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Chairman: Mr. Barriga (Vice-Chairman) . . . . . (Liechtenstein)

Contents

06-59113 (E)

In the absence of Mr. Gómez Robledo (Mexico), Mr. Barriga (Liechtenstein), Vice-Chairman, took the Chair.

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

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Witschel** (Germany) said that the provisionally adopted draft articles on responsibility of international organizations, which were based where possible on the articles on responsibility of States for internationally wrongful acts, had thus far succeeded in balancing the similarities and differences between those two aspects of responsibility under international law.

2. In the debate in the Sixth Committee during the sixtieth session of the General Assembly, his and other delegations had expressed doubts as to whether international organizations, by analogy with States, could invoke necessity, while some other delegations had supported the principle. His delegation could accept the compromise reflected in the current wording of draft article 22, under chapter V on circumstances precluding wrongfulness, since it strictly limited the circumstances under which international organizations could invoke necessity, taking into account their special character.

3. Draft articles 28 and 29, however, were without precedent, and a thorough discussion, as the Commission had requested, was vital. His delegation supported the general concept behind draft article 28, on international responsibility in case of provision of competence to an international organization — States should not be allowed to evade their international obligations by transferring competence to an international organization — but the concept needed more clarification than the current draft article provided. Some issues concerning the conditions of "circumvention" required further discussion, and the introduction of the element of "misuse" should be considered. Some helpful ideas could be drawn from the case law of the European Court of Human Rights.

4. In draft article 29, on responsibility of a State member of an international organization for the internationally wrongful act of that organization, paragraph 2, which enunciated the subsidiary character of such responsibility, appeared to reflect the relevant law. However, the conceptual and material approach of the draft article left a number of questions open. On the whole, his delegation agreed with the approach of avoiding a residual, negative rule indicating the cases in which responsibility did not arise for a State in connection with the act of an international organization and instead identifying positively those cases in which a State did incur responsibility. Systematic interpretation — and the current debates in the Sixth Committee would become part of the *travaux préparatoires* and hence supplementary means of interpretation — would then elucidate the negative cases. It was of the utmost importance to Germany, for example, that the mere fact of membership should not be held to entail the responsibility of a member State for the act of an international organization.

5. **Mr. Ma** Xinmin (China) said that the draft articles on the law of transboundary aquifers adopted by the Commission on first reading represented an enrichment and further development of international law on water resources. His delegation held the view that international cooperation on transboundary aquifers should be based on respect for the permanent sovereignty of aquifer States over water resources within their territories; reasonable exploration and utilization of such water resources should in no way be restricted. The outcome of the work on the topic could take the form of general guiding principles, since conditions were not ripe for the formulation of an international treaty. The Commission should approach the question of whether to consider other transboundary resources with prudence after broadly canvassing the views of States.

6. With respect to drafting details, draft article 1, subparagraph (b), extended the scope of application to "other activities that have or are likely to have an impact upon those aquifers and aquifer systems". His delegation felt that the wording was too broad; the relevant activities should be limited to those likely to have "a major impact". With regard to draft article 7, paragraph 2, which provided that aquifer States should establish joint mechanisms of cooperation, China was in favour of strengthening cooperation through such mechanisms, but thought that it was not appropriate to make it compulsory; the will of States should be respected and the general obligation to cooperate was not yet established in international law. His delegation therefore proposed the following wording for draft article 7, paragraph 2: "... aquifer States should give

positive consideration to establishing joint mechanisms of cooperation". With regard to draft article 8, on regular exchange of data and information, in some countries the availability and exchange of hydrological and related data and information might be subject to legal regulation; therefore a qualification should be added to the effect that the exchange of data and information on transboundary aquifers, as provided for in the article, would be carried out to the extent permitted by law. As to draft article 15, China fully supported the promotion of scientific, educational, technical and other cooperation with developing States for the protection and management of transboundary aquifers or aquifer systems, but it should be borne in mind that cooperation with regard to aquifers was an interactive process. Where the capacity of developing States to manage their aquifers was weak, technical and financial assistance from developed States would be required. His delegation therefore suggested the addition of another subparagraph reading: "mobilizing financial resources and establishing appropriate mechanisms in order to help them carry out relevant projects and facilitate their capacity-building".

7. With regard to the draft articles on responsibility of international organizations provisionally adopted by the Commission, since the articles on responsibility of States for internationally wrongful acts did not address the responsibility of a State in connection with the wrongful act of an international organization, his delegation supported the Commission's efforts to fill that gap.

8. In draft article 22 the Commission had retained "necessity" as one of the circumstances precluding wrongfulness. Even though it had set out strict conditions limiting the invocation of necessity, his delegation believed, as it had stated during the previous session of the General Assembly, that necessity should not be admitted as a ground for precluding the wrongfulness of an act of an international organization. In terms of power and function, no automatic parallel could be drawn between an international organization and a State, and international practice did not provide sound support for the invocation of necessity by an international organization. Furthermore, almost all issues currently addressed by important international organizations had a bearing on the interests of the international community as a whole, so that draft article 22 might allow an international organization to justify an international wrongful act by invoking at will the necessity of safeguarding an interest of the international community. Precedents were not rare where an international organization had been subject to manipulation or abuse by its member States. His delegation suggested that the draft article should be deleted.

9. As used in draft articles 25 to 27, on aid or assistance, direction and control, and coercion by a State with respect to the commission of an internationally wrongful act by an international organization, his delegation inferred that the term "State" could refer to a member or non-member of the international organization. While a State member of an international organization should not be held responsible for an act of the organization merely because it had participated in the decision-making process in accordance with the relevant rules of the organization, a State member having major influence over the commission of an internationally wrongful act by an international organization should bear corresponding responsibility. Since draft articles 25 to 27 could apply to member States, draft article 29 could be seen as a supplement to them. Paragraph 2 of that article provided for the subsidiary nature of the responsibility of a member State, but when a member State played a major or leading role in the commission of an act by an international organization, the main responsibility for the consequences of that act should be placed on the member State.

10. **Ms. Silek** (Hungary) said that the text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading under the topic of shared natural resources met the overall expectations of Hungary. However, her delegation was disappointed that in draft article 6 on the obligation not to cause significant harm to other aquifer States the Commission had decided to eliminate the provision proposed by the Special Rapporteur concerning compensation when significant harm was caused, even though all appropriate measures had been taken to prevent it. In view of recent developments in the field of international environmental law, whenever an aquifer State caused significant harm to another aquifer State, it should provide adequate compensation in accordance with the polluter-pays principle, regardless of whether it had taken all appropriate prevention measures. The principle and the obligation deriving from it were both well established in other instruments

of international law. The commentary to draft article 6 stated that the issue of compensation had been omitted because it was "covered by other rules of international law, including the draft principles on liability" (para. (6)). That reasoning might not be sound, since international liability was in general based on imputability, but in the field of international environmental law there were exceptions whereby liability could be established strictly on the basis of causing harm.

11. In draft article 11 on prevention, reduction and control of pollution, the term "precautionary approach" had been preferred to "precautionary principle". Hungary was among the countries that considered the precautionary principle to be already established in international environmental law. The inclusion of the principle in the text of the draft articles would contribute greatly to its general acceptance in international law.

