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Summary record of the 1943rd meeting

Topic:
Jurisdictional immunities of States and their property

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

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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 RAPporteur³ (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.

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)⁴ (*continued*)

1. Mr. MALEK said that draft article 25 was very important, in that it tended to supplement the codification conventions which were not concerned specifically with the immunities dealt with in the draft articles under consideration. That was why, at the Commission's previous session, he had wondered why the immunities dealt with in article 25 were, so to speak, concealed in a part of the draft entitled "Miscellaneous provisions".⁵ The difficulties referred to in that connection in the Special Rapporteur's seventh report (A/CN.4/388, para. 118) could be overcome by amending the title of part V to show that it was concerned with immunities not dealt with in earlier parts, namely the immunities of heads of State, including, of course, sovereigns.

2. It was good that draft article 25, taking account of both theoretical and practical considerations, dealt specifically with the immunities of sovereigns. The existing codification conventions did not appear to do so. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, for example, referred in article 1, paragraph 1 (*a*), only to a "Head of State", a term which covered "any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned". The title of draft article 25 could be taken to mean that the person of the head of State and that of the sovereign were two distinct entities, each with his own immunities. It would be preferable to use the words "Immunities of sovereigns or other heads of State". Although the expressions "personal sovereign or head of State" and "property of a personal sovereign or head of State", used in paragraphs 1 and 2, respectively, could be formulated differently, it was desirable to leave them as they were. The Commission would contribute greatly to reducing

or even preventing tragedies by taking care not to offend the susceptibilities of States and respecting their individual characteristics.

3. The Special Rapporteur was aware of all the theoretical and practical difficulties of the topic for which he was responsible and was endeavouring to cope with them by proposing solutions which he regarded as legally sound and politically desirable. Draft article 28 was a basic proposal which the Special Rapporteur believed might meet with general approval by reason of his conception of the rule of immunity in the light of practice. He had repeatedly stated that, on the basis of practice, it was possible to identify a principle of immunity that had never been considered as an absolute principle, or as being *jus cogens*, or as reflecting a peremptory norm. The Commission had consistently endeavoured to limit the scope of that principle, its affirmation of which was subject to many exceptions.

4. It was easy to maintain and defend the proposition set out in draft article 28. But, as that article was conceived and explained in the seventh report (*ibid.*, paras. 135-136), was it not intended basically to provide for optional application of the rule of immunity in all cases where it would normally be applicable? If such was in fact the case, article 28 would introduce into the draft an element of progressive development of international law.

5. Mr. FLITAN reminded the Commission that, at its previous session, a number of members had expressed reservations on draft article 25. Yet the Special Rapporteur had still not convinced all members of the need for that provision. It did not concern all persons exercising responsibilities for the State, such as the prime minister, the minister for foreign affairs, and the general secretary of the communist party in some States, who at times performed functions more important than those of the head of State himself. Had not the meeting between the General Secretary of the Communist Party of the Soviet Union and the President of the United States of America been described as a "summit"? The scope of draft article 25 should therefore not be limited to personal sovereigns and heads of State *stricto sensu*. The matter was more complex than the proposed article implied.

6. He would be inclined to delete draft article 25 and retain draft article 3. If, despite his arguments, draft article 25 was to be retained, a number of drafting amendments would be called for. Was the word "office" in the first sentence of paragraph 1 the most appropriate word? Was it correct to refer in that sentence to "criminal and civil jurisdiction" and, in the second sentence, to "civil and administrative jurisdiction"? In the second sentence of paragraph 1 of the French text, the idea of recognition should be replaced by that of attribution. In addition, movable property should be referred to in paragraph 1 (*a*).

7. With regard to draft article 26, he shared the view of those members of the Commission who had proposed that only one of the various ways of serving process mentioned in paragraph 1 should be retained, namely notification addressed to the Ministry of Foreign Affairs of the State concerned. In paragraph 3, concerning

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, para. 10.

⁵ See *Yearbook ... 1985*, vol. I, p. 264, 1921st meeting, para. 38.

judgments rendered in default, it would be well to prescribe a minimum period.

8. Draft article 27 presented only drafting problems, as already noted by several members of the Commission.

9. Draft article 28, however, raised a number of difficult points and was unacceptable as it stood. In his eighth report (A/CN.4/396, paras. 6 and 58-59), the Special Rapporteur had quite rightly raised a cry of alarm about the urgent need for a convention on jurisdictional immunities of States and their property. In its current form, however, article 28 actually called the whole draft into question, even though the exceptions provided for in articles 12 to 20 had already given rise to strong objections. Why, then, raise a cry of alarm? In his own view, it was essential to guarantee in a convention minimum privileges and immunities on to which a number of exceptions would be grafted. However, if States were permitted to encroach unilaterally on that minimum guarantee, what would be the use of a convention?

