

Document:-
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Summary record of the 1715th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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could arise of whether, in a particular case, the property was public or private, something that might create a very delicate situation in view of the unicity of the State. If the property was private and the act did not come within the category of *acta jure imperii*, immunity could not be claimed. Hence, it would be better to avoid a *renvoi* to internal law.

The meeting rose at 1 p.m.

1715th MEETING

Thursday, 27 May 1982, at 10.10 a.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.4/337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur³ (continued)

ARTICLE 7 (Obligation to give effect to State immunity)⁴ (continued)

1. Mr. AL-QAYSI said that the terms “rule” and “principle” had been employed a great deal in the course of the discussion and, in order to determine whether they could be used interchangeably, he had consulted the authorities. Paton, in his work on jurisprudence,⁵ had defined a principle as the broad reasoning that lay at the base of a rule of law: it demonstrated that the law was not simply a collection of rules, and through it, the law could draw nourishment from the views of the community. Rules, on the other hand, were precepts which laid down the consequences that would inevitably flow from certain facts—for instance, a will would be invalid if it was not attested by two witnesses. On that basis, it was apparent that article 6 set forth a rule on the jurisdictional immunity of States that was based on the principle of sovereignty.

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).

³ The texts of draft articles submitted at previous sessions of the Commission 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), p. 158, footnotes 668-671.

⁴ For the text, see 1714th meeting, para. 6.

⁵ G. W. Paton, *A Text-book of Jurisprudence* (Oxford, Clarendon Press, 1946), p. 176.

2. Clearly, the content of article 7 had to be examined in the light of its purpose, for it sought to enunciate the obligation that was the corollary to the right embodied in article 6. Accordingly, article 7 viewed the rule of State immunity from the opposite standpoint, namely, that of the State granting immunity, rather than the State claiming immunity. Moreover, the provisions of article 7 were set in the context of the interrelationship between competence and State immunity, in which connection the Special Rapporteur had rightly stated in his fourth report (A/CN.4/357, para. 21) that the “rules of competence of the court are very relevant in all cases, whether or not the question of State immunity is also involved”; the reason being that, without the necessary jurisdiction, the question of immunity would be hypothetical, since there would be no exercise of jurisdiction from which the foreign State could be deemed immune.

3. During the Commission's deliberations it had been maintained that article 7 stated nothing of substance. Although he did not share Mr. Ushakov's views (1714th meeting), they were fully justified inasmuch as they were the logical outcome of his position on article 6, to which article 7 referred. Mr. Thiam's doubts (*ibid.*) seemed to be caused, first, by the incongruity between the title of the article and the actual content, which was descriptive, and second, by the negative terms in which the article was couched. It had to be remembered, however, that obligations could be stated in negative terms, which did not detract from the force of the obligation and afforded a very appropriate drafting device when there were exceptions to the operation of the rule itself, as was the case in point. It certainly could not be argued that the principle of the non-use of force in international relations, as laid down in Article 2, paragraph 4, of the Charter of the United Nations, did not state an obligation because it was expressed in negative terms.

4. The point concerning the descriptive character of the article tallied with Mr. McCaffrey's view (*ibid.*) that the text was definitional and could be covered by making changes in articles 2 and 3. In that respect, he would endorse most of what Mr. Jagota had said (*ibid.*), namely, that paragraph 1 was not definitional because it stated an obligation, something that could readily be seen from the analysis of jural relationships referred to in the Special Rapporteur's third report (A/CN.4/340 and Add.1, para. 18). Paragraph 2 of the article was also substantive in that it dealt with legal proceedings against a State, whether or not named as a party, when the said State was in effect impleaded. That aspect of the matter was part and parcel of the obligation laid down in paragraph 1. Consequently, paragraph 3, despite the note thereto, only provided a partial alternative to the text of article 3, subparagraph 1 (a), since it contained a reference to property, a notion that obviously could not be subsumed under the notion of foreign States.

5. In one respect he disagreed with Mr. Jagota's comments on the two versions of paragraph 1. The matter

of jurisdiction was covered in the latter part of alternative A for that paragraph by the emphasis on disallowing the "continuance" of legal proceedings against another State, which implied existing competence. In alternative B, the notion was simply expressed differently by using the word "allowing" in conjunction with the phrase "to be conducted against". That meant that the competence of the court could be affirmed only by way of a clear statement, and thus accounted for the use of the phrase "notwithstanding the existing competence of the authority before which the proceedings are pending".

