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Chairman: Mr. Gómez Robledo . . . . . (Mexico)

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The meeting was called to order at 4.20 p.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Pambou-Tchivounda** (Chairman of the International Law Commission), introducing chapters VI and VII of the Commission's report, said that, in 2006, the Commission had decided to re-establish the Working Group on Shared Natural Resources to continue the consideration of the draft articles submitted by the Special Rapporteur in his third report (A/CN.4/551 and Corr.1). The Working Group had completed its work by submitting a set of draft articles, which the Commission had referred to the Drafting Committee before adopting, on first reading, a set of 19 draft articles on the law of transboundary aquifers. Though the text currently took the form of draft articles, the Commission had yet to take a decision as to its final form.

2. The scope of the draft articles was broader than that of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, on which the draft articles were modelled, since draft article 1 included activities that were likely to have an impact on an aquifer or aquifer system. That extended coverage served as recognition of the particular vulnerability of groundwater resources to pollution and other external activities. Draft article 2 contained definitions of terms used in the draft articles. The formulation of draft article 3 captured the main thrust of General Assembly resolution 1803 (XVII), entitled "Permanent sovereignty over natural resources", while recognizing that the exercise of sovereignty by States operated against the background of general international law.

3. Draft article 4 set out the general principle of equitable and reasonable utilization in an attenuated form that sought to maximize the long-term benefits of the aquifer concerned. The principle of equitable and reasonable utilization applied to all aquifers. However, some objectives might differ, as set out in paragraph (d), depending on whether the aquifer concerned was recharging or non-recharging. Draft article 5 provided a non-exhaustive list of factors relevant to equitable and reasonable utilization. In weighing the different utilizations, special regard must be given to vital human needs.

4. The obligation not to cause harm was reflected in draft article 6. Although some criticism had been voiced regarding the use of the threshold of "significant" harm, the Commission had considered that it was important to retain the threshold. The term "significant" would have to be interpreted relatively, bearing in mind the special characteristics of transboundary aquifers. Under the draft articles, aquifer States also had obligations to cooperate among themselves and to exchange data and information relating to transboundary aquifers or aquifer systems. Those obligations were found in draft articles 7 and 8 respectively.

5. Draft articles 9 and 10 related, respectively, to the protection of ecosystems within, or dependent upon, transboundary aquifers or aquifer systems and to the protection of recharge and discharge zones. According to groundwater experts, the protection of such areas was critical for the viability of the aquifer, even when they were outside the territory in which the aquifer or aquifer system was located. Draft article 11 required States to take a precautionary approach by preventing, reducing and controlling the pollution of their transboundary aquifer or aquifer system. Draft articles 12 and 13 encouraged aquifer States to carry out monitoring and management activities jointly, while recognizing that, in practice, such close collaboration might not always be possible.

6. Draft article 14, on planned activities, differed substantially from the corresponding provisions of the 1997 Convention. It contained general minimum requirements for assessing the impact of planned activities, providing notice of such activities and dealing with potentially affected States, but it largely left the details of implementation to the States concerned. The draft article applied not only to aquifer States but also to any State that had reasonable grounds for believing that a planned activity in its territory would affect a transboundary aquifer or aquifer system.

7. Draft article 15 provided for scientific and technical cooperation with developing States. Draft article 16 allowed States to derogate from certain general principles applicable to the utilization of groundwater resources in order to alleviate the impact of an emergency situation on affected individuals. Draft articles 17 and 18 were substantially similar to the corresponding provisions of the 1997 Convention. However, there had been some discussion in the Commission as to whether it was necessary or useful to include those provisions. The Commission would

therefore welcome specific comments on them. Draft article 19 encouraged States to enter into bilateral and regional agreements or arrangements, while bearing in mind the interests of other States whose rights might be affected. The Commission had not included provisions on settlement of disputes or on the relationship between the draft articles and pre-existing or future binding instruments, including the 1997 Convention. Those issues would have to be addressed if a binding instrument was the preferred final form of the draft articles.

8. Since the Commission had begun work on the topic of shared natural resources, awareness of the importance of transboundary groundwater resources had increased. States were cooperating on the utilization, protection and management of aquifers and substantial State practice was emerging. The draft articles could make an important contribution in that regard. The Commission would welcome the views of Governments on the substance of the draft articles adopted on first reading, the commentaries thereto and the final form that the draft articles should take.