10. In conclusion, he pointed out that, in the Manila Declaration on the Peaceful Settlement of International Disputes,⁶ the General Assembly had called on States to "include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes ..." (sect. I, para. 9). The draft articles on jurisdictional immunities should therefore contain one part devoted to that matter.

11. Mr. RAZAFINDRALAMBO said that he approved of the idea of a special article on the immunities of personal sovereigns and other heads of State, although draft article 3, paragraph 1 (a) (i), already assimilated them to the State itself. Moreover, it was that assimilation of principle that explained why paragraph 1 (a) of draft article 25, which was the counterpart of paragraph 1 (a) of article 15, referred only to a proceeding relating to private immovable property and did not appear to be extendible to private movable property. It was noteworthy that paragraph 1 (b) and (c) of draft article 25 corresponded to paragraph 1 (b) of article 15, just as paragraph 1 (c) reiterated the principle on which the exception to immunity provided for in article 12 was based.

12. Draft article 26 presented no difficulty in so far as the proceeding was instituted against the State itself. The most common method of service in such cases was to notify the minister for foreign affairs, as the legal representative of the Government at the international level. But, in addition to the three methods provided for in paragraph 1, consideration might be given to service by a process server, which was common in proceedings of the French type. In cases where the plaintiff was an entity having separate legal personality, or a subdivision of the State, the writ or summons, particularly if issued by a judicial authority, should be delivered by a process server.

13. The extension of the period of time provided for in paragraph 3 of draft article 26 raised a difficult problem, since it was important to avoid any uncertainty and prevent the judge from using discretionary powers. It was necessary, therefore, to stipulate the applicable time-limits and provide, for example, that the rules for the computation and extension of time-limits would be those in effect in the court of the forum State. Those comments also applied to paragraph 4, which dealt with the time-limit for applying to have a judgment set aside.

14. Draft article 27, paragraph 1, should be brought into line with the general principle of administrative law that a court could not issue any injunction against a State in the case of a dispute concerning action *ultra vires*.

15. He understood the misgivings caused by draft article 28. In the present state of international relations, there could be abuses of restriction of the immunities and privileges of some States at the discretion of the author State. It would be advisable, therefore, to include a provision regulating the power of restriction and extension of immunities and privileges. But, to make it clear that the list of reasons which could be invoked in support of a limitation of immunities and privileges was not merely indicative, it might be wise to use more restrictive wording, stipulating for example that "No State may restrict or extend with respect to another State the immunities and privileges recognized in the present articles, except in so far as ...".

16. In conclusion, he congratulated the Special Rapporteur for having successfully performed the task entrusted to him by submitting a last report (A/CN.4/396) which, like his previous reports, demonstrated his mastery of the topic.

17. Mr. JAGOTA said that the main point to be decided in regard to article 25 was whether it was necessary and desirable to include it in the draft. The Special Rapporteur had concluded that the article "appeared absolutely necessary for historical and practical reasons" (A/CN.4/396, para. 41), but had confined it to the immunities of heads of State *ratione personae*, which subsisted during their tenure of office, with certain recognized exceptions. Since the wording of draft article 25 was apparently based on article 31 of the 1961 Vienna Convention on Diplomatic Relations and other similar provisions, the immunities of sovereigns and heads of State *ratione materiae* would presumably be covered by other articles on State immunity. That distinction perhaps explained why the Special Rapporteur had decided to draft article 25 and to include the sovereign or head of State in the definition of "State" in draft article 3, paragraph 1 (a) (i).

18. There remained the question whether the personal immunities of the sovereign or head of State, which were limited in scope, could not be covered by customary international law or comity of nations, either by making an appropriate amendment to draft article 4 or by adding a provision to clarify the position. If, however, it were decided to retain draft article 25—and he was not altogether opposed to its retention—some further points would have to be considered.

⁶ General Assembly resolution 37/10 of 15 November 1982, annex.

19. The first question was whether the exception provided for in article 25, paragraph 1 (a), should be restricted to "private immovable property situated in the territory of the State of the forum" or whether it should also cover private movable property. His own view was that paragraph 1 (a) should be retained as drafted because the fact that movable property of a sovereign or head of State which fell under paragraph 1 (b) or 1 (c) would not enjoy immunity should provide an adequate safeguard. The same would apply to an ambassador under article 31, paragraph 1 (a), of the 1961 Vienna Convention.

