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Summary record of the 1622nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1980, vol. I

19. The wording of the article might be rather more explicit. The article could be drafted in terms that were closer to those of other provisions of the draft, more particularly of chapter V. The words "to defend itself or another State" did not clearly describe the substance of the problem. Again, he had some doubts about the need to refer to Article 51 of the Charter or even to the Charter itself, since up to now the Commission had not referred to them elsewhere in the draft. He for one was not opposed to mentioning the Charter as a source of international law and of the right to self-defence. It was up the Drafting Committee to find an appropriate formula. Lastly, the phrase "armed attack as provided for in Article 51 of the Charter of the United Nations" was not entirely satisfactory, for the concept of armed attack was found not only in Article 51 of the Charter but also in other texts.

20. Sir Francis VALLAT said that there seemed to be general agreement on the need to include an article on the question of self-defence in the draft. Indeed, omission of such an article could have very serious implications regarding the content of other draft articles that did not contemplate the use of armed force. However, the Commission had neither the means, nor possibly the mandate, to attempt a definition of the concept of self-defence or to take a position as to the interpretation of Article 51 of the Charter of the United Nations. That also appeared to be the view expressed in the report. The question of whether Article 51 of the Charter constituted an exhaustive definition of self-defence was a controversial one. The records of the 1945 San Francisco Conference and the reference in Article 51 to self-defence as an "inherent right" indicated that those who had drafted the Article had not attempted to codify the concept.

21. Moreover, the Commission was not seeking to define the circumstances in which it would be lawful to use armed force. If it did so, it would be endeavouring to accomplish something which had not been attempted by the General Assembly in adopting the Definition of Aggression. The Commission should take account of the views of the General Assembly as reflected in the Definition, which contained no specific reference to Article 51 of the Charter. The fifth preambular paragraph of the Definition described aggression as "the most serious and dangerous form of the illegal use of force", the implication clearly being that there were other uses of armed force which did not necessarily come under the heading of the concept of aggression and hence within the scope of self-defence. The seventh preambular paragraph mentioned "military occupation or ... other measures of force taken ... in contravention of the Charter", again a general reference. Article 2 of the Definition implied that, in some cases, the use of force could be regarded as lawful and wrongfulness was therefore precluded, and Article 4 gave the Security Council great leeway in determining whether or not a particular instance of the use of armed force constituted an act of aggression. Consequently, the Definition remained very flexible and was dependent on the Charter as a whole rather than on any one particular provision. Accordingly, it would be advisable for the Commission to refrain from expressly mentioning Article 51 of the Charter in draft article 34 and for it to refer to the provisions of the Charter as a whole, using a wording similar to that proposed by Mr. Schwebel. Indeed, a specific reference to Article 51 of the Charter would inevitably imply that the Commission was taking a position on the interpretation of that provision.

22. Another important consideration was the possible effect of draft article 34 in respect of third States. The wording of the draft article should not imply that measures of self-defence precluded wrongfulness in respect of every other State and in all circumstances. That could be avoided by adopting a wording along the lines of draft article 30.[3]

The meeting rose at 11.50 a.m.

[3] See 1613th meeting, foot-note 2.

1622nd MEETING

Monday, 30 June 1980, at 3.20 p.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. Yankov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN said he was honoured to have the opportunity of welcoming to the meeting Mr. El-Erian, a former member and Special Rapporteur of the Commission, a distinguished jurist and a judge of the International Court of Justice. He recognized the visit as being particularly significant in that it was one of a series cementing the close relationship between the Commission and the Court.

2. Mr. EL-ERIAN said that it was a pleasure for him to have an opportunity of attending a meeting of the Commission. Members would appreciate the satisfaction he felt at being once more among his former colleagues. He endorsed the views expressed by the President of the International Court of Justice in a recent letter, emphasizing the value which the Court placed on its strong links with the Commission and its wish that those links should endure. The work of the Commission, particularly on codification, was of great significance, and in a very recent case before the Court

two conventions adopted on the basis of draft articles prepared by the Commission had been referred to. That proved once more that the work of the Commission was of the highest importance. It was also significant that nine of the judges of the Court were former members of the Commission.

