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Chairman: Mr. Yáñez-Barnuevo . . . . . (Spain)
later: Mr. Zyman (Vice-Chairman) . . . . . (Poland)
later: Mr. Yáñez-Barnuevo (Chairman) . . . . . (Spain)

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

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Hernández García** (Mexico) said that the preliminary report on expulsion of aliens (A/CN.4/554) would give an impetus to the consideration by the International Law Commission of the international customary and treaty law, and the national legislation and State practice relating to a topic that was closely linked with the protection of human rights. A full and coherent system could be elaborated only if the question were examined from every side. The topic undoubtedly met the criteria for consideration by the Commission: it was based on incontestable general principles — such as the sovereign right of States to expel aliens whose presence was considered undesirable on grounds of national security, the prohibition of collective expulsions and the need for the expelling State to respect international human rights standards, among others — but had disputed aspects that needed a clear resolution in international law. The Special Rapporteur's first report should contain a more detailed examination of the various effects caused by typical cases of expulsion of aliens. First, however, the concept of expulsion must be defined. The Commission should, in any case, bear in mind the principle of *lex specialis*, which applied to aliens subject to expulsion. In its consideration of the topic, it should therefore take into account all legal provisions covering every category of person subject to expulsion from the territory of a State not his State of nationality. International law already contained provisions relating to the repatriation of migrants who had been subject to illicit trafficking, to expulsions in armed conflicts and to the return of persons seeking refuge or asylum, among others.

2. In that context, it was essential that the Commission should consider the situation of persons who were present in the territory of a State without documents. Treaty law established rules on the basis of which general principles could be developed. A number of States had concluded bilateral repatriation agreements. Meanwhile, the provision of the Protocols to the United Nations Convention against Transnational Organized Crime — the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, article 8, and the Protocol against the Smuggling of Migrants by Land, Air and Sea, article 18 — established basic rules on repatriation. Both instruments were based on the understanding that migrants who had been smuggled or persons who had been trafficked had the right to be returned to their country of origin and the State of nationality had the corresponding obligation to accept their return. The State's legal procedures and the safety and dignity of the individual had also to be taken into account.

3. Although States had the discretionary sovereign power to expel unsuitable aliens, they could not abuse that right. They must observe their existing obligations under international law, especially international human rights law. His delegation could therefore not share the view of some members of the Commission that the topic should either not cover the removal of persons who were not lawfully present or, if it were decided to include such persons, to stipulate clearly that States had the right of expulsion without the need for other justification. The Commission could not divorce its work from the modern reality of international migration. The Inter-American Court of Human Rights had already considered the legal situation and the rights of undocumented migrants.

4. A consideration of the topic from a broader perspective would show that a State's power to expel aliens had limits established by international law. In that context, his delegation was at one with the Commission in its opposition to the so-called "right" of collective expulsion. International law set limits to that "right", even in extreme cases of attacks on public order, public safety or national security. In other words, in no circumstances could aliens be deprived of other rights, such as the right to fair treatment and the right not to be subjected to torture or arbitrary detention. Mexico had just introduced the right of appeal for aliens subject to expulsion. Article 33 of the Constitution was to be brought into line with article 8 of the American Convention on Human Rights and article 13 of the International Covenant on Civil and Political Rights. As for the legal consequences of expulsion, his delegation considered that they should be included in the topic, so long as they did not duplicate the work on other topics considered by the Commission either currently or in the future.

5. **Mr. Horváth** (Hungary) said that since most of the draft articles on responsibility of international organizations for internationally wrongful acts

presented by the Commission were, mutatis mutandis, identical or very similar to the articles on Responsibility of States for Internationally Wrongful Acts, he would restrict himself to comments on draft articles 8 and 15.

6. Although the Special Rapporteur was correct in saying that draft article 8, paragraph 2, did not express a clear-cut view on the legal nature of the rules of an international organization, his delegation was concerned that the inclusion of the paragraph might generate as many questions as it tried to solve. Paragraph 1 might satisfactorily cover all possible options.

7. Draft article 15 required further refinement. It should state unequivocally — if that was the Commission's intention — that it intended to regulate the circumvention of an international obligation by an international organization by means of a decision, recommendation or authorization to commit an act that would be internationally wrongful if committed by the organization. A change in title would be helpful in that respect. The meaning of the word "circumvention" should also be further clarified. However, his delegation agreed with the distinction made by the Commission between a legally binding decision by an international organization and an authorization or recommendation.

8. His delegation understood the rationale behind the possible inclusion of articles 16 to 18 from the draft articles on State responsibility. Special care should be taken, however, to ensure that the latter served only as a starting point for the consideration of the responsibility of international organizations for internationally wrongful acts.

9. Although the Commission had recognized the difficulty of the topic "expulsion of aliens", he recalled that, at the fifty-ninth session of the General Assembly, his delegation had expressed the view that the question should have been taken up by other institutions and bodies within the United Nations system, such as the Office of the United Nations High Commissioner for Refugees or the Commission on Human Rights. In view of the Commission's decision that a number of issues, such as refoulement, non-admission of asylum-seekers or refusal of admission to regular aliens, should be excluded from the scope of the topic he urged it to take great care in determining the exact scope and content of the future study.

10. *Mr. Zyman (Poland), Vice-Chairman, took the Chair.*

11. **Mr. Hmoud** (Jordan), after commending the Commission on its expeditious adoption of the draft articles relating to the third report on responsibility of international organizations for internationally wrongful acts, thus giving States ample time to comment, said that the draft articles generally corresponded to the relevant articles on the responsibility of States for internationally wrongful acts. Although there was limited international practice or jurisprudence to support that approach, it might be profitably pursued, to the extent that it considered the juridical personality of international organizations and their independent legal capacity. The issue became more complicated when it came to the special character of an organization and its relationship with its member States, other international organizations or third States. That complexity was recognized in draft articles 8 and 15, but not in draft articles 12, 13 and 14. The Commission should examine more closely the differences between a breach by third States or international organizations and a breach by a member State or a member international organization. Draft article 15 and its commentary dealt with the latter situation, but there was a perceived overlap with draft articles 12, 13 and 14. His delegation would therefore favour additional paragraphs to those three draft articles to establish whether they applied to a breach by any State or international organization or only to members.

12. On the issue of direction and control by an international organization in the commission of an internationally wrongful act, the commentary had given an example of an operation directed by one international organization and controlled by another, adding that a "joint exercise of direction and control was probably envisaged". The two situations were different, however: joint direction and control was not the same as direction by one international organization and control by another. In the latter situation, neither organization would incur international responsibility for a given unlawful act under draft article 13. Where direction and control were assumed by separate international organizations, it would be preferable to introduce the concept of joint or collective responsibility.

