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SUMMARY RECORD OF THE 43rd MEETING

Chairman: Mr. Guna-Kasem (Thailand)

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The meeting was called to order at 10.40 a.m.

AGENDA ITEM 108: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-FIRST SESSION (continued) (A/34/10 and Corr.1 (Arabic, English, French, Russian and Spanish only), A/34/194, A/C.6/34/L.2)

1. Mr. KUCHUI (Kenya) said that, with regard to succession of States in respect of matters other than treaties, his delegation fully supported articles A and B on succession in respect of State archives, which reflected the Commission's wise decision to treat archives separately from other movable property. The work in that area, particularly in regard to the progressive development of international law, would be of special interest to the newly independent countries, where prolonged armed conflict prior to independence had resulted in the destruction, removal and disappearance of invaluable documents. Those articles would give the newly independent countries an opportunity to recover some of those documents or at least copies of them. Although the two articles were both fair and balanced, the definition of the word "document" should be as broad as possible, and should include inscriptions on wood and stone. For the sake of clarity, it would perhaps have been better to define clearly all the various types of document envisaged, instead of using the words "of all types", followed by a clearer elaboration in the commentary.

2. With regard to State responsibility, his delegation supported article 28, but cautioned that it should not be interpreted as providing an exemption from responsibility for an internationally wrongful act without exception in all cases of domination, coercion and control, which were matters of degree. For a subservient State to be able to invoke article 28 as a justification for avoidance of responsibility for an internationally wrongful act, the domination, coercion or control should be so absolute that the authorities committing the internationally wrongful act could be held to have acted as agents of the dominant State.

3. Article 29 should be given very thorough consideration. The principle of Volenti non fit injuria, when applied to individuals under national laws, did not give rise to serious difficulties because an individual could only consent to injury to himself. However, the position with regard to States was quite different because when a State consented to the injury the small number of people in authority consented on behalf of the entire population of that State. That principle had often been abused in cases where troops had been dispatched by one State to another State to prop up the régime of that other State or purely for the purposes of colonization. In such cases consent had been used as the excuse and justification. Despite the incorporation of the jus cogens rule in article 29, paragraph 2, his delegation reserved its position with regard to the inclusion of article 29 in view of the flagrant abuse to which it was likely to give rise.

4. His delegation supported article 30, since every State had the right to take reprisals against any other State that violated its legal rights, provided that such reprisals under no circumstances involved armed force. Although that was clearly set out in the Declaration on Principles of International Law Concerning

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Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, armed incursions by the racist and minority régimes of South Africa and Rhodesia into neighbouring States had become all too frequent. Those incursions, though clearly illegal, were bound to increase as the liberation struggle intensified. For that reason, his delegation would have preferred article 30 to have stated clearly the principle that States had a duty to refrain from acts of reprisal involving the use of force. Articles 31 and 32 were acceptable to his delegation.

5. With regard to treaties concluded between States and international organizations or between two or more international organizations, his delegation found the set of draft articles generally acceptable. Although it would have liked to see equality between States and international organizations in treaty relations maintained as far as possible, it felt there was a sufficiently strong case for discriminating between them for the purpose of article 45. Although the question as to whose knowledge or consent should be attributable to the State caused no serious difficulties, the same question could give rise to very serious difficulties in the case of international organizations. Such difficulties, however, could not justify a complete denial of the right of international organizations to acquiesence by reason of conduct, and for that reason, his delegation supported paragraph 2, subparagraph (b), of article 45 as a happy compromise.

6. With regard to the law of the non-navigational uses of international watercourses, he urged the Commission to consider the definition of an international watercourse at the earliest opportunity. In considering the acceptability of any draft articles formulated, the question as to whether the articles referred to successive or contiguous rivers or to the broader international drainage basin would be of decisive importance to Governments. He fully agreed with those members of the Commission who felt that States should be allowed to make the fullest possible use of water within their national boundaries as long as they took into account the effects of such use on both the lower and upper riparian States. The rules formulated in that area should, therefore, promote co-operation among riparian States in the utilization of the watercourses and not in the limitation of their rights to use them. The general approach taken by the Special Rapporteur of drafting a broad convention to be supplemented by agreements among users might provide the necessary solution.

7. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, his delegation noted with satisfaction that the analysis of the general views expressed by Governments on the elaboration of a protocol had enabled the Commission to arrive at some specific conclusions and recommendations. He felt confident that the Commission would make speedy progress in elaborating draft articles for an appropriate legal document on that topic.

8. He noted that some progress had been made with regard to the jurisdictional immunities of States and their property and urged all States to answer the questionnaire submitted to them as fully and as quickly as possible.

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9. He noted with satisfaction that the Commission's co-operation with other international bodies involved in the progressive development of international law was steadily growing and that the International Law Seminar had again been successfully conducted. The Seminar played a very useful role in training young international lawyers from various parts of the world. His delegation expressed its deep gratitude to those States which had provided fellowships and strongly urged other States which had the financial means to follow that example.

10. Mr. YIHER (Ethiopia) expressed satisfaction that the Commission had completed the first reading of the draft articles on succession of States in respect of State property and State debts. Undoubtedly the Commission would soon complete its work on succession of States in respect of matters other than treaties, which would be a significant step towards the codification and progressive development of the law of State succession. The title "Succession of States in respect of matters other than treaties" could be retained definitively without doing any harm to the substance of the future convention, but if an alternative formula was desired, "Succession of States in respect of certain matters other than treaties" would be more appropriate than the formula "Succession of States in respect of State property, State debts and State archives", which would be a little too specific.

11. With regard to article 1, his delegation agreed with the Commission that the term "effects" should be used to indicate that the draft provisions concerned not the replacement of one State by another in the responsibility for international relations of territory, but its legal effects, i.e., the rights and obligations deriving from it.

12. It was fitting that the definitions of terms in article 2 corresponded to those contained in the Vienna Convention on Succession of States in respect of Treaties, since the Convention and the draft articles referred to the same phenomenon in a number of instances.

13. Article 3 was significant in that it expressly stipulated that only transfers occurring in conformity with international law would fall within the concept of "succession of States" for the purpose of the draft articles. The Vienna Convention contained a similar rule in that regard. His delegation agreed with the Commission that in the work of codification and progressive development of international law relating to succession of States in respect of treaties and in respect of matters other than treaties it was desirable to maintain some degree of parallelism between the two sets of provisions as far as possible without ignoring the characteristic features that distinguished the two topics from one another.

14. With regard to article 11, paragraph 1 (d), which provided that immovable State property of the predecessor State situated in the territory to which the succession of States related should pass to the successor State, it was necessary to determine whether provision should also be made for the passing to the successor State of immovable property irrespective of its location, if it had belonged to the territory to which the succession of States related and had become State property of the predecessor State during the period of dependence. He agreed with the

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formulation of article 11, paragraph 4, providing that agreements concluded between the predecessor State and the newly independent State relating to succession to State property should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources. He also agreed with the view expressed in paragraph (29) of the commentary on article 11 that an appraisal should be made by reference to the principle of permanent sovereignty of States over their natural resources of the validity of so-called "co-operation" or "devolution" agreements and of all bilateral instruments which, under the pretext of establishing "special" or "preferential" ties between the new States and the former colonial Powers, imposed on the former excessive conditions which were ruinuous to their economy.

15. With regard to article 20, paragraph 2, he agreed with the view expressed by the Commission in paragraph (39) of the commentary that international law could not be codified or progressively developed in isolation from the current world political and economic situation. The Commission must reflect the concerns and needs of the international community in the rules which it proposed to that community. It was truly impossible to evolve a set of rules concerning State debts for which newly independent States were liable, without to some extent taking into account the situation in which a number of those States were placed. As the Commission had noted in paragraph (60) of the commentary, it could not but recognize certain realities of current international life, in particular, the severe burden of debt reflected in the financial situation of a number of newly independent States, nor could it ignore, in the drafting of legal rules governing succession to State debts in the context of decolonization, the legal implications of the fundamental right of self-determination of peoples and of the principle of permanent sovereignty of every people over its wealth and natural resources.

