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SUMMARY RECORD OF THE 23rd MEETING

Chairman: Mr. AFONSO (Mozambique)

later: Mr. TETU (Canada)

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The meeting was called to order at 10.05 a.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10 and A/46/405)

1. Mr. CRAWFORD (Australia) said that since being proposed on first reading by the International Law Commission the draft articles on jurisdictional immunities of States and their property had undergone many specific changes, almost all of them for the better. For example, there was the inclusion of the component units of a federal State in the definition of "State" in article 2, paragraph 1, the preference for the term "commercial transactions" over "commercial contracts", and many other verbal clarifications. The only regrettable change was the deletion of the former draft article 16 dealing with fiscal matters.

2. His delegation intended to refer only to issues of principle which might influence the subsequent handling of the topic by the Committee. It welcomed the addition of paragraph 3 in draft article 10, which made the basic point that the immunity of a State itself was not abrogated because a separate State corporation entered into a commercial transaction. The inclusion of a provision of that kind was important because misunderstanding on the point might prejudice the acceptance of the draft articles as a whole. Article 10, paragraph 3, was without prejudice to the question of any independent liability of a State in cases where it acted in relation to the transactions of separate State corporations or entities, for example the liability of a State as a guarantor in relation to a commercial transaction of a separate entity. The paragraph stated a principle generally applicable in the area of State immunity which was not limited to the topic of commercial transactions.

3. With regard to immunity from measures of constraint articles 18 and 19 represented a step in the right direction, but it was not certain that they were detailed enough to cope with the various procedural and substantive problems which could arise. The draft articles dealt simultaneously with the issue of interim or pre-judgement enforcement and with the issue of final enforcement. Although the jurisdictional principles applicable to interim and final enforcement might be the same, the context was not the same. In particular, States could have a legitimate concern that their property might be the subject of pre-judgement attachment in cases where both the jurisdiction of the local court and the merits of the case itself were contested.

4. That led to the related point that, prior to judgement, there must be some presumption that a State [illegible] subject to local jurisdiction would comply with the judgement of the court. On the other hand, once judgement on the merits had been given, a State's immunity from execution must not be so extensive as to be virtually complete. The requirement of a connection between the property and the claim, contained in article 18, paragraph 1 (c), was very vague.

(Mr. Crawford, Australia)

5. His delegation believed that more thought needed to be given to the problem of execution, in order to ensure that measures of execution, and especially pre-judgement execution, were taken only when really necessary.

6. It agreed with the delegations of Mexico and Poland that the draft articles should be given further consideration, for example by a working group of the Committee at its next session, before the matter was referred to a diplomatic conference. That would enhance the possibilities of a successful outcome, with respect not only to the adoption of a convention but also to its acceptance by the States before whose courts the issues arose most often. The draft articles formed a solid basis for the work both of the Committee and, it was to be hoped, of a future diplomatic conference.

7. Mr. SCHARIOTH (Germany) said that the draft articles on jurisdictional immunities of States and their property prepared by the Commission constituted a suitable basis for the drafting of an international convention to be approved by a diplomatic conference. The discussion had centred on the question of whether the "purpose" or the "nature" of a transaction was the decisive factor in determining its "commercial" character. His delegation had always been in favour of the criterion of the nature of the contract. The wording of article 2, paragraph 2, made it plain that both in general and in principle the legal nature of a contract should be the only determinant of its commercial character. However, the Commission had retained the idea that purpose might be taken into account as a supplementary criterion. In the light of paragraph 26 of the commentary contained in the Commission's report (A/46/10), the addition of that criterion might indeed offer a suitable basis for a generally acceptable compromise to be found at the diplomatic conference. The final text of paragraph 2 might allow that the competent court, not the defendant State, might be free in certain cases to take governmental purpose into account as well, provided that it was the practice of the defendant State to conclude such contracts for public ends.

8. A useful clarification had been added to article 6 by requiring courts to determine ex officio the question of respect for the immunity of another State. The Commission had finally found a neutral title for part III, the old version of which had given rise to much controversy. The general rule on immunity was found in article 5, which asserted immunity except in cases where States were subject to the provisions listed in part III, when immunity was not available.

9. With regard to the immunity of States operating an independent enterprise, the topic dealt with in article 10, paragraph 3, the Commission had unfortunately not accepted the proposal made by Germany in 1990. In accordance with the present text, a State setting up such entities without providing sufficient capital could secretly free itself from any risk. His delegation suggested once again that, as a minimum prerequisite for granting immunity, there must be transparency with regard to the capital resources of the State enterprise.

(Mr. Scharioth, Germany)

10. His delegation welcomed the fact that the Commission had followed the Special Rapporteur's recommendation with regard to article 16, which dealt with ships operated by a State. With the present wording the sole criterion for the granting of immunity was the non-commercial purpose of the operation at the time when the cause of action arose.

11. The rule laid down in article 22, paragraph 2, that a State should be exempt from providing any security, even when acting as plaintiff, accorded an unwarranted privilege to States and was therefore not acceptable. The plaintiff State could institute proceedings without risk, whereas the defendant might face a considerable loss even when successful. Therefore, his delegation strongly supported the original proposal submitted by the Special Rapporteur that paragraph 2 should be amended in such a way that at least the plaintiff State should be required to provide a security or bond.

12. His delegation would have liked the Commission to address as well the intricate problem of a clause on settlement of disputes. The question of how to settle a dispute about the interpretation of the text was of crucial importance.

13. Mr. Têtu (Canada) took the Chair.

14. Mr. MIKULKA (Czechoslovakia) said that at its forty-third session, the International Law Commission had completed in second reading the draft articles on jurisdictional immunities of States and their property. He wished to make a number of comments on the articles examined by the Drafting Committee and, later, by the Commission.

15. The content of article 10, paragraph 3, which accounted for the main bulk of commercial transactions engaged in under the auspices of States, had not given rise to insuperable differences of opinion. Some members had attributed to States the commercial transactions engaged in by a State enterprise or other similar entity, arguing that in such cases the State did not enjoy jurisdictional immunity; others had proceeded from the premise that State enterprises, once they had a legal personality distinct from that of the State, were acting on their own behalf. That had always been the position of his delegation, which, in describing Czechoslovak practice in that area, had consistently stressed the independent legal personality of Czechoslovak State enterprises, clearly indicating that Czechoslovakia had never invoked the immunity of its State enterprises before the courts of other States.

