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SUMMARY RECORD OF THE 56th MEETING

Chairman: Mr. KOROMA (Sierra Leone)
later: Mr. KIRSCH (Canada)

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The meeting was called to order at 3.15 p.m.

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.13; A/C.6/35/L.14 and Corr.1, L.15)

1. The CHAIRMAN said that, if there was no objection, he would take it that the Committee wished to adopt draft resolution A/C.6/35/L.14 and Corr.1 by consensus.

2. It was so decided.

3. Mr. GRAY (United States of America) said that his delegation had joined in the consensus as an expression of its willingness to make a constructive contribution to the drafting of a treaty on the problem of mercenaries. However, it had serious reservations about some paragraphs, particularly the fourth preambular paragraph, which in its present form appeared to be an attempt to assert a principle which had no basis in law, and operative paragraph 3, the wording of which prejudged the work of the Ad Hoc Committee by defining in advance the scope of the proposed convention.

4. Mr. DANELIUS (Sweden), speaking on behalf of the delegations of the Nordic countries, said that they had participated in the consensus on draft resolution A/C.6/35/L.14 and Corr.1 because they were in general agreement with its contents and objectives. Indeed, the laws of the Nordic countries already contained prohibitions in the field covered by the resolution. However, the delegations of the Nordic countries had difficulties in accepting the fourth preambular paragraph, which stated that the activities of mercenaries were contrary to fundamental principles of international law, such as non-interference in the internal affairs of States, territorial integrity and independence, since in their opinion those principles applied exclusively to the relations between States and could not be violated by the activities of private individuals.

5. Mr. FLEISCHHAUER (Federal Republic of Germany) said that he welcomed the adoption by consensus of draft resolution A/C.6/35/L.14 and Corr.1, although he would have wished certain parts of it to be formulated more clearly. He felt that the fourth preambular paragraph did not distinguish clearly enough between the responsibilities of States on the one hand and the civil and criminal liability of individuals on the other. He also had certain doubts about the words "an international convention to prohibit the recruitment ..." in operative paragraph 3, because he believed that certain activities of mercenaries could not be prohibited by the proposed convention but only through national legislation for its implementation.

6. Mr. RIPERT (France) said that the wording of the first preambular paragraph was not strictly correct, because there was no reference in Article 2 of the Charter to self-determination of peoples. The second preambular paragraph referred to resolutions on which his delegation had abstained or cast a negative vote, and its position in that respect, remained unchanged. His delegation had serious legal reservations about the fourth preambular paragraph, because it did not believe that the activities of mercenaries could be equated with those of a State. An

(Mr. Ripert, France)

individual could not interfere in the internal affairs of another State or impair its territorial integrity and independence; all he could be charged with was impairing State security. Lastly, although France had consistently condemned the policies of apartheid of the South African authorities, it did not believe that that could be termed a decolonization problem. For all those reasons, his delegation wished to state that, although it had not wanted to oppose the consensus, it would have abstained if the draft resolution has been put to the vote.

7. Mr. ANDERSON (United Kingdom) said that, although his delegation had joined in the consensus on draft resolution A/C.6/35/L.14 and Corr.1, it continued to have reservations. For instance, the fourth preambular paragraph appeared to say that the activities of mercenaries were always contrary to international law. That seemed to his delegation to go too far, particularly bearing in mind the law on State responsibility, and it would have preferred a more flexible and less categorical proposition. His delegation would have wished operative paragraph 3 to request the Ad Hoc Committee as a first step to study, from the legal standpoint, the present situation regarding mercenaries, taking into account the materials mentioned in operative paragraph 4. His delegation understood, however, that it was not the intention of the sponsors to rush into drafting the convention before the Ad Hoc Committee had had a chance to study the material requested in operative paragraph 5.

8. The Ad Hoc Committee's work would involve questions of international law, national criminal law, humanitarian law and human rights - issues much more complex than in the case of the International Convention against the Taking of Hostages, since the latter dealt with an action which was a common crime under all systems of law, whereas not all mercenary activities were common crimes.

9. A complicated exercise was about to begin, and his delegation reserved its position on the issues to be discussed and on the acceptability of the results of the work.

