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Summary record of the 1626th meeting

Topic:
Jurisdictional immunities of States and their property

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in certain respects, immune, was based on the consent of the "territorial State".

21. Immunity must necessarily be as absolute as the sovereign jurisdiction into which the foreign State had brought itself. Any derogation from absolute immunity required the consent of the foreign State, which was generally expressed by a waiver of the immunity to which it was entitled. Exceptions recognized within the principle of immunity occurred either because a case fell outside the ambit of the protection of the principle, or because the foreign State's sovereign right had been modified by its own consent. Neither instance was, in any real sense, an exception. If an act was one which the law did not recognize as falling within the scope of the principle of immunity, the fact that immunity was not granted did not constitute an exception. Moreover, it was the sovereign right of a State to modify its freedom of action by consenting to do so. Once that consent had been given, there was no exception to the rule.

22. He agreed that immunity was a right of a foreign State, rather than a mere privilege which could be granted or withheld; that interpretation should be clearly reflected in the draft articles. A more important question, however, was the extent or scope of the right. That question should be settled by reference to the modern practice of States, which corresponded to their contemporary social needs and which could be regarded as customary international law.

23. The Special Rapporteur appeared to have deliberately narrowed the field of his study to that of immunity from legal proceedings, in the widest sense of that term. He had been right to do so, since that was the field likely to be most rich in State practice and therefore most ripe for codification. Furthermore, the Special Rapporteur's use of the term "territorial State", which also tended to narrow the scope of the study, showed commendable caution on his part.

24. While it would be premature to discuss the definitions and interpretative provisions in draft articles 2 and 3, the Special Rapporteur had been right to place those ideas before the Commission. While agreeing broadly with the principles contained in draft articles 4 and 5, he thought that they, too, should be discussed at a later stage in the Commission's work. As to draft articles 1 and 6, an article on the scope of the draft articles to follow, while useful, was difficult to draft at such an early stage in the study.

25. In view of the limitations which the Special Rapporteur himself apparently sought to impose on the study, he had no particular difficulty with the terms "territorial State" and "foreign State". But if the immunity of a State from jurisdiction was to be considered a right, it might be preferable not to refer to immunity as being "accorded or extended", as was done in draft article 1. The term "jurisdictional immunities" did not seem to be the happiest combination of words; he would be inclined to favour a

draft along the lines suggested by Sir Francis Vallat (1623rd meeting, para. 18). He saw no reason for the use of the words "questions relating to" in the first line of draft article 1. It would be helpful if the idea of the right to immunity could be introduced by referring to "the immunity from jurisdiction to which a State is entitled".

26. The Special Rapporteur's use of the term "immunity" appeared to be correct. The term was generally used to mean precisely the kind of insulation from court proceedings that the Special Rapporteur wished to deal with in his study. In the 1961 Vienna Convention, for example, the term "immunities" was used in connexion with criminal, civil and administrative jurisdiction (art. 31). There also seemed to be a tendency to use the term "accord" in respect of "freedoms", "inviolability" and "immunity" from court jurisdiction, and the term "grant" in respect of "exemptions" and "facilities". He wondered whether, in draft article 1, the Special Rapporteur wished to limit immunity to the foreign State and its property and, if so, what he meant by the term "property".

27. He was in general agreement with the principle stated in draft article 6, apart from a few minor drafting considerations.

28. In conclusion, he agreed with the Special Rapporteur that the test for entitlement to State immunity lay in the nature of the activities involved, rather than in their purpose.

The meeting rose at 11.30 a.m.

1626th MEETING

Friday, 4 July 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

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

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

[Item 5 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR¹ (concluded)

1. Mr. VEROSTA associated himself with the views

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

expressed by Sir Francis Vallat (1623rd meeting) and Mr. Reuter (1624th meeting).

2. In dealing with draft articles 1 and 6, the Drafting Committee would have to proceed on the basis of exceptions to jurisdictional immunities, rather than on the basis of the existence of a right to immunity. With regard to the expressions “foreign State” and “territorial State”, while he was not completely satisfied with those terms, it was difficult to improve on them for the time being.

3. Draft articles 4 and 5 could be referred to the Drafting Committee.

4. Mr. SUCHARITKUL (Special Rapporteur) said that the comments made by members of the Commission would serve as a useful guide for future research. Due account would be taken of the note of caution sounded by many members regarding the difficulties, complexities and urgency of the work. Many approaches were possible, but the instructions of the General Assembly seemed to indicate clearly what the scope of the topic should be.

5. As had been noted by some members of the Commission, he had limited the scope of his report to the jurisdiction of courts and the incidental activities of other authorities responsible for administering the law. The source materials available contained many references to the role played by the executive and legislative authorities in the development of State practice, which was concerned primarily with the decisions of national courts. The report did not cover acts of State, extra-territorial legislation regarding the powers exercised by a foreign State, or the authority of the territorial State to deal with them, as he had not wished to become involved in detailed consideration of the relevant rules of private international law. Such questions could probably be dealt with under draft articles dealing with ground rules, which would remove a case from the context of jurisdictional immunity when no jurisdiction had existed in the first place.

6. Mr. Riphagen (1622nd meeting) had rightly expressed some reservations on the use of the term “territorial jurisdiction”. That term was not intended to be understood in the sense in which it was used in private international law, but simply as the jurisdiction of the territorial State. He apologized for any confusion that the use of the term might have caused. He had thought it preferable to concentrate on exceptions from the jurisdiction of courts rather than from the jurisdiction of executive or legislative powers, since the historical development of the topic as it related to extra-territoriality had been somewhat different.

