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Chairman: Mr. Baghaei Hamaneh (Vice-Chairman) . . . . . (Islamic Republic of Iran)

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09-57841 (E)

In the absence of Mr. Benmehidi (Algeria), Mr. Baghaei Hamaneh (Islamic Republic of Iran), Vice-Chairman, took the Chair.

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

Agenda item 81: Report of the International Law Commission on the work of its sixty-first session (*continued*) (A/64/10 and A/64/283)

1. **Mr. Seger** (Switzerland), referring to the issues raised in relation to the topic "Responsibility of international organizations" in paragraph 27 of the Commission's report (A/64/10), said that, with regard to the question of when conduct of an organ of an international organization placed at the disposal of a State was attributable to the latter, it was difficult to imagine a concrete example of such a situation. However, if one were to arise, two criteria would be decisive: first, the criterion of effective control provided for in draft article 6 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization) and, second, the criterion of exercise of governmental authority provided for in article 6 of the articles on responsibility of States for internationally wrongful acts. The placing of an organ of an international organization at the disposal of a State could presumably take various forms and would depend in particular on the agreement reached between the State and the organization and on the nature of the activity for which the organ had been placed at the disposal of the State. For that reason, the determining factor in the attribution of conduct of such an organ placed at the disposal of a State should be the criterion of effective control. Indeed, although a case could be made for an analogy with the placing of a State organ at the disposal of another State, and thus for the criterion of exercise of governmental authority, the criterion of effective control was more readily applicable to all the foreseeable situations in which an organ of an international organization was placed at the disposal of a State. The conduct of such an organ could be attributable to the State, even though the organ did not exercise governmental authority in so far as the State exercised effective control over it. His delegation's written statement contained further comments with regard to the other two questions raised by the Commission.

2. According to the Commission's report, it could be argued that the three questions raised were regulated by analogy in the articles on State responsibility. However, in his delegation's view, that conclusion was not satisfactory. The draft articles on responsibility of international organizations were comprehensive and took into account all the relevant actors, including States. The articles on State responsibility, naturally, did not take international organizations into account, since certain issues had not arisen until consideration of the responsibility of international organizations had begun. Leaving room for reasoning by analogy had the advantage of allowing a wide margin of interpretation when cases not covered by the draft articles arose. However, that approach would lead to a lack of legal certainty that would be regrettable. The questions raised by the Commission should therefore be dealt with expressly, in the form of further draft articles if necessary. His delegation would be submitting detailed written comments on specific draft articles in due course.

3. Switzerland, as a party to and the depositary of the Geneva Conventions, took great interest in the development of the draft articles on the topic "Effects of armed conflicts on treaties". The principle that situations of armed conflict should be subject to the law was generally accepted by the international community and had been decisively affirmed in the Geneva Conventions of 1949. His delegation would be providing more detailed written comments in due course but wished to make some preliminary observations. First, it supported the inclusion of internal armed conflict in draft article 2 (Use of terms). Experience in recent years had shown that internal conflicts could affect the implementation of treaties at least as much as international conflicts did and should therefore be taken into account. Moreover, in view of the development of other legal regimes applicable to armed conflict, it would be unfortunate if the definition of armed conflict in the draft articles was narrower than that established by other instruments of international law.

4. His delegation also had doubts about draft article 13 (Effect of the exercise of the right to individual or collective self-defence on a treaty). The prohibition of benefit to an aggressor State from the termination or suspension of the operation of the treaty, as provided for in draft article 15, was welcome; however, it should be made clear that even a State exercising its right to self-defence was subject to the provisions of draft article 5, which stated that certain treaties continued in

operation during an armed conflict. Such a clarification would also be in line with the commentary to article 21 of the articles on State responsibility. His delegation therefore proposed that draft article 13 should be amended to provide that its application was subject to the application of draft article 5.

5. **Ms. Tezikova** (Russian Federation), referring to the topic "Responsibility of international organizations", said that, despite the dearth of relevant practice and the Commission's consequent reliance on its previous work on State responsibility, the draft articles nonetheless reflected the specific nature of the responsibility of international organizations. Her delegation would be providing detailed comments in writing, but wished to make some preliminary observations of a general nature.

6. Her delegation commended the new structure of the draft articles, including the creation of a separate Part One containing draft articles 1 and 2, on the scope of the draft articles and use of terms respectively, and the transfer to draft article 2 of the definitions of the terms "agent" and "rules of the organization". The definition of the latter term differed from that contained in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations in that it included "other acts of the organization". The commentary to draft article 2 should clarify in greater detail the substance, form and nature of such "other acts", with specific examples. Some of its conclusions were questionable, such as the unqualified statement that the rules of an organization might include agreements concluded by the organization with third parties and judicial or arbitral decisions binding the organization.

7. In paragraph (4) of the commentary to draft article 2, the Organization for Security and Cooperation in Europe (OSCE) was cited as an example of an international organization established on the basis of an "instrument governed by international law". However, that example was inappropriate. First, the documents of the conferences at which the decisions to establish and subsequently rename the Conference on Security and Co-operation in Europe (CSCE) had been taken were not "instruments governed by international law" and, second, OSCE did not possess its own international legal personality and therefore did not constitute an international organization as defined in draft article 2. Given that the rules of an organization could also be the source of an international obligation the breach of which constituted an internationally wrongful act under draft article 9, paragraph 2, a balanced and cautious approach to the definition of those rules was required.

8. Her delegation continued to have doubts about the general rule on attribution of conduct of an organ or agent of an international organization set out in draft article 5 and the criterion for the attribution of *ultra vires* conduct set out in draft article 7. Those draft articles and the commentaries thereto required clarification.

