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Chairman: Mr. Tulbure . . . . . (Moldova)

Contents

07-57768 (E)

The meeting was called to order at 10.05 a.m.

Agenda item 82: Report of the International Law Commission on the work of its fifty-ninth session (*continued*) (A/62/10)

1. **Mr. Jaafar** (Malaysia) said that his delegation welcomed the position, expressed in draft guideline 2.6.3 ("Freedom to make objections"), that a State or international organization could object both to a reservation that did not meet the criteria for validity in accordance with article 19 of the Vienna Conventions, and to a reservation that it deemed to be unacceptable "in accordance with its own interests" (A/CN.4/574, paras. 62-63), even if the reservation itself was valid. That position was based on the principle that a State could not be bound without its consent. He looked forward to a discussion of whether a State or international organization could object to a reservation that was expressly authorized by the Vienna Conventions, a question that had yet to be resolved. Several of Malaysia's reservations to human rights treaties had been perceived by other States parties as incompatible with the object and purpose of those instruments. He therefore looked forward to completion of the Special Rapporteur's work on the impact of invalid reservations, and of objections to and acceptances of such reservations, in the context of the draft guideline.

2. Concerning draft guideline 2.6.5 ("Author of an objection"), his delegation understood the phrase "any State and any international organization that is entitled to become a party to the treaty" to mean signatory States and international organizations; a State or international organization that had no intention of becoming a party to a treaty should not have the right to object to a reservation made by a State party. In light of that draft guideline, he also proposed that draft guideline 2.6.12 ("Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty") should be amended in order to require States and international organizations to confirm, at the time when they became parties to a treaty, any objections that they had made prior to expression of their consent to be bound, since considerable time might have passed in the interim.

3. Draft guideline 2.6.13 ("Time period for formulating an objection") was not an accurate reflection of article 20, paragraph 5, of the Vienna Conventions; the words "by the end of" should be replaced by "within the" in order not to suggest that a State or international organization must wait 12 months after being notified of a reservation before objecting to it.

4. His delegation found draft guideline 2.6.14 ("Pre-emptive objections") unacceptable; States and international organizations should wait until a reservation was made in order to determine its extent before deciding whether to object to it. It would also be advisable to consider the legal effects of late objections (draft guideline 2.6.15) and of partial withdrawal of an objection (draft guidelines 2.7.7 and 2.7.8) in the context of the Special Rapporteur's future work on the effects of objection to and acceptance of reservations.

5. Draft guideline 2.8.2 ("Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations"), as currently drafted, could be understood as restricting acceptance of a reservation to the 12-month period following notification, whereas article 20, paragraph 5, of the Vienna Conventions provided that objection could be made either within that period or by the date on which the State or international organization expressed its consent to be bound by the treaty, whichever was later. The draft article should be amended accordingly.

6. His delegation agreed that the international organization must clearly express its acceptance of a reservation, as established in draft guideline 2.8.8 ("Lack of presumption of acceptance of a reservation to a constituent instrument"), but the acceptability of draft guideline 2.8.9 ("Organ competent to accept a reservation to a constituent instrument") would depend on the internal framework of the organization; the guideline should be viewed as all-encompassing.

7. While acknowledging that adoption of the draft guidelines would assist States and international organizations in their practice regarding reservations to treaties, his delegation considered that further discussion and analysis, including on the basis of States' replies to the questions posed by the Commission in paragraphs 23 to 25 of its report, was needed before they could be adopted.

8. Turning to the topic of shared natural resources, he said that linking the Commission's work on transboundary groundwaters to its work on oil and natural gas would cause unnecessary delay. He agreed with the Special Rapporteur that the issue of oil and

natural gas should not be taken up until work on the topic of groundwaters had been completed; oil and natural gas were strategically important to a country's economic and social development, but they could not be called a vital human need, and the principles drafted for groundwaters would not necessarily apply to them.

9. In light of the differing views expressed by States, discussion of the final form of the draft articles should be deferred until after the second reading; in that regard, he noted that the current draft did not include dispute settlement mechanisms, final clauses or any provision that might prejudice the final form of the document.

10. Concerning the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), in reply to the question raised in paragraph 31 (a) of the Commission's report, he said that Malaysia was a party to a number of multilateral treaties that established that obligation, including the four 1949 Geneva Conventions, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the "Hague Convention") and the 1973 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the "Montreal Convention"). It had also concluded bilateral extradition treaties with Thailand, Indonesia, Hong Kong Special Administrative Region, the United States of America and Australia; all but the first of those treaties (which had been concluded in 1911) also required the parties to either extradite or prosecute. Where a treaty did not provide for that obligation or provided for it to only a limited extent, application of the obligation was governed by the domestic law of the contracting parties; where a treaty did provide for the obligation, its scope of application was limited to requests involving nationals of the parties. There was no obligation for Malaysia or its treaty partners to prosecute non-nationals in the event that an extradition request was denied.

11. Malaysia had incorporated the obligation to extradite or prosecute into its 1992 Extradition Act; section 49 thereof provided that determination of whether to grant an extradition request or to refer it to the relevant authority for prosecution lay with the relevant Minister, who would consider the nationality of the alleged offender and determine whether Malaysia had jurisdiction to prosecute the offence. In the absence of a treaty, extradition was still possible. However, his Government did not recognize the treaties to which it was a party as the legal basis for acceding to an extradition request; a Special Direction must be issued under section 3 of the Extradition Act. In practice, such Special Direction was normally issued even when the request was made by a State with which Malaysia had no extradition treaty. The only exception to that rule was made in respect of the Hague Convention and the Montreal Convention; section 16 of the 1984 Aviation Offences Act made it possible to use those instruments as the legal basis for extradition under domestic law.

12. His Government had consistently maintained its commitment to provide the greatest possible assistance in combating crimes and to suppress impunity. In so doing, it took into account not only domestic law, but also the principles of international cooperation and the comity of nations, the seriousness of the crime, the likelihood of conviction and the interests of the victims and States concerned. In the past, Malaysia had permitted the extradition of its nationals for offences relating to international drug trafficking; in such cases, it normally sought an undertaking that the requesting State would extradite its nationals to Malaysia for a similar offence upon request.

13. An extraditable offence was defined as one that was punishable under domestic law by death or imprisonment of not less than one year. His Government did not apply the principle of universal jurisdiction in its domestic law or practice and had not specifically criminalized the offences which had such jurisdiction because it considered that domestic law was adequate to deal with them. Any extradition request which met the requirements of dual criminality and the minimum penalty threshold could be considered.

14. Generally speaking, his delegation was of the view that the obligation to extradite or prosecute arose from treaties; it was not a general obligation under customary law. It appeared from the report, including the study of State practice, that there was insufficient evidence to support the contention that the obligation had attained the required level of acceptance and that it was not incumbent on States except where established by treaty. Nevertheless, he noted that that study was ongoing.

