Document:-

A/CN.4/371

Memorandum presented by Mr. Nikolai A. Ushakov

Topic:

Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-

1983, vol. II(1)

DOCUMENT A/CN.4/371

Memorandum presented by Mr. Nikolai A. Ushakov

[*Original: Russian*]
[*11 May 1983*]

The International Law Commission has made a substantial contribution to the codification and progressive development of international law. As its many years of experience testify, successful solutions to the tasks before the Commission call for thorough and all-round examination of the problems under consideration and for the identification of universally recognized norms of international law, the codification of which must be based on international State practice, decisions of international judicial bodies, and international legal writings. It is also indispensable to take due account of the fundamental principles of contemporary international law, in particular those embodied in the Charter of the United Nations, inasmuch as these are predominantly of a peremptory character.

All this, of course, also applies to the topic of jurisdictional immunities of States and their property, since the questions considered in connection with this topic touch upon the fundamentals of international law.

Between 1979 and 1982, the Special Rapporteur, Mr. Sucharitkul, submitted to the Commission four reports[1] in which he endeavoured to follow the Commission's customary approach to the problem under consideration. These reports are of substantial interest and contain a wealth of material.

However, a number of the Special Rapporteur's conclusions do not seem to us to be well-founded. More particularly, this applies to the Special Rapporteur's view concerning an emerging general trend in favour of the concept of "limited" or "functional" State immunity.

This concept or theory runs counter to the basic principles of international law and is rejected by many States, a fact to which we have repeatedly drawn the attention of members of the Commission in our statements. Consequently it cannot, in our view, form the basis for the codification of rules on the immunities of States and their property. Our opinion is based on the following considerations.

[1] Preliminary report: *Yearbook ... 1979*, vol. II (Part One), p. 227, document A/CN.4/323; second report: *Yearbook ... 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; third report: *Yearbook ... 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1; fourth report: *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357.

I

1. The principle of the immunity of the State from foreign jurisdiction is a universally recognized principle of international law. This proposition is so firmly rooted in international law that it is unreservedly recognized by all States without exception, *inter alia* in the practice of their judicial organs as well as in the international legal doctrine of all countries without exception.

Even States that have recently espoused the theory of "functional immunity" recognize and affirm the principle of State immunity from foreign jurisdiction. Where the theory of "functional immunity" is applied, a waiver of immunity is based on the assumption that in that particular case the State was not acting as a State (sovereign, invested with State power), but as a private individual.

2. It is no less universally recognized that State immunity is based on fundamental principles of international law, in particular the principles of the sovereignty and sovereign equality of States.

From State sovereignty as the inalienable attribute of every State, and from the sovereign equality and independence of States in their mutual relations, it unquestionably follows that no State can exercise its jurisdiction, i.e. its power, over other States. That is what is meant in international law by the principle of State immunity, the essence of which is precisely the non-subordination of one State to the power of another State.

Thus State immunity subsists as a consequence of State sovereignty for as long as a State remains sovereign. It is not dependent upon any transitory condition or circumstance, including any development in the functions of States.

3. In the context of the principle of the immunity of the State from foreign jurisdiction, the term "jurisdiction" signifies, in our opinion, the sphere of sovereign power of the State—legislative, executive, judicial or other. This is also the meaning of the term as employed in the majority of international multilateral conventions.

The principle of State immunity from foreign jurisdiction is today the basis of many multilateral codification conventions relating to various spheres of

international relations. All these conventions are in a sense interrelated.

4. At the present stage in its work, the Commission has decided to limit its task to "jurisdictional immunities of States and their property", a limitation that is entirely admissible. However, the Commission cannot disregard the way in which this problem is resolved in existing conventions.

In particular, article 31 of the 1961 Vienna Convention on Diplomatic Relations[2] provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction in all cases where he is acting on behalf of the sending State. In other words, the Convention recognizes the principle of full State immunity, in particular with regard to the courts of another State. Similar provisions are to be found in other conventions, and are well known.

By mentioning them, we wish to emphasize that the principle of State immunity does not lend itself to differing applications or interpretations.

II

5. As already mentioned, the principle of State immunity is an undisputed and universally recognized principle of international law that expresses and affirms the sovereignty of States in international relations.

However, the question is sometimes raised whether the granting of immunity to a foreign State does not lead to a limitation of the sovereignty of the State granting such immunity. The Special Rapporteur, too, has raised such a question with respect to the jurisdictional immunity of States.

But such a question can be raised only from the point of view of the concept of so-called "absolute sovereignty", upheld in the past by certain authors who proceeded from the principle that a State was not bound by anything in its relations with other States and organized its relations with other States exclusively as it deemed fit.

Such a view of sovereignty leads quite logically to the conclusion that only one State can be recognized as sovereign, since the sovereignty of any other State, by the mere fact of its existence, implies a limitation of the absolute sovereignty of the first State.

Such a concept leads, in fact, to recognizing the sovereignty of only the most powerful State, to reducing sovereignty to relations of force, and to denying the sovereignty of all other States.

