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Chairman: Mr. Benmehidi . . . . . (Algeria)

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09-59130 (E)

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

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

1. **Ms. Harun** (Malaysia) said that her delegation welcomed the Commission's decision to keep the topic of treaties over time on its agenda and supported the conclusion that initially, work should proceed in the Study Group on the basis of reports to be prepared by its Chairman. Treaties were designed to preserve the agreement between the parties in a legally binding form but over time, evolving circumstances and subsequent developments might affect their existence, content or meaning; that was especially true in the case of law-making treaties. To ensure that those instruments continued to fulfil their object and purpose, a flexible approach to treaty interpretation that took into account subsequent agreement and subsequent practice was needed.

2. Although the evolutive method of interpretation had long been codified in article 31, paragraph 3 (a) and (b), of the Vienna Convention on the Law of Treaties, those provisions had not been analysed in depth owing to the difficulty of identifying subsequent agreement and practice merely from studies and reports. In the case concerning the *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, the International Court of Justice had pointed out that newly developed norms of law relevant for implementation of a treaty could, by agreement of the parties, be incorporated therein. However, although an evolutive interpretation ensured the continued effectiveness of the treaty, her delegation was concerned that it could lead to a reinterpretation beyond the actual consent of the parties. Therefore, it was imperative that the Study Group should produce illustrative guidelines that would assist courts and tribunals in assessing the relevance of subsequent agreement and practice in respect of international treaties.

3. With regard to the working methods of the Study Group, the views of Member States should also be welcomed. Her delegation was well aware of the importance of subsequent agreement and practice to treaty interpretation and was actively pursuing the issue in order to evaluate the impact on its regional and international obligations. The Chairman of the Study Group's caveat that the practice of the main bodies of the United Nations should perhaps be excluded from the inquiry if there were concerns about possible limitations to the development of the United Nations system as a whole, whereas the practice of other United Nations organs did not raise similar concerns and should be reviewed (A/63/10, para. 18), could lead to confusion since the main bodies of the United Nations were also commonly referred to as "organs".

4. **Mr. Emmerson** (Australia) said that it would be useful to update the 1978 draft articles on most-favoured-nation clauses in light of the extensive subsequent practice on the matter and of new developments in international trade law. The proposed approach could capitalize on the work already done by the Organization for Economic Cooperation and Development (OECD) and the United Nation Conference on Trade and Development (UNCTAD), particularly in relation to investment agreements. It was also important to address the development of the underlying principle in relation to the World Trade Organization (WTO) and preferential trade agreements. His delegation therefore supported the roadmap for future work agreed by the Study Group.

5. His delegation welcomed the proposed general framework for consideration of the obligation to extradite or prosecute (*aut dedere aut judicare*) and supported inclusion of the question of the interaction between the obligation to extradite or prosecute and some of the features and protections already established within the extradition framework, in particular the grounds for refusal of extradition under national and international law. The nature of any obligation to prosecute and the relationship between that obligation and the functioning of independent national prosecutorial bodies should also be considered.

6. **Mr. Kornatsky** (Russian Federation), referring to implementation of the obligation to extradite or prosecute (*aut dedere aut judicare*), queried the Commission's decision to include, in its list of questions or issues to be addressed, the question of whether an alleged offender should be kept in custody awaiting a decision on his or her extradition or prosecution, and the possibility of alternative restrictions of freedom. Such matters were normally decided according to the law on criminal procedure of the State concerned, and the Commission should not be delving into them. He did, however, consider worthy of inclusion in the general framework of the topic issues

such as the relationship between the obligation to extradite or prosecute and universal jurisdiction; the relationship with other criminal law principles, including *nullum crimen sine lege*, *nulla poena sine lege*, *non bis in idem* and the principle of non-extradition of nationals; and the possible conflict between those principles and the obligation to extradite or prosecute. He doubted that the "third alternative" of surrendering the alleged offender to a competent international criminal tribunal should be considered and hoped that in its further work, the Commission would keep to the limits of the subject matter and refrain from dealing with issues of international criminal justice.

7. His delegation supported the Commission's decision to return to the topic of the most-favoured-nation clause, which was highly relevant in the present economic circumstances. The Commission's task should be to trace the evolution of that clause since the adoption of the 1978 draft articles and to identify the problematic aspects of its application and interpretation by specific economic organizations and economic integration in agreements. The updating of legal regulations in that area was a matter of particular interest to his delegation.