12. Her delegation would also like to suggest changes to the definitions of "recharge zone" and "discharge zone" contained in draft article 2, on use of terms. The term "catchment area" used in the definition of "recharge zone" in subparagraph (f) was more commonly used in relation to surface waters. The recharge zone of an aquifer was only that part of a catchment area where infiltration through the soil was significant and/or where surface water contributed directly to the groundwater. Her delegation therefore suggested inserting the words "that part of" before "the catchment area". On the other hand, the definition of "discharge zone" in subparagraph (g) was too narrow, because it covered only those situations where the water originating from an aquifer actually flowed to the surface. A discharge zone could exist without any water being present on the surface; in many areas the upward flow system kept the groundwater table permanently close to the surface. Her delegation therefore suggested the addition of the following clause at the end of subparagraph (g): "or the upward flow system keeps the groundwater table permanently close to the surface".

13. **Mr. Lammers** (Netherlands), speaking on the topic of shared natural resources, said that the Netherlands shared many natural resources with other States or with areas beyond the limits of its national jurisdiction, such as groundwater; mineral deposits, including oil and gas; and migratory species on land, in the air and in the sea. Hence the international regulation of the uses of and impacts on shared natural resources was of the highest significance to his country.

14. During previous sessions of the General Assembly his Government had expressed its concern over the Commission's general approach to the topic. First of all, it was unhappy about the limited scope of the proposed rules. The draft articles currently under consideration related only to the law of transboundary aquifers, although it seemed that work on one or more additional sets of rules for other shared natural resources was envisaged following completion of the work on aquifers. By taking that approach the Commission would be forgoing the opportunity to develop an overarching set of rules for all shared natural resources. In particular, it was not clear why the proposed set of rules could not have been drafted to apply also to gaseous substances and liquid substances other than groundwater. His delegation strongly supported the view of the Special Rapporteur that consideration should be given to oil and gas during the second reading of the draft articles, as indeed it should have been during the first reading.

15. On the other hand, his delegation shared the Commission's view that it was premature to reach a conclusion on the question of the final form of the draft articles in the light of the differing views expressed by States. His delegation appreciated the cautious approach of the Commission and suggested that the question should be revisited only after due attention had been given to the application of the draft articles to gaseous substances and liquid substances other than groundwater. His Government also agreed with the Commission that, in the case of groundwaters and other liquids and gases, the development of bilateral and regional agreements was still in an embryonic stage and a framework for cooperation remained to be properly developed. It therefore fully endorsed the drafting and placement of draft article 19, on bilateral and regional agreements and arrangements, to reflect the change in form from that of a framework convention.

16. In the commentary to draft article 1, on scope, the Commission noted that the dual application of the provisions of the 1997 Convention on the Law of Non-navigational Uses of International Watercourses and the draft articles on the law of transboundary aquifers would not in principle cause any problem, as those legal regimes would not be expected to conflict

(para. (2)). Yet, in the draft articles the principle of equitable and reasonable utilization had been redefined in order to make it applicable to non-renewable resources. His Government agreed with the application in the draft articles of the principle of maximizing the long-term benefits in the case of non-renewable resources, as opposed to the principle of sustainable utilization applicable to renewable resources. However, in that respect there was a potential for conflict between the two legal regimes. Further clarification was required to explain how the application of two different definitions of the same term to aquifers and aquifer systems hydraulically connected to international watercourses could be reconciled.

17. The definition of "aquifer State" in draft article 2 was too limited. Aquifers and aquifer systems could be found not only in the territory of a State but also in areas under its jurisdiction or control but outside its territory. Moreover, when the Commission considered the application of the draft articles to all shared gaseous and liquid substances, it would be necessary to revisit the definition, bearing in mind the resources to be found under the continental shelf.

18. With regard to draft article 6, on obligation not to cause significant harm to other aquifer States, the commentary to paragraph 1 correctly presented prevention, which in case of non-compliance could entail State responsibility, as a duty of due diligence. In paragraph 3, which dealt with the situation where significant harm had been caused despite due diligence, his Government did not agree with the deletion of the reference to compensation. Although international law on international liability for injurious consequences arising out of acts not prohibited by international law had developed in recent years, including through the elaboration of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, those developments did not justify the deletion of a mention of compensation, in particular because the draft principles would apply only to hazardous activities relating to the use of aquifers and aquifer systems and would not cover non-hazardous activities. Furthermore, the cross-reference to draft articles 4 and 5, both concerned with equitable and reasonable utilization, linked the question of compensation to the interplay of those two draft articles. In specific circumstances, the result might be that it was not reasonable to require the payment of compensation for significant harm if the duty of due diligence was complied with. With regard to the Commission's use of the term "precautionary approach" instead of "precautionary principle" in draft article 11, his Government's view was that the precautionary principle was part and parcel of customary international law. Irrespective of that consideration, it preferred the term "precautionary principle" in the draft articles.

19. With respect to draft article 16 on emergency situations, although his Government sympathized with the objective of obliging States to provide scientific, technical, logistical and other cooperation to other States experiencing an emergency, it doubted that the provision reflected customary international law. States were obliged to consider responding to requests for assistance, but it was not incumbent on them to provide it. The use of the word "cooperation" merely obscured the law on that point. Similarly, his Government was sympathetic to the derogation provision of paragraph 3 whereby an aquifer State was permitted to disregard two basic obligations, namely, the principle of equitable and reasonable utilization and the obligation not to cause significant harm to other aquifer States, in order to protect vital human needs. However, it was not convinced that a special derogation provision was needed in addition to a State's right to invoke circumstances precluding wrongfulness to justify non-compliance with a particular obligation. The invocation of such circumstances was subject to safeguards, and it would merit further consideration whether or not to forgo such safeguards when the aim was to protect vital human needs.

20. On the topic of responsibility of international organizations, with particular regard to draft articles 28 and 29, which concerned the responsibility of States as members of international organizations, it should be borne in mind that the responsibility of members could also be incurred by international organizations which were members of other international organizations. The commentary had therefore rightly indicated that additional provisions would have to be introduced to deal with such parallel situations.

21. Specifically with regard to draft article 28, the legal literature and the case law of the European Court of Human Rights did not exclude the possibility that under certain conditions State responsibility might arise when States attributed competence to international organizations. However, the draft article

as it stood was too broad. If applied to the United Nations, for example, Members States might be held responsible for having conferred general and far-reaching powers on the Security Council, and it was not out of the question that the Security Council might act in such a way that, if States had done the same, those acts would be considered wrongful. However, if Member States could be held responsible for such acts because they had conferred powers on the Security Council in 1945, it would encroach upon the independent legal personality of the United Nations, frustrate the functioning of the Security Council, as members sought to avoid potential responsibility, and hamper the creation of new international organizations or the attribution of the necessary powers to them. In particular, the proposed article 28 disregarded the importance of the implied or inherent powers of international organizations. By focusing on the responsibility of the members for bestowing powers on international organizations, it overlooked a key feature of such organizations, namely, that they were created in areas where States could no longer deal alone with the challenges they faced. It was impossible to ensure that the attribution of powers was always accompanied by all the international obligations by which each of the members of the organization was bound. There was no practice supporting the broad scope of the proposed article 28, and the proposal would inhibit the dynamism required of international organizations. The situation contemplated in draft article 28 was to a certain extent analogous to that considered in draft article 15, which his delegation had criticized the previous year. The lack of precision of draft article 28 was apparent from paragraph (2) of the commentary to it, which stated that "a specific intention of circumvention" was not required and yet excluded the "unwitting result" of providing an international organization with competence, leaving uncertainty as to what the middle ground might be.