6. In reality, State sovereignty must be regarded as an inalienable attribute of every State. The limits of effective sovereignty lie in the sovereignty of all other States. The international obligation, voluntarily and mutually undertaken by States, to respect the sovereignty of other States, including the obligation of every State to respect the immunity of other States within the sphere of its jurisdiction, is not a limitation on sovereignty but an affirmation of such sovereignty as a fundamental universal principle of inter-State relations.

That is precisely why strict observance of the principle of State immunity from foreign jurisdiction is so important in ensuring respect for the sovereignty of all States and of each and every State.

By respecting the immunity of other States, each State expects that those other States will respect its own immunity.

7. It should also be noted that immunity from foreign jurisdiction by no means signifies that the State enjoying immunity may ignore the law of another State within that other State's sphere of jurisdiction. On the contrary, it is under an obligation strictly to abide by the other State's internal law. In particular, it may engage, within the sphere of jurisdiction of another State, only in such activities as are permitted by the latter. Each State is also under an obligation not to interfere in another State's domestic affairs.

III

8. As pointed out above, all States without exception, as well as international legal doctrine in all countries, unreservedly recognize the principle of State immunity from foreign jurisdiction.

9. However, certain States, through their judicial organs, have in a number of cases, especially in recent decades, begun to base their activities on the concept known as "functional immunity". Essentially, this concept is tantamount to the affirmation that the State, depending upon the functions it performs, may act in different capacities, and accordingly may either enjoy or not enjoy immunity. This theory is sometimes also described as the theory of "limited" or "relative" immunity.

In recent years, certain States have also adopted legislation derived from this concept. In particular, this obviously applies to the *Foreign Sovereign Immunities Act of 1976* of the United States of America.[3]

10. According to the concept of "functional immunity", a distinction should be drawn between State acts that are manifestations of public power (*jure imperii*) and State acts that are of a private or commercial nature (*jure gestionis*). In other words, the distinction is between State activity of a public law nature and State activity of a private law nature.

However, this concept is clearly unsound, for many reasons.

11. First of all, it is not in keeping with prevailing international law, which is based on the sovereignty and sovereign equality of States in all spheres of their

[2] United Nations, *Treaty Series*, vol. 500, p. 112.

[3] *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97, p. 206.

mutual relations—political, economic (commercial), social, scientific, technical, cultural and other. In its foreign relations, the State always acts as *imperium* (sovereign power), that is, as invested with public power.

12. The State is a single entity; it cannot be split up; and State power is likewise a single entity. All State organs and representatives act on behalf of public power within the limits of their rights and obligations as established by the State. No single State organ can be excluded from the general system or treated in isolation from or in opposition to other organs. The joint competence of State organs covers all powers required for the performance of the State's functions.

Thus, in particular, a State's trade missions, where they exist, act, as do other organs of the State, on behalf of the State and enjoy immunity from foreign jurisdiction.

The economic activity or economic function of a State, including what may be called State commercial activity, is no less important to any State, including States with a capitalist economy, than its other functions. The State engages in economic activities not as does a private individual, but precisely as a State, sovereign, invested with public power.

A State sector of the economy now exists in every country. In socialist countries, the State sector of the national economy is predominant. For these States, the economic function of the State (in the USSR it is described as the economic and organizational function) has become one of the most important. In many newly independent States, which have thrown off the colonial yoke, the State sector of the economy is being developed more and more.

There are thus absolutely no grounds for isolating State commercial activity and considering it apart, as something unrelated to State activity.

13. The same may be said, with equal certainty, of the distinction between State activities under public law and under private law.

So far as the socialist countries are concerned, it is altogether meaningless to speak of their activities under private law.

Even in the case of capitalist States, there are no norms or criteria on the basis of which a distinction can be made between the State's public law and private law activities. For this reason, the judicial practice of States that attempt to apply the theory of functional immunity is extremely variable, contradictory and inconsistent.

14. Furthermore, it is altogether inadmissible that a court should examine the activities of a foreign State and should qualify them in one way or another contrary to the views of that State itself. This represents inadmissible interference in the domestic and external affairs of States.

15. Lastly, in certain respects, the concept of functional immunity likens the State to natural persons, yet denying the State immunity with regard to activities that may be exercised by private individuals. This too is a radically erroneous proposition.

In concluding a transaction in civil law, a State acts not as a juridical person but as a special subject of civil law. And in this case it acts not in the interests of the personal profit of any private individual but in the interests of the State, of the economic and social development of its society, its people. Hence there are no grounds whatsoever for likening State acts to the acts of juridical persons.

16. Consequently, the theory of functional immunity is in our view manifestly unsound. It is directed towards the subordination of one State to the judicial power of another State—which radically contravenes the principles of the sovereignty and sovereign equality of States and of non-interference in their domestic and foreign affairs.

IV

17. As for the position of States, it appears to us to be incorrectly reflected or interpreted in the Special Rapporteur's reports.

