

Document:-  
**A/CN.4/SR.1763**

**Summary record of the 1763rd meeting**

Topic:  
**Jurisdictional immunities of States and their property**

Extract from the Yearbook of the International Law Commission:-  
**1983, vol. I**

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the general rule in conformity with the fundamental principles of law, the latter could hardly be said to have acquiesced in the process, particularly when it was incompatible with their social and economic systems. Under such circumstances, general acceptance or even acquiescence could not be implied. It was difficult to see how the national laws of a few States could, in the name of international law, be imposed on the rest of the international community.

33. Accordingly, he was of the opinion that the exception of commercial activity embodied in draft article 12 was not valid. The reference to any activity conducted “partly or wholly” in the territory of a forum State was entirely unsatisfactory. In order to strike a balance, an alternative might be to draw on article 7, paragraph 1, of the 1972 European Convention on State Immunity, which was worded: “. . . if [the Contracting State] has on the territory of the State of the forum an office, agency or other establishment through which it engages . . . in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment”; action could be taken only against such an office, agency or establishment. A foreign State *eo nomine* could not be sued without its consent, but State enterprises or similar entities having independent legal personality could not claim State immunity. Consequently, it would be necessary to reformulate, in draft article 3, paragraph 1(a), the definition of a “foreign State” and, in draft article 3, paragraph 2, the criterion for determining whether an activity was commercial by reference to its nature rather than to its purpose.

34. He reserved the right to speak at a later stage on the Special Rapporteur’s fifth report (A/CN.4/363 and Add.1).

35. Mr. SUCHARITKUL (Special Rapporteur) said that, when Mr. Ni had mentioned the work on State immunity done by the Asian-African Legal Consultative Committee, he had realized that he had perhaps been wrong not to refer to it in his fifth report. In 1980, Sir Ian Sinclair had given a lecture at the Academy of International Law in which he had noted that the Asian-African Legal Consultative Committee had established a Committee on Immunity of States in respect of Commercial and Other Transactions of a Private Character and that, in 1960, it had adopted the committee’s final report.<sup>30</sup> The report had made the following two recommendations:

(1) State trading organizations which have a separate juristic entity under the municipal laws of the country where they are incorporated should not be entitled to the immunity of the State in respect of any of its activities in a foreign State. Such organizations and their representatives could be sued in the municipal courts of a foreign State in respect of their transactions or activities in that State.

(2) A State which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign State in respect of such transactions. If the plea of

immunity is raised, it should not be admissible to deprive the jurisdiction of the domestic courts.<sup>31</sup>

At that time, the members of the Asian-African Legal Consultative Committee had been Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. Indonesia alone had expressed reservations regarding those recommendations.

36. He wished to make it clear that the memorandum prepared by the secretariat of the Asian-African Legal Consultative Committee to assist members attending the meetings of the Sixth Committee of the General Assembly did not necessarily reflect the views of the member Governments of the Asian-African Legal Consultative Committee. It merely gave an idea of the work being done by the Commission.

37. The CHAIRMAN said that he had represented the Commission at the most recent session of the Inter-American Juridical Committee, held at Rio de Janeiro in January/February 1983, and that he greatly appreciated the warm welcome he had received. On 2 February 1983, he had made a statement describing the Commission’s work at its thirty-fourth session, and placing particular emphasis on the most important topics discussed.

38. In the course of his visit, a working group of the Inter-American Juridical Committee had been discussing the Inter-American Draft Convention on Jurisdictional Immunity of States, which differed somewhat from the draft now under discussion in that it was not quite so broad in scope. The Secretariat would make copies of that draft convention available to members of the Commission.<sup>32</sup>

*The meeting rose at 12.40 p.m.*

<sup>31</sup> See footnote 23 above.

<sup>32</sup> See footnote 6 above.

## 1763rd MEETING

*Wednesday, 18 May 1983, at 10 a.m.*

*Chairman:* Mr. Laurel B. FRANCIS

*Present:* Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

<sup>30</sup> I. Sinclair, “The law of sovereign immunity: Recent developments”, *Collected Courses of The Hague Academy of International Law, 1980—II* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1981), vol. 167, p. 140.

**Jurisdictional immunities of States and their property**  
(continued) (A/CN.4/357,<sup>1</sup> A/CN.4/363 and Add.1,<sup>2</sup>  
A/CN.4/371,<sup>3</sup> A/CN.4/L.352, sect. D, ILC(XXXV)/  
Conf. Room Doc.1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup> (continued)

ARTICLE 13 (Contracts of employment)<sup>5</sup>

1. Mr. EVENSEN said that, in previous reports, the Special Rapporteur had relied on the so-called inductive method and had presented a wealth of information on the internal legislation of States and the jurisdiction of their courts. However, such jurisdiction was sometimes confusing, because it varied from country to country and even from court to court within the same State. Examples had also been provided of international conventions and draft conventions dealing either directly or indirectly with the topic of State immunity, together with the opinions of international law publicists. In his fifth report the Special Rapporteur had stated: "The inductive method has not been primarily used in the study of all the topics but is highly recommended, while on the current topic it has become the selected and respected method" (A/CN.4/363 and Add.1, para.14).

