Document:-
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Summary record of the 1768th meeting

Topic:
Jurisdictional immunities of States and their property

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

and in contradiction with practice, to the notion of a State having caused personal injuries or damage to property.

45. Contrary to the Special Rapporteur's statement in his report (*ibid.*, para. 76) to the effect that the practice of socialist countries in the matter was virtually unknown, those countries had always respected the principle of absolute jurisdictional immunity. A civil action could not lie against a State without the express consent of that State.

46. Finally, he objected to the Special Rapporteur's statement (*ibid.*, para. 96) to the effect that contemporary authors were all supporters of a restrictive trend. As he had stated in his own memorandum (A/CN.4/371), legal writers in the socialist countries were in favour of unqualified respect for the sovereignty of States. Furthermore, some authors from Western European countries shared that view.

47. In principle, he found no difficulties with draft article 15.

The meeting rose at 1 p.m.

1768th MEETING

Thursday, 26 May 1983, at 10.10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov.

Visit by the Legal Counsel

1. The CHAIRMAN welcomed Mr. Fleischhauer, Under-Secretary-General of the United Nations, on his first visit to the Commission in his capacity as the Legal Counsel and expressed the hope that Mr. Fleischhauer would participate in the discussions of the Planning Group relating to the organization of the work of the Commission and its relations with the Secretariat.

2. Mr. FLEISCHHAUER (Legal Counsel) assured the Commission that, like his predecessors, he would do his utmost to meet its needs and expectations. In particular, he would be pleased to attend the meeting of the Planning Group scheduled for the following week. In conclusion, he announced that the Secretary-General intended to address the Commission when visiting Geneva in July 1983 in connection with the session of the Economic and Social Council.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/357,[1] A/CN.4/363 and Add. 1,[2] A/CN.4/371,[3] 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[4] (*continued*)

ARTICLE 14 (Personal injuries and damage to property) *and*

ARTICLE 15 (Ownership, possession and use of property)[5] (*continued*)

3. Mr. FLITAN said that, like other members of the Commission, he asked himself to whom the draft articles were intended to apply. The answer to that question was to be found in article 1, according to which the draft applied to the immunity of one State and its property from the jurisdiction of the courts of another State, and in article 6, which stipulated that a State was immune from the jurisdiction of another State in accordance with the provisions of the draft. Some speakers had raised questions as to the scope of the concept of a foreign State exempt from the jurisdiction of another State. That concept was explained in paragraph 1 (*a*) of article 3 and in article 4. The former of those provisions listed the persons and State organs covered by the expression "foreign State"; the second specified that persons to whom jurisdictional immunities were recognized or accorded under a number of international codification conventions were not governed by the draft.

4. In his fifth report (A/CN.4/363 and Add. 1, para. 26), the Special Rapporteur had listed the eight limitations or exceptions to the principle of immunity set forth in article 1 which he intended to formulate in articles 13 to 20. It was legitimate to ask whether those exceptions might not render the principle devoid of content. In his view, it was necessary to see whether the exceptions were justified and to maintain only those which were essential. Those which it would at present be premature to formulate should be rejected. It was from that point of view that he proposed to examine draft articles 14 and 15.

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[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem.*

[4] 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.

[5] For the texts, see 1762nd meeting, para. 1.

5. With great intellectual honesty, the Special Rapporteur had provided in his report all the material which the Commission needed for a decision on whether to accept or reject each of the proposed articles. First, he had advanced certain arguments in favour of an exception for personal injuries and damage to property, as provided for in article 14. Thus the Special Rapporteur observed (*ibid.*, paras. 68–75): (*a*) that, in the event of such injuries or damage, it was in general the *lex loci delicti commissi* that applied, which militated in favour of the *forum loci delicti commissi* as being better qualified to adjudicate in such cases; (*b*) that physical injuries or damage were often suffered by innocent persons; (*c*) that article 14 filled a legal vacuum; without that provision, the injured party would have no access to legal remedies in order to obtain compensation; (*d*) that the main thrust of article 14 was the protection of the injured party; (*e*) that, even if the principle of jurisdictional immunity of States had been strictly observed until the present, compensation had always been obtained in one way or another and that States should therefore not regard the proposed exception to that principle as an affront; in certain cases, in particular those resulting from traffic accidents, arson or even terrorist acts, justice should not only be done but also be seen to be done; (*f*) that, in cases not covered by insurance, the injured party should receive compensation; (*g*) that the State should be humane and merciful and that its jurisdictional immunity was not lost in cases covered by article 14. However, he (Mr. Flitan) considered that the jurisdictional immunity of the State was, indeed, lost because the article provided for a real exception to the principle of such immunity.

