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Chairman: Mr. Tulbure . . . . . (Moldova)
later: Mr. Sandoval (Vice-Chairman) . . . . . (Colombia)

Contents

07-57774 (E)

The meeting was called to order at 3 p.m.

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

1. **Ms. Nworgu** (Nigeria), referring to the topic of reservations to treaties, said that reservations to treaties could be "across-the-board" in nature or could relate to specific provisions of the treaty. Owing to the contractual nature of treaties, States should be bound only to the extent of their acceptance of treaty obligations, in line with the principle of sovereignty of States. That position was based on practical considerations and should not vary, whether or not an objection to the reservation in question had been formulated and irrespective of the type of treaty. Moreover, a State objecting to a reservation should not exclude from its treaty relations with the reserving State provisions that were not related to the reservation; nor should an objection render the reservation ineffective, thus compelling the reserving State to be bound by the treaty as a whole.

2. Turning to the topic of expulsion of aliens, she said that, under Nigerian law on immigration and control of aliens, certain categories of person could be expelled from Nigeria. The legislation in question applied to non-nationals and persons who were nationals of more than one country including Nigeria. Under the Nigerian Constitution, a person who was a Nigerian citizen by birth could have dual nationality. However, a person who had acquired citizenship could be deprived of it if convicted of a felony within seven years of acquiring it or for acts of gross disloyalty, such as taking sides with an enemy State during a war involving Nigeria. Such a person could be expelled as an alien under immigration legislation. In such cases, a distinction should be made between aliens living peacefully in the host State and those involved in activities hostile to it. An alien who had had to leave the territory of a State under an expulsion order that was subsequently found by a competent authority to be unlawful should have the right of return, subject to fulfilment of the relevant requirements of the host country's laws. Nigeria also had laws covering persons in special circumstances provided for under international law, such as refugees and political asylum-seekers. In all cases, observance of fundamental human rights norms was of the utmost importance. However, her delegation agreed with the Special Rapporteur and the Commission on the need for a study of the general rules on the issue, to be followed by a consideration of the rules applicable to specific categories of aliens, especially in view of the absence of a comprehensive regime for the expulsion of aliens under existing international humanitarian law instruments. Her delegation looked forward to the Special Rapporteur's future reports on various aspects of the topic.

3. With regard to the obligation to extradite or prosecute, she said that Nigeria had ratified subregional, regional and international conventions on extradition and had concluded treaties with a number of countries on mutual legal assistance in criminal matters, under which nationals of other countries could be extradited. If an offence for which extradition was sought also constituted an offence in Nigeria, the alleged offender could be tried in Nigeria even if he or she was not Nigerian. Concerning the question of whether *aut dedere aut judicare* should be referred to as an "obligation" or a "principle", the source of the obligation, the relationship between the obligation and the concept of universal jurisdiction, and the scope of the obligation, any position taken by the Commission would need to be based on a thorough analysis of treaties, national legislation and judicial decisions. In that regard, Member States should provide the Commission with relevant information for use in its further deliberations.

4. With regard to the "responsibility of international organizations", draft articles 8 to 11 followed the general pattern of the articles on responsibility of States for internationally wrongful acts and thus reflected principles applicable to breaches of international obligations by States. Draft articles 12 to 16 generally reflected the state of international law with respect to responsibility of States. It was important to note that there was little practice relating to the international responsibility of international organizations in that regard. The draft articles therefore represented a significant step towards holding States accountable as subjects of international law. Some aspects of the draft articles were novel and might pose practical difficulties and challenges. It was therefore necessary to study and disseminate them further.

5. With regard to shared natural resources, many of the draft articles on the law of transboundary aquifers were satisfactory, but her delegation had concerns regarding some of them. Draft article 6 imposed an obligation on aquifer States, in utilizing a

transboundary aquifer or aquifer system in their territories, to take all appropriate measures to prevent the causing of significant harm to other aquifer States, and, where significant harm was nevertheless caused, to take measures to eliminate or mitigate the harm. That obligation was not clear, since no definition of the term "significant harm" was given. Such a definition was necessary, since a State might be liable to other States for the use of aquifers if, in the process of utilization, significant harm was caused to them. In addition to concerns about the scope of the harm, the effect of the article was to impose a liability that might be detrimental.

6. **Mr. Hernández García** (Mexico) said that paragraph 43 of the Commission's report raised the dilemma of whether the *aut dedere aut judicare* rule should be treated as a principle or an obligation. In his Government's view, it was clearly a principle of international criminal law which contained an obligation. An obligation was not per se a source of law; rather, it was the sources of law that gave rise to both obligations and rights. Article 38 of the Statute of the International Court of Justice laid down the sources of international law, which included principles of law. For that reason, it was unnecessary to contrast "obligation" and "principle". His Government considered that there existed a principle of international criminal law which laid down the obligation to extradite or prosecute, and that that formulation did not imply any contradiction. A legal dilemma which could arise, however, was that of determining whether that obligation was consolidated in a rule of customary international law in addition to being a principle of law. His Government was inclined to answer that question in the affirmative. However, the obligation to extradite or prosecute was a customary rule whose scope of application was clearly circumscribed by international law. The norm evidently could not encompass all crimes but only those of an international character; further the rigour with which the principle was applied depended on the customary rule that contained it.

7. For example, the International Court of Justice had recognized that the prohibition against genocide was a *jus cogens* norm. It would thus be incongruous to suppose that the obligation to extradite or prosecute an individual accused of committing that crime was limited by a treaty binding upon the custodial State when the nature of the norm violated did not allow for impunity.

8. On the question discussed by the Special Rapporteur regarding whether the obligation was alternative or conditional, his Government agreed with the view that it was conditional, since the principle of *aut dedere aut judicare* did not mean that a State was free to choose between surrendering or prosecuting the accused. Actually, the decision of a State to exercise its jurisdiction or to extradite the detained person to another State was in the first place subject to the detaining State having the capacity and the means to exercise criminal jurisdiction over the detained person. Moreover, there could be cases in which, pursuant to a treaty provision, the detaining State would have the obligation to extradite before attempting to exercise its own criminal jurisdiction. Many treaty provisions were actually worded in a manner that obliged States to exercise their jurisdiction when for some reason the detained person could not be extradited, for example when that person was a national of the concerned State. That would seem to imply a primary obligation to extradite. Similarly, there were cases in which the contrary occurred. The International Court of Justice itself had recognized that some treaty provisions, by placing on States the obligation to prosecute or extradite individuals for commission of grave crimes at the international level, also obliged States to extend their criminal jurisdiction, which seemed to indicate that those treaties favoured the exercise of jurisdiction by the detaining State when faced with the possibility of extraditing.

9. His Government agreed that the priority to be given to the options of prosecuting or extraditing should be considered in future sessions of the International Law Commission. Nevertheless, he reaffirmed his Government's conviction that, regardless of which action took priority, the obligation deriving from the principle *aut dedere aut judicare* was not alternative but conditional. He therefore suggested that draft article 1 be redrafted to eliminate that alternative characteristic.

10. Turning to the topic of shared natural resources, his delegation agreed with the view of the Special Rapporteur regarding the similarities between provisions on the use of groundwaters and those on the use of oil and gas as non-renewable resources. However, energy resources were also of great complexity with regard to prospecting, exploration and exploitation, and had different and more complex commercial characteristics than water resources. Water was vital to human

subsistence: human life depended on it, and it was essential to food production. That was not the case for oil and natural gas, which were very important resources but not essential to subsistence. Another relevant difference was the fact that water resources were in movement, as in rivers, and energy resources were basically static. Lastly, water resources directly affected the ecosystem as a whole, cutting across borders. For those reasons, it might be inappropriate to treat the two kinds of resources as similar; although related, they were different and should be analysed separately.