6. As to drafting matters, the wording of paragraph 2 should be aligned with that ultimately adopted for paragraph 1. In paragraph 3, the phrase "acting as a sovereign authority" did not seem to convey the precise intent, for the sovereign authority belonged to the State of which the organ or instrumentality formed part. Perhaps it would be better to say "when acting in the exercise of the sovereign authority of that State", which would be more in keeping with article 3, subparagraph 1 (a) (iv). Lastly, in view of the distinction between immunities *ratione materiae* and immunities *ratione personae* of representatives or agents of a foreign Government, he wondered whether the test of acting "as State representatives" was indeed preferable to the earlier formulation,⁶ which spoke of acts performed by representatives "in their official functions", which was the true crux of the matter. His comments on the drafting were in no way intended to detract from the significant improvements in article 7, on which the Special Rapporteur was to be commended.

7. Mr. OGISO said that he had some doubts about the reference to disallowing the "continuance of legal proceedings against another State" in alternative A for paragraph 1, the version which appeared to command the support of most members in the Commission.

8. If paragraph 1 was read in conjunction with paragraph 2, "legal proceedings" included proceedings against another State, even if that State was not named as a party. Normally, the competence of the court in respect of a State's jurisdictional immunity would not be determined until legal proceedings had commenced and the court had considered the case and taken a decision on it. Even then, the matter could still be brought before a higher court and, indeed, in many cases the question of whether jurisdictional immunity should be invoked would be finally decided only by the Supreme Court. He therefore wondered at what stage the State could disallow the "continuance of legal proceedings". To his mind, the statement in alternative A that a State should "give effect to State immunity under article 6 by refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities" signified that the court had to decide whether or not it had competence in a particular case. If the court decided that it did not, it should then

refrain from entering further into the substance. At the same time, the State could not go further and take steps to disallow the continuance of legal proceedings which might still be referred to a higher court. In the circumstances, the phrase in question should be deleted, and he hoped that the Drafting Committee would take account of that suggestion.

9. Mr. FLITAN said that, during the general discussion (1712th meeting), he had stressed the need to clarify the link between the set of draft articles and the four multilateral conventions enumerated in article 4. Members of the Commission who had taken up that point had sometimes gone beyond his own idea. However, the Special Rapporteur, in summing up the discussion (1713th meeting), had supplied the necessary explanations. In fact, the value of emphasizing the link was that the question of immunities was already partly dealt with in the four conventions in question. Nevertheless, he had not proposed that the draft should depart from or reproduce any of the provisions of those conventions and had simply pointed out that some of them should be a source of inspiration in considering the present topic. For example, it was inconceivable that, in matters pertaining to jurisdictional immunities, a head of State or a member of Government should enjoy lesser status than was provided for in the conventions. Some members had pondered the question of which particular immunities were in fact recognized in those instruments, but the Commission had no need to concern itself with that point. For the purposes of articles 6 and 7, reference had to be made to article 3, subparagraph 1 (b), which explained the concept of jurisdiction, and it was apparent therefrom that the draft covered a certain category of immunities, namely, jurisdictional immunities, as defined in the draft.

10. Article 7 could not be studied independently of article 6. Generally speaking, it seemed to be agreed that article 6 should enunciate the principle of jurisdictional immunity of States more clearly but that any recasting of the article at the present juncture would prevent the Commission from moving ahead. In his view, article 6 should therefore be viewed as the point of departure, on the understanding that the Commission would later define the principle of immunity of States more explicitly and more comprehensively in a new version. The new version of the article would have to stipulate, for example, that the States must grant one another immunities from criminal, civil and administrative jurisdiction, and perhaps explain that enforcement measures against other States were prohibited. It was not essential for the moment to decide whether the words "in accordance with the provisions of the present articles" should be retained. However, it was indispensable for the Commission to agree on the question of substance; otherwise, members would continue to refer constantly to article 6 while examining the other draft articles.

11. As Mr. Thiam had observed (1714th meeting), neither of the two alternative versions of article 7, paragraph 1, set forth a rule of law. The paragraph did

⁶ For the original text of draft article 7, see *Yearbook ... 1981*, vol. II (Part Two), p. 155 footnote 661.

appear to be required, for it imposed on States the obligation to give effect to jurisdictional immunity, or more exactly, to take appropriate measures to ensure *de facto* respect for such immunity. Nevertheless, the drafting should be more precise and three points should be highlighted. First of all, it should be specified that the national judicial or administrative authorities should not follow up a request which might injure the immunity of another State; next, it should be indicated that, if proceedings had already been instituted, the national authorities did not have to continue them; finally, it would be useful to clarify the questions that arose in connection with enforcement. In the final analysis, article 7 was necessary, and it must cover all possible instances in which a State must give effect, at the national level, to obligations stemming from the principle set forth in article 6.

