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SUMMARY RECORD OF THE 51st MEETING

Chairman: Mr. KOROMA (Sierra Leone)

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The meeting was called to order at 3.10 p.m.

AGENDA ITEM 106: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SECOND SESSION (continued) (A/35/10, A/35/388; A/C.6/35/4)

1. Mr. ROSENSTOCK (United States of America) said that the procedure adopted by the Committee at the present session for considering the work of the International Law Commission had operated satisfactorily and enabled the Committee to focus the debate on the basic issues.

2. Referring to the draft articles on State responsibility, he said that his comments were, of necessity, only preliminary since it was impossible to take a definitive position on Part 1 without knowing the contents of Parts 2 and 3. With respect to the first 32 draft articles, he said that the rigorous elimination of all superfluous elements would leave a leaner and more usable text; and he continued to have serious doubts about the basis or utility of draft article 19.

3. With regard to draft article 33, he said that the decision to include a reference to the state of necessity in the draft articles was correct for the reasons given in the commentary; but he agreed with the comment by the Brazilian representative that the novel formulation vis-à-vis the other articles of chapter V was perhaps a mistake. The International Law Commission had made an attempt at presentational effect; but, when the requirements of legal drafting were subordinated to concerns of that kind, it was usually at the expense of good law. Perhaps further consideration could be given to the applicability of the provision in paragraph 2 (c) of article 33 in cases where the contribution of the State invoking necessity had been relatively minor. He wondered what would happen in a case where the injured State had contributed by its action to the state of necessity. Perhaps those questions would be clarified in Part 2. The common-law concept of contributory negligence might by analogy have some utility in that context. Perhaps the answer might lie in the coherent pattern that seemed to be emerging over the years in procedures for the settlement of disputes, in particular through the intervention of the International Court of Justice. The judicial settlement of disputes was not merely desirable but essential since, as the International Law Commission's commentary noted, a State invoking the state of necessity must not be the sole judge of the existence of necessity.

4. In his opinion, draft article 34 was properly formulated, so long as it was understood that the words "in conformity" referred to the inherent nature of the right provided for in Article 51 of the Charter. It might be appropriate to add a provision which would include, among circumstances precluding wrongfulness, the case provided for in Article 25 of the Charter in connexion with decisions of the Security Council.

5. With regard to draft article 35, he hoped that Part 2 of the draft would be completed before any decision was taken on the question whether the article should be included in Part 1 or Part 2, or in the context of international responsibility for the injurious consequences of acts not prohibited by international law.

(Mr. Rosenstock, United States)

6. In respect of Part 2 of the draft articles, he agreed with the parameters laid out by the Special Rapporteur, and considered that high priority should be given both to Part 2 and to Part 3 of the draft articles on State responsibility, so that the International Law Commission could complete its first readings and subsequently consider all three parts together at second reading.

7. The topic of international responsibility for the injurious consequences of acts not prohibited by international law was a very timely one in the present-day world of interdependence, although it would be necessary to proceed with prudence in that area in order not to exceed the bounds which States were likely to be ready to accept. He commended the Special Rapporteur on bringing together evidence of the primary obligation of States to bear in mind the maxim sic utere tuo ut alienum non laedas, although great care would have to be exercised in extending its application from the sphere of private law to that of relations between States, where the degree of interdependence was less. On the other hand, the Special Rapporteur should continue to draw in his work on the full range of applicable doctrine and State practice. It seemed premature to restrict the scope of the rules to the question of the environment. Article 35 in Part 1 of the draft articles suggested other matters which might be regulated, in particular matters relating to highly dangerous activities.

8. Sir Ian SINCLAIR (United Kingdom), referring to the subject of State responsibility and in particular to the three new draft articles adopted by the Commission at its thirty-second session (draft articles 33 to 35), said that article 33 dealt with the concept of the "state of necessity" as a circumstance precluding wrongfulness. That concept must be distinguished from the other circumstances referred to in articles 29 to 32 and 34 of the draft, although there was a certain linkage between the notion of "state of necessity" and those of force majeure and distress. The commentary to article 33 reviewed a number of instances in which the concept of a "state of necessity" had been invoked in situations which could not justify the conduct of the State advancing the plea. Therefore, the concept of "state of necessity" as a circumstance precluding wrongfulness must be approached with particular prudence; and he was glad that the International Law Commission had formulated article 33 in negative terms, so as to reduce to the minimum the danger that the concept might be abused. There was a clear analogy in that respect between draft article 33 and article 62 of the Vienna Convention on the Law of Treaties.

9. The substance of article 33 was generally acceptable to his delegation. A correct balance had been struck between the rights, obligations and interests of the State committing the prima facie wrongful act and the rights, obligations and interests of the State which suffered the consequences of that act. However, paragraph 2 (b) said in effect that a state of necessity could not be invoked if the international obligation breached was laid down in a treaty which "explicitly or implicitly excludes the possibility of invoking the state of necessity". That could be taken to mean that the defence of state of necessity was completely without application to cases in which the action taken by the State involved a breach of treaty obligations. He did not think that that had been the

(Sir Ian Sinclair, United Kingdom)

International Law Commission's intention, and suggested that the words "explicitly or implicitly" should be deleted or replaced by some other expression such as "explicitly or by necessary and inescapable implication".