2. A note of caution should be sounded about the danger of any over-emphasis on that method. State practice was always valuable and must be thoroughly examined by any serious student of international law, but it had obvious weaknesses, which had become increasingly apparent as a result of the technological revolution, the advent of the nuclear age, the emergence of more than 100 new States in the developing world, the disappearance of colonial empires and the division of the world into different economic systems and power blocs.

3. The Special Rapporteur himself had drawn attention to some of the weaknesses of the inductive method, particularly if it was based on State practice. Thus he had observed that resort to the inductive method had proved "most disconcerting" (*ibid.*, para. 16), had admitted that the practice of only 25 States had been available to him (*ibid.*, para. 22) and had added that, "when State immunity was considered to have been firmly established,

the world was not so divided into socialist and non-socialist, or developing and industrially advanced countries" (*ibid.*, para. 19).

4. Again, it was quite clear, as noted by the Special Rapporteur (*ibid.*, para. 17), that there were glaring contradictions and divergences in the practice of States and even in the practice within the borders of a single State. There was always a danger that State practice, particularly with regard to court decisions and internal legislation, might be misunderstood or misinterpreted. Indeed, it might be so contradictory as not to afford much guidance even if it was correctly interpreted. Since an essential part of the Commission's role was to contribute to the progressive development of international law, taking account of the trends and developments which had occurred over the past 30 years, it must be on its guard against using largely only one method of research.

5. He fully shared the view that the general principle of State immunity had been recognized in State practice as a principle of international law. Refinements with regard to all aspects of its application had been carefully elucidated in thorough and intellectually challenging reports, but in his opinion those refinements were more an expression of progressive development than of codification.

6. The formulation of draft article 13, on contracts of employment, had to some extent drawn on the precedents of the United Kingdom's State Immunity Act 1978<sup>6</sup> and the 1972 European Convention on State Immunity.<sup>7</sup> Paragraph 1, which provided that a State was not immune from the jurisdiction of the courts of another State in cases concerning contracts of employment, had obvious merits, but a distinction should be drawn between contracts of employment relating to ordinary types of work and contracts involving the performance of official functions. A State should be immune from jurisdiction with regard to contracts of employment which involved the performance of official functions even if the official concerned was a national of the State exercising jurisdiction. That was a substantive problem that should be given further consideration. Moreover, the expression "Unless otherwise agreed" was not entirely clear. Did it refer to other provisions of the draft, to other bilateral or multilateral conventions or to express provisions of the contract of employment? If the provisions of the contract were involved, the matter was covered by paragraph 2 (d).

7. He also experienced some difficulties regarding the words "failure to employ an individual" in paragraph 2 (a). Surely it was not necessary to say that the State concerned was immune if it had no employment vacancies to offer, particularly since there would be no contract of employment that would give rise to the application of paragraph 1. Similarly, should a State enjoy immunity in connection with the "dismissal of an employee"? That possibility might impair the principle of the right to sue a foreign State in respect of contracts of employment. In that regard, the distinction between official and ordinary

<sup>1</sup> Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook . . . 1982*, vol. II (Part Two), pp. 99-100; (b) art. 2: *ibid.*, pp. 95-96, footnote 224; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

*Part II* of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook . . . 1980*, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook . . . 1982*, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

*Part III* of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

<sup>5</sup> For the text, see 1762nd meeting, para. 1.

<sup>6</sup> See 1762nd meeting, footnote 11.

<sup>7</sup> *Ibid.*, footnote 7.

functions might be relevant. Lastly, he suggested that the words “unless otherwise agreed in writing” should be added at the end of paragraph 2 (c).

8. Mr. RIPHAGEN said that the current report (A/CN.4/363 and Add.1) contained a wealth of interesting material. It gave a balanced view of the subject-matter and he had been particularly struck by the wisdom of the remarks made by the Special Rapporteur in paragraph 25. The topic should not give rise to a heated political debate, for it was a neutral, technical one that dealt with matters of concern to all States, irrespective of their social system or level of development.

9. As to draft article 13, the problem lay in determining whether or not the exceptions to State immunity resulted from the interplay between inter-State relations governed by international law, the relationship between domestic legal systems (choice of law) and the regulation of international movements of persons, goods and services. Particular difficulties arose because domestic legal systems differed in terms of (a) the extent to which domestic *jus cogens* protected the weaker party to the contract, namely the employee; (b) the extent to which a contract of employment between an individual and the State or any other instrumentality exercising governmental authority differed from a contract of employment concluded with another employer; and (c) the extent to which a contract of employment was linked to labour law and social security legislation.

10. There seemed to be no doubt that the authorities of one State could not compel another State to continue to employ any particular individual, even when the work was to be performed within the territory of the forum State or it involved other factors connected with that State. Hence it would be irrelevant whether the work itself entailed the exercise of governmental functions. Any distinction of that kind had to be made by the domestic law of the foreign State, and the contract of employment itself would freely determine the status of the employee in that regard. Account also had to be taken of the view that the individual in question was both a servant and an employee of the foreign State. The “master-servant” relationship was a labour relationship and it was in that respect that the question of the choice of law and the connecting factor of the labour relationship with the forum State came into play. The principle was that the protection of employees by the domestic legal system of the forum State should apply to all employees working on the territory of that State.

