

Document:-  
**A/CN.4/SR.1765**

**Summary record of the 1765th meeting**

Topic:  
**<multiple topics>**

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courts would thus have jurisdiction to examine the merits of cases and rule whether or not exceptions to immunity applied.

38. The Special Rapporteur had thus dealt with the questions of the applicable law and non-immunity from jurisdiction, but had not yet discussed the third question, namely the enforceability of the decisions of local courts against foreign States. Clearly, the Commission had to determine whether there were any trends with regard to those three questions and, if so, whether they would promote or hamper friendly relations among States. It must also bear those three questions in mind in drafting the exceptions to the rule of State immunity.

39. The Special Rapporteur had said that he was concerned not with private activities or the activities of corporations but with activities carried out by a State in the territory of another State, either directly or through agencies or enterprises under its control. Hence, it had to be decided what was meant by "agencies of the State" and whether such agencies were governed by local law or by international law. The reason was that diplomatic missions, consular posts and special missions were not government agencies for the purposes of State immunity; they were encompassed by the rules of diplomatic and consular immunity. Local employees might, however, be employed by diplomatic missions, consular posts and special missions, in which case the question arose of whether they would be covered by draft article 13. As it stood, paragraph 2 (d) seemed to indicate that local law would decide the issue.

40. That matter, which should be given careful consideration before the Commission concluded its study of the topic, had arisen in a case involving one of India's embassies in a foreign State. The embassy, which employed local people as gardeners, drivers or ushers, for example, entered into contracts of employment with local employees, whose conditions of work and rights were determined by local law and custom. A local employee had claimed that he had not received due and proper notice of the termination of his employment and had initiated proceedings against the embassy. The case had been brought before a local court which had exercised jurisdiction, asserting that the person in question had been employed not by the embassy, which was an agency of a foreign State, but by the Government of that foreign State, and that the applicable law was not diplomatic immunity but State immunity, which was not recognized by the forum State. Ultimately, in the interests of maintaining friendly relations with the forum State, the embassy had decided to pay compensation to the person in question but had also addressed a note to the Ministry of Foreign Affairs of the forum State, requesting it to intervene. The Ministry had replied that it could not intervene because the local courts were autonomous and competent to apply local law as they saw fit. The final remedy had been for India to apply the same law in Indian territory. India had thus learned that, if its embassies in foreign countries could be subjected to foreign jurisdiction, it would be compelled to subject foreign embassies in its territory to the same treatment.

41. It was an example that revealed the need for a precise definition of the scope of State immunity. If diplomatic immunity was excluded from the draft, the Commission must say so clearly and not leave it to local law to decide under the terms of paragraph 2 (d). That point was particularly important because States were becoming increasingly involved in activities in other States in a variety of fields. Such activities obviously involved the employment of local staff, whose interests had to be protected as against those of the foreign State employers. Yet, at the same time, friendly relations between the States concerned must not be adversely affected. That element formed the real motivation for article 13 and it was in that connection that the emerging trend mentioned by the Special Rapporteur became relevant.

42. With regard to paragraph 1, the purpose of the expression "Unless otherwise agreed" was surely to make the exception embodied in the article a residual rule, one which could be modified by detailed agreement between the parties to the future convention to which the set of draft articles would presumably lead. Unfortunately, the wording did not make it clear that the article related only to the local employees of the foreign State. There were thus two possibilities: either the persons whose interests were being protected should be clearly identified, or the term "contract of employment" should be defined in order to indicate what types of employees were covered. The latter course would, in fact, more clearly indicate the real intention of paragraph 2 (a) by obviating the mistaken impression that the foreign State could engage and dismiss persons at will, and it would also restrict the phrase "unless . . . by reason of the subject-matter" in paragraph 2 (d), which should not give primacy to local law. Furthermore, it would be preferable to replace the word "dismissal" in paragraph 2 (a) by the words "termination of the contract". Article 13 would be acceptable, subject to those changes.

*The meeting rose at 1 p.m.*

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## 1765th MEETING

*Friday, 20 May 1983, at 10 a.m.*

*Chairman:* Mr. Laurel B. FRANCIS

*Present:* Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

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### Gilberto Amado Memorial Lecture

1. The CHAIRMAN recalled the decision taken by the Commission at its twenty-third session,<sup>1</sup> on the recommendation of the Sixth Committee of the General Assembly, instituting the Gilberto Amado Memorial Lecture as an annual event to keep alive the memory of that illustrious Brazilian jurist, who had for so many years been a member of the Commission. The Commission had at that time established an advisory committee to select the lecturer each year and supervise the publication of the text of his lecture. The expenses were borne under a revolving fund sustained by a generous grant from the Brazilian Government.