10. Another point which might be consided on a second reading of article 33 was whether the circumstances which might justify the invocation of a state of necessity were such as to exclude wrongfulness entirely in all cases. The commentary to article 33 cited a number of cases in which States had invoked a state of necessity to justify nonpayment of a debt, but it was clear from the examples cited that, at most, the plea of state of necessity would have the effect only of suspending performance of the obligation as long as the state of necessity existed.

11. Article 34 demanded the closest attention, because of the intrinsic importance of the right of self-defence. The United Kingdom delegation had on many occasions made clear its views concerning the scope and proper meaning of Article 51 of the Charter, and the relationship between Article 51 and customary international law; and he thought that the International Law Commission had been well-advised not to seek to define the concept of self-defence. Also, in paragraph 1 of the commentary, the International Law Commission made clear its intention not to enter into the continuing controversy regarding the scope of the concept of self-defence or to interpret the rule of the Charter referring to that concept. That being so, he found it surprising that paragraphs 19 to 22 of the commentary evoked precisely those controversial questions, in a manner that was not appropriate by way of commentary to an article. He therefore urged the International Law Commission to shorten its commentary to article 34, particularly by omitting paragraphs 19 to 22.

12. With regard to article 35, he noted that its placing in the draft was provisional. In his opinion, the matter referred to in article 35 should rather be considered in the context of the study of international liability for injurious consequences arising out of acts not prohibited by international law. In its 1979 report (A/34/10), the International Law Commission had taken the view that the consequence of an act ceasing to be an internationally wrongful act was that the international responsibility of the author was not engaged. If that were so, it seemed difficult to accept the thesis that, in the context of the codification of the law of State responsibility, a liability to compensate for damage could arise for a State having committed an act in circumstances where the wrongfulness of that act was precluded. He thought, therefore, that article 35 of the draft might be unnecessary.

13. Part 2 of the draft articles on State responsibility should be concerned essentially with the consequences of a wrongful act and the rights afforded to the injured State. The position of third States affected by the internationally wrongful act was a secondary aspect; and he therefore had some hesitations about the concept that "new legal relationships" inevitably arose in all cases where an internationally wrongful act had been committed, particularly in the case of material breach of a treaty obligation. Consequences might flow from that material breach. As Article 60 of the Vienna Convention on the Law of Treaties had made clear, the other party or parties might be entitled to terminate the treaty, to suspend its operation, to seek reparation or even, depending on the

(Sir Ian Sinclair, United Kingdom)

circumstances, to seek restitutio in integrum. In principle, it would be wise to eschew doctrinal questions in formulating Part 2 of the draft, and to concentrate on determining the rights of the injured State in the various contingencies contemplated. In a definition of those rights, the obligations of the State which had caused the injury would simultaneously be defined. He therefore hoped that the Special Rapporteur would bear in mind that the normal remedy in cases of breach of an international obligation was reparation and that the application of countermeasures or other forms of sanction was admitted only exceptionally - namely, in circumstances where the essential interests of the injured State could not be protected by reparation alone.

14. On the question of delimiting the scope of international liability for injurious consequences of acts not prohibited by international law, a great deal of work still remained to be done by the International Law Commission. His delegation was sceptical as to the possibility of elaborating, at the present stage of development, general principles on a subject having such vast parameters; it acknowledged, however, that the impact of new technology and the increased danger to the physical and human environment posed problems for all States. A number of specific international conventions already regulated many of the more immediate transnational problems which arose in that context; and no doubt the process of specific regulation of particular injurious consequences would be further expanded to deal with new problems as they arose. His delegation considered that the International Law Commission should adopt an inductive approach in its consideration of that topic, and should continue to gather relevant materials before seeking to embark on a substantive study.

15. Turning to the question of the non-navigational uses of international watercourses, he said that his delegation welcomed the provision made in article X which preserved treaties in force relating to a particular international watercourse system or any part thereof. Further thought would no doubt have to be given to the relationship between article X and other articles as the draft was further refined. The texts of articles 3 and 4 were generally satisfactory, particularly as regards the duty to negotiate. His delegation wished to give further study to the implications of the provision contained in article 1, paragraph 2, which had the indirect effect of bringing navigational uses of international watercourses within the scope of the draft.

16. On the question of the status of the diplomatic courier and the unaccompanied diplomatic bag, his delegation still believed that disproportionate time and effort should not be expended on elaborating principles already embodied in existing multilateral and bilateral conventions. His delegation hoped that the International Law Commission could present recommendations which would strike a proper balance between the legitimate rights and interests of the sending State and those of the receiving State; nevertheless, he remained unconvinced of the case for a new legal instrument, even to solve the problem of abuse of bag facilities.

