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Summary record of the 1970th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1986, vol. I

ARTICLE 27 (Procedural immunities)

102. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 27, which read:

Article 27. Procedural immunities

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

103. The two paragraphs of the new text were based on paragraphs 2 and 3 of the former article 27.[20] Those paragraphs had been reformulated in the light of the debate. Paragraph 1 first spoke of "no consequences" being entailed by the conduct in question, although it stated that the consequences which might ordinarily result from such conduct in relation to the merits of the case would still obtain. That wording preserved the applicability of any relevant rules of the internal law of the forum State. The second sentence of paragraph 1 specified that no fine or penalty could be imposed. Paragraph 2 drew on paragraph 3 of the former article 27 and a corresponding provision of the 1972 European Convention on State Immunity. It should be noted that both paragraphs applied whether a State was plaintiff or defendant.

104. Sir Ian SINCLAIR said that he wished to place on record his reservation on paragraph 2 with regard to the position of the State as a plaintiff. He could accept the provisions of paragraph 2 when the State was a defendant.

105. Mr. TOMUSCHAT made the same reservation. In his view, the rule set out in paragraph 2 had no justification when the State was involved in a proceeding as plaintiff; it would then confer a privilege on the defendant. It should also be borne in mind that, in many cases, it was very difficult to recover monies deposited as security.

106. Mr. BALANDA proposed that, in paragraph 2 of the French text, the word *caution,* which referred to a person, should be replaced by *cautionnement.*

107. Mr. MAHIOU said that security was required of a plaintiff, not of a defendant, for if a defendant were required to provide security, he would not appear. Thus article 27, paragraph 2, would make sense only if it referred to the plaintiff. It was in the light of his own country's internal law that he made that comment.

108. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 27 with the amendment to the French text proposed by Mr. Balanda.

It was so agreed.

Article 27 was adopted.

[20] *Ibid.*

ARTICLE 28 (Restriction of immunities)

109. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 28, which read:

Article 28. Restriction of immunities

A State may restrict in relation to another State the immunities provided in the present articles to such extent as appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or as required by any international agreement applicable in the matter between them. However, no such restriction shall prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*).

110. The former article 28[21] had been modified in a number of respects. The reference to "extension" of immunities had been deleted as being unnecessary. Such extension was possible in any case and to make provision for it would add nothing to the draft. Thus the new article referred only to "restriction" of immunities.

111. The first sentence contained the essential elements of the original text, with appropriate drafting improvements. The second sentence was new and incorporated what was considered to be an essential element, namely that in no event could restriction of immunities prejudice the immunities of a State in respect of acts performed by it in the exercise of its sovereign authority (*acta jure imperii*). That provision was intended to protect the "hard core" of State immunities and to draw a line beyond which restrictions were not permitted.

112. The wording of that provision had, of course, been the subject of some discussion. The French expression *les prérogatives de la puissance publique* seemed to express the basic idea most accurately. Again drawing on the 1972 European Convention on State Immunity, the Drafting Committee had decided to include in all language versions, after the phrase "exercise of sovereign authority", the Latin expression *acta jure imperii* in parentheses, in order to bring out within the context of that particular article the fundamental nature of the sovereign authority in question.

113. The CHAIRMAN suggested that the discussion on article 28 should be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

[21] *Ibid.*

1970th MEETING

Wednesday, 18 June 1986, at 3.15 p.m.

Chairman: Mr. Motoo OGISO

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr.

Mahiou, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/396,[1] A/CN.4/L.399, ILC (XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 28 (Restriction of immunities)[2] (*continued*)

1. Mr. USHAKOV said that he was utterly opposed to article 28. It contained an alarming and preposterous proposition, for under its terms two States parties to the future convention would be able to decide, unilaterally or bilaterally, not to abide by the rules set forth in that convention.

2. The expression "for reasons of reciprocity" signified, as he read it, that if one State unilaterally violated its obligations with respect to the immunities provided for in the articles, another State could then decide that a tacit agreement existed to commit such a violation. Where would that lead? Again, as though it were not bad enough to imply that violating its obligations under the articles was the "standard practice of that other State", the expression was further qualified by the phrase "to such extent as appears to it to be appropriate", which was quite absurd. And what on earth was meant by an "international agreement applicable in the matter"?