22. With regard to draft article 29, it was unfortunate that the Commission had decided to alter the version proposed by the Special Rapporteur, which had stated in a chapeau the general rule that member States were not responsible for an internationally wrongful act of an organization and then laid out two specific exceptions. The Commission's rationale for the modification was that a positive formulation was better than a negative one, but as a consequence the general rule had disappeared. Even though the commentary stated that such a conclusion was implied, it was no longer part of the text of the draft articles, and in fact the implication was not clear. In draft article 29 there was valid justification for departing from the general approach of identifying positively the cases in which a State incurred responsibility. An explicit provision that members did not have subsidiary responsibility except in two specific cases would better reflect the specific nature of international organizations and protect their autonomy and would be in the collective interest of the members of international organizations. If member States knew that they were potentially liable for contractual damages or tortious harm caused by acts of their organization, they would intervene in virtually all decision-making, and the independent personality of the international organization would become increasingly a sham.

23. In paragraph 28 of its report, the Commission asked whether members of an international organization, even though they were not responsible for the wrongful act of the organization, nevertheless had an obligation to provide compensation, should the organization not be in a position to do so. His delegation saw no basis for such an obligation. In practice, members might decide to make ex gratia payments to an injured party, but there was no reason why they should be obliged to pay compensation if they bore no responsibility for the internationally wrongful act. In any case, from a practical standpoint it might be unworkable if an injured party had to approach all members individually. Moreover, to impose such an obligation would carry the risk he had mentioned earlier that members would feel tempted to intervene in virtually all decisions of the organization.

24. A better approach would be to improve as much as possible the rules and mechanisms to ensure that the international organization responsible for an internationally wrongful act were in a position to provide compensation to injured parties. According to the Commission's definition (draft article 2), an international organization possessed international legal personality, and with such personality came not only rights but obligations. One of the key obligations of international legal persons was to bear responsibility for their internationally wrongful acts. Inability to do so would sooner or later affect the organization's ability to operate autonomously. Ultimately it was in the members' common interest to ensure that their organization could meet its obligations. Hence members must put their organization in a position to

provide compensation to a party that was injured as a result of the organization's internationally wrongful act. The costs involved were costs of the organization that must be paid from the organization's budget, in most cases derived from the contributions of members as decided by the organization's plenary organ. Members had a binding legal obligation to pay their contributions to international organizations, thereby enabling them to provide compensation to injured parties.

25. With regard to the Commission's second question in paragraph 28 of its report, it was hard to imagine how a serious breach of an obligation could be committed under a peremptory norm of general international law, since a constituent instrument that provided for such a power would be void under the terms of article 53 of the Vienna Convention on the Law of Treaties. The only case in which the question could arise was if an international organization acted *ultra vires*. Nevertheless, the introduction of a provision for international organizations parallel to article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts could do no harm. There was no reason why there should not be an obligation for States and also international organizations to cooperate to bring to an end a serious breach of a *jus cogens* obligation of an international organization, and there was nothing in the specific nature of international organizations that would justify departing from the parallel rule for State responsibility.

26. **Ms. Harrington** (Canada) said that many of the topics on the Commission's agenda could not be dealt with by lawyers operating in isolation. The Commission's willingness to seek expert advice about management of transboundary aquifers was therefore sound practice which should be encouraged.

27. The 1997 Convention on the Law of Non-navigational Uses of International Watercourses might not be the most appropriate model on which to predicate the principles governing transboundary aquifers, since the Convention had not yet gained wide acceptance among States and the principle of "equitable and reasonable utilization" ought to be compared with other approaches found in certain bilateral arrangements. The draft articles would have to be studied in order to see whether they provided a basis for a broad international regime on the subject and what implications they might have for certain transboundary aquifers.

28. There were few transboundary aquifers between Canada and the United States of America. Groundwater had not been specifically covered by the 1909 Boundary Waters Treaty, but the Great Lakes-St. Lawrence River Basin Sustainable Waters Resources Agreement, concluded in 2005, did regulate and limit out-of-basin transfers and included groundwater in its definition of the waters of the Great Lakes. Its provisions were consistent with, and subordinate to, the Boundary Waters Treaty.

29. The success of the International Joint Commission established under that treaty had demonstrated the value of cooperative management schemes when dealing with transboundary waters. The International Law Commission should therefore devote more consideration to the manner in which the development of such regimes could be fostered by the draft articles. It was, however, not clear whether the latter Commission really intended to place States under an obligation to establish "joint mechanisms", as the wording of draft article 13 suggested or whether such an obligation would actually be of value. In fact, draft principles might do more than draft articles to promote the long-term development of the law in areas where future State practice would be useful in cementing the Commission's approach.

30. **Mr. Alday** (Mexico), noting the substantial input of technical experts to the draft articles on the law of transboundary aquifers adopted by the Commission on first reading, said that the use of technical terms would facilitate the interpretation of the draft articles by scientists and managers of the resources in question, and that in turn would make for their efficient and sustainable use.

31. Although the 1997 Convention on the Law of Non-navigational Uses of International Watercourses had not yet entered into force, it constituted an indispensable point of reference when broaching the subject of transboundary aquifers, particularly with respect to the application of the general principles of cooperation and the means of preventing, reducing and controlling pollution. The reference by the International Court of Justice to the Convention in its judgment in the case of *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* confirmed its pertinence.

32. Nevertheless, it was necessary to establish a specific regime for transboundary aquifers which were non-renewable or slow to recharge. Once the

Commission had completed its codification work on groundwaters, it should turn its attention to the other shared natural resources of oil and natural gas. The provisions on the utilization of finite natural resources would closely resemble one another.

33. As far as the scope of the draft articles was concerned, it was essential to clarify the rules applying to transboundary aquifers which were hydraulically connected with international watercourses, since, as the draft articles stood, those aquifer systems would be subject to both the provisions of the 1997 Convention on the Law of Non-navigational Uses of International Watercourses and the draft articles. Although, in principle, that situation should not give rise to any difficulties, since it was to be hoped that the two legal regimes would not conflict with one another, it would be desirable to include an article on the relationship between both texts.

34. The inclusion within the scope of the draft articles of activities unconnected with the utilization of transboundary aquifers but likely to have an impact on them was of particular importance. It was equally vital to insert a reference to the activities of non-aquifer States which could have an impact on aquifers.

