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Chairman: Mr. Al Bayati . . . . . (Iraq)

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The meeting was called to order at 10.15 a.m.

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

1. **Mr. Appreku** (Ghana), commenting on the draft articles on the law of transboundary aquifers, proposed that for the sake of consistency the word "use" in draft article 4 (b) should be replaced, by the word "utilization". The maximum long-term benefits to be derived from aquifer waters should not be limited to what was currently technically possible, but should also ensure an environmental and socio-economic equilibrium for future generations, taking into consideration the real costs of deriving the benefits. His country attached great importance to capacity-building, through international cooperation, to address the information gap in geophysical science, and to ensure the effective and equitable management of Africa's shared natural resources, including aquifers and aquifer systems. Ghana was currently hosting the seventh African Conference on Remote Sensing and Environment, with the support of its Water Resources Commission and the University of Ghana. Its national water policy upheld the principle of sovereignty while also recognizing the principle of solidarity and good neighbourliness. The sharing of natural resources implied the responsibility to cooperate to ensure their reasonable and equitable utilization, as envisaged in draft articles 4 and 5. Regional and bilateral arrangements and mechanisms promoted efficient management of shared water resources and also provided an early warning mechanism, a forum for the regular exchange of information and the notification of planned measures, and a means for peaceful settlement of disputes. In January 2007 Ghana and its six riparian neighbours Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger and Togo had concluded a convention on the status of the Volta River, and established the Volta Basin Authority, which would have jurisdiction over the groundwater and wetlands of the river's reservoirs and lakes together with the aquatic and land ecosystems linked to the basin. An existing bilateral declaration with Burkina Faso, and other bilateral agreements currently planned with Côte d'Ivoire and Togo, would normally apply both to surface waters and to associated aquifers and aquifer systems, in line with the ECOWAS subregional action plan for integrated management of water resources. It would be necessary to rationalize the relationship between the draft articles and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which might also apply to certain categories of aquifers and aquifer systems, and also to clarify which of them were to be considered as international or transboundary in nature. Some international boundaries were disputed or had not yet been delimited. The essential question should be whether the utilization of an aquifer or aquifer system in the territory of one State had or might have an impact in another State. There were still lingering doubts about the implications for State sovereignty of some of the underlying concepts in the 1997 Watercourses Convention, especially equitable, reasonable and sustainable utilization. That did not excuse inertia, because the principles could be fleshed out over time through experience, practice and judicial interpretation. In answering the question whether a particular State was complying with the normative standards set in the Watercourses Convention and the present draft articles, the test of reasonableness should apply. Good neighbourliness, the principle underpinning the draft articles, implied a duty of care.

2. Turning to the topic "effects of armed conflicts on treaties", he said attention should be paid to the effect on treaties which were themselves intended to put an end to armed conflict, as well as to their implications for third parties standing guarantor for such agreements. The Charter of the United Nations occupied a unique position among post-conflict treaties, and its principles for the avoidance of conflict should continue to motivate efforts at regulation. The topic should also address the effects of armed conflicts on treaties aimed at promoting regional integration. Where by reason of an internal armed conflict a State party to a treaty became a failed or fragile State unable to honour its treaty obligations, it should instead be encouraged to comply with the treaty at a later time or over time, so as to preserve the stability of treaty relations. Attention should also be paid to treaties dealing with international transport, such as air services agreements, so that international air traffic was not unduly disturbed by an outbreak of hostilities in a country possessing air corridors critical for international aviation.

3. **Ms. Nworgu** (Nigeria), commenting on the topic "shared natural resources", supported the Commission's recommendation that the General Assembly should take note of the draft articles and that concerned States should make appropriate bilateral and

regional arrangements for the management of their transboundary aquifers on the basis of the principles embodied in the draft. The West African subregion had already adopted a regional action plan for integrated water resources management, dealing inter alia with the management of transboundary basins. She also agreed with the Commission that the question of elaborating a convention based on the draft articles should be left to a later stage. Time was needed to resolve the policy issues that would arise and to define the appropriate relationship between the draft articles and other conventions and international agreements concerning transboundary aquifers, especially the United Nations Convention on the Law of the Sea and the 1997 Convention on the Law of Non-navigational Uses of International Watercourses. She also supported the omission from the draft of the previous draft article 20. The law on transboundary aquifers should be treated independently of any future work of the Commission on the issues relating to oil and natural gas. Her country subscribed to the principle of equitable and reasonable utilization of aquifer systems in accordance with draft article 4, which should be read in conjunction with draft article 3.

4. Life-supporting groundwater resources were of inestimable value for humanity. To ensure their sustainable use and development, she urged all aquifer States to cooperate bilaterally and regionally in the protection and preservation of ecosystems, the prevention and control of pollution, and the monitoring and management of their transboundary aquifers or aquifer systems.

5. Turning to the topic "Effects of armed conflicts on treaties", she endorsed the Commission's decision to transmit the draft articles to Governments for their comments and observations and urged Governments to respond without delay. She encouraged the Commission to consider at the appropriate juncture the effects of armed conflicts on treaties involving international organizations, so giving the international community a wider overview of the subject.

6. **Mr. Álvarez** (Uruguay) said the topic "Shared natural resources" was especially relevant for countries like his own, which had significant aquifer resources and experience of managing them in conjunction with other countries in the region. The draft articles should provide for oil and gas resources as well as for groundwater, because there were important similarities between the arrangements governing the two kinds of resources. The Commission should pursue its study of regimes for oil and gas reserves.

7. His country maintained its view that the articles should take the form of guidelines, recommendations or model agreements for the use of States in reaching multilateral agreements for managing the utilization and conservation of shared aquifers. He endorsed the principles set out in draft article 3 and in article 9. However, he did not support those parts of the text which referred to the relationship between the draft articles and other instruments, because at the current stage the draft was non-binding in character and its future relationship with other texts on the management of natural resources could not be accurately foreseen. The draft articles should be regarded as a set of recommendations for States to draw upon in reaching agreements for the management of natural resources, to supplement existing binding agreements.

