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

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

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

1. **Mr. Tugio** (Indonesia) said that, in light of new studies referred to in chapter X of the report (A/62/10), his delegation supported inclusion in the Commission's agenda of the most-favoured nation clause, whose clarification was of tremendous importance in light of recent developments in international trade and would contribute to accommodating further the interest of developing countries in competing more fairly in trade and investment, thereby narrowing the socio-economic development gap with developed countries.

2. Concerning reservations to treaties, it was a right of any sovereign State to make such reservations. In a multilateral agreement, a State could not be bound without its consent, reflecting the contractual nature of the legal instrument. However, reservations to treaties should be made in keeping with their objectives, thus securing the integrity of the treaty. The Commission's approach should not deviate from the basic principles of the Vienna Convention on the Law of Treaties: the admissibility of reservations rested on the objective criteria of the object and purpose of the agreement. That constituted a minimum threshold for the validation of a reservation by any State party, which could be found in the substantive part of the agreement itself. The genuine meaning of purpose and object should be construed in light of each case.

3. A State party also reserved the right to object to reservations, and such objection should not be subject to a time limit. Reservations could also be withdrawn at any time. That understanding was important in comprehending the legal implication of a reservation towards another State party, as referred to in paragraph 23 of the report. His delegation was of the view that the advisory opinion of the International Court of Justice on the reservation to the Genocide Convention of 1951 was of practical value in shedding light on the issue.

4. Concerning the expulsion of aliens, he said that the scope of application of the study must be clearly defined. Indonesia strongly favoured the more commonly used and more precise term "national" to the term "*ressortissant*". It was important to recognize the right of a State to expel aliens; at the same time, a procedural safeguard was needed to ensure respect for the human rights of expelled individuals. Moreover, the right to expel should be exercised without discrimination on the basis of nationality, ethnic group, religion or political considerations. His delegation was therefore of the view that the duties and obligations of the expelling State should be reflected in the draft article. The right to expel was not absolute but within the limits established by international law. The right to expel individuals did not preclude the inclusion in the draft of an important prohibition of collective expulsions. It was also important to adopt a more comprehensive vantage point than that of the expelling State, especially in order to expand the scope of application to irregular immigration such as that of migrant workers, as the influx of such workers was in most cases generated by the receiving State's need for cheaper labour. States should avoid arbitrary expulsion of aliens residing in their territory by establishing objective reasons and proofs.

5. Turning to the effects of armed conflicts on treaties, he said that the definition of treaty adopted by the Special Rapporteur was consistent with the Vienna Convention on the Law of Treaties; the scope of the study should be limited, however, to armed conflicts of an international character. Internal conflicts did not necessarily affect treaties between two sovereign States on the basis of their free intentions. Each situation of internal conflict should be evaluated according to specific circumstances. The current article 2 (b) sufficiently described the effect of internal conflict on the operation of treaties.

6. Concerning the responsibility of international organizations, he noted the finding of the Special Rapporteur in paragraph 331 on the insufficient data on relevant practice. That fact underscored the difficulty of establishing the concept of "shared responsibility" between States and an international organization of which they were members in cases of wrongful acts committed by that organization, since such organizations enjoyed independent legal personality. The existence of different categories of international organizations was another factor adding to the difficulty. In light of those factors, the practical implications arising from draft article 43 prompted serious doubts for his delegation.

7. **Mr. Horváth** (Hungary) said that the Commission had had a very productive session and took note of its intention to take up two new and

important topics, the protection of persons in the event of disasters and the immunity of State officials from foreign criminal jurisdiction. However, in view of the number of incomplete items on the Commission's agenda, the inclusion of new topics required careful examination.

8. Concerning the expulsion of aliens, he said that the report gave a comprehensive picture of that important but complex issue. The Commission itself had noted that during debate very divergent views had been expressed on the general approach to the codification of the issue and on individual draft articles. He reiterated his delegation's view that the topic should have been taken up by other institutions and bodies of the United Nations system, such as the Office of the United Nations High Commissioner for Refugees and the Human Rights Council.

9. Concerning the topic of the effects of armed conflicts on treaties, on which the Commission had made noteworthy progress by submitting 14 draft articles, he said that draft articles 8, 9, 12 and 14 required further study by the Working Group, as the Commission itself had noted. His delegation generally agreed with the report of the Working Group as endorsed by the Commission.

10. Concerning draft article 1, his delegation agreed that consideration of treaties involving international organizations should be left in abeyance for the time being, but that the Commission should seek information from international organizations concerned with the topic and should then revisit the question.

11. Concerning draft article 2, he agreed that the definition of armed conflict should also cover the issue of internal armed conflicts in view of their deplorable frequency and intensity. As suggested by the Working Group, States should be able to invoke an internal conflict only when it had reached a certain intensity. His delegation agreed that the term "state of war" was somewhat outmoded, in view of the provisions of the Charter of the United Nations and developments in international humanitarian law, and should be replaced by the term "state of belligerency". The Vienna Convention on the Law of Treaties, in article 73, used the wording "outbreak of hostilities between States".

12. His delegation supported the replacement of former article 6 by article 6 bis. Contrary to some views expressed, a general article should be devoted to such important matters as human rights law, environmental law and the law applicable in armed conflicts.

13. His delegation stressed the importance of draft article 7, which confirmed the existing rule of customary international law, namely that armed conflict should not inhibit the operation of treaties on such important subjects as armed conflicts, the protection of human rights, diplomatic and consular relations, environmental protection, international watercourses, and other important matters related to implementation and advancement of the purposes and principles of the Charter of the United Nations.

14. Responsibility of international organizations was a topic which should hold a prominent place in the general framework of international responsibility. The law on the topic was relatively undeveloped and there was scant case law that would have generally accepted implications. The diversity and expanding interaction of international organizations further complicated the picture.

15. With regard to draft article 43, his delegation strongly supported the justification stated in paragraph (1) of the Commentary but felt that the current wording of the article went beyond the scope of the draft articles. The obligation defined in draft article 43 was closer to cooperation between the international organization and its members than to the responsibility of a State for the internationally wrongful act of an international organization. He shared the majority view that the alternative version of draft article 43 offered in footnote 510 of the report would be unnecessary, since the stated obligation was implied in the obligation of the responsible international organization to make full reparation of the injury as determined in draft article 34 (1). Both the current wording of the supplementary draft article and the version presented in the footnote raised more questions than they intended to solve and required further deliberation. Articles 25 and 29 would provide enough guarantees for injured parties.

16. Concerning the breach by an international organization of an obligation owed to the international community as a whole, he said that other international organizations should also be entitled to make claims — as States may under article 48 of the articles on responsibility of States for internationally wrongful acts — in the interests of the injured State or international organization or of the beneficiaries of the obligation breached. International organizations were

increasingly recognized as fully fledged members of the international community, a fact which supported that stance.

17. As for countermeasures, all the restrictions specified in articles 49 to 53, in particular draft article 50, of the articles on responsibility of States would need to be tested against the differences between international organizations and States.

