Document:-
A/CN.4/SR.1947

Summary record of the 1947th meeting

Topic:
<multiple topics>

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

43. In conclusion, he observed that, in the French text of paragraph 1 (*e*) of article 2, the word *biens* was used in two different senses. He suggested that the paragraph should refer to *propriété d'un Etat* rather than to *biens d'un Etat*, but feared that the word *propriété* might not be accepted legal terminology.

44. Mr. DÍAZ GONZÁLEZ said that many of the doubts he felt about paragraph 1 (*e*) of draft article 2 had already been referred to by Mr. Calero Rodrigues and Mr. Lacleta Muñoz. He shared their views and, in particular, endorsed the comments made by Mr. Lacleta Muñoz about the drafting problems that arose in Spanish. The fact remained, however, that one could not speak of ownership of rights. Since, in any case, a State could exercise its rights and manage its interests only within the limits imposed on it by law, he suggested that, in paragraph 1 (*e*), the words "according to its internal law" should be replaced by "according to law". It would then be for the Drafting Committee to find the best form of words, having regard to the diversity of legal systems and official languages.

45. In draft article 3, paragraph 1 (*a*) (i), he thought it would be sufficient to refer to the head of State, an expression which covered the notion of "sovereign". He supported the proposal made at the previous meeting by Mr. Mahiou regarding the subdivisions of paragraph 1 (*b*). In paragraph 1 (*b*) (iv), he would prefer the words *fases del proceso judicial* (stages of legal proceedings) to the words *fases de los procedimientos judiciales*.

46. He had doubts about the usefulness of draft article 4, which in his opinion should be redrafted so as to distinguish between conventions that had entered into force and those that were not yet being applied, as proposed by Mr. Calero Rodrigues. Perhaps the reference to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents should be retained.

47. Draft article 5 also seemed unnecessary, in so far as no legal instrument had ever been retroactive unless otherwise expressly so provided.

48. Mr. McCAFFREY, referring to a point raised by Mr. Ushakov in connection with draft article 2, paragraph 1 (*e*), noted that many members of the Commission favoured the replacement of the reference to internal law by a reference to the law of the forum and considered that the forum State should apply its rules of private international law in making determinations. Courts throughout the world had decided that an autonomous body of rules of private international law was needed to decide the matters in question because the whole issue in a case could turn on who owned the property and whether a State could, by claiming an ownership interest, trigger an automatic reference to its internal law that would be unfair to the other party to the action.

49. Supposing, for instance, that a member of the staff of the Embassy of the United States of America in Moscow had a claim in respect of a right or interest in housing, should that claim be determined in accordance with United States law? Or, supposing that a patent had been granted to a company which had then been nationalized, what law should apply in determining who owned the patent: the law of the forum State or the law of the State claiming ownership of the patent? In decided cases on the latter point, the law of the forum State had been applied. The universal rule was that the *lex situs* governed questions of ownership of real property. Obviously that must be so; it would be futile for a United States court to seek to pronounce on questions of title to property located in Switzerland when it could not enforce its decision. In the circumstances, the only solution was to omit from paragraph 1 (*e*) of article 2 all reference either to internal law or to the law of the forum.

The meeting rose at 1 p.m.

1947th MEETING

Friday, 16 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jagota, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Co-operation with other bodies

[Agenda item 10]

1. The CHAIRMAN informed the Commission that a letter had been received from the Director of Legal Affairs of the Council of Europe, inviting the Commission to be represented at a meeting of the European Committee on Legal Co-operation to be held from 26 to 30 May at Strasbourg. He understood that the Commission had in the past declined invitations to attend meetings held during its sessions. If there were no objections, therefore, he would take it that members agreed that the Secretary of the Commission should be asked to reply to the effect that, as the Commission was in session, it would unfortunately be unable to be represented at the meeting.