17. With regard to the question of jurisdictional immunities of States and their property, he was glad that the International Law Commission had begun the process

(Sir Ian Sinclair, United Kingdom)

of elaborating a set of draft articles by adopting articles 1 and 6. The commentary to article 6 drew attention to the differing theories which could be said to underpin the doctrine of State immunity in contemporary international law. It might not be necessary for the International Law Commission, at the present stage of its work, to form a view on the question whether there was a basic principle of State immunity from which exceptions could be made, or a basic principle of exclusive territorial jurisdiction from which exceptions could also be made. The difference between the two approaches was, however, crucial. The first required that exceptions to a basic rule of immunity must be justified, while the second required that exceptions to the overriding principles of exclusive territorial jurisdiction must be justified. The first sentence of paragraph 3 of the commentary to article 6 did not seem to be compatible with the text of article 6 itself, which certainly leaned in the direction of the first of the two basic approaches. His delegation urged the International Law Commission to keep an open mind on the point, and would insist that the Commission's tentative decision to adopt article 6 in its current form should not pre-judge the further work on that topic by imposing any particular burden of proof as regards exceptions to the basic rule, given that the nature of the basic rule was itself controversial.

18. With regard to the level of the honoraria paid to members of the International Law Commission, a question mentioned in paragraph 194 of its report, he agreed that the honoraria should be increased. It was clearly the responsibility of the Fifth Committee to determine the amount of the increase, but he appealed to the Sixth Committee to raise the question with that body.

19. In conclusion, he said that steps should be taken to reduce the number of projects on which the International Law Commission was working. Priority could not be given to all of them, and the Commission must therefore exercise restraint at least until it had completed its work on the priority topics which were already on its agenda.

20. Mr. de MESTRAL (Canada) said that his delegation had studied with interest the chapter of the report dealing with the work of the International Law Commission on the jurisdictional immunity of States and their property. Its major concern was that the draft articles to be prepared by the Commission should not give undue immunity to State property which was involved in commercial activity. Where commercial activity was involved, there was no justification for a claim of State immunity, either as a matter of general policy or as a matter of existing international law. The law on the question must be brought into line with current reality and must ensure equity for all.

21. He welcomed the work undertaken by the International Law Commission on the non-navigational uses of international watercourses. His delegation had already stressed the view that the International Law Commission, as well as continuing its traditional function of codifying international law, must also be at the forefront of the development of new law and the promotion of new ideas. The non-navigational uses of international watercourses was a difficult and controversial topic, and the codification and progressive development of international law in that area would be of great benefit to all Member States of the United Nations.

(Mr. de Mestral, Canada)

22. Any topic involving the sharing of natural resources was bound to involve controversy, even between States which had friendly relations with one another. Nevertheless the possibility that controversy might arise should not be taken as a signal to withdraw from potential controversy. Once a decision had been taken that neither State could use exclusively the benefits of a watercourse running through the territory of two States, it became necessary in the interests of both to determine the basis upon which they would share those benefits. In the view of his delegation, that need to share was already enshrined in international law, which should be drawn upon in the elaboration of draft articles on the topic. The main difficulty arose in determining an appropriate basis for sharing the resources in individual cases.

23. His delegation accepted the basic thesis that the sharing of the benefits of an international watercourse should be worked out within a framework agreement between the States concerned; but it was concerned that such an approach might not carry the law very far forward. In an extreme case it might even be argued that there was no legal basis for the sharing of the benefits of an international watercourse unless such agreements had been made.

24. In the view of his delegation, the International Law Commission should not confine itself to elaborating draft articles suggesting the need to conclude framework agreements; it should rather state the legal principles upon which the sharing of the benefits of an international watercourse were to be determined. The sharing of the benefits of international watercourses had often given rise to serious international controversy since it raised fundamental problems of sovereignty over natural resources. In that area, emphasis on sovereignty alone would be unlikely to provide a workable solution. A functional approach was far more likely to provide a basis for the elaboration of solutions reflecting the interests of all States concerned. Such a functional approach had greatly assisted the development of new rules of international law in many areas; and, in the view of his delegation, it could do the same for the law governing the non-navigational uses of international watercourses.

25. Mr. CALERO RODRIGUES (Brazil) reminded the Committee that, at the thirty-fourth session of the General Assembly, his delegation had expressed the view that it would be inopportune to comment on the preliminary results of the work of the International Law Commission on the law relating to the non-navigational uses of international watercourses, until that body had been able to consider further articles submitted by the Special Rapporteur. He was sorry to say that the same held true even now, because the meaning and scope of the articles being prepared was not clear from the material which had been submitted.

26. In his second report, the Special Rapporteur had stated that the Commission should try to establish general principles applicable to the non-navigational uses of international watercourses. That was the approach supported by the Brazilian delegation, since only after there had been at least a preliminary formulation of the over-all body of principles to be followed in the matter would it be possible to have a clear idea of the meaning and scope of any proposed text. No principle

(Mr. Calero Rodrigues, Brazil)

could be considered in isolation without taking account of its implications for the whole body of principles. In paragraph 30 of his second report, the Special Rapporteur quoted a comment by Sir Francis Vallat to the effect that the Commission should not be asked to decide on isolated articles but should be given the opportunity to see the draft articles in perspective. Neither the Special Rapporteur nor the Commission had followed that course in their work.

27. Chapter III of the report of the Special Rapporteur (A/CN.4/322 and Add.1) dealt only with the general principle of the concept of water as a shared natural resource. The Commission had apparently examined none of the other principles, although one was mentioned in paragraph 58 of the commentary on article 5 and another in paragraph 14 of the commentary on article 3. Nevertheless, it was to be assumed that other principles were to be considered for inclusion in the text; that piecemeal approach was not conducive to good results.

