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Summary record of the 1770th meeting

Topic:

Jurisdictional immunities of States and their property

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involve a new jurisdiction and the court of the new jurisdiction could hardly be expected to apply the old law which the plaintiff had cast aside. As to the suggestion that article 14 should concentrate on monetary compensation for injury or damage, he wondered whether the plaintiff might not have to establish the defendant's criminal guilt before suing him for compensation. Some elucidation of that point would be welcome.

55. Mr. USHAKOV said that, in the Soviet Union, legislation relating to civil proceedings also provided for settlement out of court and that the majority of suits brought against States were settled in that way.

The meeting rose at 1.05 p.m.

1770th MEETING

Monday, 30 May 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/357,[1] A/CN.4/363 and Add.1,[2] A/CN.4/371,[3] A/CN.4/L.352, sect. D, ILC(XXXV)/Conf.Room Doc.1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[4] (*concluded*)

ARTICLE 14 (Personal injuries and damage to property) *and*

ARTICLE 15 (Ownership, possession and use of property)[5] (*concluded*)

1. Mr. DÍAZ GONZÁLEZ said that, in his opinion, draft article 14 served no useful purpose, as Mr. Flitan had amply demonstrated at the 1768th meeting. The cases mentioned by the Special Rapporteur in his fifth report (A/CN.4/363 and Add. 1) were not sufficient to justify drafting an article which formulated a new exception to the principle of jurisdictional immunity of States and their property, at the risk of transforming the general rule into a residual rule. In view of the existence of the Vienna Conventions on Diplomatic Relations and on Consular Relations, there was no question of filling a legal void. Most of the cases upon which the Special Rapporteur based the proposed exception were cases of contraventions of road traffic regulations. Yet, in order to be permitted to drive a motor vehicle, it was necessary in most States to be in possession, not only of a driving licence, but also of third-party insurance. It was well known that the numerous cases of traffic accidents brought to the attention of ministries were generally settled by negotiation without any great difficulty. Hence, there was no need to provide an exception to the principle of jurisdictional immunity in a matter in which hardly any problems arose in practice, and article 14 should be deleted.

2. He experienced no difficulty regarding article 15 except, possibly, from the point of view of the translation into Spanish.

3. Mr. JACOVIDES said that his approach to the topic under consideration had not changed since he had spoken at the Commission's previous session.[6] The views he had expressed at that time also applied to the current discussion on draft articles 14 and 15, in connection with which the Commission's aim should be to devise practical solutions and to avoid doctrinal differences of opinion.

4. Mr. MAHIOU said that he would refrain from discussing general principles, for they were sometimes difficult to reconcile. In his fifth report (A/CN.4/363 and Add. 1, paras. 68 and 99), the Special Rapporteur spoke of a recent trend towards restricting State immunity. In reality, however, that trend had been extensively debated and widely challenged, and it could more appropriately be described as but one of a number of trends in some legislations and some judicial practices.

5. Other passages in the report might have been drafted in more qualified terms in order to avoid ambiguous interpretations. In view of the judicial practice of States cited in connection with draft article 14 (*ibid.*, paras. 81–82), it would have been preferable not to assert so emphatically (*ibid.*, para. 67) that the "distinction between *jus imperii* and *jus gestionis* . . . appears to have little or no bearing in regard to this exception". That distinction was rejected by the Special Rapporteur, but it might well be appropriate to take into consideration the

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[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem.*

[4] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook . . . 1982*, vol. II (Part Two), pp. 99–100; (*b*) art. 2: *ibid.*, pp. 95–96, footnote 224; revised text (para. 1 (*a*)): *ibid.*, p. 100; (*c*) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (*d*) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook . . . 1980*, vol. II (Part Two), p. 142; (*e*) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook . . . 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*f*) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (*g*) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

[5] For the texts, see 1762nd meeting, para. 1.

[6] *Yearbook . . . 1982*, vol. I, p. 78, 1711th meeting, paras. 29–32.

concept of an "act of government", a concept familiar to the case-law of countries such as France and Algeria and one that could lead to the State being exempted from all responsibility and protected from being taken to court. The Special Rapporteur affirmed (*ibid.*, para. 75) that:

The sovereignty or governmental authority of a foreign State is not being challenged when . . . the State answerable for the physical damage to persons or property is called upon to come to the aid and assistance of the injured party.