11. As noted by the International Court of Justice, the problem of equitable exploitation of transboundary deposits should take into account geological and geographical factors, as well as the unity of the deposits. It is precisely because such unitary deposits existed that, although the Court's decision in the North Sea case was about the delimitation of the continental shelf, the Court indicated that such agreements must follow equitable principles. The Court had further determined that "... it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles". He noted that the equity that the International Court of Justice referred to had been taken up repeatedly in State practice, showing that the problem of regulating exploration and exploitation of transboundary deposits, especially of fossil fuels, was to be resolved through bilateral agreements concluded between the parties involved. Nevertheless, even while agreeing that there were general principles applicable to regulation of the exploitation of shared natural resources (such as the precautionary principle, equitable and reasonable use, the obligation to cooperate in exploration and exploitation, and the principle *sic utere tuo ut alienum non laedas*), his delegation still believed that oil and gas should be considered separately from transboundary groundwater.

12. Concerning the topic of reservations to treaties, a noteworthy feature of the Special Rapporteur's eleventh report (A/CN.4/574) was the procedural parallelism between the formulation of reservations and objections to reservations. Another point especially deserving of attention and analysis was the possibility of a pre-emptive objection being made by a potential party, namely a State or international organization that was not yet a party to the treaty but was capable of becoming a party. It was clear that pre-emptive objections would not produce the effects of articles 20 and 21 of the Vienna Convention on the Law of Treaties until their author had become a party to the instrument to which they referred. His Government concurred with the Special Rapporteur's view that not only States or international organizations that were contracting parties could make objections; a State or international organization was considered a party once the treaty had entered into force. It was possible that a State or international organization might sign a treaty but not ratify it. That signature did not give the State or international organization the status of a "party" to the treaty. That, however, did not mean that it could not formulate objections to reservations made by other parties, since the purpose of formulating an objection was to safeguard certain rights belonging to the objecting party which could be affected as a consequence of the reservation. That did not imply that any State or organization had the "right" to make objections to a treaty. That right was circumscribed by a closer link between the instrument in question and the subjects of international law related to it. The right to make objections was limited to those subjects that had a right to protect and, consequently, the mere "intention to become a party to a treaty" was not a factor clearly determining which subjects of international law had the capacity to formulate objections to the reservations made by the parties to a conventional instrument.

13. Draft guideline 2.6.11 referred to the non-requirement of confirmation of an objection when the treaty had not yet entered into force for the objecting State, whether due to some constitutional requirement or to a like requirement that might delay its ratification, in order to protect the legal interest of the signatory State objecting to its ratification, which meant that an interest to protect existed only if the State or international organization was a signatory, thus excluding other subjects that could become parties to the treaty but had not yet taken any action to that end.

14. With regard to the possibility of extending the recommendation concerning the presentation of reasons for a reservation, his delegation found it appropriate insofar as that exercise could contribute to the "reservations dialogue". Since the formulation of a reservation operated against the implementation and even the entry into force of a treaty, the other contracting parties were entitled to know the reasons why the reservation had been formulated.

15. Draft guidelines 2.6.13 and 2.6.15, concerned the issue of late objections, those falling outside the

12-month period set out in the 1969 Vienna Convention. His Government agreed with the Special Rapporteur that late objections were part of a "flexible view of the law", and with the idea that, based on the premise that they did not produce all the effects of a "true" objection, they should not be considered "objections" per se but interpretative statements which could be referred to as "objecting communications".

16. **Mr. Dinescu** (Romania), referring to the topic of Reservations to treaties, said more specifically to the effects of objections to reservations on the entry into force of a treaty between the author of the reservation and the author of the objection, said that a distinction should be drawn between reservations that were incompatible with the object and purpose of the treaty or were prohibited by the treaty and reservations against which States formulated objections for other reasons. The former category of reservations should be considered invalid, in which case, two possibilities could be contemplated: either the willingness of the reserving State to be bound by the treaty should be regarded as invalidated and, consequently, the reservation and the objection prevented the entry into force of the treaty between the two States; or the invalid reservation was considered non-existent and the treaty therefore entered into force between the two States in its entirety (the "super-maximum" effect). State practice in that area varied, and States should therefore transmit relevant examples to the Commission in order to give it the fullest possible basis for its analysis.

17. An objection to a reservation that was compatible with the object and purpose of the treaty and was not prohibited by the treaty should not prevent the application of the other provisions of the treaty between the two States. In such a case, the objection would serve the purpose of assuring the objecting State that acceptance of the reservation could not be invoked against it. Concerning the effects of reservations and objections on the entry into force of treaties, particular attention should be paid to the situation of treaties with a limited number of participants: would reservations to such treaties have the effect of causing the treaty to lapse or would they be impermissible? A study of State practice was needed in order to answer that question.

18. His delegation welcomed the establishment of the Working Group on Shared Natural Resources to determine future work on the subject. The adoption on first reading of the draft articles on the law of transboundary aquifers was an important step towards the establishment of a legal regime for the reasonable utilization of water resources, which were vital for the future of humanity. It was to be hoped that the process of adoption of the draft articles on second reading could be completed speedily in 2008, taking account of written comments from interested Governments. In that context, completion of the work on transboundary aquifers should not be linked with future work on oil and gas, given the obvious differences between the two types of resources.

19. As for the final form of the work on transboundary aquifers, his Government would support the adoption of model principles in the form of a model convention that could be used at the bilateral or regional level. Such a solution would make it easier to respond to the different situations and specific needs of different States.

20. His delegation supported the Commission's intention to study the issue of transboundary oil and gas resources with a view to establishing a legal regime governing such resources. Although State practice in that area was scarce, there were some relevant cases which could provide the basis for an analysis. Romania would contribute actively to any efforts in that regard.

21. On the topic of the obligation to extradite or prosecute, his delegation considered treaties rather than international custom to be the principal source of the obligation. However, bearing in mind the development of international criminal law, the obligation could be said to be customary with regard to international crimes such as genocide, crimes against humanity and war crimes. Given the importance of the issue, a more in-depth analysis should be conducted.

22. The *aut dedere aut judicare* principle should be separated from the principle of universal jurisdiction, since the latter had only a limited effect on the former, even though they shared the same purpose. The former imposed on States the obligation either to relinquish their jurisdiction in favour of that of the requesting State, subject to the conditions prescribed by national law, or to assume jurisdiction. In any case, it was presumed that the State had or could have jurisdiction in the case in question. The principle was applied more strictly in cases where the State had assumed universal jurisdiction because, in such cases, the scope of the obligation to prosecute was broader.

23. His delegation supported the proposal not to include in the Commission's analysis the "triple

alternative", consisting of the surrender of persons to an international criminal tribunal, since at existing international law aimed to encourage States to assume jurisdiction for serious international crimes. In addition, the obligation of States to cooperate with international tribunals was well established in international law.

24. Lastly, Romania would contribute to the Commission's work on the topic by transmitting information and comments on the issues mentioned in paragraphs 31 to 33 of the Commission's report.

25. **Mr. Mukongo Ngay** (Democratic Republic of the Congo), referring to the topic of reservations to treaties, said that, although his country did not often engage in the practice of formulating reservations, it nonetheless recognized, as a party to the Vienna Convention on the Law of Treaties, the broad freedom granted to States under that Convention with regard to the formulation of reservations. However, reservations relating to provisions in respect of which the contracting parties had expressly ruled out the possibility of reservations in order to maintain the balance of the treaty obligations violated the provisions of article 19 of the Vienna Convention. The reserving State could not benefit from such a reservation and still consider itself bound by the treaty; such situations constituted grounds for objections. Similarly, where the possibility of formulating reservations was prohibited by the treaty in question, the formulation of a reservation would not only violate article 19 of the Vienna Convention but would also cause a "fragmentation" of the treaty, the actual scope of which would become difficult to determine. In order to safeguard the treaty's integrity, the reserving State could not invoke the benefit of its reservation if it intended the effects of the treaty to apply to it. The same reasoning would apply to a reservation that was "incompatible with the object and purpose" of the treaty in question. The impermissibility of such reservations was the most important objective limit on the right of contracting parties to formulate reservations and was supported by the case law of the International Court of Justice, which had permitted objections to reservations only on the grounds of incompatibility.