3. Furthermore, the first sentence of the article, which laid down that "the immunities provided in the present articles" could be restricted, did not accord with the second, which specified that the obligations under the articles were not affected. In addition, the words "sovereign authority" in the second sentence meant no more nor less than the exercise of governmental authority; it was therefore quite wrong to add, by way or explanation, the Latin term *acta jure imperii,* which meant something entirely different.

4. Rather than permit violations of the obligations under the future convention, article 28 should provide for the imposition of restrictions in the form of lawful countermeasures. As drafted, the article completely upset the established order of things and was therefore totally unacceptable.

5. Mr. FLITAN said that article 28 posed no major problem of substance so far as he was concerned, although the wording could be improved to bring it into line with the draft as a whole. In his view, under the terms of article 8, States could give their consent to restrictions of immunity other than those specified in the draft articles. It would none the less be preferable to speak of exceptions to, rather than restrictions of, immunity.

6. With those points in mind, he proposed that the title of article 28 should be amended to read "Other exceptions to immunities". Furthermore, the two sentences of the article should form two separate paragraphs. He agreed that the phrase "to such extent as appears to it to be appropriate", which was somewhat arbitrary, could be deleted from the first sentence, but favoured retention of the reference to reciprocity. The word "standard" should be deleted from the phrase "standard practice of that other State", in keeping with the wording of article 3, paragraph 2. The first sentence would thus read: "A State may introduce exceptions other than those provided in the present articles to the immunities of another State for reasons of reciprocity or conformity with the practice of that other State ...".

7. At the beginning of the second sentence, the words "However, no such restriction shall" should be replaced by "The introduction of other exceptions to immunities on the basis of paragraph 1 shall not". It could be left to the Drafting Committee to decide whether to retain the Latin expression *acta jure imperii.*

8. Chief AKINJIDE said that, after hearing Mr. Ushakov's remarks, he had come to the conclusion that, if it was allowed to stand, article 28 could render any future convention inoperative. As was apparent from the Special Rapporteur's commentary to the article in his eighth report (A/CN.4/396, para. 42), article 28 served little purpose. Also, it might create more problems than it solved, since it could be used in bad faith. In the circumstances, he considered that article 28 should be deleted in its entirety.

9. Sir Ian SINCLAIR said that a number of connecting factors had been inserted in articles 11 to 20 to indicate that, if a case was covered by those factors, immunity could not be invoked, and that, if the case was not, the residual rule of immunity in article 6 would operate. The problem was that the Commission was not required to harmonize the rules of civil jurisdiction applied by States. Consequently, there might be certain rules of civil jurisdiction applied in a particular State that went slightly beyond those connecting factors. Some degree of flexibility was therefore necessary to cope with what was recognized, under the 1972 European Convention on State Immunity, as a kind of grey zone. An added reason for introducing a measure of flexibility into the draft was that the Commission could not predict future developments.

10. To take an example pertaining to contracts of employment, the jurisdiction of United Kingdom courts extended to any contract of employment entered into in the United Kingdom, even if the services under the contract were to be performed wholly outside the United Kingdom. Under article 12 [13], paragraph 1, immunity could of course be invoked, but only in respect of a contract of employment between a State and an individual for services performed or to be performed, in whole or in part, in the territory of the State of the forum. In the case of a contract of employment for services to be performed not even in part in the territory of the State of the forum, the position might well be that, since the case was not covered by the particular connecting factor under article 12 [13], paragraph 1, the rule of immunity would prevail. Yet that might not necessarily be the

[1] Reproduced in *Yearbook ... 1986,* vol. II (Part One).

[2] For the text, see 1969th meeting, para. 109.

right solution in terms of the overall economy of the draft. In his view, therefore, some provision along the lines of article 28 was highly desirable.

11. While the wording of the article was open to some criticism, he would point out, in response to Mr. Ushakov, that a State acting in good faith in pursuance of an article like article 28 that was designed to introduce an element of flexibility would not necessarily be committing an internationally wrongful act in relation to the other articles of the draft. Some of Mr. Ushakov's arguments therefore fell to the ground.

12. His own difficulty with article 28 was that it was not at all clear what was meant by "for reasons of reciprocity". That expression would thus have to be explained in the commentary, but he did not think it referred to reciprocity as a countermeasure within the meaning of the draft articles on State responsibility.