Generally speaking, that statement was perhaps correct, but the circumstances in which proceedings were instituted against a State had to be taken into account. The proceedings could also go awry and encroach on the sovereignty and authority of the State.

6. Article 14 could be maintained only if it was clarified and redrafted. More particularly, it should be made clear whether the article related exclusively to civil liability or whether it also covered criminal responsibility. Similarly, he doubted whether it was appropriate to deal with personal injury and damage to property in one and the same sentence. The numerous comments in connection with the last part of the provision, stipulating that the author of the injury or damage had to be present in the territory of the forum State at the time of the occurrence of the act or omission, also revealed that the proviso called for elucidation.

7. As to draft article 15, paragraph 1 (*d*) was concerned with a State establishing title to property before the court of another State and covered cases in which the right or interest claimed was "neither admitted nor supported by prima facie evidence". The question arose as to who it was that admitted or supported such a right or interest, for the process of admission or support could, unfortunately, give rise to problems in, for instance, matters pertaining to nationalization. If nationalized property was exported and a claim to title was subsequently made in connection with the property, the very principle of nationalization ran the risk of being undermined. The report did not appear to offer any solution to that aspect of the problem, yet rules on the matter were to be found in General Assembly resolutions and, in particular, in the Charter of Economic Rights and Duties of States.[7]

8. Lastly, according to the Special Rapporteur (*ibid.*, para. 112):

If a State acquires property in the form of ownership or other proprietary rights and the property, whether immovable or movable, is situated in the territory of another State, the acquisition of such property is made possible only by virtue of the application of the internal law or private law of the State of the *situs*.

The reference to private internal law was incorrect for countries such as Algeria, where the bulk of immovable property was owned by the State and its sale was regulated, at least in part, by administrative law. A solution had to be found to the special problems posed by legal systems which drew a distinction between public and private internal law.

9. Mr. JAGOTA said that draft article 14 relating to personal injuries and damage to property caused by a tortious act or omission which could be attributed to a foreign State and for which that State could be sued in certain conditions was, like draft article 13, being proposed in order to reflect an emerging trend, and it raised a number of practical problems. There was very little case-law to support the terms of the article, which had been justified primarily on the emotional grounds that innocent victims should not be left without remedy. As the Special Rapporteur had pointed out in his report (A/CN.4/363 and Add. 1, para. 75), "To be humane and merciful is not inconsistent with statehood or sovereignty", and humanity also deserved the protection of international law. The Special Rapporteur had gone on to conclude (*ibid.*, para. 99) that a trend was emerging in favour of relief being granted to individuals for personal injuries or damage to their property, but had nevertheless cautioned that the trend should not be given unlimited scope and that an international standard was needed to prevent national legislation from determining international law.

10. His own approach to the article was the same as in the case of draft article 13, primarily because he considered it essential to provide for the possibility that a foreign State could be held responsible and be sued in local courts for acts or omissions causing personal injuries or damage to property. The cases covered by draft article 14 generally involved traffic accidents caused by vehicles operated by members of diplomatic, consular or special missions. From personal experience, he had found that ministries of foreign affairs were reluctant to leave questions of liability in such matters to the courts and preferred to deal with them at the diplomatic level, their concern being to ensure the maintenance of friendly international relations. Personal injuries and damage resulting from traffic accidents involving vehicles owned by a foreign State were thus covered by compulsory insurance. In his own country, even risks of injuries or damage caused by members of the families of foreign diplomats required insurance cover, and cases were handled through diplomatic channels. Similarly, agreements between the Government of India and international organizations relating to, for example, the organization of international conferences in India always included indemnity provisions on compensation for personal injuries or damage to property.

11. It could thus be seen that, by and large, India's experience was not consistent with the provision embodied in draft article 14. However, as he had said (1764th meeting) during the discussion on draft article 13, India was learning on the rebound and, by granting consent for suits to be brought against the agencies of foreign States under section 86 of the Code of Civil Procedure,[8] it had begun to treat the agencies of foreign States in its territory in the same way as its agencies were treated in the territories of those States.

[7] General Assembly resolution 3281 (XXIX) of 12 December 1974.

[8] India, Ministry of Law, Justice and Company Affairs, *The Code of Civil Procedure, 1908 (As modified up to the 1st May 1977)*, pp. 32–33.

