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Summary record of the 1712th meeting

Topic:
Jurisdictional immunities of States and their property

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within that of the Caribbean State. The very idea of a sovereign State or State organ being arraigned before another State in such circumstances was a very serious matter, and the frequency with which it occurred should be a matter of concern to the Commission. A series of questions pertinent to the exception provided for in article 12 was bound to emerge from the North-South and South-South dialogues. Another factor to be considered was that the new diplomacy occasioned by the emergence of newly-independent States would bring into focus new concepts of international relations centring on basic needs rather than issues of high politics.

46. The Commission should bear in mind that few developing countries had any recorded State practice in the area in question, except to the extent that they had been adversely affected by the restriction of immunity. Consequently, it had a duty to be patient and to endeavour to ascertain the attitude of developing countries with regard to the very important question of limitation of State immunity, since it was those countries that stood to lose most from any restriction of immunities.

The meeting rose at 1.05 p.m.

1712th MEETING

Monday, 24 May 1982, at 3.05 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/340 and Add.1,[1] A/CN.4/343 and Add.1-4,[2] A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC(XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

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

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES[3] (*continued*)

1. Mr. RAZAFINDRALAMBO joined in congratulating the Special Rapporteur, who had considerably facilitated the Commission's task by putting before it a working document (A/CN.4/357) of exceptional scientific value on a most delicate subject.

2. The exhaustive study made by the Special Rapporteur, with masterly recourse to the inductive method, convincingly demonstrated the existence in both the common law systems and the civil law systems of a close link between the principle of absolute sovereignty and that of immunity. That link had tended to weaken in the course of the centuries, and the notion of absolute immunity based on absolute sovereignty had been progressively run down because of the appearance, in the very countries which had professed that notion, of new factors inherent in the evolution of the State's duties and role in the sphere of economic and industrial activities.

3. It should be asked, however—and many of the Commission's members had done so—whether the resulting trend towards restricting and limiting immunity, which might seem quite normal in the market-economy countries and consumer societies, made allowance for the situation of the developing countries, particularly those which had achieved their independence since the 1960s. Many of those countries had come, for overriding reasons pertaining to their economic development, to extend considerably the limits of the public sector. They had done so either through the nationalization of private companies or through the exercise of public authority in spheres of activity considered in industrialized countries to come under *acta jure gestionis*.

4. It would have been interesting to see an evaluation from the Special Rapporteur of the effects of the new concept of non-immunity based on the distinctions mentioned in his fourth report (*ibid.*, paras. 35-45) between the principles of the sovereignty, equality and dignity of all States, particularly the economically and politically least advantaged and powerful among them. It was true that in paragraph (31) of the commentary to article 6[4] a deficiency was noted with regard to the situation in Africa, but that could be explained by the fact that there were in some African countries public establishments of an industrial or commercial nature which had expressly been given the status of a trading company; it was those institutions, therefore, which undertook the activities subject to the non-immunity principle. In addition, developing countries were almost unanimous in inserting in the contracts they concluded in the context of their development, including those in the sphere of commercial activities, clauses assigning competence, and so avoiding the problem of domestic remedies.

5. Whatever the situation, the attachment of third world countries to the principles of sovereignty and independence needed no further proof, as two instances would suffice to show. To take, first, nationalization: recently, in *Libyan-American Oil Company* v. *Socialist*

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[1] *Yearbook ... 1981*, vol. II (Part One).

[2] Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

[3] The texts of the draft articles contained in parts I and II of the draft are reproduced as follows: (*a*) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (*b*) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), pp. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).

[4] *Yearbook ... 1980*, vol. II (Part Two), p. 149.

People's Libyan Arab Jamahiriya,[5] a United States District Court had judged it to be an "act of State"; and, in an arbitral award in *Agip* v. *Etat malagasy et Socima*, the International Chamber of Commerce (ICC) had given the same legal value to the right of nationalization as to the rule *pacta sunt servanda*. That jurisprudence confirmed the doctrine of such authors as Ian Brownlie, according to which right of nationalization was part of *jus cogens*.

6. The second instance concerned investment disputes: third world States which received capital had made only minor concessions to the World-Bank-supported industrialized countries which furnished capital and investments, for the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States[6] provided for recourse to arbitration by the Centre set up for that purpose only with the express consent of the State party to the dispute. In addition, States signatories to the Convention had discretion to exclude certain items from its field of application, and many of them had made use of that faculty in connection with oil. But the signatory States had undertaken to recognize to awards the same value and effects as to final judgements by their own national courts. The position thus defended by third world countries concerning investments seemed altogether indicative of the concept of immunity and sovereignty which continued to prevail in the majority of those countries.