13. He believed very strongly that the second sentence of article 28, including the reference to the concept of *acta jure imperii,* should be retained, since it represented the "bottom line" and set the limits beyond which immunities could not be restricted.

14. Mr. KOROMA said that he had some objections to article 28 as formulated, but understood the Special Rapporteur's intention. Accordingly, he proposed that the title of the article should be changed to "Reciprocal immunities" and that the body of the text should be amended to read:

> "States may agree between themselves, on the basis of reciprocity and in conformity with the practice of those States or as may be required by an international agreement applicable in the matter, to modify the immunities provided in the present articles."

15. Mr. CALERO RODRIGUES said that an objective examination of the matter revealed that Mr. Ushakov's interpretation of article 28 was mistaken. The purpose of the article was in fact to make provision for any possible grey areas in the application and interpretation of the draft articles. For instance, if on the basis of its own interpretation a State applied the articles restrictively, another State was entitled to interpret and apply the articles in the same way, either by reason of reciprocity or because such interpretation was the standard practice of the other State, or again because it was the result of an international agreement between the States in question. In all such cases there was no collective right to violate a treaty, but merely a right to interpret the treaty restrictively. That was quite clear from the second sentence of article 28, which was not preposterous but simply the logical consequence of the need to acknowledge in the draft articles that there would always be grey areas in which States had some freedom of movement and that such freedom should apply both ways.

16. Mr. MAHIOU said that he had no strong position concerning article 28, although he did have doubts about its utility. Even if it were retained in the light of the explanations given by Sir Ian Sinclair and Mr. Calero Rodrigues, a drafting problem still remained and certain ambiguities would have to be removed. He thus fully agreed about the need to cater for grey areas in the interpretation of the draft, provided that the actual wording of the article did not itself create such areas.

17. Although Mr. Ushakov's comments regarding the phrase "for reasons of reciprocity, or conformity with the standard practice of that other State" were perhaps somewhat harsh, they contained more than a grain of truth. It might be as well to replace the conjunction "or" by "and" in order to make a stronger connection between the two elements. Such a course would also help to eliminate any ambiguity or difficulties of interpretation. Reciprocity was of course already recognized under international law, along with the right of two States to conclude an agreement with a view to modifying a particular aspect of their relations. Admittedly, it might be useful to state the self-evident, but that in itself could also create ambiguity.

18. There was no need whatsoever for the Latin term *acta jure imperii* at the end of the second sentence. First of all, it would be difficult to render into other languages, such as Arabic. In addition, the expression "sovereign authority" appeared elsewhere in the draft articles without being accompanied by the term *acta jure imperii.* The sudden inclusion of the latter in article 28 could only add to the inherent ambiguity.

19. Mr. USHAKOV said that some members seemed to take the view that any State party to the future convention or to bilateral treaties could interpret the convention or the treaties as and how they wished. Interpretation, in their opinion, was a grey area. Never before in the Commission had he heard such a startling proposition. The fact of the matter was that a difference as to interpretation involved a dispute between two States that fell to be decided in the manner provided for under international law, namely by negotiation, conciliation or arbitration, or, if need be, by invoking Article 33 of the Charter of the United Nations. That was abundantly clear from all international conventions, but it would suffice to refer members to article 84 of the 1975 Vienna Convention on the Representation of States.

20. The draft articles provided for State immunity on the one hand, yet on the other proposed that such immunity could be restricted and even violated. It was something quite unheard of.

21. Mr. ARANGIO-RUIZ said that, as a matter of principle, the legislator should avoid deliberately introducing grey areas into a legal text. It was for those who interpreted the text, whether academics or practitioners, to ascertain whether such grey areas existed. Accordingly, any member of the Commission who considered that a grey area did exist should try to remove it. However, given the differences of opinion, he would suggest that a small working group, which could be composed, *inter alia,* of Chief Akinjide, Mr. Calero Rodrigues, Mr. Flitan, Mr. Mahiou, Sir Ian Sinclair and Mr. Ushakov, should be appointed to deal with the matter.

22. Mr. LACLETA MUÑOZ said that article 28 was the outcome of lengthy and complex negotiations and reflected a compromise, one which, like all compromises, was unsatisfactory in certain respects. While

he shared Mr. Calero Rodrigues's views to a large extent, he had been impressed by Mr. Ushakov's initial submission, the main point of which, if he had understood correctly, was that the other State might perhaps not have violated the convention. A degree of flexibility was none the less important in order to take account of the minor differences between the connecting factors which appeared from article 11 onwards. The problem was that the first sentence of article 28 imposed no limitation at all. Hence the solution would be to adopt some wording similar to that in article 47 of the 1961 Vienna Convention on Diplomatic Relations, so as to provide for flexibility in interpretation.

