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Chairperson: Ms. Picco . . . . . (Monaco)

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10-61365 (E)

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

Agenda item 79: Report of the International Law Commission on the work of its sixty-second session (*continued*) (A/65/10 and A/65/186)

1. **Mr. Joyini** (South Africa), noting that the topic "Treaties over time" was now rendered all the more pertinent by the dynamism of contemporary international relations, said that the Study Group's decision to study the role of subsequent agreements and State practice in the interpretation of treaties would undoubtedly promote understanding of the issue. The Group's future workplan outlined in paragraph 353 of the Commission's report was also supported by his delegation, which would furthermore welcome work relating to the effects of certain acts, events or developments on the continued existence of a treaty and to the obsolescence of certain treaty provisions over time.

2. The strength of the Vienna Convention on the Law of Treaties lay in its flexibility, consisting in recognition of the role of subsequent agreement and practice in the interpretation of a treaty pursuant to article 31, paragraphs 3 (a) and (b), thereof. Entities that had had recourse to the provisions of that article included judicial and quasi-judicial bodies, international organizations and domestic courts. Although the Commission had twice previously examined the topic, relevant subsequent agreement and practice were evidently not always well documented, often coming to light only through legal proceedings. Indeed, the current renewed interest in the topic stood as testimony to the increasingly purpose-oriented and objective interpretation of treaties by international courts, as asserted in the relevant jurisprudence of the International Court of Justice, one example being in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. The effect of treaties over time on the "fragmentation" of international law had also been notably identified as another reason for considering the adaptation of international treaties to changing circumstances.

3. **Mr. Kittichaisaree** (Thailand) commended the Secretariat on its impressive compilation of multilateral conventions relating to the obligation to extradite or prosecute. The Commission might look into whether there was emerging or established State practice according to which, under a treaty or customary international law, a requested State was bound either to extradite an offender to the requesting State, unless objectively justifiable circumstances militated against it, or to prosecute an offender in the requested State in lieu of extradition, provided that the prosecution was not a mere sham. Another alternative was to consider whether there was some other available form of prosecution, such as in a third State with jurisdiction over the offence and/or the offender in question.

4. The conditions of extradition should also be scrutinized to ensure that they could not be abused by the requested State so as to unjustifiably shield the offender from prosecution by the requesting State. In addition, consideration could be given to the issue of surrender of the offender to a competent international criminal court or tribunal when the State concerned was unable or unwilling to prosecute perpetrators of genocide, crimes against humanity, war crimes and, where the court or tribunal in question had competence, aggression.

5. The topic of the most-favoured-nation clause was important in an era when economic prosperity or underdevelopment in one State could have far-reaching economic, financial, social or political effects on the rest of the international community. The Commission might wish to explore the use of such clauses in multilateral investment treaties and in bilateral treaties or free trade agreements among States, one or more of which were also parties to multilateral investment treaties, so as to see how to reconcile divergences between the two parallel regimes.

6. On the topic of shared natural resources, his delegation agreed with the Commission's endorsement of the Working Group's recommendation that, owing to the sui generis nature of bilateral agreements on oil and gas reserves that straddled national land frontiers and maritime boundaries, it might not be feasible to develop or codify international law in that area, unless the Commission could find ways to exclude those sensitive issues from the scope of its deliberations.

7. **Mr. Salinas Burgos** (Chile), referring to the effects of armed conflicts on treaties, said that the work on the text had progressed well: all the draft articles and the annex proposed thereto had been approved by the plenary Commission and referred to the Drafting Committee. The text provided a sound basis for the continuing study of an important topic.

8. The primary objectives of the draft articles, namely to protect legal security and the continuity of

treaty relationships between States, were reflected in draft articles 3 and 6. The former, however, still had an inappropriate title that did not adequately reflect the content: it should be made more direct, and the use of the term “absence” should be reconsidered.

9. Draft articles 4 and 5 provided substantive indicia for evaluating a treaty’s susceptibility to termination in the event of armed conflict or to the creation of grounds for withdrawal or suspension. His delegation agreed in general with the indicia, particularly the intention of the parties to the treaty, but failed to see how the number of parties could provide evidence for termination or suspension of or withdrawal from a treaty. Moreover, the situation might vary depending on whether the number of parties was large or small and whether the treaty was multilateral, bilateral or regional.

10. His delegation supported the rule in draft article 5, paragraph 1, but thought that more consideration should be given to whether categories of treaties should be mentioned in a second paragraph or in an annex. If they were listed in an annex, the link with the article must be made clear, as should the fact that the list was merely indicative. His delegation disagreed with the view that treaties establishing borders should not be included. On the contrary, such treaties were among those that must not be affected by the occurrence of armed conflict. As for draft article 8, it introduced an obligation of notification that was essential for giving stability to treaty relations and strengthening dispute settlement mechanisms: more work should be done on that subject.

11. With regard to the topic of protection of persons in the event of disasters, he said consideration should be given to including the right to offer cooperation and to how the affected State was to determine what aid it would accept from third parties. In addition, the scope of neutrality in relation to the duty of impartiality should be made clear. The relationship between the primary responsibility of the affected State for dealing with a disaster and the obligation to cooperate under international law must be emphasized — a relationship that did not detract from the sovereignty of the affected State. The draft correctly emphasized the views of the international agencies involved in disaster relief.

