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SUMMARY RECORD OF THE 28th MEETING

Chairman: Mr. FRANCIS (Jamaica)

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The meeting was called to order at 6 p.m.

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

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. CALERO RODRIGUES (Brazil) said his delegation was pleased to note that the International Law Commission provisionally adopted in first reading a complete set of draft articles on jurisdictional immunities of States and their property. The development of activities of States in fields outside the usual framework had suggested that some adjustments in the application of the traditional concept of absolute immunity would be appropriate. On the other hand, some national legislations and court decisions had gone too far in failing to recognize immunity, and had seemed to dismiss lightly the basic principle of sovereign equality of States. In the chaotic situation being created, the international community needed a compendium of basic rules in order to re-establish some order in a domain of the utmost importance. That could be done only by striking a careful balance between long-standing practices and emerging needs. To have worked towards that end was to the Commission's credit, and much of that credit was due to the Special Rapporteur for the topic, Mr. Sucharitkul, who had helped the Commission to steer its course through a most delicate subject. Brazil therefore associated itself with the Commission's tribute to the Special Rapporteur.

2. While not entirely satisfied with the articles provisionally adopted by the Commission, his delegation recognized that they provided a good basis for an international instrument on the subject. At the previous session, his delegation had expressed doubts of a technical nature, as to the need for a separate part IV to deal with the question of immunity from measures of constraint. It could now express agreement with the Commission's proposals, particularly since the texts had been modified to eliminate or clarify certain points. Thus, former article 21, which his delegation had found superfluous, had been deleted and article 23 (former article 24) had been given a proper meaning.

3. In his delegation's view, the present article 21 adequately stated what property enjoyed immunity and from what measures it was immune. The Commission had been wise to refer to "measures of constraint" in general and to mention "measures of attachment, arrest and execution" as examples. Measures of constraint took many different forms in different judicial systems. A general formulation such as that adopted by the Commission was necessary to cover all possible measures. As for the property covered by immunity, there were those who believed that immunity should not extend to property in which the State had a "legally protected interest". There might indeed be cases in which a State's interest in a property was so secondary, so marginal, that to protect the property by immunity would not appear necessary. As explained in paragraph (4) of the commentary to article 21, contained in the Commission's report (A/41/10), the interest of the State might remain intact irrespective of a measure of constraint. On the other hand, there might be cases where the application of measures of constraint might affect the

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"legally protected interest" of a State. His delegation was therefore of the opinion that the text now in square brackets should be retained, possibly with the additional provision that immunity should not apply if the measures of constraint did not substantially affect the State's "legally protected interest".

4. Article 21 went on to provide that immunity should not apply to property which was used or intended for use for commercial purposes and had a connection with the object of the claim or with the agency involved in the proceeding. His delegation believed that the absence of the proviso regarding a connection would, to a large extent, render illusory the protection of State property against measures of constraint.

5. The Commission had been unable to decide whether reference should be made to property used only for "commercial purposes" or to property used for "commercial non-governmental purposes". The question had already been raised in connection with article 18, which dealt with the use of ships, and his delegation wished to reiterate what it had said on that score. It was not insensitive to the argument of some developing countries that there might be cases in which the commercial operation of a ship or the commercial use of a property did not necessarily imply use for non-governmental purposes, and that, in such cases, immunity should be recognized. Brazil would not object to a formula capable of satisfying the countries concerned.

6. Article 23 listed specific categories of property which were not to be considered as property in use or intended for use for commercial purposes. Strictly speaking, the list was not necessary, since the property mentioned was, by its very nature, not commercial property and should not be considered as such. In his delegation's view, the significance of the article resided in its paragraph 2, which provided that measures of constraint could be applied only in two cases to property falling into one of the categories listed in paragraph 1. His delegation was in general agreement with articles 24 to 28.

7. Articles 2 and 3 could be considered acceptable as they stood. It should be noted that there had been no intention To define the term "State". Such a task would have been both impossible and pointless. What article 3 did was to indicate as clearly as possible when proceedings instituted in a foreign court were to be considered proceedings against the State in question for the purpose of the application of the rules of immunity.

8. Article 6 enunciated the principle on which the whole draft could be said to be based. At its thirty-second session, the Commission had adopted a version of article 6 which provided that a State was immune from the jurisdiction of another State "in accordance with the provisions of the present articles". Although that wording could be interpreted as an affirmation of the general principles of immunity - and that had been his delegation's understanding - it had soon become clear that a different interpretation was possible, namely, that immunity would not exist except as a creation of the articles. The Commission had therefore sought to dispel any possible doubts. According to the new text, the State would enjoy immunity, not "according" to the articles, but "subject" to them. Immunity existed, independently of the articles, as a basic rule of international law. On

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that point, he disagreed with the representative of Qatar. The articles merely regulated immunity, by defining the conditions for its application. The new version of article 6 represented a considerable improvement over the former text, and Brazil could support it.