13. To give added value to draft article 8, paragraph 2, the draft articles should specify which

rules of an international organization entailed international obligations, since that would help to determine the existence of a breach. The difference of opinion among legal scholars on the legal nature of the rules of an international organization was no excuse for the draft articles to be silent on the issue. The question whether the internal legal order of an organization might form part of international law should be explored.

14. Draft article 15 required further work, since it involved the specific nature of international organizations. The substantive amendments by members of the Commission to the article as proposed in the third report changed the consequences of the obligation breached and altered the relationship with other draft articles in that section. Paragraph 1 stated that a binding decision by an international organization could, in itself, be enough to constitute an internationally wrongful act. Although the commentary outlined the potential benefits of that approach — principally that a third party that would be injured would be entitled to seek injunctive relief — it was questionable whether that was reason enough to eliminate the original requirement that the unlawful act in question should actually be committed. After all, paragraph 2 of the article required the act to be committed for international responsibility to be incurred. Yet, in either case, a third party might seek injunctive relief. Another point made in the commentary was that a member State or international organization might be given discretion with regard to the implementation of the binding decision adopted by an international organization. The issue, however, was the breach of an obligation by the international organization, not by its member. The discretion of the member should therefore not be a factor in treating the situation differently from a binding decision to commit an internationally wrongful act. Paragraphs 1 and 2 should establish identical requirements. A distinction should also be made between a recommendation and authorization by an international organization. The former was not binding, while the latter provided the authority without which a member could not act.

15. His delegation welcomed the inclusion of the topic "Expulsion of aliens" in the Commission's programme of work. Expulsion was a State's right, but, like any other sovereign right, it should be exercised with respect for the principle of legality and should not infringe other rights. Any consideration of the topic must include an examination of the national laws and procedures of the expelling State so as to ascertain whether a given measure was lawful under its national law and whether those expelled had had access to the national judicial system. Domestic rules on the admission of aliens should not be considered, but it would be pertinent to examine the relationship between the admission of an alien and the expulsion process when, for example, the decision to expel related to a wrongful decision of admission on the part of the expelling State. The title of the topic should be retained. The terms "expulsion" and "aliens" were both well understood by the international community. They should be carefully defined, however, taking into account the understanding attached to them by States.

16. It would be quite challenging to elaborate a complete regime on the topic. Any such regime should, however, take into account the existence of special rules applying to certain situations, such as those contained in the Convention relating to the Status of Refugees of 1951 and its Protocol of 1967. It should also be in conformity with international humanitarian law. In that context, he noted that the issue of expulsion from the occupied Palestinian territories should not be controversial. Those "expelled" were not "aliens" and the territories were not part of the occupying State. Lastly, his delegation considered that the Commission should prepare draft articles covering specific aspects of expulsion. That would facilitate the future development of an instrument on the basis of the articles.

17. **Mr. Taksøe-Jensen** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Special Rapporteur's third report on the responsibility of international organizations (A/CN.4/553) provided a helpful overview of the complex subject of practice and case law in that field and offered a practical framework for the Commission's work. It was therefore to be hoped that States and organizations would supply the Special Rapporteur and the Commission with further examples of national practice and case law.

18. The Nordic countries were broadly in agreement with draft articles 8 to 16. They were in favour of continued reliance on the provisions on State responsibility as a basis for draft rules on the responsibility of international organizations. Indeed, the wording of the latter should closely reflect that of

the articles on State responsibility. As far as article 8, paragraph 2, was concerned, they believed that rules of international organizations, even those of an internal nature, could give rise to international responsibility. Although article 8, paragraph 2, did not really clarify which rules did so, it provided for a case-by-case determination of the international legal character of the various types of rules of international organizations.

19. Turning to draft article 15, he said that, while organizations might be held responsible when they issued binding decisions, it was doubtful if that was also true in the case of authorizations and recommendations. The process of adopting non-binding decisions and the circumstances in which that was done varied enormously from one international organization to another. It was not certain that an organization could potentially be held responsible whenever it could be contended that the act of a member State was in some way predicated on a recommendation or authorization of that organization. The draft articles would therefore have to be refined still further on that particular point. If, however, the many types of recommendations and authorizations rendered that exercise too complex, it might be wise to refrain from seeking to regulate that aspect in the draft articles. At all events, any draft articles on those particular issues would have to reflect a realistic, comprehensive understanding of current international relations and the interaction of States and international organizations.

20. In response to the Commission's request for comments on the extent to which a State could incur responsibility when it had aided or assisted in the commission of an internationally wrongful act by an international organization, or had exercised control or coercion over that organization, he said that the Nordic countries tended towards the view that articles 16 to 18 on State responsibility could apply mutatis mutandis to a State asserting varying degrees of control over an international organization. Moreover, it might be advisable if the Special Rapporteur and the Commission were to explore the need to draft some articles on State responsibility for acts in relation to international organizations.

21. **Mr. Ehrenkrona** (Sweden), also speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), welcomed the Special Rapporteur's preliminary report on the expulsion of aliens (A/CN.4/554). While the right to expel aliens was inherent in the sovereignty of States, it must be exercised in accordance with the wide range of international legal rules and conventions which were relevant to the subject, including the Geneva Convention relating to the Status of Refugees, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention on Human Rights. Particular emphasis must be placed on the rights of individuals in that context, especially those protected by international humanitarian law and human rights law. Collective expulsion was therefore unacceptable.

22. The balance between a State's right to expel aliens and other international legal norms must also take account of current challenges to the international order. Expulsion of aliens might be warranted as a counter-terrorism measure provided that it complied with those norms. As for the scope of the study, the Nordic countries considered it inadvisable to scrutinize migration laws and policies, because any attempt by the Commission to address general questions relating to those policies would adversely affect the prospects for its work. Moreover, the topic should exclude the non-admission of aliens, aliens who had not physically crossed the border of a State and aliens on a boat which had entered the territorial waters of a State.

23. The Commission had two choices with regard to the form which should be taken by its work and its linkage with existing treaties in the field: the outcome of the study could be a set of principles covering all the rules concerning the topic, or it could be a set of draft articles codifying customary law and filling in any gaps in existing treaty law. It might well be that the difficulty lay not so much in a lack of human rights and international humanitarian law rules concerning the expulsion of aliens, but in States' failure to apply them. The Nordic countries therefore hoped that the Commission would identify and analyse existing legal problems in order to decide if a new text were needed and, if so, whether it should take the form of a set of principles, a set of articles or a whole new instrument.

24. **Ms. Dascalopoulou-Livada** (Greece) said that responsibility of international organizations was a crucial question at a time when international organizations were proliferating and their complex relationship with their own members, third States and one another was still largely unregulated. The articles on State responsibility were already a useful "*acquis*"

when it came to dealing with all facets of the responsibility of international organizations.