35. While equitable and reasonable utilization should undoubtedly constitute the basic principle governing the use of shared natural resources, an explicit reference to sustainable utilization would have been preferable to the current wording of draft article 4, subparagraph (d), since it was questionable whether the term "effective functioning" had the same meaning. Moreover, it was debatable whether the notion of sustainability could be applied to the exploitation of non-recharging transboundary aquifers. Furthermore, since their exploitation would inevitably lead to their exhaustion, it was incorrect to speak of their utilization. It was therefore necessary to clarify the application of that notion to the various kinds of transboundary aquifers.

36. The interpretation of draft article 4, subparagraph (b), might likewise give rise to controversy because the notion of "aim" did not make it clear what the compliance threshold was, namely whether the subparagraph laid down an obligation and, if so, whether the obligation was to achieve results or to engage in some particular conduct. Similarly, in subparagraph (c), the reference to the individual or joint establishment of an overall utilization plan might place upstream States in a more powerful position, in that any decision on their part would not have the same repercussions on the utilization of a transboundary aquifer as a similar decision taken by downstream States.

37. The Drafting Committee's text seemed to focus on the harm caused to an aquifer State and did not pay sufficient heed to the protection of the resource itself: the aquifer and the water it contained. While the inclusion in draft article 11 of the words "that may cause significant harm to other aquifer States" was felicitous, draft article 13 should have laid greater emphasis on the obligations of managers of aquifers by going beyond the obligation to enter into consultations and providing for dispute-settlement mechanisms. Moreover, failure to comply with the obligation not to cause harm should entail consequences; for example if a State caused irreversible harm to a transboundary aquifer, the draft articles should specify what kind of responsibility would be incurred as a result of such conduct and on what conditions an affected State might obtain reparation. Draft articles 7 and 8 ought to include some mention of capacity-building.

38. The draft articles proposed by the Drafting Committee provided a suitable basis for a future convention on the subject, as they took account of contemporary international practice and of the need to balance a State's sovereignty over the natural resources in its territory with the necessity of guaranteeing a reasonable and sustainable exploitation of them.

39. **Mr. Roelants de Stappers** (Belgium), referring to Chapter VII of the Commission's report, said that draft article 28 might be erroneously interpreted as demanding that international organizations should respect all the international obligations of their member States, which was not legally correct, desirable or practicable. In order to avoid such an interpretation, the commentary to that draft article should delineate more exactly the scope of the notion "provision of competence" by a State to an international organization. The term should be confined to instances where the provision of competence clearly implied, in particular circumstances, a way in which a member State could circumvent its international obligations on the basis of the organization's constituent instrument.

40. The Commission's formulation of draft article 29 seemed to answer the first of the two questions in

paragraph 28 of the report by specifying in paragraph 1 the cases in which a State member of an international organization was responsible for an internationally wrongful act. That paragraph appeared to suggest that member States were not responsible for the wrongful acts committed by an international organization. Wording should be added to the end of paragraph 2 to the effect that a State's international responsibility was subsidiary to that of the international organization, since several States could incur responsibility in pursuance of draft article 29, paragraph 1, in which case, the States' respective responsibility would be joint and not several, in keeping with article 47 of the articles on responsibility of States for internationally wrongful acts.

41. If the internationally wrongful act had been committed by the international organization, if the members of that organization therefore incurred no responsibility for that act, if the organization, as an international organization, had an international legal personality separate from that of its members and if its legal personality permitted the organization to behave as an independent legal person with its own rights and obligations, it was impossible to see how the members of the organization could be obliged to compensate the injured party. In the *International Tin Council* case, the British courts had clearly ruled that an international organization bore responsibility separate from that of its member States on account of its having legal personality.

42. Hence the answer to the Commission's first question must be in the negative, subject to two qualifications. The first was that the principle was without prejudice to the members' obligations vis-à-vis the international organization, but not vis-à-vis the third party injured by the international organization. In other words, if within its field of competence, the international organization was faced with new obligations resulting from the exercise of powers conferred on it by its member States, including reparation for an unlawful act connected with those powers, it could ask for supplementary contributions from its members in order to meet those obligations. If those contributions were in keeping with the law of the international organization, the members would have to comply. That did not signify that the members were under an obligation to make reparation to the injured third party or that the latter could institute direct or indirect action against the members. The second qualification was that there was nothing to prevent members from granting ex gratia compensation, if they deemed it wise to do so in the light of the circumstances.

43. The answer to the second question in paragraph 28 of the report was obviously in the affirmative. Further justification was, however, required on account of the abundance of sources. Moreover, three points were unclear. First, did the obligation to cooperate set forth in article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts also apply if the serious breach of a peremptory norm had been committed by an international organization? If States must cooperate in order to bring to an end a serious breach of a *jus cogens* norm when it was committed by a State, it was impossible to see why the obligation should be different when the breach could be attributed to an international organization. What mattered was not the status of the wrongdoer (a State or an international organization) but the seriousness of the act to which an end had to be put. Once *jus cogens* norms became *erga omnes* norms, they were obviously binding on international organizations as well. If *jus cogens* bound international organizations in the same way as it did States, it was logical to conclude that the obligation to cooperate could be transposed to international organizations.

44. Secondly, was the obligation to cooperate in order to bring to an end a breach of *jus cogens* attributable to a State or an international organization customary in nature? The commentary to article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts seemed to cast some doubt on the customary nature of the obligation. Although the Commission did not go so far as to assent that it was an obligation under positive law, that position was tenable given that *jus cogens* encompassed the prohibition of aggression, the ban on torture, the fundamental rules of international humanitarian law and the right of peoples to self-determination. That list could be supplemented with the prohibition of genocide, slavery and forced labour and the ban on all racial discrimination. The obligation of States to cooperate in order to bring to an end breaches of those rules was thus embodied in various texts, which were often universal and binding.

45. Thirdly, was that obligation to cooperate also binding on international organizations? To the extent that *jus cogens* norms were *erga omnes* norm, they

were binding on the whole of the international community, including international organizations. Hence the obligation to cooperate obviously extended to the latter, which could therefore be found guilty of having failed in their duty to take action to ensure respect for *jus cogens* norms.

46. That obligation was an obligation to achieve a result in the form of the effective cooperation of a State and/or an international organization rather than the cessation of the serious breach which the cooperation was supposed to secure. The obligation was not in itself a *jus cogens* rule and would be applied without prejudice to the pertinent provisions of the Charter of the United Nations. For that reason, a saving clause, modelled on article 59 of the articles on responsibility of States for internationally wrongful acts, should be added at the end of the draft articles on responsibility of international organizations.

47. **Ms. Escobar** (Spain) said that, although the Special Rapporteur had been wise to adhere closely to the articles on responsibility of States for internationally wrongful acts when drawing up the draft articles on circumstances precluding the wrongfulness of acts by international organizations, it was doubtful whether some of the grounds as currently formulated, were fully applicable to international organizations.

48. Draft articles 17, 20, 21, 23 and 24 were generally acceptable but draft article 18, concerning self-defence, did not sufficiently reflect the fact that the concept of self-defence as applied to international organizations differed considerably from the concept of self-defence as applied to States. Paradoxically, that fact was recognized in the commentaries to draft article 18. It should therefore form the subject of thorough debate in the future.