10. Mr. KIRSCH (Canada) said that his delegation wished to express reservations concerning the fourth preambular paragraph of draft resolution A/C.6/35/L.14 and Corr.1, because the formulation used was not a correct statement of internaticnal law; States, not individuals, were subjects of international law, and it was therefore States which were responsible for observing the fundamental principles listed in that paragraph. Thus, if a State was involved in activities of mercenaries, that involvement, rather than the activity itself, would possibly be contrary to international law. Secondly, given the fact that differing methods to implement international norms against activities of mercenaries might be required in various national legal systems, his delegation considered the mandate of the Ad Hoc Committee to be set out in operative paragraphs 3 and 4, taken together.

11. Mr. FERRARI-BRAVO (Italy) said that his delegation had joined in the consensus on draft resolution A/C.6/35/L.14 and Corr.1 because it strongly condemned the practice of using mercenaries. However, it had some reservations about the wording of certain paragraphs, particularly the fourth preambular paragraph, where ideas were expressed which related more to the relationship

(Mr. Ferrari-Bravo, Italy)

between States than to the activities of individuals. Only States could interfere in the internal affairs of other States or imperil their territorial integrity or independence.

12. In addition, his delegation would have preferred a clearer definition in operative paragraph 3 of the Ad Hoc Committee's mandate, because the present wording could open the door to formulations which would impose upon States ultra vires obligations.

13. Mr. BROOK (Australia) said that, although he had joined in the consensus, he was not in full agreement with the fourth preambular paragraph, taken with operative paragraph 3. He was not satisfied that "the activities of mercenaries", without further definition, were contrary to the fundamental principles of international law listed in the text, and he saw it as being part of the task of the Ad Hoc Committee to consider how far they should be.

14. Mr. WINKLER (Austria) welcomed the adoption by consensus of draft resolution A/C.6/35/L.14 and Corr.1 but said that he would have preferred the fourth preambular paragraph to be drafted in such a way as to make clear the distinction between the area of domestic civil and penal law and the norms and principles of international law and so as not to prejudice the future work of the Ad Hoc Committee. He would also have preferred the expression employed in the title to be used throughout the draft resolution so as not to create the impression of differences where none existed.

15. Mr. QUENTIN-BAXTER (New Zealand) welcomed the adoption by consensus of draft resolution A/C.6/35/L.14 and Corr.1. His delegation was greatly concerned that the final outcome of the Ad Hoc Committee's work should be consistent with international norms and with national penal laws, so that it could be ratified without difficulty. While his delegation had some reservations about the fourth preambular paragraph, taken with operative paragraph 3, it was sure that, if the reservations expressed were taken into account and the Ad Hoc Committee proceeded with caution, valuable results would be achieved.

16. Mr. LACLETA (Spain) said he was pleased that draft resolution A/C.6/35/L.14 and Corr.1 had been adopted by consensus. Although it had some reservations concerning the fourth preambular paragraph, for the reasons stated by previous speakers, his delegation would be happy to participate in the work of the Ad Hoc Committee.

17. The CHAIRMAN announced that the Committee had included its consideration of agenda item 29.

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)

18. Mr. GRAY (United States of America), referring to the topic of the non-navigational uses of international watercourses, said the discussion in the Committee had indicated that many States supported the efforts of the

International Law Commission. However, some comments, when combined with attacks on the status of international organizations and extreme absolutist notions of State immunity, had been thinly disguised and anachronistic reflections of an imperialist view which had not caught up with the world of 1980.

19. One speaker had noted that the report of the Commission did not contain a complete rendition of the general principles of international law applicable to the subject, and he agreed that it would be possible to give those principles definitive consideration only when they had been completely set forth. The optimum would be to have a set of general principles in extenso, all at once, but that might not be practical in the present case; as in the case of many other topics, it might be necessary to approach the subject a step at a time. Indeed, the Special Rapporteur's report referred to two further principles which were to be placed before the Commission. Regarding the difficulties which one delegation seemed to have with the expression "international watercourse system", he said it was clear that that term could not be equated with the definition of an international river for purposes of navigation which had been adopted at the Congress of Vienna. At the same time, it was not a term which could be equated with the drainage basin. Referring to paragraphs (2) and (8) of the commentary to draft article 1 (A/35/10, pp. 251 and 253), he expressed the belief that the term "international watercourse system" should be tentatively accepted as a working hypothesis which was subject to change. In paragraph 90 of its report, the Commission described its tentative understanding of what was meant by the term "international watercourse system". The description showed clearly that the term was not simply another way of saying "drainage basin".

20. His delegation was not convinced by the argument that the obligation under article 3, paragraph 3, to negotiate in good faith for the purpose of concluding one or more system agreements was not meaningful, since the States concerned would themselves decide whether or not to negotiate; it concurred in general with the analysis made by the delegation of Algeria on that point. Of course, it would be far better if there was a process of third-party judgement which could oblige States to take one or another interpretation of an international obligation.

