradition request had been duly submitted to the competent Thai authorities. If it appeared from the request that the criteria for extradition under the Act had been met, then the obligation to extradite would obtain. If not, the obligation to prosecute might take effect, provided that the extradition request was accompanied by a request to prosecute the person concerned and the details of the alleged offence had been duly examined.

94. Her delegation was of the view that an extradition request could only be refused in accordance with the terms of the relevant bilateral or multilateral extradition treaty. The Extradition Act, which served as the implementing legislation for extradition treaties and also as the governing law on the matter in the absence of such treaties, appeared to allow the competent Thai authorities some discretion in granting or refusing extradition requests. Section 9 of the Act identified two cases in which the Thai Government might consider surrendering a person to be prosecuted or to serve a sentence under the requesting State's jurisdiction: first, where the offence was an extraditable offence and was not prohibited under Thai law and not of a political or military character; and second, if there was no extradition treaty with the requesting State, when that State expressly agreed to grant any Thai requests for extradition in the same manner.

95. On the question of whether the State had the authority under its domestic law to extradite persons of its own nationality, the Extradition Act provided that the competent Thai authorities were authorized to extradite Thai nationals to a requesting State in three limited circumstances: first, if the extradition treaty between Thailand and the requesting State provided for such extradition; second, if the person sought for extradition consented to the extradition; and third, if the extradition took place under conditions of reciprocity.

96. Her delegation believed that the procedural regime for extradition should be separate from the ordinary rules of criminal procedure, since extradition proceedings were conducted for the purpose of surrendering the alleged offender to the requesting State and the merits of the case were not considered at that stage. Using ordinary criminal procedure to govern the extradition process would inevitably cause delay and undermine the effectiveness and efficiency of the justice system, particularly where the alleged offender was under arrest or in detention. Providing a separate regime of procedural rules for extradition would expedite the extradition process and ultimately benefit both the alleged offender and the requesting State. Her delegation therefore encouraged the Commission to consider formulating procedural rules specifically for extradition.

The meeting rose at 1 p.m.