49. Necessity should preclude the unlawfulness of an act attributable to an international organization but only in certain circumstances. Those circumstances had been noted in the commentaries to draft article 22. Nevertheless, the interest to be safeguarded and its scope gave rise to some misgivings. The Commission had opted for a formula which required the cumulative fulfilling of two conditions: the interest had to be an essential interest of the international community as a whole and its protection must constitute a function of the international organization. The second condition did not give rise to any objections in view of the eminently functional character of international organizations, but the first condition was less acceptable. The determining factor for defining necessity must be the function of the organization. Hence, there was no reason why necessity should not be relied upon in order to defend an interest of the international organization or an essential interest of a member State whose defence formed part of the organization's functions. For that reason, draft article 22 should be revised.

50. The wording of draft article 28 was rather imprecise. In particular, the use of the term "circumvents" when read in conjunction with the ambiguous expression "providing the organization with competence in relation to that obligation" did not sufficiently safeguard the position of a State which, in good faith and without any wrongful intent, provided an international organization with competence in areas which could in some way be related to international obligations assumed by the State outside the organization. That could result in the establishment of objective responsibility, which was unacceptable. Draft article 28 therefore needed to be rethought to take account of two factors: on the one hand the gradual widening of the material scope of international organizations' operations and the resulting impact on the many and various obligations assumed by member States within and outside the organization; and, on the other, the different types of international organizations and therefore the differing status of member States within them.

51. With regard to the precept of subsidiary responsibility in draft article 29, her delegation could endorse its spirit but felt that the meaning of phrases such as "has accepted responsibility" and "has led the injured party to rely on its responsibility" had not been sufficiently elucidated in the commentary and that draft article 29 should therefore be re-examined.

52. Turning to the two questions posed in paragraph 28 of the Commission's report, she said that any answer to the first question must take a variety of factors into account: first, the need to preserve the principle of the separate legal personality of the organization and its member States; secondly, the no less important necessity of safeguarding the principle that, within the framework of international responsibility for a wrongful act, the obligation to provide compensation flowed from the finding that a wrongful act had taken place and hence that obligation

lay with the author of the wrongful act; thirdly, the fact that, according to the general theory of responsibility, those legal subjects which were beforehand generally in a position to act as guarantor for the author of the wrongful act giving rise to responsibility had a subsidiary obligation to provide compensation; and, lastly, the person in question must have expressly agreed to assume subsidiary responsibility. Those circumstances were, on the whole, difficult to apply to a member State of an international organization.

53. As a general rule, and save as otherwise provided in the treaties establishing international organizations or other international instruments to which the State concerned was a party, the member States of an international organization which were not responsible for an internationally wrongful act committed by the organization were not obliged to compensate the injured party if the organization was not in a position to do so.

54. As for the second question in paragraph 28, there were not sufficient grounds *a priori* for concluding that, in the event of an international organization committing a serious breach of an obligation stemming from a peremptory norm, a regime different to that laid down for cases in which the same conduct would be attributable to a State should apply. The draft articles on responsibility of international organizations should therefore also include an obligation on the part of States and other international organizations to cooperate to bring to an end, by lawful means, a breach of those norms by an international organization.

55. **Mr. Tajima** (Japan) said that groundwater was a vital resource required by all human beings in order to sustain daily life. It was therefore most appropriate that the Commission had chosen transboundary groundwaters as the first subject to be studied as part of the topic of shared natural resources. The Commission had rightly steered clear of any overambitious attempt to establish a wide range of rules and principles which would also apply to other resources. Instead it had focused on the formulation of a legal framework which paid due heed to the existing shortage of groundwater resources as a result of overexploitation and pollution. The Commission should be guided by Governments' comments when it decided what form the final instrument should take.

56. The recently adopted draft articles concerning circumstances precluding the wrongfulness of an act of an international organization closely followed the articles on responsibility of States for internationally wrongful acts. It was, however, doubtful whether that approach was really advisable, since international organizations were established by agreement between States for certain objects and purposes. In some situations, it might be possible to find that international organizations were in breach of an international obligation.

57. Since Article 51 of the Charter of the United Nations did not directly apply to the self-defence of international organizations, draft article 18 should take account of the difference between States and international organizations.

58. Member States could not be deemed responsible for an internationally wrongful act of an organization. For that reason, draft article 29 ought to be discussed further when the Commission considered the issue of compensation. Although it was not clear what peremptory norms applied to international organizations, it would seem that any violation of those norms by an international organization would usually be the result of *ultra vires* action by the organization.

59. **Ms. Belliard** (France), commenting on the draft articles on the responsibility of international organizations, said that her delegation had no difficulty with draft articles 17 to 24. Since there was no reason, in dealing with the present topic, for diverging from the rules applicable to States, it was appropriate to make use of the corresponding articles adopted in 2001 on State responsibility for internationally wrongful acts. However, the wording of draft article 22, on necessity, was a departure from that approach. Paragraph 1 (a) contained a very restricted definition of necessity. Moreover, the reference to "an essential interest of the international community as a whole when the organization has [...] the function to protect that interest" would have the immediate consequence of preventing regional organizations from invoking a situation of necessity. That additional restriction did not appear justified, especially given that the articles on State responsibility placed strict conditions on the invocation of necessity. Her delegation would prefer to redefine "an essential interest" in paragraph 1 (a) of draft article 22 as: "an essential interest that the organization, in accordance with international law, has the function to protect".

60. She had no objection to draft articles 25 to 27 but wondered whether a saving clause, accompanied by a commentary, would not have been sufficient instead. Determining what constituted "aid or assistance" in practice could prove difficult. According to the commentary, the influence that might amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization. However, the commentary also mentioned possible "borderline cases", without spelling out what they might be. That made it more difficult to pin down the precise scope of draft articles 25 to 27. The commentary to draft article 25 should indicate a clear distinction between the situation envisaged in that article and the situation referred to in draft article 15, where member States of an organization were implementing one of its decisions.

61. Draft article 28 could be far-reaching in scope, since the nature of the responsibility arising under it did not require a deliberate intention on the part of the member State to evade an international obligation by conferring a particular kind of competence on the international organization. A member State of an organization should incur responsibility only when there was no doubt that its intention in conferring competence was to avoid complying with its international obligations. The cases cited in the commentary to draft article 28 did not, in her view, justify attributing such wide responsibility to a member State of an organization.

62. She had no difficulty with draft article 29, paragraph 1 (a) and paragraph 2. However, paragraph 1 (b), which made a State member of an international organization responsible for the latter's internationally wrongful act if "it has led the injured party to rely on its responsibility" was vaguely worded and might result in a State incurring responsibility merely because it was a member of the organization. In any event, if the acceptance referred to in paragraph 1 (a) included tacit acceptance, the provision in paragraph 1 (b) was unnecessary.

63. The Commission had asked for the views of delegations on whether members of an international organization that were not responsible for an internationally wrongful act of that organization had an obligation to provide compensation to the injured party if the organization itself could not do so. To frame such an obligation would be to deny the standing of the organization as an entity with international legal personality and responsibility for its own acts. The jurisprudence of the *Chorzów Factory* case should apply as much to international organizations as to States. Special arrangements could of course be made, in the constituent instrument of an international organization, for its members to contribute to the indemnification of an injured party.