18. **Mr. Hamaneh** (Islamic Republic of Iran), commenting on the topic of expulsion of aliens, reiterated his country's position that while making a decision to expel aliens was a sovereign right of a State, it should be exercised in accordance with established rules and principles of international law, especially fundamental principles of human rights. Expulsion should be based on legitimate grounds, such as public order and national security. Collective expulsion, contrary to international human rights law and to non-discrimination, should be avoided. The provisions of draft article 5 on non-expulsion of refugees should be in conformity with the 1951 Convention relating to the Status of Refugees. The reference in paragraph (1) of that article to "terrorism" should be deleted as redundant. That the expulsion by a State of its own nationals was absolutely prohibited should be duly reflected in draft article 4. His delegation preferred the more precise term "nationals" to "*ressortissants*".

19. Turning to the effects of armed conflicts on treaties, he said that observance of the sanctity of treaties was a recognized principle in international law and that any act inconsistent with the purposes and principles of the Charter of the United Nations would not affect the continuity and integrity of treaties. He reiterated his delegation's view that the Commission's mandate concerning that topic was to supplement existing international instruments pertaining thereto.

20. Concerning draft article 1 on scope, his delegation did not favour including international organizations, as that subject matter was linked to other topics currently under consideration in the Commission. As recommended by the Working Group, the decision on expanding the scope of the topic to include treaties involving intergovernmental organizations should be deferred.

21. As for draft article 2 (b), his delegation disagreed with the Working Group's recommendation to include internal armed conflicts in the scope of application of the articles and reiterated its long-standing position that the topic should be restricted to international or inter-State armed conflicts. Differences between international and internal conflicts and the non-feasibility of handling both in the same manner militated against broadening the scope. Non-international conflicts could affect a State's ability to fulfil treaty obligations, but that issue should be dealt with in accordance with the articles on responsibility of States for internationally wrongful acts, in particular under chapter V, on circumstances precluding wrongfulness.

22. There was no clear and specific criterion to determine when an armed conflict had reached "a certain level of intensity" for suspending or terminating treaties as recommended by the Working Group (para. 324 (1) (b) (i) of the report). There was general agreement that the outbreak of an armed conflict, as understood from the provisions of common article 2 of the 1949 Geneva Conventions, could not affect the validity of treaties concluded between parties to the conflict. Therefore, his delegation concurred with the view of members of the Commission set out in paragraph 290 of the report that the doctrine of continuity and survival of treaties was central to the whole topic. Accordingly, given the diversity of views over the term "ipso facto" and "necessarily", and in order to duly reflect that well-established principle, his delegation endorsed the suggestion in paragraph 290 that draft article 3 should be redrafted more affirmatively.

23. Absent an express reference in the treaty to the consequences of the outbreak of armed conflict between the parties, the object and purpose of the treaty was indicative of whether the parties intended for it to remain in operation in time of war. Consequently, including in draft article 4 "the nature and extent of the armed conflict" among the factors for determining the intention of the parties with regard to its termination or suspension seemed to be a posteriori self-contradictory. The intention of the parties at the time of the conclusion of a treaty was determinable in accordance with the provisions of articles 31 to 33 of the Vienna Convention of 1969, and that determination should not be overshadowed by and/or subject to subsequent circumstances, including an armed attack, which might occur at any time after the conclusion of the treaty. Neither the armed conflict nor its extent or nature could logically be invoked to explore the

intention of the parties to the treaty. Therefore, paragraph (b) of draft article 2 should be deleted.

24. Concerning draft article 6 bis, his delegation favoured the Working Group's proposal that the draft article should be deleted because the application of human rights law, environmental law or international humanitarian law depended on specific circumstances which could not be subsumed under a general article.

25. Draft article 7 was of key importance. His country could go along with the suggestion to re-examine the enumerated categories of treaties with a view to identifying agreed principles or criteria for determining the treaties that should continue in operation during armed conflict. A combination of the two approaches, namely a set of general criteria followed by a non-exhaustive list of categories of treaties, might prove to be the most viable option in the end.

26. He stressed, however, that draft article 7 should include treaties or agreements delineating land and maritime boundaries, whatever format the draft articles might ultimately take. A treaty establishing a boundary belonged by its nature to the category of treaties creating a permanent regime or status. Such treaties created objective *erga omnes* obligations binding not only the States parties but all the international community. Consequently, even a fundamental change of circumstances such as armed conflict could not be invoked as a ground for terminating or withdrawing from those treaties, as prescribed by article 62 (2) (a) of the Vienna Convention of 1969. Boundary treaties played a critical role in the maintenance of international peace and security and prevention of armed conflicts. The principle of *uti posseditis* indicated the extreme importance States conferred on the continuity and stability of borders, even when arbitrarily drawn by former colonial powers, in order not to endanger the mainstay of the nation state. Excluding treaties establishing boundaries from the list of treaties which should continue in operation during an armed conflict could have consequential implications and send wrong messages.

27. His delegation supported the inclusion of treaties codifying rules of *jus cogens*, as well as those encompassing *erga omnes* obligations, in draft article 7. They should continue in operation during and after an armed conflict.

28. His delegation also favoured the inclusion of draft article 10. A clear distinction should be made between the situations of unlawful use of force by a State and that of self-defence. It was his country's principled position that a State resorting to unlawful use of force must not be allowed to benefit from the consequences of its unlawful act.

29. **Mr. Park** Hee-kwon (Republic of Korea), commenting on the topic of expulsion of aliens, said that his delegation stressed the importance of clearly defining the topic and to that end favoured the term "national" rather than "*ressortissant*". Since the absolute prohibition of expulsion by a State of its own nationals was a well-established legal principle supported by a number of international human rights instruments, his delegation would like to see the deletion of paragraphs 2 and 3 of draft article 4, which provided grounds for such expulsions.

30. Turning to the effects of armed conflict on treaties, he said that the resort in draft article 4 to the intentions of the parties at the time of conclusion of the treaty was problematic. It was unrealistic to expect States parties at the time of concluding a treaty simultaneously to establish their intentions for the treaty in the event of an armed conflict with another State party. More suitable criteria should therefore be developed.

31. Concerning draft article 7, his delegation supported the inclusion of an indicative list of categories of treaties whose objects and purposes involved the necessary implication that they should continue in operation during an armed conflict. That would help to clarify the generalized language of paragraph 1 of the draft article.

32. His delegation understood the idea of draft article 10 and agreed that a State should be allowed some discretion to suspend its treaty relationships where its use of force was justifiable under international law. However, it should be borne in mind that the draft articles were meant to support stability of treaty relationships even under situations of armed conflict. His delegation would thus like to see language supporting greater limitations on the discretion to suspend treaty relationships and proposed replacing the phrase "incompatible with the exercise of the right" with more precise language along the lines of "to the extent necessary to exercise the aforementioned right".

33. His delegation strongly supported the Commission's activities on the topic of responsibility of international organizations. Its successful completion would be comparable to the Commission's achievements in the Vienna Convention of 1969 which, together with the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, had become exemplars of the progressive development and codification of international law. The articles on state responsibility of 2001 should be viewed in that greater context. Rules on the responsibility of international organizations were essential to establishing a comprehensive framework for the law of international responsibility.

34. The responsibilities of international organizations and State responsibility were the two pillars of international responsibility for internationally wrongful acts and should be determined within a basically uniform system, analogous to the relationship between inter-State treaties and treaties between States and international organizations or between international organizations. It was therefore necessary to adhere to the basic framework of common headings and provisions, paralleled by revisions to and additions of provisions reflecting the distinctive qualities of each international organization. The five reports on the responsibilities of international organizations preserved that primary structure, but the Commission should be aware of the possibility that the uniformity might eventually be undermined and should do its best to avoid it.

