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Summary record of the 1623rd meeting

Topic:
Jurisdictional immunities of States and their property

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serve an international purpose if abstraction were made of the motivation and the final objective of the activities. The phenomenon of telescoping might also apply in such a case, and, in practice, it might be difficult to make any realistic abstraction.

37. Article 4 involved a similar phenomenon, namely, that it was not always possible to distinguish between the various aspects of a particular conduct. The relationship between the rules of international law concerning jurisdictional immunities of foreign States and their property and those concerning diplomatic immunities might also give rise to complicated cases, and it might not always be realistic to make a sharp distinction between State immunity and diplomatic immunity.

38. Finally, he would like to know whether the Special Rapporteur would give attention to a problem referred to in paragraphs 46–48 of his own report (A/CN.4/330), concerning State immunity in cases where a foreign State had acted in breach of an international obligation.

The meeting rose at 6 p.m.

1623rd MEETING

Tuesday, 1 July 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/331 and Add.1)

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[1] (*continued*)

1. Mr. SUCHARITKUL (Special Rapporteur), introducing part II of his report (A/CN.4/331 and Add.1), said that its purpose was to deal with the general principles of jurisdictional immunity of States and their property; principles other than general principles, including possible limitations or exceptions and other subsidiary rules, might be dealt with in a subsequent part.

[1] For the text of articles 1–5 submitted by the Special Rapporteur, see 1622nd meeting, para. 4.

2. The main general principle was stated in draft article 6 (*ibid.*, para. 127), which read as follows:

Article 6. The principle of State immunity

1. A foreign State shall be immune from the jurisdiction of a territorial State in accordance with the provisions of the present articles.

2. The judicial and administrative authorities of the territorial State shall give effect to State immunity recognized in the present articles.

That principle concerned sovereign or State immunity and some of its close relationships with other concepts, such as diplomatic immunities and the immunities of personal sovereigns and foreign Governments.

3. Draft article 7 would be designed to draw a line of distinction between cases in which the question of State immunity arose and other types of case, in which there was no question of immunity because the territorial State lacked jurisdiction or competence under its own internal law and there was a possibility of *renvoi* to the general principles of private international law governing jurisdiction. The double application of public and private international law, and cases in which public international law governed the general application of certain generally recognized rules of private international law, would doubtless have to be re-examined during the discussion on draft article 7.

4. Draft article 8, which would deal with the role of consent, would also be of fundamental importance. It had become clear from the material he had examined that territorial States should not exercise jurisdiction against foreign States without their consent. Article 9 would be concerned with voluntary submission—a matter which was so closely connected with consent that the possibility of combining articles 8 and 9 might be considered, although certain differences had been noted. Article 10 would deal with the question of counter-claims and the extent to which a foreign State would not be accorded immunity where it had itself raised a counter-claim in a suit against it. Lastly, article 11 would deal with waiver of State immunity.

5. Before drafting article 6, on the principle of State immunity, he had attempted to trace the relevant historical and legal developments in both common law and civil law systems, particularly from the nineteenth century onwards. In common law systems, the principle could be traced back to the personal immunity of the sovereign, with subsequent transition of the attributes of the sovereign to the State as such and progressive development from the attribution of equality to the principle of common agreement. The concept of State immunity had then been extended to cover the idea of impleading, and that concept had later been extended beyond the possibility of bringing a suit against a foreign State, to proceedings seeking to detain or attach property which was owned by the State or was in its possession or control. A parallel development had taken place in civil law countries, where the legal basis was less historical and more a

logical consequence of the jurisdiction of judicial authorities. Part II of his report contained a survey of practice in different countries, particularly in western Europe.

