Document:-
A/CN.4/SR.1942

Summary record of the 1942nd meeting

Topic:
Jurisdictional immunities of States and their property

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

1942nd MEETING

Wednesday, 7 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. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Jurisdictional immunities of States and their property (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]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his eighth report on the topic (A/CN.4/396).

2. Mr. SUCHARITKUL (Special Rapporteur) said that his eighth report brought together all the draft articles so far submitted to the Commission, some of which had been adopted on first reading.

3. Taking stock of the Commission's consideration of the 28 articles constituting the five parts of the draft already submitted, he recalled that, in part I (Introduction), the Commission had provisionally adopted article 1, part of article 2 and part of article 3.

4. With regard to paragraph 1 of article 2, the Commission had provisionally adopted the definitions of the terms "court", in subparagraph (*a*), and "commercial contract", in subparagraph (*g*). The definitions proposed in subparagraphs (*b*), (*c*) and (*d*) had been withdrawn. For subparagraph (*e*), he proposed in his eighth report (A/CN.4/396, para. 34) a new definition of the term "State property", modelled on article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.[4]

5. Paragraph 2 of article 2 was pending, and he proposed that it should be referred to the Drafting Committee together with the new text of paragraph 1 (*e*). The provisions of article 2 to be referred to the Drafting Committee, therefore, read as follows:

Article 2. Use of terms

1. For the purposes of the present articles:

...

(*e*) "State property" means property, rights and interests which are owned, operated or otherwise used by a State according to its internal law;

...

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

6. Turning to article 3, paragraph 2 of which had been provisionally adopted, he had submitted in his eighth report (*ibid.*) a slightly revised and updated version of paragraph 1 as originally proposed. The main changes related to point (iv) of subparagraph (*a*) and point (v) of subparagraph (*b*). The new text proposed for paragraph 1 read as follows:

Article 3. Interpretative provisions

1. In the context of the present articles, unless otherwise provided:

(*a*) The expression "State" includes:

(i) the sovereign or head of State;

(ii) the central Government and its various organs or departments;

(iii) political subdivisions of a State in the exercise of its governmental authority; and

(iv) agencies or instrumentalities acting as organs of a State in the exercise of its governmental authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central Government;

(*b*) the expression "judicial functions" includes:

(i) adjudication of litigation or dispute settlement;

(ii) determination of questions of law and of fact;

(iii) administration of justice in all its aspects;

(iv) order of interim and enforcement measures at all stages of legal proceedings; and

(v) such other administrative and executive functions as are normally exercised in connection with, in the course of, or pursuant to a legal proceeding by the judicial, administrative or police authorities of a State.

7. Article 4 dealt with immunities provided for in other instruments. Its purpose was to fill certain gaps between the instruments mentioned therein and the

---

[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:

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 commentary 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] A/CONF.117/14.

draft articles. The original text of article 4, revised and updated in the eighth report (*ibid.*), read as follows:

Article 4. Jurisdictional immunities not within the scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to:

(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,

(ii) consular missions under the Vienna Convention on Consular Relations of 1963,

(iii) special missions under the Convention on Special Missions of 1969,

(iv) the representation of States under the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975,

(v) permanent missions or delegations of States to international organizations in general,

(vi) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973,

shall not affect:

(*a*) the legal status and extent of jurisdictional immunities recognized and accorded to such missions and representation of States or internationally protected persons under the above-mentioned conventions;

(*b*) the application to such missions or representation of States or international organizations, or internationally protected persons, of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

(*c*) the application of any of the rules set forth in the present articles to States and international organizations non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

8. Article 5 was the usual provision on non-retroactivity. He had slightly revised (*ibid.*) the original text, which now read as follows:

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby.

9. In part II of the draft (General principles), all the articles had been provisionally adopted, although article 6 had later been referred back to the Drafting Committee. In part III of the draft (Exceptions to State immunity), the Commission had provisionally adopted articles 12 to 20; only article 11 had been referred to the Drafting Committee. As for part IV of the draft (State immunity in respect of property from enforcement measures), the Commission had discussed articles 21 to 24 at the previous session and referred them to the Drafting Committee.

