Document:-
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Summary record of the 1923rd meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

origin. But the commentary should reserve the case in which a State was led to take measures against military equipment paid for but not yet delivered, following a decision to apply sanctions taken by the United Nations.

47. Lastly, on the subject of regional international organizations, he referred to the case of several States belonging to a monetary union and having a common issuing bank. It had happened that one of the member States of such a union had seized all the banknotes of the issuing institution in its territory and put them in circulation, even though some of them had not been issued. Since banknotes enjoyed absolute immunity, it was essential to mention the property of a regional international organization.

48. In conclusion, he emphasized the need to determine the causes of the main differences of opinion in the Commission, to set limits to them and to work together in a spirit of mutual understanding.

The meeting rose at 1.05 p.m.

1923rd MEETING

Wednesday, 10 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 21 (Scope of the present part)

ARTICLE 22 (State immunity from attachment and execution)

ARTICLE 23 (Modalities and effect of consent to attachment and execution) *and*

ARTICLE 24 (Types of State property permanently immune from attachment and execution)[4] (*continued*)

1. Mr. USHAKOV said that, in political terms, he understood the position adopted by some members of the Commission and some Governments regarding cases involving persons, whether natural or legal: they always championed persons, contrary to the rules of international law or any well-established theory. For example, they had advocated protection of the interests of persons when the Commission had sought to define the term "State debt" in the draft articles on succession of States in respect of State property, archives and debts. In their opinion, the definition should have covered debts which, under a capitalist system, persons could contract towards the State, even though international law did not deal with relations between States and natural or legal persons. The draft definition had covered not only any financial obligation of a State towards another State or any other subject of international law, which had been acceptable because international law governed the resulting international relations, but also any other financial obligation, in other words any debt towards a State contracted by a natural or legal person. Obviously such a debt had to be paid, but it had to be paid in accordance with private international law, not public international law. The Commission had deleted the latter part of the definition, following a tied vote on the matter.

2. Some members had spoken of triangular relations between two States and a natural or legal person and had insisted on the need to protect the interests of the latter. When their attention was drawn to the fact that State sovereignty was essential in the circumstances and that, in the same way as a State could not be subject to the governmental authority of another State, it could not itself exercise its State power *vis-à-vis* another State, those members retorted that such considerations were purely theoretical and that account must be taken of practice. They argued that the State did not enjoy immunity for its commercial activities but that all its other activities were undertaken in the exercise of its sov-

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

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

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, para. 4.

ereignty. Those views were firmly founded in legal theory, since they reflected the distinction between *acta jure gestionis* and *acta jure imperii*. In the case of *acta jure gestionis*, the State was assimilated to a natural or legal person and was denied immunity. Such assimilation was not possible, however, since a State which engaged in commerce did not do so for the same reason as did a natural or legal person. Unlike the latter, it was not seeking to make any profit; its activity was undertaken solely in the interests of its population, of society, of the national economy. Accordingly, when an exception to the principle of immunity was proposed for ships "in commercial and non-governmental service", some members could not agree to the term "non-governmental", because it ran counter to the concept they had adopted of *acta jure gestionis*.

3. By denying States, and particularly developing countries, immunity for commercial activities, some people were seeking to avert possible rivalry between States and legal persons such as multinational corporations. In a capitalist system, such corporations would prefer to be assimilated to States rather than act as rivals. That none the less overlooked the fact that any rivalry was largely ruled out, for corporations of that kind were, commercially and financially, more powerful than States. States were not protected against multinational corporations: rather it was the reverse.

4. Some members of the Commission placed limits on the sovereignty of the territorial State or the receiving State, taking the view that any nationalization had to be recognized by other States, since it affected the interests of natural or legal persons. In his opinion, nationalization was a sovereign act by a State and had no reason to be in keeping with any rule of international law.

5. Lastly, some members seemed to consider that international law could be twisted when the interests of natural or legal persons, particularly large capitalist companies, were involved.