8. **Ms. Sarenkova** (Russian Federation) agreed with the Commission's recommendations that the draft articles on the law of transboundary aquifers should be annexed to a General Assembly resolution, that States concerned should make appropriate bilateral or regional arrangements, and that the question of elaborating a convention on the topic should be considered at a later stage. When the Commission dealt with the question of the relationship between the draft articles and other instruments, it should have reference not only to the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, but also to the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Discharge zones, within the meaning of the draft articles, could include watercourses, lakes and other surface waters.

9. The draft articles should be further evaluated on their subject matter by State agencies responsible for the preservation and utilization of transboundary aquifers. The draft was a balanced text on the whole, combining the principle of State sovereignty over natural resources with the principle of reasonable and equitable use and the obligation not to cause significant harm to other States. The Commission should deal independently with the problems relating to oil and gas, which were different from those relating to aquifers. However, the question of whether to include them called for further study and discussion.

10. She welcomed the Commission's balanced approach to the topic "Effects of armed conflicts on treaties". It took account of the special circumstances in which States found themselves as a result of armed conflict, and did not undermine the principles of the stability of international treaty relationships and the performance in good faith of the obligations arising from them. However, she doubted whether the scope of the draft should be extended to internal armed conflicts. She agreed with the decision to extend the scope of the draft to third States, but it would have been useful to reflect in the draft articles the differences in the legal regimes applicable to the two groups of States. At some point the Commission would have to consider whether the draft articles should also apply to treaties involving international organizations, with the changes which would become necessary in that case.

11. In the matter of determining whether treaties continued in force in the event of an armed conflict, she welcomed the Commission's abandonment of the criterion of the intention of the parties. The indicia listed in draft article 4 were more appropriate for that purpose. The indicative list of categories of treaties to be inserted after draft article 5 was useful, but called for further study, especially with regard to the inclusion of multilateral law-making treaties. The term "law-making" did not refer to the subject matter of the treaty, and it would be premature to decide that a treaty continued in force during an armed conflict merely on the basis that it created certain rules multilaterally.

12. She endorsed the distinction drawn between the position of a State exercising the right to self-defence and that of an aggressor State. An aggressor State must not derive advantage from a situation it had created by its own unjustifiable conduct.

13. She welcomed the inclusion, in the Commission's programme of work, of the topic "Treaties over time". Changing circumstances called for careful appraisal of the means of interpreting and amending treaties in the light of subsequent agreements and practice. A guide based on practice in that area would be useful for States, international organizations and the experts involved in preparing and implementing international treaties.

14. She shared the concern expressed by the Commission, in chapter XII, section 8, about the financial constraints associated with the attendance of Special Rapporteurs at the sessions of the Sixth Committee. If the General Assembly could resolve the problem it would be of great assistance to the Commission's work on the new topics on its agenda.

15. **Mr. Sheeran** (New Zealand) said the Commission's sixtieth anniversary had been marked in this country at the Beeby Colloquium, which honoured one of the country's foremost international lawyers. To enable dialogue to continue between the Commission and the Sixth Committee, he supported the idea of an informal meeting with Legal Advisers to discuss topics on the Commission's agenda with the Special Rapporteurs concerned. He also supported the suggestion of funding attendance at Sixth Committee meetings by Special Rapporteurs, to enable them to discuss their topics with representatives of Governments. He welcomed the suggestion by the Chairman of the Commission that honorariums be restored to Special Rapporteurs, whose work was central to the Commission's ability to fulfil its mandate. As the work of the Commission became more varied and complex, it was increasingly difficult to respond adequately to its report within the given time frame. He urged the Commission and the Secretariat to explore ways of providing a longer interval between the point at which the Commission's report became available and the debate in the Sixth Committee.

16. Turning to the Commission's long-term programme of work, he welcomed its readiness to consider new areas of law, especially in regard to economic and trade questions, and the possibility of its determining common factors in the interpretation of most-favoured-nation treaties. He looked forward to receiving further information from the Study Group on "Treaties over time".

17. Commenting on the topic "Shared natural resources", he said that with increasing demands for access to freshwater, the importance of the topic would continue to grow. He congratulated the Commission on enlisting the assistance of scientists, administrators and others, a method of work which it could usefully follow in other difficult areas such as protection of persons in the event of disasters. The draft articles were well balanced and he agreed with the two-step approach recommended by the Commission. Given the specific and unique features of individual aquifers, transboundary aquifers were best managed at the regional or local level. At the current juncture, he was

not persuaded that it was useful to strive for firm rules to apply to all shared aquifers.

18. Turning to the topic "Effects of armed conflicts on treaties", he welcomed the fact that the revised draft reflected comments made during the previous year's debate by his own country and others. He was also pleased to see that internal armed conflicts were included in the definition and that the test of the parties' intention had been removed from draft article 4.

19. **Mr. Simonoff** (United States of America) said that his Government recognized that universal respect for international law was essential to orderly and peaceful relations among States and commended the International Law Commission on its contributions to the progressive development and codification of such law. His delegation believed that the Commission's recommendation to the General Assembly concerning the draft articles on the law of transboundary aquifers was a prudent compromise for future action. Context-specific arrangements were the best way to address pressures on transboundary groundwaters, as there was still much to learn about transboundary aquifers in general, and specific aquifer conditions and State practice varied widely. The draft articles clearly went beyond current law and State practice, and therefore did not reflect customary international law. For those reasons, the United States had supported recasting them as recommendatory, non-binding principles for use in specific contexts.

20. The Commission's first recommendation — to urge States to use the draft articles in context-specific bilateral and regional arrangements — was a helpful alternative approach. The draft articles could provide useful guidance for the effective management of transboundary aquifers, and his delegation encouraged concerned States to utilize them for that purpose. Regarding the later development of a convention, his Government continued to believe that, as had proved the case with the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, a global treaty on the law of transboundary aquifers would be unlikely to garner much support or make much difference in State practice. For the reasons set forth in his delegation's statement on the subject in 2007 (A/C.6/62/SR.22, para. 89), the United States also continued to believe that it would not be productive for the Commission to consider matters related to transboundary oil and gas resources.

