Document:-
A/CN.4/SR.1709

Summary record of the 1709th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1982, vol. I

1709th MEETING

Tuesday, 18 May 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/340 and Add.1,[1] A/CN.4/343 and Add.1-4,[2] A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

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

GENERAL COMMENTS ON PARTS I, II AND III OF THE DRAFT ARTICLES[3]

1. Mr. MALEK said he had been struck by two points that emerged not only from the numerous United Nations documents on the topic under discussion, including the Special Rapporteur's excellent reports and the records of the Commission, but also from doctrine. First, relatively few countries recognized the theory of the jurisdictional immunity of States in their practice, and even they did not come from all continents. Second, those countries displayed a marked tendency towards restrictive application of the theory of the jurisdictional immunity of States, a theory to which a large part of contemporary doctrine was indeed very hostile.

2. The Special Rapporteur had repeatedly noted and reaffirmed the existence of a rule of international law recognizing the jurisdictional immunity of States and their property. That rule was set out in draft article 6, and a summary of its historical and legal development was to be found in the commentary thereto,[4] which mentioned differences of opinion as to the validity of the concept of State immunity and its nature in international law. One school of thought held that there was a universal and fundamental principle of State immunity from which exceptions could be made in certain circumstances. Another school held that there was no such general rule, but rather various rules allowing State immunity in some circumstances and not in others. Yet another school held that, while a general rule on State immunity might well exist, it embraced both restrictions and exceptions.

3. To judge from the commentary to article 6, that provision had been drafted so as not to rule out completely the theoretical considerations forming the basis of those three schools of thought. The article was designed to state the existence of a general rule of State immunity under present-day customary international law, but only in relative terms. To his mind, the Commission had thereby chosen a rather timid means of indicating that it was clearly in favour of the recognition of State immunity as a rule of international law. After all, in provisionally adopting the text of article 6 in its present wording, and the commentary thereto, the Commission seemed to agree that the matter should be studied on the assumption that State immunity already constituted a rule of customary international law. In support of that position, the Commission cited in the commentary State practice, and principally the judicial practice that had emerged from the nineteenth century onwards in the common law and civil law countries and the small number of States that had submitted information on the subject. With regard to African countries, the Commission noted that there had been no report or publication of any recent decision; it did, however, mention two judgements in the Philippines. It also mentioned the practice of some States with respect to national legislation and to universal treaties that concerned certain specific aspects of State immunity. It noted the silence of international case law on the matter, and referred both to authors who had more or less upheld State immunity and to authors who had opposed it.

4. While there might be no room for doubt as to the existence of a rule of international law embodying the notion of State immunity, the universality of the rule was open to question, as was the question of the value of such immunity at the current stage in the development of international relations, either for the State which claimed it or for the State which applied it. At the present time, the application of that immunity, if only in its unlimited form, seemed to be a source of great concern. The Special Rapporteur had brought that point out clearly in his fourth report (A/CN.4/357, para. 117) by stating that the reason why writers had not looked at the possibility of practical limitations on the rule of State immunity when such immunity had first been established in State practice was that, at the time there had indeed been no cause for concern. He had gone on to say that, because of the growing participation of States in fields previously reserved for individuals, such as commerce, industry and finance, supporters of the doctrine of unlimited immunity had become a diminishing minority since the beginning of the present century. For example, Georges Scelle had considered the recognition of immunity to be a custom, but had described that custom as "pernicious" and had affirmed that it led to the paralysis of jurisdictional activity in so many cases and to such a degree as seriously

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).

[3] The texts of draft articles in part I and part II of the draft are reproduced as follows: (*a*) art. 1 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 141-142; (*b*) arts. 2 to 5, in *Yearbook ... 1981*, vol. II (Part Two), pp.153-154, footnotes 655-658; (*c*) art. 6 and the commentary thereto, provisionally adopted by the Commission, in *Yearbook ... 1980*, vol. II (Part Two), pp. 142-157; (*d*) arts. 7 to 10, revised at the Commission's thirty-third session, in *Yearbook ... 1981*, vol. II (Part Two), p. 158, footnotes 668-671. Part III of the draft contains articles 11 and 12, submitted in the Special Rapporteur's fourth report (A/CN.4/357, paras. 29 and 121).

