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Summary record of the 18th meeting
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Chairman: Mr. Prandler . . . . . (Hungary)

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The meeting was called to order at 10.15 a.m.

Agenda item 155: Report of the United Nations Commission on International Trade Law on the work of its thirty-fifth session (*continued*) (A/C.6/57/L.15)

Draft resolution A/C.6/57/L.15

1. **The Chairman** drew attention to draft resolution A/C.6/57/L.15, entitled "Enlargement of the membership of the United Nations Commission on International Trade Law", and said that two explanatory tables had been prepared to show the distribution of seats by regional groups before and after enlargement and to indicate how many members from each group would be elected in various election years and what their term of office would be.

Agenda item 153: Consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives (*continued*) (A/C.6/57/L.18)

Draft resolution A/C.6/57/L.18

2. **The Chairman** said he would take it that the Sixth Committee wished to adopt draft resolution A/C.6/57/L.18, entitled "Establishment of the International Criminal Court", without a vote.

3. *Draft resolution A/C.6/57/L.18 was adopted.*

Agenda item 152: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts (*continued*) (A/C.6/57/L.17)

Draft resolution A/C.6/57/L.17

4. **Ms. Miller** (Sweden), introducing draft resolution A/C.6/57/L.17, entitled "Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts", noted that there was almost universal adherence to the additional Protocols. The draft resolution was intended to stress the importance of the existing body of international humanitarian law and the need to ensure respect for its rules in all circumstances, and was similar in substance to General Assembly resolution 55/148. She announced that Malta had become a sponsor.

5. *Draft resolution A/C.6/57/L.17 was adopted.*

6. **Ms. Schonmann** (Israel), explaining her delegation's position, said that it had joined the consensus on the draft resolution because recent events had demonstrated how detrimental the dilution of the laws governing armed conflict could be. Combatants had a duty to comply with the laws of war and to distinguish themselves clearly from civilians. The substantial role Israel had played in the Diplomatic Conference at which the additional Protocols had been drawn up reflected not only the importance her country attached to the development of the laws governing armed conflict, but also the difficulties it had faced and the unique experience it had acquired in applying the principles of humanitarian law in the face of terrorism.

7. The effectiveness of international laws governing armed conflict was predicated on complete neutrality and impartiality. Israel was therefore concerned about certain provisions of the additional Protocols, since it was questionable whether they had a sound legal basis or actually advanced humanitarian interests. The politicization of instruments of international humanitarian law weakened their stature and risked harming the very people they were designed to protect. Israel was unable to become a party to the additional Protocols because political terminology had intruded into the text. Accordingly, her delegation would have been compelled to abstain had the draft resolution been put to the vote.

8. **Mr. Hmoud** (Jordan) said that the Protocols Additional to the Geneva Conventions of 1949 transcended treaty law and had become part of the normative rules of customary international law. As such, they were binding on both signatory and non-signatory States.

9. **Mr. Samy** (Egypt) said that his delegation had joined the consensus on the draft resolution even though the text contained some unsatisfactory language because his delegation wanted the work of the Committee to progress. The Protocols were part of international customary law and were binding on parties and non-parties alike.

Agenda item 154: Convention on jurisdictional immunities of States and their property (A/57/22)

10. **Mr. Hafner** (Austria), introducing the agenda item in his capacity as Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and

Their Property, said that the Ad Hoc Committee had decided to constitute itself as a Working Group of the Whole to discuss the five outstanding substantive issues previously identified by the working group of the Sixth Committee. While the Working Group of the Whole had made substantial progress on those issues, there were still some divergences of views which had been reflected in the revised text of the draft articles either as alternative proposals or as bracketed text. It should be noted that the Working Group's meetings constituted the first time that the draft articles had been considered in their entirety in the context of the General Assembly since their adoption by the International Law Commission in 1991.

11. The Ad Hoc Committee had decided it was important to deal with the technical aspects of the question and to ascertain whether agreement could be reached on a clean text before taking a political decision on the final form of the document. Thus any silence in the report on the question of form should not be interpreted to mean that States were unaware of the significance of the question. The Committee had further decided that, in order to arrive at agreement on the few remaining outstanding issues, it would recommend that the Sixth Committee should convene an open-ended working group with a view to resolving those questions at the fifty-seventh session of the General Assembly. Deliberations might also continue in a session of the Ad Hoc Committee early in 2003.

