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Chairman: Mr. Bennouna . . . . . (Morocco)

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

Agenda item 149: Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (*continued*) (A/59/52 and A/59/226; A/C.6/59/L.9)

1. **Mr. Kupchyshyn** (Ukraine) said that his country attached great importance to the safety of United Nations and associated personnel. In view of the increasing number of losses among the peacekeeping forces, there was an urgent need to strengthen the legal regime of protection for those in the service of the United Nations. As a troop contributor, Ukraine had experienced the bitterness of human losses among its peacekeeping personnel. The adoption in 1994 of the Convention on the Safety of United Nations and Associated Personnel had been an important step forward. As one of the initiators of the Convention, Ukraine advocated its universal application and called upon all Member States to abide strictly by its provisions.

2. It was important to provide adequate protection to personnel engaged in operations other than those specifically authorized by the Security Council or the General Assembly for the purpose of maintaining or restoring international peace and security. Such personnel were often deployed in highly dangerous situations but remained outside the scope of the existing legal protection. Consideration must continue on ways of ensuring automatic application of the Convention to personnel in all United Nations operations. Ukraine was prepared to participate actively in the elaboration of an appropriate legal instrument on the basis of practical proposals submitted to the Sixth Committee and the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel.

3. The Secretary-General was to be commended for the efforts to incorporate key provisions of the Convention into status-of-forces and status-of-mission agreements. Ukraine supported that practical approach, taking into account the small number of States parties to the Convention in whose territories United Nations missions were deployed.

4. **Mr. Amayo** (Kenya) said that United Nations and associated personnel could not effectively perform their crucial role in the maintenance of international peace and security unless their protection and safety were ensured. Kenya therefore welcomed and supported initiatives aimed at strengthening the protection and safety of United Nations and associated personnel and in particular the work of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel. Although no agreement had been reached on the extent of that enhancement and the means to achieve it, it was encouraging to note that the work was still on track. Kenya urged delegations to display flexibility and objectivity, particularly with regard to the definition of United Nations operations contained in draft article II of the proposed protocol (A/C.6/59/L.9, annex I). What was needed was a provision that could be applied with objectivity and certainty and whose scope of application was wide enough to encompass the vast scope of operations undertaken by United Nations and associated personnel.

5. In regard to paragraph 2 of draft article II, Kenya was the host country for permanent United Nations offices and for a number of United Nations missions engaged in various humanitarian assistance and development programmes at the national and regional levels. Some of those missions worked closely with the staff of the permanent offices. It was therefore difficult to draw a sharp distinction between the activities of the two sorts of personnel and to determine which set of personnel was excluded from the scope of application of the draft protocol. As a result, clear guidelines for making such a distinction would have to be incorporated into the draft protocol.

6. Effective protection of United Nations and associated personnel depended on the commitment of States to implement the Convention on the Safety of United Nations and Associated Personnel. As a demonstration of support for the Convention, his Government had deposited its instrument of accession on 19 October 2004 and would continue to work with other States to ensure the implementation and strengthening of the Convention.

7. Kenya welcomed the introduction of core provisions of the Convention into recently concluded status-of-forces and status-of-mission agreements. That in itself demonstrated that a “declaration of exceptional risk” was unnecessary. In view of the absence of agreed criteria for determining whether a situation of exceptional risk existed, Kenya concurred with the

recommendations contained in the report of the Secretary-General (A/59/226) that the need for such a declaration should be dispensed with.

8. **Ms. Crowley** (Canada) said that her country was concerned at the attacks and acts of violence against United Nations and associated personnel and believed that more should be done to ensure their security and bring the perpetrators to justice. The time had come to make concrete progress on the development of an additional protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel. Her delegation therefore urged States that had not yet done so, in particular those hosting United Nations missions, to become parties to the Convention.

9. It was also noteworthy that in cases where host countries were not signatories to the Convention they had concluded status-of-forces and status-of-mission agreements that incorporated key provisions of the Convention. However, those and other short-term measures were of limited efficacy.

10. Canada agreed with the Secretary-General that the difficulty in the issuance of a declaration of exceptional risk was the single most important limitation to the protective regime of the Convention. The Secretary-General had recommended that such a declaration should be issued in the case of United Nations operations in Afghanistan (A/58/187, para. 22). But nothing had been done about it, despite the attacks on United Nations personnel in that country. The General Assembly and the Security Council must take responsibility in that regard.