20. Another point which could be considered by the Drafting Committee was whether the words "commercial activity", in paragraph 1 (c), should be replaced by "commercial contracts", which appeared in article 12 and elsewhere in the draft. The matter should not cause much difficulty, since the words "commercial activity" appeared in article 31, paragraph 1 (c), of the 1961 Vienna Convention.

21. The Drafting Committee should also consider the scope and meaning of the terms "sovereign" and "head of State", in connection with which attention had already been drawn to article 1 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, in which "head of State" had been defined in rather broad terms. It would also be necessary to consider whether the terms in question covered members of the family of the sovereign or head of State, his staff and private servants, and whether separate provisions were needed on the inviolability of his person and residence, or whether paragraph 2 of draft article 25 would suffice. Was it also necessary to specify that a sovereign or head of State was not obliged to give evidence as a witness? All those points were covered in the 1961 Vienna Convention.

22. He agreed that, for the sake of clarity and conformity with draft article 3, paragraph 1 (a) (i), the word "personal" should be deleted from the expression "personal sovereign" throughout article 25.

23. In connection with an observation made by Mr. Pirzada at the previous meeting, he pointed out that section 86 of India's Code of Civil Procedure, as amended,⁷ provided expressly for suits against a foreign State, that provision being taken to cover the ruler of a foreign State. The word "ruler", rather than "sovereign", was used in Indian law, and was defined in section 87A, subsection (1) (b), of the Code of Civil Procedure as the person who was for the time being recognized by the central Government as the head of State.

24. Turning to draft article 26, concerning service of process, he suggested that paragraph 1 should be redrafted to provide for recourse in the first instance to diplomatic channels, save where special arrangements or binding international conventions provided otherwise. In the absence of such diplomatic channels or other agreements or conventions, service could be ef-

fectured by registered mail requiring a signed receipt and addressed to the head of the Ministry of Foreign Affairs of the State concerned.

25. The last part of paragraph 3 of article 26, reading "and of the expiry of a period of time which is to be reasonably extended", would be improved if reference were made to a specific period. A period of two months, for example, could be specified, as suggested in the Special Rapporteur's seventh report (A/CN.4/388, para. 127), or any other appropriate period.

26. Paragraph 1 of draft article 27, which was based on the original text of draft article 22, could perhaps be reviewed by the Drafting Committee in the light of the revised draft article 22 which the Special Rapporteur had submitted to the Commission at its previous session.⁸ The scope of paragraph 3 of article 27 should also be reviewed, to determine when costs should be payable.

27. It had been said that draft article 28 was unduly flexible and that it constituted "soft law". He therefore considered that the questions of the restricted and extended application of the draft articles should be separated and dealt with in two different paragraphs. The question of restricted application could not, of course, arise in the case of the rule or principle of State immunity laid down in article 6 and, to make that quite clear, he suggested that the phrase "without prejudice to the provisions of article 6" be included in the paragraph on restricted application. The extended application of the draft articles would, however, be much wider in scope and need not be made subject to article 6.

28. Lastly, to ensure that any action by way of reciprocity was not disproportionate, he suggested that the phrase "to the extent that appears to it to be appropriate" should be deleted, as suggested by Mr. Razafindralambo, or amended.

29. Mr. USHAKOV said that draft article 25 was not only unnecessary, but dangerous, since it derogated from well-established rules and conventions, some of which had been originated by the Commission and a number of which had entered into force. In the 1969 Convention on Special Missions, for example, article 21 dealt with the status of the head of State and persons of high rank, and it was the status of the latter that he wished to stress particularly. Paragraph 1 of article 21 of the 1969 Convention also referred to the facilities, privileges and immunities accorded by international law, while article 31 concerned the immunity from jurisdiction accorded to representatives of the sending State, including heads of State, when leading a special mission. The 1969 Convention thus regulated the matters covered by draft article 25. But they were also dealt with in the 1975 Vienna Convention on the Representation of States, from the standpoint of the privileges and immunities accorded to representatives of States in their relations with international organizations of a universal character. Article 50 of the 1975 Vienna Convention dealt with the status of the head of State and persons of high rank who were heads or members of delegations. It was stipulated in paragraph 1 of that article that:

⁷ India, *The Code of Civil Procedure, 1908 (As modified up to the 1st May 1977)*, pp. 32-33.

⁸ *Yearbook ... 1985*, vol. II (Part Two), p. 57, footnote 206.

1. The Head of State or any member of a collegial body performing the functions of Head of State under the constitution of the State concerned ... shall enjoy ... in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law to Heads of State.

Clearly, therefore, there already existed rules applicable to immunities and privileges accorded to heads of State and other persons of high rank in the territory of a receiving State.