28. Referring specifically to the international watercourse system concept, he said that, in their present form, articles 1-4 of the text were a new presentation of suggestions made by the Special Rapporteur in his first report. His delegation agreed that the draft articles should constitute a framework of general principles and that the States concerned should apply those principles to particular watercourses through special agreements. At a later stage, the Sixth Committee could consider the form the articles should take and decide whether or not a framework instrument would be necessary or useful. In any event, in view of objections to which the former text had given rise, his delegation did not consider it wise at the present stage to revise the articles in an attempt to give them a final or semi-final form.

29. In 1976 there had been a consensus in the International Law Commission that the problem of determining the meaning of the term "international watercouses" need not be pursued early in the Commission's work on the topic; in paragraph 120 of the report of the Commission on the work of its thirty-first session (A/34/10) it was stated that the Special Rapporteur had concluded that for the time being it was necessary to accept the ambiguity of the term "international watercouse" and that the Commission must be sensitive to the differences of opinion among Governments about taking the concept of the drainage basin as the foundation for work which would be of insufficient utility if its product failed to attract support from a significant group of riparian States. The Special Rapporteur had therefore appeared disposed not to prejudice the possibilities for the success of the Commission's work by introducing the concept of the drainage basin. Even then, however, it had been pointed out in the Commission and in the Sixth Committee that the definition of the term "user State" appeared to imply acceptance of the concept. Unfortunately, in clarifying the question in his current year's proposals, the Special Rapporteur appeared to have based himself on the concept of the drainage basin. In the Brazilian delegation's view, that was the only possible interpretation to be given to the expression "international watercourse system" as used in the six articles proposed by the Special Rapporteur and provisionally adopted by the Commission.

(Mr. Calero Rodrigues, Brazil)

30. The report of the Special Rapporteur and the report of the Commission explained, with examples, that the word "system" was frequently used in connexion with rivers, and went on to say that it was a serviceable term that would permit progress in the work on the topic on a basis that was not unduly confining (A/35/10, p. 254). His delegation considered that, precisely because a watercourse system was the sum of its hydrographic components, it was not a "serviceable term" for the purposes of the articles now being prepared. The only difference between a unitary whole of hydrographic components and a geographical area of surface and underground waters flowing towards a common collection point was that one was called a "watercourse system" and the other a "drainage basin". In his view, the concept of the drainage basin was being introduced into the draft articles by semantic subterfuge.

31. Two subsidiary concepts were derived from the concept of "watercourse systems" in article 1: "system States" in article 2 and "system agreements" in article 3. "System States" were the States in whose territories waters of a "watercourse system" existed. "System agreements" were agreements between "system States", which "applied and adjusted" the provisions of the proposed articles to particular international watercourse systems or parts thereof. While the obligation for "system States" to negotiate "system agreements" was recognized, it was not a general obligation but existed only "in so far as the uses of an international watercourse system might require". In paragraph 16 of the commentary on article 3, it was explained that if an international watercourse was hardly used, or if its uses were on such a level, relative to its resources, that agreement among the system States was not required, or if a given use by one or more system States would have so little effect on uses by other system States that agreement was not required, then no obligation to negotiate arose. It appeared logical that no obligation to negotiate existed if no agreement was required, and if the decision to come to an agreement was to be taken by the States concerned, the provision was meaningless. There was no need for a special provision to that effect, and the theoretical question as to whether States were obliged to negotiate agreements under customary law or under a progressive development of international law was irrelevant.

32. He challenged the assertion in paragraph 19 of the commentary on article 3 that an analogy existed between the obligation to negotiate agreements on the non-navigational uses of international rivers and the obligation to negotiate which the International Court of Justice had found to exist in the context of the continental shelf. In its 1969 judgement, the Court had been addressing itself to a case of delimitation of maritime boundaries which, as was universally recognized, had to be established through agreement between the States concerned. In the practice of States, that principle had been applied to terrestrial boundaries and logically extended to the delimitation of maritime boundaries. From the principle that delimitation should be made by agreement, it necessarily followed that States must negotiate such agreements. The reference made by the International Court of Justice to the "unity of deposits" as a factor to be taken into consideration had nothing to do with the essence of the obligation to negotiate. The delimination of maritime boundaries and the use of international rivers were basically different situations and there was no analogy between a question of finium regundorum between two States and the question of the use of rivers by a State within its national boundaries.

(Mr. Calero Rodrigues, Brazil)

33. In draft article 5, the concept of a shared natural resource was applied to the waters of international watercourses. In the report of the Commission itself it was admitted that the concept of a shared natural resource was relatively new and had not been accepted as a principle of international law. Furthermore, it had proved highly controversial both when the Charter of Economic Rights and Duties of States had been prepared and when the Intergovernmental Working Group of Experts of UNEP and the General Assembly had considered the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States.