11. Canada fully endorsed the conclusions and recommendations contained in the report of the Working Group, especially the recommendation that the Ad Hoc Committee established pursuant to General Assembly resolution 56/89 of 12 December 2001 should be reconvened with a mandate to expand the scope of legal protection under the Convention by means of a legal instrument. The time had come to extend the scope of application of the Convention to as broad a range of United Nations operations as possible in order to make maximum use of the legal protections available and to resolve the question definitively. Specific measures should be adopted to enhance the safety of United Nations and associated personnel and to hold accountable those who perpetrated attacks against them. Canada was ready to work with other delegations to resolve the remaining issues with the hope that consensus could soon be reached.

12. **Mr. Playle** (Australia), welcoming the progress made in ensuring the safety of United Nations and associated personnel, emphasized that more must be done to ensure that such personnel operated in a secure environment. Australia supported all efforts to strengthen the safety and security of United Nations and associated personnel, both at Headquarters and in the field.

13. The Working Group's decision to adopt the Chairman's text of the draft optional protocol as the basis for the work of the Ad Hoc Committee (A/C.6/59/L.9, para. 8) was the best way to proceed towards the conclusion of a protocol that would establish a more effective legal basis for the protection of United Nations and associated personnel. The next step was to reach an agreement on substantive textual proposals for individual articles of the protocol, so as to extend the scope of protection under the Convention. During the discussions held so far, many proposals had been submitted regarding the most contentious articles of the draft protocol. Differences remained, particularly on the scope of operations to be included in article II, paragraph 1. Australia supported extending the automatic application of the Convention to the broadest range of United Nations operations. Recognition of the risk involved in a particular mission should be by reference to its purpose rather than the specific situation in which it was established. Accordingly, Australia supported alternative A in article II, paragraph 1 (A/C.6/59/L.9, annex I).

14. The language in article III of the draft protocol would also need further consideration. It would be preferable to use language which would make it clear that a host State could exercise jurisdiction over any member of United Nations or associated personnel where expressly permitted to do so in conformity with articles 4 and 8 of the Convention. The Ad Hoc Committee should meet again in early 2005 to continue its discussion of those and other articles.

15. Australia called upon all States to continue to work together to ensure protection and security for United Nations operations in the field. It welcomed the Secretary-General's efforts to review existing security arrangements, as well as the work of the United Nations Security Coordinator to strengthen safety and security for United Nations offices and personnel in the

field. To that end, Australia supported the allocation of appropriate and reasonable resources to ensure security for United Nations operations and would take the matter up in the Fifth Committee.

16. **Mr. Thapa** (Nepal) concurred with other speakers as to the need to provide adequate legal protection to United Nations and associated personnel in the field, given the prevailing risk situation. As a State party to the Convention, Nepal was committed to undertake necessary measures in that regard. The Convention should be fully applied, and the international community must make greater efforts to make it universal. As the United Nations was engaged in a wide variety of missions, it was necessary to find ways to protect personnel involved in political missions and post-conflict peacebuilding offices, as well as humanitarian, development and human rights missions. The Convention should be applied to all operations established by the competent organs of the United Nations.

17. As a troop-contributing country, Nepal held that arrangements should be made for such countries to assess the security situation of the host country before the deploying forces. It also shared the concerns about attacks and crimes committed against locally recruited United Nations personnel and fully supported measures to increase their protection. Perpetrators of such crimes must be brought to justice.

18. The General Assembly, in resolution 57/28 of 19 November 2002, provided for status-of-forces, status-of-mission and host country agreements for the purpose of protecting United Nations and associated personnel. Those instruments would help in addressing the issue of personnel not covered by the Convention. Accordingly, Nepal urged the Secretary-General to continue his efforts with respect to those agreements.

19. On the question of exceptional risk, the declaration by the General Assembly or Security Council, which should constitute the basis for the trigger mechanism, should include measures to address exceptional risk, both actual and potential. Exceptional risk must be defined in a situation-specific manner.

20. With respect to the approval of an optional protocol to extend the scope of the Convention, New Zealand's proposal had provided a sound basis for discussion. The protocol should neither amend the Convention nor alter the balance struck therein with regard to protection of United Nations personnel. Any amendment to the Convention should be undertaken by the meeting of the States Parties thereto. Any State wishing to become a party to the protocol must also become a party to the Convention, which would help to strengthen the protective regime and promote universal accession to the Convention.