10. There remained part V of the draft (Miscellaneous provisions) consisting of articles 25 to 28, which he had introduced at the previous session, but which the Commission had been unable to discuss due to lack of time. Those articles read as follows:

Article 25. Immunities of personal sovereigns and other heads of State

1. A personal sovereign or head of State is immune from the criminal and civil jurisdiction of a court of another State during his office. He need not be accorded immunity from its civil and administrative jurisdiction:

(*a*) in a proceeding relating to private immovable property situated in the territory of the State of the forum, unless he holds it on behalf of the State for governmental purposes; or

(*b*) in a proceeding relating to succession to movable or immovable property in which he is involved as executor, administrator, heir or legatee as a private person; or

(*c*) in a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions.

2. No measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence.

Article 26. Service of process and judgment in default of appearance

1. Service of process by any writ or other document instituting proceedings against a State may be effected in accordance with any special arrangement or international convention binding on the forum State and the State concerned or transmitted by registered mail requiring a signed receipt or through diplomatic channels addressed and dispatched to the head of the Ministry of Foreign Affairs of the State concerned.

2. Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process with the procedure set out in paragraph 1.

3. No judgment in default of appearance shall be rendered against a State except on proof of compliance with paragraph 1 above and of the expiry of a period of time which is to be reasonably extended.

4. A copy of any judgment rendered against a State in default of appearance shall be transmitted to the State concerned through one of the channels as in the case of service of process, and any time for applying to have the judgment set aside shall begin to run after the date on which the copy of the judgment is received by the State concerned.

Article 27. Procedural privileges

1. A State is not required to comply with an order by a court of another State compelling it to perform a specific act or interdicting it to refrain from specified action.

2. No fine or penalty shall be imposed on a State by a court of another State by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which the State is a party.

3. A State is not required to provide security for costs in any proceedings to which it is a party before a court of another State.

Article 28. Restriction and extension of immunities and privileges

A State may restrict or extend with respect to another State the immunities and privileges provided for in the present articles to the extent that appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or the necessity for subsequent readjustments required by treaty, convention or other international agreement applicable between them.

11. The provisions of article 25 were necessary to cover the whole field of State immunity. It should be borne in mind that the privileges and immunities set forth in such instruments as the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations were in fact immunities of the State. It was the State that controlled their application; it was the State that was represented by the officials enjoying the immunities; and it was the State that could waive those immunities. The privileges and immunities belonged ultimately to the State represented by the officials enjoying them.

12. There were two types of immunity: immunity *ratione personae* and immunity *ratione materiae*. The first

did not survive the mission of the official concerned; it applied only during his term of office. The second covered all acts performed in the course of official functions and survived the term of office of the official concerned. It could be invoked long after the termination of office. The position was similar in regard to personal sovereigns and other heads of State. It was worth recalling that the immunities of diplomats had preceded those of sovereigns and that the immunities of sovereigns had preceded those of States.

13. In practice, there had been few cases of a personal sovereign being prosecuted after the termination of his reign. The reason was, of course, the long tenure of personal sovereigns. The cases which had occurred related to ex-sovereigns or to the wives of deceased sovereigns. In Italian judicial practice, an interesting distinction had been drawn, for reigning sovereigns, between acts performed as head of State and acts performed in a private capacity.

14. It would therefore be useful to retain in the draft articles a provision along the lines of article 25, remembering that a number of countries still had sovereigns bearing the title of Emperor or King, although in some cases they were assimilated to other heads of State. It was interesting to note that the relevant legislative instrument in the United States of America was entitled the *Foreign Sovereign Immunities Act*.

15. The remaining provisions of part V of the draft were article 26, which dealt with an important procedural matter; article 27 on procedural privileges; and article 28, which was a residual article necessary to allow some measure of flexibility in the development of State practice.

16. He had also submitted in his eighth report the final two parts of the draft articles—part VI (Settlement of disputes) and part VII (Final provisions)—not so that they could be discussed at the present session, but because, at the conclusion of its work on the topic, the Commission would no doubt wish to include provisions of that kind in the draft.