8. He welcomed the start made by the Commission on the topic of treaties over time. From a global perspective, the topic might cover a number of issues relating to the conclusion, application, suspension and termination of treaties, as well as matters connected with the period during which a treaty remained in force, such as the performance by former parties to a treaty of obligations that arose after its termination. It would, however, be unwise to expand the scope of the topic too far; a narrower approach was preferred. In that sense, he shared the conclusions of the Study Group, which had decided at an early stage to concentrate on subsequent agreement and practice, an aspect that had been singled out in the Commission's 2008 report (A/63/10) and was of the greatest significance in the everyday international relations of States. Subsequent agreement and practice should not, however, be studied solely from the perspective of interpreting a treaty. Although those issues were mentioned in the Vienna Convention on the Law of Treaties as factors to be taken into account, together with the context of the treaty, for the purpose of its interpretation, that did not by any means exhaust their influence on the treaty, which could be quite significant and could have a bearing on its implementation. As for the possible outcome of the Commission's work on the topic, a broad review of practice with the necessary commentaries would be very useful and would best meet the needs of States.

9. **Mr. de Serpa Soares** (Portugal) said that study of the obligation to extradite or prosecute was an important part of the effort to avoid impunity and prevent the creation of safe havens for offenders. The framework proposed by the Working Group on the topic included questions concerning the source of the obligation, its elements and its relationship to universal jurisdiction and to the third alternative of surrender of the alleged offender to a competent international criminal tribunal — all issues requiring clear analysis to enable the Commission to make real progress. The proposed framework also reflected the suggestion that, once the substantive questions had been examined, matters of a more procedural nature could be considered. He encouraged the Commission to proceed with its study along those lines.

10. His delegation welcomed the road map for future work on the most-favoured-nation clause developed by the Study Group, and agreed that consideration of the topic should take as a point of departure the 1978 draft articles on most-favoured-nation clauses as clarified by new practice and developments in jurisprudence. As the *Emilio Agustín Maffezini v. Kingdom of Spain* case had shown, the most-favoured-nation clause could become unpredictably broad and could open up a Pandora's box whereby an investor, for example, could pick and choose provisions from bilateral investment treaties to which his own State was not a party, and creating a patchwork of the best available clauses.

11. There was no doubt that most-favoured-nation clauses had taken on new importance in bilateral investment treaties and in free trade and comprehensive economic partnership agreements. Moreover, new practice and jurisprudence on which the Commission could rely had emerged. However, it was not clear whether that practice and jurisprudence were sufficiently consistent to allow for clear guidance. Thought should be given to the purpose of the work, which might not be ripe for codification or for the progressive development of international law. The Commission's main contribution could be to examine how most-favoured-nation clauses were to be interpreted and applied in order to provide guidance to States and international organizations.

12. Before going further, the Commission should study a variety of issues related to the systematization and diversity of such clauses, their historical development and current practice and jurisprudence. His delegation therefore supported the decision to entrust members of the Study Group with the preparation of eight specific papers dealing with different aspects of the scope, interpretation and application of most-favoured-nation clauses and encouraged the Group to devote attention to the differences between bilateral and multilateral treaties; exceptions to the clauses; and the relationship between most-favoured-nation clauses, national treatment and preferential treatment granted to developing countries. The Commission should proceed with caution, not forgetting the freedom inherent in States' *jus tractum*, specifically with respect to bilateral investment treaties.

13. On the topic of treaties over time, the work of the Study Group, and particularly its Chairman, had provided a clear idea of the "state of the art" and a road map for future work. Treaties should be regarded not as words carved in stone, but as dynamic instruments to be interpreted in a specific legal and social context, a view confirmed by some jurisprudence on the matter. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice had held that "the treaty is not static" and in the case of *Mamatkulov and Askarov v. Turkey*, the European Court of Human Rights had stated that the European Convention on Human Rights was a "living instrument which must be interpreted in the light of present-day conditions".

14. The Commission would have to strike a difficult balance between the *pacta sunt servanda* principle and the need to interpret and apply treaty provisions in context. It should also examine the intricate relationship between treaty law and customary law, which was more dynamic than treaty law and interacted with it. That interaction raised questions related to supervening custom, peremptory norms of international law and the issue of customary rules *contra legem*; the latter was illustrated by the classic example of the value that the Security Council currently assigned to an abstention by permanent members, an interpretation that was inconsistent with the Charter. Another difficult but pertinent question was that of obsolescence.

15. To limit the analysis at the outset to the issue of subsequent agreement and practice might take too narrow an approach that was overly focused on interpretation. For the time being, the scope should be kept as broad as possible and members of the Study Group should be encouraged to make contributions on other issues related to the topic. The Commission might adopt the method followed for the most-favoured-nation clause by having Study Group members present papers dealing with different aspects of the topic. Nonetheless, the Commission should not seek to develop law outside the scope of the Vienna Conventions on the Law of Treaties; it should take a cautious approach with the aim of providing clarification and guidance to States and international organizations. Although it was too soon to determine the final form of the work, a guide to practice might be a suitable outcome.