3. He thanked the members of the Commission for allowing him to be present at their meeting.

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

[Item 5 of the agenda]

Draft Articles submitted by the Special Rapporteur

4. The CHAIRMAN invited the Special Rapporteur to introduce his second report on jurisdictional immunities of States and their property (A/CN.4/331 and Add.1) and, in particular, draft articles 1 to 5 (*ibid.*, paras. 14, 33, 48, 54 and 57), which read:

Article 1. Scope of the present articles

The present articles apply to questions relating to jurisdictional immunities accorded or extended by territorial States to foreign States and their property.

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "Immunity" means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

(*b*) "Jurisdictional immunities" means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

(*c*) "Territorial State" means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

(*d*) "Foreign State" means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

(*e*) "State property" means property, rights and interests which are owned by a State according to its internal law;

(*f*) "Trading or commercial activity" means:
(i) a regular course of commercial conduct, or
(ii) a particular commercial transaction or act;

(*g*) "Jurisdiction" means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

Article 3. Interpretative provisions

1. In the context of the present articles, unless otherwise provided,

(*a*) The expression "foreign State", as defined in article 2, paragraph 1 (*d*) above, includes:
(i) the sovereign or head of State,
(ii) the central Government and its various organs or departments,
(iii) political subdivisions of a foreign State in the exercise of its sovereign authority, and
(iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central Government.

(*b*) The expression "jurisdiction", as defined in article 2, paragraph 1 (*g*), above, includes:
(i) the power to adjudicate,
(ii) the power to determine questions of law and of fact,
(iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and
(iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State.

2. In determining the commercial character of a trading or commercial activity as defined in article 2, paragraph 1 (*f*) above, reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose.

Article 4. Jurisdictional immunities not within scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to
(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,
(ii) consular missions under the Vienna Convention on Consular Relations of 1963,
(iii) special missions under the Convention on Special Missions of 1969,
(iv) the representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975,
(v) permanent missions or delegations of States to international organizations in general,
shall not affect

(*a*) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

(*b*) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

(*c*) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby.

5. Mr. SUCHARITKUL (Special Rapporteur) said that in preparing his report he had attempted to give a panoramic view of the topic. In recent years, some very dramatic changes had occurred in the matter of jurisdictional immunities of States and their

property—particularly as they related to trading activities and private shipping and maritime transport—and the intricacies and complexities of the subject were now becoming clear.

6. After pointing out several corrections that should be made to the text of his report, he said that its preparation had been greatly facilitated by the helpful comments made by members of the Commission when considering his previous report. He had also been greatly assisted by materials made available by Governments concerning the current state of their practice in regard to jurisdictional immunities and by information supplied in response to the questionnaire circulated by the Secretariat to Governments on 2 October 1979. The assistance provided by the Secretariat had also been most valuable.

7. Draft article 1 attempted to define the scope of existing customary rules of international law on the topic. He would be grateful for the Commission's guidance on any other rules to be developed or formulated, in addition to general principles. For purposes of practical convenience, he had employed the terms "territorial State" and "foreign State" to denote the two independent sovereign States whose existence was a prerequisite for jurisdictional immunities.

8. In preparing draft article 2, he had tried to limit the terms defined to those that were essential to the early draft articles. The list was not exhaustive, and the Commission might find it necessary to define further terms later.

9. The report provided some explanation of the term "immunity" as a legal concept, and also of the term "jurisdictional immunities" in order to underline the necessary distinction between jurisdictional immunities and exemption from substantive law.

10. The notion of "State property" had already been classified to some extent by the Commission. The definition provided in the draft articles was of a tentative nature and might require further elaboration. The term should include the property, rights and interests owned by the foreign State, ownership being determined, in the first instance, by the internal law of the owning State. The Commission would have to consider in greater detail the question of the immunity of such property from the jurisdiction of the territorial State.