17. The CHAIRMAN suggested that the Commission should begin its work by considering draft articles 25 to 28, and invited members to express their views.

ARTICLE 25 (Immunities of personal sovereigns and other heads of State)

ARTICLE 26 (Service of process and judgment in default of appearance)

ARTICLE 27 (Procedural privileges) *and*

ARTICLE 28 (Restriction and extension of immunities and privileges)

18. Mr. RIPHAGEN pointed out that article 28 was not of a purely procedural nature. As he saw it, it was the most important article in the whole draft. It affected the legal quality of all the other articles, since its provisions would have the effect of turning all the rules in the draft into what was known as "soft law" by enabling a State to restrict without any limitation the immunities and privileges provided for in the draft articles "for reasons of reciprocity, or conformity with the standard practice of" another State.

19. It had been his understanding that, if a State refused to grant another State the immunities and privileges provided for in the draft articles, it would be committing an internationally wrongful act. Now article 28 appeared to say that such was not the case. In discussions in the Sixth Committee of the General Assembly, the Netherlands Government had expressed doubts as to whether it would be possible to arrive at a sharp distinction between cases of immunity and cases of non-immunity.[5] In fact, such a distinction had not proved possible at the regional level for the countries covered by the 1972 European Convention on State Immunity,[6] for article 24 of that Convention left a considerable grey area in that matter. The position would be even more difficult on a world-wide scale.

20. In the 1972 European Convention, provision had been made for a hard core of immunities relating to *acta jure imperii*, to which immunity always applied.There was no such provision in the proposed article 28, the provisions of which would apply in all cases. He would therefore be grateful to the Special Rapporteur for clarification on that point, in order to determine whether the provisions of the draft articles were to be regarded as "soft law".

21. Mr. KOROMA asked the Special Rapporteur whether it was necessary, in draft article 25, to use the adjective "personal" before "sovereigns". He was not aware of any sovereign that was not personal. He also wished to know whether the family of a sovereign accompanying him on an official visit would be covered by article 25. Lastly, since there were several female sovereigns, he suggested the adoption of more neutral language; for example by replacing the words "during his office" by "when in office".

22. Mr. SUCHARITKUL (Special Rapporteur) explained that State immunity was relative in character in that it could be waived at any time, at any stage of judicial proceedings, for any representative and in respect of any property or activity. The rules on State immunity were not *jus cogens* rules.

23. State immunity was also relative with regard to the practice of States, which were free to extend it beyond what was required by international law. He mentioned, in that connection, the English practice concerning the Sultan of Johore.[7] Article 28 left the door open for the granting of more extensive immunities by virtue of State practice which could eventually become a rule of law. It would assist some countries in working out regional practice beyond the requirements of customary international law.

24. He fully agreed that there was a hard core of immunities covering *acta jure imperii*, that was to say acts

[5] See *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 48th meeting, para. 48.

[6] Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

[7] See *Sultan of Johore* v. *Abubakar, Tunku Aris Bendahara and others* (1952) (*The All England Law Reports, 1952*, vol. 1, p. 1261).

performed in the exercise of governmental functions. Any failure to grant immunity in respect of such acts constituted an internationally wrongful act giving rise to State responsibility and reparation. That point was made clear by preceding articles. Article 28 referred to the so-called "grey area", in respect of which it left room for flexibility. The article was not intended to go any further.

25. Mr. McCAFFREY said that he had understood draft article 28 as covering the question of reciprocity. It reflected normal present-day State practice. States did accept that the denial of immunity did not entail international responsibility. The remedy for such a denial was not reprisals, but reciprocal denial of immunity.

26. Historically, State immunity had been granted originally as a matter of courtesy or *comitas gentium*. In the United States of America, in *The Schooner "Exchange" v. McFaddon and others* (1812),[8] Chief Justice Marshall had ruled that the jurisdiction of the sovereign within his territory was not susceptible of limitation: the jurisdiction of a State within its territory was absolute and could be limited only by the State itself. Immunity granted to a foreign State was a revocable privilege extended on grounds of courtesy, goodwill and convenience.