7. It was, however, a fact that the realities of the contemporary world, based on the need for closer cooperation between North and South and for a new, fairer and more equitable international economic order, required a more flexible approach to the concepts of sovereignty and immunity. At the same time, fine distinctions such as those based solely on the functions of the State or the nature, rather than the real aims, of its activities should be avoided, for they might be thought too abstract.

8. With general reference to the draft articles submitted by the Special Rapporteur, he considered that article 6, which had been called in question by many members of the Commission, should convey unequivocally that immunity was a rule *per se*, separate from the articles which would follow. Article 7 would gain from being simplified, particularly by the deletion of paragraph 3, which referred to a concept already expressed in article 3, subparagraph 1 (*a*) (iv). Article 9 could also be simplified, as Mr. Lacleta Muñoz (1711th meeting) in particular had proposed. It might also be advisable to form a single paragraph from paragraphs 4 and 5 of that article, linking the two parts by a phrase such as "On the other hand ...". Article 10 was acceptable, subject to a few drafting changes.

9. Mr. MALEK remarked that, at the 1710th meeting, Mr. Lacleta Muñoz had ascribed to him the view that the jurisdictional immunity of States had not been recognized as a rule of international law. In fact, the opinion which he himself had expressed on such immunity at the 1709th meeting had simply been that, while there might be no room for doubt as to the existence of a rule of international law embodying the notion of State immunity, the universality of that rule was open to question. He had used the term "might" to point up the relative nature of his statement. That word would certainly not have been necessary if the matter at issue had, for example, been any of the immunities recognized to diplomatic agents. Since the constitution of the modern international community into independent and legally equal states—in other words, since well before the conclusion of the 1961 Vienna Convention on Diplomatic Relations—States maintaining diplomatic relations had granted each other the generally-accepted diplomatic immunities. Such widespread and unopposed practice represented the application of a customary rule of law of a universal nature. He wondered, however, whether the same could be said of the jurisdictional immunity of States? Could it be categorically affirmed that such immunity was a rule of international law applicable to all States, when many States neither accepted nor applied it and while much doctrine, whether old or new, did not recognize it as international law?

10. Those considerations explained his caution in subscribing to the opinion that State immunity was a customary rule of international law. Such a rule did undoubtedly exist, regardless of individual conceptions of the real value of its social or inter-social function; it existed by the very fact that large numbers of States had been making constant use of it in their practice for some time. It could not, however, be maintained, without risk of error, that it was a universally recognized rule, as was the case with diplomatic immunity. It was a rule of manifestly limited territorial scope: after having first been restricted to a few countries, particularly European countries—which had, furthermore, only begun to apply it during the past century—it has subsequently been introduced into the other continents; but under what conditions, and to what extent?

11. The Special Rapporteur had made an effort to furnish the Commission with the information to enable it to solve, in the interests of all States, the problems attendant on the elaboration of the draft articles under consideration. He had been concerned to make the geographical scope of his research as great as possible. In studying in his fourth report (A/CN.4/357) the judicial practice of States with regard to commercial activity, he had stressed that his inquiry was not confined to the practice of industrialized countries of the Western world, but was intended to cover all States generally, adding that "In any event, the Special Rapporteur is not expected to supplement want of judicial decisions with his own inventions or speculations" (*ibid.*, para. 55). In fact, the information provided concerning thirteen or fourteen countries, not all industrialized, revealed the attitude of national

[5] *International Legal Materials* (Washington, D.C.), vol. XX, No.1 (January 1981), p. 161.

[6] United Nations, *Treaty Series*, vol. 575, p. 159.

jurisprudence to the commercial activities considered as exceptions to State immunity.

12. Whatever the case, the somewhat special circumstances surrounding the preparation of the draft articles under consideration should rather serve as a stimulus. Once established, the draft would provide States with uniform and universal rules, some of which would or should govern the jurisdictional immunities of States. As early as 1949, when it had included the subject in its list of fourteen topics for codification, the Commission had recognized that, despite the difficulties which it might occasion, State immunity was a suitable matter for codification.