11. The term "trading or commercial activity" was also of a tentative nature. The Commission might have to decide later whether to adopt the term "trading activity" or "commercial activity". In practice, those terms could cover a whole series of transactions constituting a regular course of commercial conduct.

12. The term "jurisdiction" was used to denote the jurisdiction not only of the judicial power, but also that of all other authorities dealing with the administration of law. If the parties to a convention intended to place some other connotation on the term, an appropriate exception or reservation would have to be made.

13. Draft article 3 contained interpretative provisions which might be useful as indications of difficult situations in which the definitions would require further explanation. For example, with regard to the expression "foreign State", it would be useful to determine which types of entity could be regarded as forming part of the foreign State. However, if the Commission should conclude that there was no need for such interpretative provisions, or that they should be placed elsewhere in the draft, he would be prepared to reorganize the draft accordingly.

14. There appeared to be a sufficient basis in practice to warrant the inclusion of an interpretative provision making clear the distinction between the public and private capacity of a sovereign or head of State, as part of the definition of the expression "foreign State". Furthermore, not only the central Government itself, but also the various organs of departments forming part of the central machinery of government, could be legitimately recognized as enjoying State immunity in their own right. In paragraph 1 (*a*) (iii) of draft article 3, he added the words "in the exercise of its sovereign authority" because State practice seemed to suggest that the political subdivisions of a foreign State were not identified with the State itself, since they lacked international personality and hence were not entitled to benefit from State immunities unless they were exercising the sovereign authority of the State. The same applied to paragraph 1 (*a*) (iv).

15. Referring to paragraph 2 of draft article 3, he said that the criterion used for determining a trade or commercial activity was an objective one, for which a preference had been clearly shown in recent State practice. He was aware that there might be some basis for a different view. The Commission would need to consider the question at length.

16. Draft article 4 was based on similar draft articles considered by the Commission, relating to succession of States in matters other than treaties, and on articles contained in a number of relevant conventions.

17. With regard to draft article 5, it should be noted that, while the rules stated in any articles adopted by the Commission would not have retroactive effect, the provisions of any rules so adopted might reflect existing rules of customary international law, in which case the principle of non-retroactivity would not apply.

18. Mr. TABIBI congratulated the Special Rapporteur on his very useful report and valuable and oral statement on a difficult, but most important, topic. The report before the Commission was very different from that of the previous year dealing with the initial questions,[1] as it covered the basic rules governing the

[1] Reproduced in *Yearbook . . . 1979*, vol. II (Part One), document A/CN.4/323.

subject and defined the limits of immunities, besides covering, as far as possible, the practice universally followed by States Members of the United Nations.

19. The Commission should ask itself what were the real principles of customary rules regarding jurisdictional immunities of States and what the norms should be, taking into account the progressive development of international law. He fully agreed with the Special Rapporteur that of the three main elements—jurisdictional immunity, the territorial State and the foreign State—jurisdictional immunity itself was the basic and most important principle. He also agreed, however, that the topic should not deal with jurisdictional immunity alone, but should encompass all related questions.

20. Commenting on the first five articles, he said that he found article 1 acceptable; it was not exhaustive and did not tie the hands of the Commission. Article 2 was not exhaustive either; it defined the important terms, but remained open-ended, so that it could be supplemented by further terms if necessary. As to the content of article 3, he was not sure whether it should be retained as article 3 or become part of the commentary to article 2. In any case, it was useful, since some terms required further interpretation in respect of their linkage to other notions. With regard to article 4, he agreed with the Special Rapporteur that certain jurisdictional immunities did not fall within the scope of the draft articles and had already been dealt with in the various instruments mentioned in the report. Referring to article 5, he agreed with the Special Rapporteur that the articles should embody rules that could be regarded as codification as well as progressive development of international law; that was in line with the general trend for subjects that were not static.

