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New York

SUMMARY RECORD OF THE 30th MEETING

Chairman: Mr. FRANCIS (Jamaica)

later: Mr. JESUS (Cape Verde)

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The meeting was called to order at 3 p.m.

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-EIGHTH SESSION (continued) (A/41/10, 498, 406)

AGENDA ITEM 125: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/41/537 and Add.1 and 2)

1. Mr. TREVES (Italy) said that the subject of jurisdictional immunities of States and their property was different from other subjects of public international law because State practice in that area was based almost exclusively on domestic legislation, administrative practice and domestic court decisions. Diplomatic practice was very scarce, and decisions of international courts or arbitrators were totally lacking. Thus, international practice with regard to jurisdictional immunities of States and their property had followed a more divergent development than in other fields of international law.

2. For States whose basic principle was that each State exercised sovereignty over its territory, the immunity of States was an exception and must be interpreted restrictively. For other States, immunity was the point of departure, and cases in which jurisdiction could be exercised were exceptions which had to be spelt out in detail. The former approach prevailed in the developed States of the West and the latter in the socialist States, while the developing States were represented in both groups.

3. Because of the diversified practice, only two very general ideas seemed to be held by all States: first, that there were some cases in which States enjoyed immunity from jurisdiction and second, that at least in some cases such immunity did not apply. That observation seemed to be confirmed by the tendency - some evidence of which could be found in draft article 28 - to give importance to reciprocity, on the basis of which States were often ready to modify their attitude towards immunities. That underlined how few and weak were the rules and seemed to confirm a restrictive view of immunities. By and large, the only aspect to which all States subscribed was that a State should not be submitted to the jurisdiction of another State for acts relevant to the conduct of its business as a subject of international law.

4. The draft articles adopted in first reading by the Commission had to be considered in that perspective. The answers to two essential questions seemed relevant: would a codification convention on that subject be useful? And, if so, did the draft articles correspond to the needs of the international community? In answer to the first question, his delegation thought that widespread agreement on a text covering the question of jurisdictional immunities of States and their property would have the effect of halting, or at least moderating, the trend of divergent national practice. That stabilizing effect would be most welcome and would favour the development of rules of customary law more detailed and uniform than those in existence. Moreover, as the Special Rapporteur pointed out in his eighth report, the countries which stood to benefit the most from the adoption of rules of international law on that topic were the developing countries, while the advanced countries with sophisticated legal developments might be prepared to wait and see.

(Mr. Treves, Italy)

5. The answer to the second question required, as with all legal texts of some complexity, an evaluation of the general trend of the draft articles and the solutions given in specific provisions to specific questions of importance. Until the Committee had reconsidered all the provisions in detail, his delegation would reserve its overall position and only consider the general trend of the draft articles.

6. In his view, the draft articles were a reasonably well-balanced compromise, even if they did not correspond fully to what Italy as a nation would have liked. The basic of the compromise seemed to be threefold: first, immunity from jurisdiction should be the basic rule, the general principle, thus corresponding to the position of the proponents of absolute immunity, especially the socialist States; second, limitations or exceptions to that general principle should be reasonably numerous and spelt out in full detail, in keeping with recent and less recent trends in developed Western States and some developing States; third, immunity from measures of constraint in respect of property should be defined in fairly wide terms with only limited exceptions, thereby giving an indispensable safeguard, especially to the developing countries involved in judicial proceedings in those States that took a restrictive view of State immunity from jurisdiction. His delegation believed that on the basis of that compromise, further work on the subject could be usefully pursued by States and by the Commission.

7. Mr. ROBINSON (Jamaica), noting that according to the commentary on jurisdictional immunities of States and their property, article 3 was an interpretative provision as distinct from a definitional or use-of-terms provision as in article 2, said that an interpretative provision must be drafted as precisely and clearly as a definitional provision, for, in a treaty, it represented an agreement between the parties as to the interpretation of a provision, and the parties would frequently have recourse to it. The commentary stated, in part, that the general terms used in describing "State" should not imply that the provision was an open-ended formula. His delegation felt that the term "State" was in fact rather vaguely defined in that interpretative provision. It was only in paragraphs 1 (b) and 1 (c) that a State was defined as an entity entitled to perform acts in the exercise of the sovereign authority of the State.