11. How could these two points of view be reconciled? First of all, it appeared that a claim by an individual based on the fact that a foreign State decided not to employ him would clearly fall outside the jurisdiction of the forum State. Secondly, it might be advisable to examine connecting factors other than the foreign-State character of the employer and the locus of the work to be performed by the employee. From the viewpoint of protection of the employee, it was important to inquire whether the employee belonged to the local labour market of the forum State or whether he had been engaged elsewhere by the foreign State and sent out to do such work in the forum

State. That functional criterion could then be translated into various other connecting factors which were easier to verify.

12. While the recent inter-American draft convention (ILC(XXXV)/Conf. Room Doc.4) apparently recognized the locus of the work as the only relevant connecting factor, what the European Convention on State Immunity, and indeed the Special Rapporteur, regarded as relevant was the nationality of the employee at the time the proceedings were brought. If the connecting factor in the situation pointed to the foreign State, the latter had immunity from the jurisdiction of the forum State. In fact, draft article 13 went further in granting immunity than did the European Convention. Under article 5, paragraph 3, of the European Convention, the coincidence of the nationality of the employee and the “nationality” of the foreign State employer did not lead to immunity unless, at the time the contract had been entered into, the employee had had his habitual residence in the foreign State employing him. That provision of the European Convention was in keeping with the functional criterion to which he had just referred. If, at the time the contract had been entered into, the employee had had his habitual residence in the foreign State employing him and had been sent out by the foreign State to work in the forum State, he did not belong to the labour market of the forum State. It would therefore be advisable for the Special Rapporteur to consider including in the draft articles a provision along the lines of article 5, paragraph 3, of the European Convention.

13. The argument for protecting the local labour force of the forum State became less convincing when the employee neither had the nationality of the forum State nor was habitually resident in the territory of that State. Immunity should then prevail. Indeed, the European Convention did not go so far, since there was no immunity when the work had been done for an office, agency or other establishment through which the foreign State had engaged, in the same manner as a private person, in an industrial, commercial or financial activity, unless the employee, when he had entered into the contract of employment, had had his habitual residence in that foreign State. Although he himself had taken part in the elaboration of the European Convention, he would not recommend such a further limitation of immunity. If the employee in question was neither a national of the forum State nor habitually resident in that State, the additional requirement of habitual residence in the foreign State would seem unwarranted.

14. Another method of trying to reconcile the two points of view was to distinguish between the various types of relationship involved. It was possible to protect the employee without interfering in the “master-servant” relationship between the individual employee and the foreign State employer or, in other words, without forcing the foreign State to keep the individual in employment. In his own country’s legal system, for example, a court could not compel the Government to reinstate a civil servant who had been dismissed, but it could order the Government to pay the employee a sum of money by way of

compensation. The combination of leaving it entirely to the discretion of the Government to determine which individuals it accepted as its servants and of affording employees some protection against arbitrary action by their employer was not unlike the system of liability for injurious consequences arising out of acts not prohibited by law.

15. For all those reasons, he had considerable difficulty in accepting the words "dismissal of an employee" in article 13, paragraph 2 (a), a provision that granted immunity to the foreign State in respect of proceedings relating to the dismissal of an employee, regardless of the nationality and habitual residence of the employee and of the place at which the contract of employment was concluded. Dismissal was a unilateral termination of the contract and, as such, a grave breach of the contract. If immunity was granted in such an instance, article 13 might just as well be dropped altogether.

16. Like Mr. Evensen, he was uncertain about the phrase "Unless otherwise agreed" in paragraph 1 and assumed that it did not refer to a treaty between the forum State and a foreign State or to an agreement between the employee and a foreign State. Taken literally, it suggested an "agreement" between the courts of the forum State and the foreign State, but obviously that was not what was intended.

17. Turning to the question of the possible link between a contract of employment and the labour law and social security legislation of the forum State, he drew attention to two recent conflicting judgments in his own country. Two lower courts had had to deal with the situation in which a resident of the Netherlands, employed by a foreign State as a staff member of its consulate, had sued the foreign State for alleged wrongful dismissal. One lower court had granted immunity, while the other had not. The reason was that the employee had needed a court ruling only to establish the fact that he was not voluntarily unemployed and that, as such, he could claim the unemployment benefits provided for in the Netherlands' social security legislation. Admittedly, that problem could be solved by changing domestic legislation, since only the relationship between the individual resident employee and his own Government was at stake. Nevertheless, such a solution would still involve a foreign "act of State", namely the dismissal, as well as an appraisal of the relationship between the employee and the foreign State, in other words "sitting in judgment over" a foreign State. For all that, such domestic legislation could not possibly be considered contrary to any rule of international law.

18. In the matter of the regulation of international movements of persons, goods and services, Mr. Ushakov had, with apparent approval, cited in his interesting memorandum (A/CN.4/371) Ian Brownlie's remark that the theories of limited or functional immunity were all unconvincing.<sup>8</sup> Mr. Ushakov had then gone on to point out:

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

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

Secondly, it may obtain by agreement the consent of the other State to submission to local jurisdiction in a specific category of matters. (*Ibid.*, para. 25.)