21. **Mr. Kanu** (Sierra Leone) said that extension of the scope of protection under the Convention was a cornerstone of United Nations operations. He recognized the need for the Convention to become effective, in view of the intensification of attacks on United Nations personnel.

22. Sierra Leone was pleased to note the inclusion of provisions of the Convention in status-of-forces and status-of-missions agreements between the United Nations and States in whose territories peacekeeping operations were deployed; it hoped that such measures would strengthen the legal regime for protection of United Nations and associated personnel. Countries must cooperate on extending the scope of the Convention and adopting effective measures for the prosecution of those responsible for crimes against United Nations and associated personnel. The Special Court for Sierra Leone had made attacks on peacekeeping personnel a crime under international law. Sierra Leone encouraged all States to become parties to the Convention and hoped that the elaboration of an optional protocol would contribute to the attainment of that goal.

23. His delegation noted with satisfaction the elimination of the requirement of a declaration of exceptional risk. The Secretary-General had also expressed reservations about such a requirement on account of the lack of generally accepted criteria for such a declaration. That decision showed the willingness of all delegations to find common ground and achieve an effective protective regime.

24. The discussions in the Working Group revealed that maintenance of the element of risk continued to be a key issue. Alternative A of the Chairman's text, according to which the purpose of an operation would be "delivering humanitarian, political or development assistance", clearly included an element of risk. Nevertheless, Sierra Leone was open to other ways of defining risk, provided that they were not too restrictive. Definitions that were too restrictive could have serious consequences for locally recruited United Nations personnel, who often bore the greatest risks, as

indicated by the Secretary General in his report (A/59/226, para. 11).

25. As to Costa Rica's proposal, Sierra Leone recognized the need to clarify the respective areas of application of international humanitarian law and of the Convention, so as to avoid any imbalances in protection and to fill any gaps. It was important to discuss the question side by side with other issues and to analyse the relationship between the Convention and Costa Rica's proposal. The proposal could well be included in the optional protocol without the need for a separate instrument, bearing in mind that the substance of the proposal might be the factor that had prevented many countries from ratifying the Convention. In that case, the momentum should not be lost.

26. **The Chairman** said that the Committee had thus concluded its discussion of agenda item 149.

Agenda item 160: Observer status for the Organisation of Eastern Caribbean States in the General Assembly (A/59/233; A/C.6/59/L.7)

27. **Mr. Severin** (Saint Lucia) introduced draft resolution A/C.6/59/L.7 entitled "Observer status for the Organisation of Eastern Caribbean States in the General Assembly", sponsored by Antigua and Barbuda, the Bahamas, Belize, Costa Rica, Dominica, Grenada, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Suriname. He drew attention to annex I of document A/59/233, which explained in detail the nature, background, purposes and activities of the organization. The sponsors hoped that the draft resolution would be adopted without a vote.

28. **Mr. Sealy** (Trinidad and Tobago) said that the Organisation of Eastern Caribbean States provided a framework for coordination and cooperation in the pursuit of development goals in such areas as foreign policy, harmonization of legislation and economic and social development. Steps were under way to achieve economic integration at the subregional level and ensure that its member States were prepared to join the Caribbean Community (CARICOM) Single Market and Economy. The member States had established the Eastern Caribbean Supreme Court, the Eastern Caribbean Central Bank, the Eastern Caribbean Telecommunications Authority and the Directorate of Civil Aviation. They were following a common approach in such areas as education, export development, social development and pharmaceutical procurement services. Trinidad and Tobago therefore supported the request of the Organisation of Eastern Caribbean States for observer status in the General Assembly.

Agenda item 142: Convention on jurisdictional immunities of States and their property (A/59/22)

29. **Mr. Hafner**, (Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property), introducing the report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (A/59/22), recalled that the Ad Hoc Committee had been established by General Assembly resolution 55/150 of 12 December 2000. Pursuant to paragraph 2 of Assembly resolution 58/74, of 9 December 2003, the Ad Hoc Committee had been reconvened at Headquarters from 1 to 5 March 2004 and given the mandate to formulate a preamble and final clauses, with a view to completing a convention on jurisdictional immunities of States and their property, which would contain the results already adopted at its previous sessions.