9. A number of the draft articles in Part Two, chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization) overlapped in certain respects. For example, aid or assistance in the commission of an internationally wrongful act, as set out in draft article 13, could be effected in the form of recommendations, which constituted a separate basis for responsibility under draft article 16. Similarly, the adoption by an international organization of a binding decision, as referred to in draft article 16, paragraph 1, could be a form of direction or control or even coercion of a State or another international organization to commit an internationally wrongful act, which constituted separate bases for responsibility in draft articles 14 and 15 respectively. The Commission should consider ways of eliminating such overlaps when preparing the draft articles for the second reading. Similar considerations applied to Part Five (Responsibility of a State in connection with the act of an international organization).

10. In draft article 16, paragraph 2 (b), the Commission had tried to reinforce the link between an authorization or recommendation of an international organization and an act committed by a State or international organization that gave rise to the responsibility of the organization. The subjective test of whether such an act had been committed "in reliance on" an authorization or recommendation of an international organization had been replaced by an objective test, namely whether the act had been committed "because of" such an authorization or recommendation. However, neither wording fully reflected the link between the decisions, authorizations or recommendations of an international organization that were addressed to another international

organization or a State and the conduct of the addressees.

11. Part Three (Content of the international responsibility of an international organization), Part Four (The implementation of the international responsibility of an international organization) and Part Six (General provisions) of the draft articles seemed at first glance to be acceptable. The Commission had not shirked the many problematic issues, in particular the issue of countermeasures, which had been contentious since the time of drafting of the articles on State responsibility. Indeed, the solutions put forward were, on the whole, appropriate.

12. With regard to the questions on which the Commission had solicited comments in paragraph 27 of its report, the first two could be regarded as regulated by analogy in the articles on State responsibility. The question of when an international organization was entitled to invoke the responsibility of a State was not so straightforward. At first glance, it seemed that an international organization could invoke the responsibility of a State on the grounds and under the conditions provided for in the articles on State responsibility. As to cases in which the grounds and conditions for invoking the responsibility of an international organization as well as a State existed, the Commission should focus particular attention on the question of joint (parallel or subsidiary) responsibility. The Commission could consider whether there were in fact cases in which the articles on State responsibility could not be applied by analogy and what law would be applicable in such cases.

13. **Mr. Spinelli** (Italy) recalled that his delegation had previously suggested that, instead of making slow progress on a large number of topics, the Commission should concentrate on one or two subjects in its work each year, so as to allow for in-depth discussion within the Commission and more focused deliberations in the Sixth Committee. Whether as the result of a deliberate choice or not, at its sixty-first session the Commission seemed to have dealt mainly with two subjects: responsibility of international organizations and reservations to treaties. The considerable progress which had been made on those topics confirmed the usefulness of taking a selective approach.

14. With regard to the commentaries adopted by the Commission, a more uniform approach should be taken. Some of the commentaries to the draft articles on responsibility of international organizations were relatively short, although that might be explained by the dearth of specific practice on which to base them. On the other hand, some of the commentaries to the draft guidelines on reservations to treaties erred in the opposite direction, in particular where they detailed the history of the codification of the law of treaties. The main purpose of a commentary should be to explain the meaning of a particular draft article or guideline and give the reasons for its content and wording.

15. On the topic of responsibility of international organizations, he was pleased to note that the Commission, in response to comments from Governments and international organizations, had reviewed some of the draft articles previously adopted. Further dialogue should take mainly the form of written comments on the draft articles adopted on first reading. His delegation hoped that States and international organizations would provide information on their hitherto unpublished practice relating to the questions raised in the draft articles.

16. Countermeasures, which were the subject of most of the new draft articles, were seldom taken by or against international organizations, but that was not a sufficient reason for precluding their use in relations with such organizations. They might also be used in relations between an international organization and its members, although they would rarely be appropriate with regard to matters governed by the rules of the organization. Draft articles 21 and 51 reflected those principles.

17. The issues mentioned in paragraph 27 of the Commission's report did not seem to raise difficulties that required a supplementary study by the Commission. For example, articles 42 and 48 on State responsibility could be applied by analogy to the invocation of the international responsibility of a State by an international organization. It would be hard to imagine why a directly injured international organization should not be able to invoke responsibility in the same way as a directly injured State.

18. **Mr. Bethlehem** (United Kingdom) said that his delegation welcomed the progress made by the Commission on a number of topics but was disappointed at the lack of progress in other areas. There had been a sense for some time that the Commission might be running out of core topics of international law to consider. His delegation was

therefore pleased to note that the Working Group on the Long-term Programme of Work continued to study ideas for new topics. Decisions on the inclusion of new topics should be taken after careful consideration within the Commission and preferably after States had had an opportunity to offer comments in the Sixth Committee, so as to ensure that the topics chosen resulted in work of practical use. His delegation welcomed the Commission's decision to devote at least one meeting at its sixty-second session to a discussion of settlement of disputes clauses.

19. A key question was whether the Commission's future work should in all cases result in a codifying treaty text, as had been the norm in the past. The Commission should be flexible in that regard. Some subjects were not ready for codification or progressive development in the traditional sense. In such cases an outcome such as a study might be more appropriate than draft articles intended for a treaty or a convention.

20. His delegation would be providing detailed written comments on the draft articles on responsibility of international organizations in due course. It had consistently cautioned against the wholesale application of the articles on State responsibility to international organizations. Unlike international organizations, States enjoyed full sovereignty under international law and had the complete range of powers to carry out their international obligations. The diversity of types of international organizations should also be taken into account. The articles on State responsibility provided a valuable starting point, but the Commission should focus on the specific issues raised by the contemporary practice of international organizations and exercise caution in extending the analogy of State responsibility beyond well-established rules.