As cited in the report of the Special Rapporteur (A/CN.4/363 and Add. 1, para. 57, footnote 80), Brownlie had also said:

If a State chooses, it could enact a law governing immunities of foreign States which would enumerate those acts which would involve acceptance of the local jurisdiction . . . States would thus be given a licence to operate within the jurisdiction with express conditions and the basis of sovereign immunity, as explained in *The Schooner "Exchange"*, would be observed.<sup>9</sup>

19. To his mind, all the national legislation cited by the Special Rapporteur did exactly what Brownlie had suggested and what Mr. Ushakov seemed to accept, namely to give foreign States "a licence to operate within the jurisdiction with express conditions". Actually, that was only one approach to State immunity from the point of view of the regulation of international movements of persons, goods and services. It was, however, a well-known fact that, apart from treaties "liberalizing" such international movements, every State was free to determine the types and amounts of international movement to and from its territory, as well as the conditions under which such "operations within the jurisdiction" could take place, something that was particularly true in the case of the operations of foreign States. From that standpoint, the problem of jurisdictional immunities of States and their property was, in a sense, entirely spurious.

20. As in other matters of international relations in the broadest sense, it was much better for the international community as a whole to harmonize national attitudes towards State immunity. It might not succeed in bringing about a complete unification of those attitudes, but it could at least try to reach a consensus on cases in which immunity existed and cases in which it did not. The goal should, of course, be to ensure that the "grey zone" that remained was as small as possible. The Special Rapporteur deserved the Commission's full support in achieving that goal.

21. Mr. CALERO RODRIGUES said he had been very impressed by the general considerations put forward by Mr. Ushakov in his memorandum (A/CN.4/371) and by Mr. Ni in his statement at the previous meeting. The Commission should not embark lightly on the task of elaborating a set of draft articles that might tend to modify completely the traditional concept of State immunity.

22. The theory of restricted immunity posed truly enormous problems and it would be very difficult to deal with them if the intention was—as appropriately indicated by Mr. Riphagen—to harmonize the position of States in the matter. Yet despite its appeal from the standpoint of legal theory, the doctrine of absolute State immunity was not very widely accepted in reality. He therefore believed

<sup>8</sup> I. Brownlie, *Principles of Public International Law* (2nd ed.) (Oxford, Clarendon Press, 1973), p. 326.

<sup>9</sup> *Ibid.* (3rd ed., 1979), p. 334.

that, while the Commission should not endorse the doctrine of absolute immunity, it should not go to the opposite extreme and ignore its existence. That problem had already arisen with regard to the drafting of article 6 and also, to some extent, article 7.

23. In the search for reasonable solutions, the inductive approach would not suffice, for as the Special Rapporteur had repeatedly pointed out, the available information on State practice was insufficient. Nor could the Commission be content with analysing national legislation and judicial practice and trying to distil principles therefrom; it should try to develop international law, in an endeavour to secure some degree of concord.

24. Draft article 13 was a case in point. As indicated by the Special Rapporteur in his interesting observations (A/CN.4/363 and Add. 1, paras. 48–49), there was not enough evidence from State practice to justify an exception to immunity with regard to labour relations. Nevertheless, on the basis of what he saw as an emerging trend, the Special Rapporteur had drafted the article so as to embody such an exception. Some countries had recently enacted legislation that severely restricted the immunities enjoyed by foreign States, whereas others continued to adhere to the doctrine of absolute immunity, even though they were denied the benefit of such immunity in certain other States. That disparity of treatment was unsatisfactory and the Commission should indeed strive to propose a set of agreed general principles.

25. The matter of contracts of employment was clearly one area in which an exception could be made to the rule of State immunity. In his own country, Brazil, absolute State immunity was recognized by the judiciary, including the Supreme Court, but there was a tendency in the labour courts to accept jurisdiction in cases relating to the employment of Brazilian citizens by foreign Governments or their agencies. Hence there was a complete divergence between the position of the labour courts and that of the judiciary in general. The underlying reason was the special character of labour legislation, which was intended to protect individuals—an important element of social development in today's world. He concurred with that reasoning.

26. As to the drafting of article 13, however, he shared the doubts regarding the meaning of the expression "Unless otherwise agreed", which opened paragraph 1. It would not seem in any case to refer to an agreement between the parties to the contract, a point that was covered by paragraph 2 (d). Again, the terms of paragraph 2 (a) were too broad. All that needed to be specified was that a foreign State could not be obliged by a court to employ a given person or to keep a person in employment. In a case of dismissal, however, the question of compensation could arise and it could well be adjudicated on the basis of local law. Subparagraph (a) might be redrafted so as to make it clear that the rule related solely to issues of employment and reinstatement and not to claims for compensation, in respect of which the protection of local laws and local courts could be invoked.

27. The provisions on the nationality of the employee,

proposed by the Special Rapporteur in subparagraphs (b) and (c), were satisfactory. A court could not entertain a claim against a foreign State by one of its own nationals or by a person totally unconnected with the forum State.