26. One of the immediate consequences of reservations was the loss of uniformity of the legal regime established by the treaty, in the sense that the contracting parties would no longer be bound by the same obligations. The result, again, was a "fragmentation" of the treaty, the actual scope of which became difficult to determine. His delegation therefore supported draft guideline 2.6.3, which established the principle that any State or international organization had the freedom to make objections to reservations. It also took the view, with regard to the link between the objection and the entry into force of the treaty, that the treaty was considered to be in force between the reserving State and the objecting State, with the exception of the provision that was the subject of the reservation. Lastly, his delegation welcomed draft guideline 2.6.10 regarding the reasons for objections, which constituted an important innovation in comparison with the Vienna Convention, and supported the Special Rapporteur's idea of including a recommendation concerning the reasons for reservations in the Guide to Practice. His delegation would be providing a full written response to the Commission's other questions on the topic.

27. Turning to the matter of shared natural resources, he said that a broad consensus on the subject would make a valuable contribution towards the preservation of international peace and security by facilitating negotiations between States in the event of competing claims to shared natural resources. His Government congratulated the Commission on the adoption on first reading of the draft articles on the law of transboundary aquifers and intended to submit its written comments and observations shortly in preparation for the second reading.

28. The Democratic Republic of the Congo welcomed the initiative by UNESCO to disseminate knowledge about the management and regulation of groundwaters. However, such an initiative could not bring real added value unless it benefited all regions of the world, including developing ones.

29. Concerning the final form of the instrument, while recognizing the need to allow time for Governments to submit their comments on the draft articles, he believed that the views of the members of the Sixth Committee, as representatives of their respective States, counted for a great deal. Whatever form the instrument took, it was essential to ensure that it would have a real impact on relations between States that shared natural resources. The future instrument should also positively influence the implementation of domestic legislation on natural resource management. If such legislation was to be effective in fostering the development of the countries concerned, however, it

must be tailored to local realities. Ready-made laws would not work.

30. With regard to the relationship between the work on groundwaters and that on oil and gas, his delegation acknowledged the need for separate treatment of the two issues. However, the question of oil and gas should be treated as a matter of priority, and should not be considered in isolation from the issue of maritime boundary delimitation, which also required in-depth study.

31. The obligation to extradite or prosecute appeared to have the characteristics of a rule of customary international law and, even more, a general principle of law that figured prominently in the national legislation of some countries, including his own. The Congolese Criminal Code provided for the prosecution of anyone who committed outside the territory of the Democratic Republic of the Congo of an offence for which Congolese law prescribed a prison sentence of more than two months, except where the legal provisions concerning extradition applied. That provision would soon be complemented by new draft legislation implementing the Rome Statute of the International Criminal Court, which would provide that anyone presumed to have committed a crime covered under certain articles of the Congolese Criminal Code could be prosecuted and tried by the domestic courts, provided the accused was present in the Democratic Republic of the Congo at the time that the case was opened.

32. As was evident, those provisions established the principle of universal jurisdiction by Congolese courts, although the exercise of that jurisdiction was subject to certain conditions which took account of the seriousness of the crime, the absence of extradition and the presence of the suspect in Congolese territory. Indeed, the question of universal jurisdiction often arose where there was no possibility of extradition, and his delegation therefore believed that it should be included in the legal regime on extradition and vice versa. It was important to note, however, that when States had entered into extradition agreements, those agreements would apply regardless of the existence of a law on universal jurisdiction, in accordance with the maxim *specialia generalibus derogant*.

33. Lastly, his delegation did not believe that the obligation to extradite and the obligation to prosecute should be given equal footing. It was also of the view that the obligation to prosecute need not necessarily be treaty-based.

34. **Ms. Dascalopoulou-Livada** (Greece) said that the obligation *aut dedere aut judicare* had been incorporated into Greek legislation through its ratification by Greece of the various international anti-terrorism conventions. The obligation was also recognized in numerous bilateral judicial assistance and extradition treaties, albeit in a different and much more restricted manner than suggested by the Latin maxim *aut dedere aut judicare*. Indeed, in those bilateral treaties, extradition and domestic prosecution were viewed as two separate obligations, although they were linked to each other in a way that subordinated domestic prosecution to the prior exclusion of extradition, usually on the grounds that the alleged offender was a national of the requested State. In the multilateral anti-terrorism conventions, in contrast the two possibilities, extradite or prosecute, seemed to be on an equal footing, or else domestic prosecution was given preponderance through the establishment of jurisdiction.

35. *Aut dedere aut judicare* was a principle or an obligation that found its source in treaty law. Her delegation would have some difficulty accepting the notion that it constituted a rule of customary international law. A wider study would be needed to justify such a conclusion. That uncertainty, however, should not hinder the Commission’s efforts to formulate an inventory of relevant rules gleaned from existing law and practice, although it was clear that the content of such rules could not go beyond the norms that existed in international law, whether treaty-based or customary.

36. The Special Rapporteur on the topic had raised several questions, of which the most intriguing one was, perhaps, the one concerning the relationship between the obligation *aut dedere aut judicare* and the principle of universal jurisdiction. In her view, that relationship was neither substantial nor crucial. The only similarity between them was in their aim, namely, to ensure that crimes did not go unpunished. With some exceptions, the obligation *aut dedere aut judicare* had always been a means of filling the gaps left by exclusion clauses in bilateral extradition treaties. Such treaties did not normally specify the crimes to which they applied and, although they traditionally covered important crimes, they were not generally focused on crimes of international concern. A link between the

obligation *aut dedere aut judicare* and universal jurisdiction would exist only if the former applied to crimes that concerned humanity as a whole, such as genocide and war crimes. However, that was a linkage that would be created only through the evolution of legal thought. Moreover, universal jurisdiction was far from being generally accepted, at least in its pure form, in cases other than piracy and situations of subsidiary universal jurisdiction.

37. It would be wise, therefore, for the Commission to confine itself at the current stage to delineating the contours of the obligation *aut dedere aut judicare* as clearly and unambiguously as possible. To that end, it would be necessary, first, to identify the crimes for which the obligation would apply and, second, to identify certain other conditions to which it would be subject, bearing in mind that the conditions with respect to extradition might differ from those that applied to domestic prosecution. Extradition proceedings, for example, should not be allowed to go forward if there were valid grounds to believe that the alleged offender was sought for extradition for reasons other than those claimed by the requesting State, particularly for reasons having to do with race, religion, nationality, ethnic origin and the like. Prosecution in the requested State, on the other hand, should be conditional on the presence of the alleged offender in the territory of that State.

38. Concerning the "triple alternative", it was worth exploring the possibility that a requested State might, instead of either extraditing or prosecuting, surrender the person in question to the International Criminal Court. In fact, the difference between "extradition" and "surrender" might be regarded simply as a terminological one, since the latter merely meant that the alleged offender would be handed over for prosecution to an international court rather than to a State.

39. Concerning the draft article on the scope of application of the future draft articles on the topic, the focus should be on the crimes for which the alleged offender was sought for extradition or for purposes of domestic prosecution. In that connection, a thorough investigation of the assertion that persons should be under the jurisdiction of the requested State should be undertaken. With regard to the provisional draft article X suggested by the Special Rapporteur in his second report (A/CN.4/585), her delegation agreed that it was redundant, since what it asserted was, in fact, the principle *pacta sunt servanda*. That article should, instead, formulate, the rules applicable where the obligation *aut dedere aut judicare* came into play.

40. The work of the Commission on the topic opened up an exciting new territory with many different angles and interconnections with other aspects of international and domestic law, and Greece would follow that work with interest.

41. Turning to the question of shared natural resources, she said that the draft articles on the law of transboundary aquifers reflected basic principles of international law on natural resources, such as the obligation of States sharing the same aquifer to cooperate and the principle of equitable and reasonable utilization. Thus, they established a continuum between the legal regime concerning surface transboundary waters and the one applicable to transboundary aquifers. Greece agreed with the decision of the International Law Commission to proceed with the second reading of the draft articles and to treat the subject of transboundary groundwaters independently of any future work by the Commission on oil and gas. Indeed, like some members of the Commission, her delegation wondered whether the latter topic was ripe for codification at all.