25. The draft articles contained in the Special Rapporteur's third report (A/CN.4/553) represented undeniable progress. Her Government approved of the approach followed in the text of article 8, paragraph 1 of which was an adaptation of the corresponding rule on State responsibility. Of course, not all violations of an organization's rules automatically entailed a breach of its international obligations — that was the significance of the phrase "obligation under international law". It would, however, have been useful if the draft had provided more guidance on what actually constituted an international obligation, so as to achieve greater certainty in that respect.

26. The Commission had been right in draft article 15 to espouse the view that an international organization bore responsibility for recommendations or authorizations to its member States to commit an internationally wrongful act or for decisions which bound them to take such actions. The responsibility of the organization arose even before the act was committed and irrespective of whether it entailed the responsibility of the member State.

27. Nevertheless the draft article left a gap with regard to a situation in which an international organization addressed a binding decision to one or more of its member States obliging them to commit an act which would be internationally wrongful if carried out by that State or States, but not if it were performed by the international organization. As a result, the member State or States would bear international responsibility for the act, although the latter did not amount to a breach of an international obligation by the organization. That would happen, for example, when the act was a violation of a treaty provision to which the organization itself was not a party, in which case the member State which had committed the wrongful act would incur responsibility but the international organization would not.

28. There was some concern about the stipulation contained in the latter part of paragraph 1 and repeated in paragraph 2 (a) that a binding decision addressed to a member State would have to circumvent an international obligation of the organization concerned before it could be held that the latter had incurred responsibility. That requirement, which appeared only in that draft article and nowhere else, created confusion as to the exact scope of the breach of the obligation by the organization. It should therefore be deleted, in order to establish unequivocally the existence of responsibility on the part of an international organization whenever a decision, recommendation or authorization constituted a wrongful act under draft article 15.

29. Her Government did not entirely agree with the Commission that it was preferable, at the current stage of judicial developments, not to assume that a special rule had come into existence to the effect that, when implementing a binding act of the European Community, State authorities would act as organs of the European Community. International integration organizations, including the European Community, were becoming parties to an increasing number of important treaties on a wide range of subjects, while competence in crucial fields was being vested in them. Those powers provided the basis for the binding decisions of those organizations regarding acts which, in reality, were performed by a State authority as an organ of the integration organization. For that reason, since draft article 15 mentioned the binding decisions of international organizations, it should likewise refer to the particularities of international integration organizations in that regard.

30. Draft article 5 was obviously connected to its counterpart, article 6, in the articles on State responsibility and might prove useful in the case of the international administration of a territory where an international organization exercised governmental authority under international law. In those circumstances, responsibility for the conduct of a State organ placed at the disposal of such an organization would obviously be attributed to the latter. It might be helpful if the commentary were to clarify that fact.

31. *Mr. Yáñez-Barnuevo (Spain) resumed the Chair.*

32. **Mr. Läufer** (Germany) said that the issue of the responsibility of international organizations was complicated by their functional, structural and conceptual diversity. His Government had submitted a report on national State practice and case law with regard to the responsibility of international organizations. He was pleased to note that the Commission had followed the approach suggested by that report and had drawn a distinction between the responsibility of international organizations and that of their member States. Furthermore, the Commission had

been right to opt, whenever possible, for solutions found within the context of the responsibility of States.

33. With regard to draft article 8, paragraph 2, he agreed in principle that it was necessary to include a paragraph dealing with the breach of an obligation under the rules of the organization, as most obligations of an international organization originated in such rules. The status of such rules nevertheless required further clarification in the light of international practice in order to ascertain when they should be deemed international obligations. Draft articles 12 to 16 were commendable, especially in view of the paucity of international practice on which the Commission could draw, but further examination of the concepts of "direction" and "control" in draft article 13 would be welcome, in order to elucidate the effects of the measure of discretion possessed by a member State of an international organization. That question was of particular importance, given the possibility that cases covered by that article might overlap with those dealt with in article 15.

34. As for draft article 14, a binding decision of an international organization could give rise to coercion, but only in exceptional circumstances. Once again, draft articles 14 and 15 might indeed overlap. Draft article 15, paragraph 1, was based on the correct assumption that the fact that an international organization was a subject of international law, which was distinct from the organization's members, offered the organization the possibility of achieving through its members a result that it could not, lawfully, attain directly. Conversely, international organizations should not be held responsible for acts which their member States decided to commit of their own volition. Both aspects needed further examination in order to determine how much discretion a member State had when executing the decisions of an international organization.

35. His Government shared the Commission's view that the wording of draft article 16 could be construed in a more general manner to mean that the responsibility of other international organizations and States was governed by distinct rules of international law.

36. The importance of the preliminary report on the expulsion of aliens (A/CN.4/554) was demonstrated by the fact that the topic affected the lives of many people all over the world owing to an unprecedented rise in the numbers of refugees, asylum-seekers, stateless persons and migrant workers. The key issue was therefore how to reconcile the right to expel with the requirements of international law, particularly those relating to the protection of fundamental human rights. The sovereign right of a State to expel and to exercise control over State territory had to be weighed against existing human rights standards, first and foremost those laid down in article 13 of the International Covenant on Civil and Political Rights. If the progressive development of international law and its codification in that field were to be promoted, it was essential to define clearly the individual terms "expulsion" and "alien" and the scope of the topic.

37. When delimiting the scope of the topic, a clear line must be drawn between the expulsion of aliens and questions related to the refusal of admission and immigration, population movements, situations of decolonization and self-determination and the position in respect of the occupied territories in the Middle East. From a methodological point of view, the Commission's aim should be to draft articles rather than to provide a set of basic principles, since the latter would not be very effective. The draft articles should cover all aspects of expulsion and include a provision allowing for the application of treaties giving further protection to the individuals concerned.

38. The Special Rapporteur should be encouraged to examine existing customary law and treaty law and to make a comparative study, not only of international case law at the global and regional level, but also of national laws and practice. In doing so, he should bear in mind the fact that other bodies, such as the Council of Europe, were also dealing with the issue. Their texts might therefore provide valuable input to further deliberations.

39. He concurred with the Special Rapporteur on reservations to treaties that the Commission's work on guidelines and commentaries on the topic was being undertaken with the view to producing a Guide to Practice which would serve as a reference tool for practitioners and representatives in their daily work. Lastly, he welcomed the proposal that the Commission should organize a seminar open to human rights treaty bodies at its next session, because such a meeting would certainly provide valuable impetus to the Commission's work.

40. **Mr. Seger** (Switzerland) said that the question of responsibility of international organizations was of particular importance to his country, as it was host to a large number of such organizations. He commended the Commission's approach of using the articles on responsibility of States for internationally wrongful acts as a model for the draft articles on responsibility of international organizations, even though there were significant differences between the two regimes.