12. Turning to the topic of treaties over time, he said the introductory report by the Chairman of the Study Group contained an accomplished analysis of subsequent agreements and practice in relation to the interpretation and modification of treaties in the light of the jurisprudence of international courts and tribunals. Subsequent conduct was a legitimate basis for interpretation, provided it reflected the parties’ understanding of the agreement and clarified the meaning of a treaty’s terms as well as its purpose and objectives. Such clarification occurred, according to the Chairman of the Study Group, as soon as the text of a treaty became final. At what point, however, was the text understood to be final — when it was authenticated, or when consent to be bound by it was given?

13. Other behaviours, while not carrying the same weight as subsequent conduct, might also be relevant in interpreting a treaty. For example, the role of silence, particularly silence that might imply agreement, was a new avenue that could be explored. As to the methods by which parties should interpret a treaty binding them, there was considerable latitude, but the clearest were written manifestations of agreement, such as memorandums of understanding, and common or concordant conduct.

14. Since the analysis of the influence of time on the execution of treaties had had to be postponed, work might be undertaken on the basis of the introductory report by the Chairman of the Study Group on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals with ad hoc jurisdiction. Relevant aspects of the *travaux préparatoires* for the 1969 Vienna Convention, with particular reference to the rules on interpretation and modification of treaties and inter-temporal law, might also be studied.

15. His delegation welcomed the inclusion in chapter III of the Commission’s report of the request for information about specific cases of subsequent agreements or practice that had affected the interpretation or modification of a treaty, particularly those that were not the subject of a judicial or arbitral decision.

16. **Mr. Buchwald** (United States of America) said that, on the topic of shared natural resources, his delegation agreed with the recommendation by the Working Group that the transboundary oil and gas aspects should not be pursued further.

17. Concerning the topic of the most-favoured-nation clause, he said that such provisions differed

considerably in structure, scope and language and were dependent on other provisions in the specific agreements in which they appeared. They were thus ill-suited to the adoption of a uniform approach, and interpretative tools or revised draft articles were not appropriate outcomes of the work on the topic. On the other hand, the Study Group should continue with its description of current jurisprudence, which would be a useful resource for Governments and practitioners.

18. On the obligation to extradite or prosecute, he noted that the United States was a party to many international conventions containing provisions to that effect and considered them a vital aspect of collective efforts to deny terrorists and other criminals safe haven. It continued to believe, however, that there was insufficient basis in customary international law or State practice to formulate draft articles extending an obligation to extradite or prosecute beyond the binding legal instruments that contained such an obligation. A comprehensive view of State practice, and broader reporting on the subject, were essential if any hypothesis was to be developed about the existence of a customary international legal norm. The formulation of draft articles on the topic did not appear to be appropriate.

19. In connection with the topic of treaties over time and the request for information on instances when subsequent practice and agreements had not been addressed by an international body, he said it would be especially helpful if States responded by furnishing information on the jurisprudence of their national courts, which was less accessible than the jurisprudence of international tribunals. His country was interested to learn, for example, how other States addressed the domestic legal questions raised by the shifting interpretations of international agreements based on practice subsequent to ratification and whether the legislative branch was involved in approving such agreements prior to ratification.

20. It was perhaps premature to decide whether the topic lent itself to the development of guidelines, conclusions or practice pointers; based on the work done so far, however, it would seem that the latter would be the most helpful, as there was not enough consistent State practice to permit strict guidelines or conclusions to be formulated.

21. **Mr. Duray** (Belgium) said that, in response to the request for information relating to treaties over time contained in paragraph 27 of the Commission's report, his delegation wished to provide two relevant examples of subsequent practice with respect to the application and interpretation of article 3 common to the Geneva Conventions and of Additional Protocol II thereto. The first example related to Belgium's initiative — apparently unprecedented among States — of incorporating into its criminal legislation, in 1993, war crimes committed in armed conflict not of an international character. Violations of common article 3 had then been similarly criminalized under article 4 of the Statute of the International Criminal Tribunal for Rwanda, adopted in 1994. Following suit, the International Criminal Tribunal for the Former Yugoslavia had subsequently cited the pertinent Belgian law, specifically in paragraph 132 of its *Tadić* decision of 1995, to justify the application to the Bosnian conflict of offences relating to the war crimes provided for under its Statute, which formally concerned war crimes committed only in armed conflict of an international character.

22. The Belgian law had therefore brought in a practice later followed by States and by jurisprudence establishing the criminal consequences of violations of article 3 common to the Geneva Conventions and of Additional Protocol II thereto. Further validated in 1998 by the Rome Statute of the International Criminal Court, that practice served as a good example of subsequent practice that was particularly relevant in the interpretation and application of treaties.

23. The second example of such subsequent practice with respect to the application and interpretation of article 3 common to the Geneva Conventions and of Additional Protocol II thereto was illustrated in the amendment proposed by Belgium to article 8 of the Rome Statute of the International Criminal Court. Adopted by consensus in June 2010 at the Review Conference of the Rome Statute, held in Kampala, that proposed amendment extended the Court's jurisdiction to three crimes — employing poisoned weapons, employing asphyxiating gases or employing bullets that expanded or flattened easily in the human body — that had previously constituted war crimes under the Statute only when committed in armed conflict of an international character. On the entry into force of the amendment, the Court's jurisdiction would also come to apply when those three crimes were committed in armed conflict not of an international character. His delegation's hope was that the two examples it had

offered would assist the Study Group in moving forward with respect to its consideration of the topic.