8. As for as paragraph 1 (a), which referred to "the State and its various organs of government", the interpretative provision would not assist in determining what was meant by "organs of government". The expression had different meanings in different countries. Consideration should be given to adding in subparagraph (a) the clarification given in subparagraphs (b) and (c) regarding the entitlement to perform acts in the exercise of the sovereign authority of the State.

9. Paragraph 2 of article 3, was particularly important because it established criteria for determining whether a contract was commercial and whether it was covered by State immunity. Special consideration should be given to the interests of developing countries called upon to conclude contracts which, while appearing to be commercial, actually served a public purpose, and should therefore not be treated as commercial. Examples of such contracts would be those relating to the

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procurement of food supplies to feed a population in times of famine, or of medicine to combat an epidemic. His delegation felt that equal weight should be given to the purpose and the nature of the contract. For that reason, it was not entirely satisfied with the formulation of paragraph 2, according to which the two criteria were to be applied successively, the second criterion of purpose being resorted to only when it appeared that the nature of the transaction was commercial. At that point it was up to the State concerned to show that the contract was to be treated as non-commercial because of its public purpose. In such a case, the burden of proof fell on the State concerned. A fairer solution would be to consider that where the purpose of the contract was clearly public and governmental, the transaction was non-commercial. Thus, the paragraph could be redrafted to read: "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made to the nature of the contract and, to that end, due account shall be taken of its purpose."

10. Paragraph 2 of article 3 raised the further question of which State was referred to in the phrase "in the practice of that State", and also the question of what was meant by "practice". The first question arose because either the State claiming the immunity or the State from whose jurisdiction immunity was claimed could be intended. One had to resort to the commentary to the 1983 draft articles to learn that the reference was to the State claiming the immunity. It was inappropriate not to indicate that in the text itself. Why should one have to resort to the commentary for that information? The commentary should not be used as a substitute for a provision which should be in the text. Under the terms of article 32 of the Vienna Convention on the Law of Treaties, recourse might be had to the commentary only to confirm an interpretation or to determine the meaning of a term. The commentary had a useful but limited role to play. It should therefore be specified in the text of article 3, paragraph 2, that the State referred to was the State claiming the immunity.

11. Furthermore, the text itself should specify that the interpretative provisions applied not merely to a contract for the sale or purchase of goods or the supply of services, but also to other types of contracts as defined in draft article 2, such as a contract for a loan. Regarding the meaning of the word "practice", the text should also incorporate a formulation to the effect that it was the practice of the State in question to conclude contracts or transactions for public ends.

12. Jamaica believed that the bracketed phrase in article 6, "and the relevant rules of general international law", should be deleted. It might be taken to mean that the draft articles of themselves did not establish the principle of State immunity. The natural relationship between the draft articles and customary international law did not need to be expressed in a specific provision of the draft articles. One would expect States parties to ensure that their practice conformed to the convention, and it would be preferable to provide for a periodic review of the articles at a conference of the parties to the eventual convention. It would also be important for a convention of that kind to contain a provision obliging the States parties to take the legislative and other measures needed to implement its provisions.

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13. With regard to the title of part III, his delegation had no particular preference regarding the words "limitations on" or "exceptions to". On the other hand, it was puzzled as to the meaning of draft article 20 when it stipulated that "the provisions of the present articles shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization". That article fell under part III on exceptions to or limitations on State immunity, namely, cases in which, in the language of draft articles 11 to 19, "the immunity of a State cannot be invoked". That language, however, was not employed in draft article 20, and the commentary further compounded the problem by referring to the exercise by a State of its sovereign authority, thus implying that matters arising out of measures of nationalization would be protected by State immunity.

14. In that connection, the Commission had to resolve three issues. First, were matters arising out of measures of nationalization covered by State immunity? If so, there was no need for article 20. Second, if such matters were not covered by immunity, draft article 20 should be brought into line with the language of draft articles 11 to 19 and clearly indicate that State immunity could not be invoked. Third, if the aim was not to have the draft articles pass judgement on that question, article 20 as drafted should be considered a saving provision that would be more appropriately placed at the end of the draft articles. The latter solution would be the best compromise approach, and the phrase "extraterritorial effects" should then be deleted.

15. Where draft article 21 was concerned, the bracketed phrase, "or property in which it has a legally protected interest", should be retained. Once again, it was left to the commentary to bring out that the aim of the article was to ensure that before measures of constraint were implemented, a proceeding to that effect was to be instituted before a court of the State where the property was located. That point was expressed nowhere in the body of article 21, which should be redrafted accordingly.