6. Mr. McCAFFREY commended the Special Rapporteur for his inductive and empirical approach to a difficult topic, one which involved unique problems that lay at the crossroads of public international law and private international law. It also involved interaction between different systems: the centralized economy system and the free enterprise system. It was a mistake to say that the purpose of the latter system was purely to benefit individuals; the free enterprise system was of benefit to society as well. All that could be said was that it achieved that purpose in a different way. Nor was it correct to suggest that private individuals engaging in trade benefited only themselves. Reference had been made during the discussion to the activities of multinational corporations. Corporations, however, belonged to those who had invested in them and by no means all of them were large investors. It was significant that developing countries not infrequently found it to their advantage not only to trade with multinational corporations, but also to engage in joint ventures with them. In view of those considerations, he urged the Commission to steer clear of discussions on the subject of rival economic systems, discussions which could only distract it from its work. The Commission's goal should be to try to harmonize the two systems as far as possible in connection with the topic under consideration.

7. The Special Rapporteur had demonstrated convincingly that over the years, and particularly over the past half-century, States had increasingly recognized in their relations with one another that there were some situations in which considerations of justice and fairness dictated that foreign States should not enjoy judicial immunity. At the same time, States had also recognized that their relations *inter se* were facilitated and tended to be more harmonious if they accorded, by way of comity, judicial immunity to other States in cases involving governmental or sovereign acts or functions. It was comity that explained how it was possible to reconcile the two sovereignties involved — that of the foreign State and that of the territorial State.

8. The present topic was of critical importance to many Governments, including that of the United States of America. In 1952, the United States Department of State had adopted a restrictive or functional approach to State immunity in the Tate Letter (see A/CN.4/376 and Add.1 and 2, paras. 160-161). That being so, it was of interest to consider the attitude of the United States in the reverse situation, in other words when faced by claims before foreign courts. The Department of Justice was responsible for defending such cases and, in the 1950s, had usually instructed the foreign lawyers retained by it to plead State immunity before the foreign courts. In the 1960s, it had become the practice of the Department of Justice to avoid claiming immunity in countries that followed the restrictive principle but to invoke immunity in those countries still holding to a more absolute doctrine. In the 1970s, the Department of Justice had decided not to plead sovereign immunity in foreign courts in cases where, under the Tate Letter standards, a foreign State would not be accorded immunity in the United States courts.

9. In 1976, the United States Congress had adopted the *Foreign Sovereign Immunities Act*. With regard to the question of execution, the position under the Act was not altogether simple. It attempted to strike a balance between the interests of the foreign State and those of the private individual seeking redress. The 1976 Act drew a distinction between the position of a foreign State and that of a foreign State agency or institution. With regard to the former, it allowed execution against property of the State used for commercial activities, with the important proviso that there was a connection between the property and the commercial act which had given rise to the claim on which the judgment was based. With regard to State agencies or institutions, on the other hand, execution was possible against any property of the agency or institution provided that it was engaged in commercial activities in the United States. Similar distinctions could be found in the draft convention adopted by the International Law Association at Montreal in 1982 (see A/CN.4/388, paras. 81-82). In reviewing the present draft articles, the Commission could perhaps

draw on those ideas, particularly the notion of establishing a link between the claim and the property for the purposes of execution.

10. One development worth mentioning was the proposal by the American Bar Association for amendments to the 1976 Act, a proposal which had now taken formal shape as Bill No. S. 1071 submitted to the United States Senate. The general effect of the proposed amendments would be to expand the possibilities of enforcement against foreign States. The United States Government itself took a cautious view of the proposed amendments, mindful of the impact their adoption would be bound to have on foreign relations and of the exposure to reciprocity. The amendments were not at all certain of success, but the very fact that they had been submitted showed that the pressure in the United States was in the direction of greater enforcement possibilities and of more restricted State immunity.

