Document:-
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Summary record of the 1656th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

33. Sir Francis VALLAT said that, while he very much agreed with Mr. Quentin-Baxter that the resolution of the issue of consent was close to the centre of the topic, he thought that a still more fundamental requirement was the need to achieve a proper balance between the sovereignty of each of the two States that might be parties to a particular case. Care must be taken not to favour the interests of the territorial State at the expense of those of the "sending" State, and vice versa. Furthermore, that balance must be sought in the context of the needs of the late twentieth century, and not of the very different circumstances that had obtained in the eighteenth and nineteenth centuries.

34. Linked to that idea of balancing the interests of sovereign States was a point that had been brought out very clearly by Mr. Ushakov (1654th meeting), namely, that sovereignty was not an absolute concept. As Lord McNair had said, one of the attributes of sovereignty was to be able to accept limitations on its exercise; equally, it was one of the attributes of a sovereign State to be capable of living in the context of public international law, which necessarily implied limits on the exercise of sovereignty. Consequently, the question whether one State must submit to the jurisdiction of another or whether the second State must grant the first immunity was essentially a practical problem associated with the nature of sovereignty. That was the basic position from which he himself approached the draft articles.

35. That being so, he viewed many of the precedents in the form of judgements of national courts with some reserve. The Special Rapporteur had rightly perceived in the decisions of United Kingdom, and particularly English, courts a steady trend towards the granting of immunity to foreign sovereigns. It was, however, important to bear in mind in that respect that the trend had originated in the United Kingdom's imperial era. Account must also be taken of the extent to which English law courts had historically regarded themselves as bound by the judgements of their predecessors. It was only within the last decade or so that the United Kindom's supreme court of appeal, the House of Lords, had been freed from the strict application of the doctrine of *stare decisis*. While it was true, then, that United Kindom courts had developed and applied the practice of the granting of absolute sovereign immunity, covering both States and their property, he hoped that the Commission would be guided, not by that example, but by present-day United Kingdom legislation, particularly by the *State Immunity Act 1978*,[10] which clearly showed the abandonment of the previous policy. As to that policy, it might be noted that there was a remarkable lack of international judicial precedents laying down anything like a principle of absolute immunity for foreign States and their property.

36. With regard to draft article 7, he agreed in particular with the comments of Mr. Tsuruoka and Mr. Pinto (1654th meeting). He still believed that it would be necessary to see the subsequent articles before taking a final decision on the wording of article 7, but after the discussion in the Commission, he would have no objection to referral of the article, as it appeared in paragraph 44 of the Special Rapporteur's third report, to the Drafting Committee. The only comment he wished to make was that he found alternative B far too detailed and thus very much out of keeping with the gradual approach so wisely adopted by the Special Rapporteur.

The meeting rose at 12.40 p.m.

[10] United Kingdom, *The Public General Acts, 1978* (London, H.M. Stationery Office), part I, chap. 33, p. 715; text reproduced in: American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 5 (September 1978), p. 1123.

1656th MEETING

Thursday, 21 May 1981, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/331 and Add.1,[1] A/CN.4/340 and Add.1, A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 7 (Rules of competence and jurisdictional immunity)[2] (*concluded*)

1. Mr. JAGOTA, referring to the draft articles provisionally adopted by the Commission at the previous session,[3] said that his only reservation concerning article 1 related to its use of the words "questions relating to" the immunity of a State, inasmuch as it remained to be seen from the later draft articles what those questions were. Similarly, in both paragraphs of article 6, the rules stated were qualified by the phrase "in accordance with the provisions of the present articles", and most of those articles still remained to be discussed and defined.

[1] *Yearbook ... 1980*, vol. II (Part One).

[2] For text, see 1653rd meeting, para. 18.

[3] See 1653rd meeting, footnote 4.

2. In article 7, paragraph 1, the Special Rapporteur took the rule enunciated in article 6 and specified how it was to be given effect. Alternatives A and B of paragraph 2 provided, respectively, an explanation of the scope of the term "legal proceeding" and an elaboration of the definition of the term "another State".

