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Chairperson: Mr. Lamine (Vice-Chairperson) . . . . . (Algeria)

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In the absence of Mr. Al-Bayati (Iraq), Mr. Lamine (Algeria) Vice-Chairperson, took the Chair.

The meeting was called to order at 10.10 a.m.

Agenda item 75: Report of the International Law Commission on the work of its sixtieth session (A/63/10)

1. **The Chairman** expressed the Committee's sincere appreciation of the International Law Commission's outstanding contribution to the progressive development and codification of international law. The Committee's consideration of the Commission's report always constituted a high point in the Committee's work on account of the major legal and policy issues which were discussed in that context.

2. **Mr. Vargas Carreño** (Chairman of the International Law Commission), introducing the Commission's report (A/63/10) said that, in 2008, the Commission had held another productive session during which it had completed, on second reading, 19 draft articles on the law of transboundary aquifers and, on first reading, 18 draft articles on the effects of armed conflicts on treaties. It had started to debate two new topics, namely the protection of persons in the event of disasters and the immunity of State officials from foreign criminal jurisdiction and had made steady progress on all the other subjects on its agenda.

3. Interaction between the Commission and Governments was crucial, because in its work of progressively developing and codifying international law, the Commission relied on advice from Governments and on their reactions to broader policy issues, as well as on information on State practice, especially in areas not readily accessible to the public. As was clear from the section of the report describing the Commission's consideration of General Assembly resolution 62/70 on the rule of law at the national and international levels, the Commission had fostered the rule of law by adopting a systematic approach to identifying sources of law and, in doing so, it had paid particular attention to State actions and perceptions.

4. Special Rapporteurs acted as an axis around which the Commission's study of a particular topic revolved. The Commission had therefore pressed for the reintroduction of Special Rapporteurs' honoraria so that as many Special Rapporteurs as possible could interact with delegations during the Committee's discussion of the Commission's report. Such financial assistance was necessary for the research activities of Special Rapporteurs, especially those from developing countries, and moreover, that interaction also ensured that the final product would match practice more closely than if it had been grounded solely on theoretical considerations. For that reason, it might be wise for the Special Rapporteurs concerned and Legal Advisers to hold a thorough debate on one or two chosen subjects from the Commission's programme of work, during the informal meeting of Legal Advisers, which took place at the same time as the Committee's consideration of the Commission's report.

5. Referring first to chapter XII of the report, which was concerned with other decisions and conclusions of the Commission, he drew attention to the importance of cooperation between the Commission and other bodies. For example, it had received its traditional visit from the President of the International Court of Justice which, as always, had afforded an opportunity to widen the horizons of cooperation, and it had held a joint meeting with past and current members of the Appellate Body of the World Trade Organization, enabling it to exchange information about various criteria for interpreting treaties. There were plans to hold a meeting in 2009 with the Legal Advisers of international organizations within the United Nations system. At the same time, the Commission was looking at ways of consolidating existing cooperation agreements in order to make such meetings more focused.

6. The Commission's participation in the International Law Seminar was a vital means of imparting a better understanding of international law. As the number of students was rising steadily, the Commission greatly appreciated Governments' voluntary contributions to the programme. It was also to be hoped that Governments would contribute generously to the trust fund which was being established to clear the backlog in publishing the Commission's *Yearbook*.

7. The Commission had decided to include two new topics in its programme, namely treaties over time, in particular subsequent agreement and practice, and the most-favoured-nation clause. It had elected Mr. Michael Wood (United Kingdom) to fill the casual vacancy caused by Mr. Ian Brownlie's resignation.

8. The two-day event held to celebrate the Commission's sixtieth anniversary had been a great success, because it had been attended by Legal Advisers from all legal systems and cultures, judges from the International Court of Justice, former members of the Commission and other international law experts. As it had constituted a good forum for interaction, it would be useful to arrange such an event every five years, preferably in the first half of a quinquennium. In addition, Member States had held national or regional meetings between members of the Commission and regional organizations, professional associations and academia, which had centred on the Commission's work. It was to be hoped that such activities would continue.

9. The Codification Division of the Office of Legal Affairs, which acted as the secretariat of the Commission, had played a decisive role in preparations for the commemorative event. It also supplied the Commission with invaluable technical, procedural and substantive services, which had included the provision of two excellent memoranda: one on the protection of persons in the event of disasters (A/CN.4/590 and Add. 1 to 3), and the other on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/596). The Division had also done some outstanding work involving the use of information and communication technologies to facilitate the teaching and dissemination of international law, including the Commission's deliberations.

10. Turning to the substantive chapters of the report, beginning with chapter IV on shared natural resources, he drew attention to the 19 draft articles accompanied by a preamble and commentaries, which the Commission had adopted on second reading. The Special Rapporteur had pursued a gradual approach beginning with the law on confined transboundary groundwaters and based on the Commission's earlier work on the law of the non-navigational uses of international watercourses which had culminated in the Assembly's adoption of a convention on the subject in 1997. While drawing up the current draft articles, the Commission had benefited considerably from the advice of specialists from the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization of the United Nations, the United Nations Economic Commission for Europe and the International Association of Hydrologists. The transition from consideration of transboundary groundwaters to that of transboundary aquifers had been the result of that legal and scientific collaboration, thanks to which the Commission hoped that the persons for whom the draft articles were intended, in other words groundwater experts and administrators, would find them easy to consult and use.

11. Part One of the draft articles defined their scope and the use of terms. Since draft article 1 referred to activities that had or were likely to have an impact on an aquifer or aquifer system, the scope of the draft articles went beyond that of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. That wider ambit was justified by the special vulnerability of groundwater to contamination by other external activities. What that really meant in practical terms was spelled out in the substantive articles. Although draft article 2 contained a new definition of the utilization of aquifers or aquifer systems which encompassed not only the extraction of freshwater, heat and minerals but also the storage and disposal of substances, the draft articles in fact, centred on the use of the water resources contained in aquifers.