2. Following consultations with members, he now suggested that the Gilberto Amado Memorial Lecture Advisory Committee for the Commission's current term of office should consist of Mr. Calero Rodrigues as chairman, and Mr. Jagota, Mr. Quentin-Baxter and Mr. Ushakov as members, together with a fifth member from Africa to be named at a later stage. Mr. Gibrain, Principal Legal Officer at the United Nations Office at Geneva, would act as secretary to the Advisory Committee.

*It was so agreed.*

3. Mr. CALERO RODRIGUES said that he was greatly honoured by the task thus entrusted to him and, as a Brazilian, pleased that the Commission had been able to resume the tradition of the Gilberto Amado Memorial Lecture. He earnestly hoped that the tradition would be maintained in years to come, so as to perpetuate the memory of his eminent predecessor.

### Jurisdictional immunities of States and their property (continued) (A/CN.4/357,<sup>2</sup> A/CN.4/363 and Add.1,<sup>3</sup> A/CN.4/371,<sup>4</sup> A/CN.4/L.352, sect. D, ILC(XXXV)/ Conf. Room Doc.1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>5</sup> (continued)

#### ARTICLE 13 (Contracts of employment)<sup>6</sup> (continued)

<sup>1</sup> *Yearbook* . . . 1971, vol. II (Part One), pp. 354–355, document A/8410/Rev. 1, paras. 164–169.

<sup>2</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>4</sup> *Idem.*

<sup>5</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 99–100; (b) art. 2: *ibid.*, pp. 95–96, footnote 224; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

*Part II* of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

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

<sup>6</sup> For the text, see 1762nd meeting, para. 1.

4. Mr. McCaffrey commended the intellectual probity with which the Special Rapporteur had been careful not to engage in advocacy and the frankness with which, in his fifth report (A/CN.4/363 and Add.1), he had pointed to relevant decisions and, in some cases, the lack of any.

5. For his own part, he joined with Mr. Evensen and Mr. Calero Rodrigues (1763rd meeting) in sounding a note of caution not to abuse the inductive method, something the Special Rapporteur had wisely avoided in endeavouring to harmonize the positions of States on the present topic. Clearly, it would be of no help to Governments if the Commission were to proclaim an absolute rule, either of immunity or non-immunity. In order to be of real assistance to States, the draft articles must present a realistic picture of present-day State practice and of the direction in which it was moving.

6. Without wishing to repeat his remarks at the previous session on the general subject-matter, he deprecated the tendency to view the topic in terms of black and white. Indeed, the very use of such expressions as “absolute immunity” and “restricted immunity” had the drawback of erroneously suggesting that there were two diametrically opposed views on the topic. Such an approach was divisive, in that it emphasized the areas of difference rather than the areas of common agreement, when the latter were actually greater, as could be seen from the very successful and very functional 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations.

7. A unitary approach would be for the Commission to start from the principle of the sovereign equality of States, on which there was general agreement. It then followed that one sovereign could not enter the territory of another without the latter's consent, which was given in order to meet the functional need for diplomatic and other kinds of relations. The crucial point, however, was that such consent need not be unqualified. It could be, and nearly always was, subject to certain expressed or implied limitations or conditions. As Chief Justice Marshall had pointed out in his decision in *The Schooner “Exchange” v. McFaddon and Others* (1812),<sup>7</sup> the jurisdiction of courts was a branch of the jurisdiction possessed by the nation as an independent sovereign power and all exceptions to the full and complete power of a nation, within its own territories, must be traced to the consent of the nation itself, for they could flow from no other legitimate source. Chief Justice Marshall had gone on to observe that, since a sovereign was in no respect amenable to another, it could be supposed to enter a foreign territory only under a “licence”. The term “licence” had been used advisedly because, in United States domestic property law, it signified a revocable permission or privilege given by a landowner to another to enter his land. Not only was a licence by its very nature revocable, but it could be, and usually was, given subject to conditions. Hence the remark by Brownlie, cited by the Special Rapporteur (A/CN.4/363 and Add.1, footnote 80), that a State “could enact a law governing immunities of

<sup>7</sup> See 1763rd meeting, footnote 10.

foreign States which would enumerate those acts which would involve acceptance of the local jurisdiction” and that “States would thus be given a licence to operate within the jurisdiction with express conditions. . . .”<sup>8</sup>

8. The question now was to determine to what extent—beyond the area covered by the 1961 and 1963 Vienna Conventions—there was a trend towards uniformity in the licences given by States to other States to enter their territory or transact business therein. The essence of draft article 13 lay in the extent to which States made others subject to the jurisdiction of their courts in labour disputes as a condition for granting a licence to enter their territory.