24. **Ms. Schonmann** (Israel), referring to draft guideline 4.5.3 (Reactions to an invalid reservation) on the topic "Reservations to treaties", said that her delegation agreed that the nullity of an invalid reservation did not depend on the objection or the acceptance by a contracting State or a contracting organization. Her delegation did not, however, see any need to create any form of obligation on States to formulate an objection in general or to require that the objection, with its underlying reasons, be formulated as soon as possible. Time constraints and vague or overly general drafting of reservations might result in the inability of States to fulfil such an obligation. Her delegation therefore proposed that the second paragraph of the draft guideline should read: "Nevertheless, a State or an international organization which considers that the reservation is invalid might consider formulating an objection".

25. With regard to the final product of the Special Rapporteur's work on the topic, her delegation believed that the title "Guide to Practice" did not reflect the actual content of the guidelines, some of which, as noted by the Special Rapporteur himself in his sixteenth report (A/CN.4/626), reflected the current state of positive international law on the subject, while others represented the progressive development of international law or were intended to offer logical solutions to problems to which neither the Vienna Convention on Succession of States in respect of Treaties nor the relevant practice seemed to have provided clear answers.

26. Moreover, in some cases there might be differences between actual and desirable practice. For example, even if guideline 1.4.3 (Statements of non-recognition) could be considered to reflect current practice, it certainly was not a desirable one, since the guideline did not have a solid legal basis. In several other cases, the Special Rapporteur had acknowledged that the guidelines were not based on sufficient or clear practice. Hence, although the Special Rapporteur's work had contributed greatly to the study and clarification of the topic, the final outcome could not be considered a guide to practice and should, instead, be called a "study".

27. The topic of the expulsion of aliens was complex and involved a delicate balance between the right of States to decide whether to admit an alien and the safeguarding of fundamental human rights. It impinged on the issues of immigration and national security, as well as sensitive and unique legal and political issues. In addition, differences in the obligations of States could arise from a variety of national, regional and international instruments. For those reasons, work on the topic should proceed with caution and rely, to the extent possible, on codification of customary international law, which reflected well-settled legal principles and State practice.

28. Regarding the topic "Effects of armed conflicts on treaties", her delegation had concerns about some of the outstanding issues in the draft articles, including those relating to the suggested definition of "armed conflict" and to proposed draft article 15, which incorporated an overly sweeping definition of "aggression". As to the issue of shared natural resources, her delegation supported the Working Group's recommendation not to consider the transboundary oil and gas aspects of the topic, as those aspects were best dealt with bilaterally.

29. Concerning the obligation to extradite or prosecute, her delegation welcomed the survey of relevant multilateral treaties compiled by the Secretariat (A/CN.4/630), which it was still studying. Any reference made in that survey to matters relating to the principle of universal jurisdiction should be treated with particular caution, as the concept of universal jurisdiction had to be clearly distinguished from the principle of *aut dedere aut judicare*. Her delegation was doubtful that the issue of universal jurisdiction should be considered at all in the Commission's work on the topic and reaffirmed its view that treaty-based obligations were the sole legal source of the obligation to extradite or prosecute. Existing State practice supported the view that there was insufficient basis under current international customary law or State practice to extend an obligation to extradite or prosecute beyond binding international treaties that explicitly contained such obligations.

30. **Mr. Rodiles Bretón** (Mexico) said that the changing nature of contemporary international affairs raised significant questions and challenges in relation to treaty rights under the 1969 Vienna Convention, and the study on the subject of treaties over time was therefore very timely and important for ensuring the necessary legal certainty between parties to a treaty. Treaties not only occupied a central place as sources of

international law but were also a key element in building and strengthening friendly relations among States. They were concluded in order to regulate various aspects of international affairs for relatively long periods of time, and were therefore dynamic instruments to which interpretation and practice were vital. Flexibility must be maintained in treaty relations, but without undermining legal certainty.

31. Of particular interest were the relationship between the amendment of treaties and informal means of international cooperation, the relationship between treaty law and customary law, especially the issue of integration of inter-temporal law, and the possible amendment of treaties through agreements and subsequent practice. His Government would submit responses to the questions raised in Chapter III of the Commission's report in due course.

32. Turning to the subject of shared natural resources, his delegation had noted the Working Group's recommendation that the Commission should not consider the transboundary oil and gas aspects of the topic, and it appreciated the need for a cautious approach, given the technical complexity and political sensitivity of the issues involved, which were mainly bilateral in nature. Nevertheless, his delegation regretted that a third or middle path had not been pursued with a view to identifying at least some basic elements that might guide States in negotiating agreements on transboundary oil and gas deposits. His delegation supported the suggestion put forward by the Government of Canada that the Commission should draw up a "template of elements" relating to applicable practice, shared principles and features, and best practices and lesson learned.

33. Some general principles applicable to the exploration and exploitation of shared natural resources did exist. They included the precautionary principle, efficient and equitable use of transboundary oil and gas resources, the obligation to cooperate in the exploration and exploitation of such resources and the principle of *sic utere tuo ut alienum non laedas*, which was also reflected in the obligation to prevent transboundary damages as articulated by the International Court of Justice in the case concerning *Legality of the Threat or Use of Nuclear Weapons*. His delegation encouraged the Commission not to abandon the issue altogether and to consider whether the Working Group's recommendation might be at odds with the needs and concerns of the international community.