30. The Ad Hoc Committee, having made great progress at its third session, had concluded its work on the text of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property. It had based its work on the draft articles on jurisdictional immunities of States adopted by the International Law Commission at its forty-third session (A/46/10, para. 28), and on the discussions of an open-ended working group of the Sixth Committee. The text of the draft Convention, contained in annex I of the report of the Ad Hoc Committee, was therefore the culmination of 27 years of sometimes difficult work by the Commission, the Sixth Committee and the Ad Hoc Committee. The drafting of the text had been possible only because several States belonging to different legal systems and regions had made considerable concessions and shown great flexibility. Such flexibility was not easy to offer when domestic legislation was already in force, and for that reason, the flexibility and the concessions had to be mentioned particularly.

31. The report was composed of three chapters and two annexes. The first two chapters contained, respectively, the usual introductory information and a summary of the proceedings; chapter III contained the Ad Hoc Committee's recommendations. Annex I

contained the text of the draft Convention. Annex II contained the texts of two written proposals submitted in the course of the 2004 session.

32. He drew attention to the Ad Hoc Committee's recommendations in paragraphs 13 and 14 of the report. The first was that the General Assembly should adopt the draft Convention; the second was that the General Assembly should include in its resolution adopting the draft Convention, the general understanding that it did not cover criminal proceedings.

33. With the adoption of the text of the United Nations Convention on Jurisdictional Immunities of States and Their Property, the work of many years would come to a successful conclusion. As always, of course, some minor drafting corrections were still to be made in order to harmonize the text and avoid subsequent difficulties of interpretation. Such corrections, which would be done by the Secretariat, would not in any case change the substance of the draft text and should be no problem.

34. He listed the corrections that were needed in the English text. In article 2, paragraph 1 (b) (ii), the word "the" should be deleted before the words "sovereign authority". In article 11, paragraph 2 (b) (iii) should read: "A member of the diplomatic staff of permanent missions to an international organization, of a special mission, or is recruited to represent a State at an international conference". In paragraph 2, subparagraphs (c) and (d), of article 11, the word "subject-matter" should replace the word "subject", and in subparagraph (f) a hyphen should be inserted between the words "subject" and "matter". In article 27, paragraphs 3 and 4, the words "of this article" should be deleted. In article 33, the usual final clause beginning with the phrase "In witness thereof ..."needed to be added. In article 28, the date until which signature of the Convention would be possible still had to be inserted.

35. Generally, it must be borne in mind that the Convention would have to be read in conjunction with the commentary prepared by the International Law Commission, at least insofar as the text submitted by the Commission had remained unchanged. The Commission's commentary, the reports of the Ad Hoc Committee and the General Assembly resolution adopting the Convention would form an important part of the travaux préparatoires of the Convention. That common reading of the text of the Convention and the commentary would certainly clarify the text if certain questions of interpretation remained.

36. One of the issues that had been raised was whether military activities were covered by the Convention. The general understanding had always prevailed that they were not. In any case, reference should be made to the Commission's commentary on article 12, stating that "neither did the article affect the question of diplomatic immunities, as provided in article 3, nor did it apply to situations involving armed conflicts" (A/46/10, p. 114). It had to be borne in mind that the preamble stated that the rules of customary international law continued to govern matters not regulated by the provisions of the Convention.

37. That was an example of the general approach of the Convention: it did not apply where there was a special immunity regime, including immunities *ratione personae* (*lex specialis*). Sometimes that was expressly stated in the text, sometimes not. Thus, for example, the express mention of heads of State in article 3 should not be read as suggesting that the immunity *ratione personae* of other state officials was affected by the Convention.

38. He expressed his gratitude to all delegations for their valuable contributions to the work of the Ad Hoc Committee. Given the strong interest elicited by that increasingly important and ever-developing area of the law, it should be seen as a significant accomplishment to have reached agreement on an instrument which, if adopted, promised to harmonize the practice of States and facilitate commercial relations between States and private actors. In that regard, the flexibility and creativity demonstrated by delegations during the negotiations was noteworthy. He also thanked the members of the Bureau of the Ad Hoc Committee, Mr. Medrek (Morocco), Mr. Ogonoswki (Poland), Mr. Gandhi (India) and the Rapporteur, Ms. Plazas (Colombia), for their hard work and wise counsel, without overlooking the tireless efforts made over a number of years by the coordinators of the informal consultations, Mr. Yamada (Japan) and Mr. Bliss (Australia).

39. **The Chairman** commended the Ad Hoc Committee for its success in fulfilling its mandate of formulating the preamble and the final clauses of the draft Convention and expressed appreciation for Mr. Hafner's contributions in that regard.