28. Sir Ian SINCLAIR said that the reason why the task assigned to the Special Rapporteur was such a challenging one was not that there was a difference of perspective between capitalist and socialist States or between developed and developing countries. That argument was altogether too simplistic. Each State was simultaneously a giver and a taker of immunity: a giver in the sense that it had to deny the jurisdiction of its own courts in cases where immunity could properly be claimed by a foreign State, and a taker in the sense that it could seek to assert its own immunity in proceedings before a foreign court in which it was directly or indirectly impleaded. Nevertheless, it should not be forgotten that any immunity granted to a foreign State in effect represented a denial to an individual litigant of his day in court. A plea of immunity operated as a plea in bar and, as such, had to be justified by cogent reasons of public policy.

29. He would be the first to admit that such reasons applied in the case of ambassadors and other diplomatic agents. It was a matter of history that the immunity of ambassadors from the civil and criminal jurisdiction of the courts of the States to which they were accredited had been established and accepted as part of the law of nations long before the question of a corresponding sovereign State immunity had arisen. That was perfectly understandable, since an ambassador, minister or other diplomatic agent was the representative in the receiving State of the sovereign who had arranged for his accreditation. From that had developed the notion of sovereign immunity, in other words the immunity of a sovereign or Head of State from the jurisdiction of the courts of another State in respect of acts done in his capacity as a sovereign or Head of State. It had rightly been thought unnatural that an ambassador, the representative of a foreign sovereign, should enjoy jurisdictional immunity while the foreign sovereign himself might not. Hence, the personal immunity of a foreign sovereign was a by-product or offshoot of the immunity of ambassadors.

30. The doctrine of State immunity was commonly thought to derive from the judgment of Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and Others* (1812).<sup>10</sup> A close analysis of the judgment nevertheless revealed that he had not been propounding the doctrine of absolute immunity. Chief Justice Marshall had invoked the theory that the territorial State was understood to waive the exercise of a part of its exclusive territorial jurisdiction when a foreign sovereign or the "sovereign rights" exercisable by him would otherwise be subject to that jurisdiction. That judgment was in no way inconsistent with the view that immunity might extend only so far as to secure the protection of the "sovereign rights" exercised by a foreign sovereign.

31. The high-water mark had been reached in the late

<sup>10</sup> W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. VII (3rd ed.), p. 116.

nineteenth and early twentieth centuries, when the courts of many countries, including his own, had developed the so-called doctrine of "absolute" immunity, which was described in that way because it always admitted of exceptions deriving from waiver or the nature of the subject-matter of the claim. Almost simultaneously, however, the courts of other States had begun to develop the restrictive theory of immunity, which had harked back to the rationale of Chief Justice Marshall's judgment in *The Schooner "Exchange" v. McFaddon* case and had drawn a distinction between the State acting in its sovereign capacity and the State acting in a non-sovereign capacity by entering the market-place as a trader. As early as 1891, the Institute of International Law had espoused some of the main elements of the restrictive theory of immunity.<sup>11</sup>

32. Against that background, it was misleading to posit an unqualified rule of State immunity as a matter of *lex lata*. That position could not be sustained and the Commission's task was, as the Special Rapporteur had suggested, to take into account the various trends in State practice, not to seek to harmonize the rules governing the jurisdiction of local courts, particularly since many States might apply rules of jurisdiction which would be regarded elsewhere as exorbitant and might not lead to international recognition. The 1972 European Convention on State Immunity sought to establish a system for the recognition and enforcement of judgments and, in relation to the rules on immunity from jurisdiction, there were, in practically all instances, connecting factors sufficient to warrant such recognition and enforcement. The problem was that the Commission was not engaged in any similar parallel exercise and it therefore had to look closely at the connecting factors proposed in respect of particular provisions of the draft.

33. With reference to the judicial practice mentioned by the Special Rapporteur (*ibid.*, paras. 42 and 46-48), he agreed that there was little jurisprudence on the question of contracts of employment and it was gratifying to hear from Mr. Riphagen about a case in the Netherlands where that issue had arisen. In his review of case law in Italy, which had applied the restrictive rule for many years, the Special Rapporteur had concluded that even Italian jurisprudence provided for a rule of immunity in respect of contracts of employment. It was not certain, however, that that conclusion was entirely correct. He was, of course, aware of the *Tani* case,<sup>12</sup> but account should also be taken of the *Hungarian People's Republic et al. v. Onori* case,<sup>13</sup> in which the plaintiff had brought an action against the Hungarian People's Republic for damages for wrongful dismissal and the Italian Court of Cassation had ruled that the nature of the plaintiff's employment, which had not involved official functions, was a decisive factor. State practice thus had to be carefully examined to

demonstrate that the idea of non-immunity in respect of certain claims arising out of contracts of employment had not simply been invented and that there was a good deal of support for a rule of non-immunity, subject to certain conditions.