16. **Ms. Tansu-Seçkin** (Turkey) said that the practice of interactive dialogue with members of the Commission gave added value to the Committee's deliberations, and should be facilitated. However, since special rapporteurs' attendance at meetings of the Committee was subject to financial constraints, they should be encouraged to provide in their reports sufficient explanation of the positions taken in response to Member States' comments.

17. As Turkey had extensive transboundary groundwater resources, her delegation attached particular importance to the topic of shared natural resources and had made comments on the draft articles on the law of transboundary aquifers with a view to a consensus text. The Commission had wisely decided to adopt those draft articles on second reading without prejudice to the final form of the text. Her delegation considered that the two-step approach was appropriate. The draft articles were modelled to a great extent on the 1997 United Nations Convention on the Non-navigational Use of International Watercourses, which had been ratified by only 16 States to date. In view of the lack of consensus on transboundary water issues in general, and on the draft articles in particular, a cautious approach as to their final form was called for. With regard to transboundary oil and gas, her delegation's position, shared by many other States, was that the question involved highly technical and politically sensitive issues and was not a suitable topic for codification by the Commission.

18. The obligation to extradite or prosecute *aut dedere aut judicare* was a topic of importance to the international community, which was striving to put an

end to the culture of impunity and to deny perpetrators of heinous crimes safe haven. Her delegation hoped that the framework devised by the Working Group would accelerate substantive work on the topic. In his future reports, the Special Rapporteur should define the two elements of the obligation; the content of the obligation to prosecute was of great practical importance and deserved special attention.

19. Her delegation was not convinced that surrender of the alleged offender to a competent international criminal tribunal should be included under the topic. The basis of extradition between States and the obstacles encountered in practice were quite different from those involved in surrender to an international criminal tribunal. The material scope of the obligation should not be limited to crimes that fell under the jurisdiction of the existing international criminal tribunals; it should include other crimes of international concern, such as terrorism.

20. **Ms. Hong** (Singapore) said that the proposed framework for consideration of the obligation to extradite or prosecute *aut dedere aut judicare* was comprehensive and covered a wide range of pertinent issues. It was important to take national legislation and decisions into account in order to ensure that the final product of the work would have a firm basis in State practice. Her delegation would welcome work on a typology of treaty provisions and agreed that final determination of whether the obligation had a basis in customary international law should be attempted only after work on such a typology and on the scope and content of the obligation under various treaty regimes had reached a sufficiently advanced stage.

21. As a small country whose economic well-being was heavily dependent on international trade and commerce, Singapore had entered into a host of trade and investment agreements at the bilateral, regional and international levels, many of which contained most-favoured-nation provisions. Consequently, her delegation would welcome further work on the most-favoured-nation clause and, in particular, on the following sub-topics: the most-favoured-nation clause under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) regime; the *Maffezini* problem in investment treaties; and the most-favoured-nation clause in relation to regional economic integration agreements and free trade agreements.

22. With regard to the topic of treaties over time, it should be emphasized that the rules of treaty interpretation in the Vienna Convention on the Law of Treaties were well-established and underpinned the broadest spectrum of treaty relations affecting Governments and other international law entities. Her delegation would therefore view with concern and scepticism any outcome that introduced uncertainty in that area.

23. **Mr. Murai** (Japan), speaking on the topic of reservations to treaties, said that with respect to draft guideline 2.4.1 on the formulation of interpretative declarations, his Government's practice had been to submit such declarations accompanied by a letter signed by the Permanent Representative of Japan to the international organization whose representative was the depositary of the treaty concerned. Moreover, the Secretary-General of the United Nations had never requested Japan to submit such declarations accompanied by a letter signed by, or on behalf of, the Head of State, Head of Government or Minister for Foreign Affairs. As he believed that many other countries followed the same practice, he sought guidance from the Commission as to whether it was consistent with the draft guideline.

24. While he understood that draft guideline 2.6.15 on late objections was intended to reaffirm the effect of article 20, paragraph 5, of the Vienna Convention on the Law of Treaties, he did not consider it wise to assume that the draft guideline reflected widespread and consistent practice among States. Objections formulated by Japan after the 12-month period had sometimes been accepted and sometimes rejected. While he understood that the purpose of the guideline was to prevent the endless submission of objections and to ensure stability in the implementation of treaties, he encouraged the Commission to take State practice fully into account in its deliberations on the subject.

25. Draft guideline 2.9.9 on silence with respect to an interpretative declaration was a welcome improvement over the text originally proposed in the thirteenth report on the topic (A/CN.4/600) in that it defined far more clearly the situation in which silence might constitute approval of an interpretative declaration.