12. Obviously, in establishing measures to be taken at the internal level the Commission should avoid interfering in the internal affairs of States. Yet it had to be remembered that obligations deriving from rules of international law must be fulfilled by the States which assumed those obligations. Thus, under article 59 of the 1963 Vienna Convention on Consular Relations, the receiving State must "take such steps as may be necessary" in order to protect the consular premises of a consular post headed by an honorary consular officer. In the present instance, no attempt should be made to specify the practical details, as that matter came within the purview of the internal organization of each State, but the affirmation of the principle of jurisdictional immunity in article 6 inevitably meant that article 7 should indicate the measures to be taken by the national authorities in the three areas he had mentioned.

13. As several members had rightly pointed out, paragraph 2 was of practical value because of the rules laid down therein but the formulation plainly called for improvements.

14. Mr. RIPHAGEN said that the draft articles as a whole were concerned with what exactly was immune from what. Article 7, however, prejudged the question, since it was expressed in the form of a basic obligation of the State. The wider the content of the obligation, the greater the number of exceptions that would be required, for the article was based on the assumption that each and every exception to the obligation would be spelt out in the draft. It would thus exclude the grey area to which he had alluded earlier (1708th meeting), unless of course article 6 was retained in its existing form. Nevertheless, a number of members were anxious to alter article 6.

15. Stressing the need for careful drafting of article 7, he noted that paragraph 1, in both versions, imposed an obligation on the State to refrain from subjecting another State to its jurisdiction. It might seem as though that obligation excluded the service of a writ on a foreign State, at least under legal systems like that in the Netherlands, in which the normal method of securing the appearance of a defendant was for an officer of the

court to serve a writ of summons on him. Yet, such a summons to appear could constitute an act of subjecting another State to the jurisdiction of the court, and it was obvious that paragraph 1 was not intended to exclude the service of a writ in all cases. That was also borne out by the terms of article 9, which presupposed that a foreign State could decide not to plead immunity and to accept the jurisdiction, which could happen only if the State had been summoned to appear; otherwise it could not waive its immunity. If such an understanding of paragraph 1 was correct, then it should be clear from the actual terms of the paragraph.

16. Paragraph 2 was designed to preclude the indirect impleading of a foreign State. Such impleading could be done in a number of ways, one of them being to draw on the doctrine of the act of State. There again, he doubted whether the real intention of the paragraph was to do away with that possibility. Moreover, the words "involve" and "affect" and the expression "sovereign rights, interests, properties or activities of the State" encompassed concepts that were too far-reaching.

17. The language of paragraph 3 was likewise too broad. Admittedly, the paragraph spoke of the "public" property of the State, unlike paragraph 2, which referred to any property or activities of the State, but it also spoke of proceedings "designed to deprive another State of ... the use of such property in its possession or control". To illustrate the use of property, one might cite the case of a foreign State that wished to build an extension to one of its embassies, something which would not be immune from all government control. It was common practice in such instances for embassies to seek permission from the national authorities, which permission might or might not be granted. Again, the embassy's neighbours might object, with the result that contentious proceedings would be brought and some authority would sit in judgement on the foreign State. Evidently, the draft should not seek to preclude such a possibility.

18. For all those reasons, he wondered whether the Commission was fully aware of the enormous task that would be involved by establishing a broad obligation of the kind set forth in the article in its present form.

19. Mr. NI said that, since part II of the draft was concerned with general principles, it should normally begin with a provision indicating how to give effect to State immunities rather than a provision emphasizing that the existence of the competence of the authorities in the territorial State represented the *sine qua non* of those immunities. In particular, it was not necessary in the title of the article to place rules of competence on an equal footing with the concept of jurisdictional immunity, as had been done in article 7 in its original form.⁷ If a court of the territorial State was not competent to entertain proceedings under the internal law of that State, it would not normally take any measures contrary to that law. In judicial practice, the question of whether a court was competent to conduct proceedings under internal

⁷ See footnote 6 above.

law did not necessarily have to be resolved beforehand, for the court could examine the question of jurisdictional immunity instead. If immunity was to be granted, the question of competence no longer required solution. It would be impractical if the court's competence over a particular case had to be determined before the question of jurisdictional immunity could be examined, as had been provided in article 7 in its earlier form. Sir Francis Vallat⁸ and Mr. Quentin-Baxter⁹ had analysed that problem quite thoroughly at the previous session.

