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Summary record of the 1769th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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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)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[4] (*continued*)

[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, 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.

ARTICLE 14 (Personal injuries and damage to property) *and*
ARTICLE 15 (Ownership, possession and use of property)[5] *(continued)*

1. Mr. LACLETA MUÑOZ thanked the Special Rapporteur for the analysis he had carried out in order to prepare draft articles 14 and 15, an analysis made difficult by the paucity of precedents in the areas covered. It seemed, however, that the precedents cited did not always correspond to the conclusions drawn in the fifth report (A/CN.4/363 and Add.1). Rather, those conclusions were based on national legislation and on the 1972 European Convention on State Immunity.

2. Draft article 14 was a response to a logical question: to whom should the private individual apply for compensation in the case of personal injury or damage to property resulting from an act, attributable to a State, occurring in the territory of another State? In its present formulation, however, the article seemed to go a little further than was needed. It applied to all State acts having injurious consequences, the sole requirement being that the author of the act was present in the territory at the time of the act's occurrence. Hence it did not relate exclusively to State acts considered wrongful under international law. In a case involving an accident in the port of Barcelona between a warship and a merchant vessel, the latter had sunk, but the warship had enjoyed jurisdictional immunity and the judgment rendered by the Spanish court had been in keeping with the legislation of the flag State. However, if article 14 in its present form had been applied, the persons in charge of the warship could have been prosecuted.

3. While he appreciated the wish to provide stronger protection for injured persons, he considered that the scope of the article should be brought within more normal limits. The passages of the fifth report dealing with article 14 were essentially concerned with traffic accidents attributable to military or diplomatic vehicles belonging to a foreign State. The most interesting precedent cited in that respect was *Holubek* v. *United States* (1961),[6] in which the Austrian Supreme Court had rejected immunity, saying that it was the act performed by a State organ that should be looked at, not the motive or purpose, and that the act of the foreign State from which the claim was derived should always be investigated. It was indeed an interesting judgment, but he doubted whether it could serve as a basis for drafting an article of a general nature.

4. Draft article 15 did not give rise to any particular difficulty. It was a useful provision which drew all the necessary inferences from well-established State practice. The wording, however, and especially that of paragraph 1 (*d*), could be simplified. As for paragraph 2, it was not clear whether the reference to "the inviolability of premises of diplomatic or special missions or consular premises" covered both immunity from attachment and execution and jurisdictional immunity. Unless the situation of diplomatic or special missions was precisely regulated in the draft, their immunity might be subject to the same rules as that of States. Yet the basis for diplomatic immunities, which were bound up with the functions performed, was not the same as in the case of State immunity. The jurisdictional immunity of missions went further than that of States, more particularly with regard to their property.

5. Mr. USHAKOV said that, in principle, he endorsed the idea underlying draft article 15, but the passages in the fifth report (A/CN.4/363 and Add.1) in connection with that article were open to some criticism. First, as had already been pointed out, it was a mistake to speak in general terms of the situation regarding property, since the rules for immovable property and for movable property were not the same. For example, was the law applicable to a vehicle imported by a State from its territory to the territory of a foreign State for the use of a diplomatic mission the law of the receiving State or that of the accrediting State? Again, in the matter of wills and testaments, the applicable law was not always that of the place in which the property in question was situated.

6. Secondly, the practice quoted in support of the draft article (*ibid.*, paras. 116–123) was somewhat disappointing. In *Limbin Hteik Tin Lat* v. *Union of Burma* (1954),[7] the District Court of Tokyo had said:

> A State is not subject to the exercise of power by another State, and therefore is not subject to the jurisdiction of another State in the matter of civil proceedings. . . . However . . . in an action concerning immovables, it is widely admitted that jurisdiction belongs exclusively to the State of the *situs*, and consequently it must be said that a foreign State may be subject to the jurisdiction of another State.

The first sentence was correct, but what was meant by "an action concerning immovables" in the second sentence? Did the phrase refer to proceedings brought in order to establish the right of the State or to an action *in rem* relating to State property? Again, the summing up by Lord Denning quoted in the report (*ibid.*, para. 118) discussed in general terms cases in which there was or was not immunity, but it did not deal with the real problem, namely establishing the rights of the State over certain property. The exceptions relating to trading or commercial activities (*ibid.*, para. 119) and the dual personality of the State (*ibid.*, para. 122) did not enter into the question. Furthermore, the competence of the courts was not always the point at issue. Sometimes it was a matter of establishing proof independently of any proceedings; for instance, a notary, not a court, might be involved in a case involving the terms of a will or testament.