26. Of the two approaches to the topic of expulsion of aliens that had been discussed by the Commission at its sixty-first session, his delegation favoured

stipulating the general obligation of the State to respect all human rights applicable to the expulsion of aliens rather than trying to enumerate fundamental, or "hard-core", human rights, which would restrict the State's discretion to expel aliens. He therefore welcomed the new direction indicated in the draft articles as restructured by the Special Rapporteur following the debate in the Commission. However, the Commission should focus first on determining which obligations under international law prohibited a State from expelling aliens. It should then carefully discuss whether, as part of the topic, it should take up the issue of the scope and content of human rights applicable to persons under expulsion while in both the expelling and the receiving State. In addition, the Commission should bear in mind that imposition of the death penalty in a State's criminal justice system was, in principle, a matter of policy for the State to decide. His Government would submit its response to the issues raised in paragraph 29 of the report, on the expulsion of aliens, in due course.

27. His delegation supported the suggestions that work on the topic of protection of persons in the event of disasters should proceed in the form of draft articles. He hoped that the Commission would further codify and elaborate on the existing rules and norms relating to disaster relief activities so as to facilitate the flow of international assistance to those in need. He agreed with the Special Rapporteur that the primary responsibility for protecting the victims of a disaster lay with the affected State; however, the concepts of "rights" and "needs" as employed in the draft articles were rather ambiguous and the rules and obligations of States were as yet unclear. While a rights-based approach was a plausible philosophical premise for discussion of the topic, it was still necessary to clarify the nature and origin of the rights concerned if the Commission was to formulate an effective legal framework for the protection of persons in the event of disasters.

28. He supported the Special Rapporteur's view that "cooperation" ought to be the core legal principle of the topic and welcomed the adoption of draft article 5 on the duty to cooperate, although there was still a need to elaborate on the meaning of "cooperation" and "duty" in that context. His delegation would like to see the principle of international cooperation codified in a legal framework, perhaps in the context of the roles of affected States.

29. The Commission was at a turning point in its work on the topic of shared natural resources. Since the development, exploitation and management of transboundary oil and gas resources naturally presupposed the delimitation of the land or maritime boundaries between States, a case-by-case approach was often required. As that view appeared to be shared by a majority of States which had submitted replies to the questionnaire on the issue, the Commission should consider very carefully the feasibility of formulating draft articles on oil and gas. While it was true that groundwater, oil and gas were often located in the same reservoir rock and might therefore be treated as one resource for the Commission's purposes, it was important to distinguish between the physical or geological characteristics of oil and gas, on the one hand, and the legal evaluation of those resources, on the other. As each case involving oil and gas resources was unique, any attempt at generalization might be counterproductive in attempts to resolve real or potential disputes. He supported the decision of the Working Group to entrust Mr. Shinya Murase with responsibility for preparing a study on the feasibility of any future work on oil and gas.

30. As no new report on the obligation to extradite or prosecute *aut dedere aut judicare* had been submitted at the latest session of the Commission, the general framework proposed by the Working Group in the form of a list of questions and issues to be addressed was useful. He was particularly interested in the question of whether and to what extent the obligation to extradite or prosecute had become customary international law, as well as in the definition of that obligation. He encouraged the Special Rapporteur and the Commission to formulate draft articles based on the Working Group's list of questions and issues.

31. The world had evolved and circumstances had changed significantly since the Commission had adopted draft articles on the most-favoured-nation clause in 1978. Such clauses now played a different but increasingly important role in inter-State relations, and especially in bilateral investment and trade agreements. Accordingly, while a comprehensive study of State practice and the evolution of most-favoured-nation clauses since 1978 would in itself be very useful to States' treaty specialists and legal advisers and to the international community as a whole, his Government would prefer for the Commission to build on, update

and reformulate the 1978 draft articles in response to current circumstances.

32. The Study Group on Treaties over Time appeared to have focused on the scope of the topic rather than its substance. It should address, inter alia, the obsolete provisions of Articles 53, 77 and 107 of the Charter of the United Nations (the "former enemies clauses"). He hoped that the Study Group would not merely conduct a study, but would also provide useful and practical results for States.

33. **Ms. Schonmann** (Israel), speaking on the topic of responsibility of international organizations, said that her Government was not convinced that the Commission's articles on State responsibility provided a proper template for articles on the responsibility of international organizations owing to the inherent differences between the two. In light of the limited practice and controversy in that area, she urged the Commission to proceed with caution.

34. On the topic of reservations to treaties, her delegation had growing doubts about the final product. The work of the Commission and the Special Rapporteur was certainly valuable, but it had to be reviewed against the background of the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. She did not share the view that there was a need for separate document stating the main principles of the draft guidelines in order to make them more user-friendly; those principles already existed in the Vienna Conventions. It would be preferable to prepare a list indicating which parts of the draft guidelines were based on actual practice and how common that practice was.