12. In Part Two, setting out general principles, the principle of an aquifer State's sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory, which was embodied in draft article 3, reflected General Assembly resolution 1803 (XVII) entitled "Permanent sovereignty over natural resources". At the same time, it was recognized that that exercise of sovereignty by States was predicated on general international law and the draft articles themselves. The principle of equitable and reasonable utilization embodied in draft article 4, taken with draft article 5, was decisive for the law related to international water resources. The list of relevant factors for determining equitable and reasonable utilization, contained in draft article 5, was not exhaustive but paragraph 2 did state that special regard must be given to vital human needs. Draft article 6 laid down an obligation not to cause significant harm in undertaking the activities mentioned in draft article 1 and to take appropriate response measures should such harm occur. Aquifer States or States in whose territory the discharge zone of a transboundary aquifer was situated were most likely to be affected by the circumstances in question. In its previous work on the 1997 Watercourses Convention, the Commission had attached particular significance to the threshold of

"significant harm", which it had decided to retain in the current articles. Draft articles 7, 8 and 9 dealt with the general obligation to cooperate, the regular exchange of data and information and bilateral and regional agreements and arrangements. Draft article 9 had previously been draft article 19, but had been moved since it established a general principle.

13. Part Three was devoted to the protection, preservation and management of aquifer and ecosystems. The purpose of draft articles 10 to 15 was to give practical effect to the general principles, particularly those contained in draft articles 7 and 8. Groundwater specialists had pointed to the importance of protecting ecosystems within or dependent upon transboundary aquifers or aquifer systems and of safeguarding recharge and discharge zones, especially those situated outside the aquifer State. In draft article 12, the Commission had opted for the term "precautionary approach" rather than "precautionary principle", since it was a less disputed formulation and it was understood that the two terms produced similar results in practice when applied in good faith. Draft articles 13 and 14 were intended to form the basis on which States could monitor and manage their transboundary aquifers or aquifer systems jointly or on the basis of agreed or harmonized standards. Draft article 15, related to planned activities, departed from the criterion adopted in the 1997 Watercourses Convention in that it did not contain detailed provisions or mechanisms. That had been done expressly in order to give States the requisite flexibility to adopt the mechanisms best suited to the characteristics of their aquifers or aquifer systems. It did, however, lay down general minimum requirements such as assessing the impact of planned activities, notifying those activities and consulting or negotiating with potentially affected States.

14. Part Four, entitled "Miscellaneous provisions" contained four draft articles. Draft article 16, devoted to technical cooperation with developing States, had been included because the paucity of information on aquifers meant that developing countries would benefit considerably from receiving technical cooperation. Under draft article 17, which specified what was to be done in the way of notification and cooperation in emergency situations, affected States could derogate from some general principles otherwise applying to the use of groundwater in order to mitigate the effects of such situations. Draft articles 18 and 19 on protection in time of armed conflict and on data and information vital to national defence and security were essentially similar to the corresponding provisions of the 1997 Watercourses Convention. The Commission would consider dispute settlement mechanisms and the relationship between the draft articles and existing or future binding instruments on watercourses, including the 1997 Convention, at a later stage.

15. The Commission was indebted to the Special Rapporteur and to the Working Group on Shared Natural Resources, for fostering a greater understanding of the subject. In 2002 there had been a dearth of State practice, but since then States had started to adopt a more cooperative approach to the use, protection and management of water resources, including aquifers, and State practice was emerging. The Commission consequently recommended a two-step approach in which the General Assembly would first adopt a resolution taking note of the draft articles and bringing them to the attention of States in order that they might take the appropriate measures. At a later stage consideration could be given to the elaboration of a convention on the basis of the draft articles.

16. With regard to the topic of effects of armed conflicts on treaties, covered in chapter V of the report, the Commission had in 2008 completed the first reading of 18 draft articles and an annex, together with detailed commentaries thereto, which were contained in paragraphs 65 and 66 of the report. Draft articles 1 and 2 dealt respectively with scope and the use of terms. The Commission had retained the approach of including within the scope *ratione materiae* both treaties between States which were parties to a conflict and those between States which were parties to an armed conflict and third States. It had also decided to continue to exclude treaties involving international organizations. The definition of armed conflict in draft article 2 mirrored the provision on scope in that it included conflicts likely to affect the application of treaties between a State party to a conflict and a third State. That introduced an element of flexibility by recognizing that an armed conflict might affect the obligations of parties to a treaty in different ways. Hence, it also included the possible effect of an internal armed conflict on the affected State's treaty relations with another State. The formulation was also intended to include an occupation or a blockade.

17. Draft articles 3, 4 and 5 reflected the underlying policy rationale of the draft articles, namely a

preference for the legal stability and continuity of treaty relations. The principle laid down in draft article 3 would apply automatically by virtue of the law. The possibility of withdrawal from a treaty was excluded from the draft article, since withdrawal presupposed a conscious decision by a State.

18. Draft articles 4 and 5 sought to assist States in ascertaining whether or not a particular treaty was susceptible to termination, withdrawal or suspension in the event of an armed conflict. Draft article 4 listed two sets of indicia: those established in articles 31 and 32 of the Vienna Convention on the Law of Treaties and a new category relating to the nature and extent of the armed conflict, the effects of the armed conflict on the treaty, the subject matter of the treaty and the number of parties to the treaty. The new category replaced an earlier formulation that had emphasized the intention of the parties to the treaty. It was intended not as a set of requirements but rather as a set of possible indications of susceptibility. Any number of them might be relevant depending on the circumstances, and the list was not meant to be exhaustive.