34. As to the wording of draft article 13, the task had been greatly simplified by the comments of Mr. Evensen, Mr. Riphagen and Mr. Calero Rodrigues. With regard to paragraph 2 (a), he did not think that the draft should exclude proceedings relating to the dismissal of an employee, provided the employee had not been entrusted with official functions of the foreign State. It was also doubtful whether failure to employ an individual was a matter that related to a contract of employment. If there had been a failure to employ an individual, there had certainly been no contract of employment. He therefore wondered whether paragraph 2 (a) could not simply be deleted.

35. Another point related to what he had said earlier with regard to connecting factors. Paragraph 1 contained the words "work to be performed there", which would preclude the exercise of jurisdiction in respect of a contract that was made in one country and was to be fulfilled in another. It did not seem logical in that context that the connecting factor should relate exclusively to work to be performed in the forum State, whether wholly or partly. The aim was to protect individuals in the local labour-market who sought employment with a foreign State. Such employment might not be performed entirely in the foreign State, but, if the local courts had jurisdiction in respect of a contract made in the forum State, he did not think that a rule of immunity should necessarily apply. In speaking of the "local labour-market", he agreed that the conditions specified in paragraph 2 (b) and (c) should be fully applicable, but he was not sure whether, in view of the exceptions provided for in those two subparagraphs, it was necessary to retain the words "of a national or resident of that other State" in paragraph 1. However, that problem might be dealt with by the Drafting Committee.

36. Mr. FLITAN congratulated the Special Rapporteur on his excellent report on jurisdictional immunities of States and their property (A/CN.4/363 and Add. 1) and on his introductory statement (1762nd meeting), which revealed a readiness to find compromise solutions to enable the Commission to break the present deadlock. Mr. Ushakov's memorandum (A/CN.4/371) also greatly helped to clarify the subject.

37. The question was whether, faced with two opposing concepts, namely absolute immunity and "limited" or "functional" immunity, the Commission should pursue its task despite the apparently insurmountable difficulties caused by the differences in views. The fact was that the Commission was requested to prepare a set of draft articles, not a doctrinal work in which preference would be given to a particular thesis. By avoiding any formulation favouring either of the two concepts and making every effort to find a compromise, the Commission should be able to overcome those problems.

<sup>11</sup> See 1762nd meeting, footnote 9.

<sup>12</sup> *Tani v. Rappresentanza commerciale in Italia dell'U.R.S.S.* (1947) (*Il Foro Italiano* (Rome), vol. LXXI (1948), p. 855; *Annual Digest and Reports of Public International Law Cases, 1948* (London), vol. 15 (1953), case No. 45, p. 141).

<sup>13</sup> *Repubblica popolare ungherese et al. v. Onori* (1956) (*Rivista di Diritto Internazionale* (Milan), vol. XXXIX (1956), p. 190; *International Law Reports, 1956* (London), vol. 23 (1960), p. 203).

38. With regard to article 13, it was in his opinion difficult to say, as did the Special Rapporteur, that: "In such circumstances . . . the applicable law is still the administrative law or the law governing the civil servants of the employing State as distinct from the labour law of the country in which the service is to be performed" (A/CN.4/363 and Add. 1, para. 33). A distinction had to be made between civil servants performing representational functions, for whom the applicable law was that of the sending State, and other civil servants not performing such functions, who should benefit from the exception provided for in article 13, subject to the requirements of paragraph 2.

39. As to paragraph 1, the expression "Unless otherwise agreed" should be deleted, since it was superfluous and might cause confusion. Furthermore, in view of the diverse meanings attached to contracts of employment in municipal law, the Commission should try to find a definition of that legal concept.

40. Paragraph 2 called for certain comments. In subparagraph (a), it should be made clear in the text that an employing State was in no way obliged to re-employ a dismissed employee; on the other hand, it could be required to pay compensation in the event of dismissal. Subparagraph (b) should be deleted. In subparagraph (d), the phrase "if . . . the employee has otherwise agreed in writing" duplicated the beginning of paragraph 1. The remainder of this subparagraph, which read "unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter", was not justified, whatever the situation, since the law of the State of the forum had no role to play in that field.

41. Mr. MAHIU said that he would like some clarification on certain passages of the report under consideration, which was of great merit.

42. In his general considerations concerning contracts of employment (*ibid.*, paras. 28–31), the Special Rapporteur had stated the three constituent elements of a definition, namely employment by a State, the contractual relationship between the employee and the State, and the possibility for the employees to institute proceedings against the employer State before the courts of another State. Some members of the Commission had already stressed, with regard to the second element, that the concept of a contract of employment was not always very clear; the Special Rapporteur, moreover, had been right to place the expression "contract of employment" between inverted commas in the text of draft article 13. A glance at the administrative disputes procedure in certain countries showed that the concept of a contract of employment was entirely relative and that it frequently posed problems of law. That was true in Algeria, where, as applied to relations between the State and its employees, it sometimes gave rise to difficulties and doubts and the relevant case law was difficult to interpret. The tendency was to go beyond the classical distinction between recruitment through the civil service and recruitment by contractual means and move towards a concept of labour relations embodied in a general workers'

statute. Despite the efforts made along those lines by the legislature, the concept of a contract of employment was not yet clearly defined. That lack of precision could have an effect on the question of applicable law and of jurisdiction and, therefore, on the matter of State immunity.