21. It remained unclear whether and how a number of the draft articles, for example draft articles 20, 23 and 24, on self-defence, distress and necessity respectively, could ever be applied to international organizations. His delegation commended the Commission for its analysis of the available practice of international organizations and its candour in stating that, in many cases, a material body of practice was lacking. While the draft articles needed to be expressed in general terms, their utility was lessened wherever they were unsupported by significant practice, as was the case with regard to draft articles 13 to 15 on aid and assistance, direction and control, and coercion. Accordingly, the Commission should continue its efforts to identify and analyse the practice of States and international organizations and should proceed cautiously where it was lacking. In addition, a number of the draft articles used terminology and concepts that were vague or whose meaning in the context of responsibility of international organizations was not settled.

22. With regard to draft article 6, it might not be possible to use "effective control" as a test for the attribution of conduct to an international organization in all factual circumstances and in the light of the diversity of relationships that existed between international organizations and their member States. Much of the practice relied on by the Commission was drawn from member States' participation in military operations mandated by international organizations. His delegation questioned whether a general rule could or should be extrapolated from that very particular context and cautioned against an inflexible interpretation of "effective control".

23. The cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* before the European Court of Human Rights illustrated the complexity of the issue. In the absence of judicial criticism of the effective control text in those cases, no change to draft article 6 was required. However, the Court had applied a different criterion for attribution and had reached a conclusion that differed from the one that would have been reached on the basis of draft article 6. That illustrated the limitations of "effective control" as a universal rule of attribution. It should be recognized that in the cases in question the Court had placed considerable weight on the practice of the United Nations in lawfully delegating and authorizing the use of force by member States. More importantly, in its discussion of the *Behrami* and *Saramati* cases, the Commission might be understood to have proposed an "effective control" test that could be interpreted in a way that undermined the general principle that, when member States acted pursuant to the authority of an international organization and carried out the delegated functions of that organization, their acts were attributable to the organization. An interpretation of "effective control" that emphasized operational control, as opposed to ultimate authority and control, suggested that the Commission might be imposing a general rule at the cost of considering the full factual circumstances and particular context in which

international organizations and their members operated.

24. His delegation supported the rationale behind draft article 16 (Decisions, authorizations and recommendations addressed to member States and international organizations), namely that an international organization should not be allowed to circumvent its international obligations by taking advantage of its separate legal personality and "outsourcing" conduct. However, the term "circumvent" lacked clarity, and the draft article should therefore be revisited. The draft article also drew a distinction between binding decisions of an international organization on the one hand and recommendations and authorizations on the other, yet the practice of international organizations was arguably too inconsistent to support the use of those categorizations. For example, in the practice of some international organizations, authorizations might produce binding legal effects. Moreover, it was evident from the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* that determining whether an international organization's decision was binding and whether members were in fact permitted discretion in complying with or implementing it was a difficult task. His delegation would be wary of adopting the approach to responsibility set out in draft article 16 in circumstances where it was untested and its consequences were hard to foresee.

25. With regard to reparation for injury, his delegation was pleased to note that the Commission had confirmed in the commentary to draft article 39 (Ensuring the effective performance of the obligation of reparation) that the draft article did not envisage any instance beyond those referred to in draft articles 17, 60 and 61 in which States and international organizations would be held internationally responsible for the act of the organization of which they were members. It also appreciated the clarification in the commentary that no subsidiary obligation of members towards the injured party was considered to arise when the responsible organization was not in a position to make reparation. However, the draft article itself did not reflect that point adequately. Although it addressed the central issue — that appropriate measures should be taken in accordance with the rules of the organization — it did not make clear whether that obligation was owed only to other members of the organization as a function of the rules of the organization or also to non-members, or what role member States might have in ensuring that the organization could meet its obligation to make reparation. It would be helpful if the Commission could clarify those issues.

26. The entitlement of a State to invoke the responsibility of an international organization might depend on whether the State was a member of the organization in question and whether such invocation was permitted by the rules of the organization. Accordingly, there might be inconsistencies between the rules of an organization and the provisions of draft articles 42 and 48. In addition, the entitlement of international organizations and their members to take countermeasures against each other raised difficult issues, and his delegation appreciated the care with which the Special Rapporteur and the Drafting Committee had addressed draft articles 21 and 50 to 56 on that matter. However, it was not convinced that countermeasures required the detailed elaboration in Part Four, chapter II, particularly since practice was scarce and the legal regime uncertain. Any right of international organizations to take countermeasures should be subject to the applicable rules of the organization, as set out in draft articles 21 and 51.

27. With regard to draft article 60 (Responsibility of a member State seeking to avoid compliance), his delegation supported the general principle that a State should not be able to avoid responsibility for breaching an international obligation by transferring competence to an international organization of which it was a member and taking advantage of the organization's separate legal personality. However, his delegation remained concerned by the breadth of responsibility envisaged under draft article 60 and the uncertainty of its operation.

28. Lastly, his delegation welcomed the inclusion of draft article 63 (*Lex specialis*) and agreed with the Special Rapporteur that the great variety of international organizations made it essential to recognize the existence of special rules. Such rules should be able to qualify, supplement or even replace the general rules set out in the draft articles, as provided by draft article 63. The Commission was also right to highlight the rules of international organizations throughout the draft articles as special rules relevant to the relations between such organizations and their members. A provision requiring the special characteristics of a particular organization

to be taken into account in applying the draft articles should be included in addition to the *lex specialis* provision. There was no real risk that such a provision would allow international organizations to seek to escape their responsibility; in fact, the contrary might be true.