9. Unquestionably, it was in the interest of the host State to leave the diplomatic personnel of the sending, or “guest”, State as unencumbered as possible in the performance of their official functions; and in view of the common interest in the smooth functioning of diplomatic relations, it was usually labour disputes not directly involving diplomatic personnel that raised problems. Yet the host State also had an interest in providing remedies for wrongs committed within its borders, a concern that would give way to the need for smooth inter-State relations when the aggrieved employee was a national of the sending State acting in an official capacity.

10. There were, however, a number of other circumstances, for instance when the employee was a national of the foreign State but not serving in an official capacity, when the employee was a national of the host State but not serving in an official capacity, or again, when the employee was a national of the host State but serving in an official capacity. Furthermore, there was a problem of dual nationality, for the employee could be a national of both the host State and the guest State and could be employed either in an official or a non-official capacity. Lastly, the employee might be a national of a third State, a resident or non-resident in the host State and, in either instance, employed in an official or non-official capacity. In cases involving a national of the guest State, the host State was unlikely to have an overriding interest in asserting jurisdiction and the guest State would normally determine how the labour grievance of one of its own citizens should be redressed.

11. The more difficult questions concerned cases in which the employee was a national of the host State or of a third State. Where he was a national of the host State, the latter would obviously wish to assert jurisdiction if the employee had not been engaged to perform official functions and if smooth diplomatic relations would not be significantly disrupted. Even in the rare cases where the person performed official functions, the host State’s interest in providing a forum for its own national would be likely to override its concern not to impede diplomatic intercourse.

12. In cases of dual nationality, the question whether the employee was serving in an official or non-official capacity could be important, as could the additional factor of whether, by virtue of citizenship or residence in

the host State, he would become a charge on that State because of his inability to obtain redress from the employer State. Where the employee was a national of a third State but a resident of the host State, the latter would have an interest in providing a forum only to the extent that residence conferred a right to some form of public support, such as unemployment benefits. Clearly, the host State would have little interest in a case where the employee was neither one of its nationals nor a resident in its territory, and it would therefore decline jurisdiction.

13. These interests were generally reflected in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. Article 37, paragraph 2, of the 1961 Vienna Convention specified that members of the administrative and technical staff of a diplomatic mission were not exempt from civil and administrative jurisdiction for “acts performed outside the course of their duties”. Moreover, under article 31, paragraph 1(c), diplomatic agents themselves did not enjoy immunity with respect to actions “relating to any professional or commercial activity exercised . . . outside [their] official functions”, a provision that should perhaps be contrasted with Mr. Ushakov’s view (1764th meeting) that it was not possible to distinguish between official and other functions. He could not but agree that the draft articles should in no way interfere with the subject-matter of the 1961 and 1963 Vienna Conventions, as was already provided for in draft article 4, but an effort should nevertheless be made to fill any gaps in those instruments, such as the case of locally recruited employees covered by draft article 13.

14. As to the applicable law, some members considered that the law of the employer State would always apply to the contract of employment, but the position was not so simple as in tort cases, to which the well-established *lex loci delicti commissi* rule applied. The contract of employment, and the employment relationship itself, would nowadays probably be governed by the law of the State with which the contract had the “closest connection” or “most significant relationship”. Hence, it was necessary to evaluate a number of factual contacts, such as the place of contracting, the place of performance, the domicile, residence and nationality of the employee, the question of whether he had been engaged to perform official functions, and the place of a pre-existing relationship between the parties, if any. The assessment would have to be made in the light of the interest of the two States in maintaining smooth diplomatic relations, of the employer State in regulating the employment relationship (the stronger interest where official functions were concerned) and of the host State in protecting employees within its jurisdiction (stronger for locally recruited personnel). Such an analysis might well lead, at least in the case of locally recruited employees, to application of the *lex fori*.

15. Draft article 13 generally took into account the interests of the States involved. It largely accomplished its purpose of providing basic signposts by subjecting the employer state to the jurisdiction of the host State in suits entered by nationals or residents of the host State, but he

<sup>8</sup> *Ibid.*, footnote 9.

did not favour the further condition set out in the concluding words of paragraph 1 of article 13, namely that the work should be performed in the host State, whose interest in providing a forum for its nationals or residents would not be significantly diminished by the fact that the work was to be performed elsewhere. This condition was also not justified as a jurisdictional connecting factor since care should be taken to avoid prescribing rules of jurisdiction *ratione materiae* or *ratione personae*. In the cases covered by paragraph 2 (b) and (c), the host State was unlikely to display an interest except perhaps in the rare instances in which the employee, although a national of the guest State, was a habitual resident of the host State and did not perform any official functions.