23. Mr. TOMUSCHAT said that article 28 should be aligned with article 47 of the 1961 Vienna Convention to allow for a measure of flexibility to be built into the draft convention. Accordingly, he proposed that the opening clause of article 28 should be reworded to read: "A State may in relation to another State apply restrictively the immunities provided in the present articles ...".

24. There were also certain points of drafting that required examination, particularly in the French text, which used the word *limitation* in the title but the word *restriction* in the second sentence.

25. Mr. FRANCIS, agreeing that the article under discussion should be brought more into line with article 47 of the 1961 Vienna Convention, said that the main problem was one of drafting and he therefore supported Mr. Arangio-Ruiz's suggestion for a small working group to be appointed. If that suggestion were adopted, the best course would then be to place the article between square brackets and revert to it later.

26. Mr. SUCHARITKUL (Special Rapporteur) said that the original intention had been that article 28 should give an indication of the relative nature of immunity. A State could waive immunity at any stage in a proceeding, which meant that the same rule could be applied in different ways, depending on the jurisdiction. Consequently, there was a certain lack of harmony, which in turn called for a measure of flexibility. At the same time, there was a limit to flexibility, since a State could extend or restrict immunity only if certain conditions were met. Those conditions related to reciprocity, conformity with standard practice, and the existence of bilateral conventions for example, such as those concluded within the framework of EEC, OAS or ASEAN. He recognized that there were a number of inherent difficulties in the draft and was prepared to accept, for instance, Mr. Flitan's proposal as one way of dealing with them. The term *acta jure imperii* in the second sentence was a matter of formulation, not substance, and could be dealt with in the commentary. He was willing to prepare a revised text of the draft article with the assistance of Sir Ian Sinclair and Mr. Ushakov.

27. Mr. REUTER said that article 28 raised the delicate problem of the relationships between treaties and called for very careful drafting, but it was not a provision of basic substantive importance. In view of the lack of time at the Commission's disposal, it would be more prudent to delete the article altogether for the time being. He would, however, have no objection if some other method of proceeding were adopted.

28. The CHAIRMAN said that the Chairman of the Drafting Committee might wish to hold a meeting of the Committee to reconsider article 28. If no agreement was reached in the Drafting Committee, then perhaps Mr. Reuter's proposal to delete the article could be adopted.

29. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that it was apparent from the wide divergence of opinion in the Commission that points of substance as well as drafting were involved. One point of substance concerned the need to recognize whether there was a grey area. If so, it would necessarily relate not only to interpretation, but also to matters not covered by the draft, and the difficulty could not be resolved by using the formula contained in the 1961 Vienna Convention. Consequently, there was no sense in discussing article 28 further until a decision was taken on article 6.

30. Mr. EL RASHEED MOHAMED AHMED said that the extreme positions taken by members were not conducive to compromise. For that reason he supported the proposal to place article 28 between square brackets; it could then be taken up on second reading.

31. Mr. DÍAZ GONZÁLEZ said that he was not convinced of the utility of article 28 but, so far as the Spanish text was concerned, it would be preferable to replace the word *limitar* in the first sentence by *restringir*. As to the second sentence, the meaning was already quite clear from the terms of article 3, namely that only acts performed in the exercise of the sovereign authority of the State enjoyed immunity. Consequently, the question of a grey area was not at issue: such areas would always exist. A decision on article 28 should be deferred until it was known what form article 6 would take. In that way, an interminable discussion would be avoided.

32. Sir Ian SINCLAIR said that he was very much opposed to deleting article 28 at the present stage. The best solution would be to place the article between square brackets and refer it to the General Assembly. It could then be transmitted to Governments for comment and, on that basis, be considered more closely on second reading.

33. Mr. USHAKOV said that, so far as he was concerned, the main point was not whether there was a so-called grey area. Obviously, if two States parties believed that there was a grey area, nothing prevented them from concluding a special agreement to regulate the matter. But that was not what was being proposed in article 28, for, under the terms of that article, a State could unilaterally restrict immunity, simply because it appeared "to be appropriate" to do so in certain circumstances, and hence it could violate the provisions of the future convention. What was more, some members held that another State could do likewise for reasons of reciprocity—reciprocity that might well take the form of an international crime. Countermeasures, on the other hand, were something quite different and could be

taken until such time as the first State ceased its violation.