6. The historical development showed that there was some connexion between legal reasoning on State immunities and on diplomatic immunities. As Mr. Riphagen had observed at the previous meeting, one of the main problems was that of distinguishing between diplomatic and State immunities, which was sometimes very difficult. In that regard, current practice in the Federal Republic of Germany was interesting: according to the material made available to him, the German courts adhered to the principles of the 1961 Vienna Convention on Diplomatic Relations[2] for contracts made by members of diplomatic corps in their personal capacity, but made a distinction for contracts concluded on behalf of a foreign State. Thus a limited immunity might be applied without impairing the obligations assumed under the convention.

7. It was clear that once the doctrine of State immunity had been established in certain countries in the nineteenth century, it had also been followed elsewhere, had been adopted as a principle of customary international law and had become current State practice. Even in countries where there had been no decisions on the subject, the general principle of State immunity had not been challenged.

8. Part II of the report went on to describe the part played by branches other than the judiciary, particularly the executive, in influencing certain legal proceedings and formulating legal principles on State immunity. The national legislatures of some countries had adopted special legislation on State immunity, and some national laws covered specific aspects of the subject. The main principles of State immunity were recognized in a number of international conventions, and other international conventions were relevant to particular aspects. There were also regional conventions related to State immunity, in particular the International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels (Brussels, 1926).[3] Lastly, with regard to international adjudication, a historic Judgment had been pronounced by the International Court of Justice on 24 May 1980, in the case concerning *United States diplomatic and consular staff in Tehran*.[4]

9. He thought it could be concluded from the survey of all the sources available that the principles of State immunity had originally been based on the principles of sovereignty. In addition, the relevance of diplomatic immunities could not be dismissed, and in some areas they could almost be identified with State immunities, since they were related to the State as such and diplomatic representatives were regarded as organs or as agents of the State.

10. While admitting the relevance of the functional theory put forward by Mr. Riphagen as another explanation for difficulties of execution, he feared that at the present time that theory might tend to limit the extent of immunities. It might be that the concept of functions was so inextricably linked with State immunity that it would have to be further examined.

11. Having completed his oral presentation of part II of his report and, specifically, of the text of draft article 6, he suggested that the Commission might wish to concentrate on the scope of the draft articles, as defined in article 1, and the substantive contents of draft article 6, deferring consideration of the draft articles on definitions, interpretative provisions and other matters such as delineation of scope and non-retroactivity until it was in a position to examine the rest of the draft. He believed that some decision on draft articles 1 and 6 might be required at the current session.

12. Sir Francis VALLAT said that there was no doubt about the importance of the question of jurisdictional immunities of States and their property as a legal topic, since problems of State immunity arose with considerable frequency. The changes that had taken place over the past fifty years made it appropriate to attempt to codify the topic, with the necessary element of progressive development.

13. One of those changes had been the shift from the monarchic to the republican form of government. As a result, it was now more appropriate to speak in terms of State immunity than of sovereign immunity—an expression which derived from the concept of the personal immunity of the sovereign.

14. The functions of the State had also changed. Whereas in the 19th century the primary functions of the State had been the maintenance of internal law and order and the defence of the realm, most States now engaged in commercial, social and other economic activities. The involvement of the State in commercial activities that had previously been undertaken by private individuals or corporations inevitably raised the question of the exercise of local jurisdiction in respect of such activities, and it would be unrealistic to apply the old concept of absolute sovereign immunity to the commercial activities of States.

15. The definition of the scope of the topic presented serious difficulties. He noted that the Special Rapporteur took the view that it was necessary to consider the nature, rather than the purpose, of a given activity. In many cases, however, it was difficult to determine whether the activity was of a commercial or non-commercial nature. Consequently, that aspect of the topic called for closer examination, and it might be necessary to qualify the distinction between nature and purpose to some extent. While there was general

[2] United Nations, *Treaty Series*, vol. 500, p. 95. The convention is hereinafter called "1961 Vienna Convention".

[3] See A/CN.4/331 and Add.1, para. 113.