9. With regard to the topic "Responsibility of international organizations", he said that the Commission had considered the Special Rapporteur's fourth report (A/CN.4/564 and Add.1 and 2), which dealt with circumstances precluding wrongfulness and with the responsibility of a State in connection with the wrongful act of an international organization. The Commission had adopted 14 draft articles, which were reproduced, with commentaries, in chapter VII of the Commission's report.

10. Draft articles 17 to 24 were modelled on the articles on responsibility of States for internationally wrongful acts, with certain adjustments. Although practice with regard to the invocation of circumstances precluding the wrongfulness of an act of an international organization was limited, and it was unlikely that some of those circumstances would arise with respect to an international organization, there was no reason to consider that circumstances applicable to a State could not be applied to an international organization. Draft articles 17, 20, 21, 23 and 24 reproduced mutatis mutandis the corresponding articles on State responsibility.

11. Draft article 18 corresponded to article 21 on State responsibility and recognized the lawfulness of measures of self-defence taken in conformity with international law, although the circumstances in question were relevant for only a limited number of international organizations. The reference to the Charter of the United Nations contained in article 21 on State responsibility had been replaced by a reference to "the principles of international law embodied in the Charter of the United Nations", since international organizations were not members of the United Nations.

12. In the practice relating to United Nations forces, the concept of "self-defence" had sometimes been understood in a wider sense to cover situations beyond those in which a State or an international organization was the subject of an attack by a State. The extent to which United Nations troops were entitled to use force depended on the primary rules concerning the scope of the mission and did not need to be discussed in the present debate. The same applied to the conditions under which an international organization might resort to force in response to an attack by a State and to collective self-defence on behalf of one of its member States.

13. The elaboration of draft article 19, on countermeasures, had been deferred to a later stage, when the issues relating to countermeasures by an international organization would be examined in the context of the implementation of the responsibility of an international organization.

14. Turning to draft article 22, he said that practice with regard to the invocation of necessity by international organizations was scarce. The draft article reflected a compromise between two opposing positions that had been expressed in the Committee and in the Commission: the view that international organizations should be able to invoke necessity on the same level as States and the view that the invocation of necessity by international organizations should be ruled out. The compromise, set out in paragraph 1 (a), consisted in allowing the invocation of necessity by an international organization only for the purpose of safeguarding an essential interest of the international community against a grave and imminent peril when the organization had, in accordance with international law, the function to protect that interest. Nonetheless, some members of the Commission considered that an international organization should be able to invoke necessity in order to safeguard an essential interest of one of its member States. Paragraph 1 (b) provided that the act in question should not seriously impair an essential

interest of the State or States towards which the obligation existed or of the international community as a whole. Draft article 22, paragraph 2, corresponded to article 25, paragraph 2, on State responsibility.

15. Draft articles 25 to 30, on the responsibility of a State in connection with the act of an international organization, were contained in the current chapter (x), whose position in the overall text of the draft articles would be determined at a later stage. Draft articles 25 to 30 could constitute a new part of the draft articles or the final chapter of Part One.

16. Draft articles 25 to 30 were intended to fill a gap that had been left deliberately in the articles on State responsibility, which, as stated in article 57 on State responsibility, were without prejudice to any question of the responsibility of any State for the conduct of an international organization. However, not all the questions that might affect the responsibility of a State in connection with the act of an international organization were examined in the draft articles on responsibility of international organizations. In particular, if an issue arose as to whether certain conduct was to be attributed to a State or to an international organization or both, the draft articles provided criteria for attributing conduct to an international organization, whereas the criteria for attributing conduct to a State were set out in the articles on State responsibility. Draft articles 25 to 30 were based on the assumption that there existed conduct attributable to an international organization.