12. **Mr. Yamada** (Japan) welcomed the substantial progress achieved by the Ad Hoc Committee and agreed with its assessment that a generally acceptable instrument based on the draft articles adopted by the International Law Commission and on the discussions in the Sixth Committee should be elaborated in a timely manner. However, another session of the Ad Hoc Committee would be needed. States should be clear that the next session would be the last one, and every delegation should be prepared to make compromises in order to achieve consensus. Accordingly, his delegation proposed that the Ad Hoc Committee should meet for one week in February/March 2003 with a mandate to finalize the elaboration of a generally acceptable set of draft articles on jurisdictional immunities of States and their property, and to recommend the form that such an instrument should take.

13. Turning to the outstanding substantive issues, he said that, with regard to the criteria for determining the commercial character of a contract or transaction, the question was whether to adopt the "nature test only" approach. However, the practice of those States which insisted on such an approach showed that they sometimes took other factors into account. His delegation was inclined to support the Chairman's proposal for a possible compromise on article 2, paragraph 2, of the draft articles (A/57/22, annex, footnote 2).

14. With regard to the concept of a State enterprise in relation to commercial transactions (art. 10), it was the understanding of his delegation that those who opted for alternative B were concerned with the problems of "under-capitalization" and "piercing the corporate veil". Such problems did exist in free-enterprise systems; however, solutions must be sought outside the area of immunity. It might also be preferable to have a paragraph stating clearly that a State enterprise did not in principle enjoy immunity.

15. On the question of contracts of employment (art. 11), he acknowledged that it was a growing practice among receiving States not to recognize immunity in relation to non-nationals of employer States and persons having permanent residence in the forum State. It would thus be difficult for those States to accept alternative A for paragraph 2 (a bis) of article 11. It should be noted that the sending State was entitled to immunity in relation to its employees who had been recruited to perform particular functions in the exercise of governmental authority, who were its nationals or with whom it had an agreement in writing to claim immunity under paragraphs 2 (a), (d) and (e) of article 11.

16. The Ad Hoc Committee's revised text contained several bracketed phrases in articles 13, 14 and 17. It was his understanding that the proposal to delete those phrases was based on the belief that retaining them would narrow the scope of the relevant provisions. He had difficulty, however, in grasping the substantive differences involved and would appreciate further clarification on those points.

17. The final clause of article 18, paragraph (c), was also bracketed. His delegation agreed that the clause had no relevance to proceedings arising out of torts and should therefore be deleted. On the other hand, in cases involving a local Government, steps must be taken to ensure that no post-judgement measures of constraint could be taken against the property of its parent State

or another local Government, since article 2, paragraph 1 (b), defined a local Government as a State.

18. As to of the form that the draft articles should ultimately take, his Government preferred a convention and believed that most States shared that preference. His Government would not, however, stand in the way of the initial adoption of a resolution incorporating draft articles, to be reviewed subsequently with a view to the conclusion of a convention.

19. **Mr. Eriksen** (Norway) said his delegation preferred that the final text of the draft articles should take the form of a convention. That preference was based on a desire to establish principles that provided the clearest possible guidance to domestic courts when they dealt with questions involving the immunity of foreign States. At the same time, his delegation would listen closely to the views of other delegations on that issue.

20. With regard to the characterization of a commercial transaction (art. 2), his delegation had a strong preference for rules that enhanced legal certainty. It was therefore in favour of deleting any reference to the purpose of the transaction; the term "purpose" risked introducing an element of subjectivity and called for extensive submission of evidence by the parties and a subsequent complicated analysis and interpretation of such evidence by domestic courts. The emphasis should therefore be on the nature of the transaction.

21. With regard to article 10, his delegation supported the deletion of paragraph 3. It was doubtful whether State immunity with regard to proceedings related to commercial transactions undertaken by a State enterprise could be adequately governed by a general rule. There was also a risk that the provision might be abused by the establishment of under-capitalized State enterprises. At a minimum, the paragraph should be redrafted.