11. Another recent development concerned the issue of enforcement of judgments in tort cases. A judgment awarding damages at tort had been rendered against a foreign State by a District of Columbia court in *Letelier* v. *Republic of Chile* (1980),[6] following which an attempt had been made to execute the judgment against that State's national airline. The Federal Court of Appeals had decided in November 1984 that the 1976 Act contained no provision for the enforcement of a judgment in tort cases, except where the judgment arose out of the commercial activities of the foreign State concerned. It would of course be very rare for a tort action to arise out of commercial activities. The Court had arrived at the remarkable conclusion that Congress had in that instance created "a right without a remedy".[7]

12. As to the seventh report of the Special Rapporteur (A/CN.4/388), he welcomed the emphasis placed on the fact that property was an object and not a subject of rights. In his introduction, the Special Rapporteur referred to "the general rule of State immunity from attachment, arrest and execution" (*ibid.*, para. 12). Elsewhere, the Special Rapporteur stated: "Proceeding from the assumption that a general rule is established in support of immunity from attachment, arrest and execution ..." (*ibid.*, para. 43). Cases in which State property was not immune thus appeared to be exceptions to that general rule.

13. In reality, it could equally well be affirmed that the general rule was the one which asserted the territorial sovereignty and jurisdiction of the State of the forum; cases of immunity in favour of a foreign State would thus appear to be exceptions to that general rule. As he saw it, no useful purpose would be served by trying to determine which of the two was the general rule and which was the exception. A more productive approach would be simply to recognize that there were cases in which immunity applied and other cases in which it did not.

14. The Special Rapporteur very appropriately distinguished carefully between immunity from attachment and execution and immunity from jurisdiction (*ibid.*, paras. 15-17). In that connection he drew attention to the former United States practice of initiating proceedings against a foreign State, or indeed against any foreign person, by attaching their property—something which was no longer possible under the law as it now stood. It was essential to keep immunity from jurisdiction separate from immunity from execution. With regard to pre-attachment, he favoured the solution indicated by the Special Rapporteur (*ibid.*, para. 37), but would like to know the basis for such a solution.

15. He agreed with those members who had suggested that draft article 21 was unnecessary and could be deleted. Its provisions raised more questions than they answered.

16. Draft article 22 constituted the core of part IV, but the text could be greatly simplified, a course that would also have the advantage of removing unessential elements that had given rise to difficulties. The words "In accordance with the provisions of the present articles", in paragraph 1, should be deleted and he supported Sir Ian Sinclair's proposal (1922nd meeting, para. 31) to replace the words "is protected by the rule of State immunity" by the shorter expression "is immune", which would additionally eliminate the undesirable reference to a "rule" of State immunity. He also endorsed Sir Ian's constructive suggestion (*ibid.*, para. 30) that the words "attachment, arrest and execution" in paragraph 1 should be replaced by "judicial measures of constraint upon the use of such property, including attachment, arrest and execution". Adoption of that idea would make it possible to delete paragraph 2 altogether.

17. It would be useful to learn whether paragraph 1 (*a*) of article 22 covered arbitral awards; if not, a special provision on that subject would be necessary. As to paragraph 1 (*b*), he agreed with those members who considered that the formula "commercial and non-governmental service" was unsatisfactory and suggested that it should be replaced by a reference to property used for commercial purposes. Paragraph 1 (*c*) was a constructive provision which went no further than did article 15 of the draft and could be retained subject to a review of its wording by the Drafting Committee.

18. The content of draft article 23 should be limited to the subject-matter described in the title. The extraneous material which had been introduced into it had the effect of restricting unduly the manner in which a State could give its consent; it would also encourage disputes with regard to the giving of consent. He accordingly proposed that the phrase "provided that the property in question, movable or immovable, intellectual or industrial" in paragraph 1, together with subparagraphs (*a*) and (*b*), should be deleted. Furthermore, the suggestion to make provision for consent to be given in the course of proceedings was a useful one.

19. Draft article 24 should be deleted. It introduced a wholly new idea, amounting in effect to a rule of *jus cogens*—a rule which would preclude a State from giving its consent to execution in respect of certain types of property. He knew of no authority on which to base such a new rule. If retained, article 24 was bound to raise more questions than it would answer.

20. In short, he proposed that part IV of the draft be confined to article 22, stating the basic substance of the matter, and a shorter version of article 23, dealing with the modalities and effect of consent to attachment and execution.