17. Draft articles 25, 26 and 27 dealt, respectively, with aid or assistance by a State, direction and control exercised by a State or coercion by a State resulting in an internationally wrongful act by an international organization. The provisions covered situations similar to those governed by draft articles 12, 13 and 14, in which the source of such assistance, control or coercion was another international organization. Mutatis mutandis, the wording used was the same as that of draft articles 16, 17 and 18 on responsibility of States for internationally wrongful acts, since it would be hard to find reasons for applying a different rule when the entity concerned was an international organization rather than a State. The State assisting, directing, controlling or coercing an international organization might or might not be a member of that organization. If it were, such assistance, control or coercion could not simply consist in participation in the decision-making process of the organization according to the rules of the organization. It was, however, conceivable that such assistance, control or coercion could result from conduct by the State within the framework of the organization. The factual context, such as the size of membership and the nature of the involvement, would probably be decisive in borderline cases. Aid or assistance by a State could constitute a breach of an obligation that the State had acquired under a primary norm. In that case, international responsibility would have to be determined in accordance with the articles on responsibility of States for internationally wrongful acts.

18. Draft article 28, which had no equivalent in the articles on responsibility of States for internationally wrongful acts, concerned a situation in which a State, availing itself of the separate legal personality of an international organization of which it was a member, circumvented an international obligation by providing the organization with competence in relation to that obligation. According to the draft article, two elements were required for international responsibility to arise. The first was that the State should provide the organization with competence in relation to the obligation concerned, either through the transfer of State functions to an organization of integration or in order to exercise functions that member States might not have themselves. The second condition was that the international organization had committed an act that, if committed by the State, would have constituted a breach of an international responsibility. It was not necessary for the act to have been caused by the member State, but, if such was the case, the State would incur responsibility not only under draft article 28 but also under draft articles 25, 26 or 27. As indicated in draft article 28, paragraph 2, paragraph 1 applied whether or not the act was internationally wrongful for the organization concerned. The draft article did not require any specific intention on the part of the member State to circumvent an obligation, nor did it cover only cases in which the State had committed an abuse of law. The word “circumvent” was used, however, to exclude the responsibility of a member State when the act committed by the organization was an unintended consequence of the attribution of competence to it by the State.

19. Draft article 29, which also had no equivalent in the articles on responsibility of States for internationally wrongful acts, dealt with two other cases in which a member State was responsible for the internationally

wrongful act of an organization. The first was when a State accepted responsibility for the act in question, either explicitly or implicitly and whether before or after the time that responsibility arose for the organization. The acceptance, which could also result from the constituent instrument or the rules of the organization, must, however, produce legal effects in relation to the injured third party and not only in relation to the organization.

20. A member State was also responsible if it had led the injured party to rely on its responsibility. The term "injured party" covered any State, international organization, person or entity with regard to which a member State might incur international responsibility. There was no presumption that an injured party could rely on the responsibility of States members of an organization. In the cases covered by paragraph 1, subparagraphs (a) and (b), a member State incurred responsibility only if it had accepted responsibility or if its conduct had given the third party reason to rely on that responsibility. Nor was its status as a member sufficient to make a State responsible for the internationally wrongful act of an organization. Draft article 29, paragraph 2, dealt with the nature of the responsibility that was entailed in accordance with paragraph 1. In view of the limited number of cases in which responsibility arose under paragraph 1, the Commission had considered it reasonable to adopt only a rebuttable presumption of subsidiary responsibility.

21. Draft article 30, which was similar to draft article 16, constituted a saving clause concerning the responsibility of the international organization that had committed the act in question or of any other international organization. The provision corresponded to article 19 on responsibility of States for internationally wrongful acts.

22. Draft articles 25 to 30 did not address the question of the responsibility of entities other than States that were also members of an international organization. The case of an international organization that assisted, controlled or exerted coercion over another international organization of which it was a member had already been covered by chapter IV of Part One of the draft articles. Additional provisions would, however, have to be introduced in chapter IV in order to deal with situations, similar to those covered by draft articles 28 and 29, that concerned international organizations as members of other organizations. The responsibility of entities other than States or international organizations was beyond the scope of the draft articles.

23. The Commission would be glad to receive comments from Governments and international organizations, especially on draft articles 28 and 29. It would also like to hear their views on the following questions: whether States that were not responsible for the internationally wrongful act of an international organization of which they were members had an obligation to compensate an injured third party, should the organization not be in a position to do so; and, where an organization committed a serious breach of a peremptory norm of general international law, whether States and other international organizations were obliged to cooperate to bring such a breach to an end.