[4] See above, footnote 3 (*c*).

to compromise the international legal order.[5] Mention should also be made of the views of a British author, D. H. N. Johnson,[6] who had studied the position taken by doctrine and various learned societies. Doctrine revealed a trend marked either by hostility to the notion of immunity, at least in its absolute sense, or by the acceptance of that notion in specific cases or circumstances. The learned societies in question supported immunity only on condition that it would not apply to the acts of commercial enterprises or other acts under private law. Johnson also cited[7] the proceedings of an international conference held at London in 1956 under the auspices of the David Davies Memorial Institute of International studies, during which it had been stated that the United Kingdom and the other Commonwealth countries were practically the only States still to adhere strictly to the principle of absolute immunity.[8]

5. Draft article 1 merely set out, in very general terms, the purpose of the draft articles. If that was indeed its only object, it might be preferable to delete the article and to entitle the draft: "Draft articles on the jurisdictional immunity of foreign States and their property". Even if the words "questions relating to" were deleted, the article would be superfluous once those questions had been identified.

6. In provisionally adopting article 6 and the commentary to it, the Commission had viewed State immunity as a rule of customary international law, in keeping with its position since the beginning of its work on the question, in 1949. Time, however, was a very important and sometimes decisive factor in the formation, thrust or transformation of a rule of law. The main principles of the relations between States had undergone a radical change since 1949. State immunity, like any other concept connected with relations between States as such, was founded on the principle of sovereignty. That principle, however, was not what it once had been. It had been profoundly transformed since its affirmation or confirmation by the Charter of the United Nations. Admittedly, it had been placed in the forefront of the Organization's guiding principles, but the Charter had considerably limited its scope in favour of the Organization. Subsequently, the scope of the principle had constantly been reduced by the will of States themselves and, because of the large number of treaties they concluded, they voluntarily agreed to forgo their State competence in fields of steadily growing number and breadth. Hence, it was doubtful whether non-application of jurisdictional immunity could cause offence to States. Furthermore, such immunity was, as the Special Rapporteur had pointed out (A/CN.4/357, para. 49), two-edged; a State which claimed immunity for itself could also be obliged to extend it to another State.

7. Perhaps the Commission should, in an effort to limit the scope of the rule of immunity as far as possible, consider making its application optional. By so doing, it would include in the draft an element of progressive development of the law. To that end, it would be enough to replace the word "is" at the beginning of article 6, paragraph 1, by the words "may be".

8. He had no objection to the principle enunciated in article 6, but it was one that kindled little enthusiasm. Fortunately, the article was careful to ensure that application of the rule of immunity was confined to the conditions laid down in the rest of the draft. He had no doubt that the Commission would duly define the limits of the principle in the light of the trends in international law in the second half of the twentieth century.

9. Mr. McCAFFREY said that he agreed in principle with the approach adopted by the Special Rapporteur in his fourth report (A/CN.4/357), for it appeared to reflect the contemporary practice of many States in adopting a restrictive approach to State immunity.

10. Mr. Riphagen (1708th meeting) had made some very useful remarks which had focused attention on the question of the Commission's function in drafting the articles and had also posed the fundamental question of whether it was possible, given the current state of international law on jurisdictional immunities, to formulate a set of rules that would cover what he had termed a "bewildering variety of situations". Implicit in his argument was the premise that it was not possible to formulate rules of public international law—namely, customary international law—on the basis of the rich body of State practice—namely, private international law—which the Special Rapporteur had so ably documented. One reason why State practice might not rise to the level of customary international law, even assuming the near universality and consistency of such practice, was that while the material element—actual practice—was present, the psychological element—*opinio juris*—might not be. In other words, the behaviour of States might be explained by considerations of comity, rather than obligations. Even so, subparagraphs 1 (*c*) and (*d*) of Article 38 of the Statute of the International Court of Justice recognized two additional sources of rules of international law, namely, general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists.

11. Notwithstanding the paucity of decisions by international tribunals on the subject of jurisdictional immunities, could not the examples of State practice assembled by the Special Rapporteur qualify, on some issues at least, as "general principles of law recognized by civilized nations"? There were, however, certain issues on which State practice was either so discordant or in such an embryonic stage of development that it was not possible to speak, with respect to those issues,

[5] *Manuel de droit international public* (Paris, Domat-Montchrestien, 1948), p. 792.

[6] "Some recent trends in the Law regarding the jurisdictional immunities of foreign States", *Revue de droit international pour le Moyen-Orient* (Paris), vol. 6, No. 1 (June 1957), pp. 1 *et seq.*

[7] *Ibid.*, p. 14.