21. Mr. ARANGIO-RUIZ congratulated the Special Rapporteur on the clarity and wealth of information in his seventh report (A/CN.4/388) and previous reports. All that could be said about the draft articles under consideration seemed to have already been said and he would therefore confine himself to two questions.

22. First, a bill had been submitted to the Italian Senate on 11 March 1985, too late for the Special Rapporteur to take account of it in his seventh report. The text of the bill recast to some extent Act No. 1263 of 15 July 1926, which had enforced Decree No. 1621 of 30 August 1925. Under that Act, execution measures against foreign States required prior authorization by the Ministry of Justice. Before taking its decision, the Ministry had to determine whether or not reciprocity existed. The Act had not gone uncriticized, for it conflicted with the right of any subject of law under article 24 of the Italian Constitution to take legal action. In 1963, the Constitutional Court had stated that the procedure should not be regarded as a violation of article 24, since the preferential treatment granted to foreign States had been justified by the higher demands of the general interest, more particularly the exigencies of good political and economic relations between Italy and other States.

23. The Constitutional Court had none the less noted that the 1926 Act had not been acceptable in the light of a provision in article 24 precluding any possibility of appeal to the administrative authorities or courts by a subject of law who had suffered injury because no authorization had been given to proceed to execution against a foreign State. The twofold objective of the 1985 bill was to give satisfaction to the injured party without restricting the immunity of the foreign State and, indeed, to allow the opportunity for wider application of immunity. In that connection, the bill was intended—once it became a statute—to change the existing régime in two respects.

24. To begin with, in regard to the procedure for authorization, it established a need for co-operation between the Ministry of Justice and the Ministry of Foreign Affairs, since the latter was required to give a prior opinion. Secondly, reciprocity was not the only criterion that determined whether authorization was granted or refused: it was merely one of a number, because of the fact that the Ministry of Foreign Affairs was competent alongside the Ministry of Justice. Furthermore, the text expressly reserved the provisions of international conventions and stipulated that the Ministry of Foreign Affairs must "also" take into account "the existence of the condition of reciprocity". It followed that, according to the bill, any further relevant political and economic conditions had to be borne in mind. In addition, the bill contained two provisions in favour of the injured party. One provided an opportunity for the injured party to appeal against an order refusing authorization, and the other established that, where authorization was denied, the party receiving the benefit of a final judgment would have the right to claim against the Italian State compensation in proportion to the injury suffered as a result of the denial of authorization of execution. The treatment provided under the bill for foreign States included the same treatment for international organizations. In conclusion, the bill was intended to open a wider door to the possibility, for the executive branch of the Italian State, to take account of the special relations with given States, and notably of the particular needs of developing countries.

25. Before going into greater detail on the proper "ideal" for the community of States in the matter of State immunity, he wished to point out that, at the previous meeting, Sir Ian Sinclair had rightly added to the two poles constituted by the sovereign States involved in a case of immunity from execution a third pole, namely the interested party, a natural or legal person under internal law. In addition to that "third pole", and apart from it, he thought that two entities existed alongside each other in each State and hence that four public entities came face to face in each case. Each of the two States was, on the one hand, a "power" subject to the law of nations and, on the other, a legal person under internal law. The "power" exercised its activities in the arena of international relations as a sovereign, independent entity. However, when a foreign State left the domain of international relations and began to operate within the internal law of another State, it did so not exclusively as a "power", but also as a legal person, in the same way as the State on whose territory it came to operate. Naturally, in some respects it preserved its attributes as a "power" when it was present in the host State through an ambassador, a President, a military contingent, a warship or a military aircraft. Any possible dispute or any relationship entered into in that connection was then governed by the principle *par in parem imperium non habet*.