35. His delegation supported the idea behind paragraph 1 of draft article 35. Just as States could not invoke their domestic laws to avoid obligations under international law, international organizations could not invoke their own rules to evade responsibilities. Paragraph 2 of the article could also be justified by the consent given to the international organization by the member State upon joining it.

36. His delegation had concerns regarding the broad language of article 43, currently requiring member States to take "all appropriate measures" to provide the responsible organization with the means for effectively fulfilling its obligation of reparation. In particular, his delegation did not believe that the provision could guide member States to undertake concrete and apparent measures in a real situation to fulfil the obligations of an organization that was an independent legal person solely responsible for its own acts.

37. **Ms. Iaonnou** (Cyprus) emphasized the specific content of the responsibility of international organizations for the commission of wrongful acts. Her delegation agreed that the corresponding provisions of the articles on State responsibility and their underlying philosophy were suitable for adoption mutatis mutandis for the purposes of the topic of the responsibility of international organizations, which was indeed an extension of, and corollary to, the field of State responsibility. She expressed satisfaction that a clear differentiation was also made in the case of international organizations between the commission of a wrongful act and serious breaches of obligations under peremptory norms of international law. Such breaches and their consequences were particularly important, as was stipulated in draft article 45, paragraph 2. She stressed the primary significance of the corresponding obligations, including the obligation not to recognize entities that were the result of aggression.

38. Because of the considerable differences among international organizations, her delegation favoured a generic approach to wrongful acts, as opposed to an attempt at a legal construction through the extrapolation of principles on the basis of specific examples. Care should be taken to avoid a logic of non-accountability on the grounds of an organization's specificities. The primary aim of the project was to find an appropriate and effective legal methodology for dealing with wrongful acts attributable to international legal entities other than States, bearing in mind the need to define and ensure accountability for such acts for all international actors. Her delegation believed that efforts to adopt the articles on State responsibility in the form of a convention would have a positive impact on the further development of the topic under discussion. While there was a natural and logical order to be observed in the conclusion of the two projects, it was important to stay focused on the nature and gravity of the wrongful act committed, which should determine the consequences thereof. Lastly, the question whether international organizations were entitled to claim cessation and reparation from an organization in breach of an international obligation merited careful consideration, but there seemed to be no reason to exclude international organizations from the *erga omnes* logic.

39. **Mr. Stemmet** (South Africa) said that the provision in paragraph 2 of draft article 4 of the draft articles on the expulsion of aliens that a State could expel its own nationals "for exceptional reasons" would be in conflict with South African constitutional provisions regarding the rights of citizenship and would probably create a dilemma for other States as well. He therefore proposed that consideration be given to the deletion of that paragraph, and accordingly also of paragraph 3 of the draft article. He endorsed the view that the draft articles relating to refugees should be aligned with existing legal instruments on the subject so as not to create conflicting regimes.

40. **Mr. van Bohemen** (New Zealand) expressed appreciation of the work of the Special Rapporteurs and supported the suggestion that their honorariums should be restored. Concerning the topic of the expulsion of aliens, it was an open question whether, having regard to existing international instruments and rules of customary international law governing the long-established right of States to expel aliens from their territory, there was room for an instrument to amplify and codify the law on the subject, particularly in view of its potential impact on labour migration and international efforts to combat terrorism. For the time being, the main concern should be to identify the principles specific to the core subject matter and to ascertain how they related to other relevant legal and policy issues, without prejudging the eventual form of the output. It would not be desirable to have a convention on the topic if it either failed to enter into force or had a very limited membership.

41. He welcomed the progress made on key issues in the draft articles on the effects of armed conflicts on treaties. For the codification exercise to be useful, it should be relevant to current types of conflict. Accordingly, "armed conflict" should cover internal armed conflict, and the ability of States to suspend or terminate a treaty on the grounds of the existence of such a conflict should be qualified. With regard to draft article 4, he agreed that the criterion of intention was problematic and doubted whether the concept of "surrounding circumstances" could be relied on. In addition to an illustrative list of treaties that should be presumed to remain in operation during an armed conflict, it might be helpful to draw up a list of relevant factors or general criteria in order to determine whether a treaty's object and purpose implied its continued applicability in such an event.

42. He welcomed the fact that the draft articles on responsibility of international organizations took into account potential points of difference when compared with State responsibility. On the question of the reparation of victims, while draft article 43 offered one possible approach, the requirement that all appropriate measures should be taken "in accordance with the rules of the organization" required elucidation; it should not be interpreted as justifying inaction by the members of an organization in the absence of suitable rules.

43. **Ms. Telalian** (Greece) said that the definition of "armed conflicts" in paragraph 2 of draft article 2 on the effects of armed conflict on treaties should include both international and non-international conflicts, thereby removing any doubts as to the applicability of treaty obligations in situations of internal armed conflict. While that should indeed depend on the level of intensity of the conflict, the term "non-international armed conflict" should be understood along the lines of Additional Protocol II to the 1949 Geneva Conventions. For both systemic and substantive reasons, international organizations should be excluded from the scope of the draft articles. That issue should be deferred for future consideration, while issues concerning treaty relations between States members of an international organization in a situation of armed conflict, or between them and the organization itself and other related issues, might be set aside for the time being on account of their complexity.

44. Turning to draft article 3, she said it struck the right balance between the rule of non-automatic termination or suspension of treaties and the exception thereto and agreed that it should be read in conjunction with all the following draft articles. However, the phrase "ipso facto" should be retained as better reflecting the principle of the continuity of the treaty during an armed conflict. Moreover, the use of the words "non-automatic" in the text of the draft article would not only be redundant but also weaken its thrust.

45. In draft article 4, while intention should be determined in accordance with articles 31 and 32 of the Vienna Convention of 1969, it should also be deduced from, in particular, the subsequent practice of the parties in the application of the treaty and the nature and surrounding circumstances of any subsequent agreements concluded by them on the subject covered by the treaty. The draft article should be reformulated to take into account additional criteria for better ascertaining the intention of the parties, while the

phrase “at the time the treaty was concluded” should be deleted so as to dispel any confusion. However, the proposed addition of an element that would distinguish between bilateral and multilateral agreements might be a source of confusion since State practice in that regard dated back to a time when treaties had not been widely used. Then again, such a distinction would make it necessary to address the question of the participation of international organizations in the treaty. The inclusion of the “subject matter” of the treaty among the new criteria was a welcome suggestion; however, the reference in draft article 7 to the “object and purpose” of the treaty should be maintained. Her delegation agreed with the proposal of the Commission to include the content of that draft article in draft article 4, because of the close interrelation between the two.

46. The indicative list proposed in draft article 7 would provide States with useful guidance based on past practice, but it should not preclude new categories of treaties from coming within the scope of the draft articles on the basis of future State practice. Furthermore, treaties codifying *jus cogens* rules should likewise be included. As for the suggestion that the non-suspension rule might be applied in relation not only to the treaty as a whole but also to its specific provisions, she felt that the issue deserved further consideration, having regard also to articles 44 and 60 of the Vienna Convention of 1969 and relevant State practice. Draft article 6 bis, while providing useful clarifications, needed to be reformulated so as to make it clear that the *lex specialis* applicable in armed conflict did not exclude the application of human rights or environmental law treaties.