[4] *Ibid.*, para. 114.

agreement on the basic principle of State immunity, some difficulties might be encountered with regard to recognition and application of the limits of, or exceptions to, that general principle. The basic problem facing the Commission was how to resolve a conflict between two sovereignties. That problem must be seen from the viewpoints of both of the States involved.

16. The Commission should concentrate on defining the scope of the topic before proceeding to draft legal rules and principles. It was concerned with the question of the jurisdictional immunities of States and their property, and should adhere to that definition of the scope of the draft articles. However, clarification of the meaning of the term "jurisdictional immunities" was needed. The term "jurisdiction" could refer to all governmental authority, including executive, legislative and judicial authority. It could also have a territorial significance, and the Commission must decide whether to limit its consideration of the topic to territorial jurisdiction, or to include extra-territorial jurisdiction. The term could also refer to the jurisdiction of the Courts. The scope of the topic must be made absolutely clear in the draft articles. It should also be made clear that by limiting the scope the Commission was not prejudging matters that might arise in relation to other fields. Even with the clarifications provided in draft articles 2 and 3, that point was not made sufficiently clear.

17. As to draft article 1, he wondered whether the wording need be so closely tied to that of the title of the topic. He had some doubts, for example, regarding the use of the term "jurisdictional immunities", which was in itself very complicated, as it embraced two separate concepts. Moreover, if it was to be assumed that States had a customary law duty to grant immunity to foreign States, the term "accorded or extended" might not be appropriate. In addition, the use of the term "territorial State" implied that the draft articles dealt only with territorial jurisdiction. Finally, he had reservations on the use of the term "foreign State". The word "foreign" was usually avoided in conventions and, in any event, it was inappropriate to use it to refer to a State.

18. The draft article might therefore be worded along the following lines:

> "The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State."

19. Mr. USHAKOV said that there were various ways of looking at the scope of the subject-matter defined in draft article 1; it could, for example, be said either that it related to State activities or that it related to the status of the State and its property.

20. It was also necessary to define the area in which those activities or that status were envisaged. That area was the one in which the jurisdiction of another State applied, because immunities existed only in the field of application of the power of another State. He thought the Commission must make it clear that immunities applied in the area subject to the jurisdiction, administration (for example, in the case of a dependent territory) and control of a State (for example, in the case of a territory under military occupation, whether legitimate or not).

21. The concept of jurisdictional immunities was an ambiguous one, which seemed to refer to the power of jurisdictions. The concept of immunity from jurisdiction presented the same difficulty, as was shown by the provisions of article 31 of the 1961 Vienna Convention, which referred simultaneously to immunity from criminal jurisdiction, from civil jurisdiction and from administrative jurisdiction. In the draft articles, however, "jurisdiction" had the general meaning of the exercise of its powers by a State. In that connexion, he pointed out that article 6 of the draft articles on State responsibility referred to "the constituent, legislative, executive, judicial or other power";[5] in his opinion, that was how the concept of jurisdiction should be understood in the study of immunities, though the list of powers could not be considered as exhaustive. He would therefore prefer the Commission to refer to immunity from any jurisdiction of the other State. It would not be advisable to define "immunity", since a definition would be dangerous in that it might impair other international instruments in which the concept of immunity was used in a way that was perhaps clear, but not defined.

22. At the preliminary stage of its work, the Commission must also specify the activities to which its draft articles would apply. In his opinion, they would apply to the activities of a foreign State in the territory of another State, and the basic problem was to decide whether or not the latter State allowed those activities within its jurisdiction. He would like the draft articles to indicate that they were intended to regulate the status of a State in relation to activities allowed under the internal law of another State or under agreements or rules of international law. He stressed that, once those activities were allowed, the situation thus created had legal consequences, and he would like the Commission to indicate that the activities in question were not only allowed, but were also subject to the laws and regulations of the other State. In that connexion, he referred to article 41 of the 1961 Vienna Convention, and noted that exemption from application of the power of a State did not exempt the beneficiary from the duty to respect the laws of that State. The territorial State was free to allow or to refuse to allow the activities of the foreign State, but once it had allowed them, it must recognize that the situation thus created produced certain consequences.