29. **Mr. Hernández García** (Mexico) said that the establishment of a consistent and effective legal regime for the international responsibility of international organizations was crucial to the consolidation of the rule of law, since such organizations were playing an ever more active role on the international stage, particularly in the field. The development of such a legal regime was dependent not only on the work of the Commission, but also on the decisions of international courts and tribunals considering cases involving international organizations. The two elements worked in parallel: the courts and tribunals used the Commission's work as a guide, while the Commission incorporated the interpretative elements of court decisions into its codification work. Moreover, States and international organizations had an obligation to provide the Commission with the necessary input to allow it to carry out its comprehensive legal analysis. Attention should also be paid to the outcomes of international disputes involving one or more international organizations so as to avoid situations in which, despite an immense body of theory on the responsibility of international organizations, courts had no way of attributing responsibility for wrongful acts, thus leaving the victims, whether other international organizations, States or individuals, without the possibility of reparation.

30. With regard to the issues on which the Commission was seeking the views of Governments, his delegation would submit written comments in due course. However, it wished to draw attention to the continued ambiguity in draft article 4, subparagraph (a), which stated that there was an internationally wrongful act of an international organization when conduct consisting of an action or omission was attributable to the international organization under international law. In fact, international law was unclear in that regard. The key criterion for the attribution of responsibility to international organizations, particularly in cases where the constituent instrument of the organization contained no express provisions on the matter, continued to be that of effective control of the acts in question.

31. Although Part Four, chapter I, of the draft articles codified the invocation of the responsibility of an international organization, it did not state what judicial body might consider claims in that regard. The jurisdiction of the International Court of Justice, for example, was limited to disputes between States. Since international organizations per se lacked the capacity to appear before the courts, despite having their own international legal personality, that issue should be addressed.

32. Lastly, the issues on which the Commission had requested comments from Governments and international organizations should be incorporated into the draft articles after analysis by the Special Rapporteur, so as to create a sound text that governed as precisely as possible the norms of international law applicable to the responsibility of international organizations. Once concluded and adopted, the draft articles would be a key tool in strengthening the international legal order and, together with the State responsibility regime, would ensure that the rule of law encompassed all actors on the international stage.

33. **Mr. Henczel** (Poland) said that the work of the Commission seemed to have suffered a certain loss of momentum, as evidenced by the relatively little progress made on topics such as expulsion of aliens and the obligation to extradite or prosecute. In his delegation's view, there were two explanations for that situation: on the one hand, the special rapporteurs lacked information from Governments on State practice and, on the other, the Commission had become rather passive about requesting information from Governments. Chapter III of its report, for example, sought comments from Governments on only three topics. The Commission should return to its former practice of addressing questions to Governments on as many topics as possible and should be more insistent in following up with Governments that failed to respond. The technical and financial difficulties encountered by special rapporteurs in preparing their reports were also impediments to the Commission's work. His delegation therefore supported the idea of reconsidering the question of necessary assistance to special rapporteurs and endorsed the view, expressed in paragraph 242 of the Commission's report, that special rapporteurs should have the opportunity to be present during the consideration of their topics by the Sixth Committee.

34. The draft articles on responsibility of international organizations, in combination with the

articles on State responsibility, would form a code of international responsibility that would constitute a milestone in the codification and progressive development of international law. However, the commentaries to the draft articles seemed less well developed from a theoretical perspective than the commentaries to the articles on State responsibility and required further clarification in order to allow for a full evaluation of the draft articles. His delegation would submit additional written comments on the topic at a later date.

35. **Mr. Horváth** (Hungary) said that his delegation welcomed the adoption on first reading of the draft articles on responsibility of international organizations but regretted that the topic of immunity of State officials from foreign criminal jurisdiction had not been considered at the Commission's sixty-first session and that little progress had been made on several other topics. The achievement of such progress was a shared responsibility of the Commission and Member States; the latter should provide better guidance and input while respecting the Commission's independence. Topics to be considered by the Commission should be selected more carefully with a view to better addressing the needs of the international community and ensuring that the agenda was not overburdened. The form of the Commission's work should be determined for each topic individually in the early phases of work. Furthermore, firm deadlines would promote the timely completion of work.

36. Concerning the topic "Responsibility of international organizations", the issues raised in chapter III of the Commission's report merited further consideration, without which it would be difficult to decide whether they could be considered to be regulated by analogy in the articles on State responsibility or whether they should be addressed expressly in additional draft articles or in another form. One possible option would be a document annexed to or separate from the draft articles that bridged the gaps between the latter and the articles on State responsibility. The preparation of a special report on those residual issues might facilitate a decision.

37. His delegation endorsed the new structure of the draft articles and welcomed the retention of the words "and other acts" in the definition of "rules of the organization" set forth in draft article 2, bearing in mind the great variety of acts that constituted such rules. The definition of the term "agent" in draft article 2 was rather broad. It was therefore unclear whether the conduct of an "agent", as so defined, was subject in the context of draft article 5 to the effective control test provided for in draft article 6. For instance, there were semi-autonomous entities on which the creator organizations conferred significant powers, but whose conduct they could not control, at least not in an "effective" manner. Although such entities lacked a separate international legal personality, in many respects they were similar to ordinary international organizations; for example, they had their own governing bodies, often composed of States. In that context, the question arose as to whether the conduct of such entities should equally be regarded as acts of their creator organizations, despite the lack of effective control over them by the latter.

38. The new formulation of draft article 9, paragraph 2, was acceptable, since it made it clear that the rules of an organization could give rise to international obligations. In addition, the new wording of draft article 16, paragraph 2 (b), in which the expression "in reliance on" had been replaced by the expression "because of", struck the right balance between the need to preserve an effective practical criterion and the need for a more restrictive approach. As for draft article 17, his delegation agreed with the modifications that had been introduced but preferred the title originally proposed by the Special Rapporteur.

39. Self-defence was an inherent right of international organizations; draft article 20 constituted an appropriate compromise solution in that regard. The proposed changes to draft article 21 were also acceptable, as were the amendments to draft article 51, which were of a purely technical nature and were aimed at ensuring consistency with draft article 21, paragraph 2. Draft article 60 was now more clearly and precisely worded than the previous version, and the applicability of draft articles 60 and 61 to international organizations that were members of other international organizations, pursuant to draft article 17, was another welcome development. In addition, since an international organization might have powers or competences other than those conferred on it by the given member State or organization, his delegation welcomed the use in draft article 60 of the expression "has competence", which was more neutral than the previous wording, "provided with competence".