16. He agreed that the opening proviso "Unless otherwise agreed" in paragraph 1 was unnecessary, bearing in mind more particularly the provisions of paragraph 2 (d) and of article 11 as submitted by the Special Rapporteur.<sup>9</sup> As for the reference in paragraph 2 (a) to failure to employ a person, in the United States of America, for example, an employer could be sued for such failure on the grounds that it was improperly discriminatory, a point that should be borne in mind before any decision was taken to delete that reference. Again, perhaps the term "dismissal" related to cases of refusal to renew an individual's contract which had automatically terminated; but it should be made clear that the provision was not intended to refer to allegedly wrongful dismissal.

17. Paragraph 1, taken in conjunction with paragraph 2 (b), suggested that cases of dual nationality might be contemplated, and the end result would seem appropriate, since the guest State would be given the benefit of the doubt and hence immunity from jurisdiction. In any event, it was desirable to make the language clearer in that respect. Paragraph 2 (d) presumably referred not only to jurisdiction but to a mandatory rule of the *lex fori*, probably one to protect the employee from clauses inserted in the contract as a result of the superior bargaining power of the employer.

18. Lastly, contracts of employment were not expressly covered in some national legislations and international instruments, but that did not necessarily mean that the employer State would in all cases enjoy immunity from jurisdiction. In actual fact, the majority of such contracts would fall under the exception relating to trading or commercial activity, so that there was an independent ground for denying immunity.

19. Mr. AL-QAYSI, referring to the doctrinal issue regarding the basis of the topic, said that theoretical questions were interesting and thought-provoking but inevitably gave rise to differences of opinion, as was to be seen from Mr. Ushakov's valuable memorandum, which contained the following passage:

Furthermore, it is altogether inadmissible that a court should examine the activities of a foreign State and should qualify them in one way or another contrary to the views of that State itself. This represents inadmissible interference in the domestic and external affairs of States. (A/CN.4/371, para. 14.)

20. Unquestionably, the principle of the sovereign equality of States lay at the very foundation of international law. It was a principle that, in the spirit of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>10</sup> meant that States had equal rights and duties and were equal partners in international relations despite any differences with respect to economic, social, political or other factors. The concept of the duties of States was particularly significant for duties constituted a corollary to rights. The presence of one sovereign authority in the jurisdiction of another should not lead to a conflict of sovereignties between States and it was essential that the equality of duties between States should not be impaired.

21. In the initial stages, theoretical considerations had been highly relevant, but the Commission had now covered a measurable distance in the preparation of draft articles designed primarily to solve specific problems. Rather than dwell on doctrinal niceties, it should assess the interests involved and envisage solutions which carefully balanced those interests, always bearing in mind the need to achieve practical and generally acceptable solutions.

22. He welcomed Mr. Evensen's remarks (1763rd meeting) concerning the use of the inductive approach, since it should not be followed too rigidly throughout the draft. The case covered by article 13 afforded a good example in that regard. The call for harmonization was therefore in order, as the Special Rapporteur had noted in his fourth report, when he had said that the method and techniques employed in preparing the reports and draft articles had been inductive in the sense that conclusions and propositions of law were to be drawn from the practice of States and not in isolation from the living realities of customary international law; the Commission's task therefore included a process of codification of existing practice and progressive development of rules of international law designed to reconcile, if not resolve, the various conflicts of interests in the exercise of sovereign rights and powers by States (A/CN.4/357, para. 10, subpara. (d)).

23. It seemed evident that article 13 sought precisely to achieve that result, for the Special Rapporteur himself had affirmed in his fifth report (A/CN.4/363 and Add. 1, para. 61) that the possibility should be left open for the exception to assert itself in State practice, but that a mild incentive could be introduced to encourage conformity with local labour law in order to improve social conditions and labour relations.

24. As for the actual text of article 13, he was opposed to the suggestion to delete the opening proviso. It was also found in articles 12, 14 and 15 and had a definite purpose, namely to indicate that the exception constituted a residual rule. The residual character of the exception in article 13 was, in addition, clearly indicated by the revised version of draft article 11, which read:

<sup>10</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>9</sup> A/CN.4/L.351; see also footnote 5, subpara. (g), above.

The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned.

25. In respect of the main rule enunciated in paragraph 1, the Special Rapporteur commented (*ibid.*, para. 38) that the first essential point which would determine the exercise or non-exercise of jurisdiction in connection with a contract of employment related to the existence of the governmental authority of the State in the exercise of which a cause of action had arisen. However, it was difficult to see any reflection of that important element in the text of the article.