13. Mr. KOROMA commended the Special Rapporteur on his report. The topic of jurisdictional immunity was one of increasing importance, in particular for developing countries, where problems of poverty, health and education had occasioned a state of emergency of a magnitude similar to that brought about by war and necessitating intervention by public sectors in the market-place in order to ensure nations' survival as independent States. The Secretary-General of the United Nations himself had referred to that phenomenon. Consequently, the issue was not one of ideology, or of involvement of sovereign States in the market-place for motives of profit alone. In that regard, he agreed with Mr. Yankov (1710th meeting) that any universally acceptable and viable regime must cater for all social and economic conditions and for all socio-economic and legal systems.

14. For that reason, the numerous domestic cases cited by the Special Rapporteur in his report remained unpersuasive, since their point of departure and philosophy did not always coincide with those of the developing countries. A case in point was that of *Trendtex Trading Corporation Ltd.* v. *The Central Bank of Nigeria.*[7] Admittedly, the Special Rapporteur had merely advanced those cases as examples of practice within the international community. Nevertheless, the philosophy underlying most of the decisions was not universally valid.

15. The point at issue was one of two sovereignties—territorial competence and sovereign immunity—and the relationship between them. He agreed with the view expressed by Mr. Ushakov (*ibid.*) in that regard, namely that one sovereign State could exercise jurisdiction within the territory of another sovereign State only by licence or permission. An important concomitant of that principle was the exclusion of the foreign State from the jurisdiction of local courts and local law-enforcement agencies.

16. The basic principle that a State was immune from the jurisdiction of another State was well established. Although, as Mr. Malek had pointed out, jurisdictional immunity derived from diplomatic immunity, it had become a universally accepted principle of international law in its own right. The question, then, was not the existence of the principle itself, but whether the scope of immunity was absolute or restrictive. While there was nothing absolute about jurisdictional immunity, in that it was recognized that consent must be given to one sovereign State to operate in the territory of another and that immunity could be regulated or waived, there was no rationale for the so-called principle of restrictive immunity, nor had that principle been clearly defined. While the rationale of practicality put forward by Mr. Njenga (1711th meeting) could be accepted as valid, it was also true that no self-respecting State would wish to find itself in the position of pleading jurisdictional immunity whenever it was in breach of a contract. In an age of mutual interdependence, any State acting in that way would find its trade relations in difficulty. Nor was the element of reciprocity alone sufficiently viable or predictable to serve as a basis for any regime.

17. The Commission should start from the premise that the principle of one State being immune from the jurisdiction of another State existed, and that it harmonized the elements of territorial competence, sovereign immunity and the consent of one sovereign State to allow another to operate within its territory. However, since the territorial State remained competent, a treaty between the two States could be concluded setting out the categories of activities to be subject to local jurisdiction. Such an approach would eliminate the arbitrary distinction between *acta jure imperii* and *acta jure gestionis*.

18. It was to be hoped that the views of developing countries on the issue would be canvassed further, so that the regime which emerged would be truly universal and viable.

19. Mr. OGISO agreed with the approach adopted by the Special Rapporteur in beginning by stating the general principles of State immunity and then setting out the exceptions to that immunity in part III of the draft articles.

20. Referring to draft article 6, he said that, in his view, State immunity constituted a general principle of international law and, although Japanese courts had previously expressed views based on the concept of absolute immunity, the Japanese Foreign Ministry and academic circles in Japan were currently leaning towards the idea of restrictive immunity. In considering the wording of draft article 6, the Commission should take account of the relationship between the principle and the exceptions set out in part III of the draft. When it took up the question of exceptions, the Commission might have to consider the grey area between what clearly fell within the ambit of State immunity and what were clearly exceptions to it. Consequently, if the Commission decided at the current stage to adopt a wording such as that proposed by Mr. Yankov (1710th meeting), which, by the deletion of the words "in accordance with the provisions of the present articles", clearly leaned towards the principle of absolute immunity, it might prejudice any future consideration of the exceptions to immunity, in particular as far as grey areas were con-

[7] See 1708th meeting, footnote 23.

cerned. Moreover, in paragraph 6 of his fourth report (A/CN.4/357), the Special Rapporteur himself recommended that the wording of draft article 6, even if adopted provisionally, should be left open to review at a subsequent stage. Again, paragraph 27 of the report seemed to indicate that the Commission should review draft article 6 after it had completed the general review of the exceptions. It was his hope, therefore, that, if draft article 6 was referred to the Drafting Committee, it would be on the understanding that it would be subject to review after the Commission had considered part III of the draft articles.