7. The wording for draft article 1 proposed by Sir Frances Vallat (1623rd meeting, para. 18) would provide a better working basis than the existing draft, without precluding the possibility of extending the scope of the draft articles later. Referring to a comment made by Mr. Pinto (1625th meeting), he said

that the words “questions relating to” have been included in order to broaden the scope of the draft article to some extent; they could, however, be dispensed with.

8. He had been most interested to hear Mr. Ushakov’s view (1623rd meeting) on the consent of the territorial State, to the effect that once a given activity was regarded as admissible, it could be presumed to enjoy the immunities customarily accorded under international law. He had also been interested by the view expressed by Mr. Schwebel (1625th meeting) that certain activities, once regarded as admissible, would be subject to ground rules which could provide for the necessary exceptions. He was also grateful to Mr. Tsuruoka for the information he had provided (1624th meeting) on current trends in the State practice of Japan.

9. Referring to the comments of members of the Commission on the definitions in draft articles 2, 3, 4 and 5, he said that the term “immunity” meant the State of being immune, whereas “immunities” referred to different types of immunity. There might be no need to define the term “immunities”, since it was not defined in existing conventions.

10. On the question of State property, he shared the doubts expressed by Mr. Riphagen and other members, and agreed that further clarification might be needed. The question of property would, however, constitute an important element of the topic and would have to be studied in connexion with immunities from execution and attachment.

11. He had noted all the comments made on the use of the terms “territorial State” and “foreign State”. Nevertheless, there appeared to be no option but to continue to use them until better terms were found.

12. While most members of the Commission seemed to agree in principle with the definition of “trading or commercial activity” in draft article 2, doubts had been expressed as to how absolutely it could be applied. He would take note of those views in his future work. Further consideration should also be given to the extent of the influence of political motivations in certain exceptional cases, such as contracts for the purchase of rice in the event of famine. He was grateful to those members who had suggested that a saving clause be included in the draft articles to preclude any interference with the normal development of customary rules of international law.

13. Referring to Mr. Reuter’s comments (1624th meeting) on the use of the word “principle” in the title of draft article 6, he pointed out that both the Commission and the General Assembly had instructed the Special Rapporteur to look into the general principle of State immunity. He asked the Commission’s indulgence for any over-emphasis that he might have placed on historical precedent. He noted, however, that, apart from their purely historical value, many of the common-law decisions cited still applied. Further-

more, in their replies Governments had cited may cases in which decisions had been subsequently overruled, leading to the conclusion that the principle of immunity was uncontested.

14. The question of exceptions to, or limits on, immunities would be dealt with in greater detail in the third report, in the light of further information provided by Governments. Thus far, twenty-two Governments had provided source materials and seven or eight had replied to the questionnaire. None of them had contested the validity of the principle of State immunity.

15. He suggested that it might be helpful for future consideration of the topic to refer draft articles 1 and 6 to the Drafting Committee. Meanwhile, the Secretariat should be requested to renew its invitation to Governments to provide information and should make the necessary preparations for publication of the replies and source materials already received.

16. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed that draft articles 1 and 6 should be referred to the Drafting Committee and that the Secretariat should be invited to seek further information from Governments and to publish the information already received.

*It was so decided.*²

The meeting rose at 11.10 a.m.

² For consideration of the texts proposed by the Drafting Committee, see 1634th meeting, paras. 42-61, and 1637th meeting, paras. 57-58.

1627th MEETING

Monday, 7 July 1980, at 3.05 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, 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.

Also present: Mr. Ago.

State responsibility (continued)* (A/CN.4/318/Add.5-7, A/CN.4/328 and Add. 1-4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (continued)

* Resumed from the 1621st meeting.

ARTICLE 34 (Self-defence)¹ (continued)

1. Mr. TSURUOKA said that, by and large, he agreed with draft article 34, but the phrase "if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations" should be replaced by "if the act constitutes a measure of self-defence under the Charter of the United Nations".

2. In the article under consideration, reference could be made either to international law or to the Charter, and in the latter case, either Article 51 or the Charter as a whole could be mentioned. In his view, the latter course was preferable. By referring simply to international law, the Commission might give the impression that it recognized the existence of a right of self-defence other than that envisaged in the Charter. A reference to Article 51 alone would inevitably give rise to controversy, as the Commission's discussions had shown. Again, the Commission usually refrained from interpreting the Charter. The fact that self-defence was mentioned should on no account induce the Commission to define that concept. Any attempt to do so would be a departure from the Commission's customary method of leaving aside the primary rules. A reference to the Charter as a whole would cover not only Article 51 but also Article 2 and Chapter VII of that instrument.

3. Regarding the commentary to the draft article, and more specifically the passage in paragraph 114 of the report (A/CN.4/318/Add.5-7) in which Mr. Ago stated that learned writers took the view that the principles that had been current in general international law at the time when the Charter was drafted had in no way differed, as to substance, from those laid down in Article 51, that assertion was incorrect so far as Japan was concerned. Japanese writers had emphasized that in formulating Article 51 the authors of the Charter had taken an immense step towards pacifism by taking care to restrict the exercise of the right of self-defence to one clear-cut case. The Japanese writers could not be said to have been unanimous in acknowledging that Article 51 reflected a principle rooted in the legal thinking of the time.

4. Mr. DÍAZ GONZÁLEZ said that underlying the concept of self-defence there was a question of equal or even greater importance, namely, the definition of aggression. It therefore seemed to him that draft article 34 embodied two elements which were unduly restrictive and would make it difficult for the Commission to accept the article as it stood. In the first place, the text referred specifically to an armed attack, whereas it would have been more appropriate to refer to an act of aggression; secondly, the concept of self-defence was limited by the reference to Article 51 of the Charter of the United Nations. That Article was simply a safeguard clause which provided for an exception

¹ For text, see 1619th meeting, para. 1.