3. Paragraphs 7 to 23 of the Special Rapporteur's third report (A/CN.4/340 and Add.1) contained an elaboration of the concept of jurisdiction, which the Special Rapporteur had thought it expedient to distinguish from the concept of the competence of the forum. He had concluded that competence was a matter of internal law and that the question of immunity arose only if the forum was competent. That conclusion was correct, and, as the Special Rapporteur himself seemed to have recognized in the fifth sentence of paragraph 19 of his report, the issue of competence was consequently irrelevant to the topic of State immunity and need not be further considered.

4. Of the matters discussed in paragraphs 20 to 24 of the report, the only one relevant to the present topic was the "act of State" doctrine. The Special Rapporteur distinguished between the relative nature of State immunity, which he held to be relative in the sense that a State might not claim the immunity to which it was entitled, and the absolute nature of the "act of State" doctrine as applied by the United States of America, according to which an act, once established as a sovereign act of a foreign State, attracted immunity and could not be the subject of proceedings. In his own view, that distinction was false; even in cases of sovereign immunity, the Commission must look to State practice, which, as it was now emerging, was to divide State acts into sovereign acts and non-sovereign, or commercial, acts.

5. The Special Rapporteur intended to deal, in draft article 8 (A/CN.4/340 and Add.1 para. 58)[4] with the question of the need or otherwise for consent to the exercise of jurisdiction. If consent was necessary in relation to sovereign acts, it must surely also be necessary in relation to "acts of State' as defined by the United States doctrine. Moreover, with the promulgation of the *Foreign Sovereign Immunities Act of 1976*,[5] that doctrine was destined soon to disappear, even in the United States. In short, the Commission should leave aside the study of paragraphs 7 to 24 of the report and make a detailed examination of the contents of paragraphs 27 to 42, which set out the background to what he believed should be a separate article, namely, the present alternative B for article 7, paragraph 2.

6. In his view, the essence of article 7 was to be found in paragraphs 25 to 26 of the report, in particular in the passage reading:

> As "a State is immune from the jurisdiction of another State", it follows that no State has the power to make another State submit to its jurisdiction. This absence of power could also be expressed in terms of an obligation on the part of a State not to exercise sovereign authority or a duty to suspend its jurisdiction over another State against its will.

In other words, before one State could be brought before the courts of another, it must consent thereto in one of the ways to be described in articles 8 to 11.

7. He believed that article 7 was a correct statement of the law as it had existed prior to 1970. For the period 1970–1980 it was partly correct, because the world had then been divided, roughly speaking, into two parts, consisting, on the one hand, of the United States of America, the United Kingdom and much of Europe and, on the other hand, of the socialist States and the developing countries. The States comprising the first group had viewed the question of State immunity from a substantive viewpoint, distinguishing between sovereign acts and non-sovereign acts, or acts that were solely of a commercial nature, and towards the end of the 1970s, they had decided to claim jurisdiction unless the State involved had been able to prove that the act in question had been of a sovereign nature. Concrete examples of the application of that policy had included the seizure of military property owned by a State, but at the time in the hands of a private individual who had subcontracted for its repair; the application of the law of the host State to the employees—especially local employees—of foreign missions and to diplomatic premises and vehicles; and the removal of immunity from State trading agencies and the like by the provisions of the United States 1976 *Foreign Sovereign Immunities Act* which he had already mentioned and the United Kingdom *State Immunity Act 1978*.[6] Prior to 1970, the distinction between sovereign and non-sovereign acts had been made, in States of the first group, by the Ministry of Foreign Affairs or its equivalent. Now, however, foreign States were required to appear before the courts and to plead immunity, and it was the courts that determined in which category an act should be placed.

8. Owing to those two changes—the introduction of a distinction in substantive law between sovereign and non-sovereign acts and the amendment of the procedure for claiming immunity—the performance of the same act could entail the appearance of a State before the local courts in one part of the world but not in another. In India, for example, no foreign State could be brought to court without the consent of the Central Government, and no such consent had been given until

[4] Text reproduced in 1657th meeting, para. 1.

[5] United States of America, *United States Code, 1976 Edition*, vol. 8 (Washington, D.C., U.S. Government Printing Office, 1977), title 28, art. 1330. Text of the Act reproduced in: American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XV, No. 6 (November 1976), p. 1388.

[6] See 1655th meeting, footnote 10.

1981. The reasons which led the Indian Government to change its practice had been the parallel existence of the two systems to which he had alluded and a desire to avoid abuses of immunity. A similar attitute had now been adopted by the socialist States, which applied the distinction between sovereign and non-sovereign acts only to the acts of a foreign State which classified their own activities in the same way.