6. On the other hand, there were other considerations which argued against article 14. First, it had to be admitted that the exception formulated in that provision restricted the scope of application of articles 1 and 6, to the point where it might legitimately be asked what was left of the principle of jurisdictional immunity. It had to be conceded that practice in the matter was not conclusive and that the proposed article was innovative in nature; in many of the cases cited, the principle of absolute immunity had been recognized. Secondly, the question should be asked whether there were good reasons for changing the existing system, which operated satisfactorily. Thirdly, the exception provided for in article 14 had the effect of creating a different legal status for sovereigns, heads of State and members of Government, on the one hand, and for diplomatic agents, in respect of whom no such exception was provided, on the other. Why should members of Government be accorded less extensive immunities than diplomatic agents? Was it normal for judicial proceedings to be instituted before a court of the territorial State if, for instance, a minister of a foreign State caused a traffic accident while visiting the country, when the diplomatic channel was considered an adequate means of making good similar damage that might be caused by a diplomatic agent? Fourthly, he did not think that the link between the *lex loci delicti commissi* and the *forum loci delicti commissi* was self-evident. The tribunals of the *locus delicti commissi* were not necessarily competent and, even if they were, they might very well apply a law other than the *lex loci delicti commissi*. No argument in favour of article 14 could therefore be drawn from that source. Fifthly, there was no question of filling a legal void, because it was possible to imagine the system provided for diplomatic agents being applied—in other words, settlement through the diplomatic channel or otherwise application of article 31, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, according to which

> The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

7. Reading the report, he had had the impression that State practice actually argued against article 14. As for doctrine, the Special Rapporteur himself recognized (*ibid.*, para. 96) that it was still too early to speak of the existence of a doctrine with regard to the particular area of personal injuries and damage to property. The exceptions provided for in draft article 14 would, in his view, rob the principle of jurisdictional immunity of its content in many cases. Indeed, those exceptions actually expressed a theory, which was something the Commission should beware of, and were so extensive as to raise the question whether the draft was not ultimately intended to enshrine the exceptions rather than the basic principle.

8. In a sense, draft article 15 gave rise to the same questions as draft article 14. In his view, the drafting of the provision should follow closely that of article 31 of the 1961 Vienna Convention; the exceptions should apply only to problems involving private property. For example, the French Library in Bucharest, which was a dependency of the French embassy and the property of the French State, should come within the scope of application of the principle formulated in article 6. On the other hand, the Romanian Library in New York, which was not a dependency of the Romanian embassy in Washington, should come under an exception to the application of that principle. He took the view that article 15 should be limited to ownership, possession and use of property which was private and not official. With regard to paragraph 1 (*b*) of article 15, he reserved the right to raise in the Drafting Committee the question of vacant immovable property which, under different legal systems, could pass either to the State of residence or to the State of origin of the *de cujus*.

9. Mr. OGISO remarked that, with regard to judicial practice prior to national legislation in the matter of personal injuries and damage to property, the Special Rapporteur had recalled in his fifth report that the practice of States had been neither uniform nor consistent (A/CN.4/363 and Add. 1, para. 76), but that, in a number of countries where judicial practice had tended to favour a less absolute or more restrictive principle of State immunity, attempts had been made to justify the exercise of jurisdiction by competent courts of the State of the forum on the ground that the act or omission in question related to State acts *jure gestionis* or, at any rate, not to acts *jure imperii* (*ibid.*, para. 77). The Special Rapporteur had also stated (*ibid.*, para. 100) that the causes of action could arise from any activities undertaken by a foreign

State or one of its organs, agencies or instrumentalities within the State of the forum, thus implying that he was in favour of abandoning the practice referred to in paragraph 77 of the report by including acts *jure imperii* among those for which the exercise of jurisdiction by the territorial State was justified.