22. Concerning the issue of immunity for proceedings relating to contracts of employment (art. 11), his delegation recognized that lower-level employees might be involved in sovereign activities. Nevertheless, the international community would best be served by clearer rules to which States could adapt their practice. His delegation was prepared to show flexibility to that end.

23. The Norwegian delegation preferred the deletion of the bracketed phrase in article 18 (c). The first part of the phrase appeared to impose undue restrictions on the availability of post-judgement measures of constraint. The latter part should be deleted as a consequence of the exclusion of State enterprises from the scope of application of the article. Nevertheless, his delegation was willing to listen to the views of States that believed that the issue merited further consideration.

24. **Mr. Much** (Germany), referring to article 2, said that his delegation was flexible on the question of whether a definition of the commercial character of a transaction was needed at all. If it was decided that such a definition was needed, his delegation would hold to its previously stated opinion that the nature of the transaction was the most appropriate criterion. The purpose criterion might have very limited analytical value, considering that most, if not all, transactions performed by a State or its agencies would in some manner pertain to State purposes.

25. The reference to private international law in article 10, paragraph 1, should be deleted, as private international law was intended to resolve conflicts between applicable laws and did not provide rules on jurisdiction.

26. There seemed to be a broad understanding that a State enterprise having an independent legal personality should not enjoy immunity, and that in situations where an enterprise was acting as a commercial agent of a State or where the State acted as guarantor, the State should not be allowed to hide behind the enterprise and enjoy immunity. Finding the appropriate words to reflect that understanding seemed to be a matter of language rather than substance.

27. With regard to contracts of employment (art. 11), his delegation suggested that contractual relations which did not need to benefit from immunity, such as those governing salaries and promotions, should be enumerated.

28. There must be certain limits to State liability in cases of personal injuries and damage to property (art. 12). The "insurable risk test" might be a useful criterion of delimitation. With regard to military action, the principle of State immunity should be reaffirmed and a corresponding provision should be added to the draft articles.

29. His delegation welcomed the distinction between pre-judgement and post-judgement measures of constraint (art. 18) but believed that the so-called "nexus requirement" set too high a threshold and should be eliminated. In general it believed that the draft articles should establish legal clarity and have an impact on jurisdiction; it therefore would prefer that they should take the form of a convention, but would consider other options.

30. **Mr. Zellweger** (Switzerland) said that while his delegation had been satisfied with the progress achieved during the two meetings of the Working Group of the Sixth Committee, it had been somewhat disappointed with the developments during the Ad Hoc Committee's session. It seemed to his delegation that the discussions there had lost some of the momentum built up during previous sessions. A small number of delegations had not only stalled progress but had even reversed some of the prior achievements.

31. Nevertheless, the differences of views had narrowed considerably. Of the initial five outstanding issues, one had been resolved, two seemed close to resolution and two remained open. A final attempt must now be made to settle those issues. His delegation therefore supported the proposal by the Chairman of the Ad Hoc Committee to reconvene that body in order to finalize the elaboration of a generally acceptable instrument and the proposal by Japan for a week-long session to be held in the spring of 2003. The Swiss delegation also shared the Japanese view that the final form of the instrument would need to be discussed at that meeting.

32. **Ms. Flores Liera** (Mexico) welcomed the progress made by the Ad Hoc Committee and looked forward to the elaboration of an international instrument on jurisdictional immunity. State practice in the area of immunity had diversified over the years, and she therefore believed it important to adopt a uniform agreement on the basis of the texts drafted by the International Law Commission.

33. With reference to the outstanding issues mentioned in the Ad Hoc Committee's report, she agreed that the commercial character of a contract or transaction should be determined on the basis of its nature; however, the purpose of the contract might also be useful in determining its commercial character. Accordingly, her delegation supported alternative A for draft article 2, paragraph 2.

34. In the case of article 10, paragraph 3, her delegation favoured alternative A as a suitable way of resolving the difficulties associated with the question of immunity for State enterprises. A State's immunity should not be compromised in the situations mentioned in the alternative text; rather it was the enterprise that should bear responsibility.