27. The provisions of draft article 28 were thus in line with State practice. As to the difficulty of drawing a clear distinction between cases of immunity and cases of non-immunity, he pointed out that United States legislation had not even attempted to do so. It had laid down only broad standards, leaving it to the courts to interpret them.

28. He found draft article 25 acceptable, but in view of the provisions of draft article 3, paragraph 1 (*a*) (i), defining "State" as including "the sovereign or head of State", it might not be necessary to have a separate article 25.

29. Sir Ian SINCLAIR said he agreed that, since draft article 3, paragraph 1 (*a*) (i), defined "State" as including the sovereign or head of State, the whole draft would apply to a personal sovereign or head of State as well as to the State itself. It was probably desirable, however, to have a separate provision on the sovereign or head of State and in principle he would support draft article 25. But he had doubts on two points.

30. The first was the limitation of the provisions in paragraph 1 (*a*) to immovable property, although the question of movables might be covered to some extent by paragraph 1 (*c*). The second concerned a question which had arisen in practice, namely that of the members of the household of a sovereign. In the United Kingdom, the view had been taken that immunity was personal and did not extend to the immediate family of the sovereign.

31. With regard to draft article 28, he endorsed many of the points made by Mr. Riphagen. An article of that kind was desirable for the purpose of flexibility, but it should not be made too flexible. Otherwise, it might be used to cut away the bedrock of immunity which all countries recognized as covering *acta jure imperii*. That immunity must not be reduced even on the basis of reciprocity. Lastly, article 28 would be useful when it came to the question of extension of privileges and immunities beyond what was required under international law.

32. Mr. ARANGIO-RUIZ said that, in order to be methodical, he would prefer the Commission to examine part V of the draft article by article. As to draft article 28, the only one calling for comments on his part at the present stage, although he shared the doubts expressed by Sir Ian Sinclair concerning draft article 25, he doubted the wisdom of establishing a rule that would expressly restrict the scope of the uniform legal régime. As the Commission's task was to establish by way of codification a minimum uniform régime applicable to relations between States, even though it would not be a régime assimilable to the problematic *jus cogens*, it would be inadvisable to provide expressly for the possibility of encroaching on that minimum uniform régime.

33. The possibility for States to derogate by agreement from the uniform régime would anyway be ensured by the general rules of the law of treaties.

34. Mr. REUTER said that on the whole he had no serious objections to the four draft articles under consideration, although he had a few doubts on some points, but the French version did not follow the English text closely enough and certain free translations sometimes really changed the effect of a provision. For instance, paragraph 1 of draft article 25 referred to immunity being "accorded", whereas the French text spoke of immunity being recognized; and in paragraph 1 of draft article 27 the expression "specific act" was rendered as *obligation précise de faire ou de ne pas faire*, the meaning of which was problematical.

35. With regard to draft article 25, he associated himself with the previous speakers. He was not certain of the exact scope of the words "sovereign or head of State", which needed clarification. He also had some doubt about paragraph 1 (*a*), which seemed rather general, since even in the case of immovable property owned by the State, immunity from jurisdiction could not be invoked in a dispute about the actual determination of title to the property. Whether that should perhaps be indicated in the commentary was another problem. Paragraph 2 of article 25 gave the impression that immunity from execution was not so wide as immunity from jurisdiction, and it would be advisable for the Special Rapporteur to give further details on that point.

36. Draft article 26, which was very important, caused him a little anxiety, since if a person summoned to appear in court did not wish to do so, it was sufficient for him to refuse service of any notice. The very flexible rule in paragraph 1 of article 26 might involve some dangers and, for safety's sake, it might be better simply to say that process must always be served through diplomatic channels.

37. In the case of draft article 27, he understood the Special Rapporteur's intention to exempt States from

[8] W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, vol. VII, 3rd ed. (New York, 1911), p. 116, at p. 136.

the obligation to comply with any decision other than one requiring payment. The provision was, in some sort, a transposition of the rules to be found in the internal law of certain countries under which the public authorities could not be required to perform any act other than payment. The provision should not be interpreted as protecting the State from the obligation to pay. There remained a drafting problem in paragraph 1 of the French text, since the obligation *de faire ou de ne pas faire* generally excluded payment.

