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Summary record of the 1654th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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the delivery of a Foreign Office certificate—by the executive, or Government. The Commission should, therefore, consider the relevant function of the Government of a State in which proceedings of the kind in question were brought and its relationship to a claim of sovereign immunity.

32. Another, far more fundamental question (which he believed to be the underlying reason for the Commission's study of the topic) was that of the nature of the activities of a State claiming sovereign immunity and the conditions in which those activities were conducted. Should the same rule, or even the same principle, apply to activities carried on by a State through its organs, which fell, in one case, directly into the public sphere, and, in the other case, into the sphere of activities, such as commercial activities, normally conducted by private enterprises? He had in mind the case of *Mighell v. Sultan of Jahore*,¹¹ which he saw as a cause for serious doubt whether, in all circumstances, even a head of a State could be identified with the immunity of the State itself. Was it reasonable that, in relation to a private activity, such as entry into a contract to marry, a sovereign should always be able to hide behind State immunity? To make such a claim seemed to him to be a terrible abuse of the concept of State immunity. The questions which State organs could be regarded as synonymous with their parent State for the purposes of immunity and in what circumstances they could be so regarded must be given thorough study, and the outcome of that study would influence the Commission's attitude to the principles embodied in draft article 7.

33. There remained the very delicate question of the meaning of the term "implead". He agreed in principle with the Special Rapporteur's use, in alternative version A of paragraph 2 of article 7, of the words "in fact impleads", inasmuch as it was not necessary for a State to be impleaded by name for it effectively to be involved in proceedings. However, bearing in mind recent proceedings before the International Court of Justice, he believed that the Commission must find more precise wording which would indicate that a legal proceeding would be considered as one "against another State" if that State's legal interests were involved to the extent that they would be legally affected by a judgement in the case.

Question of treaties concluded between States and international organizations or between two or more international organizations (continued)
(A/CN.4/339 and Add.1-5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

¹¹ United Kingdom, *The Law Reports of the Incorporated Council of Law Reporting, Queen's Bench Division, 1894* (London), vol. I, p. 149.

**DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING (continued)**

34. Mr. PINTO drew attention to document ILC (XXXIII)/Conf. Room Doc. 5, in which he had listed the provisions of the Draft Convention on the Law of the Sea¹² and the Agreement Establishing the Common Fund for Commodities¹³ that were relevant to the question of treaties concluded between States and international organizations or between two or more international organizations.

35. He hoped that that document would assist the members of the Commission in referring to the two voluminous and important documents in question.

The meeting rose at 5.40 p.m.

¹² "Draft convention on the law of the sea (Informal text)" (A/CONF. 62/WP.10/Rev. 3 and Corr.1 and 3).

¹³ *Agreement Establishing the Common Fund for Commodities* (United Nations publication, Sales No. E.81.II.D.8), p. 1.

1654th MEETING

Tuesday, 19 May 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: 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 (continued)

1. Mr. CALLE Y CALLE said that, while the question under consideration was in some respects a difficult one, it was nevertheless of an extremely urgent nature. The concept of immunity as a consequence of sovereignty was an old concept, which was recognized and applied by States, but which was becoming increasingly difficult to apply in the modern world. A

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

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

trend was currently emerging in favour of the powers of the territorial State, which had hitherto been very respectful of the sovereignty of other States in matters of immunity, whether it was a question of foreign heads of State, for example, or of the property of foreign States. The current trend was for States to subject to their jurisdiction not other States as such, but situations in which other States were directly or indirectly involved.

2. In his third report (A/CN.4/340 and Add.1), the Special Rapporteur had attempted to state the rule of immunity, taking as a basis another general, more fundamental rule—that of competence, or territorial sovereignty. It was debatable whether one general rule could really be more fundamental than another; perhaps it would be preferable to consider one rule as preceding the other. Obviously, territorial sovereignty logically preceded immunity, since there could be no immunity without sovereignty or prior territorial competence. Sovereignty and competence constituted, as it were, the starting point, the normal situation, whereas immunity was the exception. Within States, no question of immunity arose. For a question of immunity to arise, one State must be involved in the area of jurisdiction of another State as a result of the presence of its sovereign, head of State, diplomatic agents or property. There might or might not then be assimilation to the situation of the subjects of the State in which the persons or property in question were situated. Obviously, the presence of one State in the area of jurisdiction of another State presupposed respect for the laws of the latter State, at least up to a point.