21. Finally, some reservations had been expressed about the application of the concept of "shared natural resources" to the waters of an international watercourse because that did not tell States how they were supposed to behave. He differed with that view. The principle of shared natural resources as applied to international watercourses was not tantamount to a comprehensive legal régime, and the Commission did not suggest that it was; however, it was a sound antecedent for such a régime because it implied the obligation of States to act co-operatively and to use the waters of an international watercourse in accordance with principles such as equitable use and sic utere tuo ut alienum non laedas. The Commission itself recognized that, when the draft articles were enlarged, they must include principles which would give concrete meaning to the parameters of that shared natural resource and would indicate how that resource was to be treated.

22. Turning to the topic of jurisdictional immunities of States and their property, he said that the work done by the Commission represented a sound if

(Mr. Gray, United States)

cautious beginning. To object that article 6, as drafted, was contrary to customary law totally misperceived the nature and function of the codification process. The notion that the customary doctrine of State immunity for sovereign acts could be extended to all manner of commercial activity was contrary to the raison d'être of sovereign immunity and could only lead to erosion of respect for the elements of immunity. The thought that commercial activity should be regarded as immune merely because the ownership lay with a foreign State rather than with individuals was contrary to accepted State practice and might discourage commerce with State trading companies.

23. Lastly, the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier did not merit urgent attention, and he trusted that the Commission would not distract itself from more pressing matters by focusing on that peripheral issue. He hoped that the practice of dividing the debate on the Commission's report to deal with particular issues would be continued.

24. Mr. Kirsch (Canada) took the Chair.

25. Mr. SEALY (Trinidad and Tobago), referring to the topic of State responsibility, said that draft article 33 adopted by the Commission laid down such strict and inflexible conditions for invoking a state of necessity that it would be extremely difficult, if not impossible, to do so successfully. When introducing the report, the Chairman of the Commission had said that state of necessity covered not only cases of imminent and catastrophic physical damage but also circumstances in which the essential interests threatened were economic and financial; however, the Commission had paid too much attention to examples of physical damage (the Torrey Canyon incident) and not enough to cases in the second category (e.g., the Russian Indemnity case, the Société Commerciale de Belgique case and the Case of properties of the Bulgarian minorities in Greece). Some members of the Commission had acknowledged the importance of cases in which, for reasons of necessity, States had adopted conduct not in conformity with obligations "to act" in regard to the repudiation or suspension of payment of international debts. The possibility of invoking necessity in such cases was particularly important in present circumstances, with the deterioration of the terms of trade and the harsh conditions imposed by international financial institutions on balance-of-payments support loans, which seriously jeopardized the social and administrative structure of most developing countries. The acknowledgement in positive international law of the possibility of invoking necessity in order to safeguard essential economic interests would help the Governments of developing countries to cope with their temporary, short-term financial difficulties without jeopardizing their international credit. The Commission should therefore revise article 33, paragraph 1, accordingly. At the same time, the article might reflect the notion expressed in paragraph (33) of the commentary that, once the peril had been averted by the adoption of conduct conflicting with the international obligation, compliance with the international obligation affected must, if still materially possible, begin again without delay.

26. With regard to article 34, concerning self-defence, he did not believe that a provision of that kind should be included in the draft articles, since the right

(Mr. Sealy, Trinidad and Tobago)

to self-defence could be invoked only in a particular situation in which an armed attack had occurred. Furthermore, as was clear from paragraph (24) of the commentary to the article, the objective element of the internationally wrongful act was absent. Finally, self-defence was bound up with the collective security arrangement established by the United Nations.

27. As indicated in paragraph (29) (p. 131) of the commentary to chapter V, the list of circumstances enumerated in that chapter was not absolutely exhaustive. Since that fact was not reflected in any of the provisions of the draft, the Commission might in second reading, consider the possibility of including in Chapter V a general reservation in that connexion.

28. With regard to part 2 of the topic of State responsibility, he pointed out that, in formulating a definition of the different forms of responsibility, two factors should be taken into account: firstly, the greater or lesser importance which the international community attached to the rules at the origin of the obligations violated and, secondly, the greater or lesser gravity of the breach itself. In defining the degrees of international responsibility, it was necessary to determine the role to be played by the concepts of reparation and sanction. The Special Rapporteur had suggested a method whereby the international community could determine the response proportional to the breach of a particular obligation. Accordingly, the Committee would have to await the new report of the Special Rapporteur in order to decide whether the proposed plan of work was satisfactory.

29. Referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he pointed out that, according to the report, that topic essentially concerned dangers that arose within the jurisdiction of one State and caused harmful effects beyond the borders of that State. The report also indicated that the main thrust of the elaboration of rules on that topic should be to minimize the possibility of injurious consequences, and to provide adequate redress in any case in which injurious consequences did occur, with the least possible recourse to measures that prohibited or hampered creative activities. It had also been suggested that the immediate field of application of such rules might be that of the physical environment but, in his opinion, that would unduly restrict the scope of the Commision's work. For example, an activity which currently entailed considerable danger at the transnational level was the trade in chemicals, pharmaceuticals and similar products of a dangerous nature, the use of which was banned in the country where they were manufactured. Such trade was not yet prohibited under international law but it had injurious consequences that should implicate the international liability of the State whose nationals were carrying out such activities.

30. Lastly, his delegation was in favour of increasing the honoraria paid to the members of the Commission.

31. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) drew attention to the fact that the Commission had completed the first reading of the draft articles on State responsibility. It was becoming increasingly important to stress State responsibility and to strengthen international law, in view of the fact that

(Mr. Makarevich, Ukrainian SSR)

international relations were becoming increasingly complex and since State responsibility was one of the most important principles of international law.

32. With regard to draft article 33 concerning a state of necessity, it was obviously necessary to proceed with the utmost caution in determining the circumstances precluding wrongfulness. Accordingly, he suggested that a third paragraph describing such circumstances in detail should be added to draft article 33, so as to avoid the possibility of abuse.

33. Not only socialist doctrine, but Western doctrine as well, recognized that situations of extreme necessity should be taken into account in determining responsibility. International practice made provision in various ways for acts committed with a view to protecting vital interests in circumstances of extreme difficulty. For example, a vessel was allowed to enter a foreign port and an aircraft was allowed to make a forced landing in situations of extreme difficulty. In contemporary international law, some agreements recognized a State's right to conduct activities aimed at preventing a particularly dangerous situation. A State's right to denounce an agreement in particularly grave circumstances was also recognized; article X of the Non-Proliferation Treaty recognized the right of parties to withdraw from the Treaty if extraordinary events jeopardized the supreme interests of the State. Those were exceptional cases in which, because of objective circumstances, a State must protect its citizens from serious, imminent danger, and which absolved it from responsibility for acts that would normally be qualified as wrongful. In such cases, the responsibility of the State was implicated only when the measures taken exceeded the limits of what was reasonably necessary.

34. In its commentary on articles 31 and 33, the Commission referred only to the elements of force majeure or fortuitous event and did not consider new situations. Accordingly, there was some doubt about whether those articles were necessary. Article 33 gave rise to other objections because it lacked any clear delimitation of those cases in which a State could invoke "state of necessity" as a reason for excluding wrongfulness. As a result, the concept of state of necessity could be subject to broad interpretations and could be invoked unjustifiably. Those observations also applied to draft article 34, the text of which was ambiguous. The wording of draft article 34 should be based on the Definition of Aggression. The right of self-defence could not be refuted, since it was embodied in the Charter; reference to Article 51 would help to avoid any inconsistencies. The importance of draft article 34 depended on the extent to which the rule contained therein was related to cases of use of force, and it thus needed to be formulated with the utmost care.

35. With the four new articles on State archives, the Commission had completed its consideration of the draft articles on succession of States in respect of matters other than treaties. His delegation had no objections to those articles.

36. In addition, he noted with satisfaction that the Commission had concluded the first reading of the draft articles on the question of treaties concluded between States and international organizations or between two or more international

(Mr. Makarevich, Ukrainian SSR)

organizations. In general, the approach adopted was correct; the draft articles were consistent with the relevant rules of the Vienna Convention on the Law of Treaties and reflected the special characteristics of agreements concluded by international organizations. His delegation had no objection to articles 61 to 80, but it could not accept the provisions contained in the annex, which placed international organizations on an equal footing with States. Moreover, the wording of paragraph 2 (c) could create political or other difficulties.

37. In connexion with the jurisdictional immunities of States and their property, the Commission had prepared only two articles. In his opinion, it was necessary to begin by resolving questions of principle in order to determine future work. A valid approach would be first to prepare a detailed list of existing rules and then to formulate the new rules necessitated by contemporary international relations. Viewed in that light, the two draft articles were not acceptable.