9. The question remained as to what regime States would apply in the 1980s. In his view, the decade would be one of turmoil, as more and more States reacted to the stimulus which, he believed, had led the United States and the United Kingdom to change their laws—namely, the increase in the number of States and the consequent increase in the abuse of privileges —and as the intellectual change which had led to the elimination from internal law of the rule that the sovereign was above the law took effect in international relations. There would ultimately be a change of custom, borne of a desire to achieve reciprocity of treatment, and an intellectual change based on the belief that there should be a rule of international law applicable to all. As he saw it, exceptions from that rule would be permitted only on the basis of specific agreements providing that certain acts of certain property would be exempt from jurisdiction.

10. He believed that article 7 should serve as a model for those agreements, but that it was at present drafted in too absolute and unqualified a fashion for that to be possible. That, however, was only a tentative assessment, which he would review in the light of the subsequent discussion and further draft articles.

11. Mr. ALDRICH said he wished to take the opportunity of his first statement before the Commission to thank all its members for having elected him. He considered it a signal honour to have been chosen to fill a post previously occupied by Mr. Schwebel and Mr. Kearney, and would do his utmost to justify that choice.

12. Turning to the topic under discussion, he said that he had no difficulty in accepting draft articles 1 and 6. That he had no difficulty with article 6 was due to the inclusion in it of the phrase "in accordance with the provisions of the present articles"; the concern he felt about article 7 was perhaps due in large part to the absence of any expression of that kind.

13. He agreed with the Special Rapporteur that there was a difference between competence and immunity but that the order in which they were discussed was of no importance, as other speakers had also maintained. What was important was to avoid being drawn into detailed consideration of questions of competence, since it would be most inappropriate and risky to try to regulate such matters by international agreement. The task was one he would not wish to undertake with regard, for example, to the "act of States" doctrine which, in the context of United States of America law, had undergone continual change. Despite the magnitude of that change in the last decade, he was not sure he could agree with Mr. Jagota that the United States would abandon the doctrine altogether.

14. In a sense, paragraph 1 of article 7 did avoid going into questions of competence, but that left him wondering whether it served any purpose at all. He interpreted the phrase "shall give effect to State immunity under article 6" not as a statement of absolute immunity, the recognition of which was only one aspect of contemporary practice, but, because of the reference back to article 6, as a reference to whatever immunity the draft articles ultimately established. To make the declaration contained in article 7, paragraph 1, that no State might derogate through its own rules of competence from the basic rule set out in article 6, seemed to be stating the obvious and might therefore be considered unnecessary. If such a declaration was considered useful, however, it might be best not to limit the prohibition to the use of rules of competence, but to say that there could be no derogation by means of rules of competence or otherwise.

15. He agreed with Mr. Quentin-Baxter (1655th meeting) that both versions of paragraph 2 of article 7 dealt with different subject-matter from paragraph 1 and that, if either of them was retained, it should probably constitute a separate article. He assumed that both the phrases "legal proceeding" (alternative A) and "legal action" (alternative B) meant "judicial action". It was principally the fact that they dealt with judicial action that differentiated those provisions from paragraph 1, which, like article 6, concerned the broader question of State action. Furthermore, alternative A tried to define what constituted a legal proceeding against a State and alternative B tried to identify the persons and objects that actions against would be considered as actions against a State.

16. He was not entirely happy with the use in alternative A of the term "implead', although he could appreciate the advantages of using a single word if an appropriate one could be found. Like alternative A, alternative B also attempted a difficult task; the report gave ample evidence of the problems involved in trying to give even a brief description of what that paragraph covered. That aside, if alternative B were to be retained in its present form—and he was not certain that it should be—it ought, if it were not to appear to be establishing a rule of absolute immunity, to contain either a cross reference to article 6 or a qualification similar to that found in both paragraphs of that article.

17. Other matters to be settled with regard to alternative B included the questions whether the phrase "acting as a sovereign authority" was adequate to express the meaning intended, whether the phrase "acts performed by them in their official functions" covered acts that were within the apparent authority of the persons or entities concerned but were actually *ultra vires*, acts performed on behalf of the State, and so on.