40. **Ms. Noland** (Netherlands), speaking on behalf of the European Union, the candidate countries Bulgaria, Croatia, Romania and Turkey, the stabilization and association process countries Bosnia and Herzegovina, Serbia and Montenegro and the former Yugoslav Republic of Macedonia and, in addition, Liechtenstein and Norway, said that for the first time there was a complete text of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property. It was the outcome of a long process of extensive preparatory work and difficult negotiations that had begun in 1977, when the General Assembly had recommended that the International Law Commission should take up the study of the subject with a view to its progressive development and codification. In that connection, the commentary prepared by the International Law Commission, the report of the Ad Hoc Committee, the statement of the Chairman of that Committee and the resolution by which the General Assembly would adopt the draft Convention would together form an important part of the travaux préparatoires of the Convention. In the view of the European Union, the time had come for the General Assembly to adopt the draft Convention and open it for signature.

41. **Mr. Mishra** (India) said that the draft United Nations Convention on Jurisdictional Immunities of States and Their Property had evolved over the years by taking into account the views of all Member States expressed in the Sixth Committee at various stages of its preparation. The text represented a fair and delicate balance between the different concerns of States and, although it did not give complete satisfaction to everyone, it was acceptable to every State because it was the fruit of consensus.

42. As to the form of the draft articles, India felt that the best solution was their adoption in the form of a convention, so that the rules could be stipulated with clarity, uniformity and certainty, and in a binding manner that would further clarify the scope and nature of the immunities of States and their property in relation to commercial activities. Such an instrument, which would be a significant contribution to the development of international law, would also keep in view the interests of the developing countries. For that reason, India supported the adoption of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property.

43. **Mr. Romeiro** (Brazil), speaking on behalf of the States members of the Rio Group (Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela, as well as Brazil), expressed satisfaction at the progress accomplished by the Ad Hoc Committee on jurisdictional immunities of States and their property during the session it had held from 1 to 5 March 2004, during which it had adopted the preamble and final clauses of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property. The draft text had thus been adopted as a whole with the recommendation, endorsed by the Rio Group, that the General Assembly should adopt it, and with the inclusion of a general interpretation according to which the Convention would not extend to criminal proceedings. The Rio Group countries welcomed the fact that the first preambular paragraph of the draft Convention stated that the jurisdictional immunities of States and their property were generally accepted as a principle of customary international law. Reiterating their full readiness to see the draft Convention become a legal instrument, the member States of the Rio Group expressed their conviction that such an instrument would enhance the rule of law and legal certainty and would contribute to the codification and development of international law and the harmonization of practice in that area.

44. **Mr. Stømmen** (Norway), endorsing the statement made by the Netherlands on behalf of the European Union, said that his delegation fully supported the recommendations of the Ad Hoc Committee and believed that the opportunity should be taken to adopt the draft United Nations Convention on Jurisdictional Immunities of States and Their Property, on the basis of the work done by the International Law Commission and further developed by the Ad Hoc Committee. The Commission's commentary, the Ad Hoc Committee's reports and its Chairman's statement, and the General Assembly resolution adopting the Convention would form part of the travaux préparatoires of the Convention.

45. Unlike a number of other States, Norway did not have a tradition of legislating the scope of State immunities. Instead of relying on a sovereign immunities act or some other national law on State immunity, its courts had to interpret international law to determine the limitations on the application of

national laws with regard to a foreign State. Needless to say, the adoption of the draft Convention would constitute a major achievement providing States and their courts with greater legal certainty. Consequently, Norway favoured the adoption of a convention based on the draft articles and on the general understandings provided in the commentary.

46. **Mr. Yamada** (Japan) said that his delegation associated itself with all the points made by the Chairman of the Ad Hoc Committee, including all the drafting changes to be made and the confirmation of the general understandings that had prevailed during the negotiations. Many of the draft articles incorporated from the 1991 text of the International Law Commission had remained unchanged, and therefore the Commission's commentary on those articles offered the basis for precise interpretation. Japan was convinced that the Convention would provide unified norms and stability in the field of jurisdictional immunities. It was therefore ready to adopt the draft Convention and would seriously consider early ratification of the Convention.