40. It was regrettable that the second paragraph proposed by the Special Rapporteur for draft article 39

had failed to attract support in the Drafting Committee, since it would have served to clarify the meaning and limits of the expression "all appropriate measures" contained in paragraph 1, an expression that was now instead open to interpretation. With regard to Part Six of the draft articles, his delegation was glad that the Commission had refrained from adding a new provision on the specific characteristics and variety of international organizations, since such a provision could have jeopardized the draft articles as a whole by allowing organizations leeway to sidestep them.

41. **Mr. de Serpa Soares** (Portugal) expressed disappointment that the Commission had not considered the topic of immunity of State officials from foreign criminal jurisdiction at its sixty-first session. With regard to the Commission's future work, another topic worthy of consideration was that of hierarchy in international law and the related issue of *jus cogens*, bearing in mind the increasing tension within the international law system, for example, between the legal order of the United Nations and that of the European Community. Other recent developments in jurisprudence reflected the growing complexity and dispersion of the international legal order. His delegation also welcomed the Commission's decision to discuss settlement of disputes clauses at its next session.

42. His delegation commended the recent initiatives aimed at improving the debate on the Commission's work, such as the provision to Commission members, in particular special rapporteurs, of statements made by Governments in the Sixth Committee. It also welcomed the interactive dialogue with special rapporteurs and the informal meeting with legal advisers held during sessions of the General Assembly. However, further measures should be taken to enhance such interaction. For example, the meeting held in Geneva to mark the Commission's sixtieth anniversary could become an annual tradition. An opportunity to discuss the future of the Commission's work would be particularly appreciated, not least given the increasing scarcity of topics suitable for codification and the reduced margin for progressive development. In addition, the Commission's website was an important tool that should be continually improved. In order to achieve all those aims, active cooperation between the Commission and the Secretariat was essential.

43. With regard to the topic "Responsibility of international organizations", the articles on State responsibility were in general applicable to international organizations. However, the draft articles on responsibility of international organizations mirrored the articles on State responsibility so closely as to risk failing to address the specific issues arising from the responsibility of international organizations. His Government would submit its observations in that regard in due course.

44. The restructuring of the draft articles was a satisfactory improvement. However, the definition of the word "agent" proposed by the Special Rapporteur was preferable to the definition in draft article 2, since it was in line with the 1949 advisory opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*. The wording of draft article 9, paragraph 2, was clearer than the previous wording, since not all rules of international organizations constituted international law.

45. The subject of countermeasures, controversial in relation to States, was even more problematic in relation to international organizations. Draft article 21 attempted to address some of the issues involved. Care should be taken to distinguish countermeasures from other similar measures, taking into account the source, legal basis, nature and purpose of the measure. Security Council sanctions, for example, should not be regarded as countermeasures; nor should measures taken by an international organization, in accordance with its internal rules, against one of its members.

46. On the issue of reparation, his delegation took the view that there were no grounds in international law for the joint liability of members of an international organization towards an injured party when the organization lacked the means to provide reparation. On the other hand, members had an obligation to contribute to the organization's budget in order to meet expenses incurred in the performance of its duties, including reparation. In that context, draft article 39 offered a balanced solution. In the interest of further clarification, his delegation supported the Special Rapporteur's proposal to add a second paragraph to the draft article.

47. Lastly, he expressed doubts as to the inclusion of draft article 66 on the Charter of the United Nations since, under Article 4 of the Charter, membership in the United Nations was not open to international organizations. Nonetheless, the inclusion of a provision

that reflected the content of article 59 of the articles on State responsibility merited further consideration.

48. **Mr. Panahi Azar** (Islamic Republic of Iran) said that, generally speaking, international organizations were bound by the same international normative rules as States. In addition, they were bound by their own internal rules. Where an organization was unable or unwilling to honour its obligations, its member States should take all necessary measures to enable it to do so.

49. It was understandable that the Commission had, to a large extent, replicated the articles on State responsibility in the draft articles on responsibility of international organizations. However, the distinctive nature, function and status of international organizations should be duly taken into account. A verbatim transposition of the articles on State responsibility was inappropriate except where there was a clear similarity between States and international organizations. In that light, Part Two, chapter V, of the draft articles (Circumstances precluding wrongfulness) should be redrafted.

50. Draft article 20 on self-defence should be deleted, since the concept of self-defence articulated in Article 51 of the Charter of the United Nations was applicable only to States; it was questionable whether an international organization could be the victim of an armed attack, which was the requirement for the exercise of the right of self-defence under that Article. Similarly, the issue of countermeasures taken by or against international organizations should be addressed with extreme caution since a countermeasure was principally an act of one State against another.

51. By the same token, the blanket replication in the draft articles of the general provisions from the articles on State responsibility, including the "without prejudice" clause with respect to the Charter, was untenable. Moreover, the unique status of the United Nations was reinforced elsewhere in the draft articles, including in draft article 63 on *lex specialis*. It should furthermore be made clear in draft article 65 that individual responsibility included both civil and criminal matters.

52. Concerning draft article 61, it was important to make a distinction between cases where an international organization authorized its member States to adopt a measure, and those where it ordered them to take particular action, including coercive measures. An authorization conferred a right, not an obligation, to take action; therefore, any action taken in such circumstances should be regarded as the conduct of the State concerned and not that of the organization.