10. The correct interpretation to be given to draft article 14 in the light of the above-mentioned passages from the report and of paragraphs 1 and 3 of article 7, adopted by the Drafting Committee at the previous session, was not quite clear. Was it the Special Rapporteur's intention that the general principle set forth in article 7 should apply to articles 13 to 20 and that, consequently, the territorial State should refrain from exercising jurisdiction in its courts against another State in respect of acts performed in the exercise of governmental authority? That was the interpretation which he himself would regard as natural, but a different interpretation was also possible and he would appreciate further elucidation by the Special Rapporteur.

11. He was in favour of maintaining the phrase "Unless otherwise agreed" in draft article 14 in order to cover situations such as injury or damage caused by armed forces stationed in the territorial State with, of course, the latter's agreement. The usual practice was that proceedings initiated in relation to such injury or damage were covered by status-of-forces agreements, and it was desirable to avoid confusion between such agreements and the draft articles under consideration by maintaining the words in question.

12. He supported the drafting proposal made by Sir Ian Sinclair (1767th meeting, para. 33) for the inclusion of a reference to compensation in the text of article 14. The proposal was in line with the relevant provision of the United States Foreign Sovereign Immunities Act of 1976 and made it clear that the article was intended to cover civil cases only and not the criminal jurisdiction of the State of the forum.

13. Lastly, he said that draft article 15 expressed the established judicial interpretation, particularly with respect to immovable property, and was therefore acceptable in principle.

14. Mr. KOROMA, referring to the Special Rapporteur's summary of the discussion of draft article 13 (1767th meeting), said that, since very few categories of persons were covered by that provision, it was open to question whether it should be included in the draft. Moreover, if, as Sir Ian Sinclair had pointed out (1763rd meeting), draft article 13 was not intended to derogate from the Vienna Conventions on Diplomatic Relations and on Consular Relations, the categories of persons covered became even narrower. That provision could lead to unnecessary complications in international relations and might therefore be omitted altogether.

15. The purpose of draft article 14 was to examine possible limitations to State immunity in cases involving personal injuries and damage to property or, in other words, the liability of the State or one of its organs, agencies or instrumentalities to pay damages or monetary compensation in respect of an act or omission attributable to it. The question of liability to pay monetary compensation thus lay at the heart of the matter. In his view, a State did not have to be taken to court in order to be required to pay such compensation. A just demand for compensation for injuries or damage could be made through the diplomatic channel.

16. Draft article 14 attempted to deprive a State of immunity, as the Special Rapporteur noted in his fifth report (A/CN.4/363 and Add. 1, para. 65). Since criminal proceedings were not intended by that draft article and since the objective was monetary compensation, the solution to the problem was to be found in diplomatic negotiations and insurance. It was the law of most States that all vehicles, including vehicles operated by Government agents, must be insured against accidents and personal injuries. States could even adopt legislation requiring all Government vehicles to be comprehensively insured so that an injured party would never be left claimless. The cases covered by draft article 14 and claims for monetary compensation arising therefrom should be settled through the diplomatic channel.

17. The argument against draft article 14 was all the stronger in that, on the Special Rapporteur's own admission, that provision covered very few cases and the basis for the actual exercise of jurisdiction could not be found in customary international law or in the traditional practice of States. The Special Rapporteur stated that "the question of State immunity should not be raised, or indeed need not be raised, when the causes of action are outside the jurisdiction of the courts" (*ibid.*, para. 66). Thus the jurisdiction of the courts would not be invoked if a matter was being dealt with on a Government-to-Government basis or, in other words, through the diplomatic channel. An organ, agency or instrumentality of the State would then not have to go to court to plead immunity.

18. The Special Rapporteur also stated that "an agreed basis or an unchallenged or undoubted basis for jurisdiction is obviously the *locus delicti commissi*" (*ibid.*). At present, however, plaintiffs often questioned the basis for the jurisdiction of the *locus delicti commissi*. That was one of the most vexed questions in cases relating to conflicts of laws and, in some instances, the law of the place of commission had given way to the law of the State which had the most significant relationship with the parties and the occurrence of the injuries or damage. In that connection, it had rightly been pointed out by preceding speakers that the author of injury or damage did not necessarily have to be present in the territory of the forum State at the time of the occurrence of that injury or damage.