19. Draft article 5 further recognized the fact that there were some types of treaty from whose subject matter it could be inferred that the treaty would continue in operation, in whole or in part, in the context of an armed conflict. The provision was the successor to the earlier draft article 7, the basic concept of which had been retained with some modifications, in particular the replacement of the concept of "object and purpose" with that of "subject matter". The text of the former paragraph 2, which had contained an indicative list of categories of such treaties, had been placed in the annex to the draft articles. Draft article 5 should therefore be read in conjunction with the annex. It was understood that, while the emphasis was on categories of treaties, it might well be that only the subject matter of particular provisions of a treaty carried the necessary implication of their continuance. Furthermore, the list was merely indicative and no priority was to be inferred from the order in which the categories appeared in the annex. In addition, some of the categories were cross-cutting. The selection of the categories was based in large part on doctrine, together with applicable State practice. An analysis of both aspects could be found in the commentary to draft article 5.

20. Draft articles 6 and 7 extrapolated further basic rules from the principles in draft articles 3 to 5 and had been included in order to preserve the principle of *pacta sunt servanda*. They reflected the fact that States might, even in times of armed conflict, continue to have dealings with one another, and they should be read in sequence. Draft article 6 preserved the capacity of States parties to a conflict to conclude treaties and to suspend or terminate treaties operative between them. Draft article 7 dealt with the possibility of treaties expressly providing for their continued operation in situations of armed conflict.

21. Draft articles 8 to 12 were new provisions dealing with a number of matters ancillary to the issue of termination, withdrawal and suspension. Draft article 8, which was based on article 65 of the Vienna Convention on the Law of Treaties, established a basic duty of notification of termination, withdrawal from or suspension of a treaty, while recognizing the right of another State party to the treaty to raise an objection, in which case the matter would remain unresolved for the remainder of the conflict. It had been recognized that it was not feasible to seek to impose a fuller regime for the peaceful settlement of disputes in the context of armed conflict. Draft article 9, which was modelled on article 43 of the Vienna Convention, sought to preserve the requirement of the fulfilment of an obligation under general international law, where the same obligation appeared in a treaty which had been terminated or suspended. Draft article 10 provided for the possibility of the separability of provisions of treaties which were affected by an armed conflict and was based on article 44 of the Vienna Convention. Draft article 11, which was based on article 45 of that Convention, provided for the loss of the right to terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict on the basis of express agreement or acquiescence. Draft article 12 provided for the possibility of the resumption of treaties which had been suspended as a consequence of an armed conflict. The indicia referred to in draft article 4 were also applicable in determining whether such resumption had taken place; such questions would have to be resolved on a case-by-case basis.

22. Lastly, draft articles 13 to 18 dealt with the relationship between armed conflict and other fields of international law, including the obligations of States under the Charter of the United Nations, through a number of without-prejudice or saving clauses. Draft article 13 preserved the right of a State exercising its right of individual or collective self-defence in

accordance with the Charter to suspend the operation of a treaty incompatible with the exercise of that right. Draft article 14 preserved the legal effects of decisions of the Security Council taken under Chapter VII of the Charter. Draft article 15 was intended to prohibit an aggressor State from benefiting from the possibility of termination, withdrawal from or suspension of a treaty as a consequence of the armed conflict it had provoked. Draft articles 13 to 15 were largely based on articles 7 to 9 of the 1985 resolution of the Institute of International Law.

23. Draft articles 16, 17 and 18 dealt with a number of miscellaneous matters: preservation of the rights and duties arising from the laws of neutrality; the question of termination, withdrawal from or suspension of a treaty pursuant to the Vienna Convention; and the revival of treaty relations subsequent to an armed conflict. The latter provision had been included to cover the situation in which the status of "pre-war" agreements was ambiguous. Specific agreements regulating the revival of such treaties were not to be prejudiced by the draft articles.

24. On completion of the first reading of the draft articles, the Commission had decided to transmit them to Governments for comments and observations, with the request that such comments and observations should be submitted to the Secretary-General by 1 January 2010.

25. **Mr. Fife** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), welcomed the presence of members of the International Law Commission at the Committee's meetings on the Commission's report, but expressed regret that financial constraints had prevented some of the Special Rapporteurs from attending. He expressed appreciation of the Commission's efforts to identify specific questions to which States were asked to respond. However, the Commission had not always had before it a sufficiently representative sample of replies to serve as a basis for further deliberations. One way of making the questions more user-friendly would be to explain the background to them, for instance by providing summaries of the discussions in which particular issues and problems had arisen.

26. He welcomed the interaction between the Commission and other United Nations bodies, international courts and other international organizations. The meeting between the Legal Advisers of Member States and members of the Commission as part of the commemoration of the Commission's sixtieth anniversary had provided another useful forum for interaction. Such meetings should take place at least once during a quinquennium, as advised by the Commission. He welcomed the suggestion that one or two topics on the Commission's agenda should be used as the basis for a detailed discussion at the informal meeting of Legal Advisers convened during the Committee's consideration of the Commission's report, in the presence of the Special Rapporteur concerned. He also commended the Commission's contribution to the Committee's debate on the rule of law at the national and international levels.

27. He welcomed the Commission's decision to include in its agenda two new topics, namely "Treaties over time" and "The most-favoured-nation clause". The Commission's work on those topics, particularly the former, would be of common benefit.

28. With regard to the topic of shared natural resources, the delegations of the Nordic countries were in general pleased with the draft articles on transboundary aquifers. However, given the particular vulnerability of aquifers, it was particularly important for aquifer States not to cause harm to other aquifer States. That principle should be reflected in the draft articles. Moreover, the "significant harm" threshold in draft articles 6 and 12 was too high. It would therefore be preferable, in draft article 12, to refer to the "precautionary principle" instead of the "precautionary approach", even though the two concepts led to similar results in practice when applied in good faith. He expressed support for the two-step approach proposed by the Commission, in which the General Assembly would first take note of the draft articles and recommend that States should make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the draft articles. The elaboration of a convention should be considered at a later stage.