21. Mr. RIPHAGEN expressed his sincere admiration for the way in which the Special Rapporteur had tackled the intricate problem of State immunity.

22. The prevention of conflict between the conduct of one State and that of another State was the primary object of all international law, including the rules of State immunity in the widest sense. However, the rules of State immunity did not prescribe the internal policies or social systems of States, but simply dealt with the consequences of contacts between freely chosen patterns of their conduct.

23. Unlike other rules designed to prevent situations of conflict from arising, the rules of State immunity did not aim to avoid conflicts or determine rules applicable to conduct; they determined which authority might sit in judgement over the conduct of one State having contact with another State. Consequently, the rules of State immunity had first to determine the types of conduct of States to which they applied and distinguish those activities from other activities; that was to say, they had first to determine for which conduct of State A, State A enjoyed immunity and from which conduct of State B that immunity was enjoyed. That meant that the rules of State immunity were necessarily rules of international law, even though their historical development from internal law tended to obscure rather than elucidate their present-day function and importance.

24. It was curious to see the constitutional impossibility of impleading a national sovereign before national courts being invoked as a basis for the immunity of a foreign sovereign from the jurisdiction of courts not acting in his name, and that the same basis was even invoked when it was not the foreign sovereign State but its property that was involved in the proceedings. It was equally curious to see immunity based on the ground "that there can be no legal right as against the authority that makes the law on which the right depends", quoted in paragraph 73 of the report, where there seemed to be some confusion with the doctrine of conflict of laws, since the pronouncement rather referred to the "act of State" doctrine. It was also curious to apply the concept of *acte de gouvernement* (although at least there was a link there, in that relations between Governments were involved) and to note the impact of national legislation permitting suits in national courts against foreigners, particularly as such national legislation was meant to deal with suits of foreigners residing abroad, where an extraordinary extension of the jurisdiction of a State beyond what might be called territorial jurisdiction seemed to have provoked a limitation against foreign States, as distinct from aliens.

25. As the Special Rapporteur had rightly indicated, the vital principle of equality of States as expressed by the maxim *par in parem imperium non habet* remained the best support for the principle of State immunity.

26. With regard to draft articles 1–5, he thought those rules fulfilled the initial task of stating for which conduct a State enjoyed immunity and from which conduct of another State that immunity was enjoyed. Article 1 referred to "jurisdictional immunities accorded or extended by territorial States", and the notions contained therein were clarified in article 2, paragraph 1 (*b*), (*c*), (*d*) and (*g*) and article 3, paragraph 1 (*b*). As a matter of drafting, he had been struck by the fact that the wording of article 1 was descriptive rather than normative, and supposed that the rules were in fact about immunities "to be" accorded and "to be" extended.

27. The term "territorial State", which had been chosen to indicate the State that was obliged under the articles to abstain from certain conduct, had been further defined in article 2, paragraph 1 (*c*) as "a State from whose territorial jurisdiction immunities are claimed", but it was not clear whether the articles would really deal only with the exercise by a State of its territorial jurisdiction, and, if so, why such a limitation was imposed and what exactly was a "territorial" jurisdiction, as distinct from other jurisdictions. However, the third sentence of paragraph 23 of the report seemed to point in another direction,

inasmuch as it defined the "territorial State" as "the State in whose territorial jurisdiction a dispute has arisen". It was surely not meant that, in order to raise questions of State immunity, the actual situation which had given rise to a dispute had to have connecting links with the territory of the State which might wish to exercise its jurisdiction.

28. The term "jurisdictional immunities" employed in article 1 was defined in article 2, paragraphs 1 (*a*), (*b*) and (*g*) and in article 3, paragraph 1 (*b*), so that it became clear what type of State activity in respect of another State the articles were addressed to, and the Special Rapporteur had rightly chosen to cover a relatively limited type of activity.