42. Relevant State practice seemed to be too sporadic to elucidate the principles or even the general trends of that branch of international energy and natural resources law. Moreover, the issue was linked to a topic outside the mandate of the Commission, that of maritime delimitation. It would be very difficult, at such an early stage of the development of relevant treaty practice, to decide whether the same principles should apply, whether or not the concerned States had concluded an agreement on maritime delimitation. If they had not, it might not be clear whether a reservoir of oil and gas was a shared transboundary resource. For those reasons, consideration of the issue of oil and gas should be deferred at least until after the second reading of the draft articles on transboundary aquifers, as some of the principles contained therein might also be applicable to oil and gas.

43. *Mr. Sandoval (Colombia), Vice-Chairman, took the Chair.*

44. **Ms. Schwachöfer** (Netherlands) said that, as a country that shared many natural resources, including groundwater and mineral deposits, with other States or areas, the Netherlands followed the Commission's work on shared natural resources with great interest.

Several arguments put forward by the Special Rapporteur had prompted the Commission's decision to treat the subject of transboundary aquifers independently of any future work on gaseous substances and liquid substances other than groundwater. One was that the looming prospect of a water crisis required the urgent formulation of an international legal framework. Her Government wished to point out that several international legal frameworks already existed to address such a crisis, including the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. That Convention and other international legal frameworks also covered aquifers and, hence, the use of groundwater.

45. Another argument cited in the report was that freshwater was a resource vital for the human being for which no alternative existed. That was true, but it did not necessarily warrant a separate approach for gaseous substances and liquid substances other than groundwater. Such substances might not be vital for the survival of human beings, but, like groundwater, they were scarce resources of strategic importance to States. That similarity might well prove more significant in the formulation of an international legal framework than the dissimilarities between them.

46. It was also true that oil and gas were a non-renewable resource, but, again, that fact did not warrant a separate approach. The draft articles on the law of transboundary aquifers, in their current form, covered both recharging aquifers and non-recharging aquifers, and the latter was a non-renewable resource. Recharging aquifers were hydraulically connected to international watercourses and, hence, were covered by the Convention on the Law of the Non-navigational Uses of International Watercourses. It remained to be seen how the scope of the draft articles on the law of transboundary aquifers might be reconciled with that of the Convention and, in particular, whether it was appropriate to regulate recharging aquifers under two different legal instruments.

47. Her Government did agree that the environmental concerns associated with the two types of resources called for different rules, However, different rules did not necessarily require a different legal framework. Special rules for aquifers could be included in a common legal framework for shared natural resources. The majority of the draft articles on the law of transboundary aquifers applied equally to other shared natural resources, and simultaneous consideration of the international law related to all such resources would enhance the legal quality of the emerging international legal framework.

48. Her Government had previously expressed its concerns about limiting the scope of the draft articles to groundwater, and it remained of the view that it would not be desirable to consider developing a convention on the basis of those draft articles before completing the work on gaseous substances and liquid substances other than groundwater. The adoption of a non-binding instrument on the law of transboundary aquifers might, however, merit consideration as a first step in the development of an adequate international legal framework for the use of shared natural resources. With that in mind, her Government would shortly distribute its written comments and observations on the draft articles.

49. Turning to chapter IX of the Commission's report (A/62/10), she said that the obligation *aut dedere aut judicare* was instrumental in achieving a world justice system in which criminals had no safe havens. In the new era heralded by the establishment of the International Criminal Court, States had come to realize that there was at least a moral obligation either to extradite or to prosecute alleged perpetrators of the most serious crimes.

50. Her delegation understood that a clear distinction needed to be drawn between the obligation to extradite or prosecute and the principle of universal jurisdiction, but would like once again to call attention to the fact that in order to have the possibility of choosing between extradition and prosecution, States had to ensure that they had jurisdiction over the offences involved, including on the basis of universal jurisdiction. The Netherlands had established universal jurisdiction for war crimes, crimes against humanity, genocide and torture, provided that the suspect was present in its territory, and the country was thus in a position to carry out its obligation either to extradite or prosecute persons accused of those crimes. Special attention should be given in the future draft articles on the topic to the link between the principle of universal jurisdiction and the obligation to prosecute or extradite. Moreover, a more detailed analysis of the mutual impact of the form and substance of the obligation to extradite or prosecute seemed to be required.

51. **Ms. Drenik** (Slovenia), referring to the obligation *aut dedere aut judicare*, expressed support for the

approach taken by the Commission in reviewing the most controversial issues surrounding the topic and endorsed the preliminary plan of action for future work. The question of the source of the obligation was central. Her Government had already submitted its written comments on the issue (A/CN.4/579/Add.1). The obligation to extradite in Slovenia was based on a constitutional provision, which allowed the extradition of Slovenian citizens on the condition that the obligation to extradite arose from a multilateral or bilateral treaty.

52. Her delegation agreed that the Commission should explore the possible customary status of the obligation for serious crimes, including crimes other than international crimes. Extradition could take place without a treaty if that was acceptable to both States and in accordance with their domestic laws. In other words, there was no prohibition on extradition in the absence of treaty obligations. The Commission should identify criteria to determine those categories of crimes in relation to which States were *ipso jure* bound by the obligation to extradite. Her delegation also agreed with the suggestion that the Commission should refer to the concept of "crimes against the peace and security of mankind" elaborated in the 1996 draft Code of Crimes against the Peace and Security of Mankind.

53. States should pay due attention to the human rights standards in the countries to which they extradited and should consider whether extradition would be contrary to the human rights obligations of the requested State. Respect for human rights in the requesting State, particularly respect for article 14 of the International Covenant on Civil and Political Rights, was one of the preconditions for extradition and should therefore be taken into account in the Commission's discussion of the scope of the obligation *aut dedere aut judicare*.

54. The issue of surrender to international courts was closely linked to the question of extradition. In 2004 Slovenia had amended its constitutional provision on extradition to allow the surrender of its citizens to international courts. Although her Government considered that such action constituted a partial transfer of its sovereign rights to an international organization, it also recognized that the objective of extradition and surrender was the same: to avoid impunity and ensure effective prosecution and a fair trial.

55. Lastly, her delegation supported the Special Rapporteur's suggestion that draft article 1, together with other draft provisions, should be submitted to the Drafting Committee at the next session.

56. **Mr. Brown** (United Kingdom), referring to the topic of reservations to treaties and more specifically to the first two of the nine draft guidelines adopted by the Commission in 2007, said that his Government had previously expressed its scepticism about the exercise of defining the concept of the "object and purpose" of the treaty in an abstract way, and had pointed out that the meaning of the concept might differ in different contexts. The Commission's commentary to draft guideline 3.1.5 pointed out that the phrase "object and purpose" was used in no less than eight provisions of the Vienna Convention on the Law of Treaties, none of which provided any particular clues as to the meaning of the concept. The Commission had indicated that draft guideline 3.1.5 indicated a direction rather than establishing a clear criterion that could be directly applied in all cases and was to be commended for having adopted the flexible approach encapsulated in that guideline and in draft guideline 3.1.6.

57. His Government had also previously expressed doubts about draft guidelines 3.1.7 to 3.1.13. Having had a further opportunity to review them together with the commentaries, his Government agreed with draft guideline 3.1.7. As for draft guideline 3.1.8, it was not convinced that the fact that a treaty provision reflected a customary norm was pertinent to assessing the validity of a reservation. There was a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law. His Government did, however, agree with paragraph 2 of that guideline, which stated that a reservation to a treaty provision which reflected a customary norm did not affect the binding nature of that norm.

58. With respect to draft guideline 3.1.12, his Government did not agree that human rights treaties should be treated any differently from other international agreements. It remained the United Kingdom's firmly held view that reservations to normative treaties, including human rights treaties, should be subject to the same rules as reservations to other types of treaties. There was no legal or policy reason for treating human rights treaties differently. It should not be forgotten that the law on reservations to treaties owed its origin to the advisory opinion of the International Court of Justice of 28 May 1951 on Reservations to the Genocide Convention.

59. Draft guideline 3.1.13 appeared to be redundant. It merely confirmed that reservations concerning dispute settlement or monitoring of the implementation of a treaty were to be assessed in accordance with their compatibility with the object and purpose of the treaty, which should already be apparent from the content of draft guidelines 3.1.5 and 3.1.6.