34. **Mr. Kohona** (Sri Lanka), referring to the topic "Expulsion of aliens", said that the right of expulsion must be exercised in accordance with international law, but that over-prescriptiveness must be avoided in dealing with the topic insofar as that right essentially fell within the sovereign domain of States and was governed by their domestic laws. His delegation nonetheless broadly agreed with the cluster of draft articles produced on the topic, although the obligation to respect the dignity of persons would more appropriately be reflected in an introductory section; human dignity was not a specific human right but a general overarching principle from which all human rights flowed.

35. Concerning the advisability of draft article 8, on the prohibition of extradition disguised as expulsion, he shared the view that the inclusion of a provision more concerned with extradition than expulsion was inappropriate, given the aim of protecting the integrity of the extradition regime. The matter of its inclusion should remain open, however, until after further discussion of draft article A (Prohibition of disguised expulsion), which had been presented by the Special Rapporteur with a view to accommodating such concerns.

36. With regard to draft article 9, on grounds for expulsion, the grounds embodied in international conventions and international case law appeared to be limited to public order and national security. While particular importance should indeed be accorded to those two reasons, the various other grounds provided for in national legislation should not be excluded and emphasis should also be placed on the need for compliance with the law. Equally crucial was the need to maintain a distinction between aliens who were lawfully and those who were unlawfully present in a State's territory.

37. It was also necessary to make that same distinction in the revised version of draft article A1 concerning procedural guarantees for the expulsion of illegal aliens in the territory of the expelling State. Such guarantees must also be limited to those established in international law, including, at a minimum, the right to receive notice of the expulsion decision and to consular protection. A right to legal aid and counsel, however, did not fall into that category.

Although requiring further discussion, the revised version of the draft article was welcome in the light of those considerations.

38. Turning to the topic "Effects of armed conflicts on treaties" and the proposals for reformulation of the draft articles adopted on first reading, he said that draft article 1 (Scope) gave rise to two questions: should the draft articles apply solely to inter-State armed conflict and should they apply to treaties to which international organizations were parties? Concerning the first question, given that the effect of non-international conflicts where only one State was party to an armed conflict would differ from the effect of inter-State conflicts on a treaty, the issue of how and why such cases of non-international armed conflict might affect the operation of a treaty between States should be further clarified in the commentary. The second question should be the subject of a separate study, given its complexity and the scarcity of practice in that area. For present purposes, however, the saving clause proposed in paragraph 203 of the Commission's report was helpful.

39. As to draft article 2 (Use of terms), the word "protracted" would be best retained in the definition of "armed conflict" in order to provide for a minimum threshold with respect to the elements of duration and intensity, which was an essential factor if the draft articles were to cover non-international armed conflicts.

40. Concerning draft article 5 (Operation of treaties on the basis of implication from their subject matter), his delegation was not in favour of the selective approach of including certain categories of treaties in paragraph 2; instead it agreed with the view that to do so would inadvertently have the effect of establishing two "tiers" of categories that might be difficult to substantiate in practice. Retention of the indicative list of categories of treaties as an annex was therefore a viable compromise, provided that the list was augmented by the new categories of treaties identified by the Special Rapporteur and mentioned in paragraph 237 of the Commission's report.

41. Draft article 8 (Notification of intention to terminate, withdraw from or suspend the operation of a treaty) must offer sufficient flexibility for taking into account the reality of armed conflict situations, insofar as formal notification of intention with respect to a treaty was not always possible. Paragraph 4 should therefore be deleted in order to avoid prescriptive rules on time limits and reflect only the obligation of States with regard to the peaceful settlement of disputes. Lastly, his delegation supported the suggested inclusion of a reference in draft article 15 (Prohibition of benefit to an aggressor State) to General Assembly resolution 3314 (XXIX) and to the Charter of the United Nations.

42. Having suffered the effects of a devastating tsunami in 2004, his country attached great importance to the topic "Protection of persons in the event of disasters". A legal framework that clearly articulated the rights and responsibilities of those involved would facilitate greater cooperation among States and address the current legal lacuna in the relationship between norms of international law and natural disasters.

43. With regard to the draft articles provisionally adopted on that topic by the Drafting Committee, the provision of draft article 6 on humanitarian principles in disaster response was beyond all debate, and those contained in draft articles 7 (Human dignity) and 8 (Human rights) were of a similarly fundamental nature. Those three draft articles were therefore welcome inclusions.

44. As to the role of the affected State, the fundamental principles of sovereignty and non-intervention must be the central guide for the Commission's work and any related expansion of the law in that area. Emphasis on the sovereignty and primary role of the affected State was essential; indeed, the responsibilities entailed in sovereignty included the duty of protection set forth in draft article 9, paragraph 1. Moreover, humanitarian assistance provided by other States or non-State actors as a matter of international cooperation and solidarity must necessarily be undertaken only with the consent of the affected State and for the sole purpose of complementing domestic initiatives. Such premises were in consonance with the guiding principles annexed to the landmark General Assembly resolution 46/182 on strengthening of the coordination of humanitarian emergency assistance of the United Nations.

45. The topic "The most-favoured-nation clause" now assumed particular significance for many reasons, including the proliferation of bilateral investment treaties and the consequent shift in importance with respect to such clauses from trade to investment. The papers prepared by members of the Study Group on the topic would undoubtedly serve as a useful basis for future discussions, culminating in the drafting of broad guidelines or model clauses designed to bring greater

coherence and consistency to the operation of the most-favoured-nation clause in contemporary situations. Member States and arbitral tribunals would each benefit from such an outcome.