34. However, the Commission had tried to justify the inclusion of the concept of a shared natural resource in the draft articles on the basis of the two instruments referred to, giving a strange interpretation of the decision of the Permanent Court of International Justice in the River Oder case and referring to contemporary arrangements such as the Treaty for Amazonian Co-operation of which Brazil was a signatory; and his Government was opposed to that concept. His delegation was not convinced that the concept was widely accepted, and it considered that such acceptance would have no intrinsic value, since it would not be clear that a comprehensive legal régime had been created, and States would not know what their rights and obligations under that régime would be. He therefore saw no reason for the inclusion in the draft articles of a concept that would perforce make the Commission's work more difficult.

35. Referring to the jurisdictional immunities of States and their property, he reminded the Committee that, at the suggestion of the Special Rapporteur himself, the International Law Commission had considered draft articles 1 and 6 only, and had given them its preliminary approval - a procedure that appeared neither necessary nor advisable.

36. Article 1, defining the scope of the articles, stated that they applied to questions relating to the immunity of one State and its property from the jurisdiction of another State. The present draft avoided the difficulties arising from the original version of the Special Rapporteur. However, some members of the Commission had expressed reservations concerning the article on the grounds that it contained no legal rule and was thus merely descriptive and that it was meaningless because it did not identify "questions relating to" immunity. His delegation did not agree with the first point, since it believed that it was useful to state the scope of the draft. On the other hand, it agreed that the reference to "questions relating to" immunity could be deleted; that reference should be maintained only if the Commission considered that the draft would not be comprehensive enough to encompass all the aspects of jurisdictional immunity. That seemed not to be the case, in view of the statements made in paragraph 3 of the commentary on article 1. Since it seemed that the one and only foundation of the draft articles was the concept of State immunity and any rules relating to State property would be only consequential to that basic concept, it would be possible to omit the reference to State property in article 1. He submitted that from a purely technical point of view it would be better to refer only to State immunity.

(Mr. Calero Rodrigues, Brazil)

37. With reference to article 6, which defined the basic concept of State immunity, he recalled that the initial choice had been between immunity as a sovereign right and immunity as an exception to the jurisdiction of States. His delegation was happy that the Commission had decided to recognize that a rule existed which affirmed in a positive way the existence of State immunity as an application of the principle "par in parem imperium non habet".

38. Commenting on some of the articles included in the report of the Special Rapporteur which the Commission had left for future consideration, he said that the meaning of such concepts as "state property", "trading or commercial activity", "organs" and "agencies and instrumentalities" of the State would have to be made clear; in his view, however, it was not mandatory to include a special provision containing definitions and interpretation.

39. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he said that, in view of the practical importance of the subject and the excellence of the report submitted by the Special Rapporteur, the International Law Commission would be able to present in the not too distant future a set of clear international rules which would receive wide support from States.

40. Mr. YIMER (Ethiopia), referring to the topic of succession of States in respect of matters other than treaties, said it was his view that in the case of transfer of part of the territory of a State all archives, whether situated outside or inside the territory in question, should pass to the successor State. He agreed with the Commission that the successor State should receive all the archives, historical or other, relating exclusively or principally to the territory affected by the succession of States. In that connexion, the "archives-territory" link should be interpreted very broadly and the principles of "territorial and functional connexion" should be taken into account. His delegation also agreed with the Commission that, in the settlement of those problems, priority should be given to agreement between the predecessor State and the successor State.

41. The case of uniting of States did not pose serious problems. As the Commission stated in paragraph 6 of the commentary to article D, once States agreed to constitute a union among themselves, it must be presumed that they intended to provide it with the means necessary for its functioning and administration, and one of the necessary means could be State archives.

42. In relation to separation of part or parts of the territory of a State and dissolution of a State (arts. E and F), the formulations of the Commission could help the parties concerned to reach equitable solutions. Again, the principle of functional connexion and that of territorial origin would have to be applied. The situation of dissolution of a State might appear more difficult, since it would be a case of several new States as successors to the predecessor State which no longer existed, but in practice it would not be so complicated because, as noted by the Commission, each of the successor States would receive the archives relating to its territory and the central archives would be apportioned between the successor States, if that was possible, or would be placed with the successor State they concerned most directly.

(Mr. Yimer, Ethiopia)

43. His delegation wished to restate its position that the draft articles on State archives should be included in the part relating to State property rather than forming a separate part.

44. With regard to State responsibility, his delegation was happy to note that the Commission had completed the first reading of part 1 of the draft by adopting three more articles on circumstances precluding wrongfulness, namely, article 33, concerning state of necessity, article 34, concerning self-defence, and article 35, concerning compensation for damage. In the view of his delegation, state of necessity was a highly controversial question and very susceptible to abuse in specific instances, particularly when it was invoked to justify conduct not in conformity with an obligation not to act, and most especially in relation to respect for the territorial integrity of States. The Commission itself had recognized that the controversy relating to admissibility in general of that principle had centred precisely on cases of international obligations concerning respect for the territorial sovereignty of States. In the view of his delegation, it was in the area of respect for territorial integrity and the principle of non-use of force that the plea of a state of necessity should be applied most restrictively, and in that connexion it supported the inclusion of paragraph 2 (a) of draft article 33.