12. If the draft set some kind of international standard for suits against foreign States or for the adoption by India of a new law on State immunity, the emerging trend mentioned by the Special Rapporteur would be useful as a background. Accordingly, he was ready to support further consideration of draft article 14, provided the exception was restrictive and conformed to the limitations described in the fifth report. The article should thus apply to State acts and should exclude acts of diplomatic, consular or special missions. In addition, it should be made clear that the article applied only to tortious acts, not to acts which attracted criminal liability, and only to damage to tangible property, as indicated in the report (A/CN.4/363 and Add. 1, para. 100).

13. The expression "Unless otherwise agreed", at the beginning of the article, should be retained in order to reflect the practice of States, which might conclude specific agreements containing indemnity clauses. The word "tortious" should be inserted before the word "act" to show that the provision did not cover criminal liability, and the whole phrase, thus amended ("if the tortious act or omission which caused the injury or damage in the State of the forum occurred in that territory"), might be followed by the words "or had its direct effect in that territory", the purpose being to take account of the possibility that an act might originate beyond the territory of the forum State but cause damage or injury in that State. The words "and the author of the injury or damage was present therein at the time of its occurrence" should simply be deleted.

14. Unlike draft articles 13 and 14, draft article 15 was founded on evidence from State practice. The Special Rapporteur had concluded (*ibid.*, para. 140) that, in the area of the ownership, possession and use of property, there was a general exception to State immunity established by national legislation, case-law, international conventions and international opinion. Draft article 15, whose wording was based on that of the United Kingdom's *State Immunity Act 1978*, [9] the United States *Foreign Sovereign Immunities Act of 1976*[10] and the 1972 European Convention on State Immunity,[11] dealt with the question of the sovereignty of the State in which the movable or immovable property of a foreign State was located. Any foreign State which acquired property in a forum State was thus governed by the law of the forum State, came under the jurisdiction of that State, and could not claim immunity in matters relating to such property. Otherwise, extraterritoriality would apply and extraterritoriality was, as the Special Rapporteur had observed, contrary to State practice and to the principle of the sovereign equality of States.

15. Nevertheless, it would be going too far to say that draft article 15 reflected the established practice of States, which was that a foreign State acquiring property or any property right in the forum State did so under the law of that State, and there was no extraterritoriality in respect of foreign State property. On the other hand, it was not established practice that the courts of the forum State always had jurisdiction to apply the local law in respect of a foreign State's title to and use of property. Developments in that direction had been taking place only since 1976. The Special Rapporteur's findings (*ibid.*, para. 105) thus afforded some evidence of an emerging trend, but his conclusions were too categorical (*ibid.*, para. 111).

16. Prior to 1976, India's practice in proceedings relating to its title to or use of property had been to approach the ministry of foreign affairs of the State in which the property was located. The ministry would then issue a certificate of immunity recognizing title and indicating that the property belonged to India. Such a certificate would be taken by the local courts as conclusive evidence of the status of that property. Since 1976, however, certificates of that kind were no longer issued by the United States and were also being discontinued in other countries which had adopted legislation similar to the United States *Foreign Sovereign Immunities Act*. The trend now, as indicated in the report (*ibid.*, para. 105), was for the foreign State to appear in the courts of the forum State in order to prove its title to or interest in the property. If such proof could be provided to the court's satisfaction, the foreign State could claim, and would be granted, immunity.

17. India had been very slow to accept that procedure and had refused in some cases to appear before the courts of the forum State concerned. In the past five years, however, the Government of India had been compelled to appear in the courts of other States in order to prove its title or interest in property and plead immunity. Again, it had had to rely on section 86 of the Indian Code of Civil Procedure so as to allow the same kind of suits concerning property rights to be brought against the diplomatic missions of foreign States, and it had done so by giving consent justified on the grounds of reciprocity. There was still no law regulating the jurisdiction of Indian local courts over the property of foreign States located in India.

18. Since his country was very familiar with the trend in international law that had been emerging since 1976, he was able to say that draft article 15 did reflect that trend, but that it did not reflect the established practice of States. He agreed with the substance of paragraph 1, particularly since the expression "Unless otherwise agreed" made draft article 15 a residual rule. Paragraph 1 (*d*) might be examined more closely to see whether the saving clause it embodied would cater for Mr. Mahiou's concern about nationalization. Further consideration should also be given to paragraph 2 in order to make it clear exactly what was to be excluded from the scope of article 15 in matters pertaining to "the inviolability of premises of diplomatic or special missions or consular premises".