24. **Ms. Lehto** (Finland), speaking on behalf of the European Union; the acceding countries Bulgaria and Romania; the candidate countries the former Yugoslav Republic of Macedonia and Turkey; the stabilization and association process countries Albania, Bosnia and Herzegovina and Serbia; and, in addition, Moldova and Ukraine, expressed some concern as to the feasibility of subsuming all international organizations under the terms of the draft articles, given the highly diverse nature of international organizations. The European Union and the European Community were, after all, rather specific in nature. The latter, in particular, was characterized by the direct applicability of Community law in its member States and the supremacy of its law over national law.

25. Draft articles 17 to 24 followed very closely the model of the relevant articles on responsibility of States for internationally wrongful acts. That approach, however, might not always be appropriate. Since, for example, the European Union carried out a wide variety of civil crisis management missions, for which the Presidency of the Union and the Commission were jointly responsible and which required the explicit consent of the country concerned, draft article 17 was of vital importance for a whole range of external relations activities of the Union, which could otherwise be seen as undue interference in the domestic affairs of a given country.

26. With regard to draft article 22 ("Necessity"), she noted that, even if a majority of the statements in the Sixth Committee had been in favour of including such an article among the circumstances precluding wrongfulness, some European Union member States

had expressed doubts, in view of the lack of relevant practice, the risk of abuse or the need to provide stricter conditions than those applying to States. The new draft text tried to take those points into consideration with its inclusion, in paragraph 1 (a), of the phrase "when the organization has, in accordance with international law, the function to protect that interest". The phrase, which was stricter than the condition applying to States under article 25 of the articles on responsibility of States for internationally wrongful acts, might well serve as a safeguard against abuse. The new formulation sought to create a nexus between necessity and an organization's tasks and powers, which were usually defined in the organization's founding treaty, but difficulty might arise over its implied powers. The draft article was very carefully worded, but it remained to be seen whether it could muster the necessary support.

27. The draft articles posed some challenging questions. Broadly speaking, the European Union could go along with draft articles 17 to 24, but it had serious concerns with regard to some details of draft articles 28 and 29. It was to be hoped that the Commission would take good note of those concerns. More detailed comments on the draft articles would be made at a later stage on behalf of the European Community by the representative of the European Commission.

28. **Mr. Lehmann** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the assembled examples of the practice of international organizations and the case law on responsibility provided a useful guide to a complex subject by setting a practical framework for the work of the International Law Commission. The Nordic countries hoped that States and organizations would contribute further examples of such practice and case law.

29. The Nordic countries supported the continued reliance on and reflection of the provisions on responsibility of States for internationally wrongful acts in the elaboration of the draft articles on responsibility of international organizations. Some modifications would, however, need to be made in order to reflect the particular role and functions of organizations in international cooperation.

30. The Nordic countries were broadly in agreement with the text of draft articles 17 to 30. In draft article 22 ("Necessity"), which was the result of a compromise between various views expressed in the Commission and in the Committee, the right balance seemed to have been struck. Further thought should, however, be given to the question whether it was helpful to restrict the availability of "necessity" to situations concerning the essential interests of the international community as a whole. So long as the organization had the "function to protect that interest", in accordance with paragraph 1 (a), it would seem that the essential interests of member States, or indeed the organization itself, could also be the basis for an international organization's invocation of necessity.

31. While draft articles 25 and 26 echoed well-established principles of State responsibility, the current formulation of draft article 28 ("International responsibility in case of provision of competence to an international organization") opened up a wide and unwarranted field of international responsibility for States for which there was no basis in international law. The vague criterion of "circumvention" and the meaning attributed to the term in the commentary set the threshold for State responsibility very low. Even though a State would not be responsible under draft article 28 if it was unaware of the breach of obligation by the international organization, the meaning given to the term "circumvention" and the formulation of the rest of the provision were both broad and unclear. Since the provision could be construed as constituting the progressive development of international law rather than codification, the Commission should give it further consideration. Thus, for example, one indication of whether an obligation had been circumvented by the transfer of competence to an international organization could be the rules and regulations of the organization itself and the degree to which they provided protection for the obligations of the State. If such protection was generally in place, it would seem wrong to hold a State that had transferred competence to an organization in good faith responsible for acts by the organization that violated such an obligation. A clearer distinction should be drawn between transfers of competence in good faith and those made with the intention to evade responsibility. Only the latter situation should give rise to responsibility. States should not be permitted to delegate their responsibilities to an international organization in order to avoid them. Consideration should therefore be given to providing exceptions for organizational responsibility.