26. Sir Ian Sinclair (1763rd meeting) had suggested that the words "a national or resident of that other State" in paragraph 1 might not be necessary, but it would be preferable to retain them for the reasons indicated by Mr. Riphagen (*ibid.*) in connection with labour relations and social security legislation in the forum State. To put it differently, it was unlikely that the forum State would wish to ensure the application of its social security legislation in the case of employees who came from abroad. With reference to Mr. McCaffrey's misgivings regarding the element of performance of a contract within the forum State, it was difficult to see what interest the forum State would have in asserting transboundary application of its labour laws if the person's work was not to be performed in that State.

27. Paragraph 2 (a) was presumably designed to cover what the Special Rapporteur had indicated in his report (A/CN.4/363 and Add. 1, para. 43) on the subject of the obligation to employ, in which case the wording would need to be adjusted so as to reflect the semblance of a contractual relationship. Only in that way could the question of dismissal, or termination, be properly covered. With regard to paragraph 2 (b) and (c), Sir Ian Sinclair had been right to point to the need to keep a close watch on the connecting factors, although further precision was required in paragraph 2 (c), especially in the phrase "at the time of employment". These words should be replaced by the formula "at the time when the contract was made", contained in section 4, para. 2 (b), of the United Kingdom's *State Immunity Act 1978*,<sup>11</sup> or the expression "at the time when the contract was entered into", adopted in article 5, para. 2(b), of the 1972 European Convention on State Immunity.<sup>12</sup>

28. Lastly, there was a disturbing delay in the issue of the summary records of the Commission's meetings. By the end of the third week of the session, only four records had been distributed in English.

29. The CHAIRMAN said that the Secretary would investigate the matter.

30. Mr. BARBOZA congratulated the Special Rapporteur on his technically excellent report containing an abundance of material. Unfortunately, general statements were still being made at the current stage in the Commission's work, something which doubtless

stemmed from the difficulty of the topic and highlighted the need for the Commission to show flexibility.

31. Mr. Ushakov's memorandum (A/CN.4/371) was a major document that displayed great strength of conviction. Particularly striking was the statement made in paragraph 17, namely:

Many States, possibly a majority, do not subscribe to, or reject, the concept of functional immunity. Hence it is clearly mistaken to speak of any general trend emerging in favour of that concept.

Thus, of the 29 States which, in accordance with the Commission's request, sent information and documentation in reply to the questionnaire, 14 grant full immunity and four have no legislation or practice in this area.

The same is apparent from the discussion on the pertinent sections of the Commission's reports in the Sixth Committee of the General Assembly, which shows that a large group of States are opposed to the above-mentioned concept.

32. In view of the gulf between the opposing concepts of total immunity and limited or functional immunity, it was essential to be practical rather than dogmatic, and to strive to find a compromise formula. The General Assembly was aware of the situation, and its mandate to the Commission was indeed to find just such a formula. Hence the Commission should set out in clear terms the general principles and the exceptions thereto and, as part of its work on the progressive development of international law, take account of the current course of events.

33. With regard to draft article 6, entitled "State immunity", he recalled what he had said at the Commission's previous session about its relationship to draft article 11, concerning the scope of part III, dealing with exceptions.<sup>13</sup> In his opinion, article 6 should clearly state the principle that immunity was the rule and that cases of jurisdiction by the territorial courts were exceptions. In its present form, article 6 failed to meet that need for clarity. The legislation of the United States and that of the United Kingdom, which tended to limit the immunity of States, none the less clearly stipulated that immunity was the rule. Article 6 reflected an even more extreme position than that of those countries, and was a perfect example of what should not be done in drafting the articles.

34. It was apparent from the fifth report that the trend reflected by article 13 was quite limited: there was virtually no practice in the matter; there were divergences in the case law; there was no doctrine; and national legislation was accounted for by only three countries—the United Kingdom, Singapore and Pakistan. The Special Rapporteur had also cited the 1972 European Convention on State Immunity and an inter-American draft convention. The latter draft had as yet an uncertain future, and the European Convention had been ratified by only a few countries, including Austria, Belgium and Cyprus. Furthermore, the western countries had been able to make remarkable progress in some areas precisely because of their great homogeneity in terms of culture, economic and technological development, and legal outlook. In the circumstances, it was not surprising that they had been able to develop legal instruments such as

<sup>11</sup> See 1762nd meeting, footnote 11.

<sup>12</sup> *Ibid.*, footnote 7.