26. But when the State came to operate within the legal system of another State, it did not present itself only as a power. In order to establish legal relations of any kind in the other State, it became a subject of municipal law, and the principle *par in parem* did not play the same role within such a sphere. It followed that anyone dealing with the problems of immunity, namely the status of the foreign State under the rules of law and the jurisdiction of the territorial State, had to recognize that the day would have to come when foreign States would be placed in a situation at least comparable to the situation of the territorial State itself, which was subject to its own internal law, in other words its constitution, its legislation and its judiciary. If mankind was to move forward, it must move in that direction, any foreign State being subject to the jurisdiction of the territorial State, as well as that State itself, although it would be difficult to conceive of such a development as an immediate goal.

27. It would be advisable, in reviewing the draft articles, for the Commission to display the greatest caution. It had to take account of course of the needs of countries which were in a weaker position in

relation to others, but without granting pointless concessions to States whose situation did not call for such concessions. Once a better economic equilibrium had been achieved, the community of States could move towards the "ideal" solution with regard to immunity. He was quite favourable to the idea of attempting to accommodate the requirements of developing countries, but thought that future possibilities should not be prejudged by the Commission.

28. Mr. KOROMA, congratulating the Special Rapporteur on his excellent seventh report (A/CN.4/388), said that, in elaborating rules on State immunity, it was essential to take cognizance of the closely related law of economic development. Indeed, it was because of the expansion of trade between States in the nineteenth century that the issue of a broad, as opposed to a restrictive, theory of immunity had arisen. Moreover, if the law on the topic was to be both relevant and comprehensive, due regard must be paid to international legal instruments such as General Assembly resolution 1803 (XVII) of 14 December 1962 on the permanent sovereignty of States over their natural resources and the Charter of Economic Rights and Duties of States,[8] of which domestic courts and international judicial and arbitral tribunals had taken notice.

29. It would have to be decided whether part IV was necessary to the draft articles. Personally, he believed that it was, in the first place because it was a generally acknowledged principle that a State could not be sued in a foreign forum without its consent, although, in the case of attachment and execution, certain States applied the doctrine of restricted immunity for acts purported to be *jure gestionis*. In addition, immunity from jurisdiction and immunity from execution differed in terms of time and substance, and even procedurally. Part IV of the draft was also necessary because of the inconsistency of judicial decisions in the various cases that had come before national forums, and the consequent need to settle the law on the matter through international legislation. Unless that were done, individual courts and States would be left to determine the law according to their own value-judgments, which would hardly make for uniform law.

30. The Special Rapporteur had rightly pointed out (*ibid.*, para. 4) that, notwithstanding its title, part IV was exclusively concerned with State immunity. That immunity belonged to the State, not to its property, and accordingly, once a State had established its title to property under its own internal law, the State and its property were immune from suit in a foreign court. It was important to bear in mind that attachment of State property which took the form of a bank account of an embassy or deposits of a central bank could disrupt the functioning of that embassy or cut off the economic life of the State. Therein lay the importance of the rules of immunity from execution laid down in part IV.

31. As to draft article 21, he said it appeared to be settled law that waiver of immunity from jurisdiction was not tantamount to waiver of immunity from execution. Where jurisdiction was declined, however, it followed that there was also immunity from attachment, arrest and execution. The latter element therefore required separate treatment, possibly in a separate article. It would also be useful to define the terms "attachment", "arrest" and "execution" in article 2 of the draft. Furthermore, he would like to know whether the fact that the scope of draft article 21 was restricted to attachment, arrest and execution ordered by a court would not mean that property could be made subject to such measures pursuant to an executive or administrative fiat. If that was so, it should be made clear in the body of the article.

32. With regard to draft article 22, he said that, since the rule laid down was self-contained, there was no need for the opening phrase, "In accordance with the provisions of the present articles". Also, it was necessary to have a clear understanding of what was meant by the expression "commercial and non-governmental service" in paragraph 1 (*b*). It had been held in a number of decided cases that, where a State set up a company to exploit its own natural resources, and where such activities formed an integral part of its national development policy and the company acted by authority of national law, those activities were not to be regarded as commercial. It had likewise been held that, where a State or a group of States established terms and conditions for the removal of natural resources from their territory, such an activity could be regarded as governmental and not commercial. There was, however, a wealth of case-law in the area and it merited consideration.