16. Jamaica supported the principle underlying draft article 23, and felt that draft article 24 on service of process was particularly important. It believed that transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned, dealt with in paragraph 1 (c), should proceed on the same basis as transmission under paragraph 1 (d), namely, only if it was permitted by the law of the State of the forum and the law of the State concerned. It also believed that the residual provision in paragraph 1 (d) (ii) for effecting service "by any other means" would result in too liberal and too loose a régime, and could lead to an excessive number of default judgements.

17. With regard to draft article 28 on non-discrimination, paragraph 2 (a) required careful interpretation, for it appeared to permit a restrictive application of the provisions of the draft articles even though such an application might amount to a breach of the convention. The term "restrictive application" might be nothing more than a euphemism for such a breach. To avoid that interpretation, there should be a provision allowing the States parties a certain

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freedom of action with regard to the implementation of the rules. In the absence of such a provision, restrictive application would be a breach of the convention. That interpretation was confirmed by the commentary to article 47 of the 1961 Vienna Convention on Diplomatic Relations. The Commission could usefully consider including a comment along those lines in the commentary to draft article 28 to make it clear that the article did not sanction a restrictive application of a provision that would be tantamount to a breach of that provision. His delegation also suggested that paragraph 2 (b) should be brought into line with paragraph 2 (b) of article 6 of the draft articles on the diplomatic courier, which took account of the object and purpose of the articles as well as the interests of third States, and was consistent with article 41 of the Vienna Convention on the Law of Treaties.

18. His delegation saw nothing wrong with leaving the concept of inviolability of the diplomatic bag, which was not expressly used in any of the four multilateral conventions on privileges and immunities, out of article 28, paragraph 1; it would still be possible to argue that the protection of the bag was based on its inviolability, which derived from the rule of the inviolability of archives set out in the four conventions. That remark led him to raise the question of the relationship between the draft articles and the four conventions, which remained uncertain despite the explanations provided in paragraph 3 of the commentary on article 32. At the fortieth session of the General Assembly, his delegation had drawn an analogy with the relationship between the 1946 Convention on the Privileges and Immunities of the United Nations and the later headquarters agreements which stipulated that they complemented the 1946 Convention and, where provisions in the Convention and the latter agreements dealt with the same subject, they should be interpreted in such a way that neither narrowed the effect of the other. His delegation had at that time suggested the inclusion of a similar formulation in the draft articles, but now felt that the relationship between the draft articles and the four conventions might be more complex. In such a situation, the best solution would certainly be to rely on the commentary. It might, however, be necessary to use a drafting technique to guard against an a contrario interpretation of article 32, which provided that the articles did not affect bilateral or regional agreements. Returning to article 28, paragraph 1, his delegation supported the retention of the second bracketed phrase, because the security interests of the receiving State were maintained by paragraph 2 of the same article.

19. His delegation fully supported the principles underlying paragraph 2. Noting, however, that some members of the Commission had expressed concern lest the exception provided in that paragraph be abused, it suggested that the commentary should specify that the words "serious reasons" should be interpreted as meaning reasonable grounds. The word "consular" ought to be deleted; the provisions of paragraph 2 should apply to all bags dealt with in the four conventions. The right to open the bag should not normally be accorded to a transit State, unless it could show that its interests were threatened. The bracketed portion dealing with the request for the bag to be subjected to scanning could be retained with one amendment: the right to request that the bag be opened should be established for cases where the sending State refused to allow electronic scanning, but not for cases where scanning had not satisfied the receiving State.

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20. His delegation was dismayed that the Commission had misused the commentary to delineate the scope of article 31, especially since article 82 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, the direct source of the article, was quite specific on the matter.

21. Although it understood the motive behind the provision, his delegation regarded article 33 as running contrary to the primary aim of the draft article, which was to establish a coherent and uniform régime for the status of the diplomatic bag and courier.

22. Turning to the draft Code of Offences against the Peace and Security of Mankind, he said that the distinction between crimes against peace, crimes against humanity and war crimes did not really help to isolate the acts which merited the description of crimes against the peace and security of mankind. Much time was wasted in deciding what fact belonged in what category, but in the final analysis the matter was of little importance.

23. The first sentence of article 2 was satisfactory. The second, on the other hand, needed to be redrafted to read: "the fact that an action or omission is or is not a crime under international law does not affect this characterization". That would leave open the question whether the draft articles should contain a provision incorporating the rule non bis in idem.