15. **Ms. Williams** (Canada) said that she agreed with the Commission's decision not to call into question the work of the Vienna Conventions in its work on the topic of reservations to treaties. While contracting

States and international organizations should be able to respond to the perceived invalidity of a reservation by means of an objection, her delegation was concerned at the suggestion that third parties might be able to make such objections, particularly where those parties were human rights treaty bodies that were not granted competence to do so under their constitutive instruments. One such treaty body had suggested that the consequence of invalidity was severability, which would mean that a State could become a party to a treaty without the very condition that it had intended as its precondition for adherence; that case had apparently prompted the question posed by the Commission in paragraph 23 (a) of its report.

16. In her delegation's view, in the absence of any specific rules within a particular treaty regime, the principle of State consent should prevail. Thus, it was for the State parties to determine the validity, and the consequences of invalidity, of a reservation made by another State party. Her own Government approached the formulation of objections on a case-by-case basis, taking into account both principles and practical considerations. In many cases, Canada did state that the objection did not prevent the treaty from entering into force between it and the author of the reservation, but it had no absolute rule in such situations.

17. Concerning the topic of shared natural resources, she explained that since Canada shared an international land boundary only with the United States of America, the issue of groundwater pollution was, for it, exclusively bilateral and governed by the International Boundary Waters Treaty of 1909, which was implemented in Canada by the International Boundary Waters Treaty Act, and the Great Lakes Water Quality Agreement of 1978, as amended in 1987. The two agreements interacted through the International Joint Commission, a bilateral institution created under the Treaty and given additional responsibilities by the Agreement. Although the Treaty contained no explicit provisions on groundwater, the Joint Commission had shown concern for groundwater pollution and the 1987 amendment to the Agreement included a new annex 16 that dealt with the issue of pollution of the Great Lakes by contaminated groundwater. On 13 December 2005, the Canadian provinces and American states bordering on the Great Lakes had concluded an agreement on diversions from the Great Lakes Basin, which included provisions on groundwater use and quality.

18. Those instruments, institutions and processes formed the basis on which Canada would consider any other relevant instruments. Her delegation would therefore support consideration of the draft articles as a set of model principles and the development of an information base on the issues, problems and approaches involved in enhancing the protection and sustainable use of groundwaters. However, more extensive work on the issue of transboundary groundwaters, including the development of a framework convention, might be problematic. Her delegation was also in favour of conducting a preliminary study on oil and gas, including a compilation of State practice, and of treating oil and gas separately from transboundary groundwaters.

19. Turning to the topic of the obligation to extradite or prosecute, she said that although Canada was a strong supporter of efforts to encourage accountability and avoid impunity, it did not consider that the obligation to extradite or prosecute applied to all crimes. She cautioned against adoption of an overly broad conception of that obligation, especially if it was to be referred to as an "obligation" rather than a principle or standard. In Canada, the obligation to extradite or prosecute applied only to crimes of universal jurisdiction as recognized by treaty or by customary international law. Further discussion of the source of the obligation, including a systematic survey of treaties that required the parties to extradite or prosecute, would be welcome. Her delegation endorsed the Special Rapporteur's decision to refrain from examining further the so-called "triple alternative", since it viewed surrender to an international criminal tribunal as substantively different from a bilateral, State-to-State act of extradition.

20. **Ms. Defensor-Santiago** (Philippines), speaking on the topic of reservations to treaties, said that although the fundamental assumption of the Vienna Conventions was that reservations could be made to both bilateral and multilateral treaties, it was difficult to imagine a reservation to a bilateral treaty since the instrument could not come into force unless both parties agreed to all its provisions. A unilateral statement or declaration by one party to such a treaty might be viewed as an interpretive declaration; even then, however, it would be subject to the consent of the other party.

21. As noted in the third report of the Special Rapporteur (A/CN.4/491/Add.5, para. 431), the

Commission had stated in 1966 that reservations to bilateral treaties presented no real problem because they amounted to a new proposal for reopening negotiations between the two parties; only if both States agreed to adopt or reject the reservation would the treaty be concluded. However, draft guideline 1.5.1 specifically excluded such unilateral statements from the definition of reservations. The same problem could arise in the case of multilateral treaties with only three or four parties, a situation that was envisaged in article 20 (2) of the Vienna Conventions. A more clear-cut determination of the status of reservations to bilateral treaties would be instructive.

22. Draft guideline 3.1.8 ("Reservations to a provision reflecting a customary norm") was based on the assumption that even if customary norms had been codified or embodied in conventions, as the International Court of Justice had pointed out, "It will … be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*) case, 1986, cited in the report of the Commission's Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.702, n. 9)).

23. In her delegation's view, while a customary norm might also be enshrined in a treaty, in practice there was a need to specify in each case whether it applied as a treaty rule or a customary norm. Draft guideline 3.1.8, paragraph 2, was merely a restatement of article 38 of the 1969 Vienna Convention, which made it clear that an obligation between States parties that was derived from a treaty rule was different from an obligation between third States of which the binding force was sourced from custom.

24. It would therefore be logical to conclude that since the reserving State operated within a specific treaty regime in its relations with other States parties thereto, in making its reservation it was dealing with the relevant provision of the instrument as a treaty rule. By crossing the line that separated treaty rules from customary norms, as it had done in draft guideline 3.1.8, the Commission had introduced confusion as to the source of the obligation between the reserving State and the other contracting States. The draft guideline implicitly entertained the possibility that a reservation might be in derogation of customary law as reflected in the provision of the treaty against which the objection was formulated. While the Commission did not go so far as to state that such a reservation was invalid, it took a reservation's incompatibility with a treaty provision that reflected customary law into account in assessing its admissibility, thereby suggesting that the reservation might be considered inadmissible. The inclusion of draft guideline 3.1.8 should therefore be reconsidered, particularly as customary *jus cogens* norms were relevant to the subject of draft guideline 3.1.9 ("Reservations contrary to a rule of *jus cogens*").

25. Articles 53 and 64 of the Vienna Conventions established that States could not conclude a treaty that conflicted with a peremptory norm of general international law; draft guideline 3.1.9 could therefore be interpreted as a necessary implication of that principle. The Vienna Conventions did not attempt to catalogue the various *jus cogens* norms, but article 53 set a general standard for determining which norms of general international law could be categorized as *jus cogens*: namely, those which were accepted and recognized by the international community of States as a whole. In its second report on the law of treaties (A/CN.4/156 and Add.1-3), the Commission had considered it prudent "to state in general terms the rule that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals" (cited in the *Yearbook of the International Law Commission* (1963), vol. 2, p. 53).

26. The method of identifying a *jus cogens* norm involved in a reservation was therefore problematical; reference to the jurisprudence of international tribunals would prove unavailing owing to the paucity of State practice. *Jus cogens* norm-formation involved a twin process: formulation of a norm of customary or general international law, together with its development into a peremptory norm through the acceptance and recognition of the international community, unless State practice and *opinio juris* were keyed to the peremptory factor in the very process of formulation of a general or customary norm.