41. He was pleased to note that draft article 2 stated that an international organization could include entities other than States as members. A growing number of international organizations were no longer strictly governmental organizations. With the increasing privatization of State activities, not only at the national level, international organizations were increasingly made up of partners from both the public and the private sector, a trend which would have implications for the international responsibility of those organizations.

42. Draft article 3, paragraph 2 (b), stated that an internationally wrongful act constituted a breach of an international obligation of the international organization in question. That provision implied that an organization was bound only by international rules that placed an obligation on it specifically. It went without saying that an international organization was legally bound by its own statute and by other obligations arising from conventions to which it was a party. However, it was not clear whether draft article 3 should be understood as stating that international organizations were also bound by customary international law and general principles of international law. For the purposes of determining the precise obligations of international organizations in future disputes, the scope and extent of the obligations of such organizations under customary and conventional law should be further examined.

43. With regard to draft article 8, paragraph 2, a distinction should be drawn between statutory rules of an organization that applied to third parties and those that were purely internal to the organization, such as administrative regulations. Compliance with internal rules should be ensured through specific mechanisms of the organization itself.

44. The question of attribution of conduct to an international organization raised the issue of the delicate relationship between the conduct of the organization and that of its member States. Even though, in a legal sense, an international organization had its own will, distinct from that of its members, experience showed that the two could not always be separated so easily.

45. Some of the draft articles in chapter IV required further work, in particular draft article 15 on decisions, recommendations and authorizations addressed to member States and international organizations. His delegation shared the view that the scope of that draft article should be clarified. As the representative of Ireland had stated, States should not be able to hide behind the conduct of the international organization. The idea that an international organization could incur responsibility as a result of a State acting on a recommendation, which was not generally obligatory in nature, should be reconsidered.

46. With regard to the topic "Expulsion of aliens", while the principle that States had the right to compel aliens to leave their territory was well-founded, that right was certainly not unlimited. Indeed, the rights of aliens were currently regulated by a set of international rules, most of which were treaty-based but some of which were based on customary law. The study proposed by the Commission would have the merit of elucidating the scope of the international obligations applicable in that area. The idea of formulating specific articles, as suggested by the Commission, certainly would have the advantage of making that clarification more concrete. Nevertheless, it should not be taken as a foregone conclusion that the study would lead to the preparation of a set of draft articles, although his delegation retained an open mind on the question whether the rules should subsequently be formalized in an international convention.

47. In order not to restrict the scope of the research right from the start, it would be advisable to use terms such as "expulsion" and "aliens" generically, which would mean that any type of measure compelling someone to leave the territory of a State, applied to any individual who was not a national of the State in question, would need to be covered by the study. The question of the circumstances and conditions under which expulsion should take place warranted particular attention. Indeed, it would be most interesting if the study could explain what rules of international law already existed on the issue.

48. The Commission had decided to exclude from the study the set of problems relating to preventive measures, such as those involving exclusion, limiting the examination to the issue of expulsion in the strict sense. While his delegation did understand the reasons for that choice, it nevertheless had certain doubts. Experience had shown that States often took exclusion measures, such as a refusal to issue a visa, or a prohibition on entry, precisely with the aim of avoiding the entry of undesirable persons whom they otherwise would have to expel. There was often a direct link between exclusion measures, which were preventive in nature, and expulsion, which was repressive in nature, particularly as concerned the motives for the two types of action. The Commission might therefore wish to reconsider its position on that issue.

49. His delegation also wondered whether the study should not also devote some attention to the duty of States under international law to readmit persons expelled from another country. Indeed, experience had shown that it was not sufficient to escort an alien to the frontier: unless the alien was admitted to another State, he or she was likely to return the next day. Consequently, the right of a State to expel an alien would become largely meaningless unless there was a corresponding obligation of readmission by another State.

50. **Ms. Escobar Hernández** (Spain) commended the Commission and the Special Rapporteur for their evident desire to make progress in the complex and delicate area of responsibility of international organizations. As in previous years, the work on the topic had maintained the approach of closely paralleling the articles on Responsibility of States for Internationally Wrongful Acts, introducing those modifications which, mutatis mutandis, became necessary. In the draft articles before the Committee, that parallelism was even more evident: in a significant number of cases the modifications consisted simply in replacing the term “State” with “international organization”. While her delegation agreed, in principle, with that method of parallel treatment, it wondered whether it might not be necessary to give more thought to that way of adapting the articles bearing in mind in particular the wide variety of organizations that existed, and to whether, from the use of the generic term “international organizations”, it could be concluded that the choice had been made to adopt an absolutely uniform legal regime.

51. With respect to the content of the articles approved by the Commission during its fifty-seventh session, her delegation wished to make two specific remarks. The first referred to draft article 8, paragraph 2, about which further thought was needed, for a simple reason: with the inclusion of that paragraph, the Special Rapporteur and the Commission had not answered the long-standing question whether the acts of international organizations were or were not part of international law. The paragraph, as currently drafted, could give rise to difficulties in interpretation or even inconsistencies. It referred to the breach of “an obligation under international law established by a rule of the international organization”, to which the first paragraph of the article, which defined the concept of breach, also applied. Did the use of the adverb “also” in combination with the phrase “a rule of the organization” mean that only if the situation envisaged in paragraph 2 obtained would an international organization be internationally responsible for the breach of its constituent instruments or other comparable internal rules? It seemed unlikely that that was the intention of the article and it should therefore be revised with a view to clarifying the language and avoiding ambiguous interpretations. That was especially important because the article was central to the definition of any possible responsibility that could arise from the breach of an international obligation by the organization concerned.

52. Her second comment related to draft article 15. The use of the word “circumvent” was appropriate because it encompassed a wider array of possibilities than the word “breach”. Nevertheless, further thought should be given to the presumption contemplated in paragraph 2 i.e. that by a mere recommendation or authorization an international organization could incur responsibility for acts committed by its member States. It might be necessary to introduce some new element in that article that would make it possible to take into consideration the variety of legal regimes that existed among international organizations, as well as the different meanings that the terms “authorization” and “recommendation” could have in each of them.

53. Regarding the questions raised by the Commission with respect to its future work, her delegation had doubts about the wisdom of including in the draft articles specific provisions that directly determined the international responsibility of the State. It might be sufficient to include a reference clause that

would ensure the application, mutatis mutandis, of the rules already established under the articles on Responsibility of States for Internationally Wrongful Acts. As for the second question posed by the Commission, her delegation did not consider it appropriate to include a generic formula that recognized the residual responsibility of member States for breaches directly attributable to an international organization. Any work in that sense would require careful thought and would have to take into account various factors, including the separate legal personality of member States and the organization.