21. With respect to the draft articles on the effects of armed conflicts on treaties, the United States had consistently supported an approach that preserved the reasonable continuity of treaty obligations during armed conflict, took into account particular military necessities and provided practical guidance to States by identifying factors relevant to determining whether a treaty should remain in effect in the event of armed conflict. His delegation was pleased that the draft articles reflected that approach; however, it had some concerns regarding the outstanding issues. For example, it felt strongly that attempting to define the term "armed conflict" was likely to be confusing and counterproductive. A better approach would be to make it clear that armed conflict referred to the set of conflicts covered by common articles 2 and 3 of the Geneva Conventions (i.e., international and non-international armed conflicts). The conflating, in draft article 2 (b), of the terms "occupation" and "armed conflict" — two separate concepts in the law of armed conflict — was also a source of concern. If occupation was to be covered in the draft articles, it should be dealt with separately from armed conflict. In addition, the text should state clearly that international humanitarian law was the *lex specialis* governing armed conflict.

22. He recalled that the Special Rapporteur had made it clear that the articles were drafted without prejudice to their final form. The United States agreed with that approach and noted that, should the draft articles not ultimately take the form of binding articles, the need for the inclusion of saving clauses should be reconsidered. The provision of draft article 8 (2), regarding the effective date of notification of termination, withdrawal or suspension, should be made subject to the proviso "unless the notice states otherwise". His Government would continue to review other draft articles, including draft article 15.

23. Concerning the new topics proposed for the Commission's long-term programme of work, his delegation continued to hold the view that the topic "The most-favoured-nation clause" was not appropriate for progressive development or codification. Most-favoured-nation provisions were principally a product of treaty formation and tended to differ considerably in their structure, scope and language; they were also dependent on other provisions of the agreements in which they were included and therefore resisted categorization and study. He also questioned the

Commission's decision to take up the topic "Treaties over time: in particular subsequent agreement and practice", which was potentially broad in scope and thus might not be suitable for progressive development and codification. Moreover, he was not aware of any pressing real-world issues that necessitated consideration of the topic at the current juncture; any issues relating to subsequent agreement and practice would require a case-by-case analysis.

24. **Ms. Drenik** (Slovenia) said that the draft articles on the law of transboundary aquifers represented a beneficial contribution to the codification and progressive development of international law and, in particular, of international environmental law. It was important that the topic should be addressed through a comprehensive cooperative approach, encompassing the utilization, protection and management of water resources. The Commission had rightly given priority to its consideration of the law of transboundary aquifers, independently of its work on the issue of shared oil and gas resources. Slovenia believed that the substance of the draft articles could, over time, become customary law. It was unclear which norms of environmental law had already become customary, but certainly the principle *sic utere tuo ut alienum non laedas*, set out in both the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) and the Rio Declaration on Environment and Development, was of a customary nature, and the same was true of some principles embodied in the draft articles.

25. Her delegation welcomed the proposed two-step approach with regard to the action of the General Assembly (A/63/10, para. 49), but believed that there should be more flexibility regarding the second step. In particular, the possibility of taking a soft law approach — for example, by adopting a declaration of principles or some similar instrument based on the draft articles — should be considered as an alternative option to the development of an international treaty.

26. The scope of the draft articles on effects of armed conflicts on treaties should be studied further with a view to ensuring the legal certainty and stability of international treaties. Although the draft articles were independent of the Vienna Convention on the Law of Treaties, they should reflect its customary nature. Slovenia was sceptical about creating a definition of the term "armed conflict" for the purposes of the draft articles separate from its meaning under international humanitarian law, which was the *lex specialis* governing armed conflict. Careful consideration should also be given to the usefulness of the indicative list of categories of treaties contained in the annex to the draft articles.

27. With regard to chapter XII of the Commission's report, her delegation welcomed the proposal to organize an informal exchange of views between the Commission and Legal Advisers at least once every quinquennium. Such meetings were a valuable means of addressing the phenomenon of fragmentation of international law. She was pleased to report that her country's Ministry of Foreign Affairs, together with the International Law Association of Slovenia and the law faculty of the University of Ljubljana, had recently organized a scientific symposium to commemorate the Commission's sixtieth anniversary, and the Ministry had also published a series of articles on the Commission's work.

28. Slovenia also welcomed the two new topics to be dealt with during the Commission's next session: "Treaties over time" and "The most-favoured-nation clause". Both topics related to the more general notion of the rule of law in international relations. In that connection, Slovenia was pleased that the Commission had addressed the issue of the rule of law at the international and national levels and commended its commitment to the idea that all States, regardless of their circumstances, were subject to the primacy of law.

29. Regarding the relationship between the Commission and the Sixth Committee, while her delegation favoured greater engagement of the Commission with Legal Advisers, it saw little merit in the proposal that part of the Commission's session should be convened in New York. What was needed was a more focused discussion within the Committee on each issue, with the assured presence of the Special Rapporteur for the topic concerned. The discussion would be more focused if each chapter of the Commission's annual report was introduced and discussed separately. The introduction should highlight the questions on which the Commission needed guidance or input from States. In addition, the Special Rapporteurs should be more involved in the discussions and should respond to the Committee's comments. Taking into account budget constraints, it might be beneficial for Special Rapporteurs and other members of the Commission to be included, where

applicable, in national delegations, although they should speak in their personal capacity.

30. **Mr. Keinan** (Israel), referring the Committee to his Government's comments on the draft articles on the law of transboundary aquifers contained in document A/CN.4/595, said that his delegation wished to emphasize the strategic importance of water resources in general and aquifers in particular. Any rules regarding aquifers and aquifer systems should take account of their susceptibility to pollutants and the length of time required for aquifers to clean themselves as compared to surface waters. Israel supported efforts to regulate activities that could harm aquifers and therefore welcomed the introduction of draft article 2 (e). The language of draft article 11 should be modified so as to make it clear that it also applied to discharge and recharge zones outside the territory of the aquifer State concerned. In order not to allow aquifer States to disregard their commitments with respect to cooperation with other aquifer States, his delegation would suggest that the words "joint" and "jointly" in draft articles 7 and 13, respectively, should be replaced with the words "coordinated" and "in a coordinated manner".