19. Mr. USHAKOV emphasized that articles 14 and 15 were concerned with lawful State activities. A case in which a State placed a time bomb in the territory of another State would involve its responsibility under

[9] See 1762nd meeting, footnote 11.

[10] *Ibid.*, footnote 17.

[11] *Ibid.*, footnote 7.

international law and would not raise any question of jurisdiction by the courts of the other State.

20. Sir Ian SINCLAIR, referring to Mr. Jagota's comments, said that it had been the practice in the United Kingdom well before 1976 to require foreign States to provide *prima facie* evidence of their title to or claim of interest in property. In *Juan Ysmael & Co. Inc.* v. *Government of the Republic of Indonesia* (1954),[12] a writ *in rem* against a steamship chartered by the Government of Indonesia and used for the carriage of troops had been issued at the instance of the appellant company, which had claimed possession as the owner of the steamship. The Indonesian Government had asserted immunity on the ground that the writ had implicated a foreign sovereign State and that the Government had either been the owner of the vessel or had been in possession or control or entitled to control of the vessel. In an important ruling, Earl Jowitt had stated that

> . . . a foreign Government claiming that its interest in property will be affected by the judgment in an action to which it is not a party is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. . . .[13]

21. Hence it had not been the practice in the United Kingdom actually to require a foreign State to prove its title to property before it could obtain immunity as a consequence of intervening in a case against a third party in order to assert its claim or interest in the subject-matter of the proceedings. The foreign State did, however, have to produce prima facie evidence to satisfy a court that its claim or interest was not manifestly defective.

22. Mr. JAGOTA said his point had been that, prior to 1976, the Government of his country would not have had to appear in the courts of other States in matters relating to Indian property located in those States unless such property had already been attached or seized. No such case had ever arisen, but a case involving the seizure of the cargo of an Indonesian ship had been brought before a local Indian court in 1953. The issue had been whether Indonesia should prove its title to the cargo to the satisfaction of the local court or whether the matter should be referred to the Indian Foreign Office for a decision on the question of immunity. The Foreign Office had intervened and, ultimately, the court proceedings had been discontinued.

23. In several other cases in India involving foreign States, the Supreme Court had ruled that, before proceedings could be initiated against those foreign States, the prior consent of the Government of India had to be obtained under section 86 of the Code of Civil Procedure. Such consent had not been obtained and the proceedings had been discontinued.

24. Some of the cases which he had personally dealt with in the United Kingdom and the United States had involved the question of whether India should appear before local courts to prove its title to property and plead immunity or whether it should request the foreign ministry to intervene to protect Indian immunity in the local courts. In all such cases prior to 1976, the proceedings had been dealt with by the foreign ministries concerned. The general rule had thus been that the foreign State did not have to appear before the local courts to prove its title to property and claim immunity and that the foreign ministry could be approached for a suggestion of immunity.

25. Mr. McCAFFREY said it was generally true that a foreign State owning property located in the United States could appear in court only to make a prima facie showing of its interest in that property, depending, of course, on the purpose for which the property was being used.

26. Before the adoption in 1976 of the *Foreign Sovereign Immunities Act*, it had been possible to attach property of a foreign State as a basis for jurisdiction, even when the claim had not related to that property. Since 1978, however, that basis had been eliminated by the United States Supreme Court unless the dispute related directly to rights in the property; moreover, it had not been included in the *Foreign Sovereign Immunities Act.*

27. Draft article 15, paragraph 1 (*d*), nevertheless raised an entirely separate matter and he did not think that it would be an obstacle to the exercise of jurisdiction by courts in his country. If a foreign State had no interest in the property, that could certainly be shown by a simple court appearance. On the other hand, when a foreign State produced prima facie proof of its interest in the property, that would, of course, implicate it in the litigation if the purpose of that litigation was to adjudicate the rights and interest of the parties concerned. It was therefore necessary to focus on the purpose for which the property was being used because, if the rights and interests of the parties, including those of a foreign State, were being determined, the foreign State might then have its rights and interests adjudicated.

28. Sir Ian SINCLAIR said that Mr. Jagota might be perfectly right as far as United States practice was concerned, but in the United Kingdom there had never been a time when the Foreign Office had made a suggestion of immunity to a court of law. The Foreign Office was merely prepared to certify to certain facts peculiarly within its knowledge, but any certificate it gave to a court was limited to those facts and in no sense suggested that immunity should be granted.