38. Article 6 had obvious short-comings: not only did it fail to fulfil its objective, but it also created new complications. The principle of the jurisdictional immunity of States should be set forth as a general rule, and subsequent articles should then describe the exceptions to that general rule. Paragraph 1 was ambiguous and was not consistent with a generally accepted principle. Moreover, the wording of paragraph 2 was not correct and contained incongruities, while article 1 was merely a general statement and did not define the scope of the draft articles. The relevant rules must be considered more thoroughly and greater care must be taken in formulating the draft articles.

39. The same was true of the work on the non-navigational uses of international watercourses, which presented special problems because of the nature of the question and the wide variety of those uses. The articles drafted by the Commission had considerable short-comings, mainly related to the concept of the system of international watercourses. That concept, which was complex in itself, should be the subject of a precise definition. A careful reading revealed that the first two articles did not define anything. To be useful, the definition should identify the elements of the system and explain the relationship between them. That defect had a negative effect on the other articles. Article 3 was not clear and articles 5 and 10 gave rise to new problems and difficulties.

40. With regard to the law on the diplomatic courier and the diplomatic bag, the delegation of the Ukrainian SSR supported the opinions expressed in the Commission's preliminary report. The question was extremely important in international relations. The formulation of rules on the subject would contribute to the stricter observance of the Vienna Convention on Diplomatic Relations and, consequently, to the development of international co-operation.

41. Mr. SUCHARITKUL (Thailand), after summarizing the progress achieved over the past few years by the Sixth Committee and the International Law Commission, observed that there was a close connexion between the contribution made by the former to the progressive development and codification of international law and the close co-operation and association which it maintained with the latter. As a policy-making body, the Sixth Committee adopted a resolution each year indicating

(Mr. Sucharitkul, Thailand)

the topics to be studied by the Commission and the priority to be accorded to each. The Committee was also the logical forum for contacts with the Commission which, as a subsidiary organ composed of experts serving in an individual capacity, must seek the opinions of Governments.

42. He reminded the Committee that in the 1960s severe criticisms had been made of the short-comings of traditional international law, precisely because that law had developed out of the practice of a group of States to the exclusion of the interests of States which were attaining independence. That situation had to a large extent been remedied, since all Governments expressed an opinion and contributed to the perfecting of legal rules. On the other hand, the responsibility for the progressive development of the law must fall on every member Government without exception.

43. With fullest realization of its role, the Committee would have itself partly to blame if ultimately the contents of international law on any given topic still failed to correspond to the needs of the overwhelming majority of nations. Within the Committee, every delegation could even state that it did not subscribe to the change in the law and felt itself bound by the old anachronistic law which could best serve its immediate interests. Fortunately, such a view was becoming increasingly rare and the statement that rules of international law could not evolve without the consent of all States was losing ground. In point of fact, new rules were emerging every day without the consent of every State and it had become generally accepted that, just as every State could participate in international law-making, none could obstruct it. Thus, there was a transition from the theory of consent to the expression of consensus, or the collective views of the members of the community of nations, regardless of their social, political or economic systems.

44. Consequently, the notable improvements in international law over the past few years were attributable to the wider participation of States in the international law-making process. Moreover, with better rules of law, States would be better prepared to settle their disputes by peaceful means.

45. With regard to the succession of States in respect of matters other than treaties, the four draft articles on State archives approved by the Commission followed the basic principles applied in regard to State property. The indivisibility of archives, the inseparable link between archives and the territory transferred and the possibility of reproducing documents in order to preserve the integrity of archives without restricting their accessibility deserved careful examination. The position of third States, which although not parties to the succession had rights and obligations vis-à-vis the predecessor and successor States, must also be taken into account.

46. The articles approved by the Commission on treaties concluded between States and international organizations or between two or more international organizations followed the same pattern as the Vienna Convention on the Law of Treaties as far as the special nature of international organizations would permit, since that gave rise to the need for a new terminology.

47. On the topic of State responsibility and with reference to article 34 approved

(Mr. Sucharitkul, Thailand)

by the Commission, the right of self-defence, in addition to being embodied in Article 51 of the Charter, was indirectly recognized in the Definition of Aggression adopted by the United Nations, since self-defence and aggression were mutually exclusive concepts.