38. In connection with draft article 28, it had been suggested that the draft could be classed as *jus cogens*; but those words should not even have been mentioned, since, rightly or wrongly, they terrified certain States. In any case, it was certain that nothing in the draft articles was *jus cogens*. Article 28 raised two questions: the question of reciprocity—on which it should only be said that the provisions applied without prejudice to the rules applicable to reciprocity—and the more delicate question of other treaties. Certain general conventions permitted bilateral agreements between States parties to them only if such agreements followed certain lines. That was true of the 1963 Vienna Convention on Consular Relations. In the present case, should the immunities or conversely the exceptions to them be extended? He had no objection to the solution proposed by the Special Rapporteur, but if other members of the Commission objected it would be better not to deal with that question but to refer to the provisions of the law of treaties, which was sufficiently obscure to permit any solution. It was subject to that reservation that he approved of draft article 28.

39. Chief AKINJIDE said that he had no basic objection to the four draft articles under consideration, all of which should, in his view, be retained subject to certain drafting changes. He agreed that, to remove all doubt, the words "movable and" should be added before "immovable" in paragraph 1 (*a*) of draft article 25. Articles 26 and 27 would go a long way towards solving many of the problems encountered by missions abroad, particularly those of the developing countries. Draft article 28, which he viewed from the economic rather than the diplomatic or political angle, would also allay many of the fears expressed concerning article 19.

40. Mr. RIPHAGEN, refering to draft article 25, in connection with the question of immunity from jurisdiction accorded to members of the families of sovereigns and heads of State, drew the Commission's attention to the many problems that could arise as regards legal relationships outside the patrimonial ones dealt with in the exceptions to immunity in paragraph 1 of the article.

41. Sir Ian SINCLAIR said that the only major problem concerning draft article 26 related to paragraph 1, which specified three methods by which service might be effected. While there was no problem about the first and third of those methods, the second method, whereby a writ or other document could be "transmitted by registered mail requiring a signed receipt", did present difficulties. There had been instances when the receipt of a writ initiating proceedings had created enormous problems in foreign ministries, particularly for people who were not lawyers and where there might not have been immediate access to a lawyer. If the second option were retained, therefore, the kind of receipt required and the person who signed it should be specified more clearly.

42. Paragraph 1 of draft article 27 struck him as being a little odd. The Commission had already come to the view that it might be wiser to refer to measures of constraint, which would include what, in the United Kingdom, were known as interlocutory injunctions or, in other words, orders "interdicting [a State] to refrain from specified action". There was also in English law what was termed an order for specific performance, which was presumably what the Special Rapporteur had had in mind when using the phrase "compelling it to perform a specific act". Since it was obviously not possible, in a set of international draft articles, to use language that was relevant to only one legal system, he wondered whether paragraph 1 was really necessary and whether the point about injunctions and orders for specific performance could not, instead, be covered in the commentary to article 22.

43. Mr. OGISO said he agreed that, in draft article 25, a more specific reference should be made to the family of the personal sovereign. That point could be dealt with in the Drafting Committee.

44. He also agreed that draft article 28 was too flexible. In particular, he had some difficulty with the phrase "or conformity with the standard practice of that other State". While he accepted the principle of reciprocity, he thought that, if the standard practice of any State could be invoked as a ground for restricting or extending immunities, it would complicate matters and make the future convention too flexible. That point, too, might require consideration by the Drafting Committee.

45. Mr. PIRZADA said that he was in favour of retaining draft article 25, provided that paragraph 1 (*a*) (i) of draft article 3, which included the sovereign or head of State under the definition of "State", was deleted. The retention of article 25 was desirable in the light not only of past practice, but of the jurisprudence of certain countries. For instance, while the Supreme Court of India had held, in a decided case, that the sovereign was synonymous with the State, the Supreme Court of Pakistan had dissented from that view, holding in *A. M. Qureshi* v. *Union of Soviet Socialist Republics* (1981)[9] that the State and the sovereign were different legal persons and should be treated separately. In any set of draft articles on the immunities of States, therefore, both sovereigns and heads of State should be covered.