35. The role of the depositary, described in draft guideline 2.1.8 on procedure in case of manifestly impermissible reservations, did not seem to represent general practice. It was for States parties, not the depositary, to decide whether a statement constituted a reservation, and, if so, whether the reservation was permissible. Nor did draft guideline 2.1.9 on the statement of reasons for reservations represent general practice, although such a provision could be useful and did appear in some conventions. It might, moreover, be difficult to define the legal effects of the reasons given by the reserving State.

36. The Commission might wish to reconsider the substance, or at least the language, of draft guideline 2.4.3 bis on communication of interpretative declarations. While she agreed with the Special Rapporteur that it was in the interests of the authors of an interpretative declaration to formulate their declaration in a form similar to that used for a reservation, she was not sure whether they should be specifically requested to do so as there was a danger that interpretative declarations would be assimilated to reservations.

37. She was in favour of deleting draft guideline 2.9.10 on reactions to conditional interpretative declarations. She was not convinced that there was a need to include a reference to such a rare practice, or even that such a practice was desirable. She also proposed that either draft guideline 3.2.2 on specification of the competence of treaty monitoring bodies to assess the permissibility of reservations should be deleted, or the word "should" in the first sentence should be replaced with "may" and the last sentence should be deleted. The powers of treaty monitoring bodies were determined by the States parties to the treaty, whose decision usually reflected a delicate balance that might be disturbed if additional powers to assess the validity of reservations were introduced. Moreover, the task of determining the permissibility of a reservation and assessing its compatibility with the object and purpose of a treaty lay first and foremost with the States parties.

38. Turning to the topic of expulsion of aliens, she said there was a delicate balance to be struck between the right of States to decide upon the admission of an alien and the protection of fundamental human rights. The topic touched on issues of immigration and national security that were unique to each State. Moreover, where the expulsion of aliens was concerned, States were subject to different obligations emanating from a variety of national, regional and international instruments. She therefore encouraged the Special Rapporteur and the Drafting Committee to focus, as far as possible, on codifying customary international law, which reflected settled legal principles and State practice.

39. Her delegation strongly supported the principle underlying draft articles 8 to 16 regarding the protection of the human rights of persons who had been or were being expelled. However, it was concerned that several of the draft articles featured elements which constituted progressive development of the relevant law rather than its codification and

consolidation. She therefore called on the Special Rapporteur and the Drafting Committee to proceed with caution and to rely as far as possible on customary international law.

40. With regard to the protection of persons in the event of disasters, she welcomed the Special Rapporteur's conclusion that the concept of the responsibility to protect did not apply to disaster response, as well as his decision to exclude armed conflicts from the definition of "disaster". She supported the inclusion of draft article 4 since it was important to ensure that the *lex specialis* of international humanitarian law continued to apply in situations of armed conflict. On the question of whether a rights-based or needs-based approach to the topic should be taken, she shared the concern expressed by some Commission members that an instrument declaring the rights of persons affected by disasters might not provide the pragmatic response needed. Moreover, a rights-based approach might imply that the affected State must always accept international aid; care must be taken to ensure that the principle of cooperation was not stretched to the point that it infringed on the sovereignty of affected States. International assistance should supplement the actions of the affected State, which had the primary responsibility to provide assistance to the victims; the draft articles should include a provision to that effect. At the same time, recognition of the primary responsibility of the affected State should not be understood as leaving the international community a passive observer in the event of disasters.

41. On the topic of shared natural resources, the complex issue of transboundary oil and gas reserves had already been adequately addressed in bilateral settings. In light of the doubts expressed by delegations as to the usefulness of addressing that issue, the Commission should proceed with caution.

42. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), she reiterated her delegation's position that the legal source of the principle to extradite or prosecute was solely treaty-based. State practice supported the view that there was not a sufficient basis, under current international customary law, to extend the obligation beyond binding international treaties which explicitly established it. In that context, the concept of universal jurisdiction should be clearly distinguished from the principle of *aut dedere aut judicare*; indeed, it was doubtful whether the issue of universal jurisdiction should be considered in that context.

43. With regard to the topic of the most-favoured-nation clause, her Government would be pleased to contribute to the Commission's effort to develop a catalogue of such provisions, particularly in relation to investments; to its study of the work of the Organization for Economic Cooperation and Development (OECD) in that area; and to its consideration of regional economic integration agreements and free trade agreements.

44. Lastly, she expressed regret that the Commission had not discussed the important and complex topic of immunity of State officials from foreign criminal jurisdiction at its sixty-first session.