64. The Commission had also asked whether States and other international organizations were under an obligation to cooperate to put an end, by lawful means, to a serious breach by another organization of an obligation under a peremptory norm of general international law. Although the duty of cooperation was certainly part of the progressive development of international law, there was no apparent justification for a departure on that point from the articles on State responsibility.

65. **Mr. Nesi** (Italy), commenting on the draft articles on the law of transboundary aquifers, said that they provided useful guidance for States on the principles and rules to be included in an agreement concerning a transboundary aquifer. They seemed to strike an appropriate balance between the need to utilize the aquifers and the need to protect them in the long term. They would also remind non-aquifer States of the need to cooperate with aquifer States to protect an aquifer when its recharge or discharge zone was situated on the territory of a non-aquifer State.

66. Turning to the draft articles on the responsibility of international organizations, he said that the somewhat restricted approach adopted in draft article 29 to the responsibility of a member State of an organization for an internationally wrongful act of the organization appeared to be in line with the prevailing international practice, which gave due weight to the separate legal personality of international organizations and made their member States responsible only when that was warranted by the conduct of a member State. If a member State was not held responsible under draft article 29, it seemed to follow that it had no international responsibility to provide compensation to an injured party if the organization was unable to do so. That did not however mean that in such circumstances member States should not strive to provide compensation.

67. On the question of a member State circumventing an international obligation by providing the

organization with competence in relation to that obligation (draft article 28), it seemed reasonable to hold that, generally speaking, a member State could not evade an obligation under international law by delegating competence in that area to an international organization. Whether it incurred responsibility in a particular case would depend on the nature of the obligation and the circumstances of the case. Draft article 28 should identify more clearly the cases in which responsibility arose for a member State.

68. **Mr. Tavares** (Portugal) said that his delegation considered the solutions on shared natural resources which the Commission had provided thus far to be well balanced. It saw some resemblance in the scope of the draft articles to certain articles of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the United Nations Convention on the Law of the Sea. Accordingly, the solutions were consistent with the progressive development of contemporary international law. His delegation reserved the option of making further comments on the draft articles at a later stage.

69. With regard to the approach of the Commission to the sovereignty of aquifer States, his delegation believed that it would be useful to consider taking a more contemporary approach incorporating the doctrine of mitigation. Without questioning State sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory, it might be worthwhile, as a general rule, to consider emphasizing the principle of cooperation between States.

70. Some of the key terms required clarification. His delegation viewed with concern the absence of definitions of “significant harm” (draft article 6) and “significant adverse effect” (draft article 14). It was risky to leave such subjective terms to be interpreted by States on a case-by-case basis in accordance with their interests of the moment. Doing so could place weaker States at an unfair disadvantage, and it complicated the task of distinguishing between the two terms. With regard to draft article 9, consideration should be given to defining the term “ecosystem”, as had been done in the draft principles on international liability in case of loss from transboundary harm arising out of hazardous activities. Finally, the phrase “adversely affects, to a significant extent” in draft article 19 was too vague and raised doubts as to how the extent of the effects should be assessed. All the terms to which he had referred could give rise to differing interpretations and lead to non-compliance by States with their obligations. Accordingly, they should be defined in draft article 2, “Use of terms”.

71. His delegation was pleased that the draft articles dealt with the right to water and the principles of international environmental law. It looked forward to the Commission’s further work on shared natural resources and to seeing the approach it would take to oil and gas along with aquifers. Given the importance of the question of shared natural resources, the final form of the draft articles should be a binding convention.

72. As to the topic of responsibility of international organizations, his delegation continued to believe that the draft articles followed the articles on State responsibility too closely. Many of the examples provided were based on the experience of the European Communities, which was not a good model for the traditional international organizations to which the draft articles were potentially applicable. In many of the draft articles the words “international organization” had been substituted for the word “State” without full account being taken of the differences between them. That was inappropriate, particularly because a convention on responsibility of States did not yet exist. His delegation would continue to advocate in the Committee for highly focused negotiations on such a convention. Assuming one was ultimately adopted, further consideration could be given to adapting some of its provisions to international organizations.

73. Turning to draft articles 17 to 24, on circumstances precluding wrongfulness, he said that it was unclear to his delegation what was meant by the Special Rapporteur’s observation in paragraph 84 of the report that although there was no reason to depart from the general approach taken in the context of States, it was recognized that that did not signify that the provisions would apply in the same way in the case of international organizations.

74. With regard to draft article 18, on self-defence, his delegation had difficulty understanding how, in the light of Article 51 of the Charter of the United Nations, self-defence could be exercised by an international organization. Paragraph (2) of the commentary on the draft article went too far in drawing a general rule on the exercise of self-defence by international organizations from the examples provided:

administering a territory or deploying an armed force. Even in those cases, the State whose forces were in the territory or the individual members of those armed forces were the entities exercising self-defence. Analogous difficulties could arise with the draft articles on *force majeure*, distress and necessity.

75. With regard to the innovations introduced by the Special Rapporteur concerning the responsibility of a State in connection with the wrongful act of an international organization, his delegation questioned the advisability of including the proposed draft articles because they addressed the responsibilities of States, not international organizations. If they were to be included, perhaps they could be incorporated in chapter II, on attribution of conduct to an international organization.

76. As to draft article 27, on coercion, his delegation had difficulty understanding how a State could, in practice, coerce an international organization and wished to know whether there were any examples of such coercion. Regarding draft article 28, his delegation did not believe that a single State could provide competence to an international organization. The issue in the draft article appeared to relate more to the allocation of responsibility than to the provision of competence. With respect to draft article 29, his delegation endorsed the principle of separate responsibility of international organizations and their member States and agreed that the fact of membership in an international organization did not entail responsibility. However, paragraph 1 should be reformulated in more precise language in order to preclude the consideration of implied action.

77. As the work of the Special Rapporteur demonstrated, the principles of State responsibility were in general applicable *mutatis mutandis* to the principles of the responsibility of international organizations. It was therefore preferable to concentrate on elaborating a set of draft articles dealing with the specific problems that the issue of responsibility of international organizations entailed, by identifying general abstract rules applicable to the "average" or "typical" international organization. His delegation therefore continued to advocate both a more focused approach to the specific problems raised by the responsibility of international organizations in connection with State responsibility, either in the same convention or in a related instrument, and the inclusion of a clause providing for the non-applicability of the draft articles under consideration to regional integration organizations, for the reasons he had outlined in the Committee in 2005.

78. **Ms. Rivero** (Uruguay) said that her country, as one of the States of the Guaraní Aquifer, had a special interest in the Commission's work on the law of transboundary aquifers. It took a flexible approach to the question of the form the draft articles should ultimately take but would prefer a set of recommendations or guidelines which could be used by the States of the Guaraní Aquifer as a basis for the formulation of bilateral or regional arrangements.

79. There was a need for more scientific and technological information on the subject. Moreover, the topic of shared natural resources also included oil and natural gas, which although similar in some ways to transboundary aquifers were different in other ways and might necessitate a revision of some of the concepts involved. She welcomed the studies carried out by the Food and Agriculture Organization of the United Nations (FAO), the International Hydrological Programme (IHP) and other international entities, which would lend added credence to the conclusions of the Commission.