27. Article 65 of the Vienna Conventions did not offer a means of deciding how a conflict between a reservation and a peremptory norm arising from the application of draft guideline 3.1.9 should be settled; in such a case, the reservation's admissibility did not involve invalidity, termination, withdrawal from or

suspension of the operation of a treaty. Moreover, article 65 might cast doubt on the applicability of the procedure set forth in article 66 of the Conventions, leaving disputes concerning the status of a reservation outside the settlement mechanism established in the Vienna regime. If the draft guidelines took the final form of a guide to practice, it was not clear what their legal status would be; they were not designed to have binding force, yet some disciplinary effect might result from their embodiment in a recommendation of the General Assembly under Article 10 of the Charter of the United Nations.

28. The Commission's work on the topic of shared natural resources might be useful in the context of transboundary incidents between States, specifically with regard to the allocation of rights and duties involved in the exploitation of resources that might entail environmental harm. Since transboundary aquifers, oil and gas were all fluids, their exploitation by one party could affect parties in another jurisdiction that shared transboundary groundwaters or oil fields.

29. That situation might appear to require *inter se* rules governing relations between the affected States; it might also call for the application of general norms that already formed part of the law on international responsibility or international environmental law. Principle 21 of the 1972 Stockholm Declaration on the Human Environment, which was widely recognized as having crystallized into customary norm and was reaffirmed in identical language in Principle 2 of the 1992 Rio Declaration on Environment and Development, was relevant in its integration of the issues of sovereignty and environmental protection. In the *Trail Smelter* arbitration case between the United States and Canada, that principle had acquired specific application to the issue of transboundary pollution; its application had also carried over into article 194, paragraph 2, of the Convention on the Law of the Sea in the context of protection of the marine environment. And, as the International Court of Justice had stated in its advisory opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment".

30. The transboundary impact of shared natural resources might be the focus of the Commission's concern in the context of progressive development and codification of the law in those areas. In particular, the duty not to cause significant environmental harm was the main burden of a transboundary nature in State relations; thus, the aforementioned fundamental principle of the law on environmental protection would apply to shared natural resources. In the context of the law of the sea, the rules on delimitation of the continental shelf might be decisive for issues of sovereignty arising between oil and gas States. The prospect of joint development of resources, anticipated in the Commission's debate on the report of the Working Group, might be addressed through appropriate agreements governed by the law of treaties.

31. The topic of shared natural resources would be difficult to conceptualize as a separate legal regime; her delegation would welcome clarification of the methodology to be used in the Commission's work, the problems that it anticipated and the resources on which it planned to focus in addition to groundwaters, oil and gas. The scope of the topic might also be expanded to include atmospheric pollution and straddling and highly migratory fish stocks.

32. The liability regime might need to take into account the nature of the damage or injury caused; in the case of groundwater, oil or gas, the locus of environmental harm could be identified as the persons injured or property damaged. It would also be necessary to develop the law on damage to the environment and injury to components thereof and to distinguish between damage to persons or property, which concerned *inter se* relations between States, and damage to the environment, which might involve the collective interests of States, and have *erga omnes* implications. Transboundary harm that extended beyond national jurisdiction might also have to be taken into account in the procedural aspects of establishing liability.

33. **Ms. Villalta Vizcarra** (El Salvador) said that the work on reservations to treaties could have important implications for international law. It was essential that when a State made a reservation that preserved the integrity of the treaty, in other words, that was not incompatible with its object and purpose, such a reservation should be accepted in full; partial objections should not be permitted. A partial objection could undermine the purpose of the reservation, which the reserving State had surely had serious reasons for formulating. Nor should it be permitted that, when a

reservation had not been objected to, a State could later retract its acceptance. A retraction could jeopardize legal certainty and potentially threaten international peace and security.

34. Her delegation attached special importance to the topic of the obligation to extradite or prosecute as a means of combating impunity. An increasing number of treaties included an extradite or prosecute clause. El Salvador was a party to a number of international instruments that established such an obligation in order to deny safe haven to persons accused of crimes of international importance.

35. In 2000 El Salvador had amended article 28 of its Constitution to allow extradition of its nationals. The article stipulated that extradition was possible under an international treaty provided that the treaty had been approved by the legislative branch of the signatory States. In El Salvador ratification of extradition treaties required a two-thirds vote of the deputies elected to the Legislative Assembly. The treaty must provide for reciprocity and grant Salvadoran nationals all the safeguards under penal law and criminal procedure that were provided by their own Constitution. Extradition would be carried out if the offence had been committed within the territorial jurisdiction of the requesting State, except in the case of crimes of international significance; extradition was not permitted for political crimes, even if ordinary crimes resulted therefrom.

36. It was important to distinguish between universal jurisdiction and the obligation to extradite or prosecute. Although they shared the same objective, the obligation to extradite or prosecute would only arise after the State concerned had established its jurisdiction. Her delegation agreed that universal jurisdiction should be considered only insofar as necessary to clarify its relation to the obligation to extradite or prosecute. The relationship between the two elements of the obligation should be examined. Her delegation believed that domestic prosecution of a person accused of a crime should be preferred, unless an extradition treaty provided otherwise. The alternative of surrendering the accused to an international tribunal was a limitation on a prerogative of a State to extradite or prosecute.

37. **Mr. Horváth** (Hungary) said that the topic of reservations to treaties deserved the vast amount of energy that had been expended on it. Treaties made up the main source of public international law, and proper functioning of the international order depended largely on the ability of States to identify their rights and obligations under treaties. Comprehensive guidelines on reservations to treaties would provide a very useful tool in that regard and would discourage States from formulating invalid reservations, a matter of special significance in the case of human rights treaties. To have that beneficial effect, however, the work needed to be finished and the draft guidelines adopted; a balance must be found between comprehensiveness and completion of the work within a reasonable time.

38. Concerning the legal consequences of invalid reservations, the 1969 and 1986 Vienna Conventions reflected a compromise between the desirability of maintaining in force all provisions of a treaty not affected by the reservation and the right of the objecting State not to be bound by a reservation against its will. Any change in the system would have to consider whether and under what circumstances a State formulating an invalid reservation could be considered to be bound by the provisions to which the reservation had been made without violating the principle of the sovereign equality of States.

39. Under the topic of shared natural resources, his delegation shared the view that the work on groundwaters should proceed separately from any work on issues related to oil and gas and should result in a framework convention. Such an instrument could set the basic principles of cooperation in the field and serve as a legal framework for countries not yet at that stage of international law development and as a basis for subregional or bilateral agreements to be tailored to the needs of the parties concerned. A model convention might be more quickly completed, but a framework convention would have added value to justify the additional effort.

40. Hungary was very much concerned about the problem of shared groundwaters, since it shared aquifers with all seven of its neighbours. However, the existing legal instruments concluded under the auspices of the Economic Commission for Europe, the European Union and the International Commission for the Protection of the Danube River, together with bilateral agreements, fully accommodated its needs. It was ready to contribute its experience to the further elaboration of the United Nations instrument on shared groundwaters and would communicate its position in writing.