34. Mr. KOROMA said that the question whether two or more States could agree among themselves to apply immunities restrictively was not in doubt. What was unacceptable was for one State to restrict immunity unilaterally and, in the process, compel another State to do likewise and classify it as reciprocity. He therefore strongly urged that the Special Rapporteur be allowed to work out a new text which would reflect members' reservations. If that was not possible, the article could be placed between square brackets and referred to the General Assembly.

35. Chief AKINJIDE said his fear was that article 28, which provided for a subjective test of reciprocity, could be used by a powerful State for punitive purposes. Of course there were certain grey areas, as everybody was only too well aware, but they had already been dealt with in, for instance, articles 12 [13], 13 [14], 16 [17], 17 [18] and 18 [19], all of which contained the introductory clause: "Unless otherwise agreed between the States concerned". Consequently, there was little point in retaining article 28, with or without square brackets. It might even do more harm than good, as had proved to be the case with various instruments of national legislation on immunity. The manner in which the courts had applied the United Kingdom *State Immunity Act 1978* and the United States *Foreign Sovereign Immunities Act of 1976* in cases in which he had been involved on behalf of his Government had been quite devastating. He therefore maintained the view that article 28 should be deleted.

36. Sir Ian SINCLAIR said that he wished to make it clear for the record that the Nigerian cement cases[3] in the United Kingdom had been determined not under the *State Immunity Act 1978*, but according to the common law of England, which had reflected the views of the English courts on the trend in international law towards the restrictive doctrine.

37. The Commission was dealing with a very complicated area involving interactions between principles of public international law and the rules of civil jurisdiction under national systems of law. Many of the problems in international relations were caused by the lack of harmonization of those rules, although some progress in that direction had been achieved by the member States of EEC in the context of the 1968 Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments.

38. Article 28 also raised an important point of principle, for the obvious cases were regulated but certain limited instances still remained in which it simply was not possible to perceive all the kinds of cases involving foreign States that might arise before national courts in the future. As he saw it, therefore, article 28 related solely to the exceptions and limitations in part III of the draft which contained certain connecting factors, the effect of which would be virtually to establish a rule of immunity if a particular case was not fully covered by those factors. He was willing to endeavour to narrow the terms of article 28 along those lines. Nevertheless, it might not prove possible to reach agreement in the short time available, in which case the article could, as he had already suggested, be placed between square brackets and forwarded to States for comment, with an indication in the commentary that there was a sharp division of views in the Commission on the need for the article.

39. Mr. SUCHARITKUL (Special Rapporteur) said that he was quite willing to prepare a revised version of article 28 for the Commission's consideration at the next meeting. Alternatively, he would be content to place the article between square brackets with an indication in the report on the present session that the Commission would revert to the article on second reading, at which time the question of deletion could be considered if necessary.

40. Mr. USHAKOV said that placing the article between square brackets would not be acceptable in any way. He requested that it be placed on record that he had not been able to participate in the Drafting Committee's work on article 28.

41. Mr. DÍAZ GONZÁLEZ said that he had no objection to the suggestion to place article 28 between square brackets or to incorporate some appropriate reference in the commentary. It should none the less be made quite clear that, if article 28 was referred to the General Assembly, it was precisely because the Commission had so decided and not because the Drafting Committee had approved the article. He wished his position in the matter to be placed on record.

42. Mr. KOROMA proposed that a decision on article 28 be deferred until the following day.

43. The CHAIRMAN suggested that article 28 should be placed within square brackets and that an appropriate explanation should be included in the Commission's report. In addition, if the Special Rapporteur prepared a revised version which received general acceptance in informal consultations, that version could be examined by the Commission after it had completed its consideration of article 6.

44. Chief AKINJIDE, supporting Mr. Koroma's proposal, said that the first issue to be decided was whether any revised draft of article 28 submitted by the Special Rapporteur was acceptable to the Commission. If it were, the question of square brackets would not arise. The two issues should in any event be discussed together at the Commission's next meeting.