21. With regard to the source materials cited by the Special Rapporteur in connection with exceptions to State immunities, he noted that no reference was made to the practices prevailing in socialist countries. Japan, for example, had concluded a commercial treaty with the USSR containing a provision to the effect that commercial contracts concluded by the trade representative attached to the Soviet Embassy should be excepted from State immunity.[8] Perhaps similar provisions existed in commercial treaties between the socialist countries and other countries with different social systems. Information on the practices of the socialist countries with regard to trading activities could prove to be very useful to the Commission in its consideration of the topic and, in particular, of part III of the draft articles.

22. Mr. EL RASHEED MOHAMED AHMED commended the Special Rapporteur on his report and endorsed his general line of approach.

23. The general rule of State immunity in international law derived from the personal immunity of the monarch, in which regard the law was well established. With the increase in inter-State transactions, however, the rule had been extended to Governments and their representatives in host countries. Subsequently, as the activities of Governments had grown, State practice had started to fluctuate between unlimited and qualified immunity, but not in any coherent way. That fact was well reflected in the differing practice of States and in the conflicting judgements delivered by municipal courts, even within the same country. As Mr. Riphagen had stated (1708th meeting), existing rules of international law could not really provide a ready answer to the problem, and it was not possible to give exhaustive treatment to immunity and jurisdiction in terms of rights and obligations. That was as it should be, since international law tended to be couched in hortatory rather than mandatory language. There was, however, already a recognized trend towards a rule of qualified immunity: whether that trend was acceptable to everybody was a matter of conjecture, but there was always room for compromise.

24. The distinction between *acta jure imperii* and *acta jure gestionis* was not clear, as the Special Rapporteur had noted in his fourth report (A/CN.4/357, para. 41). Mr. Ushakov's point (1709th meeting) was well taken: could the State have two faces? Would the commercial attaché who enjoyed diplomatic immunity under the Vienna Convention on Diplomatic Relations be subject to the municipal jurisdiction of the State to which he was accredited? Mr. Njenga (1711th meeting) thought not; the State had only one face, but sometimes acted as an individual. Where, however, was the line to be drawn? Other tests had been suggested—for instance, that it was necessary to look to the nature of the transaction, or to the purpose of the transaction with a view to determining whether that purpose was public or non-public. The "nature of the transaction" meant its commercial or non-commercial nature, which, according to some, was readily identifiable and easily understood. He did not agree, for in law, if not in common parlance, the issue was one which gave rise to a host of problems. For instance, did commercial or trading activity mean trading for profit? Could every transaction for profit be termed a commercial or trading activity? What of "strategic goods or commodities"? The Sudanese Government, for example, had a monopoly of certain strategic commodities such as sugar, flour and petrol. Could such a monopoly be dubbed commercial, if commercial were taken to mean motivated by profit or if the transaction was of a speculative nature, to borrow the phraseology of the Cour d'Appel of Paris, as cited in the Special Rapporteur's fourth report (A/CN.4/357, para. 64)? If the commodities in question were not always available, it could give rise to a breach of the peace. The Government therefore took the action it did, which included the import by public corporations of the commodities in question, to ensure their supply.

25. In the Sudan, the courts followed the English common law in general and were guided, but not bound, by the English precedents. While he knew of no decided case on State immunity, the situation would not be dissimilar to that of any common-law country. In practice, it was a question of "easier said than done". That applied even to the major policy statements of the super-Powers, for the reason that there were a host of factors to be taken into account in the international arena. It had been seen how former President Carter had wavered in the human rights campaign that had been a cornerstone of his foreign policy.

26. To cite an example from the Sudan, an English construction company called Turriff had entered into a contract with the Ministry of Public Works for the erection of new houses in which people were to be settled following the completion of the Aswan High Dam. A dispute had arisen over performance and that dispute had been submitted to arbitration. The Sudan Government having refused to participate further, an *ex parte* award had been made in favour of Turriff. The interesting point was that the company had sought an attachment order before the Hague District Court against the vessels of the Sudan Shipping Line, which was owned jointly by the Government and the Bank of Sudan. In the event, no proceedings for attachment had in fact been taken, but had they been, the Government of

[8] Treaty of Commerce between Japan and the Union of Soviet Socialist Republics, signed at Tokyo on 6 December 1957, annex, art. 4 (United Nations, *Treaty Series*, vol. 325, p. 86).