30. In addition to being unnecessary, draft article 25 raised difficulties. Did the personal sovereign or head of State enjoy immunity from criminal and civil jurisdiction only “during his office”? Did a former head of State leading a special mission or delegation not have immunity? As to the immunity from criminal jurisdiction mentioned in paragraph 1, he wondered what crimes were contemplated: crimes committed by the head of State in his own country—which would be subject to internal law—or crimes committed in the territory of the forum State? In the case of crimes against the peace and security of mankind, one of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,⁹ namely Principle III, read:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

31. In the circumstances, he held to his view that draft article 25 was unnecessary and dangerous, since it ran counter to well-established rules. Moreover, he did not see why draft articles on State immunities should deal with the immunities of persons representing the State, which was a matter covered by other conventions, including the 1961 Vienna Convention on Diplomatic Relations.

32. Draft article 26 was in flagrant contradiction with article 9 as provisionally adopted and should be completely recast. It was difficult to see how the mere fact of “service of process by any writ or other document instituting proceedings against a State” could impose obligations on that State. But that was what followed from draft article 26, particularly from paragraph 3, which provided that a court could render judgment in default of appearance against a State on proof of compliance with paragraph 1. A court of one State could take decisions about another State only exceptionally, when that State could not invoke immunity, that was to say in the cases mentioned in paragraph 1 of article 9. There could be no question of making a general rule of what was only an exception; and since the rule was that States enjoyed immunity, service of process could not produce any effects for them. Hence he did not understand the purpose of paragraph 1 of draft article 26 and asked that the article should be reconsidered by the Commission in the light of article 9.

33. Draft articles 26 and 27, which dealt with judicial procedure, raised a number of difficulties, particularly in regard to terminology. The terms used in the original

English text related solely to the judicial procedure of the United Kingdom and were thus too specific. That applied, for example, to the expression “by way of committal” in article 27, paragraph 2, which had no real equivalent in the other languages.

34. In the title of draft article 27 it would be more correct to refer to “procedural immunities” than to “procedural privileges”. In paragraph 1 of the English text, the terms “specific act” and “specified action” were too vague: their scope should be defined. Either the text of the paragraph could be reformulated, or the meaning to be given to the terms used therein could be defined in article 2 of the draft. It was stated in paragraph 2 that “No fine or penalty shall be imposed on a State by a court of another State by way of committal ...”. Since a penalty could never be imposed on a State, it might be asked whether it was the representative of the State in court who was referred to and whether he should not be expressly mentioned. He also thought there was some contradiction between paragraphs 1 and 2. For as it was worded paragraph 2 suggested that, contrary to what followed from paragraph 1, the courts could impose an obligation on a State. Nevertheless, subject to changes in terminology, he was prepared to accept paragraph 2 in principle. Paragraph 3 raised no problems for him.

35. Turning to draft article 28, he observed that the restriction of immunities and privileges resulting from a treaty, convention or other international agreement between States need not be considered. For as the Commission had implicitly recognized by provisionally adopting article 8, the general rule of the immunity of States and their property was not a peremptory norm, so that States could always derogate from it, in particular by international agreements. The expression “for reasons of reciprocity” was quite out of place. For while the extension of immunities was a positive measure which a State could decide to take in favour of another State for reasons of reciprocity, the same did not apply to restriction of immunities, which was a negative measure taken unilaterally.

36. The wording of draft article 28 should therefore be amended to establish a very clear distinction between measures to extend immunities and measures to restrict them, which were in fact countermeasures, and to introduce the idea of non-discrimination, as did article 47 of the 1961 Vienna Convention. That article, which would be a useful guide, provided in paragraph 2 only that:

2. ... discrimination shall not be regarded as taking place:

(a) Where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;

(b) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 47 left aside the question whether such measures were lawful or constituted an internationally wrongful act engaging the responsibility of the State or States concerned.

37. Mr. BOUTROS GHALI said that, if the Commission decided to retain draft article 25, it should extend the application of that article to heads of Government so as to conform to current practice.

⁹ *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127.

38. Since the postal service in a large part of the world was very unreliable, it would be better not to mention registered mail in draft article 26, paragraph 1, and to provide only for service of process through diplomatic channels.

39. In draft article 28, a distinction should be made between measures restricting immunities and measures extending them. That distinction could be made according to the nature of the measures taken (measures of restriction or measures of extension), or according to how the measures were adopted (measures taken unilaterally or measures taken under international agreements).