[8] F. A. Mann, "Immunity of foreign governments in trade", *Report of International Law Conference held at Niblett Hall* (London), June 1956, p. 29.

of a general principle of law. It was in that connection that Mr. Riphagen's caveat had been most forceful, for he had pointed out that, to the extent that the draft articles were couched in terms of the strict rights and obligations of States, failure to observe them would give rise to State responsibility.

12. That prompted two questions, the first of which related to the Commission's function in drafting the articles. Was it engaging in the codification or in the progressive development of international law, or was it seeking to produce a draft that would be acceptable to and reflect the practice of the largest and most representative sample of States? In his submission, the answer was twofold. In the first place, there were certain undeniable and universally agreed rules and, in setting down those rules, the Commission would be engaging in codification. Secondly, Mr. Riphagen had referred to the "grey area" between clear cases of immunity, on the one hand, and of non-immunity, on the other. It was precisely in that grey area that the draft would be most useful, for it would provide guidance as to the circumstances in which jurisdictional immunity should or should not be granted.

13. Viewed in that light, the other possible functions of the Commission—the progressive development of international law and the production of a broadly acceptable draft—might be identical. It might well be that, in the case of certain individual topics, the myriad examples of State practice given by the Special Rapporteur in his reports did not have the benefit of *opinio juris* to elevate them to principles of customary international law; some, possibly, did not even qualify as general principles of law. But did that mean that the topics in question should be eschewed on the ground that a breach of any of the relevant draft articles would give rise to State responsibility, when there was really no rule of international law that required States to adhere to such principles in the first place? The answer was clearly in the negative, for it would be tantamount to an abdication of responsibility on the part of the Commission if it were to forgo the opportunity of providing guidance on the circumstances under which national courts and administrative bodies should and should not grant jurisdictional immunity to foreign States.

14. The second question raised by Mr. Riphagen's remarks was whether all the provisions of the draft should be couched in mandatory terms, so as to provide that States "shall" or "shall not" grant immunity, or whether, for cases falling within the grey area, it was enough to use hortatory language, so as to provide that States "should" achieve a given result. One answer was that mandatory language should be used in appropriate cases, together with the kind of saving clause that was contained in article 2, paragraph 2. Another answer was that it did not really matter whether mandatory or hortatory language was used, since the Commission was not the final arbiter of the language that would appear in any convention ultimately adopted. So long as the draft indicated clearly, either in the body of the text itself or in the commentary, which of the articles reflected existing international law and which of them constituted an attempt at progressive development of international law, there would be no harm in venturing into the grey area. That, indeed, might be the very area in which the Commission's work would have most value.

15. Mr. NI said that the topic under discussion was noted for the divergent views to which it gave rise and the difficulties experienced in reconciling them. Writers and publicists none the less agreed that State practice revealed two broad theories, known as the absolute theory and the restrictive theory, although it was apparent that the increasing participation of States in commercial and economic activities was leading towards a limitation of State immunity.

16. The law, however, never developed in a straight line, and there were a variety of mutations and variations that had to be taken into consideration. Accordingly, the draft articles should be tailored to suit the different situations. Previously, one member of the Commission had rightly observed that a rule of international law could not be drafted on the basis of a single trend. More recently, other members had pointed out that adherence to the more basic and original concept of sovereignty which stemmed from the maxim *par in parem imperium non habet* was not uncommon among the developing and the socialist States, that contrary tendencies were being followed in particular by those States, and that their practice differed from that of the developed countries. In that respect, he had noted with interest the information submitted by Governments (A/CN.4/343 and Add.1-4) and also that the Special Rapporteur had referred, *inter alia*, to judicial decisions in Latin American countries, as well as in the Philippines (A/CN.4/357, paras. 90-92), and to the relevant provision of the Bustamente Code,[9] all of which firmly established the principle of State immunity.

17. There was, for all that, a clear and undoubted trend towards the extension of territorial jurisdiction in the case of trading and commercial activities of States, in which connection Mr. Pirzada (1708th meeting) had given a most useful account of developments in Pakistan and elsewhere. It had also been suggested that the presence in the territorial State of a foreign State, in the form of an agency engaged in commercial or profit-making activities, for instance, constituted grounds for invoking the jurisdiction of the local courts. But on more than one occasion there had been cases in State practice in which a foreign State had been summoned to appear before a local court to answer charges, even though there had been no link whatsoever between the act complained of and the territorial State. He was thinking not only of cases when a resident of a foreign State was so summoned, but of cases in which the Foreign Minister of the State named as defendant was summoned to represent it. In that regard, a decision had

[9] Official name of the Code of Private International Law contained in the Convention on Private International Law adopted on 20 February 1928 at Havana (League of Nations, *Treaty Series*, vol. LXXXVI, p. 111).

been taken in France to the effect that the organs of a foreign State could be sued for acts of an economic and commercial nature, but that the State itself could not be made a defendant.