Sudan had decided to plead immunity. He mentioned that case as an indication of how matters could go awry even when a transaction was said to be commercial. It had already been seen how the courts could be influenced by declarations of policy or official circulars. Even when left to their own devices, the courts tended to seek guidance, for example, regarding admission of evidence.

27. In his view, neither limb of the definition laid down in article 2, subparagraph 1 (*f*), would do much to dispel the difficulties to which he had alluded. There were, however, two possible solutions: to adopt the test used by the Supreme Court of Austria,[9] namely, was the act such that it could not be performed by a private individual, in which case it would attract jurisdictional immunity; or to adopt the rule adumbrated in the recommendations of the Asian-African Legal Consultative Committee,[10] namely, that a State trading organization which was a separate legal entity under the municipal laws of the mother country should not be entitled to immunity in the State where it carried on its activities. The second of those choices was to be preferred, since it was the more realistic and gave rise to less obvious problems.

28. Turning to draft article 4, he asked how it was possible to guard against an overlap with the Conventions referred to in that article. Bearing in mind the definition of the expression "trading or commercial activity" laid down in article 2, subparagraph (1) (*f*), a number of acts would be covered by that expression, such as services rendered, rentals, electricity and water supply. Default on payment of rent by diplomats was now giving rise to serious debate in certain places. What was the remedy of the landlord? If it were known that the sending State paid for the diplomat's lodging, could the conduct of the diplomat in that regard be attributable to the sending State? Were such acts excepted under article 31, subparagraph 1 (*a*) of the Vienna Convention on Diplomatic Relations? What would be the position if it were alleged that the property was held on behalf of the sending State for the purposes of the mission? It was clear, from such cases, that overlap was a very real possibility which called for further scrutiny.

29. Execution of the judgement obtained by the municipal courts as against the agency or instrumentality of a foreign Government was bound to give rise to difficulties. The draft articles, however, were silent on the matter. Little was known of State practice, although the Commission had been referred to the treaty practice of the USSR. It had been told that, where valid, execution might be levied only on the outstanding claims and goods that stood to the credit of the trade delegation concerned. That, however, begged the question: what if they did not suffice to compensate the claimant? It had rightly been said that there was no point in seeking a right that could not be enforced.

30. Lastly, he agreed that, in so far as it purported to state a general principle of State immunity, draft article 6 was acceptable, although it needed to be redrafted. Draft article 11 could be discarded, although its terms could be accommodated within draft article 6. Care should be taken to avoid giving an exhaustive list of exceptions and, as Mr. Jagota had stated (1711th meeting), exceptions should not be allowed to become the rule. Care was also required with regard to the question of consent in draft article 7, which could also give rise to difficulty.

31. Mr. FLITAN said that the Special Rapporteur's fourth report (A/CN.4/357) was a work of great scientific value on a difficult subject. The need to define the content of international law in connection with the jurisdictional immunities of States and their property derived particularly from the fact that some judicial or arbitral decisions and some international conventions concerned that immunity as it was provided for in international law. For example, article 50 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character provided, in paragraph 2, that, when he led a delegation to an organ of an international organization or to a conference convened by an international organization, a Head of State enjoyed in the host State or in a third State, in addition to what was granted by that Convention, the facilities, privileges and immunities accorded by international law to Heads of State. As the basis of its work, the Commission could take the Special Rapporteur's conclusion (*ibid.*, para. 68) that the qualification of State activity as "sovereign" and "non-sovereign" must in principle be made by national law of the forum, since international law contained no criteria for making that distinction.

32. It seemed from the discussions that most members of the Commission thought that there was a principle of international law concerning the jurisdictional immunity of States and their property. In his view, the existence of that principle should be recognized in the draft, but more should be done in that respect than to amend a few words in article 6 or delete paragraph 2 of that provision. Article 6 should be supplemented so as to show clearly what was that meant by the fact that jurisdictional immunity was a principle of international law. Since his country's law was broadly based on French law, he had always considered the question in the perspective of the celebrated case *Gouvernement espagnol* v. *Casaux* (1849)[11] mentioned by the Special Rapporteur (*ibid.*, para. 62). In that case, a State's jurisdiction had been defined as "a right inherent in its sovereign authority, which another Government cannot arrogate to itself without running the risk of adversely affecting their respective relations".

[9] Decision of the Supreme Court of Austria of 10 February 1961 in the case *X* v. *Government of the United States* (text reproduced in United Nations, *Materials on Jurisdictional Immunities* ... (see footnote 2 above), p. 203).