48. The question of the state of necessity might present more problems for lawyers trained in a common law system, because it did not appear to warrant preclusion of wrongfulness, with the exception of the relaxation of financial burden on the developing countries. The plea of necessity in criminal law might excuse the wrongdoer but would not justify the wrongfulness of an act. Draft article 33, paragraph 1, was drafted from that point of view and with a reduced scope of application: that was the only way in which the state of necessity could be viewed as a circumstance precluding wrongfulness.

49. The question of international liability for injurious consequences arising out of acts not prohibited by international law was closely connected with part 2 of the study on State responsibility and referred to acts which, at the time of commission, had not constituted an internationally wrongful act. An act of a State resulting in injurious consequences would engage its liability regardless of absence of wrongfulness; however, should the law prohibit such an act at the time of commission, that would engage State responsibility in a general way. The Special Rapporteur had identified that type of liability with the maxim "sic utere tuo ut alienum non laedas".

50. As international law continued to evolve, what had formerly been allowed might be prohibited, as a consequence of a necessity recognized by the international community. As a minimum measure of protection, the adoption of draft articles on that subject would be particularly beneficial to States less developed industrially, taking into account that international law lagged behind the advance of science in response to the economic needs of nations.

51. With respect to the law on the non-navigational uses of international watercourses, Thailand was a partner in several international arrangements involving the uses of international watercourses, particularly the Mekong River, and emphasized the vital importance of draft article 5, which introduced the important concept of a shared natural resource. His delegation considered it illusory to try to apply the principle of permanent sovereignty over natural resources to water that flowed in an international watercourse through various successive territories. In that case, the concept of a shared natural resource was inevitable. A riparian State should not be allowed to exclude other riparian States from the habitual use of its waters by causing drastic changes in the flow of water. Unilateral actions should give way to consultations and the adoption of concerted measures. Having reached that important conclusion, the Commission would have to examine questions which arose in connexion with the methods and criteria for the use and equitable distribution of shared resources.

52. With regard to jurisdictional immunities of States and their property, he wished to express his gratitude to those delegations that had participated in the debate in the Committee for their contribution to the clarification of various points of basic importance that would have to be considered in greater detail.

(Mr. Sucharitkul, Thailand)

53. The title of the topic could be maintained for the time being, although there was still a possibility of changing it in the future in order to make it conform more closely with the realities of State practice. In the ultimate analysis, immunities were granted only to the State. The term "immunities of State property" referred only to the scope or extent of application of the rules concerning State immunities. Nevertheless, no study on the topic could be considered complete, if it did not make reference to different aspects of jurisdictional immunities relating primarily to State property. Accordingly, express reference to State property in the title itself was not altogether purposeless.

54. Draft article 1 ("Scope of the present articles") was tentative; it was necessary because the scope of the draft articles must be defined, even if only approximately, so that he could proceed with his work. The definition should, moreover, be flexible enough to allow for future adjustments as required. Other draft articles of the introduction had also been put forward on a tentative basis in order to give the Commission an idea of possible definitional problems connected with the topic. The terms "territorial State" and "foreign State", which had been suggested tentatively for want of better ones, had proved inadequate or unnecessary. It would, furthermore, be necessary to redefine the concept of jurisdiction or immunity from jurisdiction as expressed in terms of "jurisdictional immunity". That term had been used in contrast with the concept of "extraterritoriality". Its scope had been confined primarily to immunity from the jurisdiction of the courts or the judiciary, but it also covered other forms of jurisdiction relating to the exercise of judicial power by the executive and administrative authorities responsible for the administration of justice. Although the study of State practice was essentially concentrated on judicial practice, the practice of the executive and the role it played in the process of determining the question of immunity were also examined. The practice of the legislature could not escape the attention of the Commission, and no serious study could afford to bypass consideration of the treaty practices of States that had a direct bearing on the obligation solemnly undertaken not to claim immunities in certain circumstances or in respect of the activities of certain government agencies.

55. In that connexion, he reiterated the appeal made to Governments to provide source material, especially legislation, judicial decisions and reports or recommendations that had a bearing on the topic, and to send in replies to the questionnaire sent to them in 1979.

56. With regard to draft article 6, concerning the principle of State immunity, a controversy had arisen over the use of the word "principle", it having been asserted that State immunity should be described as a rule rather than as a principle. A further controversy concerned the question of whether State immunity was truly a rule or, rather, an exception to a rule of international law, namely, the exclusive sovereignty of the State. It was necessary also to consider how far the Commission should go into the hierarchy of fundamental norms of international law and whether it should always state the accepted fundamental principles of international law, such as those of territoriality, sovereignty, equality of States and consent, as the foundation of other principles. As the representative of the United Kingdom had

(Mr. Sucharitkul, Thailand)

pointed out, such issues had a bearing on the burden of proof. If State immunity was neither a principle nor a rule, but only an exception to the rule of sovereignty, immunity would have to be proved in each individual case.