It was so agreed.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/388,[1] A/CN.4/396,[2] A/CN.4/L.398, sect. E, ILC(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

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[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

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

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*concluded*)

ARTICLE 2 (Use of terms), paras. 1 (*e*) and 2

ARTICLE 3 (Interpretative provisions), para. 1

ARTICLE 4 (Jurisdictional immunities not within the scope of the present articles) *and*

ARTICLE 5 (Non-retroactivity of the present articles)[4] (*concluded*)

2. Mr. KOROMA said that the basic issue in draft article 2, paragraph 1 (*e*), was not solely one of definition, but also involved certain categories of rights and interests in property which, it had been suggested, did not exist under some legal systems. None the less, although the definition in question might seem to have been influenced mainly by the common law, it did cover all the different categories of States rights in property. With a view to arriving at a universally acceptable formulation and to allaying the fears expressed about the word "interests", he would suggest that article 2, paragraph 1 (*e*), be reworded in the light of draft article 22.

3. The reference to internal law required further examination, since it would mean that different solutions would be required according to the property concerned. A reference to the applicable law would not solve the problem, since that law might depend on extraneous factors. In the circumstances, he was inclined to agree that the reference to internal law should be deleted from the definition of State property.

4. Draft article 3, paragraph 1, should be retained, although he agreed that subparagraph (*a*) (iv), referring to agencies or instrumentalities, should come before subparagraph (*a*) (iii), referring to the political subdivisions of a State. In addition, the means whereby the various organs, ministries, departments, political subdivisions, agencies and instrumentalities would claim jurisdictional immunity should be made clear. For instance, would such bodies claim immunity themselves or would they act through the central Government?

5. He agreed that the scope of the definition of "judicial functions" in paragraph 1 (*b*) should be enlarged to cover judicial powers and administrative functions. In some countries, including his own, the comptroller of customs was empowered by statute in certain circumstances to confiscate property without reference to a court. Such acts, which should be covered by the definition, would presumably come under administrative powers.

6. Draft articles 4 and 5 were useful and should be retained. The former placed jurisdictional immunities of the State in their proper perspective, while a provision such as the latter, although it stated a general principle of law, was included in most contemporary multilateral instruments.

7. Mr. HUANG, referring to draft article 2, paragraph 1, said that when elaborating definitions the aim should be simplicity and lucidity, in order to ensure correct interpretation and application. An effort should also be made to avoid repetition and wording that would create divergencies and complications.

8. The main purpose of defining "State property", in paragraph 1 (*e*), was to determine which State property would or would not enjoy immunity, rather than to determine how the local courts should exercise jurisdiction over State property that fell within the scope of the exceptions provided for in the draft articles. On that basis, he was inclined to favour retention of the words "according to its internal law". Moreover, during the Commission's deliberations on the definition of "State property" in connection with its work on the draft articles on succession of States in respect of matters other than treaties,[5] some members had expressed the view that the reference to the internal law of the predecessor State was correct, because it was that law which determined what constituted the State's property. Hence problems of application of private international law and of the law applicable to the property concerned should be left aside entirely when elaborating the definition of "State property". Again, the definition of State property imported concepts which, as had already been pointed out, involved contradictions or were repetitious or inconsistent with substantive articles. In that connection, he noted that the Special Rapporteur, in his eighth report (A/CN.4/396, para. 36, *in fine*), had rightly stated that "the test of the nature of use is a valid one for upholding or rejecting immunity in respect of property in use by the State".

9. With regard to the definition or interpretation of the term "State", in draft article 3, paragraph 1 (*a*), he

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*; (*m*) articles 19 and 20 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1985*, vol. II (Part Two) pp. 60 *et seq.*

Part IV of the draft: (*n*) articles 21, 22, 23 and 24: *ibid.*, pp. 53-54, footnotes 191 to 194; revised texts: *ibid.*, pp. 57-58, footnote 206.

[4] For the texts, see 1942nd meeting, paras. 5-8.

[5] Later "Draft articles on succession of States in respect of State property, archives and debts"; see paragraph (8) of the commentary to article 8 of the draft (*Yearbook ... 1981*, vol. II (Part Two), p. 25).

agreed with Mr. Jagota (1946th meeting), who had pointed out that no definition of that term had been included in any convention drafted by the Commission, and with Mr. Malek, who had referred, by way of example, to the draft Declaration on the Rights and Duties of States.[6] Even in the case of State immunity, the laws of some countries differed as to the treatment of sovereigns and heads of State and as to the legal status of agencies and instrumentalities of States. Moreover, if the expression "the sovereign or head of State" was qualified by the words "in his official capacity", difficulties could arise in the application of article 12 of the draft, which went to show that it was far more difficult to draft an international convention than to draw up domestic legislation. The whole question of whether a definition of the State was required should therefore be approached with caution.