<sup>13</sup> *Yearbook* . . . 1982, vol. I, p. 195, 1730th meeting, para. 3.

the European Convention, but that could not represent a valid precedent for a universal convention that would apply to a very large number of countries which differed enormously. The idea of protecting the labour force of territorial States was in itself a good one, but the discussion on article 13 had raised doubts as to the timeliness of such a provision. To his mind, account must be taken of the need to preserve certain values in relations among all States.

35. Draft article 13 raised the question of the nature of the relationship between the employer and its employee, a relationship which, regardless of where it occurred, fell under administrative law, as a result of the nature of the State and the special character of administrative contracts of employment, whose object was the provision of a public service. When a State acted in the exercise of its sovereign functions on its territory, relations with all its employees were governed by its administrative law. On the other hand, according to draft article 13, if its functions were exercised outside its territory, it would have two types of legal relations with its employees, the first governed by its own administrative law, and the second by the labour law of the territorial State. The staff of embassies, consulates, diplomatic missions and so forth were protected by conventions; but in the case of local staff, the 1961 Vienna Convention on Diplomatic Relations had a loophole which article 13 could attempt to remedy. Whereas the officials of the foreign State were governed by its administrative law, local employees would be governed by the labour law of the territorial State. The grounds for that distinction would be the official or non-official nature of the functions performed, something that would be difficult to determine in any circumstances. In fact, the relations between States and their employees seemed to be the same in all cases, and the possibility of turning to the labour law of the territorial State had drawbacks. Labour law governed, *inter alia*, labour conflicts, which had repercussions on public opinion and such repercussions were liable to disturb diplomatic relations and undermine the prestige of the foreign State.

36. With regard to the actual wording of article 13, and more specifically paragraph 1, the defect pointed out by Mr. Lacleta Muñoz (1764th meeting) could be made good by inserting the words "of the foreign State" after the word "national" or by deleting the words "of a national or resident of that other State". The proviso "Unless otherwise agreed", which had given rise to much comment, should be retained: in his opinion, it alluded to an international agreement between the States concerned. As for paragraph 2 (a), it was plain that a State could not be obliged to employ a person it considered undesirable; in the case of dismissal, however, compensation should always be awarded, but not through the courts of the territorial State. Recourse to local courts would be useless, since any decision by these courts might come up against difficulties of enforcement. The case of dual nationality, raised by Mr. McCaffrey, was important for all countries of immigration such as his own, Argentina, but it was a complex issue that could possibly be resolved by determining the dominant nationality.

37. Mr. BALANDA stressed how useful the inductive method had been in formulating article 12, on the exception relating to trading or commercial activity. There had been a wealth of national and international practice and the Commission had been on firm ground. In the case of article 13, on the other hand, little practice was available, as the Special Rapporteur had acknowledged (A/CN.4/363 and Add.1, para. 39). The inductive method was valid only if it could draw on a whole range of legal systems and lead to a consensus on the rules proposed. Nevertheless, in the present instance, limited and contradictory judicial practice should not lead the Commission to discontinue consideration of the subject, for under its statute it was entitled to engage in the progressive development of international law.

38. Jurisdictional immunities of States were a particularly delicate topic that touched on so fundamental a concept as that of State sovereignty, which was considered by international law as one of the attributes of the State, and the Commission should proceed most carefully. The issue raised a number of questions. To what extent could a State be subjected to the jurisdiction of another State? Could a State itself renounce its sovereignty or be obliged to do so? The provisions of draft article 13 gave a partial answer to such questions.

39. In his fifth report (*ibid.*, paras. 40 *et seq.*), the Special Rapporteur had indicated the shortcomings and contradictions not only in the legislation of States but also within one and the same legal system. The little practice that was available was marked by hesitation and tentativeness. The situation had been no different in internal law when the task of elaborating the theory of State responsibility had been undertaken. Thus, in French and Belgian administrative law, from which Zaire's administrative law stemmed, there had been a certain amount of ebb and flow before the theory of State responsibility had finally been established. Besides, the theory of acts of government still meant that State responsibility was not recognized in some cases. It was to be hoped that members of the Commission, in their desire to promote international law, would succeed, through compromise, in building a similar legal edifice.

40. The Special Rapporteur had pointed out (*ibid.*, para. 21) that the Commission and subsequently the Sixth Committee of the General Assembly had been able to recognize the existence of a general principle of State immunity, on the basis of an examination of the judicial practice of a few States in the nineteenth century. That had been possible, among other reasons, because the principle was related to another, more fundamental, principle of international law accepted by the entire international community, namely the sovereignty of States, proclaimed in the Charter of the United Nations and embodied in a number of international instruments. However, it was possible to proceed in the same manner with regard to the principles set forth in article 13. As the Special Rapporteur had noted, it was normally necessary to draw upon much more extensive practice in order to be able to point to such a principle.

