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Summary record of the 1655th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

1655th MEETING

Wednesday, 20 May 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/331 and Add.1,[1] A/CN.4/340 and Add.1, A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

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

ARTICLE 7 (Rules of competence and jurisdictional immunity)[2] (*continued*)

1. Mr. FRANCIS said it had been observed by Mr. Tabibi at the 1653rd meeting that the Special Rapporteur was concerned with the development of a new branch of international law. That was perfectly true, for while the 1961 Vienna Convention[3] and the 1963 Vienna Convention on Consular Relations[4] were confined to the representational aspects of inter-State relations, the work in which the Commission was engaged was far broader in scope, extending to all aspects of those relations in so far as they were affected by State immunity.

2. Mr. Tabibi had also said that one of the benefits of the Commission's work was that it would help to protect the permanent sovereignty of the countries of the Third World over their natural resources, which would in turn encourage protection of foreign investment within the wider context of international trade. There was, however, another dimension to that work, for it would also help to promote friendly relations and co-operation between States and to avoid disputes and dissension. That was important in view of Mr. Tsuruoka's statement (1654th meeting) that the doctrine of absolute State immunity was no longer accepted jurisprudence in Japan—and as could be seen from State practice, the same applied to other countries. Consequently, since the number of States tending to adopt a more restrictive approach to State immunity was increasing, it was only right and proper for the Commission to try to codify the law accordingly. He was sure it would be equal to the task.

3. As to the Commission's method of work, Mr. Tsuruoka had stressed the importance of an inductive approach, of a realistic understanding of the contemporary world and progressive developments, and of a readiness to compromise. Those were essential ingredients for the successful outcome of the Commission's work. In that connection, due account should be taken of article 47, subparagraph 2 (*b*) of the 1961 Vienna Convention, according to which States could "extend to each other more favourable treatment than is required" under that convention. That provision could be useful to the Commission in dealing with the question of compromise.

4. His comments on draft article 7 would necessarily be limited because, as Sir Francis Vallat had pointed out (1653rd meeting), it was not possible to take a position on that article without first examining draft articles 8 to 11. Draft article 7 was of course, the logical consequence of draft article 6. In that connection, Mr. Ushakov, speaking of the previous meeting on the general question of the relative force of immunity and territorial sovereignty, had said that there was no absolute sovereignty and that immunity, rather than being a limitation of sovereignty in the absolute sense, was based on the general mutual consent of States. By the same token, there was nothing absolute about lack of jurisdiction within the context of the application of State immunity. If lack of jurisdiction were absolute, then, if consent was given or waiver effected, the territorial State could not exercise jurisdiction.

5. The Special Rapporteur, speaking of Indian law, had referred to the application of the principle of immunity even where, under normal circumstances, the State would have had jurisdiction. The position as he (Mr. Francis) saw it was that when immunity started to operate, jurisdiction was suspended by virtue of the general mutual consent of States. That meant that, in specific cases and on a reciprocal basis, immunity could be waived and the State concerned would have jurisdiction. To that extent, there was a strong permissive element in immunity from the standpoint both of the State claiming it and of the State granting it, which enabled jurisdiction to be exercised in the event of waiver or consent by the State affected.

6. No comment on draft article 7 would be valid if account were not taken of the definitions laid down in article 2, subparagraph 1 (*b*) (A/CN.4/331 and Add.1, para. 33) and in article 3, subparagraph 1 (*b*) (iv) (*ibid.*, para. 48),[5] which referred respectively to "administrative authorities" and "administrative ... powers". Clearly, therefore, the exercise of administrative authority had to be contemplated otherwise than in a judicial context. Indeed, in paragraph 13 of his report (A/CN.4/340 and Add.1), the Special Rapporteur acknowledged that the jurisdiction of a State might not be exclusively territorial.

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[1] *Yearbook ... 1980*, vol. II (Part One).

[2] For the text, see 1653rd meeting, para. 18.

[3] See 1654th meeting, footnote 4.

[4] For text, see United Nations, *Treaty Series*, vol. 596, p. 261. The Convention is hereinafter called "1963 Vienna Convention".

[5] See also 1653rd meeting, footnote 5.