60. The questions raised by the Commission in chapter III of its report went right to the crux of the matter, namely, the problems posed by the invalidity of reservations. His Government would provide full answers to those questions, and submit its comments on the other issues on which the Commission had sought the views of Member States, in due course. He hoped that other Member States would do the same.

61. With regard to the topic of shared natural resources, his Government had refrained thus far from making substantive comments on the subject of transboundary aquifers, primarily because, while recognizing the importance of the issue, it did not consider that it was directly affected by that aspect of the Commission's work. As for the issue of shared oil and gas resources, his Government was uncertain about the existence of, or the need for, any universal rules on the question. The United Kingdom had considerable experience in dealing with cross-boundary oil and gas fields and took the view that States should cooperate in order to reach agreement on the division or sharing of such resources, guided by pragmatic considerations based on technical information. His Government was not convinced, therefore, that there was a pressing need for the Commission to draw up a set of draft articles or guidelines on shared oil and gas resources.

62. With respect to the Commission's work on the obligation to extradite or prosecute, in 2006 his delegation had urged the Commission to treat the principle of universal criminal jurisdiction with caution, and not to be diverted by a comprehensive study of that subject. It therefore welcomed the Special Rapporteur's decision to draw a clear distinction between the obligation to extradite or prosecute and the principle of universal jurisdiction, and to carry out a careful examination of their mutual relationship.

63. His Government also welcomed the Special Rapporteur's confirmation that the Commission's further work on the topic would not examine the "triple alternative", as the surrender of individuals to international criminal courts was governed by a distinct set of treaty arrangements and legal rules. His delegation remained of the view that the obligation to extradite or prosecute only arose as a matter of treaty law, and was not a rule of customary international law. Even if the obligation were said to exist as a matter of customary international law, it would exist only in relation to a very narrow class of crimes. With regard to the final form of the Commission's work, the Commission should remain flexible at the current early stage of its consideration of the topic.

64. **Ms. Arteaga Rodríguez** (Cuba), referring to the draft articles on transboundary aquifers, said that the expression "equitable and reasonable use" was inappropriate, since the term "sustainable" was increasingly used in environmental law and was embodied in the 1992 Convention on Biological Diversity. An expression such as "equitable and sustainable use" would, therefore, be more in keeping with the environmental law currently in force.

65. With regard to draft article 3, she questioned the need for the provision "It shall exercise such sovereignty in accordance with the present draft articles", since the aquifer located within the State's territory was subject to its sovereignty, and the State was therefore free to determine the policy to be followed with respect to that aquifer.

66. In draft article 4 (c) the words "present and future needs" required clarification as to whether they referred to the needs of the economy, the needs of men and women, or the needs of biological diversity. Her delegation, therefore, proposed that the words "present and future needs" should be replaced by "the needs of present and future generations".

67. In the Spanish text of draft article 6, the word "*prevenir*" should be replaced by "*evitar*". In draft article 14, the meaning of the words "significant adverse effect" should be clarified. Similarly, in draft article 16, paragraph 1, the words "causing serious harm" should be clarified, as they were imprecise.

68. Her delegation supported the Special Rapporteur's recommendation that the Commission should undertake a second reading of the draft articles independently of the question of oil and gas.

69. Turning to the topic of the obligation to extradite or prosecute, she said that it was essential to combat impunity in the case of persons allegedly responsible for international crimes and priority should be given to

the obligation of States to extradite or prosecute such persons. It was also necessary to respect the sovereign right of States to determine the appropriateness of extradition, in accordance with their internal law and other factual bases. If extradition was not possible, the State should feel itself under an international obligation to prosecute the alleged perpetrator for the crime.

70. With regard to the third component of the "triple alternative", i.e. surrender to an international criminal tribunal, it would be inappropriate to include it, since it might not be consistent with the internal law of States and of the existing criminal courts, which already had their own specific rules.

71. Concerning the final form of the draft articles, it would be very premature to define it at the current stage, given the complexity of the topic. Further consideration was needed in order to arrive at a correct decision.

72. In regard to the topic of reservations to treaties, the Guide to Practice was an important complement to the Vienna Conventions, touching on interpretative declarations, reservations and the differences between a reservation and a declaration. Draft guidelines 3.1 to 3.9 contained sound criteria regarding the validity of reservations and interpretative declarations. One especially complex matter, dealt with in draft guideline 3.1.6, was that of determining the object and purpose of a treaty, which was the basis for determining the validity or invalidity of a reservation. Her delegation therefore proposed that the order of current draft guidelines 3.1.6 and 3.1.5 should be reversed, since setting out first the elements needed to determine the object and purpose of a treaty would make it easier to understand the guideline on determining when a reservation was or was not compatible with the treaty's object and purpose. In any event, a reservation incompatible with the object and purpose of a treaty should be considered null and void. Draft guideline 3.1.12, on reservations to general human rights treaties, addressed another very complex question, especially with regard to determining the object and purpose of such treaties, since they referred to a variety of diverse rights of a global nature that those treaties were designed to protect. It would be imprudent to draw a distinction between reservations to human rights treaties and those to other treaties, since that might lead to confusion by creating different criteria of compliance for reservations to different types of treaties.

73. **Ms. Sarenkova** (Russian Federation) said, with reference to the topic of reservations to treaties, that her delegation on the whole supported the draft guidelines referred to the Drafting Committee at the Commission's fifty-ninth session. However, the wording of some of them was not fully consistent with the regime for reservations and objections established by the Vienna Conventions of 1969 and 1986. Draft guideline 2.6.4 essentially reproduced the presumption in the Vienna Conventions that a treaty would enter into force between the author of the reservation and the objecting State or international organization unless a contrary intention was definitely expressed by the latter. Yet the draft guideline stated that the objecting State or organization could "oppose the entry into force of the treaty" vis-à-vis the author of the reservation. In other words, if the draft guideline was interpreted literally, a contrary intention expressed by the objecting State or organization would not be enough to prevent the entry into force of the treaty between it and the author of the reservation. At least, that was her delegation's understanding of the word "oppose". Since, under the Vienna Conventions, the expression of a contrary intention by the objecting State or organization was the only grounds for the non-entry into force of a treaty between it and the author of the reservation, a term clearly reflecting that principle, such as the verb "prevent", should be used in the draft guideline.

74. In addition, draft guideline 2.8.2 was not fully in line with the Vienna Conventions or with draft guideline 2.6.13. Draft guideline 2.8.2 provided that objections must be raised within 12 months of notification of the reservation, whereas article 20 of the Vienna Conventions provided for an alternative: States and international organizations could object to a reservation either by the end of the aforementioned 12-month period or by the date on which they expressed their consent to be bound by the treaty, whichever was later. Draft guideline 2.6.13 contained a similar provision. The problem was that draft guideline 2.8.2 referred not only to the contracting States or international organizations but also to States or international organizations that were entitled to become parties to the treaty. The implementation of the draft guideline could therefore lead to a situation in which a State or international organization which was not a party to the treaty and did not object to the reservation within 12 months was considered to have tacitly accepted the reservation and, in violation of the

norms reflected in the Vienna Conventions, was deprived of the right to react within the time permitted by international law. Such an approach could hardly be considered legitimate.

75. With regard to draft guideline 2.6.5, which provided that objections could be formulated by the contracting States and international organizations and also by States and international organizations that were entitled to become parties to the treaty in question, her delegation wondered whether there were sufficient grounds for granting the latter group the right to object to reservations and whether the granting of that right had any practical significance. An objection was a legal act producing specific legal effects in the context of treaty relations between the author of the reservation and the author of the objection. The objection could produce the effects set out in the definition of objections only where the author was a State or international organization that had a legal connection with the treaty, in other words, a contracting State or international organization; a State or international organization that had expressed its definitive consent to be bound by the treaty, including by signature, where signature coincided with an expression of definitive consent; or a State or international organization signing the treaty, which was to be applied provisionally from or after the date of signature.