7. Lastly, the basis for article 15 appeared to lie in draft article 9 (Effect of participation in a proceeding before a

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

[6] *Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; text reproduced in United Nations, *Materials on Jurisdictional Immunities* . . ., pp. 203 *et seq.*

[7] *International Law Reports* (London), vol. 32 (1966), p. 124; also reproduced in United Nations, *Materials on Jurisdictional Immunities* . . ., pp. 339–340.

court). Under paragraph 1 (*b*) of article 9, a State could not invoke immunity from jurisdiction in a proceeding before a court of another State if it had intervened in that proceeding or taken any other step relating to the merits thereof. However, paragraph 1 (*b*) did not apply to any intervention or step taken for the sole purpose of asserting a right or interest in property at issue in the proceeding. There was an obvious link between the two articles and, in his view, the provision forming the subject of draft article 15 should appear after draft article 9. Moreover, care should be taken never to speak of proceedings against the State, for the first issue to be resolved was whether a case involved jurisdictional immunity or an exception thereto.

8. Mr. McCAFFREY said that draft articles 14 and 15 illustrated the general principle stated by Mr. Ushakov in his memorandum (A/CN.4/371, para. 7), namely that, when a State operated within the jurisdiction of another State,

> . . . it is under an obligation strictly to abide by the other State's internal law. In particular, it may engage, within the sphere of jurisdiction of another State, only in such activities as are permitted by the latter.

The principle was entirely consistent with the one recognized in 1812 by Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and Others*;[8] in other words, a State entered and operated in the territory of another by virtue of a licence granted to the former by the latter.

9. If the principle was applied to draft article 14, it seemed highly doubtful that, except in the case of members of diplomatic missions, such a licence would normally include permission, whether express or implied, to cause physical injury to property with complete immunity from the jurisdiction of the host State and with impunity from civil liability, something that was confirmed by the Special Rapporteur in his fifth report (A/CN.4/363 and Add.1, para. 69). It was thus most unlikely that the host State would effectively make the guest State immune from tort liability, in view of its concern for the safety and well-being of persons within its borders. Such concern would give way only to some overriding interest, for instance the wish not to impede diplomatic relations. Nevertheless, the host State's interest in providing remedies for wrongs committed within its borders did suggest that the immunity granted in order to foster diplomatic intercourse should be carefully circumscribed.

10. The acceptance of that approach by the international community was borne out by the fact that the immunity granted to members of a diplomatic mission under article 31 of the Vienna Convention on Diplomatic Relations did not extend to members of a consular post, for under the terms of article 43, paragraph 2 (*b*), of the Vienna Convention on Consular Relations, consular officers and employees did not enjoy immunity in respect of civil actions "for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft". Draft article 14 merely recognized the host State's interest in redressing wrongs that occurred within its jurisdiction.

11. To confirm the point made by the Special Rapporteur concerning the role played by insurance (*ibid.*, para. 72), he pointed out that the law of the United States of America, like that of other countries, required diplomats and diplomatic missions to carry liability insurance covering the operation of vehicles, vessels or aircraft, allowed the injured party to bring an action directly against the insurance carrier and barred the latter from asserting immunity as a defence. Thus diplomats enjoyed immunity, but victims of accidents caused by them were compensated.

12. Article 14 might also be seen as a logical outgrowth of the well-established practice of many States allowing their own citizens and others to sue them domestically to recover for civil wrongs allegedly inflicted by the Government. In the United States, for example, that had long been possible under the *Federal Tort Claims Act*,[9] which had counterparts in a number of other countries. However, under section 1605, paragraph (*a*), subparagraph (5) (A) and (B), of the United States *Foreign Sovereign Immunities Act of 1976*,[10] to which reference had been made in the report (*ibid.*, para. 87), the foreign State retained immunity in many of the same situations as the United States Government did under the *Federal Tort Claims Act*.

13. The exception embodied in draft article 14 for torts, like that embodied in draft article 15 for property, was entirely separate from the exception provided for in draft article 12 with regard to trading or commercial activities, for as the Special Rapporteur had pointed out (*ibid.*, para. 65), the restriction operated even where the agency or instrumentality of a foreign State had been acting in the exercise of governmental power.

14. One basis for jurisdiction was obviously the *locus delicti commissi*, but due account should be taken of the Special Rapporteur's comment (*ibid.*, para. 67) that there were other possible bases under the rules of private international law. Hence the Commission should be careful not to lay down rules of jurisdiction *ratione materiae* or *ratione personae*, which might have the effect either of depriving a court of such jurisdiction when the court would otherwise have possessed it under its own rules, or of conferring immunity which would not otherwise have existed. Rather, the assumption must be that the court would have jurisdiction *ratione materiae* and *ratione personae* under its own rules if the defendant was not a State.