31. The approach advocated by the International Law Association's study group on the draft articles should be embraced by the Commission, namely, the treatment on an equal footing of the principles of equitable and reasonable utilization of aquifers and the obligation not to cause significant harm to other aquifer States. That approach, in which neither of the two principles prevailed over the other, was consistent with the Helsinki Rules on the Uses of International Rivers as updated by the Berlin Rules on Water Resources.

32. In the light of current technology which allowed for the artificial injection of water into aquifers, there might be some merit in considering the possibility that a State that artificially contributed water of accepted quality should be rewarded with a greater apportionment of water from the aquifer. Concerning the final form of the draft articles, his Government remained unconvinced that it would be appropriate to adopt a convention, although it did believe that the general principles set out in the draft articles would serve as useful guidance for aquifer States. Transboundary oil and gas resources should be treated separately and independently from transboundary aquifers.

33. With regard to the draft articles on effects of armed conflicts on treaties, his delegation noted that the commentary to draft article 4 described the indicia of susceptibility to termination, withdrawal or suspension of treaties as being indicative and not exhaustive. The draft article itself, however, did not make that clear and should be modified accordingly. In 2007 his delegation had expressed the view that the list of categories of treaties the subject matter of which implied their continued operation during armed conflict was problematic, and it was not persuaded that moving the list to an annex had resolved the difficulties. A list of relevant factors or general criteria should suffice. His delegation also questioned whether the revised language of draft article 15 was entirely satisfactory.

34. It appeared from the current wording that a State that had committed aggression in one context would be prevented from terminating, withdrawing from or suspending a treaty as a consequence of an armed conflict in an entirely different context. Moreover, in an extended conflict, other factors might come into play. In view of those uncertainties, the question of possible benefit to an aggressor State should be regarded as a relevant consideration but not necessarily a decisive one.

35. **Mr. Fattal** (Lebanon) observed that the Commission's codification work was becoming increasingly complex, as illustrated by the painstaking process of developing the draft articles on the law of transboundary aquifers. A number of delegations had alluded to the growing importance of economics in the task of developing international law in general and in the development of the draft articles in particular. The draft articles showed, however, that the considerations that went into the formulation of a norm were much broader than simple economic need. The Commission had worked with scientists and had taken great care in choosing terminology on the basis of current scientific knowledge and usage, as exemplified by the explanation of the meaning of the term "ecosystem". The text of the draft articles evidenced the Commission's attention not only to the definition and use of terms but also to the intended users of the text, namely scientific personnel and water management administrators.

36. A number of delegations had also expressed the view that the Commission's work on the issue of shared natural resources should not include oil and

natural gas, owing to their economic and commercial nature. While it was true that there were huge economic stakes associated with those resources, there had been talk of "water wars" for years and the private sector had long been involved in drinking water management. Certainly, water was a vital human need, but it also had an industrial and commercial character. Legal specialists concerned with the two types of resources should therefore not maintain a total separation between their respective areas of endeavour, but rather should collaborate, as the members of the Commission had done, with scientists from the United Nations Educational, Scientific and Cultural Organization.

37. Delegations had also cautioned against making reference to the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses because it had yet to enter into force, but that argument was not valid. The process of codifying or developing international law was often time-consuming and thankless work, but it eventually paid off. For example, it had taken many years for the Vienna Convention on the Law of Treaties finally to enter into force and to conclude the United Nations Convention on the Law of the Sea.

38. **Mr. Murai** (Japan), referring to the draft articles on effects of armed conflicts on treaties, said that the definition of "armed conflict" in draft article 2 (b) was circular in nature and did not really specify what situations it covered. The arrangement of the indicative list of categories of treaties referred to in draft article 5, which was annexed to the draft articles, was illogical and should be modified.

39. Although draft article 13 was based on article 7 of the relevant resolution adopted by the Institute of International Law in 1985, it lacked the last part of that article, which read "subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor". Despite the statement in paragraph (2) of the commentary that "this draft article has to be understood against the background of the application of the regime under the Charter of the United Nations, as contemplated in draft articles 14 and 15", it was doubtful whether those two draft articles achieved the same purpose as the last part of the article of the Institute of International Law, because the "legal effects of decisions of the Security Council" mentioned in draft article 14 might not have the same consequences as a determination by the Security Council that the State ostensibly exercising the right to self-defence was an aggressor. Similarly, draft article 15 omitted to refer to those consequences. With regard to draft article 16, it was unclear why the laws of neutrality should be treated in a separate article rather than being included in the indicative list of categories of treaties referred to in draft article 5. That was another reason why the indicative list should be re-examined.

40. **Ms. Telalian** (Greece) said that the successful outcome of the codification of the effects of armed conflicts on treaties would depend on cooperation between Member States and the Commission, because the subject matter was largely based on State practice.

41. The draft articles should relate to contemporary types of conflict, including internal armed conflicts, whose effect on the operation of treaties could be as great as that of international armed conflicts. An explicit reference to both international and non-international armed conflicts in the definition of the term "armed conflict" in draft article 2 would clarify the scope of the entire set of draft articles and improve their consistency.

42. In draft article 3, it would be preferable to use the term "ipso facto", rather than the word "necessarily", since the former term would more accurately reflect the law existing in the first half of the twentieth century, when the principle concerned had been established. The commentary to that article appeared to be limited to examples of the practice of the United Kingdom and the United States of America and to the views of learned writers from common law countries, whereas it would be advisable for the Commission to make more extensive reference to doctrine and practice from civil law countries as well.