Many States, possibly a majority, do not subscribe to, or reject, the concept of functional immunity. Hence it is clearly mistaken to speak of any general trend emerging in favour of that concept.

Thus, of the 29 States which, in accordance with the Commission's request, sent information and documentation in reply to the questionnaire,[4] 14 grant full immunity and four have no legislation or practice in this area.

The same is apparent from the discussion on the pertinent sections of the Commission's reports in the Sixth Committee of the General Assembly, which shows that a large group of States are opposed to the abovementioned concept.

18. As we have pointed out in the Commission, reference may be made to the judicial practice of certain States only in cases where the State whose immunity is not recognized by the court consents thereto. It seems to us that in the majority of such cases States have lodged protests. In any event, the reaction of States to court decisions is not reflected in the Special Rapporteur's reports.

19. In particular, the Special Rapporteur is clearly mistaken when he interprets the practice of the USSR and other socialist countries in regard to contracts as testifying to the fact that immunity does not apply to State commercial activity.

The practice of the USSR in regard to contracts testifies to the contrary. Under many trade agreements, the USSR has voluntarily consented to its trade missions being placed under foreign jurisdiction in connection

[4] See United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 555 *et seq.*, sect. V.

with transactions concluded or guaranteed by the trade mission in the country concerned. But beyond the limits of such voluntary consent on the part of the USSR, its trade missions enjoy the immunity from foreign jurisdiction to which they are entitled as representatives of the State.

Again, generally speaking, since the 1930s the Soviet Union has not, in practice, concluded trade transactions with foreign natural or juridical persons. Such transactions are concluded by Soviet foreign trade associations and other juridical persons under national law, which as such enjoy no immunity from foreign jurisdiction.

20. The position and practice of States are thus by no means uniform. No conclusion whatsoever can be drawn from them as to an emerging trend in favour of the concept of limited immunity. At the very least, the matter calls for further in-depth study.

V

21. The Special Rapporteur's view that, among contemporary authors, there are no adherents of absolute or complete State immunity and that the opinion of specialists is unanimously in favour of a limitation on the immunity of States in respect of their trading or commercial activity, is to our mind also erroneous.

22. First of all, Soviet international legal writings are firmly and unanimously in favour of full State immunity from foreign jurisdiction, on the grounds of the sovereignty, independence and equality of States. The concept of functional immunity and other theories of limited immunity are subjected to thorough criticism that reveals their theoretical unsoundness. We ourselves have devoted some attention to this subject in a work published in 1963.[5] The situation is the same, we believe, in international legal writings in other socialist countries.

23. International law specialists in Western countries are also far from unanimous on this matter. Many Western authors have opposed or currently oppose the concept of functional immunity and other theories of limited sovereignty. Allow me to refer to just one example—a work by Ian Brownlie, entitled *Principles of Public International Law*.[6]

After referring to the arguments of some authors in favour of the concept of limited immunity, I. Brownlie states:

> These arguments have some force, but on closer examination they are seen to be in varying degrees inconclusive. In the first place the approach of many jurists to the "sovereign in the market place" is based on conceptions concerning the role of the State and the significance of State ownership which are inapplicable even to many modern capitalist economies. It is this political aspect which makes it difficult to find a rationale for a restrictive principle: as it has been pointed out, economic activity of the State remains State activity. Indeed, from this point of view it would be more logical to do away with the immunity.[7]

A little further on, the author writes:

> Neither the evidence of State practice nor the arguments from principle justify the replacement of the wider principle of immunity by some other principle, and in fact the search for an alternative has so far failed.[8]

This is the situation with regard to legal writings.

VI

24. It is sufficiently obvious that attempts to subordinate one State to the judicial power of another State lead merely to unnecessary contradictions and friction between States. At the same time, respect for the immunity of foreign States is in no sense an obstacle to the development of mutually advantageous international trade relations, *inter alia* between States with different social systems.

25. Every State has opportunities to protect its interests adequately, *inter alia* in the sphere of its jurisdiction.

First, a State may prohibit its nationals, natural or juridical persons, from concluding transactions with foreign Governments.

Secondly, it may obtain by agreement the consent of the other State to submission to local jurisdiction in a specific category of matters.

Thirdly, it may stipulate that its nationals, natural or juridical persons, may conclude transactions only on condition that their contract with the foreign Government includes a provision concerning the settlement of disputes by a court or by commercial arbitration.

The State reserves the right of diplomatic protection of its nationals, natural or juridical persons, in appropriate cases. Other possibilities are also available.

VII

26. The foregoing demonstrates that codification based on concepts of limited sovereignty would be clearly unsound and unfruitful.

The problem requires, at the very least, further study in greater depth.

---

[5] N. A. Ushakov, *Suverenitet v sovremennom mejdunarodnom prave* [Sovereignty in contemporary international law] (Moscow, Institute of International Relations, 1963).

[6] Second ed. (Oxford, Clarendon Press, 1973).

[7] *Ibid.*, p. 325.

[8] *Ibid.*, p. 326.