29. It had to be stated that there might be immunities under general international law outside the scope of the articles, and that point had, to a certain extent, been dealt with in article 4. But it would not be easy to draft a provision concerning the scope within which there would, presumably, be no immunities other than those provided for. In practice, it might not prove easy to draw a line between the types of activity dealt with in the articles before the Commission and other manifestations of the sovereignty of States, e.g. between legislation and the actual exercise of power outside the realm of the administration of justice.

30. An inherent difficulty encountered in that regard resulted from the intimate connexion between the rule of law, its application in a specific case and the enforcement of its application through the use of physical power. The Special Rapporteur had distinguished between (*a*) the applicability of the laws of a State within its territory; (*b*) the power of a tribunal to adjudicate or settle disputes; and (*c*) execution of the judgements thus rendered. In principle there was no immunity of a foreign State in regard to (*a*), and even where there was no immunity in regard to (*b*) there might still be immunity in regard to (*c*). That distinction was correct in itself, but he wondered whether it always worked in practice, since the three phases of jurisdiction were often telescoped by a State into one act.

31. By way of illustration he indicated a situation in municipal law concerning immovable property and incorporeal property (patents, trade marks, copyrights, etc), where the final application of such law might be dependent upon the activities of administrative authorities. In principle, any such property (immovable or incorporeal) within the territorial State could only be acquired by that State under all the conditions established by the applicable internal law of the territorial State, including such conditions concerning the competence of local judicial and administrative bodies. It was impossible to separate jurisdictional immunity from non-immunity in such a case. However, that difficulty was perhaps peculiar to some types of property only, and might be covered by the substantive articles still to be proposed by the Special Rapporteur. A later consideration of the question seemed to be foreshadowed in paragraph 26 of the report, which dealt with the notion of State property. But he had doubts about the usefulness of the definition of "State property", since it could obviously only apply to property acquired elsewhere than in a territorial State and brought into the territory by the other State.

32. Paragraphs 71 and 72 of the report discussed the situation in which a foreign State was not technically a party to the proceedings, but the property was merely in the "possession or control" of that foreign State, in which case it seemed clear that such property was not necessarily owned by the State according to any internal law but that its possession or control had to be determined in accordance with some kind of international test.

33. As to the other primary task of the rules of State immunity, article 1 determined a type of activity or conduct for which State immunity was enjoyed by "foreign States and their property"; that was clarified in article 2, paragraphs 1 (*d*), (*e*) and (*f*); article 3, paragraph 1 (*a*) and paragraph 2; and, to a certain extent, in article 4.

34. With regard to the definition of a "foreign State" in article 2, paragraph 1 (*d*), he thought it might be dangerous to define any object in terms of a particular situation of that object. In any case, at first sight the term seemed self-evident. The further definition in article 3, paragraph 1 was clearly useful and necessary, and was meant to be without prejudice to the question of enjoyment or non-enjoyment of immunity, as it was a list of "potential recipients of State immunity".

35. In that connexion, it was interesting to note that agencies and instrumentalities acting as organs of a foreign State otherwise than in the exercise of its sovereign authority were *a priori* excluded from the benefits of jurisdictional immunity. Again, he was not sure that it was advisable to define a subject in terms of its conduct. Jurisdictional immunity of a foreign State in modern practice seemed to be functional, relating to conduct, rather than personal, relating to status, and in that respect there was a fundamental difference between the immunity of a foreign State and the immunity of a foreign diplomat. The functional character of modern State immunity opened the way for granting immunity to entities which, under internal law governing status, were legally separate from States as such, e.g. political subdivisions and agencies or instrumentalities. Clearly in those cases such immunity was not personal and could only exist on account of conduct.

36. In regard to the functional concept of State immunity, it seemed only natural that the rules of international law must also make a distinction between the types of activity of States. It was hardly surprising that rules concerning jurisdictional immunity included the concept of trading or commercial activity, involving activities outside the exercise of the State's sovereign authority. However, such rules could only

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