16. The question of State archives was of paramount importance to a number of newly independent States which had been deprived of their cultural heritage. The final product of the Commission's work on succession of States in respect of matters other than treaties should include a separate set of articles on State archives, which were a special type of State property.

17. His delegation was satisfied with the commendable progress the Commission had made on the topic of State responsiblity. With regard to the question raised in paragraph (31) of the commentary on article 28 as to whether the responsibility of one State for an internationally wrongful act committed by another State precluded the responsibility of the State which had committed the internationally wrongful act or whether it was incurred in parallel with the latter's responsibility, his delegation favoured the arguments in favour of parallel responsibility. It therefore endorsed the Commission's decision that the attribution of international responsibility to a State which had the power of direction or control over a certain area of the activities of another State or which had coerced another State into committing a wrongful act should not automatically preclude the responsibility of the State subject to that power or coercion.

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18. With regard to chapter V of the report (A/34/10), on the question of circumstances precluding wrongfulness, his delegation shared the Commission's view that it would be incorrect to regard the expressions "circumstances precluding responsibility" and "circumstances precluding wrongfulness" as mere synonyms. As the Commission had stated in paragraph (5) of the commentary at the beginning of that chapter, it was difficult to conceive that international law could characterize an act as internationally wrongful without attaching to it disadvantageous consequences for its author.

19. His delegation had no objection in principle to the formula provided in article 30, on countermeasures in respect of an internationally wrongful act. However, the Commission should study that question further, especially with regard to the question of economic reprisals, in view of the possibility that economically strong States could use the rule to the detriment of weaker States under the pretext of legitimate countermeasures.

20. With regard to the topic of treaties concluded between States and international organizations or between two or more international organizations, he supported the drafting of article 46 on the violation of provisions regarding competence to conclude treaties in such a way that it corresponded to article 46 of the Vienna Convention on the Law of Treaties. Furthermore, with regard to the consent of organizations, the Commission's conclusions that the criteria for the "manifest" character of a violation could be defined by reference to the partners of an international organization in the conclusion of a treaty was quite persuasive. The heart of the matter was whether the partners were or should be aware of the violation.

21. His delegation agreed with most members of the Commission that it was necessary and desirable to formulate universal rules on the law of the non-navigational uses of international watercourses. Such rules should be of a general nature, leaving the conclusion of agreements on particular rivers to the States concerned. His delegation felt that it would be unrealistic to try to formulate rules on individual international rivers and that it would be inadvisable to include in the scope of the study such problems as flood control, erosion and pollution. Furthermore, the definition of the term "international watercourse" should not be unduly complicated. The traditional concept which defined an international river as a river which traversed or separated the territory of two or more States should be adhered to. His delegation would have difficulty in accepting the "drainage basin" or "river system" approach in the definition of an international watercourse.

22. The progressive development of international law on the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier would complement the Vienna Convention on Diplomatic Relations and other similar international instruments. The views and comments of Governments set forth in the report clearly indicated the need for an additional protocol, since the existing conventions were incomplete in that regard. He hoped the Commission would make further progress on that topic at its next session.

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23. With respect to jurisdictional immunities of States and their property, he agreed with the Commission's view (A/34/10, para. 181) that more than other topics studied that topic touched on the realm of internal law as well as that of private international law. He expressed the hope that the Commission would continue its studies based on the replies of Governments to the questionnaire to be circulated.

24. His delegation was gratified to note that the working paper on the question of the review of the multilateral treaty-making process had been submitted and expressed the hope that the report of the Commission would help the General Assembly to improve the techniques and procedures used in the elaboration of multilateral treaties.

25. Lastly, his delegation expressed satisfaction at the success of the fifteenth International Law Seminar and thanked the various Governments which had made fellowships available to participants from developing countries. It was to be hoped that such fellowships would continue to be made available, so that more participants from developing countries could take part in the seminar.