54. With regard to the expulsion of aliens, her delegation welcomed the Commission's work on the topic, for two reasons in particular: first, the affirmation that States had an uncontested right in international law to determine the rules under which aliens would be admitted and permitted to stay in their territories and, second, the equally important recognition of the importance of the phenomenon of migration in the modern world and of the privileged place that international human rights law had come to occupy in contemporary international society. From that perspective, the legal regime governing the expulsion of aliens was clearly a subject that should be dealt with by the Commission.

55. Any work on the topic of expulsion of aliens must take due account of the right of States to establish the legal regime applicable to the admission and residence of aliens, as well as the consequences arising from violation of those rules. In addition, it was necessary to delimit correctly the scope of application of the work under way. That, in turn, would mean achieving the greatest possible clarity with regard to the conceptual categories on which the Special Rapporteur would be asked to work, especially in reference to the concepts of "alien" and "expulsion". It would be necessary to define the various categories of aliens, as well as the various situations that might arise in relation to each category, in order to determine which categories were to be taken into consideration in establishing the scope of the Commission's work. Lastly, her delegation wished to emphasize the importance that it attached to respect for internationally recognized human rights and the inescapable need to incorporate that dimension in the Special Rapporteur's work, in relation both to the procedure to be followed in deciding to expel aliens and to the manner in which the expulsion was carried out.

56. **Mr. Henczel** (Poland) noted that during the current session the Commission had started work on two extremely important topics, namely, expulsion of aliens and the effects of armed conflicts on treaties. The Commission was to be commended for its choice of those topics, which reflected current and important problems of interest to the international community. The importance of their codification for both the theory and practice of contemporary international law could not be overestimated. The agenda of the fifty-seventh session of the Commission had been extremely rich and significant progress seemed to have been achieved on all topics. There was thus every reason to think that by the following year — the last of the quinquennium — the members of the Commission would be leaving a heritage of topics well on their way towards completion by their successors. At least three topics from the Commission's current agenda would be finalized during its fifty-eighth session: diplomatic protection, international liability for injurious consequences arising out of acts not prohibited by international law, and fragmentation of international law. In the case of the first two, on which appropriate drafts had been presented to the Sixth Committee the previous year, successful completion would depend on submission of appropriate comments and opinions by Member States. Poland intended to present detailed comments on those topics in written form before the next session of the Commission.

57. Given the unquestioned relevance of the topic "The obligation to prosecute or extradite (*aut dedere aut judicare*) in international law", especially with regard to combating international crime, including terrorism, his delegation supported the Commission's decision to include it in its current programme of work and to appoint a Special Rapporteur for that topic. As had been stressed previously in the Sixth Committee, the analysis of the aforementioned obligation should take into account the principle of universal jurisdiction in criminal matters. A combined application of that principle and the principle of *aut dedere aut judicare* might serve as an effective tool in the struggle against terrorism and various forms of organized crime. The growing practice, especially in recent years, of including the obligation to extradite or prosecute in numerous international treaties and its application by States in their mutual relations raised the question of

unification of different aspects of the operation of that obligation. Among the most important problems requiring urgent clarification was the possibility of recognizing the obligation in question not only as a treaty-based one but also as one having its roots, at least to some extent, in customary rules.

58. With regard to the topic "Responsibility of international organizations", the Commission had concentrated on two issues: the breach of an international obligation on the part of an international organization, and the responsibility of an international organization in connection with the act of a State or another organization. The Special Rapporteur and the Drafting Committee had prepared some highly commendable draft articles which largely matched the articles on State responsibility and generally reflected the current position of Poland.

59. His delegation had no comment on draft articles 9, 10 and 11, which corresponded to the respective provisions of the articles on State responsibility. Although Poland agreed with the Commission's position with regard to draft articles 13 and 15, it considered that the relationship between those articles was unclear. Further clarification was required, preferably in the commentary. In particular, the notion of coercion could be understood as encompassing both the possible threat to use force or economic measures and also mandatory rules of the organization. Coercion seemingly implied the application of certain measures to third States; coercion directed by an international organization towards its member States would not be the norm. Draft article 15, paragraph 3, should be reformulated in order to draw a distinction between different situations, depending on the scope of freedom of action of the States concerned. Once again, a distinction could be drawn between the position of member States and that of third States. Lastly, the relationship between draft article 15, paragraph 3, and draft article 16 should be clarified.

60. His delegation also took a cautious view of the extent to which the references to international responsibility of the European Union, as formulated in the jurisprudence of the European Court of Justice, were representative of international responsibility. The cases referred mostly to responsibility towards individuals, not towards other subjects of international law. One specific characteristic of European Community law must also be emphasized: even if from the point of view of law-making it could be classified as "external" in relation to the domestic legal order of the State, it had certain specific features. The differences had been emphasized, for example, by the provisions of the Polish Constitution of 1997 and in a decision of the Polish Constitutional Court.

61. The same applied to the jurisprudence of the European Court of Human Rights, widely quoted by the Special Rapporteur. Poland therefore had doubts as to whether article 8, paragraph 2, was necessary, as it largely repeated part of the content of paragraph 1. Furthermore, that provision seemed to apply also in relations between the organization and its member States. The question should be regulated by the rules governing the organization, and not by general international law. Poland reserved the right to review its position on the draft articles on responsibility of international organizations when the Commission's work was complete. In particular, the problem of responsibility of States for acts of international organizations must be reconsidered in the light of the remaining codification.

62. Turning to the topic "Expulsion of aliens", he said that on the one hand, the subject was well established in traditional international law and based on the principle of exclusive sovereign prerogatives of States. On the other hand, however, it reflected simultaneously the most modern tendencies in international law, affected by relatively new ideas on the international protection of human rights. Such a confrontation of contradictory trends made the work of the Special Rapporteur — and consequently the work of the Commission — more difficult, but also much more exciting.

63. The structure of the Special Rapporteur's report was logical and transparent, and the approach taken to the topic seemed quite acceptable, but the report gave the impression that the Special Rapporteur intended to treat the concept of expulsion as widely as possible. In the light of contemporary practice, however, the Commission should be careful to separate the expulsion of aliens from other, related concepts, which although somewhat similar were, in fact, based on different factual and legal grounds. Mixing the various issues together would unduly complicate the task of international codification.

