INTERNATIONAL LAW REPORTS

Volume

64

EDITED
BY
E. LAUTERPACHT, Q.C.
OF GRAY'S INN;
FELLOW OF TRINITY COLLEGE, CAMBRIDGE

with the assistance of
C. J. GREENWOOD,
FELLOW OF MAGDALENE COLLEGE, CAMBRIDGE

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PREFACE

This is the second of three volumes which the *International Law Reports* is devoting to the subject of State immunity in an attempt to bring up to date its presentation of cases relating to that aspect of international law which is most frequently applied in national courts. Volume 63 contained decisions from the United States. The present volume contains material from other English-speaking jurisdictions. Volume 65 will be devoted to the judgments of courts of other countries. The reader is referred to the Preface of Volume 63 for some explanation of the method used in the selection of cases for these volumes and of the mode of publication.

Although the collection has been prepared principally from volumes held in the Squire Law Library, Cambridge, considerable guidance and aid has also been received from the following, whose contributions are gratefully acknowledged: Professor James R. Crawford (Australia); Mr Mark L. Jewett (Canada); Mr Eugene Cotran, Professor Rosalyn Higgins and Mr D. Lloyd Jones (England); Mr Sudipto Sarkar (India); Mr. George Barton, Q.C. (New Zealand); Dr Florentino P. Feliciano (the Philippines); Professor C. J. R. Dugard and Mr Hugh Paton (South Africa).

For permission to reproduce material photographically thanks are due to the Canadian Law Book Company (the *Dominion Law Reports*), the Incorporated Council of Law Reporting (the English *Law Reports* and *Weekly Law Reports*), Messrs. Butterworths and Co. (the *All England Law Reports*), the Supreme Court of India (the *Supreme Court Reports*), the Punjab Educational Press (*Pakistan Legal Decisions*), Messrs. Juta and Co. (the *South African Law Reports*) and the Controller of Her Majesty's Stationery Office (the State Immunity Act 1978).

The main burden of preparing the material for publication and, in particular, of writing the summaries, has been borne by Mr C. J. Greenwood. He has had help principally from Mr S. R. Pirrie and Mr Sudipto Sarkar. The Index has been made by Mr Fergal Martin.

Mrs S. Rainbow has given secretarial help and the printers, the Gomer Press, Llandysul, have as always been most cooperative. To all who have thus made the appearance of this volume possible, I express my warmest thanks.

E. LAUTERPACHT

TRINITY COLLEGE,
CAMBRIDGE
October 1983

EDITORIAL NOTE

The *International Law Reports* endeavour to provide within a single series of volumes comprehensive access in English to judicial materials bearing on public international law. On certain topics it is not always easy to draw a clear line between cases which are essentially ones of public international law interest and those which are primarily applications of special domestic rules. For example, in relation to extradition, the *Reports* will include cases which bear on the exception of "political offences" or the rule of double criminality, but will restrict the number of cases dealing with purely procedural aspects of extradition. Similarly, while the general rules relating to the admission and exclusion of aliens, especially of refugees, are of international legal interest, cases on the procedure of admission usually are not. In such borderline areas, and sometimes also where there is a series of domestic decisions all dealing with a single point in essentially the same manner, only one illustrative decision will be printed and references to the remainder will be given in an accompanying note.

Decisions of International Tribunals

The *Reports* seek to include so far as possible the available decisions of every international tribunal, e.g. the International Court of Justice or *ad hoc* arbitrations between States. There are, however, some jurisdictions to which full coverage cannot be given, either because of the large number of decisions (e.g. the European Commission of Human Rights or the Administrative Tribunal of the United Nations) or because not all the decisions bear on questions of public international law (e.g. the Court of the European Communities). In these instances, those decisions are selected which appear to have the greatest long-term value.

Decisions of National Tribunals

A systematic effort is made to collect from all national jurisdictions those judicial decisions which have some bearing on international law.