41. With regard to the obligation to extradite or prosecute, his delegation was of the opinion that, in an era of unprecedented interdependence of peoples and States, such an obligation did exist, and the sources of the obligation were not limited to international treaties. A comprehensive analysis of treaties, customary international law, national legislation and State practice could help to identify the exact content of the obligation. His delegation would prepare and submit information on Hungarian legislation and practice concerning extradition.

42. **Ms. Kamenkova** (Belarus) said, with regard to the topic of reservations to treaties, that an important aspect of the formulation of reservations was the object of the treaty concerned. Treaties relating to human rights and the victims of armed conflicts should obviously be treated with particular respect; reservations to them should not be permitted.

43. Once a reservation was determined to be invalid, following objections by several of the contracting States, the agreement of the reserving State was, as a rule, also invalid and the State concerned could not be considered bound by the treaty. Human rights treaties and treaties relating to international humanitarian law and the law of armed conflict should be excluded from that rule, however; once a reservation was acknowledged to be invalid, they should remain in force with the maximum number of participants assuming all their contractual obligations.

44. Reservations to bilateral treaties were unacceptable, since they amounted to a counter-offer by one of the parties. The Commission had, however, drawn an important distinction between reservations and interpretative declarations; and the unacceptability of reservations to bilateral treaties did not exclude the possibility of interpretative declarations with regard to such treaties.

45. Her delegation would be in favour of a clear definition of the term "written form", which, it believed, should take account of the significant development of communication media over the past few years. The draft guidelines recognized the special status of facsimile and electronic mail. In principle, however, any form of communication dependent on the written word could be considered to be "written", although it should always, except in the case of official diplomatic correspondence, be confirmed by the subsequent traditional exchange of letters.

46. The Commission had successfully tackled the question of the incompatibility of reservations with the object and purpose of the treaty. The notion of the object and purpose, which, although mentioned in both Vienna Conventions, was famously abstract in nature, had begun to be fleshed out in the draft guidelines.

47. With regard to vague or general reservations, her delegation believed that, in addition to the criteria of the scope of a reservation and its compatibility with the object and purpose of the treaty, it would be as well to include the condition that the interests of the other contracting parties should be protected in cases in which a reservation was susceptible to a number of possible interpretations. In other words, a reservation should be interpreted in line with the *contra proferentem* rule of Roman law: it should be construed against the reserving State and in favour of the other contracting parties. States would thus have an interest in formulating their reservations carefully so as not to fall foul of unexpected interpretations of their own reservations.

48. As for reservations relating to contractual provisions reflecting general norms of international law, one important factor was a State's expression *opinio juris* in respect of the acceptability or unacceptability of a norm of international law that was considered customary. In her delegation's view, the formulation of a reservation in respect of a norm considered to be customary law did not automatically mean that the reserving State objected to the norm's having international customary status in contexts other than that of the international agreement in question. A reservation to a given norm could be predicated on the specific treaty concerned, not on its international customary nature.

49. As for reservations that affected domestic legislation, it was important to stress the unacceptability of reservations the legal effect of which could be arbitrarily modified by the reserving State amending its domestic legislation or adopting a self-serving interpretation of it. The only exceptions should be constitutional laws, which were always difficult to amend and could present a real legal obstacle to participation in an international treaty by the State concerned. While States were signatories to a treaty, they must, as it were, "freeze" their legislation: in other words, they must apply the legislation that was in force at the time of the formulation of the reservation, if amending legislation would change the legal effect of

the reservation and lead to objections from the other contracting parties.

50. Her delegation fully supported the draft guideline on reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty. The text upheld the freedom of the parties to choose the means for the peaceful settlement of their dispute and the monitoring of obligations, without permitting them to reject such means altogether, if the mechanisms in question constituted a substantive or integral part of the obligations of the contracting parties. Such an approach should be supplemented with a provision on the unacceptability of reservations to "diplomatic" means of settling international disputes, such as negotiations, consultations or mediation.

51. Her delegation hoped that, in 2011, the Commission would at length successfully complete its work on the topic, which would constitute an important landmark in the history of international law.

52. **Mr. Dufek** (Czech Republic) said, with regard to reservations to treaties, that his delegation welcomed the importance attached by the Commission and the Special Rapporteur to the "reservations dialogue" on the formulation of reservations and objections to reservations. Such a dialogue could be of significant assistance in clarifying the legal position with regard to reservations and their relationship to a specific international treaty in cases where an objection was based on the alleged incompatibility of the reservation with the object and purpose of the treaty. His delegation therefore supported draft guideline 2.6.10, which recommended that States and international organizations should indicate, whenever possible, the reasons for their objection to a reservation by another State or international organization. Moreover, as the discussion in the Commission had shown, it would probably be appropriate to insert guidelines recommending that they should also explain their reasons for withdrawing an objection and also the reasons for their reservations to international treaties. In formulating such guidelines, the Special Rapporteur and the Commission should take into account the problem of vague or general reservations, which were dealt with in draft guideline 3.1.7.

53. For the same reasons, his delegation supported the Special Rapporteur's conclusions concerning the formulation of late objections, namely those formulated after the end of the time period specified in article 20, paragraph 5, of the Vienna Convention on the Law of Treaties or the period specified in a given international treaty. Although late objections could not produce the effects anticipated under article 20, paragraph 4 (b), and article 21, paragraph 3, of the Convention, his delegation considered them a significant aspect of the "reservations dialogue" and a useful source of information for international courts, monitoring bodies and other entities that were considering the validity of a given reservation. The current text of draft guideline 2.6.15, however, should be amended: as it stood, it was too brief and general. Moreover, it stated that late objections might produce certain legal effects, which actually ran counter to the stated object of the draft guideline. His delegation would welcome further detailed consideration of the possibility, mentioned in the Commission's discussions, that late objections should be governed, mutatis mutandis, by the regime governing interpretative declarations.

54. The Commission should also give thorough consideration to draft guideline 2.6.14 concerning the regime of pre-emptive objections. Although such objections might enable a State to safeguard its rights arising from a specific treaty and to communicate its legal position on potential or future reservations to that treaty, his delegation shared some of the doubts expressed within the Commission, namely that the draft guidelines could give rise to confusion between political or interpretative declarations and declarations intended to produce a specific legal effect. The Commission should also consider whether or not a pre-emptive objection could, in all cases reflect the specific contents of potential or future reservations to which that objection applied.

55. Turning to the topic of shared natural resources, he said that, despite the many similarities between groundwaters and oil and natural gas, the differences between them were more significant. His delegation was therefore of the opinion that the reading of the draft articles on the law of transboundary aquifers could be completed, regardless of the outcome of the Commission's discussion of legal questions relating to oil and natural gas. The Commission should, moreover, establish what State practice was with regard to oil and natural gas. The questionnaire on State practice would be of key importance. The fact that gathering and subsequently assessing such information would take a relatively long time, however, was another reason why

it would be useful to complete the work on transboundary aquifers regardless of the work on oil and natural gas.