43. The three elements identified by the Special Rapporteur were undoubtedly necessary, but perhaps they were not enough. The nationality of the employee constituted another element, one that was referred to later in the report, particularly in paragraphs 36 to 52, and was included in draft article 13. Furthermore, since employment by a State constituted one element, it would be logical for status as an employee, and particularly the nationality of the employee, to constitute another. It would undoubtedly be appropriate to include that point in general considerations relating to contracts of employment, since the connecting factor of nationality was expressly covered by paragraph 2 (b) and (c).

44. The nature of the services performed by the employee formed yet another element that might be mentioned in the general considerations. Depending on whether those services were official or not, the legal relationship between the State and the employee differed, something which could affect the content of the jurisdictional immunity of the State.

45. The Special Rapporteur also spoke of a hypothetical case concerning local staff of lower rank, one that did not "call for the application of foreign administrative law, but more appropriately the applicable local labour law" (*ibid.*, para. 36). Again, the concept of "local staff of lower rank" should be clarified, since it could be interpreted in different ways, depending on whether the local character of the staff was determined from the standpoint of nationality or of the applicable law.

46. As for the *Weiss* case (1953)<sup>14</sup> mentioned by the Special Rapporteur (*ibid.*, para. 45), it should be stressed that it did not question a relationship between an employee and a foreign State or an international organization, but that of an employee and his own State of origin, something which did not, however, detract from the importance of the legal reasoning of the French *Conseil d'Etat*.

47. The trend towards restructuring State immunity was not perhaps as clear as it appeared from the report (*ibid.*, paras. 59–60). To use an image employed by the Special Rapporteur, absolute immunity could be compared with the course of the Mekong River, which ran through many countries and demonstrated its might by passing over and above their jurisdiction, whereas the restrictive trend was to be likened to the Thames, whose meandering path was full of obstacles that had to be overcome in order to try to reach the vast ocean of international law. Admittedly the Special Rapporteur pictured the latter trend with a great deal of caution, more particularly by stressing that judicial practice was almost non-existent and that the legal thinking was controversial. The matter therefore

<sup>14</sup> *Weiss v. Institute of Intellectual Co-operation* (*Journal du droit international* (Clunet) (Paris), vol. 81 (1954), p. 745).

deserved more careful consideration. It was, of course, appropriate to be guided by realities and to follow an inductive method, but that method had its limits, which must be borne in mind in order to make any headway in elaborating an article on contracts of employment.

48. As to the wording of draft article 13, he agreed with Mr. Calero Rodrigues that the expression "Unless otherwise agreed" might give rise to controversy. Secondly, it was essential to clarify the notion of "contracts of employment". Thirdly, for a State to be subject to the jurisdiction of the courts of another State, something more was needed than the three conditions listed in that provision, namely for the proceedings to relate to a contract of employment, for the contract to be concluded with a national or resident of the other State, and for the work to be performed in the territory of that State. Should not the last of those conditions be qualified, in the light of the services performed?

49. Paragraph 2 (a) had already given rise to many comments. To avoid unforeseeable consequences, either with regard to State immunity or the situation of the employee, the underlying idea should be expressed more clearly. The risk in providing for immunity in the case of proceedings relating to failure to employ an individual or dismissal of an employee was that States might apply the most serious penalty, in other words, dismissal, since it enabled them to escape the jurisdiction of other States. That paradox should undoubtedly be remedied.

50. Mr. OGISO said that, before taking a position on the proposal to delete paragraph 2 (a), or only the reference to "dismissal" therein, he would be grateful for some clarifications from the Special Rapporteur. He wondered whether the phrase "failure to employ an individual" could be interpreted to cover the case of a national of the forum State who applied for employment with a foreign embassy and asked for continuation of his local social security benefits. If the embassy refused to comply with the request and accordingly failed to employ that person, the question would arise whether the matter fell within the purview of paragraph 2 (a). It would also be useful to have further information on State practice regarding the application of the local social security system to the employees of foreign State agencies.

51. Lastly, would deletion of paragraph 2 (a) signify that a State would no longer be able to assert jurisdictional immunity in the courts of another State with respect to a case of dismissal? The issue then was whether the State concerned could be sued in the courts of another State for the purposes of reinstatement of a dismissed employee, or for compensation for dismissal.

52. Mr. SUCHARITKUL (Special Rapporteur) said that the provision contained in paragraph 2 (a) was an exception to the rule in paragraph 1 and was very logical. It concerned problems of recruitment and employment of local personnel, who would generally be of the nationality of the forum State or aliens resident in its territory. A dispute could arise between an agency of a foreign State and a person who objected to a decision not to employ him. Judicial decisions relating to that type of case had recognized that the act of appointment always entailed

the exercise of a governmental function. Actually, the decision taken at that stage on behalf of the State concerned or of one of its agencies occurred before any contractual relationship was established. The decision of the French *Conseil d'Etat* in the *Weiss* case (1953)<sup>15</sup> mentioned in the report (*ibid.*, para. 45) illustrated that point. The problem of the obligation, if any, to appoint a certain person to a post was clearly related to the exercise of governmental functions.