57. The Commission was inclined to accept that there was sufficient evidence in State practice, national legislation, treaties and opinions of writers to indicate the existence and general application of the principle of State immunity. If priority was given to the concept of sovereignty, immunity could be regarded as an exception; however, if State immunity was expressed in the maxim "par in parem imperium non habet", State immunity was then another aspect of sovereignty and not an exception to it. The State claiming immunity based its claim on the principle of sovereignty. State immunity could thus easily be viewed as an independent principle; it had been so termed as early as 1812 by Chief Justice Marshall in The Schooner Exchange v. M'Faddon and subsequently in other judicial decisions, even though it had been clearly stated at the outset that the principle was based on the theory of consent of the territorial State. In any event, the conclusion reached was tentative, and the Commission did not intend to prejudge the outcome of subsequent studies. Article 6 left open the possibility of formulating other principles and rules qualifying that general principle and its implementation, limitations and exceptions.

58. Mr. WAMALWA (Kenya) said that, with the formulation of the four additional draft articles on State archives, ILC had completed its study of succession of States in respect of matters other than treaties. In his delegation's view, it was essential to ensure that the archives of newly independent States were protected. It was therefore necessary that, upon attainment of independence, there should be an obligation on the part of the predecessor State to transfer the archives to their rightful owner. With regard to newly independent States, article 11 laid down the general principle governing succession in respect of both movable and immovable property, while draft article B dealt specifically with archives. In both cases the predecessor State must disclose the nature of the property involved, of which the successor State might have no knowledge.

59. That obligation included the return, free of cost to the successor State, of any property that had been removed from its territory, wherever such property might be.

60. With regard to State responsibility, his delegation could accept the text of article 33, which it considered balanced. However, "state of necessity" should not be confused with "force majeure","distress" or "fortuitous event". Article 33 was appropriately worded, and he supported the ILC approach of leaving the matter to State practice rather than specifying concrete instances in which the principle could be invoked. The treatment of the burden of proof in paragraph 2 was also satisfactory. His delegation considered acceptable the current wording of article 34, which covered the various situations in which the indisputable right to self-defence could be invoked.

61. With regard to non-navigational uses of international watercourses, his delegation fully supported the efforts of ILC. While it recognized the difficulties involved, it considered it essential that a functional definition of the

(Mr. Wamalwa, Kenya)

international watercourses system should be produced. In principle, it was not in favour of the suggestion put forward by ILC that the entire international drainage basin, consisting of tributaries, lakes and canals, should be included in the ambit of international watercourses. His delegation believed that every State should be able fully to utilize water within its territory for legitimate means and without external pressure, provided that it allowed an adequate volume of water to flow on to the other riparian States. It was correct to emphasize co-operation among riparian States in the utilization of watercourses, and that was the object of the provisions of draft articles 3 to 8 concerning system agreements.

62. In conclusion, his delegation supported the request made by the members of ILC concerning an increase in their honoraria.

63. Mr. EL-BANHAWY (Egypt), speaking with reference to treaties concluded between States and international organizations, said that in principle his delegation endorsed the approach taken by the International Law Commission, namely to be guided as closely as possible by the Vienna Convention on the Law of Treaties.

64. With reference to draft articles 61 to 80 and the annex thereto adopted by the International Law Commission at its thirty-second session, his delegation agreed with the interpretation of article 61 that cases of impossibility of performance had to do more with the application of the treaty than with the parties or the conduct of the parties. With regard to article 62, it would have been preferable to indicate explicitly that, in the event of a dispute, the decision as to whether there had been a fundamental change of circumstances would have to be taken by a judicial body, once the conciliation procedures had been exhausted. The exclusion of boundary treaties, although it presented certain advantages, remained the subject of reservations for some States. Furthermore, there should be some restrictions to the exception relating to fundamental change of circumstances, so as to avoid any possibility that a treaty might cease to have effect following a unilateral decision.

65. The concept of a peremptory norm of international law was of recent date and had no decisive precedent: it would therefore be necessary to include in the text of article 64 a provision dealing with the role that would have to be played by the International Court of Justice in that connexion. The principle of the registration of international treaties required that Governments publish the treaties that they had concluded so as to avoid the adverse effects that could result from secret agreements. In the case of treaties concluded by international organizations, it would be sufficient to register them with the Secretariat of the United Nations and article 80, paragraph 1, should be amended to that effect.