41. Some members were of the view that it was

unnecessary to clarify the concept of a contract of employment. In his own country, a clear distinction was made between ordinary courts and administrative tribunals. For the article to apply to all legal systems, it should be specified, either in the article itself or in the commentary, whether the term "contract of employment" referred to a contract or to a body of staff regulations (*statut*). In Zaire, the latter were dealt with by administrative tribunals, whereas contracts fell within the purview of the ordinary courts. Furthermore, a distinction was made between contracts of employment, which involved the provision of manual services, and contracts for the rendering of services, which involved the provision of an intellectual service. The term "instrumentalities of a State", used several times in the report (*ibid.*, paras. 29, 38, 63 and 65), did not seem to denote any definite entity, at least in the legal system in Zaire. He also agreed with Mr. Mahiou (1763rd meeting) that the expression "local staff of lower rank", appearing, for instance, in paragraph 36 of the report, should be elucidated.

42. Like Mr. Ushakov (1764th meeting), he entertained doubts concerning the legal foundation for article 13, and he wondered whether it was really advisable to opt for the application of local law to the exclusion of any other law, in other words for the competence of the courts of the forum State. That involved an *a priori* assumption that the law of the sending State was necessarily bad. Yet the principle of freedom of will signified that the parties should be free to provide for the application of that law, particularly if they considered that it would afford better protection of the worker.

43. Furthermore, the article placed undue emphasis on the obligations of a State that failed to fulfil its undertakings in an employment relationship. The report even referred to "innocent persons" injured by the actions of a State (A/CN.4/363 and Add. 1, para. 69). The imbalance might be remedied by drafting the text in such a way that account was also taken of the position of employees who failed to fulfil their obligations. Article 13 should, moreover, take into consideration the nature of the services performed, an element to which the Special Rapporteur had made only a glancing reference (*ibid.*, para. 38).

44. The Special Rapporteur had explained (*ibid.*, para. 31) that the exception did not apply to the case of an employer's liability in respect of acts performed by his employees. Such an approach to the problem might not be sufficiently comprehensive. If employees could institute proceedings against the State to have their rights observed, why should the possibility be ruled out of proceedings by the State against an employee when the latter's fault had caused the State to pay him compensation? The case might well arise in service relations: the State which had been obliged to compensate the injured party on account of the link binding it to its employee might, if the latter were at fault, in turn institute proceedings against him.

45. The Special Rapporteur's comments concerning the applicable law (*ibid.*, para. 35) might perhaps be regarded as contradicting the freedom which parties were

recognized as having, particularly under private international law, of choosing the competent jurisdiction in a dispute. Indeed, it was not always the law of the forum State that might apply. For example, if the Société zairoise de commercialisation des minerais, which had offices in Paris, Brussels and New York, engaged a French national in Paris and sent him to work in Brussels, in the event of a dispute it was not inconceivable that the parties might agree to application of the *lex loci executionis*, in other words Belgian law.

46. With regard to the wording of article 13, it was essential to retain in paragraph 1 the expression "Unless otherwise agreed", as it reaffirmed the principle of jurisdictional immunity. It was for States themselves to decide in what instances they wished to forgo that immunity. As for the circumstances covered by paragraph 2(a), it was difficult to see how failure to employ an individual could give rise to a cause of action, for it did not involve the creation of any obligation, and hence there appeared to be no correlative right. In a case of dismissal, application of the law of the sending State was envisaged—a proper solution if the law of the forum was considered the best. However, in the case of serious fault, the parties should be able to continue to apply a law other than local law if the latter allowed immediate dismissal. Paragraph 2(d) covered cases in which "the employee has otherwise agreed in writing". Since a contractual relationship requiring the consent of the parties was involved, it would be best to avoid emphasizing the unilateral character of the employee's intention and use the formulation "the parties have otherwise agreed".

47. As he would be prevented by professional obligations from attending the discussion of articles 14 and 15, he wished to make a number of comments on those articles. The application of the *lex rei sitae*, proposed in article 14 in connection with property, satisfied a need, and the proposed solution was also in keeping with the provisions of private international law in Zaire. If the application of the *lex loci delicti commissi* to personal injuries and damage to property did not satisfy such a need, it none the less offered some practical advantages. As a result of an act constituting an offence, questions relating to expert appraisal, evidence or statements by witnesses might arise. It should be pointed out, however, that in Belgium, for example, the *lex loci delicti commissi* was now applied, in preference to another law, such as that of the country of origin, simply because of a change in case law.