24. Regarding article 4, he pointed out that, out of regard for the constitutional systems of certain countries, modern international agreements applied the principle aut dedere aut punire by imposing the obligation not to try or to prosecute, but to submit the case to the competent authorities for prosecution. The code would be more effective if it functioned under an international criminal jurisdiction, which would give a greater impression of objectivity than a domestic court.

25. Article 7, paragraph 2, was confusing and unnecessary in an instrument specifically devoted to crimes against the peace and security of mankind, not general in nature as the European Convention on Human Rights was. Moreover, paragraph 2 referred to "general principles of international law" while the provision in the latter Convention cited in he commentary spoke of "general principles of law". Paragraph 1 would be clearer if drafted to read: "no person shall be convicted of an offence against the peace and security of mankind on account of any action or omission which, at the time it took place, did not constitute an offence against the peace and security of mankind".

26. The phrase "in principle" found in article 8, paragraph 1, was inappropriate for a penal provision; an accused person must know with certainty what exceptions to the principle of responsibility could be invoked. It must be hoped that at a latter stage the draft would provide specific criteria for the application of the provision set forth in article 8 (e) (iii), which would otherwise remain too vague.

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27. Article 2 of the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX), which had been omitted from the definition appearing in article 11 of the draft, could be of value to a court since it attached a certain evidential value to the first use of armed force by a State.

28. Most of the acts identified in article 11 were not regarded as offences against the peace unless they were committed by the authorities of a State. That was understandable in the case of crimes such as aggression, but much less so for offences such as terrorism in an age when so many acts of terrorism were committed by private individuals. Was one to conclude that such individuals were not guilty of offences against the peace and security of mankind? Furthermore, such a restriction posed problems if one considered that the actions listed in article 11, paragraph 4 (b) (iii) were already covered by international conventions which did not deal only with their commission by State authorities. If the term "authorities of a State" had been chosen in preference to "State" to avoid the notion of criminal responsibility of a State, the choice was not very persuasive: as the authorities of a State acted on behalf of the State, some criminal responsibility redounded on the State. That, moreover, was an additional reason for establishing an international criminal jurisdiction.

29. His delegation fully supported paragraphs 5 and 6 of article 11 and noted that, in so far as those paragraphs related to obligations of the State itself, the draft articles appeared to attach international criminal responsibility to States. It had little patience with the argument that the matters covered by those paragraphs should not be dealt with in the Code because they properly belonged to another forum.

30. With regard to paragraph 8, it should be noted that the definition of a mercenary had proved to be one of the most difficult issues facing the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercernaries, and that the present definition did not resolve that issue.

31. A definition of apartheid different from that adopted in the International Convention on the Suppression and Punishment of the Crime of Apartheid would be difficult for States parties to that Convention to accept.

32. He thanked the Special Rapporteur for his contribution to the work on that topic and expressed the hope that the code of offences against the peace and security of mankind would be adopted in the near future.

33. Mr. RAZAFINDRALAMBO (Madagascar) said that article 3 of the draft articles on jurisdictional immunities of States and their property, might be perceived as containing a definition of the expression "State" when in fact its sole purpose was to provide an interpretation of that expression for the purposes of the draft articles; paragraph 1 seemed sufficiently clear in that it referred to three categories of entities which were considered to be included in the expression "State". However, he had some reservations with respect to the phrase "exercer les

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prérogatives de la puissance publique de l'Etat" used in the French text, particularly in subparagraph (c). In the Malagasy legal system, the "prérogatives de la puissance publique" related to the concept of public institutions and distinguished such institutions from private ones. Thus, the drawbacks of using that phrase, which was not a very good translation of the English expression "sovereign authority," became clear. There were several types of "prérogatives de la puissance publique" and some were more particularly related to the sovereignty of the State. He would therefore have preferred to see the phrase "prérogative de l'Etat en tant que puissance publique".

34. With regard to article 6, his delegation would like to see the phrase between square brackets deleted since it seemed to limit considerably the scope of the principle of immunity and contained an element of uncertainty with respect to its scope. He wholeheartedly endorsed article 20. Likewise, he had no objection to part IV as a whole; that part was an essential counterweight to the possibility of limiting the jurisdictional immunity of States. He simply pointed out, with reference to articles 21 and 22, that the words between brackets "property in which it has a legally protected interest" referred to the interests specified inter alia in articles 14 and 15, and were therefore fully justified. The same applied to the expression "non-governmental" which had the advantage of qualifying precisely the "commercial purposes" as meaning profitable.