32. Turning to the specific questions posed to member States, he said that, on a preliminary basis, the reaction of the Nordic countries to the question whether members of international organizations that were not responsible for an internationally wrongful act had an obligation to provide compensation to the injured party was that no general principle of international law was involved, as reflected in the commentary to draft article 29, which referred to such cases as the litigation concerning the International Tin Council. It would therefore seem all the more questionable to establish a general obligation to compensate in cases where the State was not responsible for the internationally wrongful act. Where the organization was not in a position to provide compensation, the obligation of member States to contribute to compensation would probably be governed by the organization's constituent document, including the specific financial obligations that member States had assumed.

33. With regard to the second question, which asked whether States and other international organizations were under an obligation to cooperate to bring to an end a serious breach of an obligation under a peremptory norm of international law, the most appropriate approach would be to echo article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts, which did impose such an obligation. The rationale for the existence of such a principle in inter-State relations was all the more compelling in relations between States and international organizations, particularly where the State in question was a member of the organization. The commentary to article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts could be helpful in suggesting the precise content of such an obligation.

34. **Mr. Trauttsmansdorff** (Austria), referring to chapter V of the draft articles on responsibility of international organizations, said that several articles on State responsibility applied without substantial changes to organizations that met the definition of draft article 2. That seemed to be the case in regard to draft articles 20, 21, 23 and 24. The other draft articles of chapter V, required another approach, however, given the variety of existing international organizations and their diverse legal situations in relation to their member States and third States.

35. In the other new chapter of the draft articles, the Special Rapporteur had sensibly seen fit to confront the complex relationship between responsibility for wrongful acts incurred by a State, on the one hand, and by international organizations, on the other. The complex nature of the relationship between States and international organizations had become fully apparent when the Commission had attempted to apply the content of the provisions contained in chapter IV of Part One of the articles on State responsibility to the relationship between international organizations and States. The same applied to draft articles 28 and 29, contained in the same new chapter.

36. At the previous session, his delegation had raised the question of the relationship between States as genuine and full subjects of international law and international organizations as derivative subjects of international law. Questions of responsibility (and also liability) were closely linked to the specific *inter-se* relations between organizations and their member States. Disregarding or levelling those specific relations carried the risk of leaving conceptual gaps. Furthermore, a clear distinction had to be made between the legal positions of member States, third States that had recognized the international organization and third States that had explicitly refused to do so. The question had to be asked whether more clarity on the character of the different international organizations was required if the Commission continued to apply the method used so far.

37. It might be timely, at the beginning of a new quinquennium, to think about a review of the general approach adopted so far in dealing with the draft articles on the responsibility of international organizations. Basically, the system of trying to translate the principles contained in the articles on State responsibility to international organizations as defined in draft article 2 continued to appear appropriate. An attempt might be made to provide a more in-depth analysis of the organizations covered by the definition of draft article 2. Such an analysis might lead to a typology of international organizations, which would facilitate reference to the international organizations dealt with in the draft articles. The analysis should inter alia cover such elements as the function of international organizations, their legal and political nature, their recognition by third States or the community of States as a legal entity, the degree of independence of their actions from control by the

member States, their powers vis-à-vis the member States, and the status of member States within the organization. Given the difficulties inherent in the draft articles already submitted, his delegation believed that a basic analysis on those lines would facilitate the future work of both the Commission and the Sixth Committee. It would be well to keep in mind that the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had still not entered into force 20 years after its adoption. One of the main reasons for that situation was the lack of clarity on the scope of international organizations covered by that Convention.

38. Turning to specific draft articles, he said that in draft article 18, on self-defence, there appeared to be a lack of clarity regarding the legal basis for the right to self-defence by an international organization unless it derived from the inherent right to self-defence of States under Article 51 of the Charter of the United Nations. The reference to the "principles of international law embodied in the Charter" might lead to misunderstandings. As to draft article 22, on necessity, his delegation agreed that the principle of necessity should not be invocable by international organizations as widely as by States. In principle, his delegation found some value in the language finally adopted by the Commission: "essential interest of the international community as a whole". His delegation understood that the reference was designed to raise the threshold for excluding the wrongfulness of an act by an international organization. But the notion of such essential interest without further qualification lacked the necessary clarity. The problem could, however, be diminished, if the principle of necessity was tied to the mandate of the organization.