19. He found it difficult to agree with the Special Rapporteur's view that draft article 14 could cover cases of murder or terrorism (*ibid.*, paras. 84–85) or to imagine a State pleading sovereign immunity when it was accused of murder or terrorism.

20. He noted that, although the report referred to "common-law or Commonwealth countries in . . . southern Africa" (*ibid.*, para. 89) having adopted legislation relating to sovereign immunity, the relevant footnote mentioned only South Africa, excluding all other

countries in southern Africa. Perhaps the Special Rapporteur could shed more light on that point.

21. Draft article 15 and the paragraphs of the fifth report relating to it were entirely acceptable to him. That provision should, in his view, be referred to the Drafting Committee.

22. Mr. NI, referring to draft article 14, said that the occurrence of personal injuries and damage to property would not involve a rule of public international law if there was no question of State immunity from the jurisdiction of the courts of another State. In private international law, the question of civil liability for personal injuries and damage to property was usually governed by the *lex loci delicti commissi* and that rule of the application of the law was usually accompanied by the assumption of jurisdiction by the *forum loci delicti commissi*. The question of immunity or non-immunity for acts or omissions attributable to a foreign State and causing personal injuries or damage to property in the forum State was of comparatively recent origin. The denial of immunity in such cases was intended to afford legal protection to persons and property within the jurisdiction of the forum State. As the Special Rapporteur had noted in his fifth report (A/CN.4/363 and Add. 1, paras. 78 and 80–81), most such cases involved traffic accidents and there were relatively few cases giving rise to liability for compensation as a result of acts committed against persons or their property.

23. The Special Rapporteur had rightly stated that legislation restricting immunity in the area under consideration was "still in its infancy" (*ibid.*, para. 91); he had also pointed out that

> . . . On the whole, there has been very little evidence of State practice allowing or disallowing State immunity in respect of proceedings for "personal injuries and damage to property". (*Ibid.*, para. 76.)

The Special Rapporteur had gone on to warn (*ibid.*, para. 99) that the emerging trend in favour of granting relief to individuals for personal injury suffered could lead to confusion and disorder if the international community failed to steer that trend in a healthier direction which would have more salutary results for all concerned—the foreign sovereign States and the aggrieved individuals.

24. Although road traffic accidents occurred frequently, most of them were covered by insurance. Insurance companies were thus subrogated to the parties to an accident, who, under the laws of some countries, did not even have to appear in court. In addition to such cases, however, there was a wide range of cases which entailed the liability of foreign States or, rather, the personnel of their organs, agencies and instrumentalities in the forum State, not to mention diplomatic or consular personnel and members of the armed forces. Most cases of the latter type could be resolved through diplomatic negotiations or by amicable settlement. In fact, the use of the legal process was apt to create difficulties and even friction between States. In that connection, he noted that, in the memorandum which it had submitted to the General Assembly, at its thirty-seventh session, the secretariat of the Asian-African Legal Consultative Committee had stated that the inclusion of personal injuries and damage to property as an exception to State immunity would open the floodgate to litigation against foreign Governments and prove to be a constant irritant to relations between States. That memorandum, to which he had already referred (1762nd meeting), warranted careful consideration.[6]

25. Recently a suit had been brought against his country by a national of a foreign State who had claimed compensation for the personal injuries he had allegedly suffered while using fireworks manufactured by the Chinese Native Products Corporation. That suit, which had deliberately been brought against the People's Republic of China *eo nomine*, raised the very important question of jurisdiction. If a suit of that kind could be so instituted, a State in which commodities were manufactured for export to foreign countries could at any time be made the defendant in the courts of any importing State and be placed at the mercy of the would-be plaintiffs. In the case in question, physical injuries had been suffered by an individual, however negligent he might have been, and, for humanitarian reasons, an out-of-court settlement was being arranged. Many such cases could be settled through negotiation without any need to resort to compulsion by judicial proceedings. Due account should therefore be taken of the possibility of abuses, for frivolous or even malicious litigation might be instituted by unscrupulous persons in order to embarrass defendant States. The danger was that a thriving business would be created if proceedings could be conducted in accordance with the laws of the forum State.