53. His delegation supported the draft articles on reparation for injury contained in Part Three, chapter II, in particular draft article 35. An international organization should not be able to invoke lack of funds in order to evade its obligation to compensate for the damage caused by its internationally wrongful act. As provided in draft article 39, its members should furnish it with the necessary assistance, in accordance with its internal rules, to pay any compensation due. However, the brunt of responsibility in such cases should be borne by those members which, on account of their decision-making role or overall position within the organization, had contributed to the injurious act. It would therefore be advisable to take into account the issue of unlawful or *ultra vires* measures adopted by an organization or its organs as a result of undue influence or pressure from certain members. His delegation also supported draft article 46, which allowed all States or international organizations injured by the same internationally wrongful act of an international organization to invoke the responsibility of the organization independently of each other. However, it would be prudent to determine which of the injured parties had priority in taking legal action against the responsible organization.

54. With regard to the Commission's future work, the intended discussion on settlement of disputes clauses should take due account of the relevant principles of international law, in particular the sovereign equality of States and a State's unambiguous consent to a dispute settlement mechanism.

55. **Ms. Lijnzaad** (Netherlands) said that her Government would examine the draft articles adopted on first reading and, if necessary, submit comments in addition to those which it had submitted on earlier versions of the text. The three specific questions set forth in chapter III of the Commission's report clearly related to State responsibility and should not therefore be dealt with in the context of the topic of responsibility of international organizations. Moreover, there was no need to address them immediately; for the time being, the articles on State responsibility could be applied mutatis mutandis if any relevant cases arose. However, the questions should not be left undiscussed. As the Commission had consistently emphasized, the

articles on State responsibility could not simply be copied. Any new questions arising should instead be tackled through careful analysis of the specific situation of international organizations and consideration of observations made by such organizations and within the Sixth Committee. In the long term, a simple "by analogy" approach was inadequate. The Commission might also wish to await comments on the draft articles adopted on first reading, which could raise other "borderline" issues, and subsequently examine the topic further at its session in 2011. The most appropriate form in which to address the three questions should be decided following discussion within the Commission. One possibility would be to add of further draft articles to the existing articles on State responsibility.

56. With regard to chapter XIII of the report, the system of elections to the Commission should ensure continuity and allow work to be concluded without excessive upheaval or changes of key experts. Staggering could ensure such continuity; however, her delegation wished to hear the Commission's news on the matter. Information on future steps designed to improve the gender balance within the Commission would also be welcomed. Her delegation was pleased to note that the Commission intended to discuss settlement of disputes clauses, which were a crucial issue in contemporary international law, at its next session. In that context, the Commission should contribute to promoting acceptance of the jurisdiction of the International Court of Justice, which was an important tool for the peaceful settlement of disputes.

57. The intended debate on methods of work was timely, given the lack of visible progress at the sixty-first session on many of the topics on the Commission's agenda. The Commission would be wise to reflect on the selection of topics, in particular whether they were ripe for consideration, and on whether its existing working methods were suited to contemporary legal debate. It might be appropriate to reconsider the role and function of special rapporteurs and to make greater use of study groups, which, in the case of the most-favoured-nation clause and treaties over time, had helped to improve the distribution of work and to increase the likelihood of early results.

58. **Ms. Daskalopoulou-Livada** (Greece) said that responsibility of international organizations was a more complex topic than State responsibility, despite apparent similarities between the respective texts. The commentaries to the draft articles on responsibility of international organizations were extremely important in order to clarify the potential application of the draft articles to the myriad cases that might arise. Most of the commentaries were successful in that regard, but a few of them were unclear. For example, in the commentary to draft article 6, it should be made clear that conduct should be attributed to the international organization exercising ultimate control and not to the State exercising operational control, as confirmed by the European Court of Human Rights in the *Behrami* and *Saramati* cases.

59. The first of the three questions on which the Commission was seeking comments — whether the conduct of an organ of an international organization placed at the disposal of a State was attributable to the latter — related to an issue that was not covered in the articles on State responsibility. Article 6 of those articles could not be applied by analogy, since the meaning of the phrase "organ placed at the disposal of" had to be interpreted in the light of the practice of international organizations; in that respect, the practice of the United Nations might prove useful. The draft articles should therefore include a provision dealing with that question.

60. The question of when consent given by an international organization to the commission of a given act by a State was a circumstance precluding wrongfulness of that State's conduct could be addressed on the basis of draft article 19 on consent and article 20 of the articles on State responsibility. Draft article 19 reflected a general principle pursuant to which consent was a circumstance precluding wrongfulness but did not address directly the question of consent of an international organization to the commission of a wrongful act by a State. However, taken together, draft article 19, draft article 64 and articles 20 and 57 of the articles on State responsibility established not only the principle that a State was to be held responsible for an internationally wrongful act committed against an international organization but also the principle that consent by the organization to such an act was a circumstance precluding wrongfulness.

61. The question of when an international organization was entitled to invoke the responsibility of a State should, in principle, be governed by the articles on State responsibility, since they covered questions of a State's responsibility for its own conduct. However, the question of the responsibility

incurred by a State towards an international organization of which it was a member pertained to the relations between an organization and its members and between the members. Such questions could be addressed only by the rules of the organization. The issue therefore went beyond the scope of the draft articles.

62. It was clear from the commentary to draft article 39 that members of a responsible international organization were under no subsidiary obligation to provide reparation where the organization had insufficient means for that purpose. Her delegation supported the Special Rapporteur's suggestion that a provision to that effect should be included in the draft article itself so as to eliminate any doubts on the matter.

63. Lastly, her Government would submit its views on the entire set of draft articles in due course.

64. **Mr. Kingston** (Ireland), referring to the topic "Responsibility of international organizations", said that his delegation considered the inclusion of the principle of exhaustion of remedies in draft article 44, paragraph 2, generally appropriate and was pleased that the remedies envisaged included those available before arbitral tribunals, national courts and administrative bodies. However, the criteria for assessing whether any available and effective remedy existed might be contentious, and it might therefore be helpful for the Commission to elucidate the practical operation of that rule in the commentary. Issues might also arise with respect to competing remedies and/or jurisdiction. The expertise on such questions gained from the Commission's consideration of the topic of fragmentation of international law might be useful in addressing those issues.