45. Although his delegation shared the concern at what the Commission referred to as the "negative position" on state of necessity which refused to recognize it as a principle of international law while granting it a limited function in certain specific but less sensitive areas, it agreed with the Commission that, while the principle should not be allowed to operate in dangerous situations, it could be a useful "safety valve" by means of which States could escape the inevitably harmful consequences of trying at all costs to comply with the requirements of rules of law. Finally, with regard to the identification of State interests that could be described as essential, his delegation agreed with the Commission that to do so would be a futile exercise, because whether a given interest was "essential" depended on the specific circumstances of each particular case. It also agreed that "the interest sacrificed on the altar of necessity must obviously be less important than the interest it is thereby sought to save".

46. The right of self-defence was an inherent right of States which was recognized by general international law and had been enshrined in Article 51 of the United Nations Charter. Consequently, draft article 34 was founded on a sound legal basis. With regard to the formulation of the article, his delegation did not believe that it should contain a reference to "an act of a State not in conformity with an international obligation of that State", because no act of a State constituting self-defence was contrary to any international obligation. The wording given in foot-note 179 of the Commission's report would be more appropriate.

47. Regarding compensation for damage, his delegation endorsed the inclusion of draft article 35 as a useful reservation.

48. His delegation was highly satisfied with the work that had been done on that area of international law; it hoped that the comments of Governments would enable the Commission to undertake a second reading of part 1 of the draft articles on

(Mr. Yimer, Ethiopia)

State responsibility as soon as possible, and was happy to note that work on part 2 had begun.

49. He congratulated the Commission on having completed the first reading of the draft articles on the question of treaties concluded between States and international organizations or between two or more international organizations. The draft articles closely followed the corresponding articles of the Vienna Convention on the Law of Treaties, and they constituted an important contribution to the codification and progressive development of the law of treaties.

50. Turning to the question of the law of the non-navigational uses of international watercourses, he said that, so far as the scope of the draft was concerned, he agreed with the Commission that the rules should be designed to promote the adoption of régimes for individual international rivers and, as such, should be of a residual nature. Secondly, his delegation was pleased to note that the Commission had recognized that the definition of the term "international watercourse system" was not a definitive one but a mere working hypothesis and that the use of the word "system" did not purport to settle differences over the definition of an international watercourse. As his delegation had stated at the preceding session, it could not accept the internationalization of rivers wholly within the territory of a State through their inclusion in the definition of the term "international watercourse"; in its view, a better approach would be to stick to the traditional definition of the term "international river". In that connexion, his delegation agreed fully with the view expressed by a member of the Commission in paragraph 94 of the report. Thirdly, with regard to the participation of so-called system States in system agreements, his delegation was of the view that the term "appreciable extent" in paragraph 2 of draft article 3 would create unnecessary problems of interpretation and felt that, as a matter of principle, the right of all riparian States to participate in any negotiation on a system agreement should not be qualified. The Commission itself had acknowledged, in paragraph 14 of its commentary to article 3, the danger inherent in a few States' concluding an agreement without the participation of others.

51. In regard to draft article 5, his delegation did not see the relevance of the term "shared natural resource" to the consideration of the topic in question. In its view, the only term of importance which required definition was the term "international watercourse", as evidenced by the fact that the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States had not been adopted by the General Assembly because of the fundamental objections enumerated in paragraph 20 of the Commission's commentary to article 5. His delegation would like to stress the objection based on the principle of permanent sovereignty over natural resources, and it could not accept the view that that principle did not apply to a shared natural resource.

52. With reference to the jurisdictional immunities of States and their property, his delegation agreed with the formulation of draft article 1 and endorsed the view expressed by the Commission in paragraph 4 of its commentary to article 6.

(Mr. Yimer, Ethiopia)

53. On the question of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation did not share the view held by some members of the Commission that the topic had little foundation in existing doctrine. It agreed with the Special Rapporteur that the rule that it was the duty of one to exercise his right in a way that did not harm the interests of other subjects of international law was a necessary ingredient in any legal system.

54. In regard to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, he agreed with the view expressed in paragraph 159 of the Commission's report that the draft articles should formulate the fundamental principles of international law underlying the four codification Conventions, such as freedom of communication for all official purposes, respect for the laws and regulations of the receiving and transit State and the principle of non-discrimination.

55. Finally, he endorsed the Commission's programme of work for 1981 and agreed that the duration of the yearly session of the Commission should, as a minimum, be maintained at 12 weeks and that the question of the honoraria paid to members of the Commission should be reviewed.

56. Mr. AL-QAYSI (Iraq) said that his delegation appreciated the careful wording of articles 33 and 34, regarding state of necessity and self-defence. Although there was a definite link between the two situations referred to in those articles, the conceptual distinction made by the Commission in that respect was quite subtle. In both cases the act which in other circumstances would be wrongful was an act dictated by the need to meet a grave and imminent danger which threatened an essential interest of the State; for self-defence to be invokable, however, that danger must have been caused by the State acted against and be represented by its use of armed force (para. 2 of the commentary to art. 33).