45. Following a brief exchange of views in which Chief AKINJIDE, Mr. FRANCIS, Mr. KOROMA, Sir Ian SINCLAIR and Mr. SUCHARITKUL (Special Rapporteur) took part, the CHAIRMAN suggested that a decision on article 28 should be deferred until the following day.

It was so agreed.

ARTICLE 6 (State immunity) (*continued*)*

46. Mr. SUCHARITKUL (Special Rapporteur) said that he would like to know whether article 6 would be

[3] *Trendtex Trading Corporation* v. *Central Bank of Nigeria* (1976) (*The Law Reports 1977, Queen's Bench Division*, p. 529); on appeal (1977) (*The All England Law Reports 1977*, vol. 1, p. 881).

* Resumed from the 1968th meeting, paras. 49 *et seq.*

acceptable to Mr. Ushakov if the phrase "and the relevant rules of general international law applicable in the matter" were deleted. He would also welcome other members' views in that connection.

47. Mr. USHAKOV said that article 6 would be totally unacceptable to him unless the phrase in question were deleted. He noted that, whereas the English text used the expression "general international law", the French text spoke simply of *droit international*. Again, a better title for part II would be "General rules", since not all the articles in that part stated principles.

48. Sir Ian SINCLAIR said that article 6 had given rise to a very lengthy discussion in the Drafting Committee and it would be unwise for the Commission not to recognize that a number of members felt very strongly that the article would be acceptable only if it included the words "the relevant rules of general international law applicable in the matter". His own view was that, however the article was formulated, it expressed a single basic rule and not a rule of immunity subject to exceptions. The limitations merged, as it were, with a statement of principle, which was the only way to achieve a consensus on the article.

49. Mr. KOROMA said that, although it had been affirmed that article 6 was unitary in intent, it had a dual application. There could be no other reason for the two elements of the formulation, namely "the provisions of the present articles" and "the relevant rules of general international law applicable in the matter". The rules of jurisdictional immunity were much broader than were the latter. Hence article 6 was not acceptable.

The meeting rose at 5.25 p.m.

1971st MEETING

Thursday, 19 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Ago, a Judge of the International Court of Justice, and thanked him on behalf of the members of the Commission for the valuable contribution he had made to the Commission's work, particularly when he had been Special Rapporteur for the topic of State responsibility.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/396,[1] A/CN.4/L.399, ILC (XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 28 (Restriction of immunities)[2] (*continued*)

2. Mr. SUCHARITKUL (Special Rapporteur) said that, in response to the wishes of certain members, he had amended the title and reworded the text of article 28 to read:

"*Article 28. Implementation provisions*

"Subject to mutual agreement or on condition of reciprocity, immunity may be granted to a State, in respect of itself and its property, in connection with a proceeding before a court of another State, to a greater [wider] or lesser [narrower] extent than is required under the present articles, provided always that no such adjustment shall deprive any State against its will [without its consent] of the immunities it enjoys in respect of acts performed in the exercise of its sovereign authority."

3. The new text dealt not only with the restriction of immunities, but also, like the former article 28 which he had submitted,[3] with the possibility of granting immunities greater than those required under the draft articles. Accordingly, the title proposed by the Drafting Committee, "Restriction of immunities", had been replaced by "Implementation provisions".

4. Should the Commission be unable to reach a decision on the revised text, he suggested that it should be placed in square brackets as had sometimes been done in the past, for example at the thirtieth session, in the case of article 36 *bis* of the draft articles on treaties concluded between States and international organizations or between international organizations.[4]

5. Mr. USHAKOV said that neither article 28 as proposed by the Drafting Committee nor the text now proposed by the Special Rapporteur was acceptable to him. The granting of wider immunities than those required by the present articles did not need to be authorized either by the articles or by another State. Since greater liberality was always possible, the words "to a greater ... extent" were pointless.

6. Moreover, the last part of the article, beginning with the words "the immunities it enjoys ...", implied that immunities were also granted to a State other than in respect of the exercise of its sovereign authority, which was inconceivable. A State might claim that another State was not exercising its sovereign authority in order to avoid applying the provisions of the articles and thus deprive that State of its immunities. Such a text

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[1] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[2] For the text proposed by the Drafting Committee, see 1969th meeting, para. 109.

[3] See 1942nd meeting, para. 10.

[4] *Yearbook ... 1978*, vol. II (Part Two), p. 134.