65. In relation to the sensitive issue of countermeasures, the importance of clear procedures and limits was evident. His delegation considered appropriate the close relationship between the provisions on countermeasures in the draft articles on responsibility of international organizations and the corresponding provisions in the articles on State responsibility, and shared the view that countermeasures should not be a primary means of ensuring the compliance of member States. Draft article 51 (Countermeasures by members of an international organization) seemed appropriate where the relevant international organization had a dispute resolution mechanism, but the Commission might wish to give further consideration to the case of organizations that did not have such mechanisms and/or had constitutive agreements or rules that either prohibited countermeasures or were silent on their use.

66. Concerning attribution of responsibility between an international organization and its member States, his delegation noted that the current draft reflected a number of amendments with respect to earlier drafts, in particular the replacement in draft article 60 of the term "circumvents" with the phrase "seeks to avoid complying with" in reference to a member State's international obligations. Although that wording appeared to suggest that there must be intent on the part of the State, the commentary indicated that that was not the case, and that circumvention might reasonably be inferred from the circumstances. His delegation welcomed that clarification, since a requirement of specific intent to circumvent obligations and of proof of such intent might make it difficult to establish responsibility in practice. In addition, the replacement of the phrase "providing the organization with competence" with the phrase "taking advantage of the fact that the organization has competence" represented a welcome broadening of the provision.

67. On the question of diversity of international organizations, his delegation welcomed the addition of draft article 63 (*Lex specialis*). It was important not to limit the relevance of the draft articles by failing to take account of the fundamental differences that existed between organizations. His delegation would submit more detailed comments in writing on the draft articles and on the specific issues mentioned in paragraph 27 of the Commission's report.

68. **Mr. Okano** (Japan) said that his delegation had some concerns regarding the Commission's current and future work. As others had observed, the Commission seemed to have departed from the mainstream of international law. At the same time, it had not been fully engaged with the crucial needs of the international community. His delegation also had reservations regarding the recent trend towards a proliferation of study groups. The Commission's main task, as in the past, should be to develop draft articles that might become the basis for future conventions, not merely to conduct studies. The study on fragmentation of international law (A/CN.4/L.682), for example, had been interesting from an academic point of view, but

had perhaps not been an appropriate project for the Commission.

69. The Commission should select for its future work a topic relating to international environmental law, which had now become part of the mainstream of international law. Although its work on international watercourses and transboundary aquifers had produced some relevant provisions, the Commission had not taken up any topic in international environmental law since concluding its work on international liability for injurious consequences arising out of acts not prohibited by international law. That was a significant omission, particularly at a time when the world was experiencing serious environmental degradation. As the Commission was not an organ for governmental negotiations such as those that occurred at conferences of the parties to multilateral environmental agreements, it was in a position to contribute a great deal towards clarifying and redefining the basic principles and rules of international environmental law. The recent proposal to develop a law of the atmosphere was interesting and could lead to a constructive discussion on relevant rules of international law that remained ambiguous. Both the Commission and the Committee should discuss the feasibility of that proposal.

70. With regard to the topic "responsibility of international organizations", his delegation had initially believed that parallelism should be maintained between the draft articles and the articles on State responsibility. However, that approach had resulted in a degree of impracticability. For example, the question of the responsibility of international organizations often arose in relation to acts committed by peacekeepers or the staff of international organizations in countries experiencing conflict situations. Most such acts did not constitute internationally wrongful acts as they did not violate an international obligation or constitute crimes under international law; most were unlawful acts or crimes only under domestic law and thus did not fall within the scope of the draft articles. In another common situation, an international organization might be unable to fulfil its contractual obligations to a third party owing to a lack of financial means; it would incur civil liability but would not have committed an internationally wrongful act.

71. Draft article 20 (Self-defence) also illustrated the limits of parallelism. The right to self-defence under Article 51 of the Charter of the United Nations was premised on the occurrence of an armed attack. It could be argued that an international organization might resort to self-defence against an armed attack when it administered or exercised control over the territory of a State, acting under the provisions of the Charter. The extent to which United Nations forces were entitled to resort to force and the conditions under which an international organization might resort to self-defence depended on the primary rules governing the right to self-defence. Nonetheless, the substance of that right with respect to international organizations was not well established under international law, and its scope and the conditions for exercising it were far less clear than in the case of States. His delegation therefore wondered what significance the drafting of a secondary rule might have. It also had some reservations concerning the definition of the term "self-defence", since there was no broad agreement among States and international organizations on the meaning of the term as used in the documents cited in the commentary to draft article 20.

72. With regard to the specific issues raised in chapter III of the report, the question of when conduct of an organ of an international organization placed at the disposal of a State was attributable to the latter might be regarded as governed by article 6 of the articles on State responsibility, mutatis mutandis. Similarly, Part Three, chapter I, of those articles (Invocation of the responsibility of a State) might be considered to apply, mutatis mutandis, to the question of when an international organization was entitled to invoke the responsibility of a State. However, before the Commission elaborated any new provisions, it should determine how often the situations referred to actually occurred and whether, as a practical matter, there was any need for rules to be drafted.

73. **Mr. Elangovan** (India), noting that his delegation would be submitting more detailed comments on the draft articles on responsibility of international organizations, said that disputes between an international organization and its members should, as far as possible, be settled in accordance with the rules of the organization and through its internal procedures. Further, the question of whether or not an organization could take countermeasures against its members, and vice versa, should be determined by the organization's rules. Considering the limited availability of practice on the issue, the uncertainty of the legal regime and the risk of abuse inherent in the concept, a cautious approach should be taken.