80. Brazil, Paraguay and Uruguay were working together on arrangements for the monitoring and sustainable exploitation of the water resources of the Guaraní Aquifer and hoped to bring their experience to bear in future on the endeavours of the international community to regulate the use of transboundary aquifers. She welcomed the emphasis in draft article 3 on the sovereignty of aquifer States. While agreeing in general terms with the criteria framed in the draft articles and the commentaries on them, her delegation could not wholly endorse the definition of "significant harm" in draft articles 6 and 11.

81. **Ms. Wilcox** (United States of America), making preliminary comments on the draft articles on the law of transboundary aquifers, said that the work of the Commission represented significant progress in providing a possible framework for the reasonable use and protection of underground aquifers. However, there was still much to be learned on the subject, and there were wide variations in local aquifer conditions and in State practice. Moreover, the draft articles went well beyond current law and practice. Her delegation therefore preferred context-specific arrangements to address pressures on transboundary groundwaters, such

as the hydrological characteristics of the aquifer concerned, present uses and expectations for future uses, climatic conditions and expectations, and economic, social and cultural considerations. Since many States were interested in having some form of global framework to guide them in negotiating their own arrangements, the draft articles could take the form of a convention to which they could accede. The text should include appropriate final articles for a convention and additional articles establishing the relationship between them and other bilateral or regional arrangements. It should not supersede existing bilateral or regional arrangements or limit the options open to States in entering into them. Given the complexity of the subject, the Commission should continue work on that aspect of shared natural resources to its completion, rather than introduce new aspects at the present juncture.

82. Her comments on the draft articles on the responsibility of international organizations were likewise preliminary in nature. Her delegation continued to feel concern at the underlying assumption that the draft articles on State responsibility were an appropriate model for the present draft articles. States shared certain fundamental characteristics, whereas international organizations varied widely in their structure, functions and interests and were not concerned with the issues of sovereignty, citizenship and territorial integrity which concerned States. For example, it was problematic to transpose the principle of "necessity" to international organizations, because that concept was bound up with State interests relating to citizens or territory. The provision in draft article 22 that an international organization could invoke necessity to safeguard "an essential interest" that the organization had "the function to protect" set a vague and potentially expansive standard. It was not even clear whether any such principle existed which was generally applicable to international organizations. The principles governing resort to force in self-defence could not operate in the same way for international organizations as for States, because the organizations were largely creatures of the States constituting them and did not have the same interest in protecting nationals and national sovereignty. Any right they did possess to act in self-defence could not have the same scope as the right of States to do so.

83. She encouraged the Commission, as it continued its work on the topic, to focus on problems arising in the existing practice of international organizations and to give practical examples to illustrate their relevance. On the question, raised in paragraph 28 (a) of the Commission's report, of compensation for an internationally wrongful act committed by an international organization, she did not believe that members of an international organization had any general obligation to provide compensation for acts for which they were not themselves responsible. The Commission should be cautious about elaborating principles that might deter States from participating in the work of international organizations.

84. **Mr. Sardenberg** (Brazil) welcomed the draft articles on the law of transboundary aquifers. Brazil was especially interested in the topic, given that over 70 per cent of the Guaraní Aquifer, one of the world's largest, was located inside its territory. His delegation could accept most of the draft articles. Draft article 8, paragraph 3, was an important provision for the exchange of cooperation; it avoided placing an excessive burden on a State which received a request for information that was not readily available. He also saw merit in the system proposed in draft article 14, paragraph 3, providing for an impartial assessment of the effect of planned activities that might have an impact on transboundary aquifers. The Special Rapporteur recognized that the opening of negotiations between the notifying and the notified States, or the intervention of a fact-finding body, should not result in the suspension of a planned activity. Draft article 7 set adequate parameters for cooperation in achieving the reasonable utilization and appropriate protection of aquifers.

85. While agreeing with the general thrust of the draft articles, his delegation had certain points of concern. A loose formulation of their scope, such as in draft article 1, subparagraph (b), might have the unwanted effect of imposing unnecessary restrictions on the activities permitted in the area of the aquifer. As examples of activities that could have an adverse effect on aquifers or aquifer systems, reference was made in paragraph (6) of the commentary to farming, the use of chemical fertilizers and the construction of subways. The activities covered by draft article 1, subparagraph (b), should be carefully identified, failing which the Commission should consider deleting that provision altogether.

86. The draft articles should contain a specific reference to General Assembly resolution 1803 (XVII)

of 14 December 1962 and the principle of State sovereignty regarding the use of transboundary resources. Such a reference would make clear that water resources belonged to the States where they were located. The expression "shared natural resources" should not in any circumstances be construed so as to bring into question the sovereignty of a State over parts of aquifers lying within its territory. In that sense, the expression "transboundary natural resources" would be a more appropriate title.

87. The final form of the draft should not be prejudged. It dealt with a very sensitive subject, and the full implications of the draft articles were not yet clear. To ensure that the final text received the endorsement of a majority of States Members, Brazil would favour its taking the form of a non-binding declaration by the General Assembly.

88. He concluded by reaffirming the primary role of regional agreements as the most suitable tool for the legal regulation of transboundary aquifers. Such agreements, by providing for the specific aspects of each aquifer or aquifer system, could offer a body of principles acceptable to all neighbouring States. The Commission should focus chiefly on producing a set of principles for the guidance of States in elaborating such agreements.

89. **Mr. Getahun** (Ethiopia) said that in its work on the draft articles on the law of transboundary aquifers the Commission should rely on those provisions of the Convention on the Law of the Non-navigational Uses of International Watercourses that had attracted the widest support in the international community. Accordingly, the inclusion in the text of the principles of State sovereignty over the portion of a transboundary aquifer or aquifer system located in its territory, equitable and reasonable utilization, and international cooperation was appropriate.

90. However, the draft articles developed to ensure implementation of those principles required further adjustment and refinement. For example, draft article 14, on planned activities, would in effect institute a veto system impeding the development of States in which aquifers originated and would impose excessive obligations on those States. The purpose of the draft article was to facilitate the exchange of information and data, issues that were already addressed sufficiently in draft article 8. Draft article 14, coupled with draft article 6, would create an imbalance in the overall structure of the draft articles. Draft article 1, subparagraph (b), further compounded the situation because it would permit any activity that could have an impact on transboundary groundwater. Given the varying capabilities of States with respect to monitoring and compliance with the obligations envisaged, it was particularly important to review the draft articles on monitoring and management.

91. His delegation agreed that a decision on the final form of the draft articles should be deferred. If the draft articles achieved the required balance, a draft convention might be feasible. The Commission should consider incorporating in the draft articles provisions calling for the avoidance of wasteful utilization or practices.

92. Turning to other topics addressed in the Commission's report, he welcomed the adoption by the Commission of the draft articles on diplomatic protection and on international liability in case of loss from transboundary harm arising out of hazardous activities. It also supported the emerging consensus in the Sixth Committee that Member States should be allowed sufficient time to study the draft articles before they were submitted for possible action by the General Assembly. In particular, the draft articles on diplomatic protection should be further refined through wide-ranging negotiations and consultations among Member States.