10. In principle, he was inclined to favour the retention of draft article 4, but it should be worded in such a way as not to affect the conventions to which it referred. The question of the applicability of general international law or customary international law should be avoided where State immunity was concerned. Otherwise, use might be made of a formula such as the last paragraph of the preamble to the 1961 Vienna Convention on Diplomatic Relations.

11. Referring to draft articles 25 to 28,[7] which had been discussed during his absence, he noted that many members had questioned the need for article 25. In diplomatic practice, sovereigns and other heads of State, both on their official and on their personal visits abroad, were accorded full immunities, privileges and facilities in accordance with international law and custom. He wondered whether full account had been taken of current law and practice in the provisions of article 25. Among the questions which required very careful consideration were the number of actual examples that could be cited as a basis for restricting the immunities of personal sovereigns and other heads of State and what the practical effect of such an article would be. It had been suggested that a solution would be to reword the article in very brief terms, but there remained the problem of the exact choice of words. The question whether restriction of the immunities of sovereigns and other heads of State was governed by a rule of general international law should also be considered.

12. Service of process by any writ or other document instituting proceedings against a State, which was regulated by draft article 26, constituted an exercise of judicial powers and had usually been regarded as an act violating national sovereignty if performed without the consent of the State concerned. International conventions, such as the 1972 European Convention on State Immunity,[8] and the internal legislation of countries, such as that of the United Kingdom,[9] showed that service of process was generally effected through diplomatic channels, and in his view that procedure was appropriate.

13. In principle, he favoured a flexible form of wording for draft article 28 and considered that the restriction and the extension of immunities should be dealt with separately. The phrase "to the extent that appears to it to be appropriate" would not, in his view, help to reduce disagreements between States over jurisdiction and immunities, both of which were subject to the principle of the sovereign equality of States. He therefore suggested that that phrase should be deleted and that the following sentence should be added to the article: "Such restriction shall not contradict the general principles and practice of State immunity." Alternatively, the provision could be made subject to article 6, provided that that article was adequately drafted.

14. Mr. FRANCIS said he still believed that any departure from the definition of State property in draft article 2, paragraph 1 (*e*), would be undesirable. He had noted from the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts[10] that the plenipotentiary conference had not departed in any essential way from the draft articles prepared by the Commission. The Commission should therefore be very careful before it departed from a standard that it had set and that had subsequently been confirmed by a plenipotentiary conference. The members of the Commission came and went, but the Commission as an institution lived on, and its continued integrity would depend on the extent to which its members were prepared to abide by tried and tested concepts and on their recognition of the need for continuity, particularly in regard to such basic and long-standing concepts as "State property" and all its essential elements.

15. Chief AKINJIDE, expressing strong support for the retention of the phrase "according to its internal law" in draft article 2, paragraph 1 (*e*), said that the "property, rights and interests ... owned, operated or otherwise used by a State" were generally regulated by the internal law of that State. That was certainly so in his own country, where the relevant provisions had even been entrenched in the Constitution. Even if the phrase in question were deleted, States would not be prevented from taking legislative measures to control such matters internally. Also, it should be borne in mind that, if the legislative bodies of various countries decided that the convention to be adopted was not in their interests, they might not sign or ratify it. In the circumstances, therefore, the words "according to its internal law" would help to make the future convention acceptable.

16. Sir Ian SINCLAIR said that the problem of defining State property was a difficult one, as was apparent from two decided cases. In the first, *Krajina* v. *The Tass Agency and another* (1949),[11] the question had been whether the Tass Agency was a separate agency or an instrument or department of the Soviet State, and it had been decided by reference to the internal constitutional law of the Soviet Union. That was a clear example of the cases in which internal law would operate to determine

[6] *Yearbook ... 1949*, pp. 287-288, document A/925, part II.