43. Draft article 5 was one of the core provisions. The explanations provided in the commentary to the article were crucial for its proper interpretation. Again reference to the relevant practice and doctrine of civil law countries would make the commentary more balanced and a more accurate reflection of existing law on the topic. To that end, the Commission might wish to establish a questionnaire seeking information on past and current State practice on the issues covered by the article. Such a questionnaire would make it possible to reflect the practice of a large number of States which, although not involved in the Second World War, had experienced other types of armed conflict. Clarification

of the rules governing the operation "in whole or in part" of a treaty during an armed conflict would be appreciated. As those rules did not seem to differ from those embodied in article 44 of the Vienna Convention on the Law of Treaties, the Commission might wish to consider a mutatis mutandis reference to that provision.

44. While the illustrative list of categories the subject matter of which involved the implication that they continued in operation during an armed conflict would offer useful guidance to States, it might be wise to make explicit reference to that list in draft article 5. In addition to the above-mentioned categories, there might be other treaties whose subject matter likewise implied their continued applicability, in whole or in part, during an armed conflict and such treaties should also be considered on a case-by-case basis for inclusion in that article.

45. Draft article 8 on notification of termination, withdrawal or suspension drew on article 65 of the Vienna Convention, but it was unrealistic to expect States to apply the regime of notification provided for in the Convention in emergencies such as war. It did not seem feasible to require a State intending to terminate, withdraw from or suspend the operation of a bilateral treaty to notify its intention to the other belligerent party. It was also unrealistic to provide that such notification would take effect upon receipt by the other belligerent party. In that context, it might be interesting to examine State practice relating to the acts or instruments used by States to inform other States or the general public of their intention to terminate, withdraw from or suspend a treaty during an armed conflict. That practice might be scarce and outdated, especially as States tended to avoid formalities in extreme situations such as belligerency and to confine themselves to domestic law measures having the effect of suspending the treaty at the national level. Such unilateral acts should be tested against international law to ascertain their validity at the international level before they produced any effects at that level. Further clarification of the thrust of draft article 8, paragraph 3, and of its relationship with article 73 of the Vienna Convention would be welcome.

46. Her delegation fully supported draft articles 13, 14 and 15, but wondered why a State exercising its right of individual or collective self-defence could only suspend the operation of a treaty, but could not withdraw from it or terminate it. Even if draft article 17 did not purport to provide an exhaustive list of grounds for termination, one additional reason, namely the provisions of the treaty itself, should be added to the list, since it would confirm the applicability of the Vienna Convention's provisions on the termination of treaties both in peacetime and during an armed conflict. As the provisions of draft articles 18 and 12 overlapped, an indication of how the Commission saw the relationship between those articles would be welcome.

47. **Mr. Saripudin** (Indonesia) said that the dialogue between the International Law Commission and the Sixth Committee could be enhanced by holding more focused discussions within the framework of the International Law Week.

48. Referring to chapter IV of the Commission's report, he said that the law of transboundary aquifers should be treated independently of any future work by the Commission on issues related to oil or natural gas. The preamble and 19 draft articles setting forth the law of transboundary aquifers should ultimately take the form of a legally binding convention, although further deliberation and intergovernmental negotiation would be required in order to achieve that goal. In the meantime, the current text could serve as a basis for the negotiation of detailed bilateral and multilateral agreements on the use and protection of transboundary aquifers. When formulating a convention that would apply universally it would also be necessary to draw up two articles on the relationship between the draft articles and other international agreements and on dispute settlement. The two-step approach recommended by the Commission was therefore realistic at the current stage.

49. Turning to chapter V of the report on effects of armed conflicts on treaties, he said that the 18 draft articles adopted by the Commission on first reading offered a useful basis for further work. The scope of the draft articles should be restricted to situations of armed conflict of an international character in conformity with the Vienna Convention on the Law of Treaties. Internal conflicts did not necessarily affect treaties between sovereign States. The Commission's decision to annex to draft article 5 an indicative list of categories of treaties which would remain in operation in an armed conflict was welcome and the inclusion in that list of treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and

maritime borders, was consistent with the Vienna Convention.

50. The Commission's valuable contribution to United Nations action to promote the rule of law was commendable. Its main role in that respect lay in the formulation of rules in close cooperation with Member States.

51. **Mr. Al Habib** (Islamic Republic of Iran), referring to chapter V of the Commission's report, said that the Commission's work on effects of armed conflicts on treaties should supplement, but not contradict or prejudice, existing international instruments on the law of treaties which established the principle of the integrity of international treaties; any act inconsistent with the purposes and principles of the Charter of the United Nations should not affect the continuity of treaties. He therefore welcomed the statement in paragraph (4) of the commentary to draft article 2 that "the emphasis of the effects is on the application or operation of the treaty rather than the treaty itself".

52. The draft articles failed to reflect the achievements of international law in bolstering the legal stability of international boundaries. A treaty establishing a boundary belonged to the category of treaties which created a permanent regime and *erga omnes* obligations binding all States and the international community as a whole. Even such a fundamental change of circumstances as armed conflict could not be invoked as grounds for terminating or withdrawing from those treaties. The drafters of the 1969 Vienna Convention on the Law of Treaties and the 1978 Vienna Convention on Succession of States in Respect of Treaties had drawn a clear distinction between treaties establishing boundaries and other treaties.

53. It was regrettable that the Commission had not followed that approach in preparing the draft articles and had not taken the opportunity to highlight the exceptional status of that category of treaties. The mere reference in the annex to draft article 5 to "treaties declaring, creating or regulating a permanent regime or status or related to permanent rights, including treaties establishing or modifying land and maritime boundaries" would not place parties to an armed conflict under a binding obligation, since the list was merely indicative. Furthermore, treaties establishing or modifying river boundaries should be added to the list. It would, however, have been preferable to make specific reference to treaties establishing boundaries in draft article 3, since they had a critical role to play in maintaining peace and security.