48. Finally, in the matter of the jurisdictional immunities of States, exceptions should be introduced only with great caution and bearing in mind the following considerations. First, it was necessary to determine the situations where it was beyond all question essential that the law of the forum State must govern the service relationship or the situation in question. Secondly, exceptions should not be extended so far as to jeopardize the principle of State immunity and should be strictly limited and interpreted in a restrictive manner. Thirdly, exceptions should stem from a generalized practice found in a very large number of national legal systems. In that



connection, an attempt should be made to discover the underlying reasons for the limitations adopted by States either in their legislation or through agreements. To that end, greater consideration should be given to the preparatory work on legislative texts and conventions limiting State immunity. Fourthly, the nature of the act or activity should be taken into account. Immunity should remain intact, in other words absolute, in the case of acts relating to the public authority of the State. Fifthly, the exceptions to be recognized should always form residual rules, as article 13 suggested. States should always have an opportunity to stipulate otherwise if they preferred not to forgo their jurisdictional immunity. Sixthly, the exceptions should be formulated in the light of two factors, the first being the attitude of the States against which the restrictive tendency was currently applied, so as to discover in what matters they raised no objection and tacitly acquiesced, and in what other matters they did protest. In the case of the latter, it would be difficult to assert that there was a tendency to waive jurisdictional immunity and consequently recognize an exception. In that connection, he referred to *Venne v. Democratic Republic of the Congo* (1969),<sup>14</sup> mentioned by the Special Rapporteur, *Dumont v. Colonie du Congo belge* and a case in which a Belgian professor in Zaire had instituted proceedings before the Belgian courts against the university at which he was teaching. The Government of Zaire had protested against the freezing of the university's accounts, which was decided on in the judgment. As for the second factor, it was necessary to see how States which had been denied jurisdictional immunity by foreign courts had carried out the judicial decisions in question. Had they executed them spontaneously, or had they been obliged to do so as a result of diplomatic or other pressure?

49. Sir Ian SINCLAIR, supported by Mr. FLITAN, suggested that, since the Commission was scheduled to complete its consideration of the topic of jurisdictional immunities of States by 27 May 1983, draft articles 14 and 15 should be discussed together.

*It was so agreed.*

50. Mr. ROMANOV (Secretary to the Commission) said that, following the statement by Mr. Al-Qaysi, he had requested the Chief of the Languages Service of the United Nations Office at Geneva to expedite the production of the summary records of the Commission's meetings. Those records formed part of the Commission's documentation and should be available on a daily basis and without delay. Moreover, he fully agreed with what Mr. Al-Qaysi had said, particularly since, for the 12 meetings held from the beginning of the session up to 19 May 1983, only 7 summary records had been distributed in French, 2 in Arabic, 3 in Chinese, 4 in English and Russian, and 3 in Spanish. The situation was thus alarming.

*The meeting rose at 1 p.m.*

<sup>14</sup> Canada, *The Dominion Law Reports, Third Series* (Toronto), vol. 5 (1969), p.128.

## 1766th MEETING

*Tuesday, 24 May 1983, at 3 p.m.*

*Chairman:* Mr. Laurel B. FRANCIS

*Present:* Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

**Jurisdictional immunities of States and their property (continued)** (A/CN.4/357,<sup>1</sup> A/CN.4/363 and Add. 1,<sup>2</sup> A/CN.4/371,<sup>3</sup> A/CN.4/L.352, sect. D, ILC(XXXV)/Conf. Room Doc. 1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup> (continued)

ARTICLE 13 (Contracts of employment)<sup>5</sup> (continued)

1. Mr. NI said that the topic of article 13, besides being relatively new, involved administrative and labour laws which varied from country to country or were altogether lacking in some legislations. It also involved the application of laws which were important to the economic well-being of people in the countries concerned. Few judicial decisions had been adopted thus far in a particularly controversial area, and little evidence of present-day State Practice in the matter was available. The Special Rapporteur was quite right to emphasize in his fifth report the need for care and prudence (A/CN.4/363 and Add. 1, para. 39). Indeed, the question might legitimately be asked whether there was any point in exploring a region already known for the paucity of material it offered for investigation.

2. There were three reasons justifying such exploration. First, the question of the administration of labour laws was highly important for the protection of the weaker

<sup>1</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 99-100; (b) art. 2: *ibid.*, pp. 95-96, footnote 224; revised text (para. 1(a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

*Part II* of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

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

<sup>5</sup> For the text, see 1762nd meeting, para. 1.