18. To sum up, he thought that paragraph 1 of article 7 could certainly be referred to the Drafting Committee, but was uncertain whether the same applied to either alternative for paragraph 2.

19. Describing his general approach to the topic and the general concern he felt about the possible course of the Commission's future on it, he pointed out that the rapid changes in practice would oblige the Commission to proceed with great care if it was to be successful in pinning down the law of the jurisdictional immunities of States. In that respect, there was at least one parallel between the topic under discussion and the law of the sea: in each case, an attempt was being made to freeze at a particular moment of time a swiftly developing field of law. In each case, too, States were likely to be reluctant to see their hands tied, unless it could be demonstrated that the bonds would be sufficiently flexible to take account of unforeseen future developments.

20. In that connection, there were a number of questions to which he hoped the Commission's further discussions would provide answers. Had the considerable changes that had occurred in the law in the last twenty years now come to end? If not, were they continuing because of inertia or for some good reason? Could the Commission devise rules that would be sufficiently flexible and procedural in nature to give States some assurance that they would be valid beyond the day on which they were proposed?

21. Mr. USHAKOV said that there were two points he wished to make clear. With regard to what Mr. Jagota had said, he emphasized that the changes which had taken place in the law and practice of certain States regarding the principle of jurisdictional immunity only affected commercial relations. More precisely, those changes concerned judicial actions relating to commercial relations. The Commission need not consider them, because they did not affect the other categories of inter-State relations and did not shake the principle of the jurisdictional immunity of States. The general rule of immunity which the Commission had been trying the enunciate applied not only to commercial relations, but also to all possible relations between States. In matters of trade, moreover, it would not be enough to deal only with judicial actions in civil law, without taking account of administrative acts and the problems of execution of judgements that might arise.

22. Secondly, he pointed out that, as a State, the Soviet Union did not carry on foreign trade activities. Such activities were carried on by legal persons under private law who were duly authorized to do so and who clearly did not enjoy the jurisdictional immunity of States. The contracts concluded by such legal persons were private law contracts subject to the internal law of the country concerned. Through its trade delegations, which were State organs, the Soviet Union sometimes guaranteed such contracts. In that connection it should be noted that, in accordance with the annex to the 1957 trade agreement between the Soviet Union and Japan, when a trade delegation of the Soviet Union guaranteed such a contract, the Soviet State did not claim jurisdictional immunity in respect of it.

23. Sir Francis VALLAT, referring to a comment by Mr. Jagota, said he wished to clarify a misunderstanding which seemed to have arisen from a statement he had made at the Commission's 1653rd meeting. It had certainly not been his intention to suggest that the certificates delivered by the Foreign Office to which he had then referred could determine questions of immunity. The United Kingdom position had always been that those certificates determined questions of fact. The matters with which the certificates now dealt were listed in section 21 of the *State Immunity Act 1978*.

24. Mr. SUCHARITKUL (Special Rapporteur), replying to points raised, said that the Commission's rich and constructive debate would greatly assist him in his continuing task. The subject under consideration was difficult, and it was not due to any lack of care on his part that the report had been submitted piecemeal or that many more articles had not been presented. The General Assembly had, however, reiterated its instructions that the Special Rapporteur should concentrate on general principles of jurisdictional immunities and leave certain questions aside for the time being. He had therefore begun at the beginning.

25. He did not think he was being unduly optimistic in noting an emerging consensus on the content of the general principle of State immunity, and it was now clear that State immunity was an exception to the more fundamental question of sovereignty. In that connection, Mr. Ushakov (1654th meeting) had pointed out that every rule of international law was, to some extent, a limitation of sovereignty.

26. With regard to the scope of the inquiry, the question of the wider meaning of "jurisdiction" had been raised. On the basis of over twenty years' experience, he could confirm that there was very little authority, in terms of State practice, for the wider concept of jurisdiction or immunity from jurisdiction; it would be difficult for him to build on that authority and, in so doing, to adopt the inductive method advocated by Mr. Tsuruoka (*ibid.*).

27. Plans for the future work had been set out in the exploratory report of the Working Group[7] and in the preliminary report[8] as well as in the second report (A/CN.4/331 and Add.1) of the Special Rapporteur. He had discussed the use of the terms "jurisdictional immunities" and "jurisdiction", and draft articles 8, 9, 10 and 11 dealt, respectively, with consent of the State, voluntary submission, counter-claims and waiver of State immunity.