16. His delegation therefore supported the provision contained in article 10, paragraph 3, according to which the immunity enjoyed by a State was not to be affected with regard to a proceeding which related to a commercial transaction engaged in by a State enterprise or other similar entity which had an independent legal personality and was capable of acquiring, owning or possessing and disposing of property.

(Mr. Mikulka, Czechoslovakia)

17. The content of the above-mentioned provision could be deduced from the reasoning of the provisions of article 2, paragraph 1 (b) (iv). In fact, the provisions of that clause and of article 10, paragraph 3, complemented one another. Under article 2, paragraph 1 (b) (iv), the agencies or instrumentalities of the State and other entities would be included in the scope of the definition of the term "State" to the extent that they were entitled to perform acts in the exercise of the sovereign authority of the State. The distinguishing factor was one of function, to the exclusion of any other element, including the existence of an independent legal personality.

18. Joint reading of article 10, paragraph 3, and article 2, paragraph 1 (b) (iv), raised the question of how to treat commercial transactions engaged in by entities established by the State when they did not have an independent legal personality. In the view of his delegation, the only possible interpretation was that if the entity did not have an independent legal personality, the commercial transaction entered into by it must be regarded as if it were the commercial transaction of a State that was subject to the provisions of article 10, paragraph 1.

19. His delegation could support the text of article 11, although it acknowledged the logic of the argument made against paragraph 2 (c), whose purpose was to preserve the immunity of the State in the event of a proceeding which related to a contract of employment when the employee had been neither a national nor a habitual resident of the State of the forum at the time when the contract of employment had been concluded. His delegation associated itself with the opinion of the majority of States on that question.

20. Article 12 on personal injuries and damage to property required in-depth analysis. The exception to the general rule of State immunity provided for in that article was limited to cases of death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which was alleged to be attributable to the other State, if the act or omission had occurred in the territory of the State of the forum and if the author of the act or omission had been present in that territory at the time of the act or omission. That was the only realistic approach that had a chance of being approved by the majority of States.

21. His delegation had reservations about another aspect of the problem of injury to persons and damage to property, namely, the absence of a distinction between damage caused by acts jure gestionis and acts jure imperii. Although in its commentary to article 12, the Commission recognized that in the case law of some States involving motor accidents, immunity had been maintained for acts jure imperii but not for acts jure gestionis, it did not give any explanation as to why it had departed from that norm, which had been confirmed by the practice of States.

22. Article 13 on ownership, possession and use of property was one of the provisions of the draft that had been confirmed by the constant, uniform practice of the great majority of States.

(Mr. Mikulka, Czechoslovakia)

23. With regard to the immovable property of a diplomatic mission, article 31, paragraph 1 (a), of the 1961 Vienna Convention on Diplomatic Relations established that a diplomatic agent was to enjoy immunity for a real action relating to private immovable property situated in the territory of the receiving State when he held it on behalf of the sending State for the purposes of the mission. The immunities enjoyed by persons attached to missions were regarded in the final analysis as State immunities, because they belonged to the State. Such immunity for a real action was therefore covered by the provisions of article 3 of the draft. Furthermore, the Vienna Convention contained no provision explicitly relating to immunity for a real action aimed directly at the sending State if it owned the said property itself. For the drafters of the Vienna Convention, that case could have exceeded the scope of diplomatic law and of the Convention, but the draft must not disregard that problem and should instead contain an unequivocal provision in that regard.

24. His delegation approved the new title of part III, which was neutral and overcame another conflict between the various doctrinal approaches.

25. State immunity from measures of constraint, to which article 18, one of the fundamental provisions of the draft referred, could not be absolute either. Among the exceptions limiting its scope, the one contained in paragraph 1 (c), which was based on a connection between the property and the object of the proceeding or the agency against which the proceeding had been directed, deserved special attention.

26. The enumeration in article 19 of specific categories of property that could not be the subject of measures of constraint was another element of balance in the draft.

27. With regard to part V of the draft, comprising miscellaneous provisions, his delegation agreed with the idea expressed in the Commission that exceptions to the obligation set forth in article 22, paragraph 2, to provide security should be limited to situations in which the State was in the position of plaintiff.

28. The definition of the "State", which included different elements, some of which could be endowed with their own legal personality and enjoy economic autonomy under domestic law, led to the problem raised by the term "State property". As in the draft articles on State succession in respect of property, archives and State debt, the Commission was not proposing a definition of the term, but unlike in those articles, neither did it leave the matter to the domestic law of the State. While it was domestic law which first determined the status of State property, some international instruments had included provisions which defined that category more clearly, in particular the often cited General Assembly resolution 388/V/1950 on economic and financial provisions relative to Libya and resolution 530/VI/1952 on Eritrea. However, international customary law had not established an

(Mr. Mikulka, Czechoslovakia)

autonomous criterion for determining what constituted State property. The problem was aggravated by the complexity of defining the term "State", since the various political subdivisions, agencies and instrumentalities included in the term by virtue of article 2, paragraph 1 (b), could have at their disposal property which fell into the category of public property rather than State property as such. The problem was further complicated in relation to agencies, instrumentalities and units which were considered as the State only in so far as they acted in exercise of the prerogatives of its governmental authority. He wondered to what extent their property was considered State property.

29. That question among others should be carefully studied by Governments in order to arrive at a satisfactory solution at the diplomatic conference which his delegation was in favour of convening.

30. Mr. PUISSOCHET (France) said that the codification of the rules of international law on jurisdictional immunities of States and their property was of great theoretical and practical use. His country had always encouraged that effort and was pleased that the work of the International Law Commission on that item had been successfully completed.

31. The proposed text was, on the whole, satisfactory as far as its principles were concerned, although some problems remained which could be explained by the complexity of the subject and the diversity of approaches to it according to legal systems. There was no doubt, however, that on the basis of the Commission's work, solutions acceptable to all States could be found which would represent significant progress in international law.