46. With respect to the topic "Treaties over time", consideration of subsequent practice in the interpretation of treaties as they evolved on account of acts, events and developments that transpired subsequent to their conclusion would ensure their continuing contemporary relevance, while also encouraging their practical application and longevity. Taking such practice into account might, however, raise questions concerning the domestic implementation of treaties.

47. The topics "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (*aut dedere aut judicare*)" were of great current relevance, and the outstanding work on them should be delayed no further. Other possible future topics should continue to be guided by the requirements of practical utility to Member States and the contemporary needs of the international community. The issue of international law and its application to non-State actors in contemporary conflicts would accordingly be worthy of study, given the rudimentary nature of the existing legal framework.

48. Lastly, endorsing the Commission's views concerning the question of honoraria, he expressed the hope that the General Assembly would duly reconsider its decision pursuant to resolution 56/272 to reduce the honoraria of Commission members, which compromised support for the research work conducted by special rapporteurs, in particular those from developing countries.

49. **Ms. Noland** (Netherlands), with reference to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", expressed agreement with the reaffirmation of the Working Group that the general orientation of future reports of the Special Rapporteur should be towards presenting draft articles for consideration by the Commission, based on the general framework agreed in 2009. The Commission's work on the topic, to which her country attached great importance, had the potential to contribute significantly to the development of an effective international criminal justice system. The apparent lack of progress in that work was therefore regrettable, and she urged the Commission to address the topic as a matter of priority with a view to making substantive progress during its session in 2011. In that regard, her delegation would endeavour to fulfil the request for information on subsequent agreements and subsequent practice relevant in the interpretation and application of treaties, a fruitful approach that would inform the discussion through the linkage with relevant State practice.

50. Her delegation welcomed the comprehensive approach adopted by the Study Group on the most-favoured-nation clause, in that it was suited to the multifaceted nature of the topic. It also welcomed the future work envisaged by the Study Group, notably in the areas of investment protection and the Vienna Convention on the Law of Treaties.

51. **Ms. Silkina** (Russian Federation) said that her delegation took note of the progress made by the Study Group created to consider the topic "The most-favoured-nation clause" and was of the view that the analytical material it developed would be helpful for all States and interested organizations.

52. On the topic "Shared natural resources", her delegation felt that the draft articles on the law of transboundary aquifers adopted by the Commission in 2008 (A/63/10) represented a balanced approach to the issue by reaffirming the sovereignty of a State over its natural resources while safeguarding the principle of reasonable and equitable use of transboundary aquifers and the obligation not to cause significant harm. The provision pertaining to the obligation of aquifer States to establish joint mechanisms of cooperation was also important. Her delegation did not exclude the possibility that the draft articles might become a legally binding document in the future, but considered it premature to prepare a convention on transboundary aquifers at the present stage. Her delegation reaffirmed support for the proposed annexation of the text of the draft articles to a General Assembly resolution and encouraged States to conclude relevant bilateral, multilateral and regional agreements. Future discussions of a convention would need to take into consideration other international treaties that touched on the topic of transboundary aquifers, include the Convention on the Law of the Non-Navigational Uses of International Watercourses and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

53. Her delegation supported the separate consideration of the topics of transboundary aquifers and oil and gas and agreed with the recommendation

that the Commission should not proceed with work on transboundary oil and gas issues, which were subject to bilateral cooperation.

54. **Mr. Delgado Sánchez** (Cuba) said that his delegation appreciated the work of the Working Group on shared natural resources and had taken note of its recommendations. With regard to the obligation to extradite or prosecute, the topic was of great importance for the progressive development and codification of international law and was closely related to other topics of significant political and legal interest, such as the scope and application of the principle of universal jurisdiction and compliance with the obligation to extradite or prosecute in the context of international counter-terrorism conventions. Legal lacunae with respect to the issue had allowed some States to evade their obligation to prosecute known terrorists with whom they shared ideological links while at the same time refusing to extradite them, purportedly because of legal technicalities relating to the content of the extradition request or risks to the physical integrity of the terrorists. That regrettable situation not only discredited the commitment of those States to the fight against international terrorism, but also violated precepts of international law. For that and other reasons, his delegation strongly supported a thorough study of the topic in order to delineate clearly the scope and application of the obligation to extradite or prosecute.

55. With regard to treaties over time, his delegation maintained its previously stated position, namely that work on the topic should aim only to strengthen and complement — but under no circumstances to modify — the treaty regime established under the 1969 Vienna Convention. His delegation therefore considered that the Study Group should look not only at formal elements of treaties and subsequent practice, but also at the effects on treaties of certain events and circumstances, such as termination or suspension, unilateral acts and serious violations, and fundamental changes in circumstances. The Group might, for example, assess the effects of time on a treaty if the treaty lacked a termination clause or if there had been a fundamental change in the circumstances that had prevailed at the time it had been concluded.

56. His delegation attached great importance to the study of the topic "The most-favoured-nation clause", especially as it related to investment protection treaties, and supported the idea of studying arbitral awards and the rules of interpretation of treaties contained in the 1969 Vienna Convention. The broad interpretation of the most-favoured-nation clause by some courts in the context of investment protection treaties had allowed investors to disregard some of their obligations under such treaties — for example, the obligation to exhaust domestic remedies before resorting to an international court. In many cases, such interpretations had annulled obligations clearly set out in the bilateral treaty, leaving them without legal effect and instead applying criteria contained in other legal instruments or norms unrelated to the bilateral agreement in question. That was blatantly contrary to the principles of treaty interpretation and application as established by the 1969 Vienna Convention. It was extremely worrying that an investor might be allowed to claim rights and privileges that were not provided under the treaty and indeed were sometimes expressly excluded.