64. His delegation also had the impression that insufficient emphasis was being placed on the human rights aspect of the expulsion of aliens. For example,

article 13 of the International Covenant on Civil and Political Rights — which was a universal legal regulation and was of crucial importance as it concerned formal requirements connected with the expulsion of aliens — was referred to only in a footnote. Similarly, with regard to the regional regulations of the Council of Europe, although the Special Rapporteur had correctly noted Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1963, whose article 4 embodied a prohibition on collective expulsion of aliens, he had omitted to mention Protocol No. 7, adopted in 1984, whose article 1 contained procedural safeguards relating to expulsion of aliens. It was worth noting that article 3 of the European Convention on Establishment, adopted as far back as 1956, had provided that nationals of other contracting States lawfully residing in the territory of a contracting State might be expelled only if they endangered national security or offended against public order or morality. Lastly, it should be remembered that even in extreme situations related to the fight against terrorism there were already special international regulations that placed limits on any tendency of States to overuse the institution of expulsion of aliens. In 2002, the Committee of Ministers of the Council of Europe had adopted a set of guidelines on human rights and the fight against terrorism, dealing with asylum, return (refoulement) and expulsion, among other issues.

65. **Ms. Villalta** (El Salvador), said that the responsibility of international organizations was a complex theme requiring careful analysis; the Special Rapporteur's report (A/CN.4/553) and the draft articles provided an excellent basis for discussion. A precise distinction should be drawn between the responsibility of an international organization as such and that of its member States, which were substantially different. In addition, the use of the term "other entities" in draft article 2 made the definition of an international organization too broad; it should be specified what those entities were.

66. Turning to the topic "Expulsion of aliens", she said that the Special Rapporteur's report (A/CN.4/554) constituted an important contribution to the identification of the fundamental elements that should be covered in the draft articles. In the context of the expulsion of aliens there should be coordination between national law and international law and both types of law should be taken into consideration in studying the topic. Furthermore, respect for and protection of human rights, as embodied in international instruments and in international practice and case law, was of fundamental importance in that regard.

67. **Mr. Momtaz** (Chairman of the International Law Commission), introducing chapters IV, IX and X of the Commission's report, said he would begin with the topic of shared natural resources. In 2005, the Commission had received the third report of the Special Rapporteur (A/CN.4/551 and Corr.1 and Add.1), containing a complete set of draft articles on the law of transboundary aquifers, modelled on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. They sought to regulate three different categories of activities: utilization; other activities not necessarily connected with the aquifer or aquifer system but which were likely to have an impact on it; and measures of protection, preservation and management of the aquifer or aquifer system. The draft articles, which covered more activities than did the 1997 Convention, were based on two of its key provisions: the principles of equitable and reasonable utilization, found in almost all water-related treaties, and the obligation not to cause significant harm. In order to recognize the difference drawn by the scientific community between recharging and non-recharging aquifers, the Special Rapporteur had made two suggestions. In the case of a recharging aquifer, such as the Guarani aquifer, the underlying consideration would be the sustainability and non-impairment of the functioning of the aquifer or aquifer system. In the case of a non-recharging aquifer, such as the Nubian Sandstone Aquifer, the underlying consideration would be the maximization of long-term benefits. The relevant factors and circumstances to be taken into consideration were modelled on the 1997 Convention.

68. With respect to the obligation not to cause harm, the Special Rapporteur had suggested that the concept of the threshold of significant harm should be retained. While acknowledging that objections had been expressed in that regard, he considered that concept to be relative and capable of taking into account the fragility of any resource. There seemed, moreover, to be no justification for departing from the Commission's well-established position.

69. The draft articles also recognized the importance of bilateral and regional arrangements between

concerned States with respect to specific aquifers. Although the basic principles contained in the draft articles were to be respected, bilateral and regional arrangements should take priority. In addition, the draft articles stressed the importance of cooperation in the management of aquifers and aquifer systems. Provision was made for prevention and control of pollution using a precautionary approach. However, unlike the 1997 Convention, the draft articles contained no detailed provisions on planned measures, leaving them to the discretion of concerned aquifer States. The draft articles also provided for the need to protect recharge and discharge zones, which were located outside the aquifer or aquifer system but vital for its functioning.

70. With respect to the final form the instrument should take, the Special Rapporteur had stressed that the presentation of the draft articles was without prejudice to the final outcome. Although aware of views in the Sixth Committee in favour of non-binding guidelines, he had urged that at the current early stage the focus should be on substance rather than form.

71. Water was a vital resource for the sustenance and livelihood of humankind. Although groundwaters were a resource offering a considerable quantity of fresh water, existing surface water treaties, of which there were many, paid little attention to them. In most cases, groundwaters were covered by such treaties only when such waters were connected to surface waters. Several members of the Commission had mentioned the paucity of State practice in that area, and the consequences for its work. The responses received to the questionnaire circulated the previous year on practice relating to the allocation of groundwaters from transboundary aquifer systems, and the management of non-recharging transboundary aquifer systems, contained in documents A/CN.4/555 and A/CN.4/555/Add.1, from 23 States and 3 intergovernmental organizations, were therefore particularly useful. The Commission would welcome replies from other States and intergovernmental organizations which would assist it in its work.

72. With reference to paragraphs 48 to 60 of the report, a number of other issues had been raised, including how prominent the reference to General Assembly resolution 1803 (XVII), on permanent sovereignty over natural resources, should be; how much reliance should be placed on the 1997 Convention in elaborating the topic; and the extent to which the draft articles should cover bilateral and regional approaches. Also discussed were the relationship between the draft articles and general international law, the need to keep in mind the relationship between the current sub-topic on groundwaters and the related sub-topics in respect of oil and gas; whether the approach advocated by the Special Rapporteur was adequate, or whether the precautionary principle should be given a more prominent role; the obligations of non-aquifer States and the importance of providing an institutional framework for implementing the draft articles and for dispute settlement.

73. At the end of the debate, the Commission had decided to establish the Working Group on Transboundary Groundwaters to review the draft articles in the light of the discussion. The Working Group had discussed whether or not to structure the draft articles so that obligations applied to all States generally, the obligations of aquifer States vis-à-vis other aquifer States; and lastly, the obligations of aquifer States vis-à-vis third aquifer States. Currently it was focusing on the obligations of aquifer States vis-à-vis other aquifer States but would take up the related issues subsequently. The Working Group had reviewed and revised eight draft articles to date and it was hoped that it would reconvene early in 2006.

74. Turning to chapter IX, on unilateral acts of States, he said that the Commission had considered the Special Rapporteur's eighth report (A/CN.4/557), which analysed several examples of State practice in accordance with the grid established by the Working Group in 2004. As agreed, the members of the Working Group had taken up a number of studies, to be effected in accordance with the grid. The first part of the report offered a fairly detailed presentation of 11 examples or types of unilateral acts of various kinds that the members of the Working Group had submitted. Those examples were a fairly broad and representative sample of unilateral acts, ranging from a diplomatic note on recognition of one State's sovereignty over an archipelago to statements by the authorities of a United Nations host country about tax exemptions and other privileges and immunities. The second part of the report presented the conclusions drawn from the kinds of acts under discussion, which varied widely in form, content, authors and addressees.