15. In his view, the factual contacts, or connecting factors, to be borne in mind were relevant not to the issue of jurisdiction or the choice of the applicable law but to the question of determining the host State's interest in asserting jurisdiction over the guest State, an interest that would, in certain circumstances at least, surely prevail over the competing interest of granting immunity. It was thus important to pay close attention to the factual contacts, for the added reason that their quality would also

[8] See 1763rd meeting, footnote 10.

[9] *United States Code, 1946 Edition*, vol. 3, title 28, chap. 20.

[10] See 1762nd meeting, footnote 17.

determine whether they were recognized by the international community.

16. Draft article 14 mentioned three such contacts as prerequisites for non-immunity, namely that the act or omission should have occurred in the forum State; that the injury or damage should have occurred in the forum State; and that the author of the injury or damage should have been present in the forum State at the time the harm occurred. It was essential to appraise them in the light of the extent to which they implicated interests of the host State, to determine whether they covered the types of cases with which draft article 14 was most concerned or in which it would most frequently be invoked, and to establish whether they unduly restricted the scope of the exceptions for non-commercial torts.

17. As for the first question, some guidance might be found in the practice followed in the United States. The legislative history of the *Foreign Sovereign Immunities Act of 1976* showed that section 1605, paragraph (*a*), subparagraph (5), was "directed primarily at the problem of traffic accidents".[11] Clearly, the factual contacts contained in draft article 14 would cover that type of case. Moreover, in the United States, the individual author of the harm, and presumably the foreign State, would normally be protected by the legislation requiring insurance cover and allowing for direct action against the insurance carrier. That seemed to be a sensible way of protecting the foreign State while ensuring compensation for innocent victims; if insurance cover was lacking, however, some recourse by the victim against the responsible State should still be possible.

18. The question of whether the connecting factors unduly restricted the scope of the exception in article 14 might also be usefully approached in terms of the competing interests of the host State that he had mentioned earlier. They could easily be reconciled, at least in some categories of cases, since the international community had already acknowledged, in the Vienna Conventions on Diplomatic Relations and on Consular Relations, that the functioning of international relations would not be significantly disrupted by allowing suits relating to traffic accidents and similar occurrences to be brought against consular officers and other State personnel who were not members of diplomatic missions.

19. A more difficult question was whether the same would hold true for suits against the State itself. The national legislation so carefully assembled by the Special Rapporteur afforded strong evidence of the view held by a wide variety of States that such suits would not normally interfere with international relations to such an extent as to override the concern to provide a forum for the innocent victim.

20. It appeared that States would be interested in providing a forum for their own citizens, no matter where they had been injured by the foreign State, but an examination of the 1972 European Convention on State Immunity[12] and the draft conventions of the Inter-American Juridical Committee (ILC(XXXV)/Conf. Room Doc. 4) and the International Law Association[13] did not reveal a restriction whereby tort suits against foreign Governments were allowed exclusively by citizens of the forum State. On the other hand, those instruments generally required that either the act or the omission giving rise to the harm or the harm itself should have occurred in the forum State, thereby suggesting once again that traffic accidents were of primary concern. Draft article 14 imposed those conditions concurrently and further required that the author of the harm should have been present in the forum State when the harm occurred.

21. As other speakers had pointed out, it was questionable whether the occurrence of the act or omission in the forum State and the presence of the author therein were necessary or indeed desirable. Those conditions would, in effect, allow immunity both in the case of a transboundary tort and in the case of acts of terrorism. However, the State in which the harm occurred would undeniably want to provide a forum for injured parties in both instances. Therefore, the only condition or factual contact that need be mentioned in draft article 14 was the occurrence of the loss or injury in the forum State, something that could easily be accomplished by amending the article, after the words "tangible property", to read "occurring wholly or partly in the latter State".

22. With regard to the judicial practice of the United States referred to by the Special Rapporteur in his fifth report, he wished to make it clear that the first sentence of paragraph 85 should not be taken to mean that United States courts had refused to apply the non-commercial tort exception provided for in the *Foreign Sovereign Immunities Act* when the Act would have allowed them to do so. Section 1605, paragraph (*a*), subparagraph (5), of the Act showed that the first and third cases mentioned in paragraph 85 were specifically excluded from the non-commercial tort exemption. In the second case referred to in paragraph 85, which had involved harm suffered outside the United States, the requirement that the harm should occur "in the United States" had not been satisfied. Those were cases in which jurisdiction over the foreign State had been excluded by the terms of the Act itself, rather than examples of the courts declining to exercise jurisdiction allowed under the Act.