74. Draft article 39, as currently drafted, required the member States of a responsible international organization to provide the organization with the means to fulfil its obligation of reparation. However, the subject of the draft articles was the responsibility of international organizations, not that of States. Moreover, the obligations of member States towards an organization were dealt with in its constituent instrument. The draft article should therefore be reformulated as an obligation of the organization to make the necessary efforts to ensure that its members provided it with the means for effectively fulfilling its obligations.

75. His delegation welcomed the work of the study groups on the most-favoured-nation clause and treaties over time. It appreciated the decision to make the edited summary records of the Commission's proceedings up to 2004 available on the Commission's website on a pilot basis and concurred on the need to expedite the preparation of summary records. It also supported the Commission's views on the question of honoraria for special rapporteurs. The virtual discontinuation of such honoraria pursuant to General Assembly resolution 56/272 especially affected special rapporteurs from developing countries, since it compromised support for their research work. Special rapporteurs should be afforded the opportunity to participate in the meetings of the Sixth Committee and to interact with delegations during the consideration of their topics.

76. **Mr. Oegroseno** (Indonesia) said that the Commission's work on the topic "Responsibility of international organizations" was of great importance as it would provide a clear reference for States in deciding whether to join a particular international organization and implement its decisions. His Government would submit written comments on the draft articles due course.

77. Regarding the first question raised in chapter III of the report — whether the conduct of an organ of an international organization placed at the disposal of a State was attributable to the latter — a State relinquished a certain amount of its sovereignty to an international organization of which it was a member by delegating to that organization some of its powers to act. Hence, effective control in certain areas lay with the organization, not its member States. Clearly, therefore, the conduct of the organ was attributable to the organization, unless it could be proved to have been directed or controlled by a particular member State, in which case it was attributable to the State. The Commission should undertake further study of relevant examples and practice.

78. With regard to the second question — when consent given by an international organization to the commission of a given act by a State was a circumstance precluding wrongfulness of that State's conduct — the granting of consent by an organization was normally a collective decision of the organization's members, and was limited by the organization's constituent instrument. The State receiving the consent was likewise constrained by the conditions and limits of that consent. The question that needed to be addressed, therefore, was to what extent an act would be attributable to the State if the latter went beyond the mandate provided by the consenting organization. It was also important to consider whether the member State carried out a specific act in accordance with international law.

79. As to the question of when an international organization was entitled to invoke the responsibility of a State, international organizations were diverse in terms of their objectives and purposes. In many cases, their main function was to ensure compliance with agreements: in other words, precisely to invoke the responsibility of member States, often through the imposition of sanctions. In other circumstances, an international organization might have the right to invoke the responsibility of a State to respect its obligation towards the international community, provided that safeguarding the interest of the international community underlying the obligation breached was included among the functions of the international organization, as set out in draft article 48, paragraph 3.

80. **Ms. Escobar Hernández** (Spain) said that the draft articles on responsibility of international organizations had been improved both substantively and structurally. They followed the articles on State responsibility where appropriate but also incorporated specific elements relating to international organizations to which her delegation had referred on previous occasions. The addition of Part Six (General provisions) was particularly welcome. Her Government would submit written comments on the draft articles in due course. For the moment, she wished to point out that the draft articles still failed to address adequately all the possible forms of relationship between States

and international organizations with respect to international responsibility, as was made evident by the three questions raised in chapter III of the Commission's report. Although they were primarily questions of State responsibility, they also related to the responsibility of international organizations. In order to answer the first question — when conduct of an organ of an international organization placed at the disposal of a State was attributable to the latter — a detailed analysis of existing practice and plausible scenarios would be required, taking into account various factors. In particular, it would be important to consider the way in which the organ was placed at the disposal of the State, the level of control that the State could exert over the organ and the nature of the conduct of the organ. In any case, useful elements for answering the question could be found in the articles on State responsibility and the general theory of international responsibility.

81. Regarding the question of when consent given by an international organization to the commission of a given act by a State was a circumstance precluding wrongfulness of the State's conduct, a nuanced approach was needed. The following considerations, inter alia, should be taken into account: whether or not the State was a member of the organization, whether the obligation to which the act related was derogable, whether the obligation in question fell within the competence of the organization and whether the organization was empowered to consent independently, without the participation of others, to acts by third parties that might hinder the fulfilment of the obligation in question. Clearly, it would not be possible to give a single answer that would apply to all cases of such consent or to all types of international organizations.

82. Lastly, on the question of when an international organization was entitled to invoke the responsibility of a State, relevant considerations included whether or not the State was a member of the organization, the nature of the obligation breached by the State and the nature and competence of the organization seeking to invoke the responsibility of the State. The Commission should examine those questions as part of its work on responsibility of international organizations.

83. **Mr. Buchwald** (United States of America) said that his delegation appreciated the Commission's work on the draft articles on responsibility of international organizations but remained concerned about the approach that the Commission had taken to the topic, specifically its reliance on the articles on State responsibility. That approach risked eliding both the differences between States and international organizations and the wide differences among international organizations. The draft articles included provisions that applied to only a small fraction of all international organizations or that would rarely, if ever, come into play for the vast majority of them. For example, as the commentary noted, draft article 20 (Self-defence) was likely to be relevant to the acts only of those international organizations that administered a territory or deployed an armed force. Draft article 23 (Distress) would also be of limited applicability. His delegation questioned the utility of including such articles.

84. Draft article 63 (*Lex specialis*), which limited the application of the draft articles in areas that were governed by special rules of international law, including the rules of particular international organizations, was an important step in addressing the differences among international organizations. His delegation was not certain, however, that the addition of that article would alleviate its concerns about the Commission's basic approach. It would review the new article carefully and assess its consequences for the other draft articles.

The meeting rose at 1 p.m.