[10] See 1708th meeting, footnote 13.

[11] Dalloz, *Recueil périodique et critique de jurisprudence, de législation et de doctrine, 1849* (Paris), part 2, p. 9.

33. Account must also be taken of the work of codification which had given rise to the four Conventions mentioned in draft article 4. Some members of the Commission had been concerned to know whether the jurisdictional immunity of States had preceded diplomatic and consular immunities. In view of the development of the structure of States, he supposed that problems of immunity must have arisen first with regard to sovereigns or Heads of State. Subsequently, the existence of diplomatic missions, consular missions, special missions and missions of representation to international organizations and conferences had led to a large-scale codification movement which had resulted in the expression of general agreement in the Conventions to which he had alluded and by which the Commission should be guided throughout the preparation of the draft articles. Draft article 3 defined the expression "foreign State" as including the sovereign or Head of State and the central government and its various organs or departments. For him, it was inconceivable that any of those entities should enjoy, in their relations with another State, a legal status other than that laid down with regard to jurisdictional immunity in the four Conventions in question. It was therefore indispensable to keep those instruments in mind and to refrain from contradicting their provisions concerning jurisdictional immunity, since they represented what States considered to constitute international law.

34. At the start of its work, the Commission had repeatedly stressed that it would have to study the jurisdictional immunity of States in the light of the evolution of international relations, particularly the predominance of international commercial activities. Some members of the Commission had rightly pointed out that international trade was of vital importance for all States, whatever their political and social organization. He hoped that in the future the Commission would respond specifically to that implicit appeal. In his country, the main means of production had been nationalized and entrusted to legal entities which had acquired, by law, the right of direct administration. Their estate was separate from that of the State; they could not be held responsible for the State's activities, and vice versa. Each of them could engage in foreign trade activities, conclude contracts with States and take part in international co-operation. To take due account of such developments in international life, the Commission should perhaps provide for two forms of distinction. A distinction *ratione personae*, depending on their status, would apply to persons engaging in international relations with a foreign State and it would be obligatory to follow international law as already codified with respect to all those who, in their capacity as sovereign, Head of State, head of Government or other position, exercised Stated sovereignty. In the case of State organizations or machinery involved in State activities, the distinction would be made *ratione materiae*. It would then be possible to identify exceptions like those deriving from commercial activities. Since the latter sphere embraced all kinds of activities, the Commission would have to continue studying practice and doctrine and to invite Governments to continue furnishing observations and comments.

35. Mr. BALANDA said it was his impression that article 11 duplicated article 6, since both stated the principle of jurisdictional immunity and its corollary, the obligation to give effect to it. A choice should therefore be made between the two provisions. Subject to what he had said at the 1710th meeting about article 6, he considered that article 11 could be deleted, since it only repeated the content of article 6. If article 11 were maintained, it should embody the rule of jurisdictional immunity, the existence of which the Special Rapporteur had finally recognized in his fourth resport (*ibid.*, para. 14). It might then read along the following lines:

> "Subject to the provisions of the present part, States are not subject to the jurisdiction of other States".

36. Bearing in mind State practice as presented by the Special Rapporteur, and notwithstanding the comments made in that respect by Mr. Ogiso, it seemed that States recognized some exceptions, apparently mainly within the sphere of commerce, to the principle of jurisdictional immunity. In that connection, the Commission should above all, seek to define the notion of acts of commerce (*actes de commerce*), for which States used a number of expressions such as "trading operations", "commercial activities" or "commercial transactions". A definition as precise as possible, but broad enough to cover activities of a financial or industrial nature, would be required.

37. When he had inquired into the basis of jurisdictional immunity, Mr. Njenga (1711th meeting) had stressed the concern with assimilating States to individuals in international commercial relations. When a State came to perform the commercial activities which a person could perform, it should not enjoy jurisdictional immunity. In his own opinion, that concern for assimilation and equality should not be taken too far. Firstly, unlike an individual, a State enjoyed not only jurisdictional immunity but also immunity from execution. Secondly, even in domestic law, where a similar trend was apparent, an effort had been made to limit the scope of the State's *imperium* to the benefit of the individual. French-based administrative law, however, recognized at least the theory of the governmental act (*acte de gouvernement*), the effect of which was to remove from the sphere of control of courts certain activities which Governments might perform. Consequently, in the case of an act of commerce, which most of the Commission's members felt should be the main exception to the rule of jurisdictional immunity, there would be other elements to be taken into consideration when the activity concerned an individual or a State. In domestic law, where the notion of an act of commerce was sometimes defined in the commercial code, a presumption of commerciality attached to such acts: when an individual, whether a natural person or a legal entity, performed an act qualified by the code as commercial, he became a trader. Was the same true of the

State? The objective criterion proposed by the Special Rapporteur, that of the nature of the act, was of course, relevant, but it was not sufficient. Other criteria, such as purpose, must also be considered.