23. The Special Rapporteur had assembled an impressive array of national judicial decisions, national legislation and international opinion to support his conclusion that there was an emerging, if not an "emerged", trend in favour of asserting jurisdiction over foreign States in cases involving non-commercial torts. In that connection, the Commission should take care not to dismiss out of hand the evidence of that trend to be found in the draft convention of the Inter-American Juridical Committee (ILC(XXXV)/Conf. Room Doc. 4) and in the International Law Association's Draft Convention on State Immunity, which had been prepared by a highly repre-

[11] *United States Code Congressional and Administrative News, 94th Congress, Second Session, 1976*, vol. 5, p. 6619.

[12] See 1762nd meeting, footnote 7.

[13] *Ibid.*, footnote 8.

sentative group of experts from countries such as Egypt, France, the Federal Republic of Germany, Greece, Japan, the Netherlands, Norway, Pakistan, the Philippines, Poland, the Soviet Union, Sweden, Switzerland, the United Kingdom, the United States of America, Yugoslavia and Zambia. The time had come for the international community to seek to channel that trend in a constructive direction and to harmonize, to the greatest extent possible, the positions of all members of the community of nations.

24. With regard to draft article 15, on ownership, possession and use of property, the Special Rapporteur had explained (A/CN.4/363 and Add.1, para. 106) that the predominant authority of the State of the *situs* was a decisive factor in determining rights in property and that it constituted another qualification of or limitation on the licence granted to the guest State by the host State. As he further explained (*ibid.*, para. 107):

> . . . the concept of ownership and other proprietary rights or interests can only exist within the framework of the legal system of the *situs*, and such a concept is bound to be inherently absorbed within the notion of territorial sovereignty of the State of the *situs* itself.

That became evident in examining the concept or legal institution of "property".

25. While the layman would probably think of the term "property" as referring to a particular thing, whether tangible or intangible, movable or immovable, the lawyer was more likely to think of the term as referring to rights in a thing. In the case of immovables, it was universally agreed that the source of those rights was the *lex rei sitae*. Moreover, a State other than that of the *situs* purporting to determine rights in land by applying the *lex rei sitae* did so at its own peril, since the only forum with the ultimate power to make and enforce such a determination was the *forum rei sitae*.

26. In the case of immovables at least, it was thus the *situs* State which had the paramount interest in and ultimate power over the determination of rights and interests in property located within its borders, for as the Special Rapporteur had recalled (*ibid.*, para. 111):

> An alternative solution or sheer insistence on the principle of State immunity would only lead to chaos and absurdity. There would be a legal vacuum, as the rights and interests of the extraterritorial authority itself would be without legal foundation, failing its own recognition of and respect for the internal law of the territorial State.

27. The same considerations generally held true for movable property, but the one situation in which the *situs* of such property was less relevant was that of the administration of the estate of a deceased person. It was desirable, for reasons of convenience, certainty and uniformity, for the law of one State, often the *lex domicilii*, to govern the distribution of the movable property of the decedent, wherever that property was located. For that reason, he was not sure that it was desirable to provide in paragraph 1 (*b*) of draft article 15 that a State was not immune from the jurisdiction of the courts of another State in respect of proceedings relating to "any right or interest of the State in any immovable or movable property in the State of the forum, arising by way of succession, gift or *bona vacantia*". The requirement that the property should be located in the forum State should probably be retained because it made sense in all cases except that of succession to movable property.

28. Although he experienced little difficulty regarding the substance of the rest of article 15, he agreed with the drafting changes proposed by Sir Ian Sinclair (1767th meeting, para. 37) concerning paragraph 1 (*c*) and with the view expressed by Mr. Calero Rodrigues (1768th meeting) and Mr. Lacleta Muñoz that paragraph 1 (*d*) could be simplified in order to make it clearer. In paragraph 2, it should also be specified that article 15 did not purport to derogate from the immunities granted by the Vienna Conventions on Diplomatic Relations and on Consular Relations and by the Convention on Special Missions. The paragraph might have to be re-examined after the Commission had approved draft article 4, which also protected the immunities granted under those instruments.

29. At the present stage, he would merely question the appropriateness of the term "inviolability" in paragraph 2, since article 22 of the Vienna Convention on Diplomatic Relations seemed to permit the receiving State to take a number of measures with respect to premises used for an embassy, short of attachment or execution. For instance, it appeared to allow the receiving State to adjudicate questions such as ownership, rent and servitudes, as long as possession by the sending State was not disturbed. Perhaps paragraph 2 could be drafted to take account of that point. Lastly, he agreed with Mr. Lacleta Muñoz that a diplomatic mission might well be entitled to a broader immunity than the foreign State itself, so that it could carry out its functions with as few impediments as possible.

30. Mr. QUENTIN-BAXTER said that his silence in connection with draft article 13 had meant that he agreed by and large with the terms proposed by the Special Rapporteur for that provision, which should be viewed not from a negative standpoint as an exception to State immunity, but, rather, as a positive assertion of a useful rule relating to the extent of immunity.