29. The challenges of managing transboundary oil and gas reserves were quite different from those relating to transboundary aquifers. The commercial issues involved provided an incentive for neighbouring States to cooperate and find practical solutions of benefit to all parties concerned, lest it prove economically unfeasible for either State to exploit the resources. Legal certainty was vital and was covered under international law by the sovereign right of States

to exploit such resources. To the extent necessary, States had entered into bilateral treaties designed to handle specific cases. For example, Norway had a considerable amount of State practice in the field of cooperation on offshore transboundary petroleum resources, including significant cooperation with the United Kingdom with regard to the North Sea on the basis of a maritime delimitation agreement and subsequent unitization agreements. In 2007, Norway had concluded a maritime delimitation agreement with the Russian Federation containing modern provisions for the unitization of transboundary fields in the Varangerfjord area. In that context, unitization implied consideration of the transboundary field as one unit with a single operator but where earnings and costs were shared.

30. A full consideration of bilateral arrangements would, however, require analysis of a number of practical issues and of corporate law, accounting and economics, since there was an interface between unitization agreements concluded between States and the establishment of joint ventures with unitization arrangements between the oil companies concerned on each side of the boundary. It might be more productive for the Commission to note the existence of such practice rather than to attempt a process of codification, which might lead to more complexity and confusion in relation to the law concerning transboundary oil and gas reserves.

31. **Mr. Laurent** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), welcomed the Commission's completion of its final reading of the draft articles on the effects of armed conflicts on treaties. They merited thorough study and his remarks would therefore be of a preliminary nature. He was pleased to note that draft articles 1 and 4 had been formulated in such a way as to apply to the effect of an internal armed conflict on the treaty relations of the State in question, since such conflicts could affect the operation of treaties as much as international armed conflicts. He also noted that the term "armed conflict" in draft article 2 was defined for the purposes of the draft articles only. If the term were to be used more widely, the definition would have to be formulated with greater regard for the nature of contemporary armed conflicts. The delegations of the Nordic countries would return to that issue as the work on the draft articles proceeded.

32. Draft article 5 provided for situations in which the subject matter of a treaty implied that the operation of the treaty, in whole or in part, was not affected by an armed conflict. There were also situations in which the operation of the treaty or of some of its provisions might be put on hold for the duration of an armed conflict. It might also be the case, as indicated by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* with regard to environmental treaties, that while some basic treaty principles needed to be taken into account during armed conflict, it would be unreasonable to require compliance with the whole treaty or some of its provisions. Environmental treaties were listed in the annex to the draft articles as one of the categories of treaty the subject matter of which involved the implication that they would continue in operation during armed conflict. The delegations of the Nordic countries agreed with those who had raised concerns about the usefulness of such a list of categories. The operation of specific treaties or parts of them during an armed conflict should be considered on a case-by-case basis. It might be advisable to move the mention of specific treaties from draft article 5 to the commentary. In addition, the structure of draft article 10, and the relationship between it and draft article 5, required further study.

33. **Mr. Hafner** (Austria) welcomed the Commission's adoption of the draft articles on the law of transboundary aquifers, which would help to shape State practice in that field. He supported the proposed two-step approach, in which the first step would be for the General Assembly to take note of the draft articles at the current session. In view of the emerging State practice on transboundary aquifers, the final form of the draft articles should be considered at a later stage.

34. A number of issues still required further clarification, in particular concepts such as "accrual of benefits" and "maximizing the long-term benefits", referred to in draft article 4. Furthermore, the relationship between draft articles 7, 9 and 14 would require careful consideration if the draft articles were to become a convention. Article 7, paragraph 2, and article 14 provided for the establishment of joint mechanisms for cooperation and management respectively. Such mechanisms would be established in principle by "bilateral or regional agreements or arrangements", but might be only one possible form of

bilateral or regional cooperation with regard to transboundary aquifers.

35. His delegation shared many of the concerns raised during the Commission's discussions with regard to the relationship between the draft articles and the 1997 Watercourses Convention. Given the many scientific and technical uncertainties with regard to the nature of transboundary aquifers, it would be premature to take a view on the issue. Knowledge about transboundary aquifers had increased in recent years and future practice would help to shape the law in that field.

36. Concerning the topic of effects of armed conflicts on treaties, Austria took the view that in the context of treaties between States, the articles should deal only with international armed conflicts. The codification could become unmanageable if the definition of armed conflicts were extended to cover all possible such conflicts, including non-international and asymmetrical ones. The criteria on which the draft was based were already too complex. The reference in draft article 2 (b) to "armed operations ... likely to affect the application of treaties" left open the question whether all treaties were covered by the definition in that paragraph. Moreover, the criteria set out in draft article 4 (b) governing susceptibility to termination, withdrawal or suspension were unclear and appeared to amount to a circular definition. The draft did not distinguish clearly enough between relations among belligerent States and those between a belligerent and a non-belligerent one, and the reference to neutrality in draft article 16 did not solve that problem. A distinction should be drawn between the two kinds of relations, dealing first with those between the belligerent parties. It was not acceptable that a third State should suffer from an armed conflict in which it was not involved. To safeguard the legitimate interests of third parties in the event of an armed conflict, the solution in article 60 of the Vienna Convention on the Law of Treaties could be applied. Such a solution would conform to the general tendency to maintain treaty relations as far as possible during armed conflicts, and to the generally held view that the law of peace, including treaty law, should prevail as between belligerent States and third States. That solution would also be generally feasible, except where a multilateral treaty embodied norms with an *erga omnes* effect, so that the legal relations resulting from them for individual States could not be distinguished.