[7] For the texts, see 1942nd meeting, para. 10.

[8] See 1942nd meeting, footnote 6.

[9] See section 12 (1) of the *State Immunity Act 1978* (see 1944th meeting, footnote 6).

[10] A/CONF.117/14.

[11] *The All England Law Reports, 1949*, vol. 2, p. 274.

whether a particular agency or instrumentality was a separate entity or a department of the State.

17. In another case, more directly related to property—*the Dollfus Mieg* litigation[12] in the United Kingdom—gold bars had been seized by France, the United Kingdom and the United States of America in Germany at the end of the Second World War, because title to the bars was undetermined, and they had been deposited with the Bank of England under a contract of bailment. Proceedings had subsequently been brought by a private individual asserting title to some of the gold bars and the three Governments had pleaded immunity on the basis that they had a right to immediate possession or control under the contract of bailment, which was governed by English law. In other words, they had relied on the local law to determine that the property was in their possession or control and thus to entitle them to immunity. If a definition of State property was now included in the draft articles, it would preclude the possibility of a Government relying on local law to assert its right to immunity. In his view, that could not be right.

18. Although he did not wish to undermine the integrity of the Commission, he maintained that it could not use the experience gained in previous codification work if that experience was not relevant to the work in hand. In his view, therefore, it would be simplest to do without any definition of the property of a State, which was in any event already covered by the related concepts of property in the possession or control of a State or property in which a State had a right or interest.

19. Mr. KOROMA said that, given the division of opinion in the Commission, it would be futile to try to agree on the definition of "State property" in paragraph 1 (*e*) of draft article 2. He did not think any harm would be done to the draft as a whole if it were deleted, and in any case a definition of the term was to be found elsewhere in the draft.

20. The CHAIRMAN, speaking as a member of the Commission, noted that some members regarded paragraph 1 (*e*) of draft article 2 as useful, some objected to it and some held the intermediate opinion that the definition of the term "State property" should not be limited by a reference to internal law. In any event, the term should be given a definition that was valid from the standpoint of international law. The Commission had provided such a definition in article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[13] and it would be unfortunate now to ascribe a different meaning to the term. It might be advisable to adopt Mr. Ushakov's proposal (1946th meeting) to use the expression "property of a State".

21. The Commission must decide whether the words "according to its internal law" were to be retained. Of course, internal law came into play in some cases: Mr. Ushakov and Sir Ian Sinclair had given excellent examples. But the wording in question did not meet all cases, particularly where the rights and interests could not be localized. Consequently, if the definition of "State property" was limited by a reference to internal law, those rights and interests would be left out of account. If the Commission wished to retain paragraph 1 (*e*), therefore, it should find an expression which covered both internal and international law.

22. With regard to draft article 3, paragraph 1 (*a*), he wondered whether it was necessary to define the word "State". Mr. Jagota (*ibid.*) had pointed out that there were many instruments which did not define that term, including the draft Declaration on the Rights and Duties of States[14] and the 1961 Convention on the Reduction of Statelessness.[15] In the case in question, however, it might be better to do so, since once adopted, the convention would have specific applications, such as the execution of judgments rendered against States or State organs. For those reasons, he shared the view of those members of the Commission who advocated the inclusion of a definition, subject to improvement of the wording.

23. If the definition of the expression "judicial functions" in paragraph 1 (*b*) of draft article 3 was to be retained, the words "administration of justice in all its aspects" might suffice, possibly with a short list of examples. The two components of subparagraph (*b*) (i), "adjudication of litigation"—for which he would prefer the words *décision contentieuse* in French—and "dispute settlement", were not really different, since the second component partly covered the first, so that there would be some risk of confusion if both were retained.

24. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion, observed that, during the Commission's discussion of the topic some seven years previously, Sir Francis Vallat had urged that the decision on the question of definitions should be deferred. The Commission had heeded that advice, but had later found it necessary to adopt definitions for the terms "court" and "commercial contract". He himself had drafted a number of other definitions *ex abundanti cautela*, but had later withdrawn them in the light of the discussion. The only definition now under consideration was that of "State property" in paragraph 1 (*e*) of draft article 2.