32. Without undertaking an exhaustive analysis of the draft, he wished to review some of its major aspects. With regard to article 2, the accepted wording, while more satisfactory, was not fully convincing. In paragraph 1, he had doubts about the appropriateness of considering as a State the "constituent units of a federal State", given the wide variety of situations covered by that formula and the uncertainties to which it could give rise. With regard to paragraph 2, while an effort had been made to arrive at an appropriate treatment of contracts which, although involving commercial transactions, had specifically State-related purposes such as national defence and therefore should enjoy immunity, he doubted whether the wording adopted, which stated that the purpose should be "relevant in determining the non-commercial character of the contract", covered that situation clearly.

33. He also wondered whether a rule as general as that contained in article 6, whereby a State "shall ensure that its courts determine on their own initiative that the immunity of that other State is respected", could be adopted, given the evident complexity and sensitivity of the evaluation of jurisdictional immunity.

(Mr. Puissochet, France)

34. The drafting of article 11 took more fully into consideration the concerns expressed by France on several occasions and better preserved the balance between the protection of employees from other States, respect for the social legislation of the forum State and the free exercise of the governmental authority of the other State. On the whole, therefore, the text was acceptable. He was pleased that the Commission had adopted on second reading paragraph 2, subparagraph (a), which recognized State immunity if "the employee has been recruited to perform functions closely related to the exercise of governmental authority", an unambiguous formulation. He also welcomed subparagraph (b), which took into account the practical reality in which it would be unacceptable for a court to impose upon a State the recruitment, renewal of employment or reinstatement of an individual which that State did not wish to have among its employees.

35. Article 16, on the complex issue of rules governing ships owned or operated by a State, had been amended. Paragraph 1 retained the wording "the ship was used for other than government non-commercial purposes", which had the advantage of reproducing the terms of the United Nations Convention on the Law of the Sea (art. 96). It was commendable that paragraph 1 also referred strictly to the "use" of ships and no longer made reference, as before, to their intended use, since it was appropriate to be concerned only with the criterion of actual use of the ship, which was far less controversial than intended use.

36. Despite the progress he had described, he still believed, however, that the comments and proposals he had made at the previous session remained valid. Coherence with the various instruments which served as a reference for the law of the sea should be maintained. Those instruments included the Geneva International Regime of Maritime Ports of 9 December 1923, the Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, of 10 April 1926, and the Montego Bay Convention on the Law of the Sea of 10 December 1982, already cited. Those conventions offered a positive definition of the ships of a State which could enjoy jurisdictional immunity, by contrast with draft article 16, which offered a negative definition. In his opinion, it was preferable to start from the definition given in article 96 of the Convention of 1982 previously cited, and to include the provisions relating to such immunity not in the part on exceptions to State immunity, but in that on general principles. He also thought that the suggestions mentioned in the report of the International Law Commission (A/46/10) to include provisions on aircraft and space objects were very interesting and deserved further study.

37. Turning to part IV of the draft, his country had always been reluctant to deal with immunity from enforcement in a text on jurisdictional immunities, although it was not radically opposed to doing so. Great care would continue to be needed, because of the problems created by the diversity of legal systems. As the Commission said in its report, "it would be difficult, if not impossible to find a term which covers each and every possible method or

(Mr. Puissochet, France)

measure of constraint in all legal systems". It was necessary, however, to ensure that everyone assigned the same meaning to the adopted text.

38. Article 19 listed State property which "in particular", "shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes". The words "in particular" no doubt indicated that the listing was not exhaustive, which was a step forward.

39. While France still had some concerns about the draft, it felt it was an important new step in international law. France would give favourable consideration to the convening of an international conference of plenipotentiaries to negotiate a convention on that subject.

40. Mr. HAYES (Ireland) said that the ambitious targets which the Commission had set itself at the beginning of the five-year term had been met. The draft articles on all the topics demonstrated the care invested in their preparation, and the commentaries were up to the standard expected from the Commission.

41. State immunity was a classical subject of international law, important for both doctrinal and practical reasons, for it was concerned with the interplay of two aspects of sovereignty - State personality and State jurisdiction. The rules applied when a State engaged in activities in the territory of another State, and that overlapping of the exercise of sovereign functions by different States was obviously a potential source of conflict.

42. Both the codification and the progressive development of international law on the topic had had to be built more on State practice than on international legislation. Although some multilateral provisions did exist, mainly in the European Convention on State Immunity, which was a regional instrument, and almost incidentally in the 1926 Brussels Convention, the main sources were national legislation and judicial decisions and bilateral agreements. The Commission's work had been to extract selectively from that material, including recent developments in the field. The draft articles represented a treatment of the topic which afforded the international community an opportunity to adopt rules that would be generally recognized.

43. The main difficulty encountered by the Commission in its deliberations on the topic was the wide gap between two schools of thought, both of them represented in the Commission and outside it, which favoured respectively an absolute and a restrictive approach to immunity, with the second approach based on a distinction between acta jure imperii and acta jure gestionis. Absolute immunity was the older and what might even be called the traditional approach. However, his Government favoured the restrictive approach as being more appropriate in modern circumstances It was nevertheless clear that generally acceptable rules could not be devised by accepting totally the views of one school. Changes in the geopolitical situation in recent years had made

(Mr. Hayes, Ireland)

possible a compromise which represented an erosion of the absolute theory in favour of a qualified version of the restrictive theory, devoid of vagueness or extremism.

44. The present draft articles identified clearly situations in which immunity did not apply, with the corollary that it applied absolutely in other cases. Those practical provisions had been reinforced and further clarified by including in article 2 a precisely drafted and detailed definition of a commercial transaction and by dealing in substantive articles with other significant factors such as the role of State enterprises and the uses of ships. It could be said that the actual approach taken in the articles to the applicability to immunity was functional, and it should enhance their appeal to all Governments.

45. Commenting on some of the amendments to the draft articles, he said that the amalgamation of the earlier articles 2 and 3 into a single article 2 on use of terms was sensible and an improvement. The inclusion of two new elements, i.e. the constituent elements of a federal State and other entities, in the definition of a State contained in article 2, paragraph 1 (b), was also justified.

46. His delegation welcomed the deletion from article 5, which stated the basic principle of immunity, of the reference to the relevant rules of general international law included in square brackets in the version approved on first reading.