47. **Ms. Ahn** Eun-ju (Republic of Korea) said that the draft Convention was a significant achievement that would provide legal certainty and clarity, in particular for natural and juridical persons engaging in commercial dealings with States. Her delegation hoped that the General Assembly would adopt the draft Convention, as completed by the Ad Hoc Committee in March 2004, during the current session. It was also in favour of including in the resolution adopting the draft Convention the general understanding that the Convention did not cover criminal proceedings. The draft Convention was the result of a spirit of compromise among the various delegations, as manifested in the annex to the Convention, which set out understandings with respect to articles 10, 11, 13, 14, 17 and 19. She welcomed the conclusion of the draft Convention and urged all States to begin the necessary procedures for becoming party to it.

48. **Mr. Guan** Jian (China) said that long-standing differences on the issue of State immunities and conflicting national practices had adversely affected international exchanges. The formulation of an international legal instrument on State immunities was therefore highly significant for regulating State conduct and harmonizing and defining legal provisions on jurisdictional immunities, thereby helping to develop harmonious and stable international relations. His delegation had actively participated in the process of preparing the draft Convention in the expectation that it would take account the concerns of all parties as far as possible. The result, however, was not as satisfactory or perfect as had been expected. In defining a "commercial transaction", the provisions of the draft Convention did not give as much weight to the purpose of the contract or transaction as those adopted by the International Law Commission (ILC). Moreover, using the practice of the State of the forum to determine the relevance of that purpose would cause inequity, as the immunities granted by the court of the State adopting the "purpose" criterion to the State adopting only the "nature" criterion would be greater than the other way around. Of course, the important and complex issue of jurisdictional immunities of States and their property had a bearing on vital national interests and domestic legal systems. The final text of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property was the product of a compromise achieved through the best efforts of all the parties. His delegation hoped that it would be adopted during the General Assembly's current session.

49. Regarding the legal status of the understandings with respect to certain provisions of the Convention, it was true that, according to the draft Convention (article 25), the understandings formed an integral part of the Convention. However, as clearly stated in the chapeau of the understandings, the purpose of the annex was to set out understandings relating only to the provisions concerned. The understandings did not, therefore, share equal legal status with the provisions of the draft Convention.

50. Regarding immunities in criminal proceedings, there had been a general understanding at the Ad Hoc Committee that a more appropriate placement for that issue was in a General Assembly resolution. His delegation had no objection to that view. While the draft Convention did not cover the issue, it was without prejudice to the immunities that States enjoyed in criminal proceedings under customary international law. His delegation would continue to cooperate in a pragmatic and flexible manner with other countries in finding solutions to the problems relating to State immunities, with a view to facilitating stability, and the development of international relations.

51. **Mr. Mwandembwa** (United Republic of Tanzania) said that throughout the deliberations on the

draft Convention, the draft articles meant to codify customary law had provoked controversies regarding the absolute or restricted character of State immunity and the extent to which the activities of a State and its commercial enterprises should be covered by State immunity.

52. Notwithstanding such controversies and differing views, his delegation noted with satisfaction that an agreement had been reached on a draft Convention which would allow the courts of another State to recognize the jurisdictional immunities of a State and its property. The draft Convention defined the limits of the immunity of States engaging in commercial transactions (article 10). The limits also covered contracts of employment, personal injury and damage to property, intellectual and industrial property, participation in companies, and ships owned or operated by a State (arts. 11 to 16).

53. The draft Convention should play a fundamental role in the age of globalization. It should enhance the role of law and legal certainty, particularly in the dealings of States with natural or juridical persons, and contribute to the codification and progressive development of international law and the harmonization of State practice in that area, taking into account the way in which such practice was evolving. Accordingly, the United Republic of Tanzania trusted that the General Assembly would approve the draft Convention during its current session.

54. **La Sra. Núñez de Odremán** (Venezuela), endorsing the statement of the Rio Group, said that only those rules of international customary law that were expressly recognized by the country and its domestic law were applicable to Venezuela. Venezuela also considered that the jurisdictional immunity of States and their property was based on State sovereignty and the legal equality of States.

55. **Ms. Ramos Rodríguez** (Cuba) said that her Government attached particular importance to the approval of the draft Convention, in which a variety of views on the matter had been reconciled. States and their property must enjoy jurisdictional immunity on the basis of the principle *par in parem non habet imperium* (an equal has no domain over an equal), as well as full respect for the principle of the sovereign equality of States embodied in Article 2, paragraph 1, of the Charter of the United Nations .