75. The debate had been rich and constructive. In the view of several members, the examples cited, together with the international jurisprudence, confirmed that the

existence of unilateral acts producing legal effects and creating specific commitments was now indisputable. It had also been said that it was necessary to identify the conditions under which constraints arose, so as to show States to what extent they could be bound by their own voluntary commitments. Accordingly, after establishing the definition of a unilateral act, the Commission should study the capacity and authority of the author of a unilateral act, as well as the latter validity.

76. Other members, however, felt that the diversity of effects and the importance of the setting in which they occurred made it very difficult to arrive at a "theory" or "regime" of unilateral acts. In fact, such acts appeared at a necessary but insufficient threshold for the establishment of an appropriate analytical model.

77. It had been suggested that a summary should be made of the Commission's work on the subject, in the form of a declaration accompanied by general or preliminary conclusions, covering all the points that had been accepted by consensus and concerning the form of unilateral acts, their effects, their considerable variety, their relationship to the principle of good faith, and the conduct by which States evidenced an intent entailing legal consequences.

78. At the conclusion of the debate, the Commission had requested the reconstituted Working Group on Unilateral Acts of States to consider the points raised in the debate on which there had been general agreement and which might form the basis of preliminary conclusions or proposals on the topic that the Commission could consider at its fifty-eighth session, in 2006. The Working Group had acknowledged that it could be stated in principle that the unilateral conduct of States could produce legal effects, whatever form that conduct might take, but had indicated that it would attempt to establish some preliminary conclusions in relation to unilateral acts stricto sensu.

79. The Working Group had said that it was ready to assist the Special Rapporteur, if necessary, in the elaboration and development of preliminary conclusions which could then be submitted to the Commission at its fifty-eighth session, together with illustrative examples of practice drawn from the notes prepared by members of the Group.

80. Lastly, the Commission would welcome comments from Governments on practice regarding the revocation or revision of unilateral acts, their particular circumstances and conditions, the effects of revocation or revision of a unilateral act, and the range of possible reactions from third parties. Such information would allow the Commission to formulate its preliminary conclusions with greater precision.

81. Turning to chapter X, on reservations to treaties, he said that the Commission had adopted two draft guidelines, on the definition of objections to reservations and the definition of objections to the late formulation or widening of the scope of a reservation. The draft guidelines had been sent to the Drafting Committee during the fifty-sixth session, in 2004. The Commission had also considered part of the Special Rapporteur's tenth report (A/CN.4/558 and Add.1), on the validity of reservations. The Special Rapporteur proposed that the Commission should in future use the terms "validity" and "invalidity", for practical as well as theoretical reasons. The report then discussed the freedom to formulate reservations in relation to the presumption of validity of reservations. Section B of the report dealt with reservations prohibited either expressly or implicitly by the treaty, which corresponded to article 19 (a) and (b) of the Vienna Conventions. In addition, the report dealt with reservations that were incompatible with the object and purpose of the treaty, a term the Special Rapporteur had attempted to define. He was also proposing a set of draft guidelines covering some fairly heterogeneous situations involving reservations that were contrary to the object and purpose of a treaty. The last part of the report, which addressed the determination of the validity of reservations and the consequences thereof, would be considered by the Commission during its next session.

82. The Commission had sent to the Drafting Committee five draft guidelines on freedom to formulate reservations, reservations expressly prohibited by the treaty, definition of specified reservations, reservations implicitly permitted by the treaty and non-specified reservations authorized by the treaty. The Commission had also decided to send to the Drafting Committee draft guideline 1.6, on scope of definitions, and draft guideline 2.1.8, on procedure in case of manifestly [impermissible] reservations, both already provisionally adopted, for revision in the light of the terms selected.

83. The two draft guidelines adopted by the Commission during its fifty-seventh session concerned

objections to reservations. Since that term was not defined in the Vienna Conventions, it had been deemed necessary to fill the gap. Thus, draft guideline 2.6.1, on definition of objections to treaties, aimed to provide a generic definition applicable to all categories of objections to reservations provided for in the 1969 and 1986 Vienna Conventions. The Commission had taken as a model the definition of reservations itself, in particular the elements concerning a unilateral statement and the object thereof. The moment when an objection could be formulated was not mentioned. The Commission had determined that it should be examined in a separate draft guideline.

84. The intentions of States or international organizations that were formulating the unilateral statements called "objections" was the element at the heart of the definition. The State or international organization formulating a reservation sought to exclude or modify the legal effects of the reservation or to exclude the application of the treaty as a whole, in relation to the author of the reservation. There were many types of reactions to reservations, not all of which were objections within the meaning of the Vienna Conventions, thus prompting uncertainties as to their precise scope. It was therefore important to use precise and unambiguous terminology in the wording and in the definition of the scope which the author of the objection intended to give to it. The effects of objections could vary from a minimum effect, in which the provisions to which the reservation related did not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation, to a maximum effect, in which the treaty did not enter into force between the objecting State or organization and the reserving State or organization. There was also an intermediate effect, where a State wished to enter into treaty relations with the author of the reservation while at the same time considering that the effect of the objection should go beyond what was provided in article 21, paragraph 3, of the Vienna Convention (on the Law of Treaties). In addition, the definition adopted reflected a completely neutral position with regard to the validity of the effects that the author of the objection intended its objection to produce.

85. Draft guideline 2.6.2, on the definition of objections to the late formulation or widening of the scope of a reservation, had a terminological purpose. Under the terms of draft guidelines 2.3.1 to 2.3.3, the contracting Parties could object not only to the reservation itself but also to the late formulation of a reservation. Some members of the Commission had wondered whether it was appropriate to use the word "objects" in draft guideline 2.3.1, which referred to the latter case. Most members, however, had taken the view that it was inadvisable to introduce a formal distinction between opposition to the planned reservation and opposition to its late formulation, since in practice the two questions were indistinguishable. Guideline 2.6.2 nevertheless drew attention to that distinction.

86. In conclusion, he emphasized that the Commission would welcome the comments of Governments on the questions raised in paragraph 29 of its report in relation to reservations to treaties.

87. **Mr. Curia** (Argentina) said that his delegation welcomed the Commission's work on the topic of shared natural resources, in particular its work on aquifers, as Argentina had always had certain reservations about the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. He particularly welcomed the third report of the Special Rapporteur (A/CN.4/551 and Corr.1 and Add.1) and the special interest shown by him in the Guaraní aquifer system, which was under the jurisdiction of Argentina, Brazil, Paraguay and Uruguay. The Commission had produced a comprehensive set of draft articles which focused on the main aspects of the legal regime governing transboundary aquifers. His delegation would like to see the applicable principles of international law formulated as normative proposals.