53. Dismissal could give rise to a claim for reinstatement and also to an action for damages based on a claim for wrongful dismissal. Case law indicated that claims for reinstatement fell outside the jurisdiction of the local courts because reinstatement, like appointment, constituted the exercise of a governmental function; that was true regardless of the rank and function of the employee concerned.

54. Mr. OGISO had raised a very important practical point regarding the application of local labour law, including social security legislation. State practice varied considerably. Despite the efforts of the ILO, not all States had a social security system, and even among the countries that did operate social security schemes, the benefits differed a great deal. In that connection, it was necessary to bear in mind that article 33 of the 1961 Vienna Convention on Diplomatic Relations exempted diplomatic agents from social security provisions in the receiving State. A similar exemption was specified in the corresponding articles of the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. It was significant that all those instruments exonerated a foreign mission or consulate from the application of local social security legislation in respect even of domestic servants.

55. Those international instruments, however, made no mention of locally recruited staff. The situation in that respect was that errors were being made in a great many countries to apply the local social security system to locally recruited employees of a foreign Government, but exceptions were allowed in cases where an employee was a national of the sending State and did not have the nationality of the receiving State. The receiving State was thus able to enforce the application of its social security system to locally recruited employees who were its own nationals. Most embassies and foreign government agencies were usually prepared to accept that demand.

56. Generally speaking, however, such agencies were not prepared to accept the application of the local social security system in connection with nationals of a third State. Nowadays, it was not at all uncommon for such persons to be employed in an embassy or other foreign State agency. The position was that, while the receiving State had an interest in protecting persons from its own labour force—its own nationals or resident aliens—it had no such interest when it came to non-resident

<sup>15</sup> See footnote 14 above.

foreigners. Indeed, those foreigners themselves might not wish to pay social security contributions in a country in which they were to reside only temporarily and in which they were unlikely to qualify for any benefits. Nevertheless, no clear practice had yet emerged in the matter.

57. Sir Ian SINCLAIR said that, in the light of the Special Rapporteur's explanations regarding paragraph 2 (a), the problem of the reference to "dismissal" might well prove to be one that could be settled by suitable drafting.

58. He agreed that appointments of members of a diplomatic mission within the meaning of the 1961 Vienna Convention on Diplomatic Relations, or of members of a consular post within the meaning of the 1963 Vienna Convention on Consular Relations, came under a rule of immunity. It followed that the rule in paragraph 1, relating to non-immunity, did not apply in those instances, something that should be made clear in article 13 or elsewhere in the draft.

59. He agreed with the Special Rapporteur regarding the need to deal with the problem of locally recruited employees not covered by the provisions of existing international conventions on diplomatic privileges and immunities.

*The meeting rose at 12.55 p.m.*

## 1764th MEETING

*Thursday, 19 May 1983, at 10 a.m.*

*Chairman:* Mr. Laurel B. FRANCIS

*Present:* Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Jurisdictional immunities of States and their property (continued)** (A/CN.4/357,<sup>1</sup> A/CN.4/363 and Add.1,<sup>2</sup> A/CN.4/371,<sup>3</sup> A/CN.4/L.352, sect. D, ILC(XXXV)/Conf. Room Doc. 1 and 4)

[Agenda item 2]

<sup>1</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>3</sup> *Idem*.

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR<sup>4</sup> (continued)

#### ARTICLE 13 (Contracts of employment)<sup>5</sup> (continued)

1. Mr. THIAM stressed the practical aspect of the topic, which was to find solutions to problems that arose every day. Hence, he would refrain from engaging in doctrinal questions which came up for discussion at each session of the Commission. From the outset, some members had wondered whether a principle of jurisdictional immunity of the State did actually exist, a question that was difficult to answer without making a choice between the need to respect the sovereignty of the forum State and the need to respect that of the sending State. In the circumstances, the best course would be to aim for balanced solutions conducive to the development of international law.

2. Contracts of employment, the subject-matter of draft article 13, fell within the sensitive sphere of social legislation, which was marked by major social advances that compelled recognition by both the forum State and the sending State and were in some sense matters of public policy. For example, a State could not waive regulations concerning wages, work by children or women, night work, or weekly working hours. The forum State did not enjoy complete freedom in its relations with its workers, for it was subject to the control of its own courts; what was more, at the international level there were conventions on the subject and organizations which ensured their observance. Certain principles might even be considered to form part of *jus cogens*. Consequently, the sending State could not invoke the principle of jurisdictional immunity for the purpose of inserting in contracts of employment provisions that were contrary to the public policy of the forum State. That was the crux of the problem, which the Special Rapporteur had stressed when he had questioned the extent to which the sending State should conform to the labour laws and regulations of the territorial State. The principle of immunity could not be considered as going so far as to allow the sending State entire freedom with regard to contracts of employment. Moreover, in most countries, the entry into force of a contract of employment with a foreign State was subject to a registration procedure which afforded some means of control.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 99–100; (b) art. 2: *ibid.*, pp. 95–96, footnote 224; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

*Part II* of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

*Part III* of the draft: (g) arts. 11 and 12; *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

<sup>5</sup> For the text, see 1762nd meeting, para. 1.