29. In proceedings between two private parties in which a foreign State might wish to intervene to assert its title to or interest in property, the foreign State had to enter a "conditional appearance" for that purpose.

30. In the *Juan Ysmael* case, there had been a change from the pre-existing case-law because the court had held that it could not rely on the assertion by the foreign State that it had a title to or interest in the property in question. The court had had to satisfy itself that the asserted claim was not illusory or manifestly defective. That had not meant that the foreign State had had to prove its title to the property. It had merely had to make a prima facie

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[12] United Kingdom, *The Law Reports, House of Lords and Judicial Committee of the Privy Council, 1955*, p. 72.

[13] *Ibid.*, pp. 89–90.

showing of sufficient legal interest in the property to justify its claim of immunity.

31. Mr. SUCHARITKUL (Special Rapporteur) noted that his report had provoked a number of divergent opinions, both assenting and dissenting, as was only to be expected. Many legitimate questions had been asked, many doubts expressed and many basic problems restated. Mr. Flitan (1768th meeting) and Mr. Koroma (1766th meeting) had referred to the intellectual honesty displayed in his report, but the members of the Commission had demonstrated the same quality in their comments.

32. Mr. Ushakov (1767th meeting) had expressed doubt as to whether there was any real justification for draft article 14, in view of the fact that it would apply to so few cases. For his part, he agreed with Mr. Ushakov, Sir Ian Sinclair (*ibid.*), Mr. Razafindralambo (1769th meeting) and other members that cases involving actions by ambassadors, ministers of foreign affairs, consuls, *ad hoc* special envoys, delegates to international organizations or members of the armed forces which resulted in injury to private persons or property should be covered by existing legislation and therefore excluded from the scope of the article, as should matters involving criminal acts or penal action.

33. Mr. Ni (1768th meeting) had voiced concern that the provisions of article 14 might open a floodgate of litigation. It was true that the Commission should not appear to be encouraging litigation or malicious prosecutions in preference to the settlement of disputes by peaceful means. In that regard, Mr. Koroma (*ibid.*) and Mr. Calero Rodrigues (*ibid.*) had referred to the alternative of negotiation through diplomatic channels. However, the purpose of the article was to regulate the flow, rather than encourage a flood, of litigation.

34. Sir Ian Sinclair (1767th meeting) had noted that, in cases of damage or injury to private property or persons in one State resulting from the acts of another State, the practice was to attempt to reach an amicable settlement or, if that was not possible, to exhaust existing local remedies. Such cases had little to do with the ministry of foreign affairs of the host State. The Government of the United States had gained useful experience in that regard. From 1952 to 1976, the United States Department of State had acted not only as a foreign office, but also as a court of law, since every case involving State immunities had had to be argued before it. During that time it had heard more than 100 such cases and had finally decided that it was for the judicial authorities to deal with matters involving the determination of State immunity. In countries such as Thailand, Japan, Iraq, India and China, which had suffered from extraterritorial jurisdiction, efforts had been made to assert the independence of the local judiciary. In that regard, Mr. Thiam had rightly pointed out that jurisdictional immunity was, at best, an exception to the general rule of territorial sovereignty.

35. While he agreed with Mr. Calero Rodrigues (1768th meeting) that the argument in favour of invoking justice might be weak because it applied to each and every case involving jurisdictional immunities, such a trend none the less existed. Under the Convention on the Privileges and Immunities of the United Nations[14] and the Convention on the Privileges and Immunities of the Specialized Agencies,[15] the Secretary-General of the United Nations and the Executive Heads of the specialized agencies were required to waive immunities where the assertion of them would impede the course of justice. Nor was the argument in favour of negotiation put forward by Mr. Calero Rodrigues, Mr. Koroma and Mr. Ni entirely appropriate, since the territorial State did not always come to the assistance of injured private parties, particularly when other valid legal remedies were available. Draft article 14 would in no way discourage negotiations through diplomatic channels; rather, it would expedite them.