26. Mr. MEISSNER (German Democratic Republic) said his delegation was pleased to note the methodical approach adopted by the International Law Commission in its work on the draft articles on succession of States in respect of matters other than treaties. In that connexion, it had noted in particular, first, that in reviewing the form and structure of the draft articles, the Commission had taken account of the need for consistency with the terminology used in the 1978 Convention on Succession of States in respect of Treaties. That was particularly important if misunderstanding was to be avoided and the homogeneity of the law relating to succession of States as a whole assured. Secondly, the Commission had dealt with succession to State property and State debts in general terms, without endeavouring to settle each and every aspect of those questions or to add further elements. The separate treatment of State archives was justified because they could be regarded both as movable State property and as objects of historical and cultural value. Thirdly, the Commission had recognized the need to differentiate between the treatment of succession to State property and of succession to State debts, since each had its own special characteristics.

27. His delegation could, in general, support the draft articles on succession to State property, although it considered that the criteria for apportionment should be more closely defined. It had two fundamental reservations, however, concerning the draft articles on succession to State debts, the first of which related to the definition of "State debt" as laid down in article 16. In his delegation's view, the provisions on State debts should be confined to international financial obligations. Article 16, subparagraph (b), however, provided in effect for the transfer of debts that were not international, which could constitute interference in the internal jurisdiction of the successor State. His delegation's second reservation concerned the absence of any express provision to the effect that no obligation to assume odious debts should be imposed on the successor State. It was particularly important to clarify that point since the intent, under the draft articles, was that succession to State debts should be a general obligation on all

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States apart from newly independent States. His delegation therefore considered that a provision should be included in the draft to cover that point. In that connexion, the Commission might wish to refer to the draft articles submitted by the Special Rapporteur in his ninth report (A/CN.4/301, pp. 69-70), under which odious debts contracted by the predecessor State which were contrary to the major interests of the successor State or were not in conformity with the principles of international law would be excluded from the provisions on succession to State debts.

28. His delegation further considered that articles A and B, relating to State archives, should be placed after article 14 in part II (State property) of the draft, rather than after article 23, to underline their special character and close relationship with State property.

29. Of the draft articles submitted on State responsibility, article 28, which dealt with the responsibility of a State for the internationally wrongful act of another State, required particularly careful consideration. In the first place, it constituted a departure, both as to premise and as to method, from the other articles on State responsibility: whereas the latter dealt with the responsibility of a State for an internationally wrongful act which it had itself committed, article 28 dealt separately with the commission of an internationally wrongful act, on the one hand, and responsibility for that act, on the other. Moreover, under the terms of article 28, an inquiry into the freedom of decision of the State which committed the internationally wrongful act would be held after the act had been committed but before responsibility for it had been attributed, which could operate to the detriment of the weaker State and open the way to subjective decisions. Consequently, article 28, as drafted, would appear to be consistent with the principle of sovereign equality and was therefore unacceptable to his delegation. His delegation would reserve its comments on articles 29 to 32 pending the submission of the remaining articles in chapter V of the draft articles on State responsibility. It would also reserve its comments on the question of treaties concluded between States and international organizations or between two or more international organizations until all the draft articles on that topic had been submitted.

30. The draft articles on the law of the non-navigational uses of international watercourses embodied rules of general application, notwithstanding the specific characteristics of individual watercourses, but they should be rendered more specific. Also, riparian States should be afforded adequate opportunity for taking due account of the geographical and economic characteristics of a particular watercourse under bilateral and multilateral agreements.

31. The adoption of the term "international watercourse" would provide an acceptable basis for further discussion on the scope of the draft articles. Every State, however, had the sovereign right to decide on the use of the waters within its own territory. His delegation therefore considered that the expression "use of the water of international watercourses" should be confined to the section of water

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along which the frontier ran, since the neighbouring State should be concerned solely with the condition of that section.

32. While it was the practice of the German Democratic Republic to collect and exchange data, to the extent that international agreements so provided, his delegation considered that the obligation of a contracting State to collect and exchange data should extend only to other contracting States; any such obligation towards co-operating States should be governed by a specific treaty.

33. In general, therefore, his delegation could endorse the approach adopted in the first report on the international law of the non-navigational uses of international watercourses, but it was essential to reach an acceptable compromise that would take account of the different interests of States.