47. It also welcomed the adoption of a neutral title for part III reflecting the pragmatic and functional approach taken by the draft articles in that part, in particular in the new paragraph 3 in article 10.

48. Those favourable comments did not mean that his Government thought that the articles were without fault. However, it did believe that as a whole their thrust was in the right direction and that viable solutions to the most difficult problems had emerged. It therefore supported the Commission's recommendation that an international conference should be convened in order to elaborate a convention on the topic. But it did not support the proposal of some delegations that prior to the conference the draft articles should be considered by a working group of the Committee, for that would merely delay the adoption and entry into force of rules which would constitute a valuable addition to international law.

49. Mr. ASTAPENKO (Belarus) said that the Commission's report on the work of its latest session constituted a solid basis for detailed, constructive and fruitful discussion in the Committee of the urgent juridical needs of the world community.

50. The positive changes on the political atmosphere had had a favourable impact on the Commission's work, and there was no doubt that the mutually acceptable resolution of the complex legal questions considered by the

(Mr. Astapenko, Belarus)

Commission would enhance the role of international law and establish its primacy in the solution of the practical problems of relations between States, as well as helping to achieve the goals of the United Nations Decade of International Law.

51. The Supreme Soviet of the Republic of Belarus had adopted a Declaration on Principles of Foreign Policy in which it confirmed the country's commitment to the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, as well as its undertaking to fulfil all the obligations under international law arising out of the international treaties to which it was a party.

52. His delegation had followed with keen interest the Commission's work on the topic of jurisdictional immunities of States and their property and was happy to note that the Commission had taken into account many of the proposals made by Belarus at various times. The Commission had succeeded in drafting a balanced and quite detailed document, on the basis of which suitable solutions could be found to the complex and thorny problems which arose in that area of State relations.

53. The draft articles approved by the Commission were based on the concept of the absolute immunity of a State as expressed in the universally recognized principle par in parem imperium non habet, which had been embodied in article 5. His delegation supported those members of the Commission who had been in favour of deleting from that article the reference to the relevant rules of general international law, because that had made it possible to define accurately the scope of application of the whole set of draft articles and had considerably increased its attractiveness for the further codification of international law.

54. The draft articles contained a very satisfactory definition of a State, which included the constituent elements of a federal State conducting their external trade relations independently; they established the requirements for taking into account the specific features of the activity of different States when determining whether a contract or transaction was of a commercial nature; they reflected the principle that State immunity was not only a right but also an obligation; and they analysed in detail the consequences of the express consent of a State to exercise jurisdiction and of its participation in proceedings before a court.

55. Part III of the draft articles, concerning proceedings in which State immunity could not be invoked, was of great practical importance, especially the provision which stated that the immunity from jurisdiction enjoyed by a State should not be affected with regard to a proceeding which related to a commercial transaction engaged in by a State enterprise which had an independent legal personality. That solution would be very important for the development of stable economic relations between States and between their various enterprises.

(Mr. Astapenko, Belarus)

56. His delegation also agreed with other exceptions to immunity of jurisdiction, particularly the one contained in article 16, which resolved on a residual basis the problems connected with exceptions in respect of ships owned or operated by a State.

57. His delegation attached fundamental importance to the formulation of the principle of the inadmissibility of measures of constraint in respect of a State. The limitation of immunity provided by article 18 could be accepted if it was borne in mind that the provision also established precisely and unambiguously the general rule that the authorities of one State could not take measures of constraint against another State and confirmed that such immunity from execution was totally independent of the jurisdictional immunity of States. In that connection his delegation supported the Commission's decision to provide some protection for special categories of property, including in particular the property of the central bank or other monetary authority of the State. That seemed to be the only correct approach, because central banks were instruments of the sovereign power of States and therefore any activity exercised by them fell under the immunity from execution of court decisions.

58. On the basis of the foregoing comments his delegation could draw the preliminary conclusion that the draft articles proposed by the Commission were a good basis for the further codification of international law and for the adoption by States of a final decision on the topic. It therefore supported the Commission's recommendation that an international conference should be convened to examine the draft articles and conclude a convention on the topic.

59. Mr. YAMADA (Japan) said that the international community was undergoing a profound transition from confrontation to cooperation and that the Gulf crisis had clearly shown that universal acceptance and respect for the rules of international law regulating the basic relations between States constituted an essential foundation for building a new peaceful and stable international order. Accordingly, the mission which had to be carried out for the sake of the next generation was to promote the progressive development of international law.

60. Furthermore, the increase in international trade and in technological developments was creating new needs and concerns which had to be addressed effectively so as to promote the rule of law in the international community.

61. In the past the Commission had played an important role in the codification of international law by formulating a number of conventions which formed the core of contemporary international law. However, from now on the Commission would give particular attention to the progressive development of international law, i.e. one of its most important tasks would be to determine how it might respond to the changing needs of the rapidly evolving international community. The Commission's usefulness in the future would depend on the extent to which it managed to perform that task successfully.

(Mr. Yamada, Japan)

62. The proper approach to the progressive development of international law should be problem-oriented rather than ideological, so that the final output reflected the actual world situation. His delegation expected that the Commission would respond appropriately to the new needs and concerns of the international community and would continue its efforts to establish an international legal order which would serve the cause of world peace and prosperity. The Commission's programme of work in the future should be designed to expedite its deliberations on the remaining topics. In view of the strong demand for the establishment of legal rules regulating international liability for injurious consequences arising out of acts not prohibited by international law, everything possible should be done to produce a document capable of winning broad acceptance.

63. With regard to the selection of new topics for inclusion in the Commission's long-term programme of work, great care should be taken in determining whether a topic was of concrete concern to the international community and whether there was a reasonable prospect of achieving practical and generally acceptable results without any excessively theoretical discussions.

64. The question of the jurisdictional immunities of States and their property was of keen interest to his delegation, which thought that internationally uniform rules should be adopted on the topic as soon as possible. The practice of States in the matter indicated that, while some continued to subscribe to the theory of absolute immunity, others thought that absolute or unlimited immunity should not be granted to a State when it engaged increasingly in commercial activities in various fields. Consequently it would be difficult to claim that the international community held a unified position on the issue.