47. She supported the new formulation of draft article 10 and welcomed the Commission’s decision to address the issue of the effect of the exercise of the rights of individual or collective self-defence on a treaty, based on the resolution adopted by the Institute of International Law in 1985. She agreed that articles 7, 8 and 9 of that resolution should be taken into account by the Drafting Committee. Indeed, the draft articles should be inspired not only by State practice, but also by the principles of the Charter of the United Nations regarding the right to self-defence and by other provisions of international law or other relevant material.

48. Turning to the draft articles on expulsion of aliens, she supported the methodology suggested by the Special Rapporteur, stressing that, while the progressive development of international law in that field might be warranted, it was important not to contradict established principles and practices. It was vital to take into account the case law and practice of international and regional, judicial or quasi-judicial bodies. States’ control of the entry and residence of aliens was closely linked to their sovereign right and responsibility to maintain public order and to other legitimate concerns, which must therefore be reconciled with the constraints deriving from the international legal order. As difficult as it was to enunciate general rules and criteria for striking a balance between individual rights and the interests of the State, the search for an appropriate methodology to that end should form part of the discussion on the relevant draft articles. Her delegation therefore welcomed the reformulation of draft article 3 but thought that the reference to the “fundamental rights of the human person” might give rise to a restrictive interpretation and should be replaced by a phrase along the lines of “rules stemming from the international protection of human rights” or “applicable human rights law”.

49. Aliens unlawfully present in the expelling State should not be excluded from the draft articles, which should however take fully into account the distinction between those in a regular situation and those in an irregular situation. Her Government was not in favour, however, of the inclusion of refugees and stateless persons, because of the risk of creating contradictory legal regimes. Other issues that would be better left out of examination of the topic included issues of denial of admission and the situation of aliens entitled to privileges and immunities under international law, extradition and other procedures under international criminal law. She also questioned the advisability of analysing in that context measures that might accompany or be a consequence of the expulsion of an alien.

50. On the question of the collective expulsion of aliens in time of peace, the key element was indeed not quantitative but qualitative. States might legitimately proceed with expulsion, but in doing so they must respect the principle of non-discrimination. In draft article 7, the second sentence of paragraph 1 constituted a good basis for future work, since it served to qualify appropriately the concept of collective expulsion and spelled out an important safeguard for the persons expelled. It was not necessary, however, to

single out, in the first sentence of that paragraph, migrant workers and members of their family.

51. As for the prohibition of the expulsion of nationals, it merited inclusion in the draft articles, as being well enshrined in international law and State practice. Any exceptions to that principle should be carefully specified; it might also be well to provide for procedural safeguards. If a rule of general application was to be formulated, criteria other than nationality, such as nature or intensity of ties with the host country, should be used with caution.

52. She noted that, for those aspects of the topic that touched on issues under existing rules of international humanitarian law, a "without prejudice" clause would be helpful; that the concepts of "national security" or "public order" were wide enough to cover recourse to the measure of expulsion, without explicit mention of terrorism; and that the importance of respect for procedural safeguards, under both domestic law and the applicable treaty law, should be reflected, as appropriate, in the draft articles.

53. Lastly, her Government welcomed the inclusion in the Commission's current work programme of the topics "Protection of persons in the event of disasters" and "Immunity of State officials from foreign criminal jurisdiction" and looked forward to the inclusion in its long-term programme of the topic "Most-favoured-nation clause".

54. **Ms. Seçkin** (Turkey) said, with respect to the topic of the expulsion of aliens, that the inclusion in draft article 5, paragraph 1, of terrorism among the grounds on which a State might lawfully expel a refugee from its territory was welcome, because refugee status was still being exploited by terrorists, notwithstanding paragraph 3 (g) of Security Council resolution 1373 (2001), which called on all States to ensure that such abuse did not occur. Since the content of the term "national security" was imprecise, it would not provide sufficient justification for the expulsion of a terrorist, especially as it was unclear whose national security was meant. Perpetrators of terrorist acts might not be regarded as such by some States if their own public order and national security were not in jeopardy. In addition, persons who had committed terrorist offences in one country might be very careful not to do so in another, in order to use the latter as a safe haven. In short, the omission of an express reference to terrorism among the grounds for the expulsion of a refugee would preserve an existing loophole which was hampering the fight against terrorism.

55. The notions of "public order" and "danger to the community" were likewise too vague to serve as grounds for the expulsion of refugees or stateless persons guilty of terrorist acts. The brackets around the words "or terrorism" should therefore be removed and, for the sake of clarity, the term "terrorism" should be replaced with "counter-terrorism". It should also be borne in mind that, on some occasions, it had proved impossible to convict terrorists by a final judgement, as legal proceedings or extradition procedures against them could not be completed because they had claimed refugee status. As far as paragraph 2 of that article was concerned, it should be remembered that an application for refugee status could be abused to frustrate an expulsion order against persons in an unlawful situation in the territory of the receiving State.

56. **Ms. Shatalova** (Russian Federation) said that, with regard to the subject of the expulsion of aliens, it was doubtful whether some of the issues whose inclusion had been proposed by the Special Rapporteur really fell within the scope of the topic and whether the wording of the corresponding draft articles was therefore apt. In that connection, it would be advisable for the International Law Commission to reconsider the structure of draft article 1 on scope. The list contained in paragraph 2 was not, and could hardly be, exhaustive. For example, it encompassed asylum-seekers, but not persons who had been granted asylum. In principle, it would be preferable to enumerate the categories of person to whom the draft articles would not apply such as, perhaps, persons enjoying special status (in the form of immunities and privileges). At a later stage, the list could possibly be extended to refugees, stateless persons and enemy aliens. Alternatively, the draft articles could be divided into two parts: a general section dealing with various aspects of expulsion as such and a section specifically covering individual categories of persons.

57. It was uncertain whether the scope of the topic included the expulsion of a State's own nationals or of persons possessing dual or multiple nationality, or the deprivation of nationality with a view to subsequent expulsion. If, however, the question of the expulsion of a State's own nationals were to be regulated in the draft articles, it would be necessary to examine the notion of the "exceptional circumstances" which might justify such a measure. Working out objective criteria in order

to determine the existence of such circumstances would be extremely difficult. Apart from that, since the law of most States and many regional international agreements banned the expulsion of nationals, there were grounds for supposing that a corresponding norm of general international law was emerging and that the incorporation of the term “exceptional circumstances” in the Commission’s final text would scarcely promote the progressive development of international law.

58. The codification of the legal standards governing the expulsion of dual or multiple nationals would require the painstaking study of *opinion juris* and State practice in the matter. Since it was doubtful that the expulsion of such persons was prohibited under current international law, the formulation of such a ban, at least in respect of the State of predominant nationality, would be a desirable development of international law.

59. The expulsion of refugees and stateless persons was adequately regulated by the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons, so there was no reason to change the rules established therein. The Special Rapporteur’s proposal hardly constituted a step forward, in that draft article 5 made no mention of the universally recognized principle of the non-refoulement of refugees, whether legally or illegally present in a State’s territory, to countries where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political convictions. If provisions on the expulsion of refugees or stateless persons were to be included in the draft articles, a reference to the rules of the above-mentioned conventions would suffice.