56. The draft articles on the law of transboundary aquifers could serve as the basis for the negotiation of detailed bilateral or multilateral agreements on such aquifers in the future. His delegation was, however, concerned that the use of the term "good faith" in draft article 7 held the danger that States might take measures in good faith that had not been negotiated with the other party and that could therefore have an adverse effect on the other party's needs. His delegation was also concerned about the provision in draft article 14 under which a State could, as far as practicable, assess the possible effects of a particular planned activity in its territory on a transboundary aquifer or aquifer system. Such an assessment could not be left to a single party; all the States concerned should participate.

57. With regard to the final form that the draft articles should take, he said that, on the one hand, the topic of transboundary aquifers had many similarities with the draft articles that had resulted in the adoption of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, so it might seem only logical that the draft articles on the law of transboundary aquifers should be finalized in the form of a framework convention. On the other hand, the 1997 Convention had not yet entered into force owing to insufficient interest in its ratification. There was thus a danger that the draft articles could suffer the same fate. Nonetheless, a framework convention would be of greater benefit than a non-binding resolution or simply a report by the Commission, in that the law of transboundary aquifers constituted an example of the progressive development of international law. Whereas the failure of a convention codifying customary rules of international law could lead to the questioning of the generally binding nature of those rules, there would be no such risk in considering the progressive development of international law through a framework convention. Although it might not enter into force so soon and would be binding on a smaller number of States, a binding convention would be more appropriate.

58. **Mr. Brownlie** (Chairman of the International Law Commission) thanked the delegations that had spoken on the Commission's report. The feedback that the Commission received, through Governments' comments on the report or on its draft texts, was central to the strategic dialogue on the Commission's efforts at the codification and progressive development of international law. Needless to say, the views of Governments were important to the Commission. He wished to draw the attention of Governments once again to the specific issues highlighted in chapter III of the report. In particular, he urged Governments to submit written comments on the draft articles on the law of transboundary aquifers, the first reading of which the Commission had completed. Written comments by Governments would provide the Commission with information that would be essential for the second reading.

59. He would not respond to statements by delegations, since the Commission was a collegial and collective body. All pertinent comments and observations would, however, be taken into account. All written statements would be made available to the Special Rapporteurs. He stressed how useful the discussion over the past week had been and he looked forward to continuing the discussion at the commemorative meeting to be held on 19 and 20 May 2008 in Geneva, in honour of the Commission's sixtieth anniversary to which Legal Advisers were invited.

60. **Ms. Belliard** (France) said that she would not comment on the draft guidelines already adopted by the Commission on the determination of the object and purpose of the treaty and on the incompatibility of a reservation with the object and purpose of the treaty, although her delegation reserved the right to comment after the second reading on some of the difficulties raised by certain draft guidelines.

61. The draft guidelines referred to the Drafting Committee at the fifty-ninth session related to issues that, despite being very technical, were also of practical interest, since they related to the procedure for making and withdrawing objections and acceptances. The Drafting Committee had made a number of useful changes. Her delegation had some doubts, however, about draft guidelines 2.6.14 and 2.6.15, relating to pre-emptive objections and late objections, respectively. It was doubtful that the former were objections in the true sense of the word; and the risk of such a guideline was that it would encourage States, on the pretext of making pre-emptive objections, to increase the number of their declarations — with uncertain legal effects — when

they became parties to a treaty. As for late objections, it should be clearly said that they had no legal effect whatsoever, contrary to the impression given by the draft guidelines as it stood.

62. With regard to the acceptance of reservations, her delegation supported all the draft guidelines on that topic in the twelfth report. It was, however, surely unnecessary to make too much of the distinction between a tacit acceptance and an implicit acceptance. It was, moreover, hard to see a tacit acceptance, once 12 months had passed following the notification of a reservation, as a "presumption" of acceptance in the legal sense of the term, as had been suggested during the Commission's discussions. The text of draft guidelines 2.8.1 and 2.8.2, which reflected that of article 20, paragraph 5, of the Vienna Convention on the Law of Treaties, in that it applied to cases in which a reservation was "considered to have been accepted", did not seem to mean that an acceptance could, in itself, be "reversed". The separate question of the non-validity of a reservation, and consequently of an acceptance, related, in her view, to the effects of reservations and acceptances.

63. She had doubts about whether it was appropriate to include draft guideline 2.8.11 in the Draft Guide to Practice. Although it concerned the more or less indisputable right of member States of an international organization to take an individual position on the validity of a reservation to the constituent instrument of that organization, there was a risk that such a draft guideline might, in practice, lead to interference with the exercise of the powers of the competent organ and respect for the proper procedures.

64. The question raised in paragraph 23 (a) of the report, concerning the conclusions drawn by States if a reservation was found to be invalid, was crucial. The question of the consequences of invalid reservations was one of the most difficult problems raised by the Vienna Convention on the Law of Treaties. No provision of the 1969 Convention related to the link between the rules on prohibited reservations and the rules on the mechanism of acceptance of or objections to reservations. Her delegation had already expressed its misgivings about the use of terms such as the "validity" or "invalidity" of reservations, which took no account of the wide range of reactions by States to reservations by other States. In her delegation's view, issues relating to the consequences of invalid reservations should be resolved primarily through the objections and acceptances communicated by States to the reserving State. A reservation might be found to be invalid by a monitoring body, but the consequences of such a finding inevitably depended on the recognized authority of that body. The "opposability" of a reservation between States parties, on the other hand, depended on the acceptances or objections by those parties.

65. Paragraph 23 (d) of the report invited States to give their opinion on whether, in objecting to a reservation that it judged incompatible with the object and purpose of the treaty, a State could consider that the reservation had no effect and that the reserving State was bound by the treaty as a whole, including the provision or provisions of which it wished to amend the effects (the "super-maximum" effect objection). Such a solution seemed directly contrary to the principle of consensus that prevailed in the law of treaties. It was also possible, in accordance both with practice and the Vienna Convention, that States that had objected to a reservation they considered incompatible with the object and purpose of the treaty (or prohibited by a reservation clause) would not oppose the entry into force of the treaty between them and the reserving State. The scenario according to which a reservation incompatible with the object and purpose of the treaty could completely invalidate the consent of the reserving State to be bound by the treaty seemed to run counter both to the will expressed by the reserving State and to the freedom of the objecting State to choose whether or not the treaty should enter into force between itself and the reserving State. The latter might well be bound by some important provisions of the treaty, even though it had formulated a reservation to other provisions relating to the general thrust of the treaty, and hence incompatible with its object and purpose.

66. France's practice was that, when it objected to a reservation prohibited by the treaty but did not oppose the entry into force of the treaty vis-à-vis the reserving State, it respected the intention expressed by that State. Moreover, in expressly recognizing that the objection did not prevent the entry into force of the treaty — which was not strictly necessary under the Vienna Convention — France meant to emphasize the importance of the contractual link thus established and to contribute to the "reservations dialogue" promoted by the Special Rapporteur. The effects of such an entry into force might, of course, be extremely limited in

practice, particularly for so-called "normative" treaties or in cases where the reservation was so general that few of the treaty's provisions had been truly accepted by the reserving State.