65. The text of the Commission's draft articles on the topic contained two types of provision. The first confirmed the position that in principle States enjoyed immunity, while the second elaborated in concrete terms the scope and extent of the limits on State immunities.

66. Turning to the key elements of the draft articles he said that a two-step criterion was used to determine whether a transaction was of a commercial nature. The first step tested the nature of the transaction and the second tested its purpose. The aim was to ensure the appropriate application of immunity from jurisdiction to acts of developing States whose purpose was to promote the development of their country's economy. One of the key factors in the examination of the draft articles was the way in which article 2, paragraph 2, was evaluated, for the provision was based on the most important elements which were common to all States despite their different positions.

(Mr. Yamada, Japan)

67. The text of the draft articles took into account the position of the countries concerned with respect to the question of State enterprises. For example, article 10, paragraph 3, established clearly that a State enterprise which engaged in a commerical transaction was an entity independent of the State and subject to the same rules and liabilities as were applicable to a natural or juridical person. And article 2, paragraph 1 (b) (iv), allowed that there were some cases in which private enterprises, even though not governmental organizations, could perform acts in the exercise of the sovereign authority of the State as agencies or instrumentalities of the State.

68. With regard to State immunity from measures of constraint, it must be borne in mind that there had previously been a tendency to consider that issue separately from the issue of immunity from jurisdiction, so that the two topics had developed independently. Since there was a division of views even among those States which subscribed to the theory of restrictive immunity, careful consideration must be given to the question of whether the provision was really acceptable to all States.

69. The practice of States with regard to jurisdictional immunities was not uniform, for every State had dealt with the issue differently by establishing its own laws or by basing its judgements on legal precedents. That situation underscored the need to codify the legal rules on the topic and demonstrated how difficult it was to produce a text acceptable to all. Consequently, in considering the appropriateness of convening an international conference of plenipotentiaries it was necessary first of all to ascertain the views of every State on the need to consolidate the international legal rules and at the same time to study the possibility of drawing up a convention allowing all countries to agree on a text which reflected both the practice of the States subscribing to the principle of absolute immunity and the practice of the States supporting restrictive immunity.

70. Mr. Afonso (Mozambique) resumed the Chair.

71. Mr. JAKOVIDES (Cyprus) said that the Commission had achieved the goals which it had set for itself at the beginning of its term of office: it had concluded its consideration of the topic "Jurisdictional immunities of States and their property" by adopting the final version of a set of draft articles; it had provisionally adopted two sets of draft articles on two other topics in its programme of work, i.e. the draft Code of Crimes against the Peace and Security of Mankind, and the law of the non-navigational uses of international watercourses. Furthermore, at its forty-first session the Commission had approved the final version of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by a diplomatic courier and of the draft optional protocols thereto. In addition to those achievements the Commission had made considerable progress on the topics of international liability for injurious consequences arising out of acts not prohibited by international law, relations between States and international

(Mr. Jakovides, Cyprus)

organizations, and State responsibility. The Commission's programme of work had been made less burdensome by those achievements and advances. It was therefore to be hoped that it would conclude as early as possible the draft articles on the important topic of State responsibility.

72. The role of the Sixth Committee was to make general comments on the Commission's report and to give it guidance on legal and political matters. That was the Committee's best contribution to the attainment of the objective of the codification and progressive development of international law.

73. With respect to chapter II of the report, his delegation noted with satisfaction the adoption on second reading of the draft articles on jurisdictional immunities of States and their property. From the beginning, Cyprus had maintained that a pragmatic approach should be adopted and that doctrinal differences between the absolute and restrictive immunity theories should be avoided. That had, by and large, been achieved on the basis of State practice. His delegation supported the Commission's recommendation on the convening of an international conference of plenipoteniaries to examine the draft articles and to conclude a convention on the subject, without ruling out the possibility of the matter being considered by a working group. His delegation hoped that the international conference would establish a legal mechanism for the settlement of disputes.

74. With reference to chapter III, his delegation welcomed the adoption on first reading of the draft articles on the law of the non-navigational uses of international watercourses. In that regard, it should be noted that Member States would be requested to submit their comments and observations on the draft articles by 1 January 1993. Referring to paragraph 35 of the report, his delegation expressed the hope that it would be possible to include a provision on the peaceful settlement of disputes during the subsequent consideration of the topic.

75. With respect to chapter IV, his delegation believed that the adoption of the draft Code of Crimes against the Peace and Security of Mankind, whose essential elements were crimes, penalties and jurisdiction, would discourage those seeking to commit such crimes and punish those who violated the provisions of the Code. While the Code should be comprehensive, its provisions should be precise and should encompass legally definable crimes in order to ensure the widest possible acceptability and effectiveness.

76. The adoption on first reading of those draft articles marked a major step towards the progressive development of international law and constituted a highlight of the United Nations Decade of International Law. Once Governments had submitted their comments and observations on the draft articles, the Commission would have to re-examine some aspects of the text. It would also be necessary to carry out additional work regarding the creation of international criminal jurisdiction. His delegation had taken note of the work carried out by the Special Rapporteur and the Commission, as well as the

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impetus that the subject had received in other forums, such as the seminar held at Talloires, France, in May 1991. A number of distinguished personalities, such as the Vice-Chancellor and Minister for Foreign Affairs of Germany, Mr. Hans-Dietrich Genscher, had also advocated the establishment of an international criminal court with jurisdiction in such cases as crimes against humanity, peace and the environment, genocide and war crimes. The Prime Minister of Trinidad and Tobago, Mr. Robinson, had proposed the establishment of an international criminal court with jurisdiction in the area of drug trafficking. In the light of those developments, his delegation was convinced that the time had come for the General Assembly to give a clear directive to that effect so that the Commission could proceed with an unambiguous mandate.

77. With regard to draft article 5 of the draft Code of Crimes against the Peace and Security of Mankind, it was important to bear in mind that the "prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it". As pointed out in the commentary to draft article 5, even though "the Commission decided, at least at this stage, not to apply international criminal responsibility to States", the draft article "leaves intact the international responsibility of the State".