36. It had also been argued that it would be premature to incorporate article 14 in the draft because the opinions of writers on the subject had not yet crystallized. However, at its session in Hamburg, the Institute of International Law had, on 11 September 1891, adopted draft international regulations on competence of courts in proceedings against foreign States, sovereigns or heads of State (*projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etats étrangers*), article 4, paragraph 6, of which stated that the only actions admissible against a foreign State were actions for damages resulting from an offence or tort committed in the forum State.[16] Consequently, draft article 14 proposed nothing new, since a hundred years earlier there had already been an emerging trend which, if anything, had later been reinforced by international conventions and national legislation. Further evidence of that trend was contained in a letter to the Legal Counsel of the United Nations dated 3 July 1979 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom, stating that the State Immunity Bill, as presented to Parliament, had been circulated to all diplomatic missions in London and that no State to which the draft legislation had been sent had offered substantial criticism of its terms.[17]

37. While he agreed with Mr. Ushakov that the draft article should not deal with matters which could be excluded, it should none the less be remembered that existing international instruments did not deal with all areas of activity in which questions of jurisdictional immunities of States and their property might arise, nor did they apply to all countries. Consequently, the need for further regulation was all too apparent. In any event, the existence of other international instruments was taken into account by the use of the proviso "Unless otherwise agreed". Nevertheless, he was prepared to accept the insertion of a more general provision in draft article 11.

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[14] United Nations, *Treaty Series*, vol. 1, p. 15.

[15] *Ibid.*, vol. 33, p. 261.

[16] See 1762nd meeting, footnote 9.

[17] See United Nations, *Materials on Jurisdictional Immunities* . . ., p. 97.

38. Mr. McCaffrey had wondered whether the *Foreign Sovereign Immunities Act of 1976* conferred or prohibited jurisdiction by the courts, as in the recent case *Sedco, Inc.* (*Petróleos Mexicanos*) (1982).[18] That was indeed a moot point.

39. Sir Ian Sinclair (1767th meeting) and Mr. Mahiou had expressed doubts as to whether a distinction should be drawn between *acta jure imperii* and *acta jure gestionis*. In that regard, he agreed with Sir Ian Sinclair's suggestion that perhaps the distinction should not be expressed in such categorical terms as to be misleading to those who were less familiar with the problems involved than was the Commission.

40. With reference to the observations made by Mr. Ushakov (*ibid.*), he was prepared to accept that the Soviet practice was to safeguard immunities, though as yet there appeared to be no recorded judicial decision to that effect.

41. The problem was to find some way of enlarging the scope of draft article 14, provided it remained a residual rule. As Mr. Jagota had proposed, a second paragraph might be inserted to provide greater balance, since the provisions of the draft article would not apply in the event of hostilities. For all that, the question of military hostilities lay somewhat outside the scope of the topic.

42. He was ready to accept Sir Ian Sinclair's proposal concerning compensation (*ibid.*, para. 33), excluding any reference to penal matters. On the question of diplomatic immunities, which was also dealt with in draft article 15, it was true that all matters involving accidents with warships should be dealt with later on in what was to be draft article 19. While India and the United States had effective legislation concerning compulsory insurance, such was not the case in Thailand. On one occasion, the Vice-President of the Judge Advocate's Court had been involved in a traffic accident with an official of an international organization. The court hearing the case had been informed by the Protocol Department that the official in question was included in the list of persons who were immune from the jurisdiction of the courts, and the case had been dismissed. Subsequently, however, the Ministry of Foreign Affairs had informed the court that the official in question enjoyed immunity from jurisdiction only *ratione materiae*. In that regard, he agreed with Mr. Ushakov (1767th meeting) that diplomatic, consular or other immunities were State, rather than personal, immunities. However, he also concurred with the view of Mr. Lacleta Muñoz (1769th meeting) that the matter went further than that.

43. Mr. McCaffrey (*ibid.*) had raised the question of whether diplomatic immunities were broader than State immunities. Article 31 of the 1961 Vienna Convention on Diplomatic Relations confirmed that ambassadors enjoyed immunity *ratione materiae* as well as *ratione personae*, thus covering seemingly wider areas of activity than State immunity. However, it was evident for a Buddhist that the immunity enjoyed by diplomatic agents *ratione personae* was only temporary and did not survive their terms of office. Article 39 of the 1961 Vienna Convention was explicit on that point. A diplomat enjoyed immunity *eundo, morando et redeundo*, but no further. The sending State could at any time waive the immunity enjoyed by its diplomats, who, in turn, could not waive their immunity *ratione materiae* or *ratione personae* without authorization from the State. In any event, even during their terms of office, diplomatic representatives could be sued in the courts of the sending State. As Mr. Lacleta Muñoz had stated, the basis for diplomatic immunities was functional necessity. With regard to heads of State, the problem was more straightforward in that their visits were usually at the invitation of the receiving State and of limited duration, and they were placed in the category of internationally protected persons. However, an ex-sovereign or a former head of State could be sued in a court of another State in respect of personal or non-official acts performed during the course of his public office.