45. **Ms. Diéguez La O** (Cuba) said that discussion of the obligation to extradite or prosecute must take into account the sovereign right of States to take decisions on extradition in accordance with their domestic law and with the principle of reciprocity. Where extradition was not possible, the State concerned must be under an international obligation to prosecute individuals who had committed wrongful acts. The obligation to extradite or prosecute was established in Cuban legislation and, notwithstanding the basic principle that Cuban citizens could not be extradited to another country, offenders faced criminal prosecution.

46. As yet, there had been no fully convincing answers to the questions raised since the International Law Commission had begun its work on the obligation to extradite or prosecute. That work should include a full analysis of various international treaties, the relevant jurisprudence, domestic law and doctrine. It was clear from the wide range of views expressed by members of the Commission and the Committee that a closer examination of the substantive and procedural issues involved was required.

47. The purpose of the obligation to extradite or prosecute was to combat impunity and to ensure that those accused of certain crimes could find no safe haven and would be brought to trial. The obligation drew primarily on international treaties and, where certain serious crimes were concerned, could be considered to have acquired the status of customary law; for example, it covered genocide, war crimes, crimes against humanity, torture, corruption and terrorism. Her delegation would contribute its views on the topic with a view to a just codification that took

due account of the sovereignty and self-determination of peoples.

48. Lastly, her delegation would like to thank the Chairman of the Study Group on Treaties over Time for his remarks, and would follow with great interest the discussions on that topic.

49. **Ms. Ross** (United States of America), speaking on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) said that her country was a party to several international conventions containing an obligation to extradite or prosecute and considered such provisions to be an integral and vital aspect of collective efforts to deny terrorists and other criminals safe haven. The Commission had indicated the importance of ascertaining State practice in the area before proceeding to any conclusions but it appeared that although the United States had provided the requested information, an insufficient number of replies had been received.

50. Her delegation agreed that some of the issues identified, such as whether and to what extent the obligation had a basis in customary international law, could be considered only after a careful analysis of the scope and content of the obligation under existing treaty regimes. However, it continued to believe that United States practice, as well as that of other States, reinforced the view that there was insufficient 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 only assumed the obligation to extradite or prosecute by adhering to binding international legal instruments that contained such provisions, and only to the extent of the terms of those instruments. Otherwise, States could be required to extradite or prosecute an individual where they lacked the required legal authority, such as a bilateral extradition relationship or jurisdiction over the alleged offence.

51. A comprehensive review of State practice was essential to consideration of whether there was a basis for inferring the existence of a customary international legal norm to extradite or prosecute. That was especially true when, as in the case at hand, State practice was largely confined to implementing treaty-based obligations. The lack of consistent and sustained State practice regarding extradition or prosecution in the absence of a treaty-based obligation should suffice to determine that such a norm did not, as yet, exist, and any claim to the contrary would require a broader range of reporting. If the obligation to extradite or prosecute existed only under international treaties, draft articles on the topic would seem inappropriate. Given the issues identified by the Working Group, further consideration of the source and content of the obligation under existing international conventions would be welcome. Thereafter, if the Commission still believed that it might be warranted to consider a customary norm in that area, it should allow sufficient time to receive and evaluate additional information provided by States.

52. Concerning the most-favoured-nation clause, her delegation supported the decision of the Study Group not to prepare draft articles on the topic; such provisions were principally a product of treaty formulation and their structure, scope and language tended to vary. The Study Group should also bear in mind that such clauses were dependent on other provisions of the specific agreements in which they were located; thus, they resisted easy categorization or study. Her delegation would be happy to provide further input into the current programme of work, as appropriate.

53. On the topic of treaties over time, her delegation welcomed the Study Group's decision to focus for the time being on subsequent agreement and practice but recommended that instead of addressing only the jurisprudence of the International Court of Justice and other international tribunals, it should begin by looking at the jurisprudence of national courts that had considered the role of agreement and practice in treaty interpretation. Mr. Nolte, Co-Chairman of the Study Group, had taken note of some relevant national court decisions in his working paper (http://untreaty.un.org/ilc/reports/2008/english/annexA.pdf) and it would be of considerable interest to know of others as such information was less accessible to States. For example, it would be useful to know how other States' courts had addressed the domestic legal questions raised by shifting interpretations of international agreements based on post-ratification practice, where the legislative branch had been involved in approving such agreements prior to ratification.

54. **Mr. Bonifáz** (Peru) said that the recent interactive dialogue had included interesting observations on the relationship between the obligation to extradite or prosecute (*aut dedere aut judicare*) and

universal jurisdiction. However, although both were designed to avoid impunity for the perpetrators of certain international offences and, consequently, could complement each other in that regard, as they were two very different mechanisms; universal jurisdiction arose from customary norms, while the obligation to extradite or prosecute was treaty-based and had subsequently become a customary norm in respect of certain specific offences. In addition, the obligation to extradite or prosecute could be established in a treaty for any offence, even one that was not an international crime subject to universal jurisdiction. Moreover, that obligation was met if a State extradited, or if it exercised its jurisdiction by prosecuting on the basis of territoriality, active personality, passive personality, protection of its interests, aggression or universal jurisdiction.