Editorial Treatment of Materials

The basic policy of the Editor is, so far as possible, to present the material in its original form. It is no part of the editorial function to impose on the decisions printed in these volumes a uniformity of approach or style which they do not possess. Editorial intervention is limited to the introduction of the summary and of the bold-letter rubric at the head of each case. This is followed by the full text of the original decision or of its translation. Normally, the only passages which will be omitted are those which contain either statements of

fact having no bearing on the points of international law involved in the case or discussion of matters of domestic law unrelated to the points of international legal interest. The omission of material is usually indicated either by a series of dots or by the insertion of a sentence in square brackets noting the passages which have been left out.

Presentation of Materials

The material in this volume is of two kinds, material reproduced photographically and material which has been freshly set for this volume.

Material photographically reproduced. This consists exclusively of reports originally printed in the English language. The material can usually be recognized by the differences between its type-style and the Baskerville type otherwise used in these *Reports*. The source of the material is identified by the reference to "Report" in square brackets at the end of the case. Where more than one citation is given, the report used is the one first listed. The bold type figures in square brackets in the inner margin of each page refer to the pagination of the original report. The smaller figures in square brackets in the margins of these cases are the indicators of footnotes which have been editorially introduced.

Other material. The remaining material in the volume has been typeset for this volume. This includes all material specially translated into English for these *Reports* as well as some material in English which in its original form was not suitable for photo-reproduction. The source of all such material is indicated by the reference to the "Report" in square brackets at the end of the case. The language of the original decision is also mentioned there. The bold figures in square brackets in the body of the text indicate the pagination of the original report. Small figures in square brackets within the text are indicators of footnotes which have been editorially introduced.

Notes

Footnotes. Footnotes enclosed in square brackets are editorial insertions. All other footnotes are part of the original report.

Other notes. References to cases deemed not to be sufficiently substantial to warrant reporting will occasionally be found in editorial notes either at the end of a report of a case on a similar point or under an independent heading.

ADVISORY COMMITTEE

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TABLE OF CONTENTS

TABLE OF CASES REPORTED

[ALPHABETICAL]

TABLE OF CASES REPORTED

[ARRANGED ACCORDING TO COUNTRIES.]

TABLE OF TREATIES

[This table contains a list, in chronological order according to the date of signature, of the treaties referred to in the decisions printed in the present volume. It has not been possible to draw a helpful distinction between treaties judicially considered and treaties which are merely cited.

In the case of bilateral treaties, the names of the parties are given in alphabetical order. Multilateral treaties are referred to by the name by which they are believed commonly to be known, *e.g.* Hague Convention No. 1 of 1899; Treaty of Versailles, 1919. References to the texts of treaties have been supplied, including wherever possible at least one reference to a text in the English language. The full titles of the abbreviated references will be found in the List of Abbreviations printed in the volume containing the Consolidated Tables and Index to Vols. 1—35.]

CANADA

Sovereign immunity—Foreign State—Restrictive theory of sovereign immunity—Onus of establishing the claim to immunity—Whether on the foreign State—State obtaining services of architect for the construction of State's national pavilion at exhibition—Whether a public sovereign act of the foreign State—Mode of determination of the question—Whether foreign State entitled to immunity—The law of Canada

VENNE *v.* DEMOCRATIC REPUBLIC OF THE CONGO

Canada, Quebec Court of Queen's Bench, Appeal Side.[1] 18 *October* 1968

(Taschereau, Owen and Brossard JJ.)

SUMMARY: *The facts:*—The plaintiff was engaged as an architect to prepare plans for the construction of the national pavilion of the Congo at an international exhibition in Canada (Expo '67). The request for his services was made by the duly accredited diplomatic representatives of the Congo as well as by the representative of the Congo's Department of Foreign Affairs. The plaintiff claimed his fees for the services he had rendered. The Government of the Congo pleaded sovereign immunity and appealed from a decision of Leduc J. refusing to dismiss the action on that ground in preliminary proceedings.

Held:—The Government's plea of immunity was rejected. The absolute theory of sovereign immunity had now been superseded by the restrictive theory, so that a foreign State was entitled to immunity only in respect of public, sovereign acts. It was for the foreign State to show that an action brought against it was based upon such acts and that it was then entitled to sovereign immunity. This the Government of the Congo had failed to do.