20. The changes made by the Special Rapporteur in the present, recast version of article 7 were satisfactory. Personally, he preferred alternative A for paragraph 1, but some drafting changes seemed essential. For example, the phrase "and by disallowing the [conduct] continuance of legal proceedings against another State" was redundant because the idea involved was already inherent in the use of the word "refraining" earlier in the sentence. Again, in the English version of alternative B, the expression "existing competence" seemed to be unduly emphatic and was not sufficiently flexible. Similarly, the words "are pending", could give rise to divergent interpretations, for the question would arise every time of whether or not proceedings were pending. Unfortunately, the expression "refraining from subjecting another State to the [its] jurisdiction", in alternative A and in alternative B, was inelegant and difficult to translate into Chinese. Furthermore, the question of including an express reference to all the competent judicial, administrative or police authorities was a delicate matter, since it would be difficult to draw up an exhaustive list of such authorities.

21. Paragraphs 2 and 3 were a great improvement on their earlier equivalents, namely, alternatives A and B of the former paragraph 2 of the article, but paragraph 3 could not constitute an alternative to the text of article 3, subparagraph 1 (a), since the two provisions were quite different from the standpoint of both their purpose and their content. That question should be taken up again when the Commission came to consider article 3, subparagraph 1 (a).

22. In connection with Mr. Riphagen's comments, he wondered whether a State, in order to subject another State to its jurisdiction, could serve a writ of summons on the Minister of Foreign Affairs of the other State.

23. Mr. USHAKOV said that, when it elaborated a set of draft articles, the Commission was in the habit of leaving the definitions until after the substantive articles had been drafted in their final form, for only then could the Commission ascertain which definitions were really necessary. However, it did happen that definitions were proposed earlier on, so as to clarify in which sense certain expressions were being used.

24. Some terms had never been defined, since it would be dangerous, or even impossible, to do so. Thus, the Commission had never attempted to define the term

"State", which appeared in many treaties and conventions of a universal character. Draft article 3, subparagraph 1 (a) sought to clarify the expression "foreign State", which would include, in particular, the sovereign or Head of State, the central Government and its various organs or departments. In his view, such an attempt was pointless and could affect existing treaties and conventions. In fact, the provision did not contain a definition of the State but a reference to certain of its organs, yet a State's organs were instituted in accordance with internal law, and not with international law. Part I of the set of draft articles on responsibility of States for internationally wrongful acts contained an article, namely article 5, entitled "Attribution to the State of the conduct of its organs",¹⁰ in which conduct of any State organ having that status under the internal law of that State was to be considered as an act of that State under international law. The Commission had in that instance referred to the internal law of each State because, generally speaking, it was impossible to establish what a State organ was; reference had to be made to internal law, which varied from one country to another. For that reason, it was useless in draft article 3 to try to define the concept of State by referring to certain organs.

25. The term "immunity" was defined in draft article 2, subparagraph 1 (a), but it had been considered clear enough to obviate any need for a definition in existing treaties and conventions. Any definition of it in the present draft would also have effects on those treaties and conventions. Furthermore, under draft article 2, the expression "immunity" meant the privilege of exemption from, or suspension of, or non-amenability to, the exercise of the jurisdiction, but an immunity could not be assimilated to a privilege. The 1961 Vienna Convention on Diplomatic Relations dealt with immunities, privileges and facilities. The right of the sending State to use its flag and emblem on the premises of the mission was a privilege and not an immunity, and the obligation on the receiving State to help in the acquisition of the necessary premises for the mission was a facility granted to the sending State. Such an example showed that it was not only futile but even hazardous to try to define terms which were employed in international instruments without being defined. Hitherto, the Commission had always been very cautious in that regard.

26. In connection with the advisability of providing States with guidelines on how to give effect to jurisdictional immunity, Mr. Flitan had referred to article 59 of the 1963 Vienna Convention on Consular Relations. His own view was that the article in question did not impose any obligation on the receiving State vis-à-vis its organs. The receiving State was required to ensure the protection of consular premises, and it was for that State to determine how to give effect to its obligation. The way in which it went about doing so and the organ to which it assigned that task were of little importance. For that reason, it would be quite strange to take the view that a

⁸ *Yearbook ... 1981*, vol. I, p. 59, 1653rd meeting, para. 29.