31. He experienced no fundamental difficulty with draft article 15, and particularly the substance of the article as a true exception to State immunity, because in the common-law tradition it had always been regarded in that way in judicial decisions. Problems might none the less arise in respect of movable property. As Mr. Lacleta Muñoz had said, the justification for the provisions relating to such property was that the interest of the foreign State was followed from the determination by the court in respect of title. Hence there might be room for some rearrangement of the provisions relating to movable property and for deciding whether the question of the determination of title was a matter precedent to the foreign State's interest from the point of view of immunity. Paragraph 2, in one form or another, was absolutely essential to draft article 15.

32. He had greater difficulty with the seemingly straightforward content of draft article 14. Mr. Ushakov's comment in his valuable memorandum (A/CN.4/371, para. 6) that the boundary of real sovereignty lay in the sovereignty of all other States was of broad significance in

that the independence of States and their authority within their territory was derived from the law and required respect for the territorial sovereignty of other States. That problem arose again and again in every aspect of the Commission's work and was part and parcel of the task of codification and progressive development of international law.

33. In examining Mr. Ushakov's memorandum on the relative priorities of territorial sovereignty and respect for State immunities, he had been reminded of the *Lotus* case,[14] in which rather similar issues had been at stake. For a minority of judges in the PCIJ, it had been a fundamental proposition that respect for territorial sovereignty demanded absolute self-denial by States in the assumption of jurisdiction over matters arising in relation to the citizens of other States. By a small majority, however, the final decision in the case had moved in the opposite direction: it had been ruled that the territorial sovereignty of the State came first and that the rights accorded to other States had to be grounded in positive rules of international law.

34. In the area under consideration, States had on the whole shown the greatest self-restraint, so that the problem of the assumption of criminal jurisdiction had not greatly worried the international community. Now that the Commission had resumed its consideration of the draft Code of Offences against the Peace and Security of Mankind, however, that problem had once again come to the fore. The question whether the draft code would contribute to universal law and order or merely cause pandemonium would depend very much on the self-restraint displayed by States in assuming jurisdiction over matters involving the citizens of other States.

35. The sovereignty of a State within its own borders became derisory if the pressures and harm to which it was subjected from beyond its borders were not under legal control. To think in terms of absolute sovereignty in, for instance, the present topic or the topic of international liability for injurious consequences arising out of acts not prohibited by international law would ultimately lead to recognition of the sovereignty of only the most powerful State, as Mr. Ushakov had rightly pointed out in his memorandum (*ibid.*, para. 5).

36. In formulating draft articles 1 to 12, the Commission had in a sense been setting the stage; but with draft articles 13 to 15 it had entered a phase in which it would be making a direct and practical contribution to solving the everyday problems encountered by diplomatic missions and other agencies of sovereign States.

37. If the Commission was unable to solve the problems underlying draft article 14, it was liable to create an obstacle that would divide international opinion. Anyone who had ever been responsible for protecting the legal interests of a foreign ministry in relation to the agencies of other States would remember only too well the pressures that had to be faced and the need for the State to give proper expression to its territorial authority in dealing with private individuals and trying to make them understand the degree to which immunities could modify the normal rights that the law conferred on them. The duty of a foreign ministry in such matters was not a simple one. It must, on the one hand, always be concerned to hold a certain line and not to allow the immunities that were proper and necessary to develop into abuse. On the other hand, it was usually concerned to persuade the other ministries of its own Government of the need to give full weight to the demands of diplomatic, consular and sovereign immunity.

38. In view of those considerations, he could not agree with some members that the problems under consideration could be avoided simply by omitting article 14. Such a course would not increase the scope of the immunities provided for in the draft. However, it would not be wise to ignore the kind of anxieties which the question of personal injuries and damage to property produced in the minds of the representatives of what were, in most cases, small countries that did not wish to become involved with the domestic law of forum States. It would be of great comfort to foreign ministries and diplomatic missions alike to know that certain matters could be settled through diplomatic channels.

39. Article 14 must also take account of the possibility that foreign States *eo nomine* could be taken to court as defendants in all sorts of circumstances, a possibility that did not appear to cause concern in relation to draft article 15, since the question of real property was as much in the interests of the forum State as of the foreign State, or in relation to draft article 13, which adopted a very balanced approach to the duty of diplomatic missions to abide by the labour law of the forum State when they chose to engage local employees. The possibility did, however, cause concern in relation to the unexplored aspects of draft article 14. One such aspect was that the agencies of foreign States must be able to insure themselves against certain kinds of risks. The best course might therefore be for matters in dispute to be litigated in the ordinary courts, because diplomatic negotiations were notoriously a very bad substitute for an exact determination of legal rights and obligations both under municipal law and under public international law. In that connection, the provisions of legislation in the United States of America, which enabled an insurance company to sue in its own name rather than by subrogation in the name of its client and so entirely avoided the question of suits against foreign States *eo nomine*, might well serve as useful guidelines for the drafting of article 14.