Subject to the content of draft articles 8 to 11, it seemed to him (Mr. Francis) that article 7 had been drafted in an exclusively territorial context, with emphasis on legal proceedings and adjudication. Possibly, however, the Special Rapporteur intended to deal with the point raised in paragraph 13 of his report in another context.

7. Lastly, expressing his preference for alternative A of article 7, paragraph 2, he recommended that the draft article be referred to the Drafting Committee.

8. Mr. ŠAHOVIĆ said he agreed with Sir Francis Vallat that it would be useful to have a clearer idea of the Special Rapporteur's intentions regarding the articles that would follow draft article 7. It might have been advisable for him to submit to the Commission a general outline of the whole draft, for the third report was not confined to expounding general principles, but also raised certain questions that could only be settled after a precise analysis of practice and the various sources on which the Commission's work should be based.

9. As shown by the information submitted by Governments (A/CN.4/343 and Add.1–4), the Commission must take account of the growing diversity of legal systems. It was undoubtedly from the contemporary practice and legislation of States, much more than from doctrine, that it must derive new rules, though it should not neglect the older rules that should be adapted to the current situation.

10. In his report, the Special Rapporteur still paid great attention to the general foundations and the nature of the jurisdictional immunities of States, although that aspect was no longer fundamental at the stage reached in the Commission's work, which should henceforth be firmly concentrated on practice. However interesting they might be, theoretical questions gave rise to views that were bound to differ, as was shown by the Commission's discussions, whereas the task on hand was to prepare a draft aimed primarily at the solution of specific problems. It would therefore be advisable for the Special Rapporteur to concentrate his analysis on State practice and to propose to the Commission draft articles that would carry its work beyond the preliminary stage.

11. The text of the report contained the expressions "more fundamental ... concept of sovereignty" and "more basic principle of sovereignty" (A/CN.4/340 and Add.1, paras. 7 and 8), which the Special Rapporteur had used to refer to the theory of absolute sovereignty. He (Mr. Šahović) pointed out that the Commission had already found that that theory was undoubtedly losing support, and noted that there could never be degrees of sovereignty. It existed as a fact and as an attribute of every State engaged in international legal intercourse. In his view, it would be difficult for an analysis based on such an approach to lead to the formulation of practical provisions for inclusion in draft articles.

12. As to the "new point of departure" mentioned in paragraph 9 of the report, he thought the general basis of the draft should rather be the principle of co-operation between States, which should make it possible to settle the practical question of jurisdictional immunity, taking the mutual interests of the States concerned into account. Any other solution would inevitably lead to a deadlock through the opposition of two rival sovereignties of equal strength. The draft articles must indeed settle a series of problems relating to the rights and obligations of the two parties and to the concrete circumstances of the jurisdictional immunity of States. Unless it deliberately pursued that aim, the Commission might confine itself to preparing a draft of ten articles or so, in which it would attempt to solve, by the traditional method, the problem of jurisdictional immunity, which usually took up only two or three pages in works on international law. The most important aspect of the Commission's work lay in the conclusions to be drawn from the notion of the consent of States, with a view to solving the problem of reciprocity on the basis of a study of practice.

13. With regard to draft article 7, he referred to the reservations he had expressed at the previous session when draft article 6 had been adopted on first reading,[6] and suggested that it might be advisable to redraft article 6 in the light of the wording proposed for draft article 7, paragraph 1. That would make it possible to clarify the scope of the concept of jurisdictional immunity. The purpose of draft article 7, paragraph 1, was not entirely clear, however, particularly because of the wording of the second part of the sentence, starting with the word "notwithstanding". The rule was stated negatively, and perhaps placed too much emphasis on the concept of competence.

14. With regard to alternatives A and B of paragraph 2, he would prefer a general, but clear formulation. He noted that alternative B expressed two ideas in one and the same provision; he would prefer alternative A. Like other members of the Commission, however, he considered that the concept of "impleading" was not sufficiently clear and should be further clarified.

15. Mr. DÍAZ GONZÁLEZ said that the discussions at the previous session had already shown the extent of the difficulties raised by the question of the jurisdictional immunities of States. There were two possibilities: to make a thorough study of the general principles that applied, and thus prolong the preliminary phase of the work; or to begin to prepare a draft of articles at once, so as to avoid loss of time.