3. In comparing the concepts of competence and immunity, the Special Rapporteur had referred to the existence of a general rule of competence. The notion of competence was thus taken in its broadest sense, including not only the jurisdictional power of courts, but also the power of the State to act in a certain way and its obligation to refrain from exercising its competence. It was there that the essence of immunity lay. In that connection, he noted that articles in preparation were concerned with the idea of judicial competence; they related to jurisdictional immunity, from the point of view of the courts of justice, to the exclusion of everything concerning direct or objective immunity. A State that refrained from entering a foreign Embassy was respecting an objective immunity, which did not need to be established before the courts. On the other hand, an immunity invoked by a State before a court must be considered and ruled on by that court. In that connection, he pointed out that the mere fact that one State notified another State of judicial proceedings instituted in the former State in itself meant that the former State was subjecting the latter State to its jurisdiction.

4. The report before the Commission contained a very well-ordered presentation, the various elements of which were articulated so as to lead up, step by step, to

the text of draft article 7. That provision relied on the territorial competence of States to enunciate the rule that such competence could not be exercised in certain circumstances. The Special Rapporteur stated that it was not necessary to name the State against which legal proceedings were being taken when such proceedings were against persons, entities or property connected with that State. Recently, claims for compensation for a death resulting from the conduct of police officers of a foreign State had been brought before the courts of the United States of America, and the action had been not only against the perpetrators of the act, but also against the State of which they were nationals.

5. The principle stated in article 7, paragraph 1, was quite acceptable as to its substance. As to drafting, it would be preferable for the last phrase in the Spanish version to read: “*aunque con arreglo a sus reglas de competencia esté en general facultado para iniciar un procedimiento jurisdiccional en una materia determinada*”. As far as the alternative versions of paragraph 2 were concerned, alternative B was preferable because it was more explicit and contained all the relevant elements. In the Spanish version of those two alternatives the word “*acción*” was qualified by “*judicial*”, whereas it should be qualified by “*jurisdiccional*”.

6. Mr. USHAKOV said that the Commission had just begun its work on the jurisdictional immunities of States and their property and was in a position of some uncertainty, particularly because of the two articles that had been adopted the previous year.³

7. Article 6 was, in fact, only a restatement of article 1, and neither one of them stated substantive rules. According to article 1, the draft articles related to the immunity of States and their property from the jurisdiction of other States. Article 6, paragraph 1, provided that:

A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

That meant that the draft articles were going to define the content of jurisdictional immunities. Since article 6 provided that States were immune from the jurisdiction of other States in accordance with the draft articles, and article 1 stated only that the articles applied to questions relating to the jurisdictional immunities of States and their property, it would be necessary to draft articles indicating what the immunities in question were and in what cases they must be granted. The Commission would then have to formulate provisions similar to those of the 1961 Vienna Convention on Diplomatic Relations.⁴

8. That task was possible, in principle, but it would be necessary to consider every conceivable situation

³ See 1653rd meeting, footnote 4.

⁴ For the text of the Convention (hereinafter called “1961 Vienna Convention”) see United Nations, *Treaty Series*, vol. 500, p. 95.

separately, specify which State organs could act within the jurisdiction of another State and, in each case, indicate what immunities the receiving State must grant. In practice, however, such a task did not seem possible. It would first be necessary to define the cases in which a State was represented in one way or another within the jurisdiction of another State, such representation differing in more than one respect from representation by a diplomatic mission, and, in each case, to determine the immunities to be granted. The 1961 Vienna Convention contained no general rule on the enjoyment of privileges and immunities; it specified what those privileges and immunities were. In his opinion, it was probably not possible to enumerate the jurisdictional immunities of States and their property in the same way. Yet it appeared from article 1 and article 6 that those immunities would subsequently be enumerated. Article 7, which provided that the territorial State must refrain from exercising its jurisdiction in certain cases, added nothing to articles 1 and 6, since those cases had not been specified.