88. Argentina welcomed the inclusion of a specific draft article accommodating concerns about the principle of the sovereignty of States over the part of an aquifer system situated in their territory. The express affirmation of that principle was consistent with the legal nature of groundwaters which were under national territorial jurisdiction, and with the obligation of aquifer States to respect the rights of other relevant aquifer States and to develop and utilize the aquifer in conformity with the applicable rules and principles of international law reflected in the draft articles. His delegation also agreed with the Special Rapporteur that the utilization and management of a transboundary aquifer were matters solely for the States in which the aquifer was situated and that under

no circumstances should such aquifers be under international or universal jurisdiction.

89. With regard to the scope of application of the draft articles, his delegation agreed that priority should be given to the protection, preservation and management of transboundary aquifers by aquifer States, bearing in mind the fragility of such aquifers. Vital human needs were also a priority consideration.

90. His delegation welcomed the new definitions of "aquifer" and "aquifer system" in draft article 2, as contained in the Special Rapporteur's third report. The criteria of rechargeability, non-negligibility and contemporaneity merited further analysis so that appropriate rules could be elaborated accordingly.

91. As a State in whose territory one of the world's largest aquifer systems was situated, Argentina fully supported draft article 3, as proposed by the Working Group on Shared Natural Resources. The wording of paragraph 2 of the draft article could be adjusted, but his delegation endorsed the substance. It also welcomed the provisions on equitable and reasonable utilization in draft article 5 and on factors relevant to equitable and reasonable utilization in draft article 6. Special consideration should be given to the characteristics and special uses of each aquifer or aquifer system and to the obligation for aquifer States to consult and cooperate with each other and to negotiate in good faith.

92. With regard to the obligation not to cause harm, Argentina agreed that the question of compensation was connected to harm caused despite the taking of all the preventive measures envisaged.

93. Argentina attached particular importance to the provisions on prevention, reduction and control of pollution set out in draft article 14 but would like the wording to be more explicit so as to make the consideration of pollution risks a priority in all aspects of the utilization and management of groundwaters.

94. Turning to the question of reservations to treaties, he said that the Guide to Practice in respect of reservations to treaties contained in document A/CN.4/L.671 was useful in that it defined the concept of reservations and specified the procedure for formulating them in compliance with the Vienna Convention on the Law of Treaties. The Guide also filled a gap by defining the concept, nature and scope of interpretative declarations. The distinction between reservations and interpretative declarations set out in draft guideline 1.3 was particularly useful.

95. However, his delegation had a number of comments on particular draft guidelines. With respect to draft guideline 1.1.6, he was concerned about the possible undesired effects of including in the concept of reservations statements purporting to discharge an obligation pursuant to a treaty "in a manner different from but equivalent to" that imposed by the treaty. A State might be inhibited from being bound by a treaty to which reservations were not permitted, even if it were able to discharge its obligations fully, with certain nuances that did not affect the substance of the obligations. The main criterion should be whether or not the legal effect of the obligation was modified. That criterion was already set out in the definition of reservations.

96. The exclusion from the scope of the Guide to Practice of statements concerning modalities of implementation of a treaty at the internal level, as set out in draft guideline 1.4.5, was too far-reaching. In many cases, such a statement clarified the scope attributed by a State to the provisions of a treaty — in other words, it constituted an interpretative declaration.

97. Draft guideline 2.1.4 was incomplete. To be consistent with article 46 of the Vienna Convention on the Law of Treaties, it should provide for the exceptional situation in which a violation was manifest and concerned a rule of the State's internal law that was of fundamental importance. The same comment applied, mutatis mutandis, to draft guideline 2.5.5.

98. The term "impermissible" in draft guideline 2.1.8 might be inappropriate. The term was not used in article 19 of the Vienna Convention on the Law of Treaties, which merely set out cases in which reservations could not be formulated.

99. Draft guidelines 2.2.1 to 2.2.3 required that a reservation formulated at the time of signature of a treaty should be confirmed at the time of ratification unless the treaty expressly provided that a reservation might be formulated at the time of signature. That requirement might be inconsistent with article 19 of the Vienna Convention on the Law of Treaties, which allowed States to formulate reservations at the time of signature without any additional requirements.

100. He wondered why the formulation of draft guidelines 2.4.1 and 2.4.2 was inconsistent with that of

draft guidelines 2.1.3 and 2.1.4. It was his delegation's understanding that the two pairs of draft guidelines were intended to parallel each other.

101. Draft guideline 2.4.4 was redundant, for reasons similar to those expressed in relation to the draft guidelines on confirmation of reservations.

102. So as to avoid doubts about the consistency between draft guideline 2.6.2 and article 20, paragraph 4, of the Vienna Convention on the Law of Treaties, the word "opposes" in the draft guideline could be replaced with the expression "reacts to".

103. One of the most sensitive aspects of the draft guidelines was the definition of the object and purpose of a treaty for the purposes of determining the validity or invalidity of a reservation. His delegation welcomed the remarks of the Special Rapporteur on the topic, contained in document A/CN.4/671/Add.1, but nonetheless agreed that the issue should be considered in more detail at the Commission's next session. The criterion of compatibility of a reservation with the object and purpose of a treaty was not applicable when the reservation could affect a peremptory norm of international law directly or indirectly. That principle was particularly important for the purpose of discouraging reservations to procedural rules that promoted monitoring of a State's compliance with substantive rules for the protection of a fundamental human right.

104. With regard to unilateral acts of States, he welcomed the eighth report of the Special Rapporteur (A/CN.4/557) and noted that the Commission's discussions on the topic revealed the difficulties associated with it. The major problems were the definition of a unilateral act and the question of distinguishing such acts from the non-binding political statements frequently made by States.

105. The Commission's work should focus on the unilateral act in the strict sense, as an autonomous source of law, so as to distinguish it from the unilateral act with an antecedent in a principal source of law, such as international custom or a treaty. His delegation therefore agreed with the Special Rapporteur that it was of paramount importance to determine whether the unilateral conduct of a State had per se created, modified or extinguished rights at the international level.

106. His delegation was aware of the differences of opinion on the subject of unilateral acts. However, it would be useful if the Commission could submit a document in 2006 containing preliminary conclusions on which there was a minimum level of consensus among its members. Those conclusions should incorporate the following points: international law attributed legal effects to certain lawful acts of States without the need for an act or omission of another subject of international law; a unilateral act was not necessarily an express act, nor did it necessarily consist of a single act or omission, but might rather consist of a series of concordant and related acts or omissions; the form of a unilateral act was not legally relevant: it could be written or unwritten; the legal effects of the unilateral act could be the renunciation or affirmation of a right of the subject performing the act, the acceptance of an international obligation by the State that was the author of the act or the attribution of a right to a third State, but not the creation of an obligation for a third State; and, in accordance with the principle of good faith, which should be applied in all aspects of international law, the State could not perform contradictory acts or acts incompatible with its own unilateral acts.

The meeting rose at 1 p.m.