66. Since 1959 and 1971 respectively, the Secretariat of the United Nations and the International Law Commission had played an important and positive role with regard to the law of the non-navigational uses of international waterways. General principles had been established that guaranteed a balance between detailed rules that were difficult to apply and general rules that, owing to their generality, tended to be ineffective. His delegation endorsed the method adopted by the

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International Law Commission in establishing a set of basic rules that was to be applied to international watercourses and was based on the principle of goodwill, the positive use of law, humanitarian concerns, co-operation among the user States of watercourses and their responsibilities in the context of fundamental rules. User States were formulating clear and more detailed agreements that took into consideration their special needs and characteristics, so as to define obligations and arrangements allowing for the best possible use of watercourses.

67. With regard to the terminology used in considering the subject, he pointed out that in Arabic the expression "water system" covered all international watercourses, whatever their geographical characteristics. It was important to include the term "international" in the definition, since what was involved were systems of watercourses in which more than one State participated. The international character was relative and not absolute, and was confined solely to non-navigational uses; the navigational use of international watercourse systems was involved only when other uses of the waters affected navigation, as indicated in article 1, paragraph 2.

68. The draft articles would serve primarily as a basis, once the International Law Commission had received the replies from Governments to the questionnaire and was in a position to complete work on the draft. His delegation supported the idea that each international watercourse system should be organized in a manner appropriate to the needs of that system.

69. Besides the principle that system States must negotiate in good faith, as provided in article 3, the principles of justice and fairness in the use of international watercourse systems should also be added. He referred to the examples in paragraph (3) of the commentary to article 3 dealing with international watercourses, namely the 1923 Geneva Convention and the 1969 Brasilia Treaty on the River Plate Basin. Those agreements were of a general nature and did not inhibit the parties from entering into specific or partial agreements, bilateral or multilateral, tending towards the attainment of the general objectives of developing the basins in question. His delegation supported the conclusions of the International Law Commission, which were in agreement with the views of specialists. The best way of dealing with a watercourse was to deal with it as a whole, as had been done with regard to the Amazon, the Plata, the Niger and the Chad basins. There was no doubt that some issues arising out of watercourse pollution necessitated co-operative action on the part of all riparian States, which required the establishment of unified treatment and the conclusion of agreements among the parties concerned. What was involved was an obligation that flowed from customary international law.

70. With regard to paragraph (19) of the commentary to article 3, he referred to the analogy mentioned between the obligation of States to negotiate in good faith agreements with regard to the continental shelf and their obligation to negotiate in good faith agreements with regard to the uses of the water of international watercourse systems, and indicated that, although both cases were important from the economic point of view, that of watercourses raised a vital issue. Egypt believed that the sole manner in which the joint use of watercourses could be

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regulated, with particular reference to efforts to combat pollution, was by the conclusion of agreements. The obligation to negotiate with a view to concluding agreements was also in conformity with Article 33 of the United Nations Charter.

71. Article 4 stated that every system State of an international watercourse system was entitled to participate in the negotiation of any system agreement that applied to the international water system as a whole and that could affect its use of the system's waters; in that connexion he referred to the Convention regarding the Determination of the Legal Status of the Frontier between Brazil and Uruguay.

72. Article 5, relating to the use of waters which constituted a shared natural resource, was extremely important with reference to protecting the environment. The concept of shared natural resources could be found in the Charter of Economic Rights and Duties of States, in the Mar del Plata Action Plan adopted at the United Nations Water Conference and in the draft principles of conduct in respect of shared natural resources prepared by the United Nations Environment Programme. Regional and interregional co-operation between States sharing natural resources was essential. Although treaties generally accepted the principle of equality in the sharing of boundary waters between two riparian States, sharing in equal portions was not the only method employed.

73. Turning to the subject of the jurisdictional immunities of States and their property, he indicated that his Government had responded to the questionnaire in March 1980. His delegation endorsed the method adopted by the International Law Commission in studying the subject and thanked the Special Rapporteur for his work.

74. Referring to the status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier, he stressed the need to adopt more exact rules, since the existing agreements had gaps. An additional protocol to the Vienna Convention on Diplomatic Relations should be prepared as soon as possible.

75. In conclusion his delegation noted with satisfaction the co-operation between the International Law Commission and the regional bodies mentioned in the report.

The meeting rose at 6.15 p.m.