78. Transfers of population under draft article 21 meant transfers "intended, for instance, to alter a territory's demographic composition for political, racial, religious or other reasons, or transfers made in an attempt to uproot a people from their ancestral lands".

79. Moreover, the commentary to draft article 22 noted that "it is a crime to establish settlers in an occupied territory and to change the demographic composition of an occupied territory ... Establishing settlers in an occupied territory constitutes a particularly serious misuse of power, especially since such an act could involve the disguised intent to annex the occupied territory. Changes to the demographic composition of an occupied territory seemed to the Commission to be such a serious act that it could echo the seriousness of genocide".

80. With regard to chapter V, it should be recalled that the Special Rapporteur had invited the members of the Commission to consider the following issues under the topic "International liability for injurious consequences arising out of acts not prohibited by international law": the title of the topic, nature of the instrument, scope of the topic, principles relevant to the topic, prevention of transboundary harm, liability for transboundary harm and the issue of harm to the "global commons". The consideration of the nature of the instrument could be postponed until coherent, reasonable, practical and politically acceptable draft articles had been developed. With regard to the title of the topic, the word "acts" should be replaced by the word "activities", since that would be more in keeping with the scope of the item, which should refer both to activities involving risk and to activities

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with harmful effects. With respect to the procedural obligations regarding prevention, the obligation of due diligence should be a fundamental obligation and, failing agreement through the other methods for the settlement of disputes set out in Article 33 of the Charter of the United Nations, a compulsory dispute settlement system should be established. To that end, and in order to ensure that rule of law among nations acquired real meaning, all treaties should include a comprehensive system of third-party dispute settlement.

81. His delegation considered that there should be original State liability when individual liability was impossible to determine because the damage had been caused by unidentifiable authors. However, whenever possible, there should first be redress from the responsible private person and only residual State responsibility.

82. Liability should be extended to cover the concept of "global commons", as part of the broad objective of protecting the environment. Given the wide divergence of views, it would be wise to defer any decision on the subject.

83. With respect to chapter VI, his delegation noted that, at the last session of the Commission, further progress had been achieved on the question of the archives, publications, communications, fiscal immunities and customs duties of international organizations. The draft articles that had been referred to the Drafting Committee for consideration were in keeping with the existing practice of securing the maximum facilities for international organizations, subject to the legitimate requirements of the host State. There was little doubt that international organizations require inviolability and protection, provided that they were not excessive and did not encroach unduly on the domain of States.

84. Chapter VII was devoted to the third report of the Special Rapporteur and contained a review of the legal regime of the measures that an injured State could take against a State that had committed an internationally wrongful act. The Special Rapporteur's report made due reference to the norms of jus cogens and erga omnes obligations. In that regard, reprisals could not violate peremptory norms; that brought into focus the transformation of the topic of State responsibility from its traditional context of injury to aliens to the context in which the interests of international public order and of the international community must be taken into account. The Commission should ensure that due account was taken of the expectations of the international community and, in particular, States that had gained their independence after the classical rules of international law on the topic had been formulated.

85. With regard to chapter VIII, the Commission was fully aware of the need to keep its programme, procedures and working methods under constant review. During its forty-third session, particular importance had been attached to consideration of the Commission's long-term programme of work. In the debate held during the previous session his delegation had suggested that the

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Commission should consider, in the context of its long-term programme, the following issues: the implementation of United Nations resolutions and legal consequences arising out of their non-implementation, and the binding nature of Security Council resolutions in accordance with Article 25 of the Charter and the advisory opinion of the International Court of Justice on Namibia. In that respect, he was pleased to note that the Commission had included among possible topics for its long-term programme the legal effects of resolutions of the United Nations. As the Working Group on the Commission's long-term programme of work had noted, the resolutions of international organizations had become a fundamental element in the process of evolving rules of international law, and some of them often exercised greater influence in international relations than treaties. The question of the legal force of those resolutions, however, remained controversial. The Working Group recommended that, at the outset at least, consideration should be confined to resolutions of the United Nations, with emphasis on those of the General Assembly and the Security Council, as well as on their degree of binding force, their effects, the circumstances of their adoption and their content. His delegation strongly urged that the item should be included in the Commission's long-term programme of work. Consideration could also be given to the question of the legal content of the notion of jus cogens, or peremptory norms of international law, the existence of which had been formally recognized in the 1969 Vienna Convention on the Law of Treaties. That issue had been examined by various experts but had not received a detailed analysis in any international forum.

86. He noted with approval the work carried out by the Drafting Committee and the Commission's intention to coordinate its work with that of other United Nations institutions, regional organizations and scientific centres that dealt with subjects related to the Commission's programme of work. In that regard he noted his delegation's suggestion that the Commission should not only continue its fruitful cooperation with such regional bodies as the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the European Committee on Legal Cooperation, but should also establish contacts and exchange views with the Movement of Non-Aligned Countries and the Commonwealth with regard to its work in the legal field. The changes in the international situation had given the Movement of Non-Aligned Countries greater scope to concentrate on issues and ideas relating to international law. Indeed, the United Nations Decade of International Law had had its origin in a suggestion by the Movement of Non-Aligned Countries. Similarly, the Commonwealth, which represented one of the world's principal legal systems, could make a vital collective contribution to the development of international law.

87. He noted that the Commission had made full use of the time and facilities available to it during its session, and he agreed that the usual duration of the session should be maintained. Sessions could be held without interruption, following the Commission's usual practice, or they could be divided into two parts, as was the practice in other United Nations bodies, if that was thought expedient.

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88. The twenty-seventh session of the International Law Seminar, dedicated to the memory of Paul Reuter, had been held with great success during the Commission's forty-third session. Thanks to the collaborative efforts of the Government of Brazil the latest Gilbert Amado Memorial Lecture had been delivered by the Minister of External Relations of Brazil.

89. The highlight of the Sixth Committee's work was the annual debate on the report of the International Law Commission. International law was constantly evolving, and that process must be guided by the Sixth Committee. For that reason, and in view of the recent developments in the world, the Sixth Committee should give impetus to the application of the rules of international law and the resolutions of the United Nations, as well as to the strengthening of the mechanism for third-party dispute settlements and to cooperation in combating terrorism and drug trafficking and in protecting the environment.