34. Lastly, his delegation attached great importance to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It supported the Commission's conclusions regarding the future work to be undertaken on the subject (A/34/10, para. 164), particularly regarding the appointment of a Special Rapporteur and, in that connexion, would refer members to its own detailed written comments (A/31/145, pp. 6-7; A/CN.4/321/Add.7, pp. 4-5).

35. Mr. DANELIUS (Sweden) expressed satisfaction at the progress achieved by the International Law Commission at its thirty-first session.

36. Referring, first, to the draft articles on succession of States in respect of matters other than treaties, he agreed that the title of the articles, as well as the terms of article 1, were somewhat too broad in scope, since the draft articles were confined to the effects of State succession on State property and State debts. The Commission's conclusions on those two subjects were on the whole satisfactory.

37. He noted that, although it followed from article 5 that the draft articles did not apply to property owned by third States, the Commission had decided to include article 9, (Absence of effect of a succession of States on third party State property). While his delegation agreed with the terms of that article, it considered that its wording should be simplified. It seemed unnecessary to refer to property, rights and interests "situated in the territory of the predecessor State" when that applied, a fortiori, to property, rights and interests situated outside the territory of the predecessor State. The deletion of the reference to the location of third State property, rights and interests would also improve the drafting of the article and remove the practical difficulty of determining the geographical location of a right or interest.

38. Succession to State property, as dealt with in part II, section 2, of the draft articles, posed no real problem in the case of immovable property since geographical location was the logical criterion, and it had been adopted in articles 10, 11, 13 and 14. He would merely suggest that immovable property should be dealt with before movable property in article 11, paragraph 1, to bring that

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article into line with articles 10, 13 and 14. In the case of movable property, however, a valid criterion was more difficult to find. While it was true that, in many instances, the application of the criterion of geographical location would not produce equitable results, it could usually serve as a guideline and should therefore not be altogether discarded. His delegation could accept the formula finally adopted by the Commission, namely, that the property must be "connected with the activity of the predecessor State in respect of the territory to which the succession of States relates", although it had some doubts whether it was sufficiently clear to provide guidance in the event of a dispute.

39. Article 16, which defined the term "State debt", provided for two categories of obligation, but it was not clear what purpose would be served by making such a distinction, particularly since the subsequent articles did not do so. It might therefore be simpler to adopt as the definition of "State debt" the phrase "any financial obligation chargeable to a State" or some similar wording.

40. Article 18, which dealt with the effects of the passing of State debts with regard to creditors, was particularly important. Paragraph 1 could be read to imply that the creditor maintained his claim against the predecessor State and did not automatically obtain a claim against the successor State. Moreover, paragraph (10) of the commentary stated that the creditor did not, in consequence only of the succession of States, have a right of recourse or a right to take legal action against the State which succeeded to the debt. In cases where the predecessor State ceased to exist, however, the creditor would be seriously prejudiced if he did not automatically obtain rights, as a result of succession, against the successor State or States.

41. Paragraph 2 of article 18 provided that an agreement between the predecessor State and the successor State could not be invoked against a third State or an international organization unless one of the two conditions laid down in subparagraphs (a) and (b) was fulfilled. In the first place, his delegation did not understand why paragraph 2 was confined to creditor States and creditor international organizations, whereas paragraph 1 dealt with creditors in general. Secondly, the effect of the condition laid down in subparagraph (b), namely, that the agreement must be accepted by the third State or international organization, was that the predecessor and successor States would have the right to invoke an agreement against a third State or international organization. There was nothing in article 18, however, to suggest that the third State or international organization enjoyed a similar right as against the predecessor and successor States. That did not seem reasonable to his delegation. Thirdly, his delegation also had doubts about the condition laid down in subparagraph (a), namely, that the consequences of the agreement must be in accordance with the other applicable rules of the articles in part III. The only exception to the general rule that the predecessor and successor States could conclude such agreements as they saw fit was to be found in article 20, paragraph 2, which provided that the agreement should not "infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should its implementation endanger the fundamental equilibria of the newly independent State". It was not clear to his delegation whether that was the restriction which had to be observed under paragraph 2, subparagraph (a), of

article 18. Another, and possibly more reasonable, interpretation was that the agreement could be invoked only if it complied with the general principles of succession which, under articles 19, 20 and 22, had to be applied in the absence of any agreement between the predecessor and successor States.