57. According to article 33, necessity was an exceptional circumstance precluding the wrongfulness of an act which was otherwise wrongful, provided that the act committed fulfilled the two conditions laid down in subparagraphs (a) and (b) of paragraph 1. However, a state of necessity could not be invoked as a circumstance precluding wrongfulness if any of the provisions of subparagraphs (a) to (c) of paragraph 2 applied. As could be seen, the criterion of "essential interest" was central to the fulfilment of both conditions of a state of necessity. The Commission had been right in deciding not to lay down pre-established categories of interest, because the extent to which a given interest was essential naturally depended on all the circumstances in which a State was placed in different specific situations (para. 32 of the commentary to art. 33). It was the State invoking a state of necessity which determined whether the required conditions existed in a particular case because, in its situation of imminent peril, it did not have time to refer the matter to any other instance. That was what made it necessary to balance the various elements in the manner done by the Commission in the draft article. His delegation was particularly gratified that the Commission had envisaged, in the event of a dispute, the need for a settlement by one of the peaceful means specified in Article 33 of the Charter.

(Mr. Al-Qaysi, Iraq)

58. The representative of Italy had stated that the term "essential interest" referred to in article 33, paragraph 1 (a), should not be construed as a political interest. That opinion would seem to diverge to some extent from that of the Commission, which had considered necessity in relation to article 33 as a "necessity of State" (para. 3 of the commentary to art. 33); consequently, the political aspects of the interest were involved. The State was a political institution, and political interest often connoted matters vital to the existence and well-being of the State itself.

59. With reference to paragraph 2 (a) of article 33, and paragraphs 22 to 26 of the commentary to that article, he noted that the Commission had not taken any position with respect to those cases in which the conduct of a State involved the use of armed force but did not amount to an act of aggression, or in any case to a breach of an international obligation of jus cogens. The Commission did not say whether a plea of necessity was admissible in such cases, since that would involve a determination of whether Article 2, paragraph 4, of the Charter was or was not intended to impose an obligation which could not be avoided by a state of necessity. In that connexion, his delegation wished to stress three points. In the first place, the Commission clearly admitted that there was doubt on the question whether all international obligations concerning respect for the territorial sovereignty of States had really become obligations of jus cogens; however, Article 2, paragraph 4, of the Charter must be borne in mind. What, for example, would be the legal situation in a case where the territorial sovereignty of a State was violated against the explicit terms of a treaty through forcible occupation and non-performance of the said treaty? Would the plea of necessity still be rejected? Should non-action be imposed upon the State whose territorial sovereignty had been violated on the ground of the inadmissibility of a plea of necessity? Was it not legally legitimate to conclude that the decisive factor in determining the situation depended in each individual case on a careful weighing of all the relevant circumstances? A negative answer to that question would certainly lead to the impossible result of non-action.

60. Secondly, in rightly rejecting the admissibility of a plea of necessity as a justification for committing an act of aggression, the Commission had referred to article 5 of the Definition of Aggression adopted by the General Assembly in its resolution 3314 (XXIX). It should be remembered in that connexion that the operation of that provision presupposed a determination of the existence of an act of aggression and that the characterization of aggression was to be made by the Security Council, taking as a guide the other provisions of the Definition, and particularly those of articles 2, 3, 6 and 7.

61. Thirdly, despite the subtle distinction made by the Commission, inasmuch as a plea of necessity could be substantiated, a plea of self-defence could also be made. While each of those grounds for precluding wrongfulness had its own parameter, there might be situations in which the facts were so interwoven that the two pleas became admissible. Article 34 dealt with self-defence; in paragraph 1 of the commentary, the Commission merely took as its premise the existence of a general principle admitting self-defence as a definite exception to the general prohibition on recourse to the use of armed force; similarly, according to paragraph 8 of the

(Mr. Al-Qaysi, Iraq)

commentary, self-defence was a concept clearly shaped by the general theory of law to indicate the situation of a subject of law driven by necessity to defend himself by the use of force against attack from another.

62. As indicated in paragraph 18 of the commentary, the total ban on the use of armed force in international relations and its limitation, as represented by the concept of self-defence, were both parallel rules of jus cogens. With regard to the relationship between the rules in Article 51 and the other Articles of the Charter, and between those rules and customary international law, the Commission had rightly referred in draft article 34 to the Charter as a whole, rather than to Article 51 only. However, in some parts of its commentary, the Commission had loosely referred to "armed attack" in a manner which might tilt the Commission's position in favour of one school of thought contrary to the posture it had tried to maintain; that was the case in paragraphs 8 and 9 of the commentary on article 34 and he hoped that during the next reading of the draft articles, the Commission would scrutinize the wording of the commentary scrupulously so as to leave no doubt on its position.

63. In paragraph 16 of the commentary the Commission seemed to indicate with approval that the prevailing opinion at present was that self-defence was an act by a State to ward off a danger emanating from another State, rather than from private individuals or groups; the Commission highlighted the fact that writers, especially in the period between the two world wars, had in many cases based their opinions on a notion of self-defence which was much closer to the one characterized today as a state of necessity; the celebrated case of the steamer Caroline was cited as an example. The works of the writers cited by the Commission, Visscher, Brierly and Basdevant, had appeared before the adoption of the Charter. Moreover, the Commission had been able to make the subtle distinction between a state of necessity and self-defence, based on the adoption of the centralized system of the use of force in the Charter. But that did not negate the element of necessity in the case of self-defence and, while the case of the Caroline could aptly be cited in relation to necessity, the statement of Secretary of State Webster could still be cited as a succinct description of the state of self-defence.