76. In that context, the practical rationale for granting States and international organizations entitled to become parties to the treaty the right to formulate such prior objections was not clear. Granting them that right would create difficulties and could even hinder the application to them of general rules set forth in the Vienna Conventions and reproduced in the draft guidelines. For example, it could make it difficult to distinguish between objections and political declarations. The latter could be made at any time and, like objections, could express the author's negative attitude to the reservation. Draft guideline 2.6.12 implied that, in order to distinguish a prior objection from a mere declaration, a State or international organization, when expressing consent to be bound by the treaty, would have to make special mention of the fact that the declaration it had made was not an objection and therefore did not produce the effects thereof. Such an approach could not be considered correct. It would be more reasonable to provide that a declaration made previously must be confirmed in order to be regarded as an objection and that unconfirmed "objections" should be regarded as mere declarations. Moreover, non-confirmation of the declaration at the time of signature must indicate that no objection had been raised. However, the State was not deprived of its right to raise a formal objection by the date on which it expressed its consent to be bound by the treaty.

77. If States and international organizations entitled to become parties to a treaty were granted the right to formulate prior objections, a number of questions would arise, such as how the other draft guidelines — in particular concerning the prohibition against the widening of the scope of an objection — would apply to such prior objections. It was not clear at what point the objection would be considered to have been made: at the time of its formulation, at the time of signature of the treaty or at the time of expression of consent to be bound by the treaty. In that context, her delegation wondered about the interpretation of draft guideline 2.7.4: where a State that was entitled to become a party to the treaty formulated a "prior objection" to a reservation and subsequently, while still not a party to the treaty, withdrew it, would that State be considered to have accepted the reservation and therefore lose the right to formulate an objection during the period from the date of signature to its expression of consent to be bound by the treaty?

78. The foregoing examples demonstrated that a distinction should be drawn between declarations of any kind made by States or international organizations entitled to become parties to a treaty and genuine objections made by States and international organizations that either were parties or became parties or signed the treaty.

79. Her delegation endorsed on the whole the position reflected in draft guideline 2.7.9 concerning the prohibition against the widening of the scope of an objection to a reservation. However, it was hypothetically possible, as a result of subsequent practice in the application of a reservation by its author or of the interpretation of the reservation by, for example, the International Court of Justice, for the reservation to acquire a completely different meaning from that which it had had at the time of formulation. In such cases, States that had accepted the reservation could find themselves "unarmed". The Commission should therefore consider the question of how States and international organizations should act in such circumstances.

80. Lastly, her delegation called for terminological uniformity. With regard to objections, the term "formulate" instead of "make" should be used throughout the draft guidelines. In the context of formulating objections, the term "freedom "should be replaced with the term "right". As for "pre-emptive objections" (draft guideline 2.6.14) and "late objections" (draft guideline 2.6.15), neither of which produced legal effects in the same way as a "genuine" objection and thus could barely be called objections, her delegation would prefer the terms "preventive objecting declarations" and "late objecting declarations". If the existing terms were retained, the word "objections" should be placed in quotation marks, by analogy with draft guideline 1.5.1, "'Reservations' to bilateral treaties".

81. Turning to the topic of shared natural resources, she said that her delegation supported the recommendation that the Commission should complete the second reading of the draft articles on the law of transboundary aquifers independently of any future work on oil and gas. Despite the apparent similarity between non-recharging aquifers and hydrocarbons, the differences between them were significant. Oil and gas therefore required a separate, specific approach. However, that did not preclude the possibility of conducting parallel preparatory work on oil and gas; such work would even be desirable in order to determine to what extent it was appropriate for the Commission to consider the issue. Her delegation therefore welcomed the decision of the Working Group on Shared Natural Resources to circulate a questionnaire on State practice with regard to oil and gas. Comments from Governments would provide a good basis for preliminary research by the Secretariat, which could result in the issuing of a memorandum on the subject.

82. The obligation to extradite or prosecute was reflected in numerous international legal instruments concerning efforts to combat various types of criminal acts. The Russian Federation was a party to nearly all the universal instruments and a number of regional and interregional instruments on cooperation in combating crimes that represented a danger to the international community. However, the question of whether the obligation to extradite or prosecute constituted an obligation under customary international law, at least in relation to certain categories of crime, should be treated with caution. It should be borne in mind that extradition and prosecution were, in principle, sovereign rights of the State in whose territory the alleged offender was found. It was hardly possible to presume the existence of a customary obligation which would so substantially limit the sovereign rights of the State in such a sensitive area.

83. As the International Court of Justice had stated in one of its judgments, the material of customary international law was to be looked for primarily in the actual practice and *opinio juris* of States. The Russian Federation did not a priori rule out the existence of a customary norm obliging States to extradite or prosecute with respect to certain categories of crime. However, the existence and scope of such a norm could be established only if the Commission identified relevant State practice where no treaty obligations existed and evidence that such practice was due to the fact that States considered themselves bound by a legal norm. The latter element was particularly important since, in reality, it was difficult to determine whether a State which extradited or prosecuted a person was doing so on the basis of the *aut dedere aut judicare* principle. If a State was not bound by a treaty, it might extradite a person not because it considered itself bound by an obligation to the other State but simply on the basis of the principle of reciprocity.

84. Significant evidence of *opinio juris* on the issue could be provided by decisions of national courts or official statements by States indicating clearly that the refusal to extradite an alleged offender imposed an obligation on the requested State to refer the case to the competent national authorities, even in the absence of relevant treaty obligations. There did not yet seem to be convincing evidence of the existence of the obligation to extradite or prosecute under customary international law. Moreover, her delegation could not agree with the assertion that the existence of a customary norm could be inferred from the fact that a large number of international treaties provided for the obligation in question. No one would contend, for example, that the conclusion by States of numerous treaties on extradition testified to the emergence of a customary norm obliging States to execute extradition requests. It was well known that extradition obligations arose only from relevant international instruments.

85. The question of the emergence of a customary obligation to extradite or prosecute with regard to a narrow range of criminal acts that were of concern to the whole international community — primarily crimes

such as genocide, war crimes and crimes against humanity — deserved separate analysis. It was hardly correct to suppose that, if the obligation *aut dedere aut judicare* was regarded exclusively as a treaty obligation, there was no interest in codifying international norms in that area. International treaties merely recorded the existence of the obligation of the States parties to extradite or prosecute. They left unresolved a number of questions which the Commission could consider. For example, when did the obligation to extradite or prosecute arise: when a State discovered that an alleged offender was in its territory or when another State made a request for extradition? Was a State obliged to prosecute if no State requested extradition? Were there any limits on the obligation?

86. Her delegation believed that there was a link between *aut dedere aut judicare* and universal jurisdiction. One example was a situation in which a State received no extradition requests, or the requests received had been legitimately refused because, for example, there was a serious risk that the person in question could be subjected to torture in the requesting State. If, in such a situation, the person was not a national or permanent resident of the requested State and had allegedly committed a crime outside the territory of that State which was not directed against the interests of that State and whose victims were nationals of other States, the requested State could prosecute the person only on the basis of universal jurisdiction. However, that link should be reflected in the commentaries to the final product of the Commission's work on the topic rather than in draft articles or recommendations themselves.

87. With regard to the "triple alternative", there was no single procedure for the surrender of persons to international tribunals. While ad hoc tribunals had priority jurisdiction for the investigation of crimes that fell within their jurisdiction, the jurisdiction of the International Criminal Court was only complementary. Thus, the obligation of States to surrender alleged offenders to ad hoc tribunals was absolute, whereas, in the case of the International Criminal Court, States had the option of investigating the case themselves. In addition, it was not advisable to consider the question of the surrender of persons to ad hoc tribunals, since the work of those tribunals might come to an end before the Commission completed its work on the subject. The surrender of persons to the International Criminal Court was governed by the Rome Statute and, moreover, concerned only the States parties to the Statute. Her delegation therefore saw no grounds for including the "triple alternative" in the scope of the topic.