16. The topic of the jurisdictional immunities of States was quite suitable for progressive development, and called for the elaboration of new law. He agreed with Mr. Šahović that a prolonged study of doctrine

[6] See *Yearbook ... 1980*, vol. I, p. 205, 1624th meeting, para. 26; and pp. 265–266, 1634th meeting, paras. 54–56.

could not produce a satisfactory result; for the views of States and the practices they followed had always differed widely in regard to jurisdictional immunities, which were a privilege whose extent was determined by the State that accorded it.

17. Sovereignty could not be qualified; it was the very foundation of the legal equality of States. He noted that Mr. Ushakov had said that a State which accorded a privilege did so in anticipation of what it might receive in return, and thus did so with a view to safeguarding its own interests.

18. He agreed with Sir Francis Vallat (1653rd meeting) that it would be difficult to take any valid decision on the draft articles adopted at the previous session, or on draft article 7, without knowing what provisions were to follow. Moreover, the Special Rapporteur had taken care to submit a draft article 7 that was worded flexibly enough to dispel any possible hesitation and to allow the Commission to go forward in its work without waiting till all the preliminary difficulties had been overcome.

19. The principle of sovereignty was universally recognized as a source of the jurisdictional power of States, and the draft articles were intended to regulate the exceptions to that principle. The basis of the draft could not, however, be a doctrine or a basic definition of international law; it must lie in State practice, whose common denominator must be ascertained and reflected in a set of provisions.

20. He could accept draft article 7 as submitted by the Special Rapporteur, provided that the texts of that article and of articles 1 and 6 were regarded as guidelines liable to be revised. He also endorsed the drafting amendments proposed by Mr. Calle y Calle at the previous meeting.

21. As to alternatives A and B for paragraph 2, he was in favour of the former, which was the most general and the most likely to further the Commission's work.

22. Lastly, he agreed with Mr. Tsuruoka (1654th meeting) that further progress should be made on the basis of practice, and shared Sir Francis Vallat's view that the Commission could not take any final decisions until it had made a more thorough study of available source materials.

23. Mr. QUENTIN-BAXTER said he could quite understand why Mr. Ushakov felt that the articles adopted the previous year provided no firm foundation on which to proceed. However, the absence in the initial stages of a solid basis for future work was by no means peculiar to the present topic; there were often real difficulties in establishing such a basis until there had been a thorough exchange of views. Hence, he could see no immediate prospect of returning to the subject-matter of draft articles 1 and 6 and believed that the Commission should, as the Special Rapporteur had suggested, continue its efforts in the light of those provisions.

24. Other speakers had rightly said that there were excellent reasons why the Commission should be experiencing difficulty in finding the core of the topic before it. When the Commission had discussed the question of diplomatic intercourse and immunities, it had been able to start from a universally accepted proposition: the institution of diplomacy was held to be inseparable from the immunities that made possible the performance of its functions. When it came to sovereign immunity, or the jurisdictional immunities of sovereign States and their agencies, the Commission had a vast range of incidents to consider, from those affecting a travelling head of State to those affecting property that might or might not be closely connected with the sovereign activities of a State. To pick out from that background the factors that might lead from the outset to the drafting of disciplined articles was extremely difficult.

25. Like a number of other speakers he could, however, see a beginning of differentiation with respect to the concept of consent. Irrespective of whether immunity preceded consent or vice versa, the question of immunity only arose when a State admitted to its territory emanations of a foreign sovereignty. Such exchange of immunity by consent was so much a part of certain aspects of international life that immunity itself might be considered the basic rule; but in spheres outside that uncontroversial core, the question must be asked to what States had consented in their mutual relations. It was clear from judicial judgments and the literature that a distinction had been made from the earliest times between express and implied consent, between the kinds of activity—such as the peacetime movement of one State's naval vessels through the territorial waters of another State—that could be taken as receiving implied consent to their performance and attracting the immunity that went with such consent, and the kinds of activity with respect to which consent must be express for immunity to exist at all.

26. That led to the question of knowledge. In the complex modern world, it was a normal occurrence for emanations of a foreign sovereignty to be present in the territory of a State without the authorities of that State having any particular knowledge of that presence. From the legal point of view, such situations immediately raised the question what the territorial States concerned had consented to: could they, for example, be said to have agreed to the pursuit, within their own territories, of any dealings that were properly subject to their own authorities and would attract immunity if it emerged that they were sufficiently associated with another sovereign State? In his view, neither practice nor reason warranted the making of such a sweeping assumption.