42. In dealing with State archives, it was important to distinguish between two main categories of documents, each of which called for separate treatment: documents of practical importance for the administration of the successor State, which should be handed over to that State, and documents that could be of historical interest to both the successor and the predecessor State, and which might therefore give rise to dispute. Documents in the second category should be treated in the same way as other cultural property and it would therefore be desirable to study the question in the light of the work being carried out on the cultural property of newly independent States. Modern methods of reproduction made it easier to reach compromise solutions on the transfer of State documents.

43. Turning to the question of State responsibility, he first noted that the Commission's work on international liability for injurious consequences arising out of acts not prohibited by international law was still at a preliminary stage. In view of the importance of that question, which involved issues of environmental law and the question of neighbourly conduct between States, his delegation trusted that the Commission would soon be in a position to make real progress in that regard.

44. Article 28 of the draft articles on State responsibility for an internationally wrongful act dealt with the difficult question of the responsibility of one State for the internationally wrongful act of another. His delegation considered it important to uphold the principle that each State was responsible for its own acts and, consequently, that only in very exceptional cases should another State assume that responsibility. The Commission had therefore been right, in its view, to reject the idea that a State which had entrusted its representation in international affairs to another State was not thereby relieved of responsibility for an internationally wrongful act.

45. The first of the circumstances which precluded wrongfulness was consent, and it was dealt with in article 29. Although the principle was simple, many problems could arise in practice: to determine the legal effect of consent, it had to be established that the consent was voluntary, that it was given by a body which was in law the representative of the State concerned, and that it did not involve an act that was contrary to jus cogens. The wording of the article provided little guidance on that point and, despite the terms of paragraph 2, no attempt was made to define the norms to which that paragraph referred. A similar remark applied to article 30, which provided that countermeasures in respect of an internationally wrongful act could likewise preclude wrongfulness but did not determine which countermeasures were legitimate. The Commission's commentary on those two articles, and also on articles 31 and 32, which dealt respectively with force majeure and fortuitous event, and distress, answered many of the questions on which the articles were silent but, since the Vienna Convention on the Law of Treaties accorded little value to the travaux préparatoires of a treaty, it could not expect to achieve the normative effect it merited.

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46. The draft articles on treaties concluded between States and international organizations or between international organizations did not differ greatly from the Vienna Convention on the Law of Treaties, which prompted the question whether it was in fact necessary to draft a new legal instrument on the subject and whether, in practice, it would not have sufficed to apply the Vienna Convention by analogy.

47. There was still considerable uncertainty in the Commission as to the best way of dealing with the difficult but important question of the law of the non-navigational uses of international watercourses. His delegation therefore trusted that more replies to the questionnaire that had been circulated on the subject would be forthcoming from Member States, so that the Commission could base its work on a broader survey of their views.

48. Lastly, the Commission's work on the jurisdictional immunities of States and their property would be of value not only to international legal experts but also to judges, lawyers and other practitioners, since State immunity was relevant to both international and national law. The draft which the Commission was to prepare on the subject would therefore serve not only to develop and codify international law but also to harmonize national law and practice.

ORGANIZATION OF WORK

49. The CHAIRMAN said that the President of the General Assembly had requested him to draw the Committee's attention to the statement he had made to the plenary meeting of the General Assembly on 15 November 1979. In that statement, the President had pointed out that, for the remainder of its session, the General Assembly would have to consider and vote on a large number of reports submitted by the Committees. He had therefore declared his intention to start the plenary meetings punctually and to proceed to the vote as and when required and whenever the necessary quorum existed. He had explained that, for those who arrived too late to take part in a vote or who wished to correct an inaccurately recorded vote, a system existed whereby representatives could fill in a form at the voting table in the Assembly hall. The President had also appealed for the co-operation of all delegations in expediting the business of the plenary meetings.

The meeting rose at 12.05 p.m.