The text of the judgment of the Court commences on the following page.

[1] See also the decision of the Supreme Court of Canada, p. 24, below.

TASCHEREAU, J. (translation) :—I concur with the opinion [129] expressed by my colleagues, which conforms with the one expressed by the Secretary of State for the United States of America in a letter dated January 31, 1968, addressed to the Ambassador of the Republic of Guinea, dealing with the absolute immunity which removes sovereign States from the jurisdiction of foreign tribunals. That situation involved a case pending before the Supreme Court of the State of New York, under the name "New York World's Fair Corporation 1964-65 v. Republique de la Guinee".

As that case was very similar to the one at bar, I shall quote *in extenso* the text of the letter in question:

His Excellency
Karim Bangoura,
Ambassador of the Republic of Guinea.

His Excellency,

I have the honor to refer to your request of October 24, 1967, that the Government of the United States transmit to the Supreme Court of the State of New York (County of Queens), a suggestion of Guinea in an action styled New York World's Fair Corporation 1964-65 v. Republic of Guinea, Index No 477/1967.

The Department of State has given careful consideration to this request. It has reviewed the material submitted by the Republic of Guinea and its attorneys, and by the attorneys for the New York World's Fair. As you may know, at the request of the parties an oral hearing was held on January 15, 1968.

In considering requests for suggestions of sovereign immunity, the Department of State applies the "restrictive" theory of sovereign immunity, as announced in the "Tate Letter", 26 Department of State Bulletin 984 (1952). Under that theory, the immunity of the sovereign is suggested with regard to sovereign or public acts, (jure imperii) or a state, but not with respect to private acts (jure gestiones).

In this case, the Republic of Guinea requests a suggestion of sovereign immunity from a suit arising out of its participation in the 1964-65 New York World's Fair, more particularly, from a contract it entered into with the World's Fair Corporation for the rental by the Republic of Guinea of exhibition space at the Fair grounds. In considering this application, the Department has been particularly impressed by the fact that the Fair was privately organized, including a number of business corporations, participated in the Fair, and that in at least one case a pavilion in the international section was sponsored by a group of business firms resident in the country concerned. Considering these facts and the character

[130] of the New York World's Fair, the actions of the Republic of Guinea giving rise to this suit do not qualify as sovereign or public acts under the standards established in the Tate Letter. The Department of State finds it necessary, therefore, to decline the request for a suggestion of sovereign immunity.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State:

OWEN, J.:—This is an appeal from an interlocutory judgment of the Superior Court, District of Montreal, dated October 20, 1967, which dismissed a declinatory exception by the defendant, the Government of the Democratic Republic of the Congo, invoking sovereign immunity. The action was taken by an architect claiming fees for professional services rendered in preparing plans for the Congo pavilion at Expo 67.

The judgment appealed from held that the relations between the sovereign State and the architect were of a private nature and that in connection therewith the sovereign State was subject to the jurisdiction of our Courts (J.C., p. 19):

CONSIDERING that when the defendant engaged the services of the plaintiff, through its Chargés d'Affaires, who were duly accredited with the proper authorities of Expo 1967 — it was not performing a public exercise of its power, but was acting in a purely private capacity;

CONSIDERING that although the Democratic Republic of the Congo is a sovereign State, a contractual relationship of a purely private nature was established between the parties.

The problem raised by this appeal is whether under conditions existing today our Courts will continue to apply the doctrine or theory of absolute sovereign immunity or whether the time has come to apply a doctrine or theory of qualified or restrictive sovereign immunity.

In my opinion we should abandon the doctrine of absolute sovereign immunity and adopt a theory of restrictive sovereign immunity.

Some concept of the conflict between these two doctrines may be gathered from the following statements by Judges and authors.

Lord Denning, *Rahimtoola v. Nizam of Hyderabad,* [1958] A.C. 379 at p. 422:

Faced with an inconsistency between two lines of cases, the only course is to see which is more consistent with principle. For this I go back, as Upjohn J. did, to the words of that great international lawyer, Sir Robert Phillimore, in *The Charkieh*, who, after a full review of the authorities, said this: "The object of international