27. None the less, there was, with regard to the granting of immunity for commercial activity, a discernible trend towards the application, not of a complex and subtle distinction between acts of sovereignty and other acts, but of the simple, practical test of asking whether the activity related merely to

trade and whether the sovereign whose interests were involved had entered the marketplace of his own volition. Most important precedents in that sphere were to be found in the Convention on the Territorial Sea and the Contiguous Zone[7] and the Convention on the High Seas,[8] adopted at Geneva in 1958, and it would seem that the criteria in question were increasingly applied in international commerce. Criteria of that sort were, he believed, more fundamental than the criterion of competence, to which the Special Rapporteur had paid particular attention in his third report (A/CN.4/340 and Add.1).

28. He fully appreciated that there was a very subtle relationship between the competence of a State and the granting of immunities, and that there might, for example, be cases in which it would be necessary to determine whether an organ was declining to act for reasons of immunity or because of its own lack of competence. However, the general approach in matters of international law was not to look into the internal arrangements of States or to accept them as a jusitification for the waiving of international rules. Furthermore, he wondered whether concern with the problem of competence was really necessary in the case of the draft articles. If State organs did not have the requisite competence they would presumably not act, and the need to plead immunity would not arise; if, on the other hand, that need did arise, the question whether a particular organ had a particular competence would not be a factor in the problem. As the Special Rapporteur had indicated, competence was of the essence in the rule that no State should attempt so to extend its own jurisdiction as to interfere with the activities of other sovereign States within their own borders; but so far as he himself could determine, that kind of question did not arise directly in the draft articles.

29. He believed that in draft article 7 the Special Rapporteur had presented the Commission with two articles, for the community of interest between paragraph 1 and either version of paragraph 2 was not such that they ought ultimately to be included in a single provision. Paragraph 1 dealt, in the broadest possible terms, with the subjection of one State to the jurisdiction of another. It served to remind the reader of the basic proposition that States acted through all branches of their Government and of their obligation to observe, in the circumstances with which the draft articles as a whole were concerned, the requirements, whatever they might be, of the law of sovereign immunities. Both versions of paragraph 2 focused on the judicial branch of Government, thereby fulfilling a requirement that must indeed, be met early in the draft articles.

30. With regard to alternative A, he had some doubt about the meaning to be given to the word "impleads". In paragraph 28 of his report, the Special Rapporteur suggested that the word itself implied a compulsion, the doing of something against someone's will. It was certainly a very common concept in the English law of sovereign immunity that a sovereign State might not be "impleaded" against its will, but in that context the word was used neutrally. He would, therefore, welcome clarification of the sense in which the word was employed in the draft articles: did it mean simply that the State concerned was to be considered party to a proceeding, or did it mean more, in the sense that the party's legal interests were involved?

31. In paragraph 29, the Special Rapporteur took up the question of the extent of the notion of a "State". In that respect, he had employed in alternative B of article 7, paragraph 2, language very close to that used by Lord Atkin when, in the case *The "Cristina"* (1938),[9] he had laid down, in perhaps the widest terms ever used in an English court, the proposition that immunity applied not only when a State became a party to proceedings, but also when those proceedings affected in any way the destination or use of property within its ownership, possession or control. That dictum had heavily influenced judgements on questions of immunity in United Kingdom courts and other British jurisdictions, leading to an increasingly absolute application of the rules of immunity. On the other hand, the courts themselves had voiced doubts about that practice, and the other great common law system, that of the United States of America, had broken away from it at an early date. Indeed, a Justice of the United States Supreme Court had gone out of his way to say that the test of ownership, possession and control was impossible to apply consistently and had such ramifications that it could not become the basis for an adequate legal distinction. That view had, indeed, been borne out by events, for the common law system itself had rejected the distinction by legislative intervention. It was, in fact, one of the Special Rapporteur's greatest difficulties in considering policy with respect to sovereign immunity, that he was required to do so at the very time when States themselves were reviewing such questions and when they were, in some instances, abrogating the effects of very long lines of precedent.