37. He welcomed the Commission's discussion of its role in promoting the rule of law at the national and international levels. The Commission could further enhance its role in that respect, and could also suggest specific topics for discussion in the Sixth Committee.

38. Noting the two new topics in the Commission's long-term programme of work, he said that the topic of "treaties over time" was highly relevant. His country could make a contribution to the topic by reference to the principle of obsolescence, in the light of its practice regarding certain provisions of the State Treaty of 1955. As for the topic "The Most-Favoured-Nation clause", before reconsidering it the Commission should analyse how far the situation had changed since the elaboration of the draft articles on the question.

39. **Mr. Popkov** (Belarus) said his country recognized the necessity of examining the effects of armed conflicts on treaties, a question not adequately dealt with either in the Vienna Convention on the Law of Treaties or by the relevant rules of customary international law. Many problems arose for the parties to conflicts and for third States when treaties were suspended or terminated in situations of armed conflict. Progressive recommendations by the Commission on the topic would contribute to the stability of international treaty relations. His delegation agreed with the opinion upheld by the draft articles that armed conflict did not automatically suspend or terminate the operation of treaties. To conclude otherwise would be wholly unreasonable in the modern world, where the norms of the Charter of the United Nations took precedence over other international treaties and there were universal conventions in the field of international humanitarian law. Treaties should remain in force during armed conflicts unless insuperable circumstances made it impossible to perform them.

40. He supported the Commission's endeavour to make clear that it had no intention of creating a special legal regime for the termination of treaties on the outbreak of armed conflicts, such as would exclude the grounds for termination and suspension provided in the Vienna Convention. Those grounds, which could be formulated in the light of the criteria listed in draft article 4, should be regarded as fundamental and not merely supplementary when the possibility of termination or suspension at a time of armed conflict was in question. The proposal, in draft article 4 (a), that a treaty's susceptibility to termination, withdrawal

or suspension should be ascertained by resorting to articles 31 and 32 of the Vienna Convention, was of little practical use, because States did not necessarily have in mind the future possibility of armed conflict when concluding treaties which, by their nature, governed long-term relations between them on a basis of friendship and normality. Moreover, the indicia listed in draft article 4 (b) were somewhat abstract and unconnected with the traditional grounds for terminating and suspending treaties. Their arbitrary use, on their own, could threaten the stability of treaty relations between States, and especially between a State party to the conflict and third countries. The indicia should be given further detailed treatment, by adding criteria referring to the intensity and duration of the conflict. His country was convinced that only a lengthy period of armed hostilities could in practice render impossible compliance with the majority of treaties.

41. He was in favour of the general trust of draft article 5, which should, however be further developed to specify which additional criteria would not affect the operation of certain treaties because of the role of those treaties in protecting the rights and interests of natural and legal persons in the States parties to the conflict and of third countries, and in preserving international security and the international legal order. A mere illustrative list of treaties annexed to the draft articles would not serve that purpose. Article 5 ought to make specific reference to the Charter of the United Nations, international humanitarian instruments and human rights treaties, the constituent instruments of international organizations and treaties concerning State boundaries and their legal regime.

42. Draft article 8 was insufficiently clear on the effects of an objection by a State to the termination or suspension of a treaty. He agreed that it was unrealistic to incorporate into the draft the provisions of article 65 of the Vienna Convention. However, to leave open the question of the effects of an objection would create ambiguity as to the fate of the treaty concerned during an armed conflict and afterwards, and the consequent rights and duties of the parties and their citizens and legal persons.

43. He regretted the absence in the draft of provisions governing the effects of a termination or suspension during an armed conflict, and of any reference in that connection to articles 70 and 72 of the Vienna Convention. The question should not be dealt with in isolation from that Convention, whose provisions should be adapted to the circumstances of an armed conflict, in the light of contemporary international law.

44. When the work on the draft articles had been completed, it would be useful to consider extending them to cover international treaties to which international organizations were parties.

45. **Ms. Defensor-Santiago** (Philippines) said that the draft articles on the law of transboundary aquifers were limited in their application almost exclusively to States in whose territory any part of the aquifers or aquifer systems were situated. That also applied to technical cooperation with developing States under draft article 16, which appeared to refer to developing aquifer States. Non-aquifer States would only be covered if a discharge zone was located in their territory (draft article 6 and draft article 11 (2)); if a recharge zone was located in their territory (draft article 11 (1)); if they were planning activities (draft article 15); if they had an obligation, under draft article 16, to promote scientific, educational, legal and other kinds of cooperation with developing States; and if an emergency originated in their territories (draft article 17 (2)). In the first three of those cases, the nexus of obligation was clearly defined. In the fourth, however, there appeared to be no ground apart from the abstract principle of cooperation for applying the force of law to the non-aquifer State in question.

46. The obligation in draft article 12 to prevent, reduce and control pollution pertained only to aquifer States. The commentary did not explain why no allowance was made for the possibility that a neighbouring non-aquifer State might be a source or potential source of pollution to the aquifer or aquifer system. It must be made clear how the principle *Sic utere tuo ut alienum non laedes* was limited by the exclusion of non-aquifer States which were close neighbours of aquifer States from the obligations in draft articles 6, 7 and 10, especially as the draft articles dealt with the possible effects of their activities on aquifers or aquifer systems.

47. According to the commentary, the term “aquifer State” in draft article 2 (d) encompassed the State’s territorial waters or sea as well as its land territory, and “sovereignty” in draft article 3 extended to an aquifer located in the territorial sea. It would therefore be appropriate to consider the consequences of laying cables and pipelines that entered the territorial sea of a

State, or its land territory, which might be significant for the protection of aquifers or aquifer systems in the territorial sea or in the archipelagic waters of mid-ocean archipelagos. Article 21 (1) (c) and article 79 of the United Nations Convention on the Law of the Sea should be taken into consideration in that respect, since the present draft articles did not attribute responsibility for protection.