46. With regard to drafting, he suggested that throughout article 25 the word "personal", before "sovereign", should be deleted. In paragraph 1 (*a*), the proposal to add the words "movable and" could be met by simply deleting the word "immovable", so that the phrase would read "relating to private property". He was not sure whether the term "commercial activity" should be retained in paragraph 1 (*c*), especially as it had been replaced in earlier articles by the term "com-

[9] *International Legal Materials* (Washington, D.C.), vol. XX (1981), p. 1060.

mercial contract". He too considered that some reference should be made to orders for specific performance and interlocutory injunctions, as indeed also to Mareva injunctions, all of which were known to India and Pakistan.

47. He agreed that draft article 28 was too flexible and that it required further consideration. For the time being, his inclination would be to retain those parts that related to reciprocity or conformity with the standard practice of the other State.

48. Mr. TOMUSCHAT said that, as he read it, draft article 25 covered the private activities of a personal sovereign or head of State so long as those activities were not of a professional or commercial nature. Where a sovereign or head of State acted in his official capacity, his acts would be attributed to the State, and it was the State as such that would have to be sued. Article 25, therefore, applied only in cases where the plaintiff sued the head of State or sovereign in his personal capacity, and the basis of the action would have to be some personal activity of the sovereign or head of State.

49. As to whether article 25 should be extended to other persons, he had noted that article 1 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents referred not only to a head of State, but also to a head of Government or Minister for Foreign Affairs. Draft article 25, however, rested on a traditional basis and it would perhaps be unwise to enlarge its scope *ratione materiae* to other persons.

50. He shared Sir Ian Sinclair's doubts about paragraph 1 of draft article 26. The words "may be" were perhaps too loose and should be replaced by the words "may only be" or "shall be".

51. Draft article 27 required some adjustment, because the wording of paragraph 1 was inconsistent with the draft articles on enforcement measures.

52. He also shared the doubts expressed with regard to draft article 28. In his view, the model to be followed was article 47, paragraph 2 (*a*), of the 1961 Vienna Convention on Diplomatic Relations, under which reciprocity was specifically confined to what could be termed "grey areas".

53. Mr. LACLETA MUÑOZ said he thought that draft article 25 was necessary because it dealt not with the immunities accorded to the head of State as an organ of the State (draft article 3, para. 1 (*a*) (i)), but with the immunities he enjoyed *ratione personae*. Moreover, if it were decided to delete article 25 as being superfluous in view of the provisions of article 3, paragraph 1 (*a*), there would no longer be any mention anywhere of the principle of the immunity of the sovereign or head of State from criminal jurisdiction, since that principle did not follow from any other provision of the draft.

54. As to the field of application of article 25, he did not think it should be extended to cover heads of Government or prime ministers. For although, even in customary law, the head of State enjoyed personal immunity of a very special type, the same was not true of the other representatives of the State. Subject to a few drafting changes, article 25 was thus quite satisfactory.

55. Draft article 28 raised more problems. If the success of the work on jurisdictional immunities depended on that article, he could of course bring himself to accept it; but he would much prefer the Commission to leave it aside for the time being and study the possibility of amending its formulation. In his view the article should be confined to mentioning the legitimate principle of reciprocity and should refer, for the rest, to the relevant provisions of the 1969 Vienna Convention on the Law of Treaties.

56. Mr. REUTER said that the comments by Mr. Lacleta Muñoz on criminal jurisdiction had made him wonder whether, if national courts had to try crimes against humanity, sovereigns and heads of State would enjoy immunity. That aspect of the question should be dealt with, if only in the commentary.

The meeting rose at 1 p.m.

1943rd MEETING

Monday, 12 May 1986, at 10.05 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. Jagota, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov.

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]

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

ARTICLE 25 (Immunities of personal sovereigns and other heads of State)

[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:

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.