39. Draft article 25, on aid or assistance, suffered from a shortcoming with regard to States providing national contingents under the operational control and command of an international organization. As currently conceived, draft article 25 might endanger international military missions because it would provide sending States with reason and justification to interfere with the command structures of the international organization, a matter which was a legitimate concern of the United Nations. The term "aid and assistance" would therefore require a more in-depth definition of the relationship between a State and an international organization.

40. The whole concept of draft article 26 on direction and control exercised by a State over the commission of an internationally wrongful act by an international organization needed further clarification. With regard to draft article 27, on coercion, the specific nature of international organizations should be taken into account before merely applying the law of State responsibility. In nearly every field of activity, international organizations were highly dependent on the willingness of their member States to cooperate. In principle, draft article 28, on international responsibility in case of provision of competence to an international organization, reflected the jurisprudence of the European Court of Human Rights, although the draft did not take the Bosphorus decision into account. However, since the Bosphorus reasoning was very much designed to ease relations between the European Court of Justice and the European Court of Human Rights, it seemed doubtful whether that approach should become a general rule. With regard to draft article 29, on responsibility of a State member of an international organization for the internationally wrongful act of that organization, the Commission should reconsider the terminology, especially the relation between "responsibility" and "liability". Most of the draft articles he had mentioned seemed to require reconsideration by the Commission. In particular, he hoped that the Commission would make good use of the start of the new quinquennium by working on an in-depth analysis of the different types of organizations covered by the definition in draft article 2, as he had earlier suggested.

41. Turning to the topic of shared natural resources, he said that his delegation welcomed the completion of the first reading of the draft articles on the law of transboundary aquifers. Bearing in mind that international practice and scientific knowledge concerning transboundary aquifers had been growing steadily in recent years, the Commission should consider other means than a convention. "Guidelines" or "principles" could be an appropriate way of consolidating the law of transboundary aquifers. The scope of the draft articles seemed to include only freshwater resources, and it should perhaps be clearly stated that saltwater resources were excluded. Furthermore, with regard to the commentary to draft article 1 and the potential questions to be raised therein concerning the relationship between the current draft articles and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses,

his delegation held the view that that matter should receive careful consideration when the decision on the final form of the draft articles was taken.

42. **Mr. McDonald** (Ireland), referring to chapter VII of the Commission's report, said that Ireland welcomed draft articles 17 to 24, on circumstances precluding wrongfulness. His delegation also supported the inclusion of a draft article on necessity, while remaining conscious of the need to limit the scope of the exception within defined boundaries. In its current form, draft article 22 failed to adequately protect member States' essential interests. A State might choose to entrust certain functions to an international organization; however, the fact that a State had transferred functions did not mean that it no longer retained essential interests in relation to those functions. Those essential interests of the State might be imperilled by an act of omission of the organization, even if the organization's conduct was consistent with, and indeed required by, its own legal obligations. However, according to the wording of the most recent draft of article 22 adopted by the Commission, unless a member State's essential interest coincided with an essential interest of the international community as a whole, the international organization was unable to invoke necessity. Obviously, States might be reluctant to transfer powers to an international organization if their essential interests were not afforded sufficient protection. His delegation therefore supported the view held by some members of the Commission that an international organization should be entitled to invoke an essential interest of its member States when claiming necessity.

43. His delegation was also concerned that draft article 22 might not reflect the present reality of movement towards international integration. The draft article made an organization's ability to invoke necessity dependent on its functions. While in the modern era, international integration had led to States granting international organizations more and more functions, most of those organizations dealt individually with discrete issues and were entrusted with a narrow range of functions. Draft article 22, in its present form, might fail to adequately accommodate that state of affairs. After all, it was quite plausible that the actions of an international organization might imperil an essential interest of a member State, or indeed of the international community as a whole, without that organization having as one of its functions the protection of that interest. In such circumstances, the current wording of draft article 22 would leave the organization without recourse to the claim of necessity in order to safeguard the imperilled essential interest.