18. It was plain that, in drafting the articles, the Commission should not lose sight of the wide range of situations and practice. It should be aware of the difficulties that lay ahead and that it would not suffice to label the various tendencies as either "absolute" or "restrictive".

19. Mr. USHAKOV said he was compelled to point out that, notwithstanding the merits of the report under consideration (A/CN.4/357), the Commission had got off to a bad start. It was apparent from article 6 that the entire draft lacked foundation. The Special Rapporteur was seeking to interpret the article as one which embodied a principle, but that was not in fact the case. Since it stood in part II, entitled "General principles", the article ought precisely to enunciate a general principle deriving from international law. Yet in the form in which it had been adopted after arduous debate,[10] the article simply indicated the existence of State immunity exclusively in terms of the draft articles as a whole. That was tantamount to saying that, in the absence of provisions thereon, State immunity did not exist. It followed that all that did exist were exceptions, in other words, cases in which one State was exempt from the jurisdiction of another.

20. The situation was both strange and ridiculous, for no State, even one that upheld the theory of limited immunity, had ever gone as far as to proclaim the non-existence of the jurisdictional immunity of States. The very fact that the Special Rapporteur had been able to cite in his fourth report (*ibid.*, para. 27) provisions that were in keeping with the theory of limited immunity showed that the States which held to that concept of immunity accepted the existence of the principle of State immunity. For example, article 15 of the European Convention on State Immunity[11] declared that a Contracting State was entitled to immunity from jurisdiction if the proceedings did not fall within articles 1 to 14 of the Convention, and according to the United Kingdom's State Immunity Act of 1978,[12] a State was immune from the jurisdiction of United Kingdom courts except as provided in the Act itself. The same principle was to be found in the United States Foreign Sovereign Immunities Act of 1976,[13] which prescribed that, subject to international agreements and the provisions of the Act itself, a foreign State was immune from jurisdiction of the courts of the United States and of its constituent States. Thus, the principle of State immunity was affirmed in each case.

21. In contrast, draft article 6 contained only exceptions to the principle of the non-existence of jurisdictional immunity of States. In his view, it was clear from the Special Rapporteur's written explanations and from the entire commentary to article 6 that a principle of immunity did exist, and it was surprising that it had not been set forth in the article. The Commission could not pursue its work on such a basis.

22. Paragraph 2 of the article backed up paragraph 1 and, in the absence of special provisions to the contrary, no effect was given to immunity. Consequently, the article denied the existence of the principle of jurisdictional immunity and then went so far as to assert that such immunity did not exist unless the State concerned met certain conditions. Hence, the Special Rapporteur and, later, the Commission had twisted the problem around completely.

23. Article 6 posed another fundamental problem, namely, the legal and factual basis of the principle of State immunity, a basis which the Special Rapporteur did not seem to have established properly. In his own opinion and in his country's doctrine of international law, which was probably the same for many other countries, whether socialist or not, the keystone of jurisdictional immunity was simply the principle of the sovereign equality of States. That principle was set forth in the Charter of the United Nations and formed the true foundation of historical and modern international law. It was a reflection of the situation in which States, sovereign bodies unlike any other entities, actually found themselves. Within the limits of their jurisdiction, States exercised public authority and were independent of one another. Furthermore, they were not subordinate to any other power; otherwise, international law would have to be replaced by a body of world law. It followed that the principle of the sovereign equality of States went hand in hand with the jurisdictional immunity of States, as without that immunity international law would become baseless, for States would no longer exist as sovereign bodies. Any restriction on the immunity of States was a restriction on their sovereignty and entailed the collapse of international law. To assert the existence of limited immunity was to argue that there was no longer sovereign equality but merely limited equality among States.

24. Moreover, could a State have a dual personality—in other words, act one way in political matters and another way in commercial or economic relations—and be treated differently in consequence? That was obviously impossible, for a State was a sovereign body exercising public authority, and it remained so in every kind of activity, whether commercial, cultural, technical or political, that it engaged in. It never lost its public personality and it always acted *jure imperii*. It could never act in the same way as a private person, even though article 7 of the European Convention on State Immunity provided that it could. Similarly, it could never be assimilated to an artificial person, although it could form a *sui generis* subject of its own domestic law or of that of another country.