56. She firmly supported the recommendations of the Ad Hoc Committee, especially with regard to the adoption of the draft Convention by the General Assembly, and held that the adoption of a legally binding instrument would be an important contribution to the efforts to harmonize international practice in that area, which had so far been noted for confusion and the absence of universal standards. Only a convention codifying the subject could lead to a uniform international practice that would be more respectful of justice and the principles of international law, while also affording greater confidence and security to States in their international relations.

57. The draft Convention would need to enjoy wide international acceptance as well as support. Only its universal application would lead to attainment of the goals pursued during the years of intense efforts deployed for the adoption of such an important instrument.

58. **Mr. Rosand** (United States of America) said that the agreement reached on the text of the draft Convention at the final session of the Ad Hoc Committee had represented a very substantial achievement in an increasingly important and rapidly developing area of international law and practice. The text of the draft Convention reflected an emerging global consensus that States and State enterprises could no longer claim absolute, unfettered immunity from the proper jurisdiction of foreign courts and agencies, especially for their commercial activities.

59. The draft Convention embodied the so-called restrictive theory of State immunity, which was generally based on the classic distinction in international law between acts *jure imperii* and acts *jure gestionis*. Under that distinction, States which engaged in commercial transactions with foreign nationals could not invoke their sovereign immunity with respect to disputes based upon their commercial activity. Nor might immunity be invoked against claims for compensation for personal injury or damage to property caused by acts or omissions of a private law nature occurring within the foreign State where the damage was suffered, or claims with respect to rights or interests in real property within that foreign State.

60. Those exceptions to the general rule of foreign State immunity were widely recognized and had worked well. Courts could use them to balance the legitimate interests of States acting in their sovereign

capacity against the need to provide appropriate means of recourse for those who dealt with or were affected by States acting in a private capacity. A testament to the success of such exceptions was seen in the fact that they were increasingly followed in domestic and international practice. They should be endorsed by the United Nations.

61. The draft Convention, when adopted and brought into force, would provide a solid foundation on which all Member States could base their domestic law. It would result in a greater measure of harmonization and compatibility between domestic law and practice. However, no international legal instrument either was perfect or dealt with all the questions that it was meant to resolve. During negotiations, his Government had expressed a number of concerns in specific areas. In some instances, such concerns resulted from an insufficiently clear and precise wording of the text. While in others, the articles still contained gaps, omissions, ambiguities and inconsistencies.

62. First, in the area of remedies, the articles were not intended to disturb the general rule that a court in one State had no enforcement jurisdiction to issue coercive equitable relief, such as injunctions, to dictate the conduct of a foreign sovereign. At the same time, the draft articles should not be understood as limiting the use of such remedies by a court to protect the integrity of its own proceedings, or when the foreign State had dropped its mantle of sovereignty by appearing as a claimant.

63. Second, with regard to immunity from liability for personal injury and property damage, the formulation adopted in the Convention left open questions with respect to the further evolution of public international law in those specific circumstances where the impugned conduct contravened other widely accepted international conventions obliging States to grant remedies to the victims of prohibited conduct. The United Nations Conventions against torture and against hostage-taking were cases in point. Similarly, article 12, on jurisdiction over non-commercial torts, must be interpreted and applied consistently with the time-honoured distinction between acts *jure imperii* and acts *jure gestionis*. It was entirely appropriate for States to be held accountable — not to be able to invoke immunity — with regard to their tortious acts or omissions in circumstances where private persons would be. Domestic law in the United States and in many other countries provided for that eventuality. However, extending that jurisdiction without regard to the accepted private/public distinction under international law would be contrary to the existing principles of international law and would generate more disagreements and conflicts in domestic courts which could be better resolved, as they currently were, through State-to-State mechanisms. In other words, article 12 must be read in the light of established State practice to concern tortious acts or omissions of a private nature which were attributable to the State, while preserving immunity for those acts of a strictly sovereign or governmental nature.

64. Third, the precise scope of article 10, paragraph 1, as it related to proceedings "arising out of" commercial activities, posed similar difficulties. The essence of the draft Convention, which the United States strongly supported, was the principle that when States acted in the marketplace in a commercial capacity, they should be subject to the same jurisdiction as private parties. Accordingly, the "arising out of" jurisdiction provided in the article extended to conduct which was itself commercial in nature or related to such conduct, and not to acts of a public or sovereign nature. That was what the law provided in most States whose laws incorporated the so-called restrictive theory of immunity and what the United States believed the negotiators of the draft Convention had intended. As much could be said of the possible reach of host State jurisdiction into the internal operations of foreign embassies and consulates in article 11.