48. She endorsed the Commission's recommendation that the draft articles should be annexed to a resolution of the General Assembly and that States concerned should make appropriate bilateral or regional arrangements for their transboundary aquifers on the basis of the principles enunciated in them. There was a need to consider further the concept of sovereignty over shared freshwater resources and the impact of the draft articles on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

49. **Mr. Hwang** Seung-Hyun (Republic of Korea) said that although it was unlikely that the Commission would be able to take up any more new topics in the next few years, in the long term it should deal with the question of the regulation of the Internet in international law, either by having the Secretariat conduct a feasibililty study or by establishing an open-ended working group. Among current topics, the most useful one would be the protection of persons in the event of disasters, which would have practical benefits for populations in distress.

50. Concerning the topic of shared natural resources, he supported the two-step approach outlined by the Special Rapporteur. However, some of the obligations embodied in the draft articles went beyond the current obligations of States, and some of the articles therefore fell short as a declaration of customary law. He suggested that aquifer States should have the option of joining with other aquifer States to conclude agreements that might diverge in substance from the draft articles. They were the ones best fitted to judge the local situation, to weigh competing considerations with respect to particular aquifers, and to manage their shared aquifers.

51. Some of the draft articles imposed obligations on non-aquifer States with respect to activities that might affect aquifer States. The provisions on cooperation, the exchange of information, the protection of ecosystems and pollution control did not, however, apply to non-aquifer States.

52. Any proposal by the Commission to regulate oil and gas resources would probably be controversial, because of the economic and political interests involved. Unlike transboundary aquifers, there was no urgent humanitarian need to protect those resources. As most of the provisions in the draft articles would be inappropriate for them, the Commission should not treat the draft as a template for all transboundary resources.

53. Turning to the effects of armed conflicts on treaties, he supported the proposal to include in the annex to the draft an indicative list of categories of treaties which could continue in operation during an armed conflict. He agreed with the principle embodied in draft article 13 that a State should be allowed some discretion to suspend its treaty relationships where its use of force was justifiable under international law. That discretion should, however, be more strictly limited, because the draft as a whole was intended to support the stability of treaty relations even in situations of armed conflict.

54. Commenting on chapter XII of the Commission's report, he welcomed the fact that international organizations, and the International Court of Justice, were routinely consulted on matters of direct interest to them. Such consultations should be expanded, since the exchanges of views and cooperation with other bodies were especially useful in the complex modern world.

55. **Mr. Tarrisse da Fontoura** (Brazil) said the work of the Commission and the General Assembly on the topic of shared natural resources should be directed towards the establishment of generic principles to guide States in negotiating regional agreements of a more specific kind. If the text elaborated by the Commission was overambitious, with too much technical and legal detail, it would not create a broad consensus among States. The principles concerned should also be sufficiently flexible and balanced to act as a guide to cooperation among States where transboundary aquifers were located, with a view to taking the best advantage of the aquifers in an equitable manner and according to the specific characteristics of each aquifer. The draft should recognize that regional agreements were the most appropriate to regulate cooperation regarding transboundary aquifers, and that such agreements must take priority. His delegation's written comments on the draft articles on the law of transboundary aquifers were contained in document A/CN.4/595.

56. **Mr. Bethlehem** (United Kingdom) said that his Government would respond in unity to the question put in chapter III of the report (A/63/10) relating to the topic of reservations to treaties, responsibility of international organizations and the protection of persons in the event of natural disasters. With regard to the last topic, he said that in the past year natural disasters had been visited on the populations of many States, testing the ability of those States to respond and the ability of the international community to assist. His delegation looked forward to the response of the United Nations and of the International Red Cross and Red Crescent to the question addressed to them in paragraphs 32 and 33 of the report.

57. He welcomed the preliminary report by the Special Rapporteur on the topic of the immunity of State officials from foreign criminal jurisdiction and the very useful memorandum by the Secretariat on that topic (A/CN.4/596). The Commission's work on that topic was of interest to everyone.

58. Turning to the topic of shared natural resources, he expressed support for the Commission's recommendation that the General Assembly take note of the draft articles in a resolution, and encouraged States to continue to negotiate mutually beneficial bilateral arrangements on the issues concerned. The possibility of a convention could be considered later, if thought to be useful. He doubted the need for any universal rules on shared oil and gas resources, or for draft articles on the subject. His country had much experience of cross-border oil and gas fields, and its bilateral discussions with neighbouring States were guided by pragmatic considerations based on technical information. It took the general view that States should cooperate in order to reach agreement on the division or sharing of cross-border oil and gas fields.

59. Turning to the effects of armed conflicts on treaties, he said that his delegation questioned whether it would always be practical for a State party that intended to withdraw from or terminate a treaty to carry out its obligation to notify other States parties of its intention as required under draft article 8, particularly if the other State party or other States parties and the depositary were belligerents. The United Kingdom had a number of other detailed technical comments concerning the draft articles on the effects of armed conflicts on treaties, which were included in his delegation's written statement.

60. His Government welcomed the report of the Commission's Working Group on the most-favoured-nation clause and was supportive of further work in that area. It would be cautious, however, about an exercise that proceeded on the basis of a "one-size-fits-all" approach to the interpretation of most-favoured-nation clauses. It was clear that not all such clauses were drafted in the same terms. The problem identified in paragraphs 23 and 24 of annex B of the Commission's report in relation to the case of *Maffezini* v. *Kingdom of Spain*, for example, was one that might simply be regarded as a question of treaty interpretation. In contrast, in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A*. v. *the Hashemite Kingdom of Jordan*, also alluded to in the report, the International Centre for the Settlement of Investment Disputes tribunal had been faced with a differently worded most-favoured-nation clause, which had enabled it to reach a different conclusion from that reached in *Maffezini* case. His delegation agreed that some guidance on the interpretation of such clauses would be useful, but would encourage the Commission to be flexible concerning the final form of its work. He welcomed the establishment of a Study Group on the topic and hoped that States would be given suitable opportunities to comment on its reports.