67. Unsatisfactory as such a solution might sometimes be, it was the one that best respected the international legal system and the only one to offer a practical response to questions that might seem insoluble in theory. A reservation might not be valid, but the law of treaties could neither deprive a reservation of all its effects by recognizing the possibility of "super-maximum" objections nor restrict the consent of a State to be bound by a treaty on the grounds that its reservation was incompatible with the treaty from the moment that the objecting State consented to maintain a contractual relationship with it.

68. **Mr. Troncoso Repetto** (Chile) said that the Commission's work on the principle of extradite or prosecute could be of great practical value. The obligation to extradite or prosecute was linked to the principle that States should cooperate in combating transnational crime and preventing the perpetrators of serious crime from finding a safe haven.

69. The source of the obligation could be found in many bilateral and multilateral extradition treaties and other international instruments for the suppression of certain particularly serious crimes, such as the various conventions against terrorism, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the United Nations Convention against Transnational Organized Crime. Its source in customary international law, at least for some categories of crimes, would depend on the existence of general practice by States in that regard, together with the required *opinio juris*, to be determined by examining the conduct of States. Moreover, the Special Rapporteur was correct in thinking that the topic required an analysis of national legislation and judicial decisions as well.

70. The principle of extradite or prosecute applied to a State in whose territory an alleged offender was present. It was associated with the concept of universal jurisdiction, but the two concepts were not absolutely comparable. The Special Rapporteur correctly drew a distinction between universality of suppression and universality of jurisdiction or competence. The principle "*aut dedere aut judicare*" was one way of achieving universality of suppression. Whatever conclusions the Commission might reach concerning the relation between the two concepts, the focus of study should be on the principle of extradite or prosecute.

71. A key issue was the scope of the obligation with regard to subject matter. It was clear that the obligation to extradite or prosecute applied to particularly serious international crimes which the international community as a whole had an interest in prosecuting and punishing. Nonetheless, that did not prevent States, in their treaty relations, from applying the principle to other crimes.

72. His delegation would like the Special Rapporteur to delve more deeply into the question of the alternative nature of the obligation to extradite or prosecute. The commitment that States normally made in treaties was that they would grant an extradition request provided that all the stipulated conditions were met. Only if the person was not extradited did the obligation to prosecute arise, but the requested State could not simply decide to prosecute rather than to extradite without giving due consideration to the extradition request. Moreover, even in the absence of a specific extradition request, a State was obliged to exercise jurisdiction over certain categories of crimes under international law.

73. The exceptions to the obligation to extradite should be carefully formulated to avoid leaving gaps or room for discretionary, even arbitrary decisions. If an extradition request was rejected solely on the grounds of nationality, there would seem to be no exception to the duty to prosecute. If it was rejected on the grounds of insufficient evidence, it was not clear that the requested State would then have an obligation to prosecute. However, if the extradition request was rejected because there were substantial grounds for believing that the person whose extradition was sought would be in danger of being subjected to cruel, inhuman or degrading treatment or of being sentenced to the death penalty, rules would have to be formulated to determine whether and how the obligation to prosecute would then apply. Moreover, there was a need to examine the relationship of the principle to the right of asylum and the status of refugees. The obligation to prosecute would also have to be analysed in the light of the limitations to the obligation to extradite set out in various international treaties, such as the principle of the non-extradition of nationals, which some States had made a constitutional rule, and

other exceptions to extradition contained in treaty instruments or recognized as principles of international law.

74. It should be specifically provided that, in some cases in which the principle applied, the State in question should adopt measures to ensure that its jurisdiction could be exercised in practice. It should also be determined whether the State in which the alleged offender was found should exercise jurisdiction on its own initiative or at the request of the foreign State.

75. Another issue to be dealt with was the relationship between the principle of extradite or prosecute and the response to a request for surrender of an individual to an international criminal tribunal. It should be well understood that extradition and surrender were two different institutions; the first was requested by a State, the second by an international criminal tribunal. In the case of the International Criminal Court, the jurisdiction exercised was complementary to that of States; if a State was prepared to exercise its jurisdiction in a genuine manner, there could be no competition between requests for extradition and surrender. Moreover, the Rome Statute of the International Criminal Court contained rules on how to deal with competing requests for extradition and surrender. In view of the complex factors involved, his delegation agreed that the Special Rapporteur should refrain from examining the so-called "triple alternative" and should focus instead on the effect that the duty for a State to surrender an individual to an international tribunal might have on its obligation to extradite or prosecute.

76. With regard to draft article 1 on scope of application, his delegation shared the doubts expressed in the Commission about presenting the concepts of "establishment, content, operation and effects" of the obligation in the first draft article. At the current stage of elaboration, it was premature to decide whether those elements should be included in the draft articles. The draft article referred to "persons under their jurisdiction", whereas the key point to be made with regard to scope was that the draft articles applied to persons present in the territory of the custodial State or under its control.

Statement by the President of the International Court of Justice

77. **The Chairman**, welcoming the President of the International Court of Justice, said that the important role played by the Court as the principal judicial organ of the United Nations over the years deserved recognition. In addition, the efforts of the Court in cooperating with other international tribunals were admirable and represented an effective way of addressing problems that might arise as a result of fragmentation of international law.

78. **Ms. Higgins** (President of the International Court of Justice) said that she would like to speak to the Committee on a legal issue of interest: the judicial determination of relevant facts. Much work was currently being done on the topic of evidence in international courts and tribunals generally. Occasionally the Court found a case to be one of pure law, as in the *Genocide Revision* case (*Bosnia and Herzegovina v. Yugoslavia*) and the *Arrest Warrant of 11 April 2000* case (*Democratic Republic of the Congo v. Belgium*). More frequently, the Court was faced with the need to determine facts and law, as in virtually every case concerning title to territory. With increasing frequency the Court found it necessary to make heavy findings of fact critical to the legal issues in dispute.

79. Findings of fact in a criminal court necessarily entailed different procedures from those in a civil court. The International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court had detailed pretrial, trial and appeal procedures for determining individual criminal responsibility. By contrast, the International Court of Justice was a court for determining international law as it applied to States.

80. With regard to how the Court handled the judicial determination of facts, she said that some classical "legal facts" were said by the parties to flow from the documentation they had produced before the Court. For example, an exchange of correspondence or statements in Parliament might be claimed to show that there was a binding arrangement between States X and Y. Such documentation had to be examined in meticulous detail. That situation often arose in territorial dispute cases, where the two sides had different versions of the history of the relations between them. In the case concerning *Maritime Delimitation and Territorial*

Questions between Qatar and Bahrain (*Qatar v. Bahrain*), for example, the Court had had to determine what exactly had been agreed by whom and in what circumstances: whether the Ruler of Qatar had consented to have the question of the Hawar Islands decided by the British Government in an exchange of letters in 1939; whether Janan Island was part of the Hawar Island group according to the letters from the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain. To answer such questions the Court had examined all the relevant correspondence and archival materials.