[7] See 1653rd meeting, footnote 2.

[8] *Ibid.*, footnote 3.

28. In connection with his third report, there had been some discussion on the relativity of competence and jurisdictional immunity. He might have over-stated the case in his oral presentation (1652nd meeting) by suggesting that competence might have some priority, possibly in terms of time or logic, over immunity. Sir Francis Vallat had pointed out, however, that counsel representing the State would raise a plea of jurisdictional immunity regardless of whether or not there was competence—a view with which he, as Special Rapporteur, fully concurred. If he had introduced the question of competence, it was simply for the benefit of those members who had been trained in the common law jurisdictions. For members from civil law jurisdictions, the question of competence was extremely important and not at all irrelevant. As was apparent from Government replies to the questionnaire (A/CN.4/343 and A/CN.4/343/Add.3 and 4), particularly from those of the Moroccan and Tunisian Governments, in such jurisdictions the court had to determine its own competence, although in practice it could consider various grounds for not exercising jurisdiction in a particular case.

29. When preparing the relevant part of his third report, he had borne in mind the case of the *Libyan American Oil Company* v. *Socialist People's Arab Jamahiriya*, which was decided in 1980 in the United States Court of Appeals for the District of Columbia Circuit.[9] There had been a waiver of jurisdictional immunity to enable the court to hear the case; but in the event, it had decided not to exercise jurisdiction because an act of State was involved. He raised the point not in argument against the irrelevance of competence, but because the competence of a State was itself a subject of international law.

30. He had been at pains to point out that the subject of jurisdictional immunities derived for the most part from judicial decisions, although State practice and legislation had also been considered in his report. The courts were the first to decide on their own competence and, in so doing, they referred to their rules of competence. Possibly the terminology was not apt, because it derived from private international law, and it might be well to avoid it. Internal law on competence, however, including private international law, was subject to the superior regime of public international law. That had been clearly brought out by those speakers who had referred to the need to balance the various interests involved.

31. Many new criteria had emerged during the discussion. It had rightly been said that the Commission was dealing with a new branch of international law. It had also been said that the Commission should be guided by the principle of friendly relations and co-operation between States. Consideration of friendly relations and co-operation had, however, already been apparent at the time of *The Schooner "Exchange"* v. *McFaddon and others* (1812).[10] The ideas expressed in that judgement were not so very different from those of comity, reciprocity, consent and waiver of sovereignty. He had been much encouraged to hear from Mr. Ushakov that there was no absolutism, and that the concept of sovereignty was not sacrosanct.

32. The Commission would no doubt be discussing the scope of the draft articles further, and certain questions pertaining to jurisdictional immunities would have to remain in abeyance for some time. He had, for example, deliberately refrained from examining changes in the law, but he was grateful to Mr. Tsuruoka for his brief account (1654th meeting) of the developments that had taken place in Japan between 1926 and the post-war period, which could not be ignored. Sir Francis Vallat had also referred to the dramatic developments in English law. He (the Special Rapporteur) had decided to refrain from using the terms "restrictive immunity" and "absolute immunity"—though members were, of course, free to use them—so as to leave the way open for compromise and for a more widely acceptable solution. Sir Francis Vallat had referred to a number of interesting cases which indicated that the courts had moved away from the simple finding that the property belonged to the foreign sovereign and were now asking him to prove his title to it.

33. Another recurrent theme throughout the discussion had been commercial activities, on which there had been some very encouraging comment in the Sixth Committee of the General Assembly. What Mr. Ushakov had said was most helpful, but the Commission should consider the statement made in *The "Swift"* case (1813), to the effect that, if the sovereign engaged in commercial transactions and if he had a monopoly of certain commodities, then he should conform to the general rules by which all trade was regulated.[11]

34. He was also grateful to Mr. Jagota for projecting the Commission into the future—for preparing the ground for its ultimate achievement. He could assure the Commission that it would be counter-productive for him to try to reintroduce any doctrine of absolutism into future reports or future draft articles. He reminded members that the preliminary report of 1979 had listed the following possible exceptions to the general rule of State immunity: commercial transactions; contracts of employment; personal injuries and damage to property; ownership, possession and use of property; patents, trademarks and other intellectual properties; fiscal liabilities and customs duties; shareholdings and membership in bodies corporate; ships employed in commercial service; and arbitration. Those items had been listed without any further study because the law

[9] American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XX, No. 1 (January 1981), p. 161.