55. Several courts and experts in public law had debated whether States were empowered to exercise universal jurisdiction as a basis for the attribution of jurisdiction and whether that power was optional or compulsory based on the source of international law that regulated it. It was usually accepted that universal jurisdiction was optional when regulated by international custom and compulsory when treaty-based. However, any classification a priori was deceptive; it was necessary to determine how the source of law, whether as international custom or a treaty, regulated the universal jurisdiction applicable to each specific case. Since international custom could incorporate the criterion of universal jurisdiction optionally or compulsorily, and the same was true of treaties, it was necessary to examine how each source treated universal jurisdiction based on the crimes to which it would be applied. In light of the foregoing considerations, the Commission should proceed with caution when examining the relationship between the obligation to extradite or prosecute and universal jurisdiction so as not to prejudice the Committee's discussions.

56. International crimes whose prohibition had achieved the status of a *jus cogens* norm gave rise to a special situation. It would be at odds with that characterization if the perpetrators of such crimes enjoyed impunity owing to the absence of an obligation to extradite or prosecute the perpetrators. His delegation therefore welcomed the Working Group's plan to consider that issue.

57. Determination of whether to extradite or prosecute should remain in the hands of the requested State. The Commission, in its commentary on article 9 of the draft Code of Crimes against the Peace and Security of Mankind (A/51/10, p. 53, para. (6)), was in favour of allowing the custodial State to decide. However, that prerogative was not absolute, for example, where there was a danger that the individual would be subject to the death penalty after extradition.

58. Lastly, his delegation considered it necessary to give further thought to the issues of competing jurisdictions, extradition of nationals, standards for evidence, due process guarantees, sentences, international cooperation, the right of victims to take part in the proceedings, and protection and compensation measures.

59. **Mr. Henczel** (Poland) said that his delegation supported the Commission's approach to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*). While the general framework proposed by the open-ended Working Group was intended to facilitate the work of the Special Rapporteur, it did not take a position on whether treaties constituted the exclusive source of that obligation, or whether it also existed under customary law. While agreeing that all the issues proposed in the general framework were important for future work on the topic, his delegation suggested that the Special Rapporteur should undertake a more detailed analysis of the most crucial questions: first the content of the obligation to extradite and prosecute, then its scope *rationae materiae*, and lastly its legal basis. That approach would facilitate progress on the main topic and preparation of background information for further consideration. In view of current trends, another factor to consider was the relationship between the principle of universal jurisdiction and the obligation to extradite or prosecute; however, the Commission should avoid politicizing the issue and should limit itself to an analysis of the legal aspects of that relationship. In that regard, his delegation would follow with interest the first International Court of Justice case directly related to the obligation and its impact on the Commission's work on the topic.

60. His delegation encouraged the Study Group on the Most-Favoured-Nation Clause to continue its work on the basis of a preliminary assessment of the draft articles prepared by the Commission in 1978, taking into account their current status and developments in

other forums. There was a need to consider further the question of whether it was desirable and possible to cover areas as divergent, in terms of their object and purpose, as trade and investment.

61. Regarding the road map for future work, it would be advisable to broaden the scope of the analysis to include consideration of whether preparation of a catalogue of case law was preferable to a draft multilateral convention; whether it was worth attempting to harmonize international investment law in relation to the most-favoured-nation treatment, even at the cost of reducing States' freedom to develop their own policies in that regard; and what lessons could be learned from the failed attempts to introduce a "template" for the inclusion of most-favoured-nation clauses in regional trade agreements or customs unions. With respect to the second of those issues (harmonization), the causes of the failure to garner widespread support for the 1978 draft articles should be highlighted and consideration should be given to regional trade agreements and customs unions and to the problem of disincentives arising from most-favoured-nation agreements between developed and developing countries.

62. The topic of treaties over time was complex and fraught with difficult theoretical questions, particularly that of the relationship between treaty law and customary law. The Commission should avoid entanglement in academic debate and consider the issues from a practical perspective. Since the topic revolved around the *pacta sunt servanda* principle, it was important not to jeopardize the fundamental status of that rule while elucidating the impact of subsequent agreement and practice on treaties. Regarding the final form of the project, his delegation was in favour of preparing first a repertory of practice and then a set of guidelines for States, international organizations and courts; there was no need for a draft convention. The sequencing of the guidelines should follow, to the extent possible, that of the Vienna Conventions, and it would be commendable if the Commission could complete its work within the next five years.