44. With reference to Mr. Jagota's observations regarding draft article 15, he admitted that the exception provided for in the draft article might not have been universally established. In the United Kingdom, assertion of title by a State had been accepted as grounds for immunity as early as 1924, and in the *Gold bars* case in 1952,[19] but not in the *Hong Kong Aircraft* case in 1953.[20]

45. In response to Mr. Mahiou's comments, he wished to confirm that article 15 was concerned with private law title according to the *lex situs* and not with questions of nationalization or State cession, which would be decided by the ICJ.

46. He experienced no difficulty in accepting the improvements to article 15, paragraph 1, proposed by Sir Ian Sinclair (1767th meeting, para. 36) and, with regard to paragraph 2, he agreed with Mr. Jagota that the concept of inviolability was wider than that of immunity. While immunity was negative in substance, in that it constituted the consent of the State not to exercise jurisdiction, inviolability represented a positive obligation on the part of the State. In addition, the question of inviolability was not entirely without consequences. In Thailand, for example, many examples could be found of embassies which were not the property of a foreign government but were rented from private individuals. If the original owner died and the heirs did not wish to continue the arrangement, the Ministry of Foreign Affairs was obliged to negotiate the matter. However, even if the individuals in question won their case, it would be impossible for them to evict the embassy staff, since they could not enter the premises.

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[18] United States of America, *Federal Supplement*, vol. 543 (1982), p. 561.

[19] *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England* (*The All England Law Reports, 1952*, vol. 1, p. 572).

[20] *Civil Air Transport Inc.* v. *Central Air Transport Corp.* (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1953*, p. 70).

47. In respect of an observation made by Mr. Ushakov, he pointed out that the decision of the District Court of Tokyo in the *Limbin Hteik Tin Lat* v. *Union of Burma* case had not been quoted in its entirety since the text was reproduced in the volume of the United Nations Legislative Series concerning jurisdictional immunities.[21]

48. Lastly, it was his impression that draft article 15 appeared to give rise to drafting rather than substantive problems.

49. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 14 and 15 to the Drafting Committee.

It was so agreed.[22]

The meeting rose at 6 p.m.

[21] See 1769th meeting, footnote 7.

[22] For draft article 14, see the decision by the Drafting Committee, 1805th meeting, para. 59 *in fine*; for draft article 15, see the consideration of the text proposed by the Committee, *ibid.*, paras. 69–74, and 1806th meeting, paras. 78–87.

1771st MEETING

Tuesday, 31 May 1983, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV
later: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

State responsibility (A/CN.4/354 and Add.1 and 2,[1] A/CN.4/362,[2] A/CN.4/366 and Add.1,[3] ILC(XXXV)/Conf.Room Doc. 5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)[4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN recalled that, for part 2 of the draft articles on State responsibility, the Special Rapporteur, in his second report, had submitted a set of five articles (arts. 1–5),[5] which the Commission, after consideration at its thirty-third session, had decided to refer to the Drafting Committee, but that the latter had been unable to examine them for lack of time. The Special Rapporteur, taking account of the comments made by the Commission on the first set of articles, had submitted in his third report (A/CN.4/354 and Add.1 and 2, paras. 145–150) a new set of six articles (arts. 1–6). The Commission, at its previous session, had decided to refer that second set of articles to the Drafting Committee and had confirmed its referral of articles 1–3 of the first set.

2. The texts of the draft articles referred to the Drafting Committee for consideration at the current session were the following:

Draft articles submitted by the Special Rapporteur in his second report

Article 1

A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation.

Article 2

A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.

Article 3

A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.

Draft articles submitted by the Special Rapporteur in his third report

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

Article 2

The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.

Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

Article 6

1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:

(*a*) not to recognize as legal the situation created by such act; and

(*b*) not to render aid or assistance to the author State in maintaining the situation created by such act; and

(*c*) to join other States in affording mutual assistance in carrying out the obligations under (*a*) and (*b*).

2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in

[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem.*

[4] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

[5] *Yearbook . . . 1981*, vol. II (Part One), pp. 100–101, document A/CN.4/344, para. 164.