88. **Mr. Aoyama** (Japan), commenting on the topic of reservations to treaties, said that his country had, in the past, raised objections to reservations it considered incompatible with the object and purpose of the treaty, without opposing its entry into force between Japan and the reserving State, as provided in article 20, paragraph 4, of the Vienna Convention on the Law of Treaties. Japan had never raised the objections described in paragraph 23 (d) of the Commission's report, namely those with intermediate effect or those with super-maximum effect. His country was concerned that objections with intermediate effect could result in the abusive use of the right to make objections to reservations. The Vienna Convention only provided that the objecting State could oppose the entry into force of the treaty between itself and the reserving State or that the provisions to which the reservation related did not apply as between the opposing State and the reserving State to the extent of the reservation. If the objecting State could use the opportunity to influence arbitrarily the treaty relations between itself and the reserving State, the stability of the reservations system could be undermined.

89. Concerning objections with super-maximum effect, various State practices existed, especially regarding human rights treaties. Not to accept such objections would be politically difficult, especially when a treaty needed to bind as many States as possible without reservations. However, a reserving State generally would not be expressing consent to be bound by the treaty if it might be bound by a provision to which it formulated a reservation. If, in accordance with the objection with super-maximum effect, that State were nevertheless bound, it would be equivalent to being bound by a treaty to which the State had not agreed, a situation contrary to the principle of consent, one of the most fundamental principles of international law.

90. When Japan objected to reservations without opposing the treaty's entry into force between it and the reserving State, it considered that the effect was to exclude application of the relevant provision to the extent of the reservation. In some cases, the effect could be the same as the effect of admitting the reservation. But Japan considered that there should be

limitations on what each State was able to do under the objections system, and it therefore had doubts about the formulation of an objection with super-maximum effect. The question of whether reservations by a State were admitted in the treaty in accordance with article 19 of the Vienna Convention on the Law of Treaties was a different issue, to be discussed separately.

91. On the topic of shared resources, his delegation fully agreed with the Commission that oil and natural gas should be treated separately from groundwater and hoped that the second reading of the draft agenda on transboundary aquifers would be completed in the near future.

92. Turning to the obligation to extradite or prosecute, his country had concluded several multilateral treaties that included such an obligation, and had made no reservations to them. To implement the obligation, the Law of Extradition, the Penal Code and other related laws and regulations would be duly applied in Japan's judicial system. His delegation wished to study the practice of other States and hoped the discussion would produce meaningful results.

93. **Mr. Adi** (Syrian Arab Republic) expressed support for the Special Rapporteur's recommendation that the draft articles on the law of transboundary aquifers should be considered independently from the Commission's future work on oil and natural gas. His delegation would be submitting its written comments on those articles as adopted on first reading and proposed that the title should be changed to "Draft law on shared international aquifers".

94. Referring to the draft articles on protection, preservation and management of aquifers, he said that in accordance with the principle of sovereignty over natural resources, water resources belonged to the States in whose territory they were located and were exclusively subject to the sovereignty of those States. Consequently, when recharge or discharge zones were located in non-aquifer States, it would be difficult to impose any obligation on those States, because they did not benefit from the aquifer. The discussion of such matters should take into account the needs of all the States concerned and not simply those which had recharge zones located in their territories. It was also important to develop standards for the protection of aquifers from pollution that were binding on all the States concerned, including those which did not benefit from the aquifer but had recharge or discharge zones for the aquifer located in their territories. Standards should similarly be developed for the exchange of data and information essential to national defence or security as distinct from information required for aquifer-related studies and research.

95. His delegation was opposed to the inclusion of any reference in the draft articles to the protection of industrial secrets: in the case of shared aquifers such a provision was illogical, since it could be used as a pretext for concealing information about industrial activities that polluted groundwaters or for withdrawing excessive amounts of water. Similarly, there should be no reference to the protection of intellectual property rights in connection with the exchange of information and data on groundwaters, since such a provision might enable upstream States to introduce unfair charges for data provided to downstream States. Equitable utilization, on the other hand, was a logical concept and should therefore be included in the draft articles. The sustainable use of renewable water resources was also the most conducive to sustainable development; exceeding the limits of such use would adversely affect the quantity and quality of not only aquifer water but also of the water in discharge zones located in maritime environments. In conclusion, he thanked the United Nations Educational, Scientific and Cultural Organization for its expert drafting assistance and for its organization of seminars on the draft articles on transboundary aquifers, from which he hoped that all regions would benefit.

96. **Mr. Kanu** (Sierra Leone) said that, while States had a sovereign right under international law to expel aliens, as spelled out in the Commission's draft article 3 on the topic, such expulsion raised sensitive political and legal issues for many African States. The State practice of Sierra Leone in that regard was governed by its domestic laws which were in line with international law. As a matter of national policy, refugee status in his country was granted in accordance with the provisions of the 1951 Geneva Convention relating to the Status of Refugees. As for the parallel use of the terms "national" and "*ressortissant*", his delegation did not consider them to be synonymous.

97. With regard to the effects of armed conflicts on treaties, he welcomed the decision to confine the topic to treaties between States and not to expand it to include international organizations, in view of their intrinsically different nature and functions. It would not be useful to expand the scope of the draft articles to

conflicts of a non-international character, the bulk of which had recently been shown to involve State and non-State actors. The wording of draft article 2 did not appear to include internal conflicts; if, however, it was intended to do so, it should be either deleted or amended. In the light of the comments of the Working Group, clarification was also required regarding the implication in draft article 7 that a treaty or some of its provisions would continue to operate during armed conflict.

98. Turning to the topic of responsibility of international organizations, he said that, while broadly agreeing with the general principles set out in the draft articles, his delegation was concerned about their heavy reliance on the draft articles on State responsibility. Unlike international organizations, States had a boundless capacity to discharge their international obligations. Draft article 43 went some way towards meeting that concern in that it provided for the responsibility of the members of an international organization for an internationally wrongful act committed by that organization; but the issue needed to be considered further.

99. On the topic of *aut dedere aut judicare*, treaties were currently the primary source of that obligation; it was, however, a customary international norm having the character of *jus cogens*, which such treaties merely served to codify. Rather than concentrate on drafting articles with a view to their adoption as a convention, the Commission should for the time being study the relevant treaties, as well as the domestic legislation and practice of States. Moreover, the relationship between that obligation and the principle of universal jurisdiction needed to be clarified: his delegation took the view that they both represented a positive reinforcement of the rule of law and accountability. Sierra Leone was a party to treaties establishing the obligation to extradite or prosecute, without reservations as to the application of that obligation, and had itself adopted domestic legislation providing for the extradition of persons accused of specific crimes, some of which were relevant to the discussion. He looked forward to further work by the Commission on the scope of the obligation.

100. Lastly, his delegation welcomed the inclusion in the Commission's programme of work of the topics "Protection of persons in the event of disasters" and "Most-favoured-nation clause" and reiterated its proposal of the following three topics for the Commission's consideration, particularly in view of the judgment of the International Court of Justice in the case *Bosnia and Herzegovina v. Serbia and Montenegro*: the legal consequences arising out of the use of private armies in internal conflicts; the legal consequences arising out of the involvement of multilateral corporations in internal conflicts; and the legal consequences arising out of the use of private security agencies in internal conflicts.

101. **Mr. Tavares** (Portugal), while noting the quality and value of the Commission's work on the topic of reservations to treaties, said that in some cases the proposed results were too far advanced when compared with actual State practice and the Vienna Conventions on the Law of Treaties. In draft guidelines 2.6.3 and 2.6.4, it would be more appropriate to speak of a "right" than of a "freedom", and in draft guideline 2.6.3 as well as in others, the term "make" should be replaced by "formulate", for the sake of consistency. Draft guidelines 2.6.5 and 2.6.13 were not in line with article 20, paragraph 5, of the 1986 Vienna Convention, which stipulated that a State or an international organization could formulate an objection by the date on which it expressed its consent to be bound by the treaty. It was neither accurate nor necessary to allow a State or an international organization to formulate objections before becoming a party to a treaty, even if the objections would produce effects only when it became a party. In draft guideline 2.6.10, the words "whenever possible" should be deleted. With regard to draft guideline 2.6.14, it was to be feared that the proposed approach could have ramifications beyond the reservations dialogue provided for in the Vienna Convention. In addition, pre-emptive objections might in some cases not have a sufficiently determined content, with the result that there might be uncertainty as to whether an objection had indeed been formulated. In the case of late objections, covered by draft guideline 2.6.15, it would be wise to specify what legal effects, if any, would be produced thereby. He wondered about the reason for the prohibition against widening the scope of an objection, contained in draft guideline 2.7.9: it was not justified either by the Vienna Conventions or by practice. In the case of withdrawal of an objection, Portugal, in the spirit of its comments on draft guideline 2.6.10, would support a draft guideline on statement of the reasons.