54. The omission of that category of treaties from draft article 3 risked sending the wrong message to States which harboured an intention to alter the demarcation of their borders, a risk intensified by the fact that the scope of the draft articles was not limited to international armed conflicts, but also encompassed non-international armed conflicts. His Government had always opposed the inclusion of the latter type of conflict in the scope of the draft articles, because they might adversely affect the operation and implementation of treaties by impairing the ability of the State concerned to honour its treaty obligations to other States. The articles on responsibility of States for internationally wrongful acts, particularly the provisions on the circumstances precluding wrongfulness, might cover situations resulting from the non-application of treaties in a non-international armed conflict

55. The presumption of legal stability and of continuity of treaty relations was central to the whole topic. While the Commission had clearly intended to confirm that principle by the statement in draft article 3 that "the outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties", the use of the terms "non-automatic" and "necessarily" in the title and chapeau of the article might compromise that principle. Draft article 3 should therefore be recast.

56. In draft article 4, the inclusion of "the nature and the extent of the armed conflict" among the indicia of susceptibility to termination, withdrawal or suspension of treaties might give the mistaken impression that the wider and more intense an armed conflict became, the more probable it would be that the treaty relations between the belligerent States would be terminated or suspended. "The effect of the armed conflict on the treaty" was likewise not a viable determining factor because the absence of a definition of those indicia and the use of similarly vague phraseology in draft article 2 (b) had produced circular ambiguity. Moreover, it was inappropriate to allow "withdrawal" under draft article 4, since it contradicted the content of draft article 3.

57. It was unfortunate that draft article 8 did not distinguish between different categories of treaties and therefore apparently applied to treaties establishing boundaries. For that reason, it might be seen as an invitation to a State which wished to terminate, withdraw from or suspend a treaty to declare its intention to open hostilities. In addition that provision was not consonant with the indicative list annexed to draft article 5. It might be more rational if the initial right of a party to an armed conflict to give such notification were limited to treaties other than those the subject matter of which involved the implication that they continued in operation during an armed conflict.

58. Draft article 15 should be included, since it was essential to make it clear that States resorting to the unlawful use of force would not be allowed to benefit from the consequences of aggression. The "without prejudice" clause in draft article 14 was, however, not only superfluous, in view of Articles 25 and 103 of the Charter, but dealt with subject matter falling outside the Commission's mandate. It should therefore be deleted.

59. **Mr. Vargas Carreño** (Chairman of the International Law Commission), introducing chapters VI, VII and VIII of the Commission's report on its sixtieth session (A/63/10), said that in the case of chapter VI, on the topic "Reservations to treaties", the Commission had considered the thirteenth report of the Special Rapporteur (A/CN.4/600) on reactions to interpretative declarations, and 10 draft guidelines on the issue had been referred to the Drafting Committee. The Commission had also considered a note by the Special Rapporteur (A/CN.4/586) on a new draft guideline 2.1.9 on the statement of reasons for reservations. The Commission had also adopted 23 draft guidelines dealing with formulation and withdrawal of acceptances and objections and the procedure for acceptance of reservations.

60. Following the adoption of draft guideline 2.6.13 on the time period for formulating an objection, it had become necessary to adjust draft guideline 2.1.6 by deleting the third paragraph, which covered the same matter.

61. Although a statement of reasons was not a condition for the validity of a reservation under the regimes of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, some instruments did require States to give reasons for their reservations. Draft guideline 2.1.9, in an effort to promote a reservations dialogue, encouraged the author of a reservation not only to explain and clarify the reasons why the reservation was being formulated but also to provide information useful in assessing the validity of the reservation.

62. Draft guidelines 2.6.5 to 2.6.15 concerned the formulation of objections. Draft guideline 2.6.5 provided that the author of an objection could be any contracting State or international organization or any State or international organization entitled to become a party to the treaty. In the latter case, however, the objection would be conditional in the sense that the legal effects would be subordinate to the expression of definitive consent to be bound. Draft guideline 2.6.6 on joint formulation of objections was modelled on draft guidelines 1.1.7 and 1.2.2. Draft guideline 2.6.7 essentially repeated article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions on the well-established requirement that an objection to a reservation must be formulated in writing.

63. Draft guideline 2.6.8, on the other hand, filled a gap left by the Vienna Conventions, which, while providing for the possibility of precluding the entry into force of a treaty as between the reserving and objecting States, were silent on the time at which the objecting State must express that intention. Normally the declaration of that intention should accompany the objection, but in cases where the treaty did not enter into force immediately for other reasons, there was no reason to prohibit the author of the objection from expressing at a later date the intention to preclude the entry into force of the treaty, provided the treaty had not yet entered into force.

64. Draft guideline 2.6.9 transposed the procedural rules concerning the formulation of reservations to the formulation of objections. The marked formalism was justified by the highly significant effects that an objection could have on the reservation and its application as well as on the entry into force and the application of the treaty itself. Draft guideline 2.6.10 sought to encourage States and international organizations to expand and develop the practice of stating reasons for their objections.

65. Draft guideline 2.6.11 merely repeated article 23, paragraph 2, of the Vienna Conventions in stating that

an objection to a reservation made before a reservation had been confirmed did not itself require confirmation. Draft guideline 2.6.12 established the principle that an objection formulated prior to the expression of consent to be bound by a treaty did not need to be confirmed, unless the objecting party had not yet signed the treaty at the time. Non-confirmation generally posed no problem of legal security, since objections were communicated in writing and notified to all interested States and international organizations; moreover, an objection modified treaty relations only between the reserving State and the objecting State.

66. Draft guideline 2.6.13 addressed the question of the time period for formulating an objection and was based on article 20, paragraph 5, of the Vienna Conventions of 1969 and 1986. Draft guideline 2.6.14 simply stated that an objection to a specific potential or future reservation did not produce the legal effects of an objection. Although State practice was not uniform in that regard, the Commission believed that nothing prevented States or international organizations from formulating pre-emptive or precautionary objections that would not produce their effects until a corresponding reservation was formulated by another contracting State or organization. Draft guideline 2.6.15 provided that late objections did not produce the legal effects of an objection made within the time period specified in draft guideline 2.6.13. The practice of late objections was not uncommon and should not be condemned, since it allowed States and international organizations to express their views on a reservation; on the other hand, such late objections could not produce the normal effects of an objection made in good time.