35. On the issue of employment contracts, her delegation had some doubts, in the light of article 3, paragraph 1, about the Ad Hoc Committee's proposal to include in article 11 a new subparagraph concerning diplomatic agents and consular officers. It was, however, willing to accept the inclusion of a subparagraph such as alternative B for paragraph 2 (a bis).

36. She believed that it was time to implement General Assembly resolution 49/61 and convene a conference of plenipotentiaries with a view to concluding a convention on jurisdictional immunities of States and their property, since such a high-level forum would provide an opportunity for resolving any outstanding issues. Her delegation was, however, prepared to consider alternative ways of concluding the debate on the long-standing issue of jurisdictional immunity and welcomed in particular the proposal put forward by the representative of Japan.

37. **Mr. Kazemi** (Islamic Republic of Iran) said that the international community should not rely on diverse national legislation to define the limits of immunity of States and their property, since the proliferation of differing norms in that area was not conducive to the rule of international law, would lead to further disputes between States and did not favour the development of international trade.

38. At its 2002 session, the Ad Hoc Committee had made considerable progress, managing to give consideration to all five outstanding issues and to review all the draft articles with a view to identifying points for further discussion. In order to bring the efforts of all the bodies involved in the preparation of the draft articles to fruition and to reach agreement on the outstanding issues, his delegation supported the proposal to convene a working group to consider, inter alia, ways and means of adopting the draft articles at the current session.

39. His delegation agreed with the recommendation of the International Law Commission regarding the preparation of the draft articles as a binding instrument

but remained open-minded about the choice of forum in which to adopt those articles. It was to be hoped that the next session of the Ad Hoc Committee would be its last.

40. **Mr. Liu** Zhenmin (China) said that his delegation welcomed the achievements of the Ad Hoc Committee at its 2002 session and was particularly pleased that a candid and fruitful exchange had taken place on the five outstanding substantive issues. Although the Committee had been unable to reach a consensus on a final draft, the full exchange of views and cooperative approach which had characterized the session had laid the foundations for an eventual resolution of the question.

41. Most countries still had gaps in their domestic legislation on the jurisdictional immunity of States and their property, and legal provisions and practical measures frequently differed among countries that had promulgated laws on that topic. However, with the steady increase in recent years of legal proceedings brought against foreign States, leaders and State property, an increasing number of States were recognizing the importance and urgency of the question of jurisdictional immunity. His delegation believed that the formulation of a uniform international treaty on that question was not only essential to regulate State actions and define State jurisdiction but would also have a positive impact on the preservation of harmonious international relations. China therefore supported the proposal that the Sixth Committee should convene a working group at the earliest opportunity to conclude the relevant agreement.

42. **Mr. Cannon** (United Kingdom) said that the most recent session of the Ad Hoc Committee had provided a useful opportunity to discuss all the draft articles adopted by the International Law Commission in 1991 for the first time in many years. Significant progress had been made towards finalizing the text, and while there were still differences on some key issues, there were also signs of possible solutions.

43. His delegation hoped that further progress would lead to a prompt and successful conclusion of the work on the topic. Agreement had to be reached on outstanding substantive issues and on the form of the draft articles, but with good will on all sides the next session of the Ad Hoc Committee would make a significant contribution to that objective.

44. **Ms. Telalian** (Greece) said that despite the progress achieved by the Ad Hoc Committee at its most recent session, differences persisted on some key issues, and it was to be hoped that they could be overcome at the current session of the Sixth Committee. The major outstanding issues related to the concept of the State for purposes of immunity, the criteria for determining the commercial character of a contract, contracts of employment and the question of post-judgement measures of constraint.

45. With regard to the definition of a commercial transaction in article 2, paragraph 2, her delegation supported alternative B, which eliminated the nature and purpose test in the determination of the commercial nature of a contract or transaction. That alternative offered the most pragmatic solution, even though the Greek courts applied the nature test as the sole criterion for such a determination.

46. On the issue of State enterprises, her delegation supported revised alternative A for article 10, paragraph 3. That paragraph reflected a basic principle of commercial law, namely respect for the distinct legal personality of moral persons. Accordingly, State immunity should not apply to liability claims in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State, subject to the conditions set out in subparagraphs (a) and (b).