65. Lastly, there were significant omissions in the draft Convention, such as the time limit for States to respond to lawsuits in foreign courts. Although several articles addressed aspects of service of process on foreign States, the text did not incorporate the generally accepted rule of customary international law that a defendant State was entitled to no less than 60 days' notice of a suit before it must file its first response in a foreign court. The minimum 60-day rule had long been recognized internationally in court decisions dealing with the question as well as in national codifications of foreign State immunity. It was grounded in international public policy and intended to provide all States with the necessary time to evaluate their obligations and their options before responding to a complaint in foreign courts. That was the rule followed in the United States and he knew of no basis in international law or practice to the contrary.

Although the draft Convention did not explicitly endorse the 60-day rule which the United States would have preferred, he did not believe that it adopted or endorsed a contrary or more restrictive practice.

66. His delegation believed that the work in that area was not entirely complete and that, with the benefit of time and experience, the need might well arise to revisit some of the issues in the appropriate forum.

67. **Mr. Lavalle** (Guatemala) expressed his delegation's satisfaction at the fact that, after so many years, the work of drafting a multilateral treaty of universal scope on the jurisdictional immunities of States and their property had been brought to a successful conclusion, and that those States which already had domestic laws in the matter had not opposed the consensus that had emerged as the draft Convention was being approved in the Ad Hoc Committee. It was to be hoped that those States would become parties to the Convention.

68. Regarding the recommendation made by the Ad Hoc Committee in paragraph 14 of its report, he said that if the General Assembly accepted that recommendation, it would be difficult to implement. First, because the norms that defined the scope of a multilateral treaty normally appeared in the very text of the treaty, it would not occur to anyone who interpreted the Convention, and who was unfamiliar with the General Assembly resolution adopting it, to consult that resolution in order to determine the scope of the Convention, particularly because articles 2 and 3 of the draft Convention and its annex contained provisions limiting its scope.

69. Second, in accordance with the recommendation contained in paragraph 14, the resolution whereby the General Assembly adopted the Convention would form part of its *travaux préparatoires*. For that reason, in accordance with the guidelines provided in the Vienna Convention on the Law of Treaties on the interpretation of treaties, that provision could only be used to interpret the draft Convention if the conditions provided in article 32 (a) and (b) of the Vienna Convention were fulfilled. Nowhere did the draft Convention contain any provision that would require the *travaux préparatoires* to be used in its interpretation, as recommended in paragraph 14, which would fulfil the requirements of the Vienna Convention. Consequently, if the General Assembly were to act in the manner indicated in paragraph 14, it would do so in vain.

70. In order to refute that argument, it would have to be shown that should the General Assembly act in the manner described, the provision in the resolution whereby the Convention was adopted could, for the purposes of interpretation, be covered under article 31 (a) or (b) of the Vienna Convention, especially if that resolution was adopted without a vote. Even under those circumstances, however, such a line of argument was not convincing, because when the text of a treaty adopted by the General Assembly was published in the *United Nations Treaty Series*, the text of the respective Assembly resolution was not published alongside it.

71. Accordingly, Guatemala proposed that the recommendation contained in paragraph 14 should not be implemented literally unless the substance of that recommendation was incorporated in article 3 of the draft Convention, where it could appear as paragraph 4 of that article. In any case, a provision containing the recommendation could be incorporated in the annex to the draft Convention.

72. **Mr. Elmessallati** (Libyan Arab Jamahiriya) said that since its establishment pursuant to General Assembly resolution 55/150, of 12 December 2000, the Ad Hoc Committee had made significant contributions internationally. For that reason, his Government had supported its work. He noted with satisfaction that a balanced and effective international convention which contributed to the progressive development of international law had been drafted. The principle of State immunity was of particular importance. The draft Convention contained in document A/59/22 was a genuine contribution to the reaffirmation of that principle.

73. A list of the immunities and privileges embodied in international law was given in article 3 of the draft Convention, with an indication that they would not be affected by the Convention. Those immunities and privileges were thus reaffirmed as currently codified in international law. In article 5, the principle of State immunity from the jurisdiction of the courts of another State was reaffirmed, as was the principle of jurisdictional sovereignty.

The meeting rose at 12.05 p.m.