67. The next set of draft guidelines dealt with the withdrawal and modification of objections to reservations, an issue treated very cursorily in the Vienna Conventions. It was clear from the *travaux préparatoires*, however, that in principle the withdrawal of objections ought to follow the same rules as the withdrawal of reservations, just as the formulation of objections followed the same rules as the formulation of reservations. Draft guideline 2.7.1 stated that an objection could be withdrawn at any time; it was self-evident that the consent of the reserving State was not required. Draft guideline 2.7.2 borrowed from article 23, paragraph 4, of the Vienna Conventions in stating that the withdrawal must be formulated in writing. Draft guideline 2.7.3 transposed the draft guidelines on formulation and communication of reservations to the case of objections, underlining the procedural parallelism between the withdrawal of a reservation and the withdrawal of an objection. Draft guideline 2.7.4 established the principle that the withdrawal of an objection was considered to constitute acceptance of the reservation, a conclusion that followed implicitly from article 20, paragraph 5, of the Vienna Conventions. Draft guideline 2.7.5 dealt with the effective date of withdrawal of an objection, drawing on article 22, paragraph 3 (b), of the 1986 Vienna Convention. Thus, the withdrawal of an objection became operative only when notice of it had been received by the reserving State or international organization, even if the effects of withdrawal of an objection might go beyond the strictly bilateral relationship between the reserving party and the objecting party. Under draft guideline 2.7.6, however, the withdrawal of an objection could become operative at a later date set by its author.

68. Draft guidelines 2.7.7 and 2.7.8 dealt with the partial withdrawal of an objection. Draft guideline 2.7.7 established the possibility of partial withdrawal and made it subject to the same formal and procedural rules as a complete withdrawal. Although the Commission was unaware of any State practice involving partial withdrawal of an objection, it felt that such a guideline would be useful. Draft guideline 2.7.8 discussed the legal effects of a partial withdrawal. Draft guideline 2.7.9 addressed the problem of the widening of the scope of an objection and stated that it might be done during the time period referred to in draft guideline 2.6.13, provided that it did not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

69. Lastly, draft guideline 2.8 was the first in a section dealing with acceptance of reservations and provided that acceptance might arise from a unilateral statement or silence within the periods specified in draft guideline 2.6.13. It derived directly from article 20, paragraph 5, of the 1986 Vienna Convention, which presumed that acceptance of a reservation could be defined as the absence of an objection.

70. In view of the dearth of practice with regard to reactions to and consequences of interpretative declarations, the Commission would welcome replies to the questions on the topic “Reservations to treaties” set forth in chapter III of its report.

71. With regard to chapter VII of the report, on the topic "Responsibility of international organizations", the Commission had considered the sixth report of the Special Rapporteur (A/CN.4/597), dealing with Part Three of the draft articles, which concerned the implementation of the international responsibility of an international organization. The eight draft articles adopted by the Commission made up chapter I of Part Three, entitled "Invocation of the responsibility of an international organization" and included some procedural rules of a general nature closely corresponding to the analogous provisions of the articles on the responsibility of States for internationally wrongful acts (A/RES/56/83). Draft articles 46 and 47, for example, dealing with the general parameters of the invocation of responsibility and notice of claim, followed the wording of the articles on State responsibility with only minor adaptation. The same was true for draft article 48, which dealt with two aspects of admissibility of claims, namely, nationality of claims and exhaustion of local remedies. Since most practice in that area concerned States, those requirements might be less relevant to international organizations than they were in inter-State relations, but the Commission had deemed it necessary to include those provisions to avoid giving the impression that the requirements could never apply to the responsibility of an international organization.

72. Draft articles 49 and 50 dealing, respectively, with loss of the right to invoke responsibility and a plurality of injured States or international organizations, were also closely modelled on the analogous provisions on State responsibility. Despite the paucity of relevant practice, the Commission felt that there was no reason to depart from those general rules. Draft article 51 dealing with a plurality of responsible States or international organizations included a paragraph that was not in the corresponding text on State responsibility and provided that subsidiary responsibility might be invoked insofar as the invocation of the primary responsibility had not led to reparation. Paragraph 2 addressed the situation in which a State or an international organization had the obligation to provide reparation only if, and to the extent that, the primarily responsible State or international organization failed to do so, but it did not imply the need to follow a chronological sequence in addressing a claim.

73. Draft article 52 had a slightly different structure than the corresponding provision on State responsibility but was almost identical in substance. However, paragraph 3 sought to reflect the views expressed by several States and some international organizations by restricting the entitlement of an international organization to invoke responsibility to the case where the obligation breached was owed to the international community as a whole and the organization invoking responsibility was vested with the function of safeguarding the interest of the international community underlying the obligation breached.

74. Draft article 53, which concluded chapter I of Part Three, contained a provision not in the articles on State responsibility. In practice, some person or entity other than a State or international organization might well be entitled to bring a claim against an international organization seeking cessation of a wrongful act and reparation for the injury caused. Draft article 53 was intended to safeguard that possibility.

75. Draft articles on countermeasures against international organizations had been provisionally adopted by the Drafting Committee and would be considered by the Commission at its next session. He would like to draw attention to the debate on countermeasures reflected in paragraphs 145 to 163 of the report. The Commission would welcome comments and observations from Governments and international organizations on draft articles 46 to 53 and on issues relating to countermeasures.

76. Turning to chapter VIII of the report, dealing with the topic "Expulsion of aliens", he said the Commission had considered the fourth report of the Special Rapporteur (A/CN.4/594) addressing the problem of the expulsion of persons having dual or multiple nationality and the issue of loss of nationality and denationalization in relation to expulsion. The Special Rapporteur had devoted his fourth report to those issues in response to questions raised by members of the Commission, but he was not convinced that it would be worthwhile to elaborate draft articles on them. In his report he concluded that the prohibition against the expulsion of nationals did not cover nationals of the expelling State who also possessed one or more other nationalities. He considered that there might be exceptions to the rule prohibiting the expulsion of nationals, in the case, for example, of an individual involved in espionage, if the State for the

benefit of which the espionage had been conducted was willing to receive the person concerned.