35. Part V contained procedural rules and some especially important rules pertaining to substance, notably article 28. The final version of that article, as proposed by ILC was designed to lessen the danger of a unilateral interpretation limiting the application of the immunities recognized by the draft articles - which would be to the disadvantage primarily of third-world States - in violation of the rule "pacta sunt servanda". His delegation had reservations concerning paragraph 2 (a), which implied that the possibility of unilateral application was envisaged. It could raise difficulties and they would be all the more disturbing because the draft articles made no provision, for the time being, for the settlement of disputes.

36. His delegation had always followed with sympathy the efforts made by the Special Rapporteur and the ILC to elaborate an international instrument concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It had no objection, in principle, to the draft articles as a whole which had been adopted on first reading. It merely wished to explain its views regarding article 28, which contained one of the most important provisions of the draft articles. It supported the current wording of paragraph 1, and was in favour of keeping the text that was currently within square brackets. Paragraph 2, which was the product of an effort to reach a compromise and to strike a balance between the interests of the sending State and those of the receiving State, took into account the concerns of those who had expressed disquiet at the recent renewed incidence of misuse which had been the subject of much talk in diplomatic circles. His delegation would be prepared to support the proposed compromise provided that paragraph 1 was adopted in its entirety and that the square brackets were deleted. However, it would have difficulty in agreeing that paragraph 2 applied to all bags;

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that was far too great an innovation and contrary to positive law. Furthermore, it saw absolutely no reason for granting to a transit State the powers that devolved upon the receiving State.

37. It was hard to reconcile the possibility of making an optional declaration, provided in article 33, with the main purpose of the draft articles, which was to establish a coherent and uniform régime for the status of the diplomatic bag and diplomatic courier. It remained to be seen whether that would encourage more States to accept the draft articles.

38. With respect to the responsibility of States, he noted that the seventh report of the Special Rapporteur on the subject was merely a systematic formulation of the outline in the sixth report; any general comments on the draft articles of the third part could not differ appreciably from those which his delegation had already made at the fortieth session. However, some comments were in order.

39. As the Special Rapporteur had pointed out in his earlier reports, the three parts of the set of draft articles were inseparable from one another and that indivisibility reflected the limits placed by the Special Rapporteur on the implementation of responsibility: the goal was not to draw up a procedure for the settlement of disputes that was binding in all cases, but simply to draw up a procedure to be applied in the context of the second part alone, in order to avoid the measures and counter-measures outlined in that part or, at least, to prevent the escalation of the successive reactions of States.

40. With regard to the different kinds of recourse available to States that were parties to a dispute, the Special Rapporteur gave pride of place to recourse to the International Court of Justice for the settlement of the most serious disputes, those which involved the application and interpretation of article 12 (b) concerning jus cogens, and article 14 and, naturally, article 15 concerning international crimes. In the other cases, the Special Rapporteur had proposed a procedure of compulsory conciliation. In that connection he had merely elaborated on the ideas expressed in his sixth report in which he already indicated a preference for a procedure based on article 66 of the Vienna Convention.

41. While it was true that some States rejected the system of compulsory jurisdiction of the International Court of Justice under the pretext that it had been accepted by only a small number of States, there was at present, if the procedures for peaceful settlement of disputes failed, and if it was desired not to use force, no other solution than to turn to the International Court, whose moral authority and international prestige had been reinforced by several recent decisions of great importance for the promotion of and respect for international law. That was, at least, the view of the countries of the third world, which placed increasing trust in the Court.

42. With regard to the procedure arrangements proposed in part III, including the rules contained in the annex for the implementation of compulsory conciliation, his delegation approved of the main lines and left it to the Commission's Drafting Committee to prepare the final draft.

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43. As to the topic of international liability for injurious consequences arising out of activities not prohibited by international law, his delegation was pleased to note that the new Special Rapporteur, Mr. Barboza, intended to take the schematic outline developed by the previous Special Rapporteur, the late Professor Quentin Baxter, as the raw material for the topic he was to study.

44. With respect to the scope of the topic, he noted that it was to cover any human activity undertaken within the territory or control of a State giving rise to loss or injury to persons or things within the territory or control of another State. The activity in question, in the view of the Special Rapporteur, should relate solely to physical use causing "transboundary" physical effects.