90. In his address to the General Assembly the President of Cyprus said: "We all know that a just world is one where international law is respected and applied. Therefore, we all have an obligation to apply the rule of law and the appropriate process of peaceful settlement of disputes, including recourse to the International Court of Justice, and to refrain from imposing the will of the stronger." Those words expressed the position which Cyprus had always maintained, for itself and for the world, on the role of international law in the United Nations.

91. Mr. SUN Lin (China) said that the question of jurisdictional immunities of States and their property was a sensitive topic which involved such fundamental principles of international law as State sovereignty and the equality of sovereign States. After the first reading, the comments by Governments had prompted the Committee to take a practical approach and produce a text that accommodated the positions of States. His delegation had always held the position, which it wished to reiterate, that the purpose of devising a legal regime governing jurisdictional immunities of States and their property was to reaffirm the principles of international law concerning the immunities of States and to enhance their effectiveness. The Commission might formulate exceptions to the principle of State immunity in order to strike a balance between the need to reduce and prevent the abuse of domestic judicial process against sovereign States and the need to find a fair and reasonable way of settling disputes. Measured against that criterion, the text of the draft articles adopted on second reading could be improved.

92. His delegation favoured the exclusion, in the definition of "State" in article 2, of entities set up by the State to engage in commercial transactions which had the capacity to assume civil liability and to acquire and dispose of property. Such State enterprises and corporations were legal entities with an independent legal personality.

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93. For the same reason, his delegation welcomed the addition of paragraph 3 in draft article 10, under which the immunity from jurisdiction enjoyed by a State would not be affected in any proceeding which related to a commercial transaction engaged in by a State enterprise or other entity which had an independent legal personality. That provision would help curb the abuse of judicial process against the foreign States to which the enterprises in question belonged.

94. Draft article 5 set out the main principle governing jurisdictional immunities of States and their property. His delegation supported the deletion of the phrase "and the relevant rules of general international law", as it could give rise to an unduly liberal interpretation of the draft article.

95. With regard to the title of part III, the Chinese delegation had always maintained that State immunity was a fundamental principle of international law based on State sovereignty and the sovereign equality of States. The alternative "Exceptions to State immunity" was the appropriate choice of title. Those who supported the alternative "Limitations on State immunity" were arguing that the principle of the jurisdictional immunity of States did not exist in international law, an argument that was unacceptable to the Chinese delegation. The current title, "Proceedings in which State immunity cannot be invoked", remained unsatisfactory. Both the United States Foreign Sovereign Immunities Act of 1976 and the United Kingdom State Immunity Act 1978 referred to "exceptions". The Chinese delegation wished to reiterate that, while it was necessary to envisage exceptions to the jurisdictional immunity of States, such exceptions must be kept to a minimum that corresponded to real needs arising in practice.

96. For the same reasons, the Chinese delegation supported the deletion from the original draft articles of article 16, "Fiscal matters", and article 20, "Cases of nationalization". The enactment and enforcement of fiscal regulations was the prerogative of sovereign States and fell within the domain of public law. As for cases of nationalization, such measures taken by a State within its territory were sovereign acts which did not allow of any interference by a foreign court. The treatment of cases of nationalization in the original text of the draft articles as exceptions to the principle of State immunity was inappropriate.

97. On the same basis, the Chinese delegation continued to object to the retention of article 12, "Personal injuries and damage to property". To allow the national court of a State to determine that an act was attributable to a foreign State violated the principles of sovereignty and sovereign equality. To allow proceedings before national courts against a foreign State would encourage irresponsible and abusive litigation. Compensation for physical injury to persons or physical damage to property could be sought through diplomatic channels or through insurance.

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98. Part IV dealt with State immunity from measures of constraint in connection with proceedings before a court. The position of the Chinese delegation was that immunity from measures of constraint against property of a State was a principle recognized in the theory of international law and consecrated by practice in international relations. To allow attachment, arrest and execution against property of a foreign State pursuant to a judgement by a national court would seriously disrupt inter-State exchanges and cooperation and generate tension in international relations. The Chinese delegation supported the basic principle expressed in article 18, that the waiver of State immunity from jurisdiction did not mean the waiver of State immunity from measures of constraint.

99. Mr. LACLETA (Spain) said that the term of the Commission's current membership had been brought to a very successful conclusion with the completion of the second reading of the draft articles on jurisdictional immunities of States and their property and the first reading of the draft articles on the law of the non-navigational uses of international watercourses.

100. Referring specifically to the draft articles on jurisdictional immunities of States and their property, the more important of those achievements, he said that Spain welcomed the Commission's recommendation to the General Assembly that the draft articles should be examined by an international conference of plenipotentiaries with a view to concluding a convention on the subject. While the draft articles were not perfect, they did offer a suitable basis for such an international conference.

101. The Commission had managed to strike a satisfactory balance in an area in which extreme and apparently irreconcilable positions had been taken. The first stage of the Commission's work, in which it had sought simply to reach a consensus on the limits to the absolute immunity of the State, had resulted in the formulation of texts in which the traditional principle of immunity was circumscribed with precise exceptions, generally worded in an acceptable manner, which guaranteed that a private citizen entering into a direct legal relationship with a foreign State would not be unprotected or unable to secure a judicial ruling in the event of dispute.

102. It had not been an easy task to reduce the enormous number of cases and decisions presented by the Special Rapporteurs and considered by the Commission to the eight articles of part III, which contained the exceptions to the fundamental principle of immunity. The interests of States, including those of the developing States, and those of individuals had been considered, as had the problem of the special case of diplomatic and consular representations.

103. In his contribution to the discussion of the report of the Commission on the work of its thirty-eighth session he had indicated that the Commission did not appear to have considered either the issue of how a State invoked immunity

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in the courts of another State or the issue of the authority called upon to decide, in the event of a dispute, whether in a specific case the principle of immunity should prevail or whether one of the permitted exceptions should apply. It was the current practice of some States for such a decision to be the responsibility of the judge of the State whose jurisdiction was in question (the State of the forum) and any challenge had to be settled in accordance with the legal rules of that State. In other words, it was the court of the State whose jurisdiction had been challenged which was responsible for the decision. In his delegation's opinion, a dispute of that nature constituted an international dispute and should be dealt with as such. It was true that the Commission had considered the question of how a State could invoke immunity, but articles 6, 8, 20 and 21, even when read in conjunction, as was necessary, did not solve the problem in a satisfactory manner.