77. Some members had been of the opinion that the Commission should elaborate draft articles on the situation of dual or multiple nationals and on denationalization in relation to expulsion, while others had shared the Special Rapporteur's view that there was no need for draft articles dealing with those questions, without necessarily supporting his analysis. It had been argued that the increasingly common phenomenon of dual or multiple nationality could not be ignored, and that the elements of practice relied upon by the Special Rapporteur in support of a distinction between different categories of nationals were not conclusive with respect to the question of expulsion. While some members had agreed that the criterion of dominant or effective nationality could play a role, others had argued that the criterion was relevant in the fields of diplomatic protection and private international law but could not justify a State treating some of its nationals as aliens for purposes of expulsion.

78. On the issue of denationalization in relation to expulsion, it had been pointed out that States had the right to punish the abuse or fraudulent use of dual or multiple nationality, but some members had emphasized that denationalization was often used as a means of political punishment in order to violate the rights of certain individuals and deprive them of their property before expelling them. In the light of the divergent views expressed, the Commission had decided to establish a working group. The Working Group had concluded, and the Commission had approved its conclusions, that those issues should be addressed in the commentary rather than in the draft articles. For the purposes of the draft articles, the principle of the non-expulsion of nationals also applied to persons who had legally acquired one or several other nationalities, and the commentary should make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of non-expulsion of nationals. The seven draft articles that had been referred to the Drafting Committee during the Commission's fifty-ninth session remained in the Drafting Committee.

79. **Mr. Bühler** (Austria) said that his delegation welcomed the thirteenth report (A/CN.4/600) of the Special Rapporteur on reservations to treaties, which addressed the issue of interpretative declarations. The subject had been neglected in the Vienna Convention on the Law of Treaties, but recent practice showed that States frequently resorted to interpretative declarations, particularly in connection with treaties that did not allow reservations. The legal consequences of silence in response to an interpretative declaration must be assessed in the light of article 31 of the Vienna Convention. It was his delegation's view, based on the jurisprudence of the Austrian Administrative Court, that the interpretation put forward in a unilateral declaration by one State party could have effect only with respect to the declaring State unless another State party explicitly aligned itself with that interpretation.

80. His delegation had doubts about the draft guidelines concerning the reclassification of an interpretative declaration. Whether a declaration constituted an interpretation or a reservation should result from the objective definition of reservations. The formulation in draft guideline 2.9.3 that reclassification was a unilateral statement whereby a State "purports to regard the declaration as a reservation and to treat it as such" gave the impression that an individual State could determine on its own whether the declaration was an interpretation or a reservation.

81. The recommendation in draft guideline 2.1.9 that a reservation should indicate the reasons why it was being made, although useful and reflecting the usage of some conventions, did not correspond to general practice. Since it would be difficult to determine the legal effects of the reasons given for a reservation, the need for such a guideline could be questioned. That was not to diminish the importance of formulating reservations in a clear and well-defined manner that allowed their precise scope to be determined. On the other hand, the recommendation in guideline 2.6.10 encouraging the statement of reasons for an objection was necessary. In practice objections were made both to admissible reservations and to reservations considered inadmissible. Since the legal consequences differed, the reasons for the objection should be indicated.

82. With regard to the topic "Responsibility of international organizations", his delegation welcomed the thought-provoking sixth report (A/CN.4/597) of the Special Rapporteur on the implementation of the responsibility of international organizations. The invocation of responsibility by an international organization was closely connected with the scope of its legal personality. In its advisory opinion on

Reparation for Injuries Suffered in the Service of the United Nations, the International Court of Justice distinguished between subjective and objective personality and limited the scope of personality to the necessary means to achieve the objectives of the organization. Therefore, the question arose whether the right to invoke responsibility, which was normally not explicitly foreseen in the constituent instrument of an organization, could be based on the implied powers doctrine. There were good reasons for accepting that approach, but it should not be taken too far. It should at least be mentioned in the commentary that draft article 46 providing for the right to invoke responsibility affected the scope of the personality of the relevant international organization.

83. The next question was against whom should an international organization be entitled to invoke responsibility. A distinction should be drawn between member States and third States and between subjective and objective personality. In its advisory opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, the Court derived the right of the United Nations to bring claims against a non-Member State from its universal vocation. The question remained whether the right to bring claims would apply in the case of an organization not of a universal character. The commentary did not reveal whether the Special Rapporteur was of the view that all international organizations enjoyed objective legal personality, so that any organization could invoke responsibility against any State or other organization. Moreover, the issue of *ultra vires* acts of international organizations had not been sufficiently explored.

84. Although the right of an international organization to invoke the responsibility of another international organization might be justified by its implied powers in cases where it was itself the injured party, it was doubtful whether it would have such a right, as proposed in draft article 52, in cases where the organization was not injured and the right was not provided for in its constituent instrument. The advisory opinion of the International Court of Justice on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts* in response to a request by the World Health Organization suggested that the limited functions of many international organizations argued against their capacity to invoke responsibility for the breach of an obligation owed to the international community as a whole. The same considerations had even more weight in relation to countermeasures, where the distinction between member States and non-member States and the scope of personality of the organization were fundamental. Those aspects needed to be analysed in greater detail before any conclusions could be drawn.

85. His delegation shared the view that the rule of nationality of claims did not apply to cases where international organizations exercised functional protection on behalf of their officials. Draft article 48 left it open whether an international organization could exercise such protection for former officials or for current officials injured during the exercise of their office in a different organization. The last point he wished to make was that the draft articles did not address the case where an international organization invoked the responsibility of a State, even though such situations arose rather frequently. Since that situation was not addressed in the articles on State responsibility, the matter might escape regulation.

The meeting rose at 1 p.m.