57. Arbitral tribunals, in seeking to assert their competence to hear cases, were improperly expanding the scope of investment protection agreements beyond the will of the contracting States. The very integrity of an agreement was threatened when, by means of the most-favoured-nation clause, courts extended the scope of the protection provided by the agreement, ignoring the restrictive criteria that States had applied in defining the concepts of "investment" and "investor". The work of the United Nations Conference on Trade and Development on the subject offered important conclusions which the Commission should bear in mind. Interpretative decisions on the most-favoured-nation clause overrode the interpretation of the contracting States and gave precedence to the interpretation of a third party, whether an investor or the court itself, thus enabling transnational corporations to attempt to claim rights and privileges to which they were not entitled, while evading their fundamental obligations. Hence, his delegation supported any initiative aimed at clarifying the content, scope and limits of the most-favoured-nation clause.

58. **Mr. Dolata** (Poland) said that his delegation agreed with the recommendations of the Special Rapporteur regarding the issues to be addressed by the Working Group on the obligation to extradite or prosecute and suggested that in his next report the Special Rapporteur should take into account the report of the Secretary-General prepared on the basis of comments and observations of Governments on the

scope and application of the principle of universal jurisdiction (A/65/181), which highlighted the links between the latter principle and that of *aut dedere aut judicare*. Although the work on the topic was not proceeding very rapidly, his delegation believed that the cautious, step-by-step approach of the Special Rapporteur and the Working Group would ensure positive results. Thorough analysis of State practice, though time-consuming, was necessary.

59. As for treaties over time, it was obvious that treaties evolved as a result of intentional acts and situations that occurred subsequent to their establishment. Applying subsequent agreements could ensure that treaties remained relevant. His delegation was certain that the Commission's examination of subsequent agreements and practice would yield useful input on the application of the law of treaties, and it encouraged the Commission to complete that work as quickly as possible. Regarding the outcome of that work, his delegation favoured the production of a repertory of practice and a set of guidelines for the interpretation of treaties in the future.

60. His delegation generally supported the Commission's broad approach to the topic "The most-favoured-nation clause" but wished to highlight the need to take account, in the discussion of the outcome of the work on the topic, of the differing nature of such clauses in bilateral, regional and global treaties and of the different contexts in which they were applied. For example, the multilateral nature of the most-favoured-nation clause in the context of the World Trade Organization was related to the specific character of trade relations under the multilateral trade regime, and under the General Agreement on Tariffs and Trade or the General Agreement on Trade in Services the most-favoured-nation clause had the effect of progressively diminishing obstacles to the global exchange of goods and services. Under investment treaties, on the other hand, the most-favoured-nation clause served as a standard for the treatment or protection of an investor or investment originating in a particular State, which raised the issue of the so-called multilateralization of investment protection standards through the most-favoured-nation clause, which did not reflect the bilateral nature of treaty-based relations.

61. Moreover, the most-favoured nation clause could be given different meanings and scope under investment treaties. They could apply only to the post-establishment phase of investment or also cover the pre-establishment phase, or they could apply generally or be specific to certain investment activities. In the face of such variations, it would be difficult to find sufficient common denominators for the drafting of general rules.

62. The same could be said of the practice of arbitration tribunals. On the one hand, there was the very broad approach adopted in the *Maffezini* case and followed in several other cases. On the other hand, some tribunals had presented a more balanced view, as exemplified by the recent *Austrian Airlines v. Slovak Republic* case. The divergence between those two paths made it difficult to reach any consensus on the meaning of the most-favoured-nation clause in the context of investment law.

63. Nevertheless, some issues were ripe for consideration in the Commission's work on the topic. One was the so-called *ejusdem generis* principle, which was the basic criterion for the application of most-favoured-nation clauses. Another was the impact of regional integration on such clauses at the multilateral and bilateral levels. A third consisted of procedural matters, such as interpretation, relating to the application of the most-favoured-nation clause. As to the rules concerning the nature and meaning of the clause, his delegation welcomed the view presented in the Commission's report.

64. **Mr. Park** Chull-joo (Republic of Korea) said that the obligation to extradite or prosecute was a duty under treaties to which a State was a party; it was not a duty under international customary law. The principle of *aut dedere aut judicare* was neither equivalent to nor synonymous with universal jurisdiction, but inextricably linked to it insofar as a State signatory to a treaty incorporating that obligation might exercise jurisdiction as appropriate, including in situations where it was unconnected to the crime concerned.

65. Turning to the topic "Treaties over time", he said that treaties were interpreted in accordance with the ordinary meaning to be assigned to the terms thereof within their context and in the light of the object and purpose of the treaty. Notwithstanding the provision of article 31, paragraph 3, of the Vienna Convention on the Law of Treaties concerning subsequent agreement and practice, consideration must be given to situations where the subsequent practice was contrary to a treaty or became international customary law and to the

question of whether the subsequent practice preceded the provision of a treaty as *lex posterior*.

66. With regard to the topic "The most-favoured-nation clause", the Commission should consider how it might be examined in relation to traditional areas of international law other than trade and also whether the clause applied to both the procedural and substantive aspects of a treaty. As to the topic "Shared natural resources", his delegation welcomed the decision not to pursue further its oil and gas aspects. With the debate on the draft articles on the law of transboundary aquifers now apparently complete following their adoption on second reading, attention should be turned to the question of how to build future State practices under those articles.