102. With regard to the procedure for acceptances of reservations, his delegation was in favour of retaining in draft guideline 2.8 the expressions "express acceptance" and "tacit acceptance". In the case of tacit acceptance, its preference was for draft guideline 2.8.1, with the inclusion of the words "Unless the treaty otherwise provides", since that possibility was provided for by article 20, paragraph 5, of the Vienna Convention. He agreed with the Special Rapporteur's observation that draft guideline 2.8.1 bis was superfluous. With reference to draft guideline 2.8.7, acceptance was required not only of the competent organ of an international organization, but also of its members: the object of the formulation in article 20, paragraph 3, of the Vienna Convention that a reservation required the acceptance of the competent organ of an international organization was surely not so much to exclude the parties to the constituent instrument as to include the competent organ. A problem arose, however, if the reservation was formulated before the entry into force of the constituent instrument and, hence, before the establishment of an organ competent to determine the acceptability of the reservation. Then again, with reference to draft guideline 2.8.9, the competence of that organ must be established in the constituent instrument of the organization. Those two matters deserved further consideration by the Commission. As for the provision regarding lack of presumption of acceptance of a reservation to a constituent instrument, in draft guideline 2.8.8, it went beyond article 20, paragraph 5, of the Vienna Convention.

103. On the question of the compatibility of a reservation with the object and purpose of a treaty, his delegation considered that the qualification of reservations as valid or invalid, or as permissible or not permissible, was premature. The regime laid down in the Vienna Conventions in that regard was sufficient and emphasis should be placed on the scope of the effects of the reservation and of objections thereto, rather than on the qualification issue.

104. His Government supported the work done on the topic of shared natural resources, bearing in mind the similarities between both the legal and the geological aspects of groundwater and of oil and gas. The Commission should, while adopting a cautious approach, proceed with the second reading of the draft articles on the law of transboundary aquifers independently of issues concerning oil and gas, dealing with the two subtopics separately. The final form of those draft articles should be an international framework convention, to be adopted in due course.

105. Lastly, on the topic of the obligation *aut dedere aut judicare*, his delegation agreed with the cautious approach adopted by the Commission and stressed the relevance of a general commitment to its goal, which was to put an end to the impunity of offenders, in particular by preventing the creation of safe havens for them. Deep reflection should be given to the core issue of the existence of a general rule in regard to an international obligation to extradite or prosecute; his Government doubted whether there was such a general rule. It was hoped that the Commission would provide facts and arguments that could lead to a conclusion. In any case, his delegation had reservations about the "triple alternative" approach. Surrender of an alleged offender to an international criminal tribunal could not be an additional option to the alternative of extraditing or prosecuting, since it was not on the same level. With regard to the relationship between that obligation and the concept of universal jurisdiction, further work was required to determine the limits within which that principle of universal jurisdiction should be considered and how it related to *aut dedere aut judicare*.

106. **Ms. Schonmann** (Israel) said that, because of the complexity of the topic of *aut dedere aut judicare*, further analysis was needed, particularly for the determination of its constituent elements and the relationship between them. Her Government believed that the extradite or prosecute principle derived solely from treaty-based obligations and that there was no significant basis in current customary international law or State practice for extending it beyond the treaties that explicitly contained such an obligation, especially in the context of criminal law which resumed legal clarity and certainty. The scope and essence of that principle, and in particular its interplay with the concept of universal jurisdiction, remained uncharted territory. The two should be distinguished from one another; indeed, it was doubtful whether the issue of universal jurisdiction should be considered in the context of the topic under consideration. Her delegation welcomed the shift of emphasis away from the "triple alternative" option of surrender to an international criminal tribunal and the renewed focus on the vital role of national law-enforcement mechanisms, since the primary responsibility for the prosecution of alleged offenders should remain within the national legal system.

107. On the question of whether either of the two elements of the principle of *aut dedere aut judicare* should take precedence over the other, her Government took the view that the custodial State was free to decide which part of the obligation it would execute, provided that it acted in good faith. As a general rule, jurisdiction over a crime should normally be exercised by the State in whose territory the crime was committed. However, the absence of sufficient safeguards against potential abuses of criminal jurisdiction might be a compelling reason for the exercise of extraterritorial jurisdiction, notwithstanding the many obstacles in the way. Prosecution for an extraterritorial offence was complicated and, for that reason, Israel's law had been amended to allow the extradition of its own citizens to the country where the alleged offence had taken place, subject to a commitment by the requesting State that any sentence would be served in Israel. One of the questions remaining to be considered by the Special Rapporteur concerned the nature of the territorial link required to establish the applicability of the principle of *aut dedere aut judicare*. What were the elements constituting such jurisdiction and to what extent did they apply beyond national sovereign territory? It would also be important to determine the nature of the requirement of presence and whether it was subject to a condition of time, and to examine the legal threshold for determining whether all possible courses of action had been considered and exhausted by a State.

108. As for the final form of the Commission's work on the topic, it would seem premature to address it in the form of draft articles. The Commission should concentrate on the study and analysis of relevant State practice, of which there was a relative lack, despite the inclusion of the principle in many international treaties.

109. Turning to the topic of shared natural resources, she said that her delegation supported the Special Rapporteur's recommendation that the Commission should address the question of transboundary aquifers separately from its future work regarding oil and natural gas. In the development of principles and arrangements relating to transboundary aquifers, additional guidance could be provided by the International Law Association's Helsinki Rules (1966), as updated by the Berlin Rules (2004), and the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (1997). She emphasized the value of draft articles 9 and 11 in that they obliged States to protect and preserve aquifers and the related ecosystems, while taking into account the susceptibility of aquifers and aquifer systems to pollution and the amount of time required to remove pollutants. The draft articles were also useful in establishing the principle of equitable and reasonable utilization of aquifers and the obligation not to cause significant harm to other aquifer States; however, an approach should be adopted that treated those principles on an equal footing. In any case, all the principles to be considered should be general and flexible and should serve as necessary guidelines for aquifer States. The draft articles containing them should not be adopted in the form of a convention, since, paradoxically, the adoption of such a convention, particularly if it was not ratified or not wholly supported, could reduce their usefulness.

110. **Ms. Viotti** (Brazil) said that the draft articles on the law of transboundary aquifers offered a good conceptual basis for building a set of principles to guide States in their use and conservation. The subject was of particular interest to Brazil as more than 70 per cent of all of the world's largest transboundary aquifers, the Guarani aquifer, was located in its territory. While generally agreeing with most of the draft articles, her delegation was still undecided about their proposed scope which, if loosely formulated, might unnecessarily restrict activities within the area of the aquifer or aquifer system. Those activities that could have an adverse impact on aquifers or aquifer systems should be identified; if that was not feasible, it might be better to delete subparagraph (b) of draft article 1. Brazil fully subscribed to the principle of the sovereignty of States over the transboundary resources located within their territories, set out in draft article 3, and considered that it merited a direct reference in the draft articles to General Assembly resolution 1803 (XVII). Moreover, the expression "shared natural resources" in the title of the item under discussion should not allow such sovereignty to be called into question; it might be advisable to replace it by the term "transboundary natural resources".

111. The Commission should beware of being overly ambitious in its work on the topic, lest it forfeit all or part of the support of Member States. The final output should take the form of a non-binding declaration by the General Assembly setting out generic principles that would guide States in the framing of regional agreements, which were the most suitable tool for the

legal regulation of transboundary aquifers. Her delegation agreed that the Commission should proceed with the second reading of the draft articles and that it should do so independently of any future work on oil and gas.

The meeting rose at 6.05 p.m.