⁹ *Ibid.*, p. 68, 1655th meeting, para. 28.

¹⁰ For the text, see *Yearbook ... 1980*, vol. II (Part Two), p. 31.

State should compel the courts to act or not to act in a particular way. Any obligation incumbent on a State was incumbent not on certain of its organs alone but on the State in its entirety.

27. Mr. THIAM said that he would like to clarify his position on article 7 for some members of the Commission. He was not opposed to the rule on immunity set forth in the article, but was compelled to observe that it did not emerge clearly from the present wording, at least in the French version. For that reason, he had proposed that paragraph 1 should start with a phrase such as: "A State shall refrain from ...".

28. As for the remainder of the text, he hoped that the Special Rapporteur would avoid getting bogged down in rules on proceedings, something which fell within internal law. It would be better to keep to general rules.

29. Mr. KOROMA said that article 7 performed a dual function in that it was definitional and, at the same time, set forth the duty of the State to give effect to State immunity. However, it had to be read in conjunction with article 2, since it was there that the definition of immunity was to be found.

30. He agreed that the article should not seek to interfere in the internal affairs of States by specifying how States should give effect to the rule. Indeed, throughout the text, the Special Rapporteur had consistently placed the onus of giving effect to the obligation on the State itself, rather than on its organs. In other words, it was left to the State, through its own internal mechanism, to prevent its organs from assuming jurisdiction over another State.

31. As to the amendments proposed (1714th meeting) by Mr. Evensen and Mr. Balanda, the text might be expanded to include military tribunals—which sometimes temporarily assumed law-enforcement powers—by inserting the words "and law-enforcement agencies" after the word "authorities" in alternative A for paragraph 1. The provisions of that paragraph would then encompass all law-enforcement agencies, including police and military tribunals. In general, he preferred the wording of alternative A to that of alternative B.

32. Paragraph 2, which was also definitional in character, was based on the principle of the separation of functions, something which could not be accommodated in all legal systems. However, the Special Rapporteur had once again been careful to ensure that the obligation to give effect to State immunity was assumed at all times by the State itself.

33. Lastly, in connection with paragraph 3, he endorsed the suggestion that the words "is designed" should be replaced by "seeks", and also proposed that the word "instituted" should be replaced by "initiated".

34. Mr. CALERO RODRIGUES said that in article 7, paragraph 1 set forth the obligation stemming from the rule laid down in article 6. In his opinion, such an approach was unnecessary, since the obligation was im-

plied by the statement of the rule. Moreover, there was no need to stipulate that the State should give effect to its obligation by refraining from subjecting another State to the jurisdiction of its judicial and administrative authorities and by disallowing the continuance of legal proceedings against another State, since the second course of action was implicit in the first. In addition, it was superfluous to refer to the competence of the courts as a prerequisite for the application of State immunity, for a court could not hear a case if it was not competent to do so. All in all, paragraph 1 could be dispensed with, since the meanings of the terms "jurisdiction" and "immunity", as used in article 6, were clearly defined in articles 2 and 3.

35. Paragraphs 2 and 3 were of a different character. Paragraph 2 sought to make it clear that, whether or not a State was implicated by name, it enjoyed immunity from bearing the consequences of a judicial determination by the competent authorities of another State. Paragraph 3, however, went further and regarded proceedings against organs, agencies or instrumentalities or representatives of the State as tantamount to proceedings against the State itself. The formulation of that provision could none the less be made more succinct, and it should be noted that the phrase "or [if] it is designed to deprive another State of its public property or the use of such property in its possession or control" would be unnecessary if the last part of paragraph 2 was adopted.

36. Mr. YANKOV said that if paragraph 1 was to be regarded as setting forth a general principle concerning the implementation of the general rule of State immunity, it appeared to be simply a reiteration of what was stated in paragraph 2 of article 6, particularly as far as the introductory words were concerned.

37. Paragraphs 2 and 3 were interpretative rather than substantive in nature, and the whole article could well be reduced to one paragraph, since the basic purpose was to lay down a State's general obligation to give effect to jurisdictional immunity, either by refraining from instituting proceedings against another State, or by disallowing the continuance of proceedings which had already been initiated. However, the article did not specify the action to be taken by a State to fulfil its obligation at the stage of execution, an omission which might give rise to difficulties later.