67. It was regrettable that time constraints had precluded the Commission's urgently needed discussion of the important topic of the immunity of State officials from foreign criminal jurisdiction. The number of exchanges of such officials between States was rising rapidly, yet clear rules on their immunity were lacking. In discussing the topic, it would be necessary to consider the purpose and extent of that immunity, as well as to whom it would apply and at what level.

68. **Mr. Böhlke** (Brazil), speaking on the topic "Reservations to treaties", applauded the solution offered by guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty) of the Guide to Practice concerning the matter of the disparity, explained in the commentary to guideline 4.2.1 (Status of the author of an established reservation), between the provisions of article 20, paragraph 4, of the 1969 Vienna Convention and the practice of the Secretary-General of the United Nations in his capacity as depositary of treaties.

69. His delegation had noted with interest the Commission's analysis of interpretative declarations, particularly with respect to the absence of a specific provision in the Vienna Convention concerning the legal effects of such declarations. Similarly noted was the distinction made between "simple" interpretative declarations in guideline 3.5 (Permissibility of an interpretative declaration) and conditional interpretative declarations, which were to follow the reservations regime (guidelines 3.5.2 and 3.5.3).

70. The guidelines contained in section 4.5 (Consequences of an invalid reservation) of the Guide to Practice were likely to merit particular attention, in that the Vienna Convention did not deal explicitly with the legal effects of a reservation that failed to meet the conditions of permissibility and formal validity. Given the content of paragraph (18) of the commentary to section 4.5, which concluded that it was a question not of creating, but of systematizing, the applicable principles and rules, relevant comments from States and international organizations continued to be extremely important and were to be encouraged.

71. His delegation looked forward to progress on the topic of expulsion of aliens, which had grown in significance as a result of the increased flow of people among countries. It welcomed the distinction articulated in the Commission's report between expulsion and extradition; disguised expulsion had been condemned by a number of courts, and it was essential to state the grounds for expulsion, which must comply with the provisions of international law. In the light of differences among domestic legal regimes in that area, however, further clarity as to the exact meaning of "expulsion" was still needed with a view to informing the debate. With respect to the obligation to ensure respect for the right to life in the receiving State of persons who had been or were being expelled, he suggested that consideration should be given to extending the obligation set forth in revised draft article 14, paragraph 2, to cases where there was a risk of a death penalty being imposed in the receiving State on an alien who was not under a death sentence.

72. Concerning the topic "Protection of persons in the event of disasters", he noted with interest the humanitarian principles mentioned as applicable to disaster response and emphasized both the need to strike a balance between State sovereignty and human rights protection, including through analysis of the role and responsibility of the affected State and the need to respect the principle of non-intervention in internal affairs. Another relevant issue was the proportionality of assistance to needs, which would be best achieved through a case-by-case assessment made on the basis of realities on the ground. Lastly, he expressed agreement with the conclusion of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) concerning the need for a systematic assessment with respect to the duty to cooperate in the fight against impunity.

73. **Ms. Escobar Hernández** (Spain) said that proper articulation of the obligation to extradite or prosecute could be a very useful tool in the fight against

impunity. The increased presence of the principle *aut dedere aut judicare* in practice was evident from the Secretariat's survey of multilateral conventions (A/CN.4/630). It was also present in a number of bilateral extradition agreements and was a topic of considerable interest in the realm of international law, as was illustrated by the case concerning *Questions relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal)* currently before the International Court of Justice. Moreover, it was closely related to other topics on the Commission's long-term programme of work, in particular the issue of extraterritorial jurisdiction, which could also be an effective tool in combating impunity. The essential issues to be addressed in relation to the topic had now been identified by the Working Group and the Special Rapporteur, and her delegation trusted that the Commission's work on it would move forward significantly during its next session.

74. With regard to treaties over time, her delegation supported the approach adopted by the Study Group. Her Government considered the problems underlying the issue to be of great practical importance to States and therefore intended to cooperate with the Commission by submitting information on Spanish practice in due course. On the topic "The most-favoured-nation clause", although her delegation considered that such clauses were generally applicable in all areas of international law, it endorsed the sectoral approach to the topic adopted by the Study Group, as the area of investment was, without doubt, a key area for the application of the most-favoured-nation clause. During its next session, the Commission should undertake to identify a list of topics to be addressed by the Study Group in the future. Her delegation trusted that the Commission would soon be able to begin developing draft articles or, failing that, a guide to practice.

75. Regarding shared natural resources, her delegation shared the Commission's concerns in relation to treatment of the oil and gas aspects of the topic, but had reservations about the wisdom of abandoning the issue altogether. The existence of commonly accepted guidelines in respect of transboundary deposits of oil and gas could prove to be of crucial importance.

76. **Mr. Munde** (India) said that his delegation supported the objective of the obligation to extradite or prosecute in that an offender should not be allowed to go unpunished on the basis of a technicality. Ensuring prosecution would work as a deterrent and would strengthen the cause of the administration of justice and the rule of law.

77. India's Extradition Act of 1962 and the bilateral extradition treaties to which it was a party all contained provisions concerning the duty to extradite or prosecute that were implemented in letter and spirit in respect of all extradition offences. India was also a party to several international conventions dealing with international crimes that obliged States parties to extradite persons accused of offences defined in those conventions or to prosecute them in the event that an extradition request was refused. In the absence of a bilateral extradition treaty, those conventions could serve as a legal basis for extradition.