33. In connection with draft article 23, it could not be assumed that, because an activity was regarded as commercial, there had been a waiver of immunity or consent to jurisdiction. For consent to operate, it had to be explicit, if not express. Consent also had to be based on law, and a genuine link between the suit and the forum was a particularly important factor.

34. As was apparent from draft article 24, consent to attachment and enforcement of execution did not confer a general licence to attach or levy execution against any type of State property regardless of its public or governmental purpose. The Special Rapporteur had thus rightly provided that certain State properties were permanently immune from attachment and execution. The list of property contained in article 24 should not, however, be considered as exhaustive.

35. The CHAIRMAN, speaking as a member of the Commission, joined previous speakers in complimenting the Special Rapporteur on his seventh report (A/CN.4/388). The topic, which was a sensitive one, had been developed mainly over the past 10 years: no doubt it would continue to develop in the coming decade in view of the initial interest in the matter, particularly on the part of developing countries.

36. He agreed with the broad framework of the Special Rapporteur's approach and, in particular, thought that part IV of the draft articles was necessary in order to deal with attachment and execution of property. It was important to bear in mind that part IV did not deal with a separate topic but with a part of State immunity that involved a different stage in

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

the proceedings: precisely for that reason, a separate part was required. He noted in that regard that the definition of "jurisdictional immunities" given in article 2, paragraph 1 (*c*), was qualified by the terms of article 1, so that the scope of part IV was limited to immunity from measures of arrest and execution taken pursuant only to a decision or order of court.

37. In dealing with part IV it would be necessary to define State property more clearly and, in so doing, to take account of the provisions of draft article 2, paragraph 1 (*f*), articles 15 and 18, and draft article 19. The scope of part IV should also be clarified to take account of any other measures, in addition to attachment, arrest and execution, such as Mareva injunctions, by which State property might be affected. Draft articles 22 and 23 should be harmonized since they could give rise to two inconsistent conclusions. The main point was whether paragraph 1 (*a*) and (*b*) of article 22 provided for two separate alternatives or whether there was a link between the two provisions which was spelt out in article 23. Possibly the problem could be resolved by providing for implied consent and identifying the property to which it would relate.

The meeting rose at 1.05 p.m.

1924th MEETING

Thursday, 11 July 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*concluded*)

ARTICLE 21 (Scope of the present part)

ARTICLE 22 (State immunity from attachment and execution)

ARTICLE 23 (Modalities and effect of consent to attachment and execution) *and*

ARTICLE 24 (Types of State property permanently immune from attachment and execution)[4] (*concluded*)

1. The CHAIRMAN, speaking as a member of the Commission and continuing the statement he had begun at the previous meeting, said that draft article 22 was based on two assumptions, which the Special Rapporteur had stated in paragraph 83, subparagraphs (*a*) and (*c*), of his seventh report (A/CN.4/388). It was evident from those assumptions and from the part of the report dealing with draft article 23 that paragraph 1 (*a*) and paragraph 1 (*b*) of article 22 were closely connected. The first and last sentences of paragraph 85 of the report, which stressed the importance of consent, were, moreover, clarified by the introduction, in paragraph 88, of the notion of implied consent on which article 24, paragraph 1 (*c*) and (*d*), were also based. The basic thesis that consent should be clearly given for the purposes of the attachment of property was developed in paragraph 97 and the overall position was summed up in paragraph 102. The latter paragraph also advocated that the scope of consent should be specified, and that might explain the detail in which article 23, paragraph 1 (*a*), had been drafted.

2. Against that background, the normal interpretation would have been to read article 22, paragraph 1 (*a*) and (*b*), and article 23, paragraph 1 (*a*), together. The question that arose was, however, whether there was any special reason or justification for referring to article 22, paragraph 1 (*a*) and (*b*), as alternatives, particularly bearing in mind the controversy to which that approach had given rise in the Commission and to which it would undoubtedly give rise in the Sixth Committee of the General Assembly. Since an exception to State immunity from jurisdiction had been made in the case of commercial transactions, it would

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[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

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Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, para. 4.