61. With regard to the report on "treaties over time" in annex A to the Commission's report, his delegation agreed that it would be useful for the Commission to examine the topic. However, as the subject was potentially very broad, the focus should be limited to issues relating to subsequent agreement and subsequent practice with respect to treaties. His delegation agreed with the two goals identified in the report, namely, first to produce a repertory of practice and thereafter to identify guidelines and conclusions that might be drawn from that repertory. The issues of subsequent agreement and subsequent practice in the interpretation and application of treaties must be rooted in what States actually did, and the United Kingdom therefore supported an approach aimed at identifying whether there were any general guidelines that might be drawn from State practice.

62. **Mr. Witschel** (Germany) said that his Government was pleased that the Commission had taken up the issue of transboundary aquifers, which had tremendous positive potential for environmental protection and development, but also had negative potential to trigger international conflicts. Germany

supported the two-step approach recommended by the Commission with respect to the draft articles and the possible subsequent development of a convention, and was satisfied with the draft articles in their current form. It particularly welcomed the general principles of cooperation and coordinated utilization of resources laid down in draft articles 3 to 8.

63. With regard to his country's utilization of groundwater, Germany was bound by a number of European Union directives on the subject and thus had already implemented the provisions of draft articles 8 and 9. He concurred with the view expressed by the representatives of Norway and the United Kingdom with regard to groundwater, namely, that it should be treated separately from oil and gas deposits, even if some geological factors might suggest dealing with the two resources together. However, such a limited geological approach would, to some extent, ignore social and economic implications, which were very different with regard to groundwater from those associated with oil and gas. Furthermore, oil and gas deposits were usually found at much greater depths than groundwater deposits, which made comparisons even more problematic.

64. His delegation would submit detailed written observations on draft articles 2, 4, 5, 7 and 13 and the commentaries thereto. It also planned to submit written comments on the draft articles on effects of armed conflicts on treaties.

65. Germany welcomed the inclusion of "treaties over time" in the Commission's long-term programme of work and the establishment of the Study Group on the topic. His Government had repeatedly highlighted the growing importance of the issue of correct interpretation of international treaties in changing circumstances and was confident that the Commission's work would produce important results. His delegation also welcomed the Commission's continued efforts to enhance the relationship between itself and the Committee. Closer relations and coordination would benefit all parties involved and would form a natural basis for the development of international law. Good coordination and cooperation could not be achieved, however, without active contributions from States. Detailed preparatory meetings of Legal Advisers on topics selected in advance, as proposed in the report, would increase efficiency. However, such proposals should not lose sight of the importance of the contributions of States to the development of international law in general and the work of the Commission and the Committee, in particular.

66. **Mr. Seger** (Switzerland), referring to draft articles 1 and 2 on the effects of armed conflicts on treaties, said that, unlike the delegation of Austria, his delegation believed that it was appropriate to include internal conflicts within the scope of the draft articles, although the effects of an internal conflict on treaty relations would not necessarily be the same as those of an international conflict. Indeed, the internal or international nature of an armed conflict was one of the elements to be considered within the terms of draft article 4 (b) in order to determine whether a treaty was susceptible to termination, withdrawal or suspension in the event of an armed conflict.

67. With regard to draft article 5, his delegation wondered what had led the Commission not to include treaties relating to international criminal law in the indicative list of treaty categories contained in the annex to the draft articles. It was true that some crimes defined in such treaties could also fall under the categories of treaties relating to human rights or international humanitarian law, but that was not true of all crimes recognized under international law. In his delegation's view, "treaties relating to international criminal law" should be added as a category to the list in the annex because the subject matter of such treaties involved the implication that they would continue in operation in the event of armed conflict.

68. The provisions in the draft articles containing "without prejudice" clauses were justified and important. Draft article 16, concerning rights and duties arising from the law of neutrality, was, of course, of particular importance to Switzerland. In that connection, he agreed with the Austrian delegation's observation that a clearer distinction was needed between treaty relations involving belligerents and those involving a belligerent and a third State. His delegation's written statement contained additional technical comments on the draft articles on the effects of armed conflicts on treaties.

69. **Mr. Astraldi** (Italy) welcomed the Commission's adoption on second reading of the draft articles on the law of transboundary aquifers. The text adopted contained a valuable survey of issues that States should address when concluding agreements with regard to transboundary aquifers. An important result of the draft

articles was that they would increase awareness of all the problems involved in regulating such aquifers. However, as the solutions outlined in the draft articles were of a fairly general nature, the States concerned would need to agree on the necessary specifications in order to provide effective protection of their transboundary aquifers and ensure an equitable apportionment of resources.

70. He was not certain that the adoption of a convention based on the draft articles would add much value, as the subject of transboundary aquifers was not one on which a framework convention would be useful. His delegation would prefer that the General Assembly take a decision at the current session with regard to the eventual drafting of a convention, rather than leaving the question in abeyance as proposed by the Commission.

71. The draft articles on effects of armed conflicts on treaties provided a useful basis for future work. The principle set out in article 3, namely, that the outbreak of an armed conflict did not necessarily terminate or suspend the operation of treaties, deserved endorsement. However, it should not be ruled out that in certain cases termination or, more likely, suspension of the effects of a treaty might occur in the event of armed conflict, such as when a treaty contained an express provision to that effect. Accordingly, the wording of draft article 7, which addressed only the case of treaties that expressly provided for continued operation in situations of armed conflict, should be modified to convey the idea that any treaty provisions must be regarded as decisive, whether they provided for the treaty to continue in operation or provided the contrary.