60. The expulsion of aliens during armed conflicts was a subject of international humanitarian law and therefore lay outside the scope of the Commission’s topic. The conclusion drawn in the Secretariat memorandum (A/CN.4/565) as to the absence in international law of any ban on the expulsion of enemy aliens was based on a sufficiently broad analysis of State doctrine and practice.

61. Turning to the topic of the effects of armed conflicts on treaties, she endorsed the Working Group’s decision to replace in draft article 4 the sole and not entirely felicitous criterion of the intention of parties at the time the treaty was concluded with a whole series of indicia of susceptibility to termination or suspension of treaties in case of an armed conflict.

62. Since the principle of treaty continuity was established in draft article 3, it was questionable whether draft article 9 on the resumption of suspended treaties was necessary. In principle, it could be presumed that if a treaty had been suspended owing to an armed conflict, once that latter had ended, the treaty would automatically go back into operation, unless the parties expressed the opposite intention. That was the thesis underlying article 11 of the resolution adopted by the Institute of International Law in 1985.

63. The Working Group’s recommendation to delete draft article 6 bis and its conclusions with regard to draft article 7 were welcome. While the list of categories of international treaties whose operation would not be inhibited by the outbreak of an armed conflict could never be exhaustive, it would be useful to refer to them in the commentary to the draft articles. The defining feature of such international treaties was indeed their subject matter and not their object and purpose.

64. The distinction drawn between a State illegally using force and a State exercising its right of self-defence was of particular significance from the point of view of the legal consequences of their action for their treaty relations. While it was obvious that, in the context of the topic under consideration, the standards of general international law concerning the legality of the use of force should not be touched, the recommendation that the wording of draft articles 10 and 11 should be guided by the ideas set out in articles 7 to 9 of the resolution of the Institute of International Law was sound.

65. Generally speaking, she was not opposed to postponing the decision on whether treaties to which international organizations were a party should be included in the draft articles. On the other hand, her Government still maintained that internal armed conflicts did not fall within their purview, given that internal armed conflicts, unlike international ones, would not usually change the nature of treaty relations between States. The reference to such a subjective factor as the “level of intensity” was not a solution. Indeed, it was pointless to define the term “armed conflict” in the context of the topic when a reference to international humanitarian law would suffice.

66. In connection with draft article 8, she wondered whether, in such an extreme situation as an armed conflict, it was reasonable to be guided by general rules for the suspension or termination of a treaty which were designed for peacetime, since it was unlikely that the procedural rules and deadlines laid down in article 65 of the Vienna Convention on the Law of Treaties could be adhered to in wartime conditions. As for further work on the subject, it would be sensible to take a separate look at the effects of armed conflicts on the treaty-based relations between the parties themselves on the one hand and between the belligerents and third parties on the other. It would also be useful to examine the effects of armed conflicts on both applicable and provisionally applicable treaties.

67. The timeliness of the subject “responsibility of international organizations” was evidenced by the fact that, although far from complete, the Commission’s work was already being relied upon by international judicial bodies such as the European Court of Human Rights. While the Special Rapporteur’s fifth report (A/CN.4/583) had been logically structured, the few examples of practice he had quoted were irrelevant. In many respects, the rules relating to the content of the responsibility of international organizations were similar to those concerning State responsibility. Hence, in Part Two of the draft articles, the Special Rapporteur had been right to follow the provisions of the corresponding part of the articles on State responsibility while duly reflecting the specific features of international organizations in draft article 35, paragraph 2, and draft article 43. She was not opposed to the inclusion in the latter article of the reference to the “rules of the organization” which could, as *lex specialis*, enable those bodies to obtain the resources they required to cover expenditure linked to their international responsibility.

68. The new draft article did not speak of the residual or subsidiary responsibility of member States of an international organization towards an injured party and in point of fact such an interpretation would conflict with the principle that international organizations qua subjects of international law themselves bore responsibility for their internationally wrongful acts. For that reason, it appeared logical that States which derived certain advantages from their membership of an international organization should assume the resultant obligations, one of the most fundamental of which was to provide the organization with the requisite resources to make reparation for injury it had caused.

69. It was incorrect to assert that, in international practice, there were no cases confirming that member States were obliged to provide the injured party with reparation if the organization itself was not in a position to do so. Such an obligation was contained in several international instruments on space law including the 1966 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and the 1971 Convention on International Liability for Damage Caused by Space Objects.

70. In response to the first question on which the Commission would appreciate Governments’ views in connection with international organizations’ responsibility, she said that, since international organizations were playing a growing role in fields such as disarmament, the maintenance of international peace and security and the protection of human rights, they might well be entitled to react to breaches by another international organization of its *erga omnes* obligations. Any such right of action must, however, be limited to the organization’s area of competence.

71. As for the second question, she assumed that, if an international organization intended to resort to countermeasures, it would always have to act within the limits of its mandate and in accordance with its own rules.

72. **Mr. Dinescu** (Romania), referring to the topic of the expulsion of aliens and the definition of terms in draft article 2, said that, although he could understand the reasoning behind the Special Rapporteur’s wish to use the expression “*ressortissant*”, the terms “alien” and “national” had unambiguous meanings in international law, whereas that of “*ressortissant*” was imprecise. Nevertheless, since migration was increasing, it might be prudent to agree with the Special Rapporteur’s suggestion that once he had defined the notions of “alien” and “national”, he should then turn his attention to other situations in which aliens would be deemed to be lawfully present in a State’s territory and therefore entitled to better protection of their rights and to careful consideration of their case prior to expulsion. There should be a general ban on expulsion to States where there was good reason to believe that the expellee would be subjected to torture and other forms of inhuman or

cruel treatment or punishment. Similarly, the expulsion of nationals should be absolutely prohibited by international law in line with international human rights norms. While, in principle, refugees and stateless persons should not be expelled, the rules applicable to them should be consistent with the provisions of the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. As there was no agreed definition of “terrorism”, the latter should not be mentioned as a specific ground for the expulsion of a refugee or stateless person; the more general notion of “national security” would suffice.

73. With regard to the effects of armed conflicts on treaties, he stated that, as a matter of principle, it was vital to uphold the continuity of treaty obligations in the event of armed conflicts, because it was the only approach which would safeguard the international legal order and the stability of international relations. The wording of draft article 3 was therefore commendable, as was the Working Group’s recommendation that treaties involving international organizations should be considered a later stage, since it could be held that they should be included within the scope of the topic by virtue of the fact that both treaties between States and international organizations and treaties between international organizations regulated wide areas of international relations and could be affected by armed conflicts in the same way as inter-State treaties. When the time came, it would be essential to analyse the practice of States and international organizations in that respect.

74. As for the scope of the topic, he disagreed with the Special Rapporteur’s position that it was unnecessary to include treaties provisionally applied between parties because such treaties were covered by article 25 of the Vienna Convention on the Law of Treaties. That article did not extend to exceptional cases where the exercise of rights, or the performance of obligations, under a provisionally applied treaty might be affected by armed conflicts. More thought should also be given to the impact of internal armed conflicts. On the one hand, the fact that such conflicts could affect the application of treaties by the States concerned would warrant their coverage in the draft articles even if the notion of “a certain level of intensity” needed clarification. On the other hand, the way in which internal armed conflicts influenced the application of international treaties could differ substantially from the manner in which they hampered the fulfilment of international treaties. Hence there was merit in the argument that they should be excluded from the topic.