47. Regarding article 11, on contracts of employment, her delegation supported alternative B for paragraph 2 (a bis) in the revised text, as it was in line with the jurisprudence of the Greek courts concerning non-immunity for non-nationals and permanent residents of an employee State. Alternative A broadened unnecessarily the category of persons enjoying immunity.

48. The distinction made between pre-judgement and post-judgement measures of constraint was an interesting one. With regard to post-judgement measures, her delegation could accept revised article 18, provided that the bracketed words in subparagraph (c) were deleted.

49. Her delegation had often stressed the importance it attached to the codification of the existing rules and practices in the field of jurisdictional immunity of States and their property, which was dominated by national jurisprudence. A uniform international legal system governing State immunity would provide clarity and legal certainty, encourage commercial transactions and provide useful guidance to legislators and national courts. Greece supported the elaboration of an international convention based on the draft articles of the International Law Commission and the work of the

Ad Hoc Committee, as well as the convening of a diplomatic conference, which was the appropriate forum for considering outstanding issues and taking the relevant decisions. It also supported the suggestion by the representative of Japan that another session of the Ad Hoc Committee should be convened to complete work and make a last attempt to reach consensus on all pending issues.

50. **Ms. Galvao Teles** (Portugal) said that the Ad Hoc Committee had made real progress towards reaching final agreement on the text of the draft articles on jurisdictional immunities of States and their property. For the first time since its adoption by the International Law Commission, the entire draft text had undergone a second reading, which had enabled the Ad Hoc Committee to narrow the divergence of views. Portugal felt strongly that all States would benefit from the adoption of a universal convention on the topic and that a special effort should therefore be made to reach consensus.

51. Concerning the definition of a commercial transaction in article 2, paragraph 2, her delegation recognized that some legal systems might favour the "purpose" test but favoured the "nature" test nevertheless, because it provided greater legal certainty. However, if that paragraph was deleted, as proposed in alternative B, neither option would be given preference and the matter would be left to the domestic courts. Accordingly, Portugal supported alternative B.

52. Her delegation supported alternative B for article 10, paragraph 3, relating to commercial transactions involving a State enterprise. Alternative A either did not improve on the concepts of State and commercial transactions proposed in article 2, paragraphs 1 (b) and (c), and was therefore unnecessary, or else it created new grounds for immunity.

53. With regard to article 11, paragraph 2 (a bis), her delegation considered that the scope of immunity in the case of State contracts of employment should be reduced to a minimum in order to ensure proper legal defence, particularly in cases of nationals of a host State in the employment of diplomatic or consular missions. She therefore supported alternative B, which was the more restrictive approach and gave added legal protection to persons employed by such missions.

54. Lastly, regarding article 18, subparagraph (c), on post-judgement measures of constraints, she agreed that the final phrase in square brackets, which contained two nexus requirements, should be deleted. The first requirement was too restrictive and the second was subject to national liability rules; its elimination would facilitate the development of national jurisprudence to deal with the problem of the under-capitalization of State enterprises. Moreover, deleting those two requirements would make it less difficult for private parties to bring legal proceedings against a State.

55. The Sixth Committee should convene an intersessional working group to find consensus on key issues so that the draft articles could be finalized. Even though her delegation strongly preferred to see the draft articles adopted in the form of an international convention, it could accept their becoming a model law or declaration attached to a resolution of the General Assembly.

56. **Ms. Taylor** (Australia) said that Australia, which fully supported the work of the Ad Hoc Committee, already had its own legislation on the jurisdictional immunity of States and their property in the Foreign States Immunities Act 1985. However, her delegation wished to make a number of observations on the outstanding issues relating to the draft article before the Committee.

57. First, with regard to the meaning of the word "State" in article 2, paragraph 1 (b), she wondered why the text had reverted to requiring the additional element of the exercise of sovereign authority in the conduct of constituent units of a federal State; she would prefer to revert to the words "government authority", which had been used previously. Alternatively, the wording "constituent units of a federal State or political subdivisions of the State" would be acceptable.