25. He stressed the important difference in kind between the definitions in draft article 2 and the "interpretative provisions" in draft article 3. The latter article did not deal with questions of definition or terminology. Paragraph 1 (*a*) of article 3 accordingly began with the words: "the expression 'State' includes". That presentation made it clear that there was no intention of defining the term "State" in article 3.

26. Unfortunately, in the French translation of article 2, paragraph I (*a*), the original English words " 'court' means any organ of a State ..." had been rendered as *L'expression "tribunal" s'entend de tout organe d'un*

[12] See *Dollfus Mieg et Cie S.A.* v. *Bank of England* (1950) (United Kingdom, *The Law Reports, Chancery Division, 1950*, p. 333) and *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England* (1952) (*The All England Law Reports, 1952*, vol. 1, p. 572).

[13] A/CONF.117/14.

[14] See footnote 6 above.

[15] United Nations, *Treaty Series*, vol. 989, p. 175.

Etat ... . The fact that the word *expression* was used in the French text had led to some misunderstanding. He therefore wished to reiterate that article 3 contained only interpretative provisions and did not purport to define any terms as used in the draft articles.

27. It had been suggested that the words "State property" should be replaced by "property of a State" (*biens d'un Etat*). That suggestion merited consideration, especially as there were several references in the draft to the property of a State and few, if any, to "State property".

28. As to the wording of the definition in article 2, paragraph 1 (*e*), the reference to internal law raised the problem of determining which State's law was meant. That problem had not arisen in the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[16] article 8 of which referred to "property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State". The judicial precedents of various countries showed that immunity was usually granted on the basis of the internal law of the foreign State concerned. In the United Kingdom, for instance, in *Krajina* v. *Tass Agency and another* (1949),[17] immunity had been granted on the basis of a document presented by the Soviet Embassy certifying that the Tass News Agency was a State agency of the Soviet Union. That fact that the competent court would have to refer to internal law did not, of course, preclude it from referring also to private international law. That might be necessary if the title to the property was contested; the court would then have to apply the rules of private international law to determine the law governing that title.

29. He would be inclined to favour a rather simpler definition, along the following lines:

> " 'property of a State' means property, rights and interests owned by the State."

That definition could be supplemented by introducing into article 3 an interpretative provision explaining that the formula was intended to include property possessed or used by a State, and property in which it had a legally protected interest. But if that point was covered in article 22, it would not be necessary to introduce such an interpretative provision. Indeed, if the Commission so wished, he might even agree to the deletion of the definition in paragraph 1 (*e*) of article 2.

30. Referring to the interpretative provision on the expression "State" in draft article 3, paragraph 1 (*a*), he drew attention to the terms of article 7, paragraph 3, according to which

> ... a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority ...

Since that provision dealt with practically all the points he had wished to cover in paragraph 1 (*a*) of draft article 3, he would have no objection to the latter subparagraph being deleted. The similarity of coverage was illustrated further by the Commission's commentary to article 7, adopted at the thirty-fourth session in 1982.[18] The question of proceedings against political subdivisions of another State was dealt with at length in paragraphs (9) to (12) of that commentary, which made abundant use of case-law. Paragraphs (13) to (15) dealt with proceedings against organs, agencies or instrumentalities of another State.

31. The interpretative provision in draft article 3, paragraph 1 (*b*), concerning the expression "judicial functions" had been added at a later stage in the discussion on article 3, in response to suggestions by Sir Francis Vallat and Mr. Ushakov that the draft articles should cover immunity in general, rather than immunity from court jurisdiction in the narrow sense. Subparagraph (*b*) (v) was especially relevant because, in many countries, measures for the execution or enforcement of judicial decisions were within the competence of non-judicial authorities.