75. With respect to the topic of the responsibility of international organizations, he urged States and international organizations to supply the Special Rapporteur with further examples of practice and case law. The Special Rapporteur had been right to broach the subject by generally following the pattern of the articles on the responsibility of States for internationally wrongful acts, save with regard to certain legal issues arising in the context of international organizations which he had specifically addressed. That was the only way to take account of the special characteristics of international organizations and, at the same time, to create a coherent framework for dealing with responsibility in international law.

76. He endorsed the principles reflected in the draft articles on reparation: the duty of international organizations to make reparation, the forms it could take and the distinction drawn between the obligations owed by international organizations towards their members and those owed towards non-members. He agreed with the reasoning set out in paragraph (1) of the commentary to draft article 35 which explained why an organization could not rely on its rules to justify failure to comply with its international obligations towards third States, but was of the opinion that its rules might be of relevance when the injured State was one of its members.

77. While broadly concurring with the contents of draft article 43, he drew attention to two issues which might raise problems, namely the lack of a precise legal definition of the expression “required” and the possibility that strict adherence to the internal rules of an organization might render timely reparation impossible (for example when they made no provision for calling for extraordinary financial contributions in exceptional circumstances), which would conflict with the very principle of reparation.

78. Lastly, with reference to the Commission’s future programme of work, he was in favour of the inclusion of the topics on protection of persons in the event of disasters, immunity of State officials from foreign criminal jurisdiction and most-favoured-nation clause.

79. **Mr. Lindenmann** (Switzerland), referring to draft articles 31 to 36 on responsibility of international organizations, said that it seemed appropriate to follow the logic and, mutatis mutandis, the wording of the corresponding articles on responsibility of States for internationally wrongful acts. His delegation endorsed in particular the provisions of draft article 35, paragraph 2.

80. International organizations were increasingly involved in activities that could affect the rights of individuals, sometimes to a significant extent, in areas such as peacekeeping, sanctions, criminal justice and economic law. Thus the likelihood of a violation of those rights inevitably increased. Draft article 36, paragraph 2, was particularly important in that context, since it provided that Part Two of the draft articles was without prejudice to any right which might accrue directly to any person or entity other than a State or an international organization. While the principles established in Part Two might, to some extent, be applicable in cases where the rights of individuals were affected, the draft articles were not necessarily intended to cover those cases.

81. With regard to Part Two, chapter II, his delegation agreed with the Commission's general approach of following closely the articles on State responsibility with respect to forms of reparation, namely restitution, compensation and satisfaction, either singly or in combination. Draft article 43, entitled "Ensuring the effective performance of the obligation of reparation", merited closer consideration. In general, his delegation endorsed the underlying principles of the draft article and the reasons put forward by the Commission in support of it. In particular, it agreed with the statement that members of a responsible international organization did not incur responsibility because of their membership of that organization, other than in the cases mentioned in draft articles 25 to 29. It also agreed that there was no subsidiary obligation for members to make reparation when the responsible international organization was not in a position to do so.

82. However, his delegation was of the view that the members of an international organization had a general duty to exercise the rights and obligations associated with their membership in such a way as to allow the organization to act in full conformity with international law. Such a duty became particularly relevant if the international organization nonetheless became responsible for an internationally wrongful act. In that case, the members had to cooperate with the organization so that the latter could fulfil its obligation to make reparation. That appeared to be the thrust of draft article 43, which his delegation endorsed, with one important proviso. The measures required of members in order to provide the organization with the means of effectively fulfilling its obligations constituted a collective effort. However, for each member State or member organization, the obligation to contribute was proportionate to its share in the organization, in accordance with the rules of the organization. Thus, there was no joint liability under which any one member was obliged to contribute the whole amount needed for the organization to make reparation. That was implied by the reference in draft article 43 to the rules of the organization. Nonetheless, the Commission might wish to consider whether the limits on the obligation of the members of a responsible international organization to contribute should be stated more clearly in the draft article.

83. Unlike the other provisions in chapter II, draft article 43 focused not on an obligation of the responsible organization but on an obligation of its members. That was a conceptual difference which the Commission might wish to reconsider. His delegation was flexible as to the suggestion made by a number of other delegations that the wording supported by a minority of Commission members (A/62/10, footnote 510) should be used. In any case, it considered draft article 43 to be a useful provision that should be retained in some form. International organizations were, after all, a creation of their members and, while an organization had a separate legal personality and will, its members continued to share responsibility for its operation. Draft article 43 could also be useful in practice because it emphasized the need for international organizations to make progress in the area of risk management. Where international organizations engaged in risky activities, member States and member organizations might wish to consider in advance the establishment of separate reserves or funds for the purpose of making reparation if the need arose. Members might also consider requesting the international organization in some cases to take out insurance to cover certain risks.

84. The two draft articles in Part Two, chapter III, were in line with the position previously stated by his delegation. With regard to draft article 45, he wished to

add only that the purpose of the international organization in question and the mandate conferred on it by its members placed limits on its duty to cooperate to bring to an end any serious breach of an obligation arising under a peremptory norm of general international law.

85. With regard to the questions posed by the Commission in paragraph 30 of its report, his delegation's preliminary response was along the same lines as the remarks he had just made. If an international organization breached an obligation owed to the international community as a whole, States should be entitled to claim from the responsible organization cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. Such a solution would correspond to the regime provided for in article 48 of the articles on responsibility of States for internationally wrongful acts, where it was a State that was breaching the obligation in question. The subsequent question for the Commission was whether an international organization could also be entitled to claim cessation of the act and performance of the obligation of reparation by another organization which had breached an obligation owed to the international community as a whole. His delegation took the view that the answer to that question should be determined by the purpose and mandate of the organization wishing to make such a claim. There might be limits on such a right arising from the organization's charter.

86. Lastly, the Commission had invited comments on whether an international organization that intended to resort to countermeasures would encounter further restrictions than those that States encountered in accordance with articles 49 to 53 of the articles on State responsibility. Once again, his delegation believed that the extent to which an international organization might resort to countermeasures depended on the purpose and mandate of the organization. If it was established in a particular situation that the international organization was entitled to resort to countermeasures, the restrictions listed in articles 49 to 53 of the articles on State responsibility would apply.

87. **Mr. Roelants de Stappers** (Belgium), referring to the Commission's question in paragraph 29 of the report relating to draft article 43 on the responsibility of international organizations, said that if, within its field of competence, an 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. 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. However, members would have to comply with all their obligations in terms of contributions to the organization.

88. Sometimes that type of obligation was expressly provided for in the organization's constituent instrument, as was the case in article XI, paragraph 1, of the Operating Agreement on the International Maritime Satellite Organization (INMARSAT). However, such provisions were the exception rather than the rule. In their absence, the more general principles of the law of international organizations provided the basis for the obligation of the members of an organization to take appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation to make reparation. The International Court of Justice, in its advisory opinion of 1962 on *Certain expenses of the United Nations*, had stated that, if an expenditure was made for a purpose which was not one of the purposes of the United Nations, it could not be considered an "expense of the Organization". In so far as the expenditures generated by an obligation to make reparation for the consequences of a wrongful act of an international organization resulted from activities that were intended to fulfil the purposes of the organization — which was almost always the case — it could easily be concluded that all expenditures resulting from an organization's responsibility were expenses of the organization.