38. The reference to disallowing the continuance of legal proceedings instituted against another State had some merit as a safeguard clause, but in terms of the procedure involved, it might be impossible under some legal systems for a foreign ministry or other government agency to intervene once a matter had been deemed to be within the jurisdictional competence of the State. If the rule was to operate efficiently, the Special Rapporteur might consider whether the statement of the general obligation should not be immediately followed by a statement of an obligation to give effect to that obligation.

39. Mr. QUENTIN-BAXTER said that, in view of the definition contained in articles 2 and 3, he believed, as did Mr. Calero Rodrigues, that article 6 could for the time being be regarded as stating the general rule of State immunity. However, the question of whether the rule was specified in article 6 or article 7 was ultimately unimportant.

40. One practical problem posed by the current draft articles, which had not arisen in respect of the drafts on diplomatic and consular immunities, was that the immunities concerned situations which might arise, without the prior knowledge of anyone in the receiving State, in the innumerable instances in which one State found that another State had manifested itself in some way. The very absence of a balancing of sovereignty or jurisdiction with immunity tailored to the particular situation illustrated the importance of having rules. In that regard, the Commission had, at the outset, made a conscious decision to confine itself to jurisdictional immunities as described in article 3.

41. Throughout its consideration of the draft, the Commission would be confronted with the problem of how far it could go in attempting to provide some direction that would help to unify the practice of national courts. Even within the jurisdiction of a single State, judicial opinions could vary widely. As a number of members had indicated, paragraphs 2 and 3 represented a courageous attempt by the Special Rapporteur to give some guidance in that regard, but in doing so he was entering a very difficult area. Anyone familiar with the common law system would be aware of the enormous difficulties posed by the notions of ownership, possession and control, but he was instinctively opposed to any attempt to deal with the question at the level of national courts or other government organs. The aim of international codification must always be to state principles succinctly and clearly. Accordingly, at the present stage the Commission must endeavour to state the quintessence of the rule, rather than pinpoint situations which were so different that it would be impossible to take account of all of them.

The meeting rose at 1.05 p.m.

1716th MEETING

Friday, 28 May 1982, at 10.05 a.m.

Chairman: Mr. Paul REUTER

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,

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**A/CN.4/L.339, ILC (XXXIV)/Conf. Room
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[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)

ARTICLE 7 (Obligation to give effect to State immunity)⁴ (*concluded*)

1. Mr. MALEK said that he subscribed entirely to the opinion expressed at the previous meeting by Mr. Ushakov, that it was neither possible nor desirable to give a definition of the term "State". It was true that nowhere in any of its sets of draft articles had the Commission defined that term. From the outset of its work, it had adopted an unvarying attitude in that connection: in view of the theoretical and practical difficulties inherent in any definition of the concept of State, it had acquired the habit of using the word "State" in the sense attributed to it in international law, in the sense commonly accepted in international practice. Thus, in its observations concerning the draft Declaration on Rights and Duties of States which it had drawn up at its first session in 1949, it had stated its conclusion that no useful purpose would be served by an effort to define the term "State", and its impression that it had not been called upon to set forth in that draft Declaration the qualifications to be possessed by a community in order that it might become a State.⁵

2. Admittedly, the Commission had attempted, in the commentary to article 2 of the draft articles on diplomatic intercourse and immunities,⁶ to define the category of States which could establish diplomatic relations: it had held that faculty to be reserved for "independent States" and members of a federation empowered by the federal constitution to establish diplomatic relations. Thus, the adjective "independent" was used only in the commentary; on the other hand, its use by the Commission when preparing a draft convention at a time, some quarter of a century ago, when the terms "sovereign" or "sovereignty" had been in quite common legal use, represented considerable progress in contemporary thinking on the concept of the State—in other words, a more realistic conception of the idea of sovereignty. The Commission rarely used the words "sovereign", "sovereignty", or even "sovereign authority", in its work, seeming to do so only when it felt they would greatly improve the

³ The texts of draft articles submitted at previous sessions of the Commission 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: *Yearbook ... 1981*, vol. II (Part Two), pp. 153-154, footnotes 655-658; (c) art. 6 and the commentary thereto, provisionally adopted by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (d) arts. 7 to 10, revised at the Commission's thirty-third session: *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671.

⁴ For the text, see 1714th meeting, para. 6.

⁵ *Yearbook ... 1949*, p. 289, document A/925, para. 49.

⁶ *Yearbook ... 1958*, vol. II, p. 90, document A/3859, chap. III, para. (4) of the commentary.