32. It had been suggested that draft article 4 might be deleted. He believed that it was necessary in order to safeguard the position regarding immunities that were outside the scope of the draft articles but were provided for in existing conventions. The 1961 Vienna Convention on Diplomatic Relations did not mention the immunities of diplomatic missions as such, but referred to the immunities of the members of a diplomatic mission and to the inviolability of the embassy. The practice varied in different countries. As late as 1985, it had been ruled in Italy that a foreign embassy was not a juridical person. Where the ambassador himelf was concerned, the usual distinction was drawn between acts performed in his private capacity and acts performed in his public capacity. Recently, the concept of *ambasciatore pro tempore* had been introduced, as a legal entity created by Italian law.

33. He believed that article 5 was also necessary in the draft; its wording could be left to the Drafting Committee.

34. In conclusion, he proposed that the outstanding provisions of draft articles 2 and 3 (including Mr. Ogiso's proposal for a new definition), and draft articles 4 and 5 should be referred to the Drafting Committee.

35. Sir Ian SINCLAIR proposed that the draft articles under discussion should be referred to the Drafting Committee for consideration in the light of the summing-up by the Special Rapporteur, bearing in mind the Special Rapporteur's willingness to accept the deletion of the definition of "State property" in paragraph 1 (*e*) of draft article 2, and of the interpretative provision relating to the expression "State" in paragraph 1 (*a*) of draft article 3.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 2, paragraphs 1 (*e*) and 2, draft article 3, paragraph 1, and draft articles 4 and 5 to the Drafting Committee, which would consider them in the light of

[16] A/CONF.117/14.

[17] See footnote 11 above.

[18] See footnote 3 (*f*) above.

the comments made by the Special Rapporteur and then propose to the Commission the necessary deletions or amendments.

It was so agreed.[19]

The meeting rose at 11.35 a.m.

[19] For consideration of draft articles 2, 3, 4 and 5 proposed by the Drafting Committee, see 1968th meeting, paras. 5-48.

1948th MEETING

Tuesday, 20 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/390,[1] A/CN.4/400,[2] A/CN.4/L.398, sect. D, ILC (XXXVIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 36, 37, 39 AND 41 TO 43

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 36, 37, 39 and 41 to 43 as revised by him in his seventh report (A/CN.4/400). The articles read:

[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*;

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*;

Article 12 (new commentary to paragraph 2) and articles 18 and 21 to 27, and commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session: *Yearbook ... 1985*, vol. II (Part Two), pp. 39 *et seq.*;

Articles 36, 37 and 39 to 43, referred to the Drafting Committee by the Commission at its thirty-seventh session: *ibid.*, pp. 30 *et seq.*, footnotes 123, 128, 130, 131, 133, 135 and 138.

Article 36. Inviolability of the diplomatic bag

1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other mechanical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than official correspondence, documents or articles intended for official use, referred to in article 25, they may request that the bag be returned to its place of origin.

Article 37. Exemption from customs duties, dues and taxes

The receiving State or, as appropriate, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the free entry, transit or exit of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and other related charges, other than charges for storage, cartage and other specific services rendered.

Article 39. Protective measures in case of force majeure

1. The receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag and shall immediately notify the sending State in cases of illness, accident or other events preventing the diplomatic courier from delivering the diplomatic bag to its destination, or in circumstances preventing the captain of a ship or aircraft from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State.

2. If, as a consequence of *force majeure*, the diplomatic courier or the diplomatic bag is compelled to pass through the territory of a State which was not initially foreseen as a transit State, that State shall accord to the diplomatic courier and the diplomatic bag inviolability and protection and shall extend to the diplomatic courier and the diplomatic bag the necessary facilities to continue their journey to their destination or to return to the sending State.

Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations

1. The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under these articles shall not be affected either by the non-recognition of the sending State or of its Government by the host State or the transit State or by the non-existence of diplomatic or consular relations between them.

2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the host State or the transit State shall not by itself imply recognition by the sending State of the host State or the transit State, or of their Governments, nor shall it imply recognition by the host State or the transit State of the sending State or of its Government.

Article 42. Relation of the present articles to other conventions and international agreements

1. The present articles shall complement the provisions on the courier and the bag in the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975.

2. The provisions of the present articles are without prejudice to other international agreements in force as between States Parties to them.

3. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and from modifying the provisions thereof, provided that such modifications are in conformity with article 6 of the present articles.