93. The draft articles on responsibility of international organizations dealt with fundamental principles of international law and would have repercussions on the activities of international organizations and their members. Accordingly, the Commission must pursue broader consultations with Member States and international and regional organizations. Draft article 17, on consent, should be more tightly drafted in order to define what constituted valid consent, the limits of consent, and how those limits were determined. The Commission should also elaborate on the allocation of responsibility between international organizations and their members in situations such as peacekeeping and peace enforcement operations.

94. With regard to the draft guidelines on reservations to treaties, further elucidation of the question of compatibility of reservations with the object and purpose of treaties and the invalidity of reservations to peremptory norms or *jus cogens* would

add clarity to the subject. His delegation cautioned that competence to determine the validity of reservations rested with the States parties concerned.

95. Although his delegation appreciated the work of the Commission with respect to unilateral acts, it was not yet convinced of the advisability of codifying the rule of law in that area, given the absence of sufficient and consistent State practice. Reliance on the provisions of the 1969 Vienna Convention on the Law of Treaties might not be appropriate owing to the obvious differences in the sources of obligations.

96. The Charter of the United Nations and *jus cogens* or peremptory norms of international law should be at the core of the draft articles on the effect of armed conflicts on treaties. Although the intention of the parties to a treaty should be considered, it should not be the main factor. The Commission should keep in mind that the different status of States with respect to adherence to Article 2, paragraph 4, of the Charter, was critical and that the aggressor State and the victim of aggression were not to be treated on an equal footing.

97. His delegation supported all the Commission's suggestions with regard to topics for its long-term programme of work, particularly codification and the development of norms on protection of persons in the event of disasters. The scope of the subject should include more specific treatment of all relevant actions and the omission of factors such as the obligations of transit countries with respect to the principle of access.

98. **Ms. Kamenkova** (Belarus) said that although the Commission had not yet considered elaborating an implementation mechanism for the responsibility of international organizations, the 30 draft articles it had so far presented were a sound basis for a future universal instrument on the subject. She agreed with the Commission that it was now necessary to frame rules governing the responsibility of States for the internationally wrongful acts of international organizations, whether or not they were members of the organizations concerned.

99. However, draft articles 28 and 29 called for further work. The possibility of a State evading its international responsibility by relying on its membership of an international organization was closely bound up with the issue of effective monitoring of the compliance of States with their international obligations in general. The question of a monitoring mechanism must be addressed either in the text of the draft articles, or in the commentary. Draft article 28 should specify that responsibility could arise for a State if it took part, within the international organization, in adopting decisions that were contrary to international law and that conferred competence on the organization or that sanctioned a particular form of conduct by the organization and its members, when the State concerned was aware of the wrongfulness of the decisions. The condition set in draft article 29, paragraph 1 (b), that "it has led the injured party to rely on its responsibility" was too vague. Draft article 29 should make clear in what form a State might accept responsibility as a member of an international organization, for example, in the constituent instrument of the organization, through a decision by one of its organs, in an agreement between the organization and the member State, by tacit consent, or in some other way. The rules in draft articles 28 and 29 should be applied according to the circumstances of each case. She agreed that the responsibility arising under draft article 29 for States members of international organizations must be subsidiary to that arising for the international organization itself and also for States in the situations contemplated in draft articles 25 to 28.

100. Turning to the issues on which the Commission was seeking the views of Governments and international organizations (para. 28), she said that the present view of her delegation on the question of compensation was that it should be regarded as the consequence of the internationally wrongful act committed by an international organization and of responsibility for that act, not a consequence of a State's membership of the organization concerned. There was no rule of international law that made States responsible for all the acts of the international organizations to which they belonged, merely by virtue of their membership. If any such act was internationally wrongful, a State not responsible for the acts had no duty to make compensation for the damage done. If the organization itself was unable to do so, the duty of compensation must be placed on the member States which were responsible, jointly with the organization, for the wrongful act. Nevertheless, in view of the specific activities of different international organizations, a scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources. A provision to that effect could be included in the draft articles. Her delegation was willing to

participate in resolving the issue. It could not be sensible for responsibility for an internationally wrongful act to be laid on the international organization alone, without any of its members being jointly responsible. That outcome would undermine the authority of the organization and restrict the legal rights of victims. One exception to be borne in mind was the abuse of authority by an official of an organization. In such a case the individual concerned should be responsible for all the consequences, including the payment of compensation.

101. Concerning the second issue on which the Commission was inviting the views of delegations, her delegation took the view that all subjects of international law must cooperate to put an end to breaches of obligations under international law, including those arising under a peremptory norm. However, a final decision on that question should only be taken when the Commission had completed work on the basic elements of the topic of the fragmentation of international law. A rule on cooperation must not be used to justify a breach of norms other than peremptory ones. Draft article 22, on necessity, also raised an issue relating to the topic of the fragmentation of international law. Discussion of the rule framed in that draft article would be more productive when the Committee had dealt with the question of hierarchy in international law, *jus cogens* and obligations *erga omnes*.

102. **Mr. Henczel** (Poland) said that the final form of the draft articles should be a draft convention, given the importance of international protection of transboundary aquifers for all States and as a follow-up to the Commission's earlier work on codification of the law of surface waters. If the idea of a convention prevailed, more precise rules should be established concerning the relationship between that instrument and the Convention on the Law of the Non-navigational Uses of International Watercourses. The Commission's experience in adopting the draft articles, along with constructive comments to be offered by States, would facilitate its codification work on other shared natural resources, including oil and gas.

103. His delegation supported the Commission's approach in modelling the draft articles on circumstances precluding wrongfulness on the draft articles on responsibility of States for internationally wrongful acts. Draft article 17, on consent, referred to "valid consent by a State or an international organization", which his delegation understood to relate to acts performed by an international organization within its powers, whether conferred or implied. However, it was conceivable that an organization could give its consent to another international organization to act, for example, in a territory of a member State; such consent would constitute an *ultra vires* act.

104. An act of the type described in paragraph (3) of the commentary to draft article 18 would very likely take place with the knowledge of the Security Council, in which case it would constitute use of force authorized by a political body of the United Nations, rather than self-defence within the meaning of Article 51 of the Charter.

105. His delegation was disappointed that no proposal had been made regarding the wording of draft article 19, on countermeasures. The draft article should contain an explicit reference to the Charter and United Nations law, in order to indicate the possible scope and substantive and procedural limitations to countermeasures taken by an international organization. The provision on countermeasures was closely related to draft article 28, and his delegation could foresee a situation in which an international organization was empowered by its member States to take countermeasures that, if taken by the States, would constitute an internationally wrongful act and, consequently, abuse of power.

106. With regard to draft articles 25 to 30, his delegation generally agreed that international practice and the theoretical concept of the international legal personality of international organizations logically excluded nearly any form of responsibility on the part of member States for the acts of the organization. However, such responsibility could perhaps be accepted in certain situations, such as where a member State acted on behalf of an international organization and in doing so preserved significant freedom of action, in particular, control over operational decisions.

The meeting rose at 1 p.m.