81. In territorial dispute cases, an understanding of the colonial past and where to find the information in the archives was invariably necessary. Often, one or both parties would rely on the *uti possidetis juris* principle as the basis of sovereignty over the territory in dispute. As the Chamber of the Court had explained in the *Frontier Dispute* case (*Burkina Faso/Republic of Mali*), "the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved". States invoking the *uti possidetis juris* principle might have on their legal teams counsel from Germany (for Namibia in the case concerning *Kasikili/Sedudu Island* (*Botswana/Namibia*)), France (for Chad in the *Territorial Dispute* case (*Libyan Arab Jamahiriya /Chad*)) and Britain (for both parties in *Qatar v. Bahrain*). In the case concerning a *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*), the "legal fact" of how maritime matters had been handled by the Spanish Crown had been pleaded by Spanish counsel on the teams of both parties.

82. The Statute of the Court and the Rules of Court distinguish between experts and witnesses. Persons called by the parties as experts must make a special declaration before making any statement (art. 64 of the Rules) and were examined by counsel under the control of the President (art. 65 of the Rules). In practice, however, persons with a particular expert knowledge were often included as part of the team rather than called in as experts. The task of proving historical facts, for example, was usually done as part of the written and oral pleadings of the team. It was not presented as expert testimony and was therefore not subject to cross-examination. The "expert" lawyer on each team would instead respond to the claimed "evidence of history" of the other in his own submissions, and such a person would be treated as counsel rather than expert under the Rules of Court.

83. The same phenomenon of expert as team member also occurred with respect to technical evidence. One such instance was the expert opinion advanced as to the impact of river meanders on the identification of the main channel in the *Botswana/Namibia* case. The Court had heard experts on both sides as team members, not as experts called by the parties under articles 57 and 63 of the rules. After examining the evidence put forward as to depth, width, flow, bed profile configuration and navigability, the Court had concluded that the northern channel of the Chobe River around Kasikili/Sedudu Island was to be regarded as its main channel.

84. Detailed expert reports on major technical questions were often annexed to pleadings for the Court's scrutiny, as had been done in the *Gabčíkovo-Nagymaros Project* case. It would then be for the team concerned to decide whether to include the expert in their delegation, or whether they would leave any oral submissions as to the evidence to counsel. Different choices in that respect had been made by Nicaragua and Honduras in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case. On the question of whether there was evidence that the King of Spain had attributed maritime spaces to one or other of the provinces of the Captaincy-General of Guatemala, Honduras had annexed expert reports to its Rejoinder, whereas Nicaragua's counsel had analysed historical material during the oral hearings. Parties might even ask the Court to appoint an expert whose report would be officially annexed to the Judgment. That method had been followed in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, when Canada and the United States of America had requested the Chamber in their Special Agreement to appoint a technical expert nominated jointly by them to assist the Court in the preparation of the description of the maritime boundary and of the charts indicating its course.

85. Expert evidence generally seemed to be assimilated within the submissions of a legal team, but witness evidence, namely personal testimony as to facts, was still called very occasionally. Article 43, paragraph 5, and Articles 48 and 51 of the Statute of the Court contained provisions concerning witnesses, while the Rules of Court determined how the parties

should give notice of their intention to call witnesses, the declarations to be made by them and questions of interpretation.

86. Only 10 cases heard by the Court had involved the live testimony of witnesses or experts, the last being the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) case. At first, there had been suggestions that the parties might wish to call hundreds of witnesses, and the Court had put provisional plans in place to cope with all the problems that might have arisen; in the event, however, the Applicant had called two experts and the Respondent had called six witnesses and one witness-expert. The category of witness-expert was not actually mentioned in the Statute or Rules of Court, but it had been recognized in the *Corfu Channel, Temple of Preah Vihear* and *South West Africa* cases. The term referred to a person who could both testify as to a knowledge of facts and also give an opinion on matters on which he or she had expertise. In the case involving Bosnia and Herzegovina versus Serbia and Montenegro, the witnesses and experts had been examined and cross-examined in court. Testimony had been heard as to the structure of military organizations, the relationship between the army of the Republika Srpska and the Yugoslav army, the destruction of the cultural heritage and estimates of war casualties.

87. There had been exceptional instances of historical testimony which no one would wish to challenge, such as the testimony of the mayors of Hiroshima and Nagasaki in the advisory proceedings concerning the *Legality of the Threat or Use of Nuclear Weapons*, who had described the devastating damage and human misery which had befallen those cities and their citizens. The Court had suggested that the mayors should be included in the Japanese delegation, although they had not been pleading any point of law. That solution had avoided the complex issue of whether the usual procedures regarding witnesses applicable in contentious cases could also be applied in advisory proceedings.

88. Although the Court could itself call witnesses under Article 62 of its Rules, appoint experts under Article 50 of its Statute and arrange for an expert enquiry or opinion under Article 67 of its Rules, it had never actually availed itself of the possibility to call witnesses. Court-appointed experts had been used by the Permanent Court of International Justice in the *Factory at Chorzów* case and by the International Court of Justice in the *Corfu Channel* case. In the latter case, the Court had appointed a commission of experts under Article 67 of the Rules to make an independent study of the facts in dispute between the Parties in order that the Court might reach a decision on the merits. The Court had later requested an expert evaluation of the damage sustained by the Applicant in order to assess the quantum of compensation to be paid. In recent years, there had been no reliance on such techniques, and reviewing technical evidence was generally regarded as part of a judge's job.

89. On the one occasion when the Court had made an *in situ* visit under Article 66 of its Rules, it had done so not to collect evidence, but to seek information in the *Gabčíkovo-Nagymaros Project* case. Slovakia had invited the Court to visit the site on the Danube River where the locks to which the case related were situated, and Hungary had agreed to the proposal. During the visit, the Court had taken note of the technical explanations given by the representatives designated by the parties.

90. As for the burden of proof, the Court had consistently held that a party alleging a fact bore the burden of proving it. Sometimes each party would bear the burden in relation to the different claims made within a single case. In the *Ahmadou Sadio Diallo* case, which had concerned diplomatic protection, the Court had explained that it was incumbent upon the applicant to prove that local remedies had indeed been exhausted, or to establish that exceptional circumstances had relieved the allegedly injured persons whom the applicant sought to protect of the obligation to exhaust available local remedies. It was for the respondent to convince the Court that effective remedies in its domestic legal system had not been exhausted.