38. It was surprising that the Special Rapporteur should have stated in his fourth report (A/CN.4/357, para. 31) that, in the circumstances falling within any of the accepted exceptions, the rule of State immunity as an obstacle to the exercise of jurisdiction was "obviated or removed". In fact, it was never obviated since, if the act performed fell into the category of the accepted exceptions, immunity was always completely removed.

39. In the report (*ibid.*, para. 43), the Special Rapporteur also referred to the theory of implied consent "to submit to the exercise of jurisdiction by the sovereignty controlling the territory into which a foreign State has transplanted itself". In his opinion, that theory was not absolute; it could be set aside under the rules of private international law, particularly in the name of freedom of will. It was accepted that, in a legal relationship containing an element of foreign origin, the parties could refer to the jurisdiction of a State other than that where the commercial activity had taken place.

40. Referring to draft article 12, he observed that the words "In the absence of agreement to the contrary", with which paragraph 1 of that provision began, seemed to exclude the exception. The parties would thus be enabled to stipulate that, in a specific relationship, any acts of commerce they performed would enjoy jurisdictional immunity even though it might be generally accepted that jurisdictional immunity could not be invoked in such a case. To permit States to depart from that rule would be a step towards the negation of the exception it was wished to assert. With regard to the words "being an activity in which private persons or entities may there engage", it was, as Mr. Ushakov had observed (1709th meeting), difficult to envisage a State acting with or without its *imperium*; the State should be taken as such. He could readily imagine, however, that a State could act as a private person. By retaining the present wording of article 12, paragraph 1, the Commission would sustain the controversy between the act performed *jure gestionis* and the act performed *jure imperii*. That criterion had still not been definitively adopted by the courts and the relevance of certain decisions—such as that in *Montefiore* v. *Congo belge*,[12] which the Special Rapporteur had cited (A/CN.4/357, para. 66) was open to question.

41. With respect to article 12, paragraph 2, he was surprised to see a reservation made for transactions concluded between States and contracts concluded on a government-to-government basis. States and Governments could effect transactions and conclude contracts among themselves just as private persons could. If the operations in question were commercial, they fell within a sphere where an exception was recognized and there seemed no reason to exclude them from its scope.

[12] *International Law Reports, 1955* (London), p. 226.

42. The Commission should avoid delay over doctrinal problems deriving from differences between legal systems. The guiding factor should be State practice. While the principle of jurisdictional immunity no longer seemed in dispute and was accepted in practice, with a few exceptions, it must be stated in carefully-selected terms so that its expression would gain general acceptance.

43. Mr. NI was grateful to the Special Rapporteur for having introduced in his fourth report useful amendments to certain draft articles submitted in his third report.

44. With regard to article 6, many members of the Commission seemed to think that the jurisdictional immunity of States constituted a rule. Some considered, however, that the sovereignty of the territorial State was essential and that reciprocity should be the basis. The Special Rapporteur was right in proposing to keep in article 6 the words "in accordance with the provisions of the present articles" for the time being. Jurisdictional immunity was nevertheless the principle.

45. The various drafting suggestions made by such members of the Commission as Mr. Yankov, Mr. Jagota, Mr. Calero-Rodrigues and Mr. Al-Qaysi could constitute variants to be chosen at a later stage. But to say that article 6, as it stood now, implied a denial of State immunity would be an unnecessary overapprehension. It would be better not to take a final decision on the matter immediately. Unless the Special Rapporteur could find better wording or the Commission could choose a constructive proposal among those already submitted, the present formulation should not be an obstacle to the continuance of the discussion on the articles which follow. He himself thought it preferable not to modify article 6 for the time being.

The meeting rose at 6. p.m.

1713th MEETING

Tuesday, 25 May 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (A/CN.4/340 and Add.1,[1] A/CN.4/343 and Add.1-4,[2] A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).