72. Draft article 3 concerned the operation of treaties between the States parties to an armed conflict and between a State party to an armed conflict and a third State; it would be useful to specify that other provisions were also intended to apply to both cases. It should be recognized that the solutions would not necessarily be the same when two States parties to a treaty were involved in an armed conflict as when only one was involved. Moreover, the case in which two States might be on the same side in an armed conflict should also be considered.

73. The draft articles and commentary gave great weight to the implications that might be drawn from the subject matter of a treaty. Since the scope of treaties was often broader than the subject matter specifically considered as relevant according to the indicative list of treaty categories contained in the annex to the draft articles, it was not clear what implication should be drawn with regard to a treaty which contained certain provisions that suggested that the treaty would continue in operation in the event of armed conflict, but which also contained provisions dealing with matters not covered in the annex. Partial suspension of such a treaty with regard to the latter matters would presuppose separability of treaty provisions, but separability could not be easily assumed.

74. In order to complete its work on the effects of armed conflicts on treaties, the Commission should undertake a more thorough examination of relevant State practice, in particular national judicial decisions. That analysis of State practice should be reflected in the final commentary.

75. Several interesting points and suggestions had come out of the meeting with Legal Advisers organized in conjunction with the commemoration of the Commission's sixtieth anniversary. It was now expected that the Commission would act on those suggestions. With regard to the two new topics included on the Commission's programme of work, the studies thereon should be carefully delimited and should address issues that were clearly relevant to practice and that might be the subject of guidelines or draft articles. The addition of those two topics would increase the number of items on the Commission's agenda from eight to ten, which was a source of concern. The Commission should avoid overloading its programme of work and, instead, concentrate on a limited number of subjects, endeavouring to conclude its examination thereof more speedily.

76. **Mr. Al-Otaibi** (Saudi Arabia) drew attention to the observations of his country on the draft articles on the law of transboundary aquifers contained in document A/CN.4/595 in which his country had pointed out, in particular, that the draft articles did not address the banning of directional, slant and horizontal drilling in aquifers, nor did they refer to the fact that the articles did not apply to parties that were not aquifer or aquifer system States.

77. The draft articles likewise failed to take into account differences in the extent, thickness and other characteristics of an aquifer, the direction of the flow

of groundwaters or variations in population from one State to another. Similarly, they did not refer to the use of pollution-causing substances and their effect on aquifers or aquifer systems, or deal with hidden groundwater sources, a subject fraught with danger because of the lack of precise information and data and the many underground geological formations, such as fissures and folds, which might impede the flow of certain groundwaters.

78. It would be preferable to have a mechanism for the exchange of successful experiences in the management of transboundary aquifers so that other countries might benefit from such experience. Lastly, he said that, although the general concept underlying the draft articles encompassed both aquifers and aquifer systems, some of the articles referred only to aquifers and not to aquifer systems. Examples included draft article 6 (2), draft article 7 (1) and draft article 8.

79. **Mr. Horák** (Czech Republic) said that the draft articles on the law of transboundary aquifers struck a balance between the principle of sovereignty of States over natural resources, their reasonable and equitable utilization, their preservation and protection and the obligation not to cause significant harm. On the question of the final form of the draft articles, the Czech Republic was aware that the differing views and customs of States regarding transboundary aquifers made it difficult to build a broad consensus for a binding international convention. Concerns about potential failure had recently been heightened by the case of the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, which had not yet entered into force because it had not been ratified by a sufficient number of States. Nevertheless, the Czech Republic favoured the development of an international convention incorporating the draft articles and was pleased that the Commission had left that possibility open. Recognizing that it might take considerable time to create such an international instrument, however, his delegation welcomed the two-step approach proposed by the Commission and hoped that the draft articles would be accepted by the largest possible number of States as guidance for bilateral and multilateral treaties that would facilitate reasonable and equitable utilization of transboundary aquifers.

80. Concerning the effects of armed conflicts on treaties, the Czech Republic supported the definition of "treaty" contained in draft article 2, which was taken from article 2 (1) of the Vienna Convention on the Law of Treaties. As the primary purpose of the draft articles was, in his delegation's view, to supplement that Convention, the draft articles should not deal with treaties concluded by international organizations, particularly as they did not generally participate in armed conflicts.

81. His delegation did not consider it necessary to include a definition of "armed conflict" in the draft articles, for two reasons. First, the term belonged to the sphere of international humanitarian law and had been clarified to a large extent by the recent jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in particular the Appeals Chamber judgement in the *Tadić* case. The recent Trial Chamber judgement in the *Haradinaj et al*. case had further elucidated the meaning of the term "internal armed conflict". Second, the inclusion of a separate definition of "armed conflict" in treaty law might contribute to the fragmentation of international law.

82. Concerning the scope of application of the draft articles, the Czech Republic would prefer not to restrict it to situations involving an international armed conflict, as had been suggested by some delegations. Although his delegation understood that the Vienna Convention on the Law of Treaties dealt with inter-State relations only, it believed that leaving internal armed conflict out of the draft articles would greatly limit their applicability, as most present-day armed conflicts were internal.

83. His Government was in agreement with draft article 3, which, in its view, constituted the core of the draft articles and was supported by customary international law. The Czech Republic was also satisfied with the current wording of draft article 4 and was pleased that the criterion of the intention of the parties to a treaty had been abandoned. In his country's experience, the States negotiating a treaty did not usually think about the consequences of a possible armed conflict on that treaty. Lastly, while his delegation agreed with the wording of draft article 14, in the light of Articles 25 and 103 of the Charter of the United Nations, it considered that article to be superfluous.

The meeting rose at 1 p.m.