9. It was for those reasons that he had not been in favour of articles 1 and 6 the previous year. The situation had become all the clearer now that the Special Rapporteur had made article 7 derive from article 6, basing himself on article 6 as though it stated a rule. For the Special Rapporteur, providing in article 6 that a State was "immune from the jurisdiction of another State" amounted to restating jurisdictional immunity as a general rule or general principle (A/CN.4/340 and Add.1, para. 7). But article 6 did not state a general rule; it merely specified that a State was immune from the jurisdiction of another State "in accordance with the provisions of the present articles", which did not mean that it had general immunity from the jurisdiction of another State. The Special Rapporteur was thus proceeding from a general rule which did not exist, to announce, in article 7, the rule that the receiving State must refrain from exercising its jurisdiction when there were jurisdictional immunities, whereas article 6 did not indicate when such immunities existed.

10. Since the Commission had only just begun its work and it followed from the two articles provisionally adopted at the previous session that the content of jurisdictional immunities and the cases in which they must apply would be specified in other articles, it was important to clarify some basic concepts.

11. The Commission must, for example, define the meaning of the term "jurisdiction of the State". Did it mean the power of the State, the authority of the State and the sovereignty of the State, taken as a whole, or only judicial jurisdiction? When it was said that a territory was under the jurisdiction of a State, that meant that it was under the power, authority or sovereignty of that State. It was precisely in that sense that the concept of jurisdiction should be understood for the purposes of the draft articles. If only courts and

tribunals were involved, a distinction must obviously be made, on the one hand between civil and criminal cases and on the other, between the administrative tribunals and constitutional courts that might exist in some States. The topic under consideration, however, could only involve civil cases, for it was quite clear that a State could not be subject to criminal jurisdiction or, for that matter, to the jurisdiction of an administrative tribunal or a constitutional court. Yet that point did not seem to have been made clear by the Special Rapporteur when referring to courts.

12. The use of the term "competence" instead of the term "jurisdiction" should be avoided. Those terms might sometimes have the same meaning, but in the present case it would be very dangerous to use them synonymously. According to the theory of competence developed by the normativists, in particular by Kelsen, the competence of States existed only insofar as it was granted to them by international law. Consequently, the use of the term "competence" in the draft was bound to raise the question of who granted such competence. It was thus clear that the Commission should not take the term "jurisdiction" in the restrictive sense of "judicial jurisdiction", which was necessarily limited to civil procedure and would exclude certain measures of coercion. In that connection, he pointed out that the 1961 Vienna Convention did not apply only to judicial immunities, as shown by article 22 on the inviolability of the premises of the diplomatic mission and article 24 on the inviolability of the archives and documents of the mission.

13. That situation could have been reflected in article 1 if it had been stated that the draft articles applied to the immunities of a State from the jurisdiction of another State or other States. A distinction should be drawn between the concept of jurisdiction in the strict sense and in the broad sense. In the strict sense, the term applied only to immunities from the jurisdiction of a State. In the broad sense, it also applied to immunities from the administration or control of a State, according to whether reference was being made to a dependent territory administered by a State or to a temporarily occupied territory under the control of a State. It was therefore important for the Commission to agree on the exact meaning to be ascribed to the term "jurisdiction".

14. There seemed to be no doubt about the existence of a principle of international law according to which a State was immune from the jurisdiction of another State. The Commission could not confine itself to indicating the cases in which a State did not enjoy that immunity. It could not draft provisions on the exceptions without first having stated the principle. At present, however, it was stated in article 6 that a State was immune from the jurisdiction of another State "in accordance with the provisions of the present articles", which meant that there was no general principle, but that the Commission was going to indicate when jurisdictional immunities existed and how they applied.