89. With regard to the Commission's second question, in paragraph 30 (a) of the report, his delegation saw no reason to adopt a different approach from that of article 48 of the articles on State responsibility. Concerning the possible existence of an obligation of States and international organizations to cooperate to bring to an end a serious breach of an obligation under peremptory norms of international law, his delegation had previously stated that, to the extent that *jus cogens* norms were *erga omnes* norms, they were binding on the whole of the international community, including international organizations.

Hence the obligation to cooperate obviously extended to the latter.

90. The same reasoning could be applied, mutatis mutandis, in the present case. An obligation owed to the "international community" as a whole was an *erga omnes* norm, the essential characteristic of which was that, if it was breached, not only the directly injured State but all States were entitled to react in order to restore compliance with the norm in question, which was considered essential in the international legal order. It was logical to extend that right to international organizations. Given that they were "major subjects" of international law whose activities were taking on increasing importance, their cooperation with a view to bringing to an end a breach of a fundamental norm could contribute significantly to a swift restoration of compliance. For that reason, international organizations should have the right to claim cessation of an internationally wrongful act committed by another organization, where the act consisted in the breach of an obligation owed to the international community as a whole. They should also have the right to claim reparation from the responsible organization in the interest of the injured State or of the beneficiaries of the obligation breached.

91. Turning to the Commission's third question in paragraph 30 (b), he noted that the recognition of countermeasures both as circumstances precluding wrongfulness and as instruments for the implementation of the responsibility of States had been highly controversial. For that reason, the right to resort to countermeasures in order to induce a State to comply with its obligations had been strictly circumscribed by the Commission. Articles 49 to 53 of the articles on responsibility of States set out a number of procedural and formal requirements with regard to countermeasures, which seemed a priori to provide sufficient guarantees to ensure that countermeasures did not become instruments of "private justice". It therefore seemed entirely justified to apply the same requirements to international organizations.

92. One problem that might result from the resort to countermeasures by an international organization was the scale of their potential impact on the State or organization that was the author of the initial wrongful act. It should be borne in mind that the collective nature of such countermeasures could have a multiplier effect: economic countermeasures, for example, were clearly likely to have more impact if they were taken by an organization comprising 20 or 30 member States than if they were taken by a single State. However, that type of difficulty could probably be overcome satisfactorily by means of a requirement of proportionality, as formulated in article 51 of the articles on responsibility of States. The transposition of that requirement to international organizations would prevent the type of multiplier effect just described and thereby prevent countermeasures adopted by an international organization from exerting an excessively destructive impact.

93. **Ms. Kamenkova** (Belarus), having welcomed the progress made by the Commission on the topic of responsibility of international organizations, said that her delegation looked forward to the Commission's deliberations on the implementation of the responsibility of international organizations and the completion of the first reading of the draft articles. It was to be hoped that a universal instrument could be adopted in the future on the basis of the draft articles.

94. It was impossible for the draft articles to cover the full variety of international organizations both in terms of the type of work such organizations undertook and in terms of the level of involvement of States in that work. For the time being, the draft articles should contain provisions based on existing practice that were general enough to resolve questions of responsibility for the majority of international organizations.

95. The draft articles adopted at the Commission's fifty-ninth session covered the important issue of the content of international responsibility. Although most of the draft articles were similar in content to the articles on responsibility of States, the difference in legal nature between States and international organizations as subjects of international law should be taken into account in the process of codification of international responsibility. In that context, her delegation endorsed the content of draft article 35: a responsible international organization should not rely on its rules as justification for failure to comply with its obligations in respect of non-members of the organization, whether States or international organizations. The application of those rules to the organization's members, however, was justified by the very nature of international organizations: the benefits gained from cooperation within the framework of the organization were accompanied by risks, including those associated with acts of the organization that entailed international responsibility.

96. With regard to effective performance of the obligation to make reparation for injury caused by an internationally wrongful act, the question of whether or not it was necessary to enshrine the principle of subsidiary responsibility of the State remained open. The proposed wording of draft article 43 raised more questions than it answered. Reparation in accordance with the rules of the organization could be regarded only as a general rule. The question of subsidiary or even joint responsibility of member States might arise in certain cases where significant injury had been caused by the wrongful act of an international organization. The possibility of subsidiary responsibility of member States or member organizations of a responsible international organization should not be completely ruled out in cases where the organization itself was not in a position to make reparation. It was questionable whether an international organization could be held responsible for an internationally wrongful act without any of its members being jointly responsible under any circumstances. Such a position would undermine cooperation within the framework of international organizations and restrict the legal rights of victims. The issue required further consideration.

97. With regard to responsibility for breaches of obligations derived from a rule of *jus cogens*, her delegation believed that States and international organizations should be subject to the same rules of conduct. As for the issue of self-defence, a stronger link should be established in draft article 18 with the provisions of Article 51 of the Charter of the United Nations governing exercise of the right of individual and collective self-defence.

98. The question of resort to countermeasures in response to a wrongful act of an international organization required careful analysis. The application of countermeasures should not impair the exercise of the functional competence of international organizations for the benefit of the general social, humanitarian and other interests of their members that did not give rise to serious international controversy.

99. **Ms. Schonmann** (Israel) welcomed the Commission's inclusion of two new topics in its future programme of works, namely, immunity of State officials from foreign criminal jurisdiction and protection of persons in the event of disasters. Her delegation appreciated the Commission's work with regard to responsibility of international organizations, particularly in view of the insufficient availability of definitive international practice on the subject, but urged it to proceed with caution in developing norms. The draft articles should be made consistent with those on State responsibility, in order to avoid future conflict between the two proposed bodies of law, although due consideration must be given to the profound differences between States and international organizations.

100. She wished to echo the concerns raised by other delegations regarding the wording of draft article 43. Although the commentary to the draft article rightly confirmed that under international law the members of an organization had no subsidiary responsibility towards an injured party when the responsible organization was unable to make reparations, the current wording of the article required more clarity in order to underline that principle. Her delegation supported the inclusion of a specific provision requiring international organizations to take appropriate measures to ensure that their members provided the organization with the means to compensate an injured party. In order to avoid possible legal complexities, her delegation also proposed the creation of a mechanism whereby each international organization would be called upon to create a fund for the purpose of granting compensation in circumstances where legal ambiguities existed with regard to the possible attribution of relative culpability to the member States of an organization. She welcomed the suggestion made by the representative of Switzerland in that regard.

101. Concerning the effects of armed conflict on treaties, although Israel was still formulating its position on the subject and on the question of whether the draft articles were actually necessary, she did have two preliminary comments to make on the draft articles as they now stood. First, her delegation agreed that new draft article 6 bis was redundant and should be deleted. Second, with regard to draft article 7, Israel supported the view that the indicative listing of categories of treaties in the article was problematic, and that a list of relevant factors or general criteria would be more appropriate.

102. Although the topic of expulsion of aliens merited meaningful consideration, her delegation had serious doubts about the scope of the Commission's study. A careful distinction should be made between questions relating to the traditional notion of expulsion and the

issues of a country's non-admission of aliens and its removal of illegal immigrants. Failure to make such a distinction would seem to be incompatible with current State practice. Like other countries, Israel questioned the desirability of including the issue of non-admission within the scope of the topic. The Commission should exercise great caution so as not to become mired in complex, concrete cases before developing general criteria. The scope of the debate should be confined essentially to established rules of customary international law, without considering other controversial issues of international law.