44. His delegation welcomed the observation of the Special Rapporteur that in determining the essential interests which an international organization had the function to protect, reference only to the constituent instrument might be too restrictive. Conversely, not all the functions which an organization was vested with in its constituent instrument were to be regarded as essential interests. For all the reasons he had mentioned, he urged the Commission to review the formulation of draft article 22.

45. Turning to draft article 28, on international responsibility in case of provision of competence to an international organization, he said that his delegation supported the efforts of the Special Rapporteur to make provision for member States to incur responsibility for acts of international organizations in certain circumstances. His delegation had reservations, however, as to the wording of draft article 28. The scope of the draft article in its present form was inadequately defined. The insistence on the provision of competence in relation to the circumvented obligation might unduly narrow the scope of the article where a restrictive understanding of that requirement was employed. In such circumstances, the member State might not have provided the organization with competence in relation to the specific obligation being circumvented but might nevertheless, in the knowledge that the organization had a general competence that could impinge on the obligation, have intended that it should be breached by the organization.

46. Conversely, a broad understanding of the provision of competence requirement could result in State responsibility where an international organization acted on the basis of a general competence which might affect the obligation in question but without any intent on the part of the member State that the obligation should be breached. In that regard, his delegation welcomed the Commission's commentary to draft article 28, which provided that the use of the term "circumvention" was intended to exclude that international responsibility arose when the act of the organization, which would constitute a breach of an international obligation if taken by the State, had to be regarded as an unwitting result of providing the international organization with competence. On a

practical level, the determination of whether or not a State had provided an organization with competence in relation to an obligation could prove problematic. His delegation's primary concern, however, was the absence of any requirement of intent in draft article 28 which would limit the potential scope of the draft article.

47. **Mr. Marsico** (Argentina), referring to chapter VI of the report, on shared natural resources, said that his delegation agreed with the Commission's approach in formulating the general rules applicable to the law of transboundary aquifers. The final format of the draft articles could be that of a framework convention which would serve as a basis for subsequent agreements or other detailed arrangements. His delegation particularly agreed with the definitions of aquifer and aquifer system in draft article 2. It reiterated its support for the inclusion in draft article 3 of an express affirmation of the principle of sovereignty of the State over the portion of a transboundary aquifer or aquifer system located within its territory. Aquifers and their resources belonged to the States where they were located, notwithstanding obligations to cooperate in their rational use and preservation. That provision also was significant because it clearly placed the primary responsibility for the use and management of each transboundary aquifer in the State where the aquifer was located. His delegation gave its full approval to the criteria behind the development of the principles and rules proposed in draft articles 4 to 19.

48. Turning to chapter VII, on responsibility of international organizations, he said that his delegation supported the text of draft articles 17, 18 and 20 to 24, concerning circumstances precluding wrongfulness. In draft articles 25 to 29, it was important to bear in mind that the attribution of responsibility to a member State was possible only as an exception to the rule that an organization had a legal personality that was different and separate from those of its members. Therefore, the conditions and scope of any concurrent or subsidiary responsibility of the member State would depend on the specific characteristics of the organization, its constituent instrument, its established practice and other modalities of what draft article 4, paragraph 4, defined as "rules of the organization". His delegation had no comment on the proposed norms in draft articles 25 to 27 and agreed with the approach taken in draft articles 28 and 29.

49. With reference to paragraph 28 of the report, he said that his delegation considered that the question of whether the members of an international organization that were not responsible for its wrongful act must compensate the injured party when the organization was insolvent must be approached taking into account the basic distinction between the legal personality of the organization, which in principle should be solely responsible, and the individual and separate status of the member States. The Special Rapporteur might analyse whether the special characteristics and rules of each organization, as well as considerations of justice and equity, called for exceptions to the basic rule, depending on the circumstances of each case.

50. Regarding the second question, his delegation believed that article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts was, mutatis mutandis, applicable to the case of a serious breach of an obligation under a peremptory norm of international law by an international organization. For the reasons that had inspired that rule, States and other international organizations must cooperate to put an end to the breach in a joint and coordinated manner by such lawful means as were called for under the circumstances, regardless of whether they had been directly injured by the breach or not.

The meeting rose at 6 p.m.