104. A satisfactory solution could be provided only by a mechanism on the settlement of disputes which, as indicated in paragraph 26 of the report, the Commission considered could be looked at by the future conference of plenipotentiaries.

105. Mr. GODET (Observer for Switzerland) said that the draft articles on jurisdictional immunities of States and their property formed a sound basis for the work of the conference of plenipotentiaries recommended by the Commission. The proposed text would facilitate the universal embodiment of the trend in international law to limit, on the one hand, cases in which a State could invoke immunity before foreign courts and, on the other hand, the execution ofjudgements rendered against a State. The Commission's final text on immunity from jurisdiction was closely modelled on the solutions contained in the European Convention on State Immunity and, to a certain extent, combined the concepts of absolute and relative immunity. His delegation agreed with the general thrust of the principles set forth in parts II and III of the draft. On the other hand, it believed that the Commission's text on immunity from execution overly limited the power to apply exceptions to a State's property. While part III of the text devoted eight articles exclusively to cases in which immunity from jurisdiction could not be invoked, only two provisions appearing in part IV dealt with State immunity from measures of constraint. Thus, in that regard, the draft was somewhat imbalanced. In his delegation's view, immunity from execution should follow from immunity from jurisdiction, of which it was a corollary. While the Commission's draft did indeed contemplate exceptions to the general principle of immunity from measures of constraint, they were weak and allowed States too many opportunities to claim immunity from execution.

106. Under article 2, paragraph 1 (b) (ii), the term "State" included the constituent units of a federal State. The Commission had included that provision in order to take into account the special situation of some federal systems whose constituent units enjoyed the same immunities as a State but could not, on that basis, exercise sovereign authority. The scope of

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application of that provision was very broad, as it empowered all the constituent units of a federal State, without any distinction whatsoever, to invoke immunity. His delegation would have preferred a draft based on article 28 of the European Convention on State Immunity, which confirmed that individual states in a federal State did not enjoy immunity, while authorizing the federal State to formulate a declaration indicating that those individual states could invoke the provisions of the Convention.

107. The Commission had decided to delete the reference to the relevant rules of international law which had appeared in square brackets in the text of article 5 adopted on first reading, as it believed that any immunity or exception to the rule of immunity under the draft articles would have no effect on either general international law or the future development of State practice. While it was true that the draft articles elaborated by the Commission would not prevent the development of international law if their provisions were subsequently incorporated into a convention, the deletion of the reference in question would enable those States which became parties to the instrument to oppose the application of future international law, which seemed to be tending towards a growing limitation of immunity.

108. Under paragraph 2 (a) of draft article 10, commercial transactions between States were immune from jurisdiction, which was an exception to the principle set forth in paragraph 1 of that draft article. The commentary by the Commission stated that the expression "commercial transactions between States" indicated a transaction which involved all agencies or instrumentalities of the State within the meaning of paragraph 1 (b) of article 2. Certainly, the fact that commercial transactions effected by a State agency were not subject to the jurisdiction of the State of the forum must be recognized. Since in some countries whole sectors of economic activity were controlled by the public sector, the scope of the exception should have been limited.

109. Referring to exceptions to the rule that States were not immune from jurisdiction relating to contracts of employment, he said that, even if, in principle, the hypothesis set forth in paragraph 2 (c) of draft article 11 rarely arose, the fact remained that the employee who at the time of entering into the contract of employment was neither a national nor a resident of the State of the forum ran the risk of being denied all legal protection.

110. Article 16, paragraph 1, stated the principle that ships owned or operated by a State which were "used for other than non-government non-commercial purposes" could not invoke immunity from jurisdiction. From that it could be inferred that the provision did not apply to ships used exclusively on government non-commercial service, and the additional information contained in paragraph 2 therefore seemed redundant. Moreover, the phrase "other than government non-commercial purposes" had been introduced on second reading in paragraphs 1 and 4 in order to eliminate the problem of the dual criterion of "commercial and non-governmental" and "governmental

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and non-commercial" use. However, the problem had not totally vanished, for the question of the government and non-commercial character of a ship arose again in paragraph 7.

111. He reiterated that the exceptions to the principle of State immunity from measures of constraint (art. 18) were limited in the extreme. Moreover, article 19 greatly inhibited their scope in listing various categories of State property which were not subject to any measures of execution. Further, since as a result of the infelicitous introduction, on second reading, of the word "specifically" the list of categories of property was not exhaustive, part IV of the draft articles obviously offered States countless opportunities to invoke immunity from execution.

AGENDA ITEM 125: MEASURES TO PREVENT INTERNATIONAL TERRORISM WHICH ENDANGERS OR TAKES INNOCENT HUMAN LIVES OR JEOPARDIZES FUNDAMENTAL FREEDOMS AND STUDY OF THE UNDERLYING CAUSES OF THOSE FORMS OF TERRORISM AND ACTS OF VIOLENCE WHICH LIE IN MISERY, FRUSTRATION, GRIEVANCE AND DESPAIR AND WHICH CAUSE SOME PEOPLE TO SACRIFICE HUMAN LIVES, INCLUDING THEIR OWN, IN AN ATTEMPT TO EFFECT RADICAL CHANGES (A/C.6/46/L.4)

(a) REPORT OF THE SECRETARY-GENERAL

(b) CONVENING, UNDER THE AUSPICES OF THE UNITED NATIONS, OF AN INTERNATIONAL CONFERENCE TO DEFINE TERRORISM AND TO DIFFERENTIATE IT FROM THE STRUGGLE OF PEOPLES FOR NATIONAL LIBERATION

112. The CHAIRMAN said that following broad-based, lengthy consultations on the draft resolution to be adopted on international terrorism a consensus had been reached on the text set out in document A/C.6/46/L.4. If he heard no objection, he would submit the text for the Committee's consideration at the meeting on Thursday, 31 October, at which time a decision would be taken.

113. It was so decided.

The meeting rose at 1.10 p.m.