91. The Court's prime objective as to the standard of proof was to retain freedom in evaluating the evidence while relying on the facts and circumstances of each case. In the *Corfu Channel* case, the Court had rejected evidence "falling short of conclusive evidence" and, at the same time, had referred to the need for a "degree of certainty". Since then, however, it had been reluctant to specify the standard of proof, even for a particular case. In the *Oil Platforms* case, it had satisfied itself with saying that it did not have to decide "on the basis of a balance of evidence" who had fired the missile which had struck the *Sea Isle City* and had merely

noted that the United States of America had not discharged the necessary burden of proof because "the evidence available [had been] insufficient", without specifying the criteria by which sufficiency/insufficiency was being tested. Part of the reluctance to be specific was caused by the gap between the explicit standard-setting approach of common law and the "*intime conviction du juge*" familiar in civil law. The Court naturally had judges from both traditions on the Bench.

92. When dealing with genocide claims in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, the parties had wished to know whether the criminal standard of proof was applicable. The applicant had argued that the matter before the Court was not one of criminal law and that the appropriate standard was therefore the balance of probabilities, inasmuch as what was alleged was a breach of treaty obligations. The respondent, on the other hand, had contended that a charge of such exceptional gravity against a State required "a proper degree of certainty" and that the standard should "leave no room for reasonable doubt".

93. In the circumstances of that case the Court had found it necessary to specify the standard of proof to be met, and in that connection, had stated:

> "The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive […]. The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts."

94. There had been some curious comments from observers about that being a "higher" or a "lower" standard than "beyond reasonable doubt", but it was simply a comparable standard which employed terminology more appropriate to a civil, international law case.

95. In contrast to its general reluctance to specify a standard of proof, over the years the Court had been systematically deciding what types of evidence it had found to be weighty. In the *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) case, the Court had been faced with a very complex set of facts and a vast amount of documentation provided by both parties. It had undertaken a detailed evaluation of the evidence and had examined the origin, authenticity and reliability of each source in addition to its substantive content. It had stated that it would be cautious in its treatment of evidentiary materials specially prepared for that case and materials emanating from a single source. The Court had given substantial weight to the report of the Judicial Commission set up by the Ugandan Government and headed by Justice David Porter (the "Porter report"), noting the following:

> "That evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention."

96. The Court had further observed that, since its publication, there had been no challenge to the credibility of the Porter report, which had been accepted by both parties. That report had since played its part in the case brought by Bosnia and Herzegovina against Serbia and Montenegro, since it, too, was a fact-intensive case where the Court had held that the fact-finding process of the International Tribunal for the Former Yugoslavia fell within the "Porter" formulation. The oral hearings had lasted for two and a half months, witnesses had been examined and cross-examined and thousands of pages of documentary evidence had been submitted. Although the Court had made its own determinations of fact based on the evidence before it, it had also greatly benefited from the findings of fact made by the Tribunal when it had dealt with the accused individuals. When examining that case, the Court had distinguished between the decisions taken at various stages of the Tribunal processes. For example, as a general proposition, no weight could be given to the charges included in an indictment or to judgments on motions for acquittal made by the defence at the end of the prosecution's case. In contrast, the Court had found that it should in principle accept as "highly persuasive" relevant findings of fact made by ICTY at a trial, unless of course they had been overturned on appeal.

97. In its most recent judgment on the merits of the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case, the Court had addressed the specific evidentiary issue of affidavits, because Honduras had produced sworn

statements by a number of fishermen attesting to their belief that the 15th parallel represented and continued to represent the maritime boundary between Honduras and Nicaragua. The Court had said:

> "In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attested to the existence of facts or represented only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred."

98. In other circumstances, where there would have been no reason for private persons to offer testimony, earlier affidavits prepared even for the purposes of litigation would be useful. In that connection, she invited the Committee to refer to paragraph 244 of the judgment in that case.

99. Recent cases heard by the Court, such as *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*), had been particularly fact-heavy, with hundreds of pieces of evidence annexed to the written pleadings of the parties. The case between Malaysia and Singapore had involved about 4,000 pages of annexes. Hence the determination of the relevant facts would be an increasingly important task for the Court. That task explained the continuing need for each judge to have a law clerk. The International Court of Justice was the only senior international court whose judges did not have such assistance in the marshalling, collating and checking of evidence.

100. With reference to General Assembly resolution 61/262 of 4 April 2007 on "conditions of service and compensation for officials other than Secretariat officials: members of the International Court of Justice and judges and ad litem judges of the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda", she emphasized that the Court was governed by its Statute and that it could not have judges sitting on the same Bench but receiving different salaries. Nor should the Court stand alone as the only judicial body bearing the negative impact of the resolution. The current situation raised a genuine rule of law issue to which the Court was seeking to find a solution. It had therefore drawn up some proposals on that subject, which would be annexed to the Secretary-General's forthcoming report on the conditions of service and compensation for officials other than Secretariat officials.

101. **Mr. Mukungo-Ngay** (Democratic Republic of the Congo) said that public opinion in his country had been disappointed by the finding of the International Court of Justice that it had no jurisdiction to entertain the new application filed by the Democratic Republic of the Congo in the *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Rwanda*) case. He therefore asked how such cases could be solved in the future if they could not be heard by Court. Should they be submitted to arbitration or negotiation?

102. **Mr. Shemshuchenko** (Ukraine) requested the President of the Court to give her views with regard to the conflicting jurisdiction of the International Court of Justice, arbitration tribunals, the International Tribunal for the Law of the Sea and other judicial bodies in current environmental disputes concerning the use of the seas and the oceans.

103. **Ms. Higgins** (President of the International Court of Justice), responding to the question from the representative of the Democratic Republic of the Congo, said that the Court realized that lay people and the victims of the armed activities would not understand why, within a very short period of time, a judgment had been handed down in the *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) case, but the Court had been unable to provide assistance in the *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v. Rwanda*) case. The Court's jurisdiction was subject to consent, which had to be manifested by States submitting a joint application to it, by reference to a treaty clause recognizing the Court's jurisdiction, by a declaration made under the optional clause referred to in Article 36, paragraph 2, of its Statute, or by *forum prorogatum*.

104. Although the Court had meticulously examined all the possible bases for jurisdiction in the case which the Democratic Republic of the Congo had brought against Rwanda, it had not found any grounds of competence. It had therefore endeavoured to explain to the wider public why it had been unable to examine the merits of the case. She drew attention to the fact that the consent of both parties would also be required for arbitration proceedings, but added that she was not in a position to explain from a legal perspective how litigation could proceed in that matter.

105. In response to the question from the representative of Ukraine, she said that overlapping jurisdiction in environmental disputes relating to the use of the seas and oceans was a fact of life and had come about owing to the genesis of the various judicial bodies in question. They must all walk together in harmony in order to avoid a bifurcation of international law. She already collaborated closely with Judge Wolfrum, the President of the International Tribunal for the Law of the Sea, a body whose jurisdiction was determined inter alia by decisions of the International Court of Justice.

106. When parties to a dispute were deciding to which forum they should turn, they would not be looking for different answers from diverse bodies and they would therefore have to be guided by procedural issues. The International Court of Justice did, however, occupy the centre of the stage in that area of the law.

The meeting rose at 1 p.m.