9. The words "and the relevant rules of general international law" enclosed in square brackets appeared reasonable at first sight, since the very assertion of State immunity was made by a "relevant rule of general international law". But the term "subject to" implied limitations or exceptions, and a reference to "relevant rules of general international law" in that context might be interpreted as admitting limitations and exceptions which might be found in rules of international law other than those contained in the articles themselves. The usefulness of the codification effort which the articles represented would thus be considerably weakened, if not destroyed. The articles would not be as clear as was desirable, and there would be a risk of reverting to the present situation of uncertainty and doubt. His delegation was therefore strongly in favour of omitting the words in question from the draft.

10. The Commission had provisionally adopted in first reading certain draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Brazil joined the Commission in paying tribute to the Special Rapporteur, Mr. Yankov, for his outstanding work on the topic.

11. The articles were a signal contribution to the establishment of generally acceptable rules to facilitate the proper functioning of an important instrument of communication between a State and its missions abroad. The Commission had considered its task to be one of codification; in trying to formulate general rules applicable to all categories of couriers and bags used for official communications, it had been at pains to adhere to existing law as set forth in existing conventions relating to couriers and bags. In his delegation's view, the Commission might have gone a little further and taken emerging practices and needs more fully into account. For example, it was regrettable that the draft failed to cover couriers and bags of international organizations. Nevertheless, the draft was an achievement which did honour to the Commission.

12. Article 28 was a key article. The title referred to "protection" and the text suggested that the diplomatic bag might be considered "inviolable", but the words to that effect were in square brackets. In his delegation's opinion, it would be correct to say that the bag, which could not be opened or detained or subjected to any means of examination which might jeopardize the confidentiality of its contents, was "inviolable". True, the word was not used in respect of the bag in the existing conventions. But the archives and documents of a diplomatic mission were "inviolable", as was the official correspondence of the mission (art. 27, para. 2, of the Vienna Convention on Diplomatic Relations). Since the main contents of the bag were, in principle, diplomatic or other official correspondence, it was normal that the bag itself should be considered inviolable. There was no reason to be afraid of using a word which clearly expressed a concept inherent in the condition of the diplomatic bag.

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13. The provision that the bag should be exempt from examination directly or through electronic or other technical devices also appeared between square brackets. As everyone was aware, sophisticated means of examination now existed which might result in the violation of the bag's confidentiality. In his delegation's view, the article should expressly provide that no such examination was permitted.

14. It was argued that such a prohibition would harm the security interests of the receiving and transit States. His delegation realized that abuses had been committed, and agreed that the bag, while being inviolable, was not sacred. But a reading of the article as a whole led to the conclusion that the provision in paragraph 2 afforded sufficient protection for the security interests of the States concerned. If the authorities of a receiving State - and, possibly, also of a transit State - had serious reason to believe that the bag was being improperly used, they were entitled to request the sending State to open the bag. If that request was denied, they could require that the bag be returned to its place of origin. Provision for that course of action was made in article 35, paragraph 3, of the Vienna Convention on Consular Relations. His delegation saw considerable merit in applying it to all types of bags. Some members of the Commission were, however, opposed to that extension, which explained the square brackets in the paragraph. In his delegation's view, it was the Vienna Convention system, rather than the admissibility of examination through electronic or other technical devices, which would strike a reasonable balance between the security interests of the receiving State and the confidentiality interests of the sending State.

15. The wording of article 31 might give rise to doubts as to the real scope of the provision. Of course it would be untenable to maintain that a State which did not recognize another State or its Government was bound to apply the articles fully to the diplomatic couriers and bags of that other State. The same could be said, in most cases, about the non-existence of diplomatic or consular relations. Indeed, if there were no missions or consular posts of a given State in another State, the latter could not be a receiving State in respect of the former. The question whether the latter State should be a transit State would be left to its own discretion. The real interest of the provision lay in the situation of a State in whose territory an international organization had its seat or an office, or in which an international meeting or conference was held. In that particular case, protection under the articles should indeed be given to the diplomatic courier or bag of a State not recognized by the host State or with which the host State had no relations. That was the sense of article 82, paragraph 1, of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

16. That being so, more precise language would seem to be needed in order to make the scope of article 31 clearer. In addition to explaining that it specifically contemplated the situation of host States, the article should refer to special missions. Such missions might well be exchanged between States which did not recognize each other or had no relations; in fact, it was not uncommon for special missions to be dispatched for the very purpose of negotiating recognition or the establishment of relations. The couriers and bags of such missions should of course be protected under the articles. His delegation hoped that in second reading the Commission would find it possible to revise article 31.

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17. Article 33 gave States an option to decide not to apply the articles to all categories of diplomatic couriers and bags. It might be argued that the provision destroyed one of the main purposes of the articles, the creation of a uniform system for all couriers and bags. While his delegation would not go quite so far, it recognized that the acceptance of the provision compromised, to a certain extent, the achievement of one of the article's more important purposes. At the same time, some weight had to be given to the argument that certain States might not be prepared to accept the articles' applicability to all couriers and bags. Only the possibility left open by the optional declaration would make the articles acceptable to those States. The optional declaration would thus be the price to pay for a universal convention. Under the circumstances, his delegation was reluctantly prepared to pay that price.

The meeting rose at 6.30 p.m.