58. Secondly, with regard to the criteria for determining the commercial nature of a contract or transaction, she expressed support for article 2, paragraph 1 (c), rather than article 2, paragraph 2. Regarding the latter, she preferred to see the "nature" criterion as the sole test for determining the commercial nature of a contract or transaction. Her delegation would be willing, however, to compromise if the "purpose" test could be applied by a court in subsequent litigation and the parties had agreed to enter into the transaction on that basis, and if States had the option of indicating that purpose was a relevant criterion under their national law and practice, either in a general declaration to the convention or by notification to the other party. Alternative A did not satisfy the compromise position because it did not contain a requirement that the parties should inform

each other prior to entering into the contract that it was the practice of their State to consider the purpose of a contract or transaction as relevant to determining its non-commercial nature. Alternative B left the criteria of nature versus purpose open and uncertain. The Chairman's proposal incorporated the element of prior knowledge, but wording should be added to make it clear that reference to the *lex forum* should be made at the time the contract was concluded.

59. Thirdly, in the case of article 10, paragraph 3, regarding the concept of a State enterprise or other State entity in relation to commercial transactions, alternative A caused some concern because it unnecessarily extended the circumstances in which a State might invoke jurisdictional immunity in commercial transactions. Consequently, her delegation supported alternative B.

60. Fourthly, it supported alternative A for paragraph 2 (a bis) of article 11 on contracts of employment.

61. Fifthly, with regard to the articles on measures of constraint, her delegation was concerned about the wording in square brackets in article 18, subparagraph (c), because the requirement of a connection between the property and the claim was too restrictive.

62. Lastly, as previous speakers had noted, a widely accepted instrument on the topic would make an important contribution to the development of international law. To date, Australia had supported an instrument in the form of a model law because it would be the most appropriate way to achieve consistency in national legislation on the topic. Nevertheless, in view of the wide range of views on the issue, it could accept the text in the form of a convention if that form had the support of a significant majority of States.

63. **Mr. Hoffmann** (South Africa), referring to draft article 2, paragraph 2, said that neither alternative A nor alternative B reflected his delegation's view that the nature test should have primacy and that the purpose test should be employed as a supplementary measure in certain well-defined cases. Alternative A could place natural and legal persons at a disadvantage, as they would not necessarily be familiar with State practice with regard to the purpose test. Moreover, State practice was often contradictory and confusing, and it was difficult to ascertain whether the purpose test was used in all circumstances. His delegation was in favour of the Chairman's proposal in the footnote to article 2, providing that the reference to "public service mission" could be deleted: the meaning of that expression was unclear, and he believed that the purpose test should be used to determine whether or not the contract was a commercial transaction.

64. In the case of article 10, paragraph 3, his delegation preferred alternative B; a separate paragraph was not necessary, since the definition of a State in article 2 already encompassed State enterprises. The current formulation went beyond his delegation's understanding of State practice, which was that the principle of immunity was equally applicable to State entities and to States. Thus, a State entity might enjoy immunity if it was acting *jure gestionis*, but a State could not hide behind its public enterprises.

65. With regard to article 11, paragraph 2 (a bis), alternative B was preferred, since it was consistent with a restrictive approach to immunity. Staff other than diplomatic agents and consular officers should not be granted diplomatic immunity because they would have little or no protection in the event of an employment dispute with a foreign mission.

66. Turning to the future work of the Ad Hoc Committee, he said that his delegation was not in favour of reconvening the Ad Hoc Committee if the Sixth Committee could not resolve the differences regarding the outstanding issues. Those issues were matters of principle relating to the development of legislation within the context of differing legal systems and could not be resolved simply by drafting amendments. Given the early adjournment of the Ad Hoc Committee's most recent session, he felt that reconvening it might be premature and a waste of valuable resources. His delegation did, however, support the development of a non-binding instrument such as a resolution or a model law.

Organization of work

67. **The Chairman** drew attention to paragraph 79 of the report of the Committee on Conferences (A/57/32), regarding the intended integration of the functions of the technical-servicing secretariats of the Fifth and Sixth Committees into the Department of General Assembly Affairs and Conference Management, and said that he had sent a letter to the Chairman of the Fifth Committee requesting that that Committee should defer any decision on the matter until the Sixth Committee had received information on the modalities of the intended transfer. He was also awaiting a response on that matter from the Secretariat.

The meeting rose at 11.55 a.m.