15. The expression “absolute sovereignty”, which the Special Rapporteur had used in explaining the justification for the jurisdictional immunities of States (A/CN.4/340 and Add.1, para. 7), was not satisfactory. Such immunities did, of course, result from the sovereignty of States, just as all international law was based on the concept of sovereignty. It could be held that jurisdictional immunities placed limitations on State sovereignty, but then it was international law as a whole that imposed the limitations. Since there was no State in the world that enjoyed absolute sovereignty, international law could be regarded as limiting the absolute sovereignty of all States. Moreover, the same applied to internal law: restrictions on the freedom of the individual implied restrictions on the freedom of other people. It was thus always in regard to all persons or all States that limits were placed on freedom or on sovereignty. The State that granted jurisdictional immunities no doubt agreed to a limitation of its sovereignty, but from that point of view, international law as a whole would have the effect of limiting its sovereignty. In fact, the immunities granted by a State safeguarded the sovereignty of all other States and its own sovereignty as well, since by virtue of the principle of reciprocity, it granted such immunities only because other States must grant them to it. In the absence of such a rule of reciprocity imposed by international law, the sovereign equality of States would no longer exist. The rule of the granting of jurisdictional immunities was, in fact, the corollary of the basic rule of the sovereign equality of States.

16. States granted jurisdictional immunities to other States of their own free will. True, international law required them to grant such immunities in some situations, but those situations only arose if the receiving State was willing. The presence of a State within the area of jurisdiction of another State was always fully agreed to by the latter, as Mr. Riphagen had pointed out at the previous meeting. The same applied to State property: there was nothing to prevent a State from refusing to have the property of another State within its area of jurisdiction. There was thus no limitation of any kind, but rather consent, generally given on the basis of reciprocity. A State which allowed the presence of another State or property of another State within its area of jurisdiction accepted the consequences in regard to immunities.

17. The internal law of the receiving State must obviously be respected by States enjoying jurisdictional immunities, and it might perhaps be advisable to introduce into the draft articles a provision corresponding to article 41 of the 1961 Vienna Convention.

18. Mr. TSURUOKA said that the Commission’s work on the question of jurisdictional immunities was still at a preliminary stage. He had already had an

opportunity of expressing his views on the subject, in particular with regard to the method to be followed.⁵

19. He noted that the principles of the jurisdictional immunity of States were evolving considerably, moving away from the so-called “doctrine of absolute immunity” and closer to the theory of restrictive or limited immunity. Although that phenomenon was widespread, there were nevertheless, in many respects, profound divergencies between States—and even undeniable incoherences within some States.

20. Moreover, it was generally recognized that jurisdictional immunity was linked with the question of State sovereignty, and thus with a fundamental aspect of international legal relations. The Commission should therefore exercise the utmost caution.

21. The discussions at the current session showed the doctrinal differences and the variety of practices in different States and under different legal systems. Consequently, if it was to achieve any useful result in the area under study, the Commission must adopt a realistic approach and avoid departing too far from practice, in order to ensure the greatest possible number of ratifications of any future draft convention. The inductive method must be used. The Commission should apply itself to ascertaining precisely what current State practice was in regard to jurisdictional immunities all over the world. Nevertheless, the need for a compromise between the different positions would call for some degree of progressive development of law. The contradiction between those two affirmations was only apparent, since it would be advisable to remain as close as possible to current practice, but show a spirit of compromise in order to reconcile divergent positions.

22. He then referred to the position of Japan, which he had already had occasion to explain earlier. In 1928, the Supreme Court had pronounced firmly in favour of the doctrine of absolute immunity. That position had remained the basis for subsequent judicial decisions, although they had shown a trend in favour of restriction, mainly during the post-war years. In his view, it would not be correct to say that contemporary Japanese judicial practice still favoured absolute immunity.

23. By contrast, Government practice had firmly adopted the doctrine of relative immunity, as evidenced by the trade treaties concluded with the USSR in 1957 and with the United States of America in 1953. Japanese practice thus appeared to be gradually moving away from the strictly conservative school and adopting a more restrictive attitude. The same trend could be observed in many other countries, and might even be described as general.