[10] See 1653rd meeting, footnote 9.

[11] J. Dodson, *Reports of Cases argued and determined in the High Court of Admiralty*, vol. I (London, Butterworth, 1815), p. 339.

was in process of evolution. He had sought to capture the general principles in the hope that he would be in a position, the following year, to present some of the main articles. In so doing, it was not his intention to impose his own views on the Commission: rather, those articles would be the result of a careful examination of the practice of States, and particularly of their treaty and judicial practice.

35. Referring specifically to draft article 7, he said that it was the logical consequence of draft article 6, and dealt in essence with the obligation to refrain from exercising jurisdiction. The reference to authority under the rules of competence did not mean, as Mr. Aldrich appeared to have understood, that the State could escape responsibility for non-fulfilment of an obligation by having recourse to its own rules of competence. That reference applied in particular to civil law countries, because rules of competence were primary rules and could not be dispensed with. In the draft articles, the words "jurisdiction" and "competence" had been used in the same sense; but in Italian practice, for example, the competence of a particular court was narrow by comparison with national jurisdiction. Earlier reports had described how the law on State immunity had become established in civil law jurisdiction: it was primarily an exception to the rule of competence.

36. A very academic distinction had been drawn by the French Court of Cassation between the theory of "*incompétence d'attribution*" and that of "*immunité de juridiction*". By using two theories, the courts had been able to limit the application of jurisdictional immunity, either by reference to the capacity in which the State or State organ had acted, according to the theory of "*incompétence d'attribution*", or by looking at the nature of the activities, according to the theory of "*immunité de juridiction*". That was a very fine distinction, and he would therefore ask members not to dismiss too lightly the relevance of the competence of the court. In that connection, he was grateful to Mr. Calle y Calle (1654th meeting) and Mr. Díaz González (1655th meeting) for proposing the use of the term "judicial proceedings" in article 7, paragraph 1.

37. With regard to the relevance of competence, the "act of State" doctrine was but one of the many grounds on which a court could decide that it had no jurisdiction under the normal conflict rules. There had to be a sufficient nexus: even in the case of a chosen forum, the court was not required to exercise jurisdiction if it was too remote from, or too unconnected with, the matter to decide the issue, regardless of whether or not one party was a foreign sovereign.

38. A number of members had questioned the use of the word "implead" in draft article 7. One of the meanings ascribed to that word was to bring an action or to prosecute, which denoted a degree of unwillingness on the part of the other party. The equivalent French term "*mettre en cause*" did not have such a connotation, however. He was not alone in using the word "implead"; Lord Atkin had done so in *The "Cristina"* case,[12] but a better term could perhaps be found by the Drafting Committee.

39. Alternatives A and B for draft article 7, paragraph 2, were not really alternatives. The idea behind alternative A was to explain what was involved in impleading, namely, bringing an action against somebody or something which affected the interests of the State concerned. The Drafting Committee could perhaps be asked to find an appropriate formulation. In alternative B, it had been far from his intention to reintroduce the doctrine of absolutism, but as was clear from the title of the subject, property would have to be dealt with at some point. It had been agreed that, as defined, jurisdictional immunities meant immunity from jurisdiction, not from substantive law. An ambassador must respect the local law; he was not immune from it. He was liable under it, but action could not be brought against him because he benefited from diplomatic immunity, which could be lifted by waiver or some other method of expressing consent.

40. Mr. Quentin-Baxter had raised the question at the previous meeting of property in the possession or control of the State. It should be noted that American practice placed greater reliance on the test of actual possession and control than on ownership when granting immunity. He was not seeking to provide for any absolute immunity, but merely wished to point out that there were two opposing tendencies: on the one hand, the number of beneficiaries of State immunity was increasing; on the other, the content of immunities was becoming more restricted.