63. Concerning the merits of the project, his delegation welcomed the so-called "optimal specificity" of the prospective guidelines. The 1969 Vienna Convention had proved its usefulness; it was widely accepted by States and functioned well as an instrument governing the treaty relationships of the international community as a whole. Also, it had been a conscious decision of the drafters to leave States parties a broad margin of discretion in the details of their treaty practice. The results of the Commission's work on the topic should not reduce that well-tested and useful flexibility.

64. Another crucial question was whether the term "treaties" referred only to treaties already in force and binding or whether it included treaties applied provisionally, as provided for in article 25 of the 1969 Vienna Convention, which were characterized by the "subsequent agreement and practice" that were the focus of the Commission's study. The term "treaties" could also include treaties whose operation had been suspended in accordance with articles 57 and 58 of the Vienna Convention, as well as treaties that were signed but not ratified or confirmed, mentioned in article 18 thereof, which imposed certain obligations on contracting States whether or not they had entered into force. In addition, it would appear advisable to extend the project to cover subsequent agreement and practice with respect to the conclusion of treaties. Article 24, paragraph 4, of the Vienna Convention provided that a number of provisions of a treaty applied as from the time of its adoption. Subsequent agreement and practice would never become a separate topic for consideration by the Commission, yet it was an area of international practice that was worth examining.

65. It might also be advisable to include agreement and practice concerning the possibility of dispensing with the need for full powers, as envisaged in article 7, paragraph 1 (b) of the Vienna Convention, so that a person without those powers could represent a State for various treaty-making purposes, including expressing the State's consent to be bound by a treaty, if it appeared "from the practice of the States concerned or from other circumstances" that such was their intention. Elucidating such State practice and clarifying the "other circumstances" referred to in article 7 of the Convention might be of significant value, particularly in the context of the issue of the "actors" who were authorized to express subsequent agreement or whose actions constituted the relevant subsequent practice. Such extension of the scope of the topic might appear inconsistent with the call for "optimal specificity", but they would ensure the soundness and accuracy of the guidelines.

66. **Mr. Charles** (Trinidad and Tobago) said that his country considered the obligation to extradite or prosecute a cardinal principle for maintaining the rule

of law at the national and international levels. Trinidad and Tobago's adherence to the obligation was founded on the bilateral agreements and multilateral instruments to which it was a party. The Working Group should examine State practice carefully to see whether customary rules had developed over time, based on the principle of *opinio juris*. If there was a clear pattern of State practice on the matter, the Commission could consider whether the obligation constituted a peremptory norm from which there could be no derogation and which would help the international community prevent the impunity of offenders. In his next report, the Special Rapporteur should clarify the relationship between the obligation to extradite or prosecute and other issues, such as universal jurisdiction.

67. **Mr. Galicki** (Special Rapporteur) said that after three years' work on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), it had become evident that the effort was losing momentum. He had therefore proposed the establishment of an open-ended working group, since the experience gained from other topics had shown that such an approach could be extremely useful for the development and acceleration of work. The efforts of the Working Group to date had been very positive and he was grateful to its Chairman, Alain Pellet, for his frank, constructive and stimulating opinions. Both the Working Group and the Committee had emphasized the need to work more quickly and to focus on the main issues contained in the Working Group's proposal.

68. In that regard, he suggested concentrating on the first three issues on the list of questions to be addressed — the legal bases, material scope and content of the obligation to extradite or prosecute — as a foundation on which to base future work. A growing number of States had expressed interest in the topic because the obligation had taken on greater importance in their internal affairs.

69. Lastly, he thanked delegations for their constructive suggestions and remarks, which would be taken into account in future work on the topic.

70. **Mr. Petrič** (Chairman of the International Law Commission) stressed that the feedback that the Commission received from Governments, through the Committee's annual consideration of the Commission's report or in writing, was a central feature of the Commission's work on the codification and progressive development of international law and would be taken into account in its deliberations. The Commission looked forward in particular to receiving written comments from Governments on two topics completed on first reading: the effects of armed conflict on treaties and the responsibility of international organizations. He and his colleagues present in New York had also benefited immensely from informal contacts and exchanges with members of the Committee. The interactive dialogue had been particularly fruitful and had confirmed the value of promoting synergies between the two bodies on both substantive and procedural topics.

71. Some of the special rapporteurs had come to New York using their own resources; such interaction could only be sustained if a secure financial footing was assured. In his statements, he had also stressed the enormous burden that the current system placed on individual special rapporteurs, in terms of both time and resources, and the report of the Secretary-General on assistance to special rapporteurs of the International Law Commission (A/64/283) provided additional food for thought. He thanked delegations for the sensitivity that they had shown with regard to the financial constraints faced by the Commission and hoped that the dialogue begun on that issue would be continued by delegations in the relevant forums.

The meeting rose at 12.20 p.m.