26. Turning to draft article 15, he said that he was grateful to the Special Rapporteur for his untiring efforts to collect, analyse and carefully evaluate materials on the question of the ownership, possession and use of property. The criterion of the *lex situs* was the established rule in relation to immovable property and the competence of the *forum rei sitae* was seldom disputed. That was, however, not always the case with regard to movable property. State practice allowed actions to proceed which might involve titles or interests of a foreign State in transactions concerning immovable property situated in the territory of the forum State without granting immunity to that foreign State. The law of the United Kingdom and several of the Commonwealth countries extended the exception of non-immunity to movable property in cases involving an interest arising by way of succession, gift or *bona vacantia*. Article 10 of the European Convention on State Immunity[7] contained a similar provision, but the régime of trust funds and their administration was not generally recognized and practised except by common-law countries. It might therefore be preferable to simplify the wording of draft article 15.

27. Mr. CALERO RODRIGUES said that, in considering the question of exceptions to the principle of State immunity, the Commission should take great care

[6] *Ibid.*, footnote 24.

[7] *Ibid.*, footnote 7.

not to allow the exceptions adversely to affect the principle. Thus, in examining draft article 14, on personal injuries and damage to property, the Commission must decide whether an exception was justified and, if so, why. In his fifth report (A/CN.4/363 and Add. 1, para. 68), the Special Rapporteur had clearly stated that the exception was not recognized in customary international law or the traditional practice of States. Indeed, in his research on judicial practice, the Special Rapporteur had found only one case, in Austria, in which immunity had been denied (*ibid.*, para. 81). It should also be pointed out that the Inter-American Draft Convention on Jurisdictional Immunity of States (ILC (XXXV)/Conf. Room Doc. 4) did not actually establish an exception for personal injuries and damage to property. It stated in article 6 (*e*) that, in proceedings for losses and damages or tort liabilities, an exception to immunity would apply only when such losses and damages or tort liabilities arose out of trading or commercial activities.

28. The Special Rapporteur had concluded (A/CN.4/363 and Add. 1, para. 99) that there was an emerging trend in favour of an exception to sovereign immunity in cases involving personal injuries or damage to property. He himself was not sure that such a trend actually existed and he had been puzzled by the theoretical and practical arguments in favour of the exception which had been presented by the Special Rapporteur (*ibid.*, paras. 69–70 and 74–75). On the one hand, he had stated (*ibid.*, para. 69) that the exercise of jurisdiction by the courts of the place where the personal injury or damage to property had occurred was probably the best guarantee of sound and swift justice, while, on the other, he had noted (*ibid.*, para. 70) that the absence of competent judicial authority and lack of applicable law would leave the injured party remediless and without adequate relief or possible recourse.

29. If the Commission accepted those arguments, they would have to apply to many other cases and not only to the particular category of exceptions under consideration. It might even be said that, on the basis of such arguments, there was no ground whatever for State immunity because, in practically every case, the best guarantee of sound and swift justice would be recourse to the courts. There were, however, good reasons for not taking States to court and he was inclined to believe that many cases of personal injuries and damage to property could be settled through channels other than the courts, including the diplomatic channel, negotiations and consultations between the injured party and the State responsible. He was therefore not in favour of the exception provided for in draft article 14.

30. Draft article 15 raised far fewer problems than draft article 14 because it was generally agreed that, in the case of immovable property, the laws and courts of the State in which the property was situated should prevail and that an exception to State immunity should apply. It should, however, be borne in mind that, if it was agreed that litigation should not involve the property of the State, the application of the exception would be considerably limited.

31. Although he would normally be reluctant to agree to the application of an exception in the case of movable property, he could accept the very general wording of draft article 15, which subjected movable property to the jurisdiction of the local courts only in cases involving secondary matters such as succession, gift, *bona vacantia*, the administration of estates and trusts, bankruptcy and the winding up of companies. The wording of draft article 15 and, in particular, that of paragraph 1 (*d*) could no doubt be improved. The two safeguards provided for in paragraph 2 were useful, but it remained to be seen how the Special Rapporteur would deal with the difficult questions of attachment and execution.

The meeting rose at 1.05 p.m.

1769th MEETING

Friday, 27 May 1983, at 10 a.m.

Cthairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/357,[1] A/CN.4/363 and Add.1,[2] A/CN.4/371,[3] A/CN.4/L.3352, sect. D, ILC(XXXV)/Conf. Room Doc. 1 and 4)

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[3] *Idem*.

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