41. Mr. Ushakov had compared diplomatic immunity with immunity from jurisdiction, to which there had already been some reference in the 1961 Vienna Convention.[13] It was, however, necessary to be somewhat flexible in that area. In most cases the jurisdiction concerned was civil jurisdiction, but military and criminal jurisdiction should not be excluded. If criminal jurisdiction was possible, then so was immunity from it. A State might have an organ—an embassy, for example—which violated the criminal laws of another country; the extent to which such activities were immune was not outside the scope of the Commission's inquiry. In certain countries, such as Germany and Austria, questions of immunity were decided not by the ordinary civil courts, but by the constitutional court. Such points would have to be examined in detail in due course. The Commission would also have to direct its attention to the different types of immunity to which Mr. Ushakov had referred.

42. Subject to those remarks, he would suggest that the Commission refer draft article 7 to the Drafting Committee.

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[12] See 1655th meeting, footnote 9.

[13] See 1654th meeting, footnote 4.

43. Mr. USHAKOV, explaining his position, said he believed that, from the point of view of a single State, international law could be regarded as a set of restrictions on its sovereignty or its capacity. That was what might be called the metaphysical approach. For the community of States, on the other hand, international law was a means of safeguarding sovereignty. The same was true of immunities, which, from the point of view of a single State and, in particular, of the beneficiary State, constituted a restriction on sovereignty. From the point of view of the community of States, on the other hand, the rules of jurisdictional immunity acted as a safeguard for sovereignty.

44. Although he did not accept the idea of absolute sovereignty, he nevertheless considered that a State, as such, enjoyed full sovereignty. The same applied to immunities, for although there could be no absolute immunity, a State could enjoy full immunity.

45. Mr. CALLE Y CALLE said that draft article 7 related to immunity from judicial proceedings and that its scope was thus confined to the action of the courts of a State. He noted, however, that draft article 2[14] defined jurisdictional immunities as "immunities from the jurisdiction of the judicial or administrative authorities of a territorial State", and that article 31 of the 1961 Vienna Convention granted diplomatic agents immunities from the criminal, civil and administrative jurisdiction of the receiving State.

46. He would like the Commission to take account of those provisions in the text of draft article 7, and not to refer only to immunity from jurisdiction.

47. The CHAIRMAN suggested that the Commission should refer draft article 7 to the Drafting Committee.

It was so decided.

The meeting rose at 1 p.m.

[14] See 1653rd meeting, footnote 5.

1657th MEETING

Friday, 22 May 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/331 and Add.1,[1] A/CN.4/340 and Add.1, A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 8 (Consent of State),

ARTICLE 9 (Voluntary submission),

ARTICLE 10 (Counter-claims), *and*

ARTICLE 11 (Waiver)

1. The CHAIRMAN invited the Special Rapporteur to present draft articles 8, 9, 10 and 11 (A/CN.4/340 and Add.1, paras. 58, 71, 81 and 92), which read:

Article 8. Consent of State

1. A State shall not exercise jurisdiction against another State without the consent of that other State in accordance with the provisions of the present articles.

2. Jurisdiction may be exercised against a State which consents to its exercise.

3. A State may give consent to the exercise of jurisdiction by the court of another State under paragraph 2:

(*a*) in writing, expressly for a specific case after a dispute has arisen, or

(*b*) in advance, by an express provision in a treaty or an international agreement or in a written contract in respect of one or more types of cases, or

(*c*) by the State itself through its authorized representative appearing before the Court in a proceeding to contest a claim on the merit without raising a plea of State immunity.

Article 9. Voluntary submission

1. Jurisdiction may be exercised against a State which has voluntarily submitted to the jurisdiction of a court of another State:

(*a*) by itself instituting or intervening in proceedings before that court; or

(*b*) by appearing before that court of its own volition or taking a step in connection with proceedings before that court without raising a claim of State immunity; or

(*c*) by otherwise expressly indicating its volition to submit to the jurisdiction and to have the outcome of a dispute or question determined by that court.

2. The mere fact that a State fails to appear in proceedings before a court of another State shall not be construed as voluntary submission.

3. Appearance or intervention by or on behalf of a State in proceedings before a court of another State with a contention of lack of jurisdiction on the ground of State immunity, or an assertion of an interest in a property in question, shall not constitute voluntary submission for the purpose of paragraph 1.

Article 10. Counter-claims

1. In any legal proceedings instituted by a State, or in which a State intervenes, in a court of another State, jurisdiction may be exercised against the State in respect of any counter-claim:

[1] *Yearbook . . . 1980*, vol. II (Part One).