32. With those considerations in mind, he thought that both the proposed versions of paragraph 2 of article 7, especially alternative B, went too far. He believed that the Commission would at least begin to see what should be the core of the draft articles if it followed the natural process of differentiation through consent, knowledge and the application of the criterion of commercial or non-commercial activity, but that if it gave too much weight to tests such as that of ownership, possession and control, it would find itself confronted with the same difficulties as has been encountered by the judicial systems that had developed them.

[7] United Nations, *Treaty Series*, vol. 516, p. 205.

[8] *Ibid.*, vol. 450, p. 11.

[9] *Annual Digest and Reports of Public International Law Cases, 1938–1940* (London), case No. 86, p. 250.

33. Sir Francis VALLAT said that, while he very much agreed with Mr. Quentin-Baxter that the resolution of the issue of consent was close to the centre of the topic, he thought that a still more fundamental requirement was the need to achieve a proper balance between the sovereignty of each of the two States that might be parties to a particular case. Care must be taken not to favour the interests of the territorial State at the expense of those of the "sending" State, and vice versa. Furthermore, that balance must be sought in the context of the needs of the late twentieth century, and not of the very different circumstances that had obtained in the eighteenth and nineteenth centuries.

34. Linked to that idea of balancing the interests of sovereign States was a point that had been brought out very clearly by Mr. Ushakov (1654th meeting), namely, that sovereignty was not an absolute concept. As Lord McNair had said, one of the attributes of sovereignty was to be able to accept limitations on its exercise; equally, it was one of the attributes of a sovereign State to be capable of living in the context of public international law, which necessarily implied limits on the exercise of sovereignty. Consequently, the question whether one State must submit to the jurisdiction of another or whether the second State must grant the first immunity was essentially a practical problem associated with the nature of sovereignty. That was the basic position from which he himself approached the draft articles.

35. That being so, he viewed many of the precedents in the form of judgements of national courts with some reserve. The Special Rapporteur had rightly perceived in the decisions of United Kingdom, and particularly English, courts a steady trend towards the granting of immunity to foreign sovereigns. It was, however, important to bear in mind in that respect that the trend had originated in the United Kingdom's imperial era. Account must also be taken of the extent to which English law courts had historically regarded themselves as bound by the judgements of their predecessors. It was only within the last decade or so that the United Kindom's supreme court of appeal, the House of Lords, had been freed from the strict application of the doctrine of *stare decisis*. While it was true, then, that United Kindom courts had developed and applied the practice of the granting of absolute sovereign immunity, covering both States and their property, he hoped that the Commission would be guided, not by that example, but by present-day United Kingdom legislation, particularly by the *State Immunity Act 1978*,[10] which clearly showed the abandonment of the previous policy. As to that policy, it might be noted that there was a remarkable lack of international judicial precedents laying down anything like a principle of absolute immunity for foreign States and their property.

36. With regard to draft article 7, he agreed in particular with the comments of Mr. Tsuruoka and Mr. Pinto (1654th meeting). He still believed that it would be necessary to see the subsequent articles before taking a final decision on the wording of article 7, but after the discussion in the Commission, he would have no objection to referral of the article, as it appeared in paragraph 44 of the Special Rapporteur's third report, to the Drafting Committee. The only comment he wished to make was that he found alternative B far too detailed and thus very much out of keeping with the gradual approach so wisely adopted by the Special Rapporteur.

The meeting rose at 12.40 p.m.

[10] United Kingdom, *The Public General Acts, 1978* (London, H.M. Stationery Office), part I, chap. 33, p. 715; text reproduced in: American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 5 (September 1978), p. 1123.

1656th MEETING

Thursday, 21 May 1981, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/331 and Add.1,[1] A/CN.4/340 and Add.1, A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

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

ARTICLE 7 (Rules of competence and jurisdictional immunity)[2] (*concluded*)

1. Mr. JAGOTA, referring to the draft articles provisionally adopted by the Commission at the previous session,[3] said that his only reservation concerning article 1 related to its use of the words "questions relating to" the immunity of a State, inasmuch as it remained to be seen from the later draft articles what those questions were. Similarly, in both paragraphs of article 6, the rules stated were qualified by the phrase "in accordance with the provisions of the present articles", and most of those articles still remained to be discussed and defined.

[1] *Yearbook ... 1980*, vol. II (Part One).

[2] For text, see 1653rd meeting, para. 18.

[3] See 1653rd meeting, footnote 4.