⁵ See *Yearbook . . . 1980*, vol. I, p. 204, 1624th meeting, paras. 19 *et seq.*

24. In his opinion, draft article 7, as proposed by the Special Rapporteur, was a preliminary provision which had the great merit of being sufficiently flexible, and the unquestionable ambiguity of which was quite deliberate. The article represented a door through which everyone could pass and which should enable the Commission to move beyond the preliminary stage of its work. He recommended that everyone should cross that threshold without fear.

25. Mr. PINTO said he believed the message to be derived from Mr. Tsuruoka's wise comments was that the Commission needed not so much to state a doctrine as to reflect current practice, including the evolution of practice regarding State immunity. The matter should be approached in a practical way, with a view to stating what the legal position was and, if necessary, what it ought to be.

26. In considering the Special Rapporteur's reports, he had endeavoured to determine why there was a need for the rule known as State immunity. It seemed to him that some kind of balance had to be established between the various interests involved. They included, for instance, the interests of private individuals engaged in commercial transactions with a foreign State; the interests of a Government in promoting such transactions and in building up the confidence on which they must be based; the interests of the territorial State in maintaining its own jurisdiction throughout its territory and in such areas as it deemed it necessary to do so for the protection of its wider interests; and lastly, the interests of the foreign State in not permitting its own interests to be made subject to the decisions of foreign courts, since that could reduce the efficiency of its actions and even subvert the implementation of its policies. In balancing those interests, certain rules had to be laid down and, as Mr. Tsuruoka had pointed out, a practical rather than a doctrinaire approach was required. The Commission should review the situation and endeavour to reflect in practical terms what it considered the rules were and what they should be.

27. In preparing his reports and draft articles 1, 6 and 7, the Special Rapporteur had done precisely that. He had invited the Commission to consider the relationship between competence and immunity, competence being understood in the sense of the competence of a judicial or administrative jurisdiction, since the other meanings of that term were apparently not included. He had stated that where there was no competence the Commission did not have to consider immunity from jurisdiction, and, in paragraph 2 of draft article 6, he had provided the Commission with a further elaboration of the kind of immunity he had in mind. Although it was arguable that neither draft

article 1 nor draft article 6 stated a principle, his own (Mr. Pinto's) view was that the Special Rapporteur had indeed stated a principle; the fact that it was a refinement of a qualified doctrine made it no less a principle. The fact that the Special Rapporteur had not yet expounded all his ideas regarding such qualification would not prevent the Commission from proceeding with its examination in the manner indicated by the Special Rapporteur, although it should reserve the right to review the question as a whole on completion of the draft and to decide whether or not practice had been properly reflected.

28. The Special Rapporteur had then proceeded to distinguish cases which related not to the concept of immunity as such, but to lack of jurisdiction for reasons other than immunity. He had formulated the proposition that a State should not exercise compulsory jurisdiction over a foreign State—in other words, that it must not implead a foreign State. The word “implead”, as he (Mr. Pinto) understood it, implied prosecution and, used in that sense, meant that the territorial State must not compulsorily subject a foreign State to its jurisdiction. The Special Rapporteur had described what constituted a foreign State and the various subdivisions of the State; he had also described what constituted State property for the purposes of his exposition, and had pointed out that it should not be limited to claims of title or ownership by the foreign Government, but should extend to property in its possession or control.

29. Draft article 7 constituted a logical progression from draft article 6. The word “submitting”, in article 7, paragraph 1 was, however, somewhat concise; possibly what was meant was “subjecting” or “permitting the subjection of”. Under alternative A of paragraph 2, as was clear from the use of the word “impleads”, proceedings could be contemplated, but must not involve compulsory jurisdiction over the foreign State. Alternative B dealt with the circumstances in which jurisdiction over a foreign State would arise, and referred to the kind of agencies and property that would attract immunity. His own view was that alternative B was a necessary extension of, as opposed to an alternative to, alternative A.

30. While he was prepared to agree to the referral of draft article 7 to the Drafting Committee, he considered that certain points required further examination. In particular, the phrase “so long as the proceeding in fact impleads that other State”, in alternative A, was perhaps not full enough. It was necessary to introduce the idea of a legal relationship involving the interests of the foreign State which needed to be protected by immunity.

The meeting rose at 12.35 p.m.