45. From the standpoint of the specific interests of developing countries, his delegation had always considered that the criterion might be too restrictive and ignore certain economic activities which had catastrophic consequences for neighbouring countries, in particular, measures in the customs or monetary fields, not to mention economic blockades or dumping. It was countries with a fragile and vulnerable economy, such as the developing countries, that might be the most frequent victims of such measures which, while they were not strictly speaking physical in nature, might none the less cause appreciable material damage in the countries concerned. In that regard mention might be made of the decisions to put a sudden end to the financial or military aid provided to a country that had to deal with armed opposition.

46. Furthermore, the territorial criterion did not cover the situation of the international organizations, in particular those which were non-governmental and whose activities scarcely differed from those of transnational corporations. There were also other difficulties, related to the location of the real control of those corporations. In some cases, corporations established in a country were in fact under the control of parent corporations with headquarters in capital-exporting countries. A good example was that of Union Carbide, which had become notorious following the Bhopal catastrophe in India. It was therefore necessary to establish in some way or other the liability of the State exporting technologies or capital.

47. Obligations arose from what the previous Rapporteur had called a "prevention-reparation continuum". In fact, obligations had four successive aspects: prevention, which implied information, and reparation, which implied negotiation. They involved both procedural elements and substantive rules.

48. In general, his delegation accepted the proposals appearing in that regard in the schematic outline, while observing that the duty to propose fact-finding should rest equally with the affected State and the source State. Furthermore, where the damage affected several States, fact-finding organized by multilateral consent might be necessary. It might perhaps be appropriate to provide for a standing fact-finding body composed of independent experts, attached to or appointed by an international organization. In the case of nuclear catastrophes, for example, IAEA should be able to entrust an international fact-finding body with the task of collecting all the necessary information.

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49. Lastly, the duty to provide information posed a difficulty related to the exception based on the need to protect secrecy in respect of national or industrial security. Such an exception might considerably diminish the duty to provide information and place developing countries in a situation of inferiority.

50. With regard to the law of the non-navigational uses of international watercourses, his delegation thought that the topic was very similar to that of international liability: indeed, the question also concerned potential conflicts between the sovereign rights of riparian States to carry out freely activities in their own territory, free from any interference from other States. The two Special Rapporteurs entrusted with the topics of international liability and the law relating to international watercourses considered in both cases that any failure to comply with the prescribed obligations (to prevent, to notify, to negotiate and to make compensation) gave rise to a wrongful act likely to entail the international liability of the State at fault.

51. In view of the qualitative and quantitative importance of the procedural aspects, his delegation wondered whether, as some delegations had advocated, it would not be appropriate to give the topic the form of a framework agreement. Similarly, with regard to the definition of an international watercourse or an international watercourse system, it would perhaps be wise, because of the differences of opinion which continued to exist in that regard, to postpone the choice of a definition to a latter stage. The concept of shared natural resources seemed likely to reduce in one way or another the scope of the principle of permanent and full sovereignty over natural wealth and resources; his delegation was therefore inclined to support draft article 5 proposed by the previous Special Rapporteur in his second report, which avoided the use of that controversial formula. The concept of reasonable and equitable use should be understood as a general principle, the relevant factors of which should not appear in the text of draft article 8 itself, but rather in an annex or in the recommendations attached to the main instrument, as in the case of the recommendations which accompanied the ILO Conventions.

52. Furthermore, it was necessary to reconcile the maxim sic utere ut alienum non laedas, which was a well-established norm of international law, with the sovereign right of States to use freely waters situated within their territory. In that regard, the text of draft article 9 proposed by the previous Special Rapporteur seemed to provide a good basis for discussion.

53. With regard to the procedural and institutional elements, he left it to the Special Rapporteur, who had demonstrated a thorough knowledge of the topic and a remarkable degree of open-mindedness, to find formulas which were flexible, simple and capable of satisfying the countries directly concerned, i.e. the riparian States of an international watercourse.

(Mr. Razafindralambo, Madagascar)

54. Lastly, he noted that, although the Commission had been able to conclude its first reading of two sets of draft articles on particularly important topics, jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, there was reason to fear that, in view of the very delicate topics on its agenda, including more de lege ferenda elements than de lege lata provisions, it would be unable to sustain indefinitely the pace of work which it had adopted in 1986, the session having been shortened by two weeks. It seemed in any case unlikely that it could undertake the consideration of new topics, for that would considerably slow down its task of codifying and progressively developing international law.