40. He agreed with other members that the words "and the author of the injury or damage was present therein at the time of its occurrence" would have to be reconsidered, but he understood why the Special Rapporteur had wished to draft the article as narrowly as possible. Nevertheless, it was somewhat difficult to regard civil proceedings against a foreign Government in connection with a transboundary tort as proceedings of the kind with which the Commission was practically concerned in the present article. Article 14, like article 13, dealt with an area that touched in some ways on diplomatic and con-

[14] Judgment No. 9 of 7 September 1927, *P.C.I.J., Series A*, No. 10.

sular immunities and it was in that area, in particular, that the Commission should take care to formulate balanced provisions in order to narrow the possible grounds of dispute as to what constituted a normal relationship between a forum State and a foreign State. He therefore shared the view that the proviso "Unless otherwise agreed" should be retained, so as to take account of the likelihood that some States might choose to modify that provision.

41. Mr. RAZAFINDRALAMBO said that, in connection with draft article 13, he had expressed serious doubts (1764th meeting) regarding the inductive method and had supported that article only on the condition that the exception should be in the nature of a residual rule. His doubts were not dispelled by the passages in the Special Rapporteur's fifth report (A/CN.4/363 and Add. 1) relating to personal injuries and damage to property. The exception proposed in that particular area was fraught with still greater consequences than were the exceptions contained in articles 12 and 13, for in the case of personal injuries and damage to property, the acts or omissions in respect of which the State was denied jurisdictional immunity constituted torts. Disputes in matters pertaining to commercial activities or the performance of contracts of employment involved a breach of some form of consensus or agreement, a breach that set in motion the mechanism which called into question the principle of jurisdictional immunity. Those considerations explained the reserved attitude of many members who had emphasized that, in State practice, the principle of immunity was virtually absolute in nature.

42. As the Special Rapporteur had stated (*ibid.*, para. 73), the areas specified as personal injuries and damage to property were mainly concerned with accidental death, personal injuries and damage to property resulting from traffic accidents, but also covered cases such as assault and battery, malicious damage to property, arson and even murder or political assassination. It had been proposed that acts of terrorism should be added to the list, which was far from exhaustive. In that connection, it should be noted that some of the acts listed by the Special Rapporteur could result from mere negligence that gave rise to tortious liability and were thus amenable to civil jurisdiction, but most of them constituted genuine penal offences of a punishable or even criminal nature. If, as the Special Rapporteur affirmed (*ibid.*, para. 71), the main thrust of the article was to protect the injured parties, there was nothing to indicate that the victim protected in the case of damage to property had to be a natural person. Unquestionably, it was also possible for a private or public juridical person to suffer damage to property.

43. In the matter of the competent jurisdiction, there were a number of conclusions to be drawn in the light of the distinction between personal injuries and damage to property. In all probability, the court which heard an action in respect of personal injury occasioned by punishable or criminal acts would be a penal court, at least in Roman-law legal systems. The author of the offence would be summoned as a principal. But the organ, agency or instrumentality of the foreign State, or the foreign State on behalf of which the author of the act performed the functions justifying his presence in the territory of the *locus delicti commissi*, would at the same time be summoned before the penal court as having civil liability. Hence, in the judicial practice of many countries, the foreign State or one of its organs might well have to plead its privilege of jurisdictional immunity before a penal court in a penal action.

44. If it was accepted that material damage could be suffered by any person, whether natural or juridical, it also had to be recognized that the victim could also be a public juridical person. In countries with an administrative jurisdiction, suits for compensation in respect of damage to property (with the exception of traffic accidents in the French and Malagasy systems) involving a national administrative organ fell within the competence of the administrative courts. Article 14 in its present form did not protect the foreign State either from a civil suit brought before a criminal court or from a contentious suit before an administrative court of the *locus delicti commissi*. It was true that the latter hypothesis was highly theoretical, since it was more than likely that, when an organ of the forum State found itself in conflict with the foreign State, the dispute would be settled through official or diplomatic channels in the interests of friendly relations between the two States. The fact nevertheless remained that a provision which was too general and which set aside the principle of jurisdictional immunity in cases of personal injury and damage to property was liable to have more drawbacks than advantages.