[10] See *Yearbook ... 1980*, vol. I, pp. 265-266, 1634th meeting, paras. 51-61, and p. 287, 1637th meeting, paras. 57-58.

[11] See 1708th meeting, footnote 12.

[12] United Kingdom, *The Public General Acts, 1978* (London, H. M. Stationery Office, 1978), part I, chap. 33, p. 715.

[13] United States of America, *United States Code, 1976 Edition* (Washington, D.C., U.S. Government Printing Office, 1977), vol. 8, title 28, chap. 97.

25. Yet another fundamental question was whether rules of internal law could be treated in the same way as rules of international law. That, again, was impossible: rules of internal law could be invoked only in the light of their conformity or non-conformity with international law, which, as stated in article 27 of the Vienna Convention on the Law of Treaties and in article 27 of the draft articles on treaties concluded between States and international organizations or between international organizations,[14] always took precedence in the event of conflict.

26. Finally, jurisdictional immunities were indivisible. Since article 31 of the 1961 Vienna Convention on Diplomatic Relations provided that, in the exercise of his functions on behalf of the sending State, a diplomatic agent enjoyed immunity from even civil jurisdiction in the receiving State, the sending State should similarly enjoy such immunity for, say, its own trading activities. Plainly, the draft article must be based on the fundamental principle of the unrestricted sovereign equality of States, and he hoped that the Special Rapporteur would take account of his comments.

27. Mr. QUENTIN-BAXTER said that he attached rather less fundamental significance than did Mr. Ushakov to draft article 6. Admittedly, paragraph 1 of the article could not be read as a complete statement of a rule, but it could not be read as a denial of the existence of any relevant law. The article should be seen, not as a foundation, but as a sort of scaffolding without which no building would be possible. It affirmed that the topic in question was one in which it had been customary to state a law and to qualify it. A statement of the rule without qualification would be unacceptable in most quarters, and a statement of the qualifications would make little sense unless those qualifications could be related to a hypothetical rule. Consequently, the Commission should suspend judgement as to whether the sovereignty of States to do as they wished in their own territories preceded or succeeded the duty of States to give effect, where appropriate, to the principle of State immunity. The success of the Commission's efforts would depend on its ability to strike an acceptable balance between the statement of the rule and the statement of the exceptions or qualifications pertaining to that rule. Article 6 should therefore be regarded simply as a pre-condition for that balancing exercise.

28. In its work on the current topic the Commission had reached a stage where it was no longer satisfactory to set forth the rights and obligations of States in hard and fast terms, for modern relationships between States involved a more subtle element of give and take. There could be no doubt that international relations functioned more smoothly when States accorded due deference to the activities and the property of other States within their territory and did not seek to involve them needlessly in the administration of local justice. The absolute view of State immunity, on the other hand, must imperil the sovereign discretion of States within their own territory.

29. One fact to be considered in deciding how far the Commission wished to take the principle of sovereign immunity was the anxiety felt in some countries with regard to the possible over-reach of domestic laws in other countries. The relationship between that question and the draft articles before the Commission might be remote, but should nevertheless be recognized as a legitimate concern of Governments. In the final analysis, a number of grey areas might persist, as alluded to by a number of previous speakers. The rule might have to be based on the principle of reciprocity, whereby the minimum demands made by law in any circumstances could be supplemented on an agreed and reciprocal basis.

30. Lastly, great difficulty was obviously being experienced with regard to terminology. Expressions such as "trading and commercial activities" had long been the subject of serious disagreement within individual legal systems and between members of courts. The Commission's success in dealing with the topic would be judged partly on its ability to introduce a measure of uniformity and clarification, so that the draft articles would act as an encouragement to national jurisdictions to move towards a common interpretation of certain vital elements. However, that process could not be carried to the point of eliminating the very fine judgements which courts had always had to make in the area in question.

The meeting rose at 1.05 p.m.

1710th MEETING

Wednesday, 19 May 1982, at 10.10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLES

Jurisdictional immunities of States and their property (*continued*) (A/CN.4./340 and Add.1,[1] A/CN.4/343 and Add.1-4,[2] A/CN.4/357, A/CN.4/L.337, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 3)

[Agenda item 6]

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

[14] See *Yearbook ... 1980*, vol. II (Part Two), p. 71; see also 1699th meeting, para. 27.

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] Reproduced in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10).