55. As to the method of work, his delegation noted that the members of the Commission living in countries relatively far from New York were still not receiving the reports of the Special Rapporteurs until after the beginning of the Geneva session; that state of affairs was prejudicial to the quality of their contribution to the discussion of those reports, and it was to be hoped that the Secretariat, which was quite aware of those difficulties, would spare no effort to remedy them.

56. Mr. RIPHAGEN (Netherlands), after paying tribute to the work accomplished by Mr. Sucharitkul, the Special Rapporteur on the jurisdictional immunities of States and their property, noted that one of the main points on which the Commission had not taken a definite position in first reading concerned the scope and force of the draft articles as a whole. Taking as a starting point the well-known distinction between acta jure imperii, in respect of which in principle a State enjoyed immunity from the jurisdiction of another State, and acta jure gestionis, to which in principle such immunity did not apply, it was possible in theory to elaborate that distinction in such a way as to arrive at a clear dichotomy, such that, for all cases in which the question arose, there were legal provisions giving the answer as to whether or not there was immunity.

57. Nevertheless, apart from the theoretical difficulty of covering all the situations which might arise, the practical difficulty was to obtain world-wide agreement among States concerning the exact dividing line between immunity and non-immunity. It should be recalled that the European Convention on State Immunity, adopted by a much smaller group of States, the members of the Council of Europe, did not stipulate such a dichotomy. It would already be a great step forward in the codification and progressive development of international law if, on the world-wide plane, States reached agreement on a number of situations in which immunity did apply, and a number of situations in which immunity did not apply, while leaving a "grey zone" of situations to the further development of State practice, in particular the practice of national courts. His delegation had already drawn attention several years previously to that state of affairs, and the Netherlands Government's most recent comments on the Commission's report on the work of its 1985 session (A/41/406) returned to another aspect of the matter.

58. The problem of a dichotomy or "grey zone" explained why, in article 6, paragraph 1, the reference to "relevant rules of general international law" was placed between square brackets and why the title of part III of the draft had two

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alternative texts, namely, "Limitations on" or "Exceptions to" State immunity. Of course, if a dichotomy was intended, the reference to other "relevant rules of general international law" should be deleted and the title of part III should read "Exceptions to State immunity". On the other hand, if it was decided to leave a "grey zone", the aforementioned reference was essential, and the title of part III must be "Limitations on State immunity".

59. His delegation, for its part, favoured the more modest approach of leaving a "grey zone", for it was hardly likely that the world community would agree on a precise, detailed dichotomy in the near future. Indeed, the very distinction between imperium and gestio involved choices which, on the level of domestic law, gave rise to different results in the different domestic legal systems, which explained why there was no uniformity of judicial practice. Even where, in several regions of the world, countries had adopted national legislation on the topic to bring about more uniformity in the practice of their courts, such legislation was not uniform from country to country. That was why it seemed preferable to take the more modest approach to world-wide international legislation.

60. Such an approach had, of course, consequences with respect to the "force" of the draft articles if they were eventually adopted at an international conference and came into force as a United Nations convention. It was to that "force" that the Netherlands Government had drawn attention in its written comments contained in document A/41/406. If a "grey zone" was left in the convention, there might be cases in which the courts of one State party did not recognize immunity whereas the courts of another State party had recognized or would recognize it. In such a situation, the principle of reciprocity might be invoked by the latter State for a change in its practice, including court practice, in respect of the former State. If the case in question fell within the "grey zone", it would not be a question of a "countermeasure" of the latter State in response to an internationally wrongful act of the former State.

61. The admissibility of such reciprocal treatment was addressed in article 28, paragraph 2 (a), of the draft articles, but from an entirely different angle, that of non-discrimination between foreign States. Indeed, that provision presupposed the possibility that a restrictive application of the articles by a State party would be responded to by a restrictive application by another State party with regard to the former State party. That would obviously result in a discrimination in treatment as between foreign States. It was equally obvious, however, that in a dichotomy approach there could, strictly speaking, be no restrictive application: the rule was applied or not applied, and the legal consequences of non-application were a matter of State responsibility, including the question of admissibility of the "countermeasure" of reciprocity; and "countermeasures" necessarily discriminated between a State which had committed an internationally wrongful act and a State which had not done so. There were obviously good reasons for not treating divergent interpretations of rules in that field of State immunity as involving State responsibility, provided that the "hard core" of immunity for acta jure imperii was respected. In effect, that meant that a "grey zone" was accepted and that article 6 and the title of part III should be drafted in accordance therewith. In any case, the matter should be looked into and clarified in second reading.