23. The main consequence was that the foreign State was not subject to the power of the territorial State. It must, of course, respect the laws and regulations of the

[5] *Yearbook ... 1979*, vol. II (Part Two), pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.1.

territorial State, but it could not be coerced by the power of that State. That was the basic general principle, and it was always an absolute principle, because the consent of the territorial State was presumed; it had agreed to the activities of the foreign State and its agreement automatically produced certain consequences. But the absolute nature of the exemption from coercion did not rule out the possibility of exceptions, since the foreign State could always freely consent to submit to the power, whether administrative or judicial, of the territorial State.

24. That, in his opinion, should be the basis of the draft articles, and those were the reasons why draft article 6 should not refer to the "present articles", but state the principle of immunity as an absolute principle, subject to possible exceptions.

25. With regard to the concept of commercial and other activities, he considered it impossible to distinguish the different aspects of the single phenomenon that was the State. The State had only one face, and although, for the sake of convenience, it was possible to distinguish between its political, economic, cultural and other activities, that did not mean that its economic, cultural and other relations were not in themselves political, for all State activities were political. If the territorial State allowed an activity, it did so with the attendant consequences, which was to say, essentially, the application of the principle of exemption from power, without any need to delimit the different activities of the foreign State. For relations of immunity were based on free acceptance of the situation created.

26. He hoped that his comments could guide the Special Rapporteur in his research. The Drafting Committee should be able to put those basic considerations into appropriate form.

The meeting rose at 12.55 p.m.

1624th MEETING

Wednesday, 2 July 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/331 and Add.1)

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[1] (*continued*)

1. Mr. CALLE Y CALLE said that the topic of jurisdictional immunities of States and their property was of great importance by reason of the many and diverse problems which arose all over the world concerning the financial, banking, commercial and other activities undertaken by modern States in the territory of other States. The fundamental task of the Commission was to establish clearly the nature and essence of the concept of State immunity itself. The Special Rapporteur had pointed out that the dramatic changes which had taken place over the past fifty years had given rise to different practices regarding the limitations of, and exceptions to, State immunity. It was worth noting that the Convention on private international law,[2] concluded in 1928, contained a number of provisions on various immunities and special exceptions.

2. The principle of State immunity should be regarded as a right deriving from other basic principles such as the sovereignty, independence, equality and dignity of States. In paragraph 19 of his report (A/CN.4/331 and Add.1), the Special Rapporteur referred to immunity as "a right or a privilege". There was some difference between those two concepts, for whereas a privilege was granted, a right was enjoyed automatically. If State immunity was to be regarded as a right, the Commission's draft articles should reflect that interpretation. The question whether the right was absolute or limited in a given case should be determined according to the nature of the activity concerned, rather than its purpose, which was a less objective criterion.

3. Referring to draft article 1, he said that, if immunity was recognized as a right, the words "accorded or extended" should be replaced by the word "recognized". Similarly, in draft article 2, paragraph 1 (*c*), it would be preferable to use the term "invoked" rather than "claimed".

4. He had reservations on the use of the term "jurisdictional immunities". If the intention was to cover all aspects of jurisdiction, it would be preferable to separate the two concepts by referring to the immunity of one State from the jurisdiction of another State. While he had no objection to the use of the terms "territorial State" and "foreign State" to distinguish between the States concerned, many of the problems raised by the present wording of draft article 1 could be avoided by adopting a formulation such as that proposed by Sir Francis Vallat (1623rd meeting, para. 18).

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[1] For the text of articles 1–6 submitted by the Special Rapporteur, see 1622nd meeting, para. 4, and 1623rd meeting, para. 2.

[2] League of Nations, *Treaty Series*, vol. LXXXVI p. 111.