45. If the exception formulated in article 14 was to be maintained, it was essential to word the article in such a way as to emphasize its residual nature. The expression "Unless otherwise agreed" should be retained or possibly replaced by a more explicit phrase. As Sir Ian Sinclair had suggested (1767th meeting), it should also be made clear that the exception was applicable only in cases of civil jurisdiction and in respect of claims for compensation or reparation for personal injury or damage to property. Furthermore, there was no need for the second territorial condition, namely that the author of the injury or damage should have been present in the territory of the forum State.

46. In the French text, the phrase *un dommage à des biens corporels ou la perte de ce type de biens* might be replaced by *un dommage matériel ou la perte de biens*, for the term *corporel* was synonymous with *physique* or *matériel*, which explained the phrase *dommage corporel ou matériel* which the Special Rapporteur himself had employed repeatedly in the report and, of course, in the title of article 14. The very general term *fait* should be replaced by *acte*, in order to convey the notion of a positive act rather than an omission.

47. With regard to draft article 15, he fully endorsed the Special Rapporteur's conclusion (A/CN.4/363 and Add. 1, para. 124) that the judicial practice in the matter of ownership, possession and use of property appeared to be consistent in support of an exception to State immunity, although there was no prototype judicial decision on every point at issue in every existing case-law in the world.

In terms of form, the article could give the impression of having been designed as a catch-all for anything that might have been overlooked. In particular, paragraph 1 (*d*) could be simplified, for it was difficult to understand and the report afforded little enlightenment in that regard. Lastly, he wished to endorse the remarks made by Mr. Lacleta Muñoz and Mr. McCaffrey in respect of paragraph 2 of article 15.

48. Sir Ian SINCLAIR said that, in view of the way in which the debate had developed, he felt obliged to add two further points to his earlier remarks (1767th meeting). The first was of a general nature and related to the whole rationale of the rule of the jurisdictional immunities of States. In many countries, the State itself could not be sued in its own courts and, *a fortiori*, in a foreign court. Prior to the *Crown Proceedings Act* of 1947,[15] the only way in which a private individual could institute proceedings against the State in the United Kingdom had been through a "petition of right" addressed to the Crown and requesting the right to pursue a remedy to the wrongful act that was the subject of complaint. The Attorney-General, acting in his quasi-judicial capacity, had to give his consent before the petition could be heard by the courts. Thus the concept of a foreign State's immunity from jurisdiction derived, if only in part, from the fact that some States were immune from that of their own courts.

49. The second point related to the distinction, mentioned in passing at the beginning of his previous statement, between jurisdiction and applicable law. All States had rules governing the scope of their civil jurisdiction, rules that varied greatly from country to country. Some attempts were currently being made to harmonize them to a limited extent within the European Communities, but no such harmonization existed at a broad international level, nor did the task of harmonizing rules pertaining to jurisdiction form part of the Commission's mandate in elaborating draft articles on the present topic. In the United Kingdom, for example, the courts could exercise jurisdiction in respect of any matter arising from a contract made in that country; that, however, had nothing to do with the applicable law, which in the United Kingdom was the law of the contract—in other words, the law most closely connected with the contract, which might be the law of the place where the contract was made, of the place where it was executed, or of the country of nationality of a contracting party. The distinction was an important one and confusion between the two concepts should be avoided.

50. With reference to the argument advanced (1768th meeting) by Mr. Koroma, Mr. Ni and other members that the matters covered by draft article 14 could more properly be settled through diplomatic channels, long experience of dealing with dissatisfied litigants against foreign States had convinced him of the need to seek an alternative way of settling disputes of the type in question, provided, of course, that the sovereign immunity of the foreign State in its own territory was not put at issue. In connection with the *Lotus* case, mentioned by Mr. Quentin-Baxter, it should be remembered that States generally exercised great restraint with regard to criminal jurisdiction, but often failed to do so in matters of civil jurisdiction.

51. Draft article 14 dealt with sensitive and difficult issues and should be framed to avoid giving rise to some of the problems mentioned by various members. Thus it should be made clear that the article dealt solely with civil jurisdiction, and not with criminal jurisdiction. The reference to "tangible" property already made it plain that unfair competition or commercial torts were not covered. Furthermore, a sufficiently broad range of exclusions should be provided, either in the article itself or in the form of a general provision, to avoid any possibility of conflict with other existing international conventions, which included not only the relevant Vienna Conventions, but also such instruments as the Convention on Third Party Liability in the Field of Nuclear Energy,[16] the Convention on International Liability for Damage Caused by Space Objects,[17] and others.

52. Mr. USHAKOV, referring to Mr. McCaffrey's remarks concerning the work of the group of experts of the International Law Association, explained that the participation of his compatriot, Mr. Bogdanov, in that work in no way signified that Mr. Bogdanov endorsed the group's conclusions. Mr. Bogdanov was in fact a firm advocate of strict preservation of the jurisdictional immunity of States.