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62. Another, perhaps minor, matter, on which the Commission - in paragraph 4 of the comments on draft article 21 - requested reactions from Governments, concerned the words in square brackets in that article, "or property in which it has a legally protected interest". That provision should be read in conjunction with draft article 7, paragraph 2. Accordingly, when a proceeding, as mentioned in article 21, was instituted against an entity which was the owner of a particular property, or which had the property in its possession or control, but which was not a foreign State, the proceeding was nevertheless considered to have been instituted against the foreign State under the conditions set forth in article 7, paragraph 2, namely "so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State". That interpretation of article 7, paragraph 2, of course, did not in itself create an immunity for that foreign State, which would also benefit the entity which was not a State. The latter consequence was addressed in article 21. Thus, it would seem that in any case the word ng of the two provisions should be reconciled. When article 7, paragraph 2, applied, it would appear that the immunity depended on the status of the "affected" property, rights, interests or activities of the foreign State. The mere fact that the foreign State had a legally protected interest in the property did not seem to justify an immunity, which would also benefit the non-State owner of the property, who was subject to the jurisdiction of the court. That matter should be given further consideration, and it seemed relevant to look at other situations in which a foreign State, by its own volition, entered into what could be called a situation of common interest with a non-State, subject to the jurisdiction of the court. In that sense, articles 14, 15 and 17 might be relevant, inasmuch as they also dealt with mixed situations.

63. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the ultimate purpose of the rules on that topic was to guarantee the confidentiality of information exchanged between a Government and its official representatives abroad; the status of the diplomatic bag and that of the diplom tic courier were subject to that purpose.

64. The question inevitably arose as to the status of a diplomatic bag which contained objects not related to that purpose. How were those objects to be separated from the others without jeopardizing the confidentiality of the information? There was a preliminary question, namely, how to ascertain, or at least have sufficent reason to believe, that there were extraneous objects in the bag, again without jeopardizing the confidentiality of the information. Those were essentially technical questions. Opening the bag was only one technique which, apparently, did not necessarily jeopardize the confidentiality of the information, particularly if the bag was opened by an authorized representative of the sending State in the presence of the competent authorities of the receiving or transit State. Indeed, confidential information was normally not only included in the bag but also contained in a closed, and often sealed, envelope.

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65. Moreover, modern technology provided methods of detecting the presence of some objects in the bag without opening it, in the same way that some animals could detect the presence of drugs in the bag without its being opened. Obviously, those methods did not enable one to read the documents. There was, of course, no guarantee that technical devices making it feasible to read such documents without opening the bag would not be devised in the future, but for the moment that seemed to belong to the realm of science fiction. In any event, experience had shown that protection against such devices was much less complicated than the device itself. For those reasons, his delegation thought that scanning and other technical means should not be generally prohibited.

66. All that preceded concerned the preliminary question. If there was sufficient reason to believe, perhaps as a result of the use of the methods just described, that there were extraneous objects in the bag, it should be the task of the sending State or its official representative to remove such objects. If they did not do so, the separation of the extraneous objects from the other objects was impossible without opening the bag; the only means of preventing the entry of the non-legitimate objects was to return the bag to the sending State. That would inevitably delay the entry of legitimate objects.

67. Also, in relation to article 28, he noted that the words "transit State" had been placed in square brackets. Apparently it was thought that the option of returning the bag to the sending State should not be given to the transit State. In his delegation's opinion, that position ignored the purpose of the control of the transit State. Such control was not exercised for the protection of interests located in its own territory; the objects in the bag left that territory anyway. The control was in the interest of the State of final destination, because it was in the common interest of all the States concerned that the transit State should exercise the control of passage through its territory. It seemed therefore unwarranted to deprive the transit State of the means of control which the State of final destination might apply.

68. Mr. Jésus (Cape Verde) took the Chair.

69. The Chairman and Mr. Thiam (Chairman of the International Law Commission) paid tribute to Mrs. Petermann, an official of the Codification Division, who was leaving the Organization, for the competence, efficiency and devotion which she had displayed during many years of service rendered to both the Sixth Committee and the International Law Commission.

The meeting rose at 5.20 p.m.