40. Mr. CALERO RODRIGUES said that he shared the doubts of other speakers about the utility of article 25, and especially about the question whether an article on sovereigns and heads of State had any place in draft articles on State immunity. There were only two possibilities. Either the immunities of the sovereign or head of State derived from his position as an organ of the State, in which case the provisions of draft article 3, paragraph 1 (a) (i), would suffice; or his immunities were personal immunities, in which case it was difficult to see why they should be mentioned in the draft.

41. The existence of such personal immunities was undeniable and several international conventions expressly recognized them. But if the draft articles were to deal with them, it would be necessary to codify the applicable rules, including those dealing with the family and servants of a sovereign or head of State. Clearly, it would be inappropriate for the draft articles to go into such details.

42. It had been suggested that the reference to the sovereign or head of State should be deleted from draft article 3 and that suggestion was a reasonable one. In fact, the reference was unnecessary, because the head of State was an organ of the central Government.

43. If the majority of the Commission wished to retain draft article 25, the drafting should be improved. For example, the adjective "personal" before "sovereigns" should be deleted. He felt strongly, however, that the article should be deleted entirely. It would then be necessary to amend draft article 4 so as to include a reference to sovereigns and heads of State as persons to whom the present articles did not apply—an exclusion which would not affect their status and rights under international law.

44. With regard to draft article 26, he agreed with Mr. Boutros Ghali that the reference to service by registered mail should be deleted. It was important that a State be notified of a proceeding against it in another State, and that should be done through diplomatic channels. Process could be served through diplomatic channels even if the two countries concerned did not have direct diplomatic relations.

45. As to draft article 27, he had no objection to Mr. Ushakov's suggestion that the title "Procedural privileges" be replaced by "Procedural immunities", but he did not agree that article 27 would affect the rule in article 9. Article 27 dealt with practical procedural matters and set out certain advantages which it was

perfectly appropriate to extend to foreign States. For example, a State could never be required to provide security for costs; hence the provisions of paragraph 3. Similarly, a foreign State should be exempted from the fines and penalties normally applicable in case of failure to produce documents for the purposes of a proceeding; hence the provisions of paragraph 2. Paragraph 1, however, was couched in unduly broad terms and could make proceedings meaningless. He was not at all convinced by the explanations on that point given by the Special Rapporteur in his seventh report (A/CN.4/388, para. 131).

46. Draft article 28 dealt with the restriction and extension of immunities and privileges. No difficulty arose in regard to extension; there would be no objection to a State extending to another State greater immunities and privileges than those specified in the draft articles. Restriction of immunities and privileges would cause no difficulty either if it was effected by agreement between the States concerned. Obviously, two States could agree between themselves to apply a more restrictive system than that set out in the draft articles.

47. A different situation arose in the event of action by way of reprisal or reciprocity. A provision might permit of two different interpretations: restrictive and extensive. The fact that one State applied a restrictive interpretation could lead the other to do the same in relations between them. That was more a matter of countermeasures than a matter of reciprocity. The reasoning would be the same in the event of restriction of immunities and privileges for reasons of "conformity with the standard practice" of the other State.

48. On the presentation of draft article 28, he agreed with those members who had urged that restriction and extension should be treated separately. He also agreed with Mr. Tomuschat (1942nd meeting) that article 47 of the 1961 Vienna Convention on Diplomatic Relations could serve as a model when redrafting article 28.

49. In conclusion, he suggested that draft articles 26 to 28 should be referred to the Drafting Committee with any changes suggested by the Special Rapporteur in the light of the debate. As to draft article 25, the Commission should first decide whether it wished to retain the article; if so, it could also be referred to the Drafting Committee.

50. Mr. BALANDA said he did not think that draft article 25 served any useful purpose. The Commission should confine itself to the jurisdictional immunities of States without going into immunities accorded to heads of State or personal sovereigns. If the majority of the members of the Commission thought it necessary to retain the article, however, he would prefer its field of application to be extended to heads of Government, in conformity with present practice, for instance, in OAU. He would also like the first sentence of paragraph 1 to mention immunity from administrative jurisdiction expressly, as did the second sentence.

51. As to the terminology used in article 25, he suggested that, in paragraph 1 (a), (b) and (c), the word "proceeding" should be rendered in French by *action*

en justice, which was the term used in the 1961 Vienna Convention on Diplomatic Relations.

52. In draft article 26, the Commission should avoid using too specific terms which might not correspond to the judicial procedure of all countries. The title of the article should be redrafted, since the expression *actes introductifs d'instance* was too restrictive.

53. In paragraph 1, on service of process, although postal services might be unreliable, he thought it advisable to retain the reference to registered mail requiring a signed receipt in addition to service through diplomatic channels, which should be addressed not to the minister, but to the Ministry of Foreign Affairs. For unlike a *note