64. With regard to part 2 of the draft articles on State responsibility, the Commission would seem to have made a good start; the new legal relationship arising in the context of content, forms and degrees of international responsibility should be dealt with in part 2. As for the question of loss of the right to invoke the new legal relationship established by international law as a consequence of a wrongful act, he agreed with the suggestion that the question should be dealt with in part 3 of the draft articles. The articles in part 1 should be closely followed in drafting the articles of part 2 without ruling out the possibility of revision or adaptation. On the point of "overlap" raised in paragraph 42 of the commentary, the criterion of the integrity of the eventual international instrument should be the decisive factor.

65. Regarding international liability for injurious consequences arising out of acts not prohibited by international law, there were links between the Commission's consideration of that topic and the consideration of part 2 of the topic of State

(Mr. Al-Qaysi, Iraq)

responsibility. To start from the level of the greatest generality, as reflected in the maxim sic utere tuo ut alienum non laedas, which was also germane to Islamic law, was a step in the right direction. His delegation entirely agreed with the main thrust of the topic as formulated in paragraph 137 of the report.

AGENDA ITEM 29: DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES: REPORT OF THE SECRETARY-GENERAL (continued) (A/35/366 and Add.1 and 2; A/C.6/35/L.14 and Corr.1)

66. The CHAIRMAN announced that the Lao People's Democratic Republic, Madagascar, Sao Tome and Principe and Seychelles had joined the sponsors of draft resolution A/C.6/35/L.14.

67. Mr. JEMIYO (Nigeria) said it was obvious that the international community condemned the activities of mercenaries, considered it necessary to prepare, as a matter of urgency, an international convention to prohibit the recruitment, use, financing and training of mercenaries and approved the Nigerian proposal for the establishment of an ad hoc committee to draft a convention.

68. It had been argued in the debate that article 47 of Additional Protocol I to the Geneva Conventions was unsatisfactory as it denied mercenaries the status of prisoners of war which other combatants enjoyed and that to deprive mercenaries of protection as combatants or prisoners of war would leave the way open for a fundamental transformation of the humanitarian law of war. In that connexion, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts had not dealt with the question of the crime of mercenarism. If the international community considered the use of mercenaries, within its historical contexts and in the interest of international peace and security, as a violation of international human rights, it was right to deny such people the benefit of laws which they did not respect. The General Assembly had drawn attention to the illegality of the activities of mercenaries in its resolutions 2465 (XXIII), 2548 (XXIV) and 3103 (XXVIII). Likewise, the Security Council, in resolution 405 (1977), had condemned all forms of external interference in the internal affairs of Member States, including the use of international mercenaries to destabilize States or violate their territorial integrity, sovereignty and independence and, in resolution 169 (1961), had authorized the Secretary-General to take steps to prevent the activities of foreign advisers and mercenaries in the Congo.

69. Those resolutions were evidence of a new norm of general international law and, consequently, in the progressive development and codification of international law, due regard should be paid to the distress felt by the international community at the sordid and inhuman acts of mercenaries. Besides, the discipline and rights of soldiers of a country's regular army fighting for a national cause in obedience to the lawful commands of their sovereign, could not be equated with the lawless conduct of bands of mercenaries whose main objective was personal gain through vandalism, looting and pillage of innocent peoples. Mercenaries could not therefore be given the same treatment as prisoners of war as was given to soldiers of a regular army.

(Mr. Jemiyo, Nigeria)

70. Another issue raised during the debate which would figure prominently in the future consideration of the item was the degree of State responsibility. Under the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, every State had a duty to refrain from encouraging the organization of bands of mercenaries for incursion into the territory of another State. Unfortunately there was no corresponding obligation on the part of States to prevent their nationals from joining mercenary bands outside their territory, a lacuna which also occurred in the definition of aggression adopted by the General Assembly in 1974. The contemporary development of international law since 1945 and the increasing interdependence of relations between States suggested quite positively that the need to preserve good international relations and international peace and security was a sound basis for an obligation on the part of a State to prevent its nationals from engaging in mercenary activities which were injurious to and undermined the internal security of another State.

71. He was aware that on the basis of article 13 (2) of the Universal Declaration of Human Rights, which guaranteed the right of an individual to leave any country including his own and to return to his country, it could be argued that it might not be practicable for a State to prevent the departure of any of its nationals intending to take part in mercenary activities, but it should be affirmed that, where a national of a State left his country surreptitiously to engage in mercenary activities in another State, he should not be allowed to make his country a place of refuge, especially if he was a refugee from justice elsewhere. His delegation maintained that the right of jurisdiction which a State exercised within its territory over its nationals carried with it the obligation to prevent the commission of injurious acts against another State. The maintenance of international peace and security must have primacy over individual rights and freedom of movement and association. That over-all interest of the international community should therefore set the limit to the rights of States and individuals where such rights were being abused.

72. Draft resolution A/C.6/35/L.14 and Corr.1 represented an important stage in the process of setting up machinery for the drafting of an international convention against the recruitment, use, financing and training of mercenaries and he hoped that it would be adopted by consensus since the essential objective of the sponsors was to have a convention which would be implemented by as many States as possible.

The meeting rose at 5.50 p.m.