103. **Mr. Henczel** (Poland) said that the Commission was to be commended for its progress in codifying existing rules on the expulsion of aliens. That progress gave hope for further positive development with respect to the seven draft articles referred to the Drafting Committee.

104. Concerning draft article 1, his delegation agreed in general with the proposed scope of the articles, although it would prefer that the term "alien" be defined not in opposition to the wide and imprecise notion of "*ressortissant*", but rather in the context of the much better established concept of "national". It appeared from the English version of draft article 4 that even the Special Rapporteur felt safer speaking about non-expulsion of "nationals" rather than of "*ressortisants*".

105. The terms defined in draft article 2 were those of real relevance to the topic, although the possibility of incorporating some additional definitions should not be excluded. For instance, in draft article 5, the concept of "refugees" was rightly treated in a broad sense, including both de jure and de facto refugees. For the sake of consistency, it might be advisable to define the term the same way in draft article 2.

106. With regard to draft article 4, a very careful approach should be taken to the Special Rapporteur's suggestion regarding exceptions to the prohibition of the expulsion of nationals. Allowing it "for exceptional reasons" could endanger the institution of nationality, which should be regarded not just as a prerogative of the granting State but as one of the principal human rights of individuals. As for draft article 7, which dealt with the prohibition of collective expulsion, his delegation suggested that an appropriate solution would be to follow, to the extent possible, the practice of the member States of the Council of Europe based on the additional protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

107. The question of expulsion of aliens had thus far been considered by the Commission primarily in the context of States' rights. In its future work, the Commission should focus more on the human rights aspects of the issue. Poland would submit exhaustive answers as soon as possible to the questions concerning the expulsion of aliens formulated in chapter III of the Commission's report (A/62/10).

108. With regard to the effects of armed conflicts on treaties, his delegation recognized that the rules on the subject were difficult to discern, given the relative lack of State practice and international case law, and supported the approach taken thus far of formulating articles that were expository in character. The goal should indeed be to put together a set of guidelines, rather than to produce a definitive and dogmatic set of solutions. Keeping that goal in mind should accelerate the process of producing the final document.

109. In discussing the drafting of rules on the topic, the provisions of article 73 of the 1969 Vienna Convention should be kept in mind, especially with regard to the scope of those rules. Accordingly, draft article 1 should refer to the "outbreak of hostilities" rather than to "armed conflict". With that change, moreover, the term could be defined so as to include occupation. His delegation did not see any reason to provide a special regime for treaties being provisionally applied, as there was no such special regime provided for in the Vienna Convention. Although the draft articles should be fully consistent and compatible with the Vienna Convention of 1969, they should not be formulated as a supplement to it. Rather, they should become an independent instrument, following the pattern of the Vienna Convention on Succession of States in Respect of Treaties or the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

110. The presumption of continuous operation of treaties expressed in draft article 3 was laudable. It was consonant with the relevant provisions of the Vienna Convention of 1969 and consistent with the principle of *pacta sunt servanda*. The provisions of draft article 5 bis, on the other hand, were ambiguous, unclear and redundant, and the article should be deleted. As the

draft articles dealt solely with treaties concluded by States, if parties to a conflict were not States the articles could not grant them the capacity to conclude treaties. Lastly, with regard to draft article 8, rather than a reference to the Vienna Convention of 1969, a set of rules on the mode of termination and suspension should be provided.

111. **Ms. Orina** (Kenya) said that chapters I to III of the Commission's report touched on important aspects of the international relations of States. It was important, therefore, that Member States participate actively in the deliberations on those issues in order to ensure that their views and concerns were taken on board in the codification of international law. While the Sixth Committee offered a forum for that purpose, its heavy schedule meant that time was never sufficient for in-depth examination of the topics under consideration. Her delegation therefore encouraged the International Law Commission to circulate its reports in a timely manner and urged Member States to submit commentaries whenever draft documents of the Commission were circulated.

112. Her delegation welcomed the Commission's decision to include the topics on protection of persons in the event of disasters and immunity of State officials from foreign criminal jurisdiction in its work programme. It also considered the establishment of a working group on the most-favoured-nation clause timely. She urged the Commission's secretariat to intensify collaboration with relevant international bodies with a view to organizing regional seminars and discussions on the topical issues under consideration by the Commission in 2008.

113. **Mr. Paasivirta** (Observer for the European Commission), speaking on behalf of the European Community, said that the European Community congratulated the International Law Commission on the rapid progress of its work on the responsibility of international organizations and found the draft articles largely satisfactory. However, as in previous years, it did have some concerns as to the feasibility of subsuming all international organizations under the terms of the draft articles on the topic, given the highly diverse nature of international organizations, of which the European Community itself was an example.

114. Draft articles 31 to 36 followed very closely the model of the relevant articles on State responsibility (A/RES/56/83, articles 28 to 33). As had been pointed out by the Special Rapporteur in his fifth report on the topic (A/CN.4/583), the fundamental principle of full reparation that applied to States should apply equally to international organizations because to exempt them from facing reparation as the consequence of their international wrongful acts would be tantamount to saying that they were entitled to ignore their obligations under international law. The European Community fully endorsed the general principles of the content of international responsibility of international organizations embodied in draft articles 31 to 36. Like States, international organizations were under an obligation to cease a wrongful act and offer appropriate assurances of non-repetition, and to make full reparation for any injury caused by such act. The European Community had accepted those principles, as evidenced by its dispute settlement practices. Moreover, the Community's consent to the provisions of the United Nations Convention on the Law of the Sea concerning responsibility and liability showed its acceptance of the principle of full reparation.

115. With regard to draft article 43, he said that while its provisions seemed acceptable and the language satisfactory, it might not be correctly placed at the end of chapter II of Part Two, which mainly discussed the different forms of reparation, interest and mitigating circumstances. The duty of the members of an international organization with regard to its obligation to make reparation could also be seen as a general principle falling under chapter I. If that view was taken, it would be more appropriate to insert the language of draft article 43 as a new paragraph 3 of draft article 34, although the reference to "this chapter" would have to be deleted.

116. Concerning draft articles 44 to 45, the view that international organizations should face the same consequences as States when their internationally wrongful acts constituted a serious breach of obligations under peremptory norms of general international law was theoretically sound. As to the difficult question of whether the draft articles should specifically emphasize the duty of the members of an international organization to cooperate in order to bring the organization's breach to an end, it would be hard to formulate a rule which applied equally to all members of an international organization when only some of them sat on a particular body thereof that had the capacity to provide an appropriate remedy. The Special Rapporteur therefore had good reason not to attempt to

define a specific duty that members of a responsible organization would have, but to leave the issue to be settled in accordance with the applicable rules of the organization.

117. Lastly, international organizations were, like States, under an obligation not to recognize as lawful a situation created by a serious breach of international law (as provided in draft art. 45, para. 2). In that connection, the Special Rapporteur had rightly mentioned, in his fifth report (A/CN.4/583), the declaration of the European Community and its member States of 1991. However, it should be pointed out that the statement had been a joint statement of both the Community and its members and not only of the members, as the Special Rapporteur had indicated. It therefore formed part of the practice of the European Community as an international organization.

The meeting rose at 6 p.m.