53. Mr. NI said that, in his own experience, as in Sir Ian Sinclair's, litigants in cases involving a foreign State were often dissatisfied; but in oriental countries, and more particularly in China, they none the less appeared to be more inclined to accept compromise solutions than were litigants in the west. In his view, conciliation was simpler than, and generally preferable to, recourse to the courts. Moreover, conciliation procedures avoided the tensions and ill-feeling that would inevitably emerge if a foreign sovereign State was brought before the courts as a defendant. Most of the cases falling under draft article 14 were traffic accidents, which could usually be settled promptly through insurance cover. In other cases, which were relatively rare, conciliation procedures were always worth trying even if they required a great deal of time and patience and the conciliator sometimes ran the risk of being blamed by both sides.

54. Mr. KOROMA said that he was somewhat at a loss regarding the conclusion to be drawn from the very interesting distinction made by Sir Ian Sinclair between jurisdiction and applicable law. As he had pointed out in his earlier remarks (1768th meeting), there was an increasing tendency for plaintiffs to look for the applicable law elsewhere than in the *lex loci delicti commissi*. To invoke a different law would obviously

[15] United Kingdom, *The Public General Acts, 1947*, vol. 1, p. 861.

[16] United Nations, *Treaty Series*, vol. 956, p. 251, and Additional Protocol, *ibid.*, p. 335.

[17] *Ibid.*, vol. 961, p. 187.

involve a new jurisdiction and the court of the new jurisdiction could hardly be expected to apply the old law which the plaintiff had cast aside. As to the suggestion that article 14 should concentrate on monetary compensation for injury or damage, he wondered whether the plaintiff might not have to establish the defendant's criminal guilt before suing him for compensation. Some elucidation of that point would be welcome.

55. Mr. USHAKOV said that, in the Soviet Union, legislation relating to civil proceedings also provided for settlement out of court and that the majority of suits brought against States were settled in that way.

The meeting rose at 1.05 p.m.

1770th MEETING

Monday, 30 May 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, 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.352, sect. D, ILC(XXXV)/Conf.Room Doc.1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[4] (*concluded*)

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

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

1. Mr. DÍAZ GONZÁLEZ said that, in his opinion, draft article 14 served no useful purpose, as Mr. Flitan had amply demonstrated at the 1768th meeting. The cases mentioned by the Special Rapporteur in his fifth report (A/CN.4/363 and Add. 1) were not sufficient to justify drafting an article which formulated a new exception to the principle of jurisdictional immunity of States and their property, at the risk of transforming the general rule into a residual rule. In view of the existence of the Vienna Conventions on Diplomatic Relations and on Consular Relations, there was no question of filling a legal void. Most of the cases upon which the Special Rapporteur based the proposed exception were cases of contraventions of road traffic regulations. Yet, in order to be permitted to drive a motor vehicle, it was necessary in most States to be in possession, not only of a driving licence, but also of third-party insurance. It was well known that the numerous cases of traffic accidents brought to the attention of ministries were generally settled by negotiation without any great difficulty. Hence, there was no need to provide an exception to the principle of jurisdictional immunity in a matter in which hardly any problems arose in practice, and article 14 should be deleted.

2. He experienced no difficulty regarding article 15 except, possibly, from the point of view of the translation into Spanish.

3. Mr. JACOVIDES said that his approach to the topic under consideration had not changed since he had spoken at the Commission's previous session.[6] The views he had expressed at that time also applied to the current discussion on draft articles 14 and 15, in connection with which the Commission's aim should be to devise practical solutions and to avoid doctrinal differences of opinion.

4. Mr. MAHIOU said that he would refrain from discussing general principles, for they were sometimes difficult to reconcile. In his fifth report (A/CN.4/363 and Add. 1, paras. 68 and 99), the Special Rapporteur spoke of a recent trend towards restricting State immunity. In reality, however, that trend had been extensively debated and widely challenged, and it could more appropriately be described as but one of a number of trends in some legislations and some judicial practices.

5. Other passages in the report might have been drafted in more qualified terms in order to avoid ambiguous interpretations. In view of the judicial practice of States cited in connection with draft article 14 (*ibid.*, paras. 81–82), it would have been preferable not to assert so emphatically (*ibid.*, para. 67) that the "distinction between *jus imperii* and *jus gestionis* . . . appears to have little or no bearing in regard to this exception". That distinction was rejected by the Special Rapporteur, but it might well be appropriate to take into consideration the

[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.

[6] *Yearbook . . . 1982*, vol. I, p. 78, 1711th meeting, paras. 29–32.