78. On the important topic "The most-favoured-nation clause", his delegation welcomed the work of the Study Group and expressed the hope that the Commission would add clarity to the use and implications of most-favoured-nation clauses. As for the topic of shared natural resources, his delegation fully subscribed to the Working Group's recommendation that the Commission should not take up the transboundary oil and gas aspect of the topic for consideration. Those issues were best dealt with at the bilateral level, bearing in mind geological features and other regional specifics. Codification attempts in that field could affect established bilateral treaty obligations and assiduously negotiated agreements at the political level.

79. **Mr. Yee** (Singapore) said that the report of the Study Group on treaties over time was ambitious and touched on many vital issues of practical importance in treaty implementation. Noting that treaties that dealt with sensitive political issues and had wide-ranging impact on domestic laws and practices were the ones that subsisted longest over time, his delegation suggested that one of the focal points of the report should relate to the implementation of major treaties.

80. With regard to the impact of State practice on treaty implementation, he noted that the cornerstone of interpretation remained the wording of the treaty itself, and delving deeply into State practice therefore had its limitations. While flexibility and adaptation to changing circumstances were sometimes needed, the key issue was determining what weight to accord to deviations of practice from the original wording. While practice could reflect a shared understanding among

the parties of how their obligations had varied subsequent to the conclusion of a treaty, the parties could also be acting out of political expediency or engaging in a temporary departure with the intention of reverting to a state of conformity with a treaty. Finally, State practice and the underlying motivations thereof were usually not properly recorded, making it difficult to ascertain the exact contours of such practice. Since parties almost always put in writing any agreement amending or changing the implementation of a treaty, practices should only amend a treaty provision in exceptional circumstances.

81. With regard to the most-favoured-nation clause, his delegation agreed that the topic needed to include issues concerning trade in services and in intellectual property and that the 1978 draft articles of the Commission on the topic required re-examination, owing to the recent explosion of most-favoured-nation clauses in free trade agreements and bilateral investment treaties. One of the perennial issues that arose in the negotiation of such instruments related to the scope of the most-favoured-nation obligation. An undesirable level of uncertainty surrounded the ambit of those clauses, given the differing approaches towards them by dispute settlement bodies. While the decision in the *Maffezini v. the Kingdom of Spain* case appeared to have been rejected by most recent tribunal decisions, others had followed the *Maffezini* decision. Consequently, countries had sought to specify in the investment-related provisions of their free trade agreements that procedural rights did not fall within the ambit of the most-favoured-nation clause, although it remained to be seen whether tribunals would interpret such provisions as intended. His delegation urged the Commission to expedite its work on the issue and provide much-needed clarity in that area of law, which would be of immediate benefit to the international community.

82. Regarding the topic of shared natural resources, his delegation supported the recommendation that the Commission should not take up the transboundary oil and gas aspects of that topic and should focus its work essentially on transboundary aquifers. Humans depended on fresh water for survival in a way that they did not on oil and gas resources, and water sources were more susceptible to pollution. It appeared sensible for the Commission to proceed with the draft articles focused on transboundary aquifers, which would form a useful reference point if the focus eventually turned to shared oil and gas resources.

83. **Mr. Galicki** (Special Rapporteur) said that he appreciated the contribution made by delegations voicing their opinions and constructive suggestions related to the Commission's work on the topic of *aut dedere aut judicare*. The Commission had contacted States over the previous few years for information on their practice in the application of that principle, as that information was necessary for forming a complete picture of States practice as a necessary basis for identifying the relevant customary norms. Unfortunately, the number of States that had submitted information was insufficient for the effective formulation of appropriate draft norms by the Special Rapporteur and by the Commission.

84. Nonetheless, there were grounds for optimism. The Working Group had proposed a general framework and created special guidelines for the consideration of the topic. He expressed his appreciation to the Secretariat for its survey of relevant multilateral conventions, which would be of great value to the Commission in its future work. The growing interest of the international community in the topic of universal jurisdiction was another positive factor. He expected that the report of the Secretary-General summing up State practice with regard to the scope and application of the principle of universal jurisdiction (A/65/181) would be very helpful for the future work of the Commission concerning the possible linkage between the issue of universal jurisdiction and the *aut dedere aut judicare* principle.

85. It had been difficult to find examples of possible customary rules pertaining to *aut dedere aut judicare*. He expressed the hope that the development of the case pending before the International Court of Justice dealing with that topic, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, would provide appropriate examples.

86. **Mr. Wisnumurti** (Chairman of the International Law Commission) said that the feedback that the Commission received from Governments was an important feature of the Commission's working methods and ensured that the outcome of the Commission's work responded to the practical needs of Member States. He assured the Committee that the Commission would take into account the statements made by delegations. The Commission also looked

forward to receiving written comments concerning specific issues that were of particular interest to the Commission. Specifically, written comments on the topic "Responsibility of international organizations" were due on 1 January 2011. Similarly, further comments had been invited on the topic "Reservations to treaties" and were anticipated before 31 January 2011.

87. He stressed that the current system placed enormous burdens, in terms of both time and resources, on special rapporteurs, some having come to New York at their own expense. The issue of assistance to special rapporteurs remained crucial to the proper functioning of the Commission. He expressed hope that steps would be taken within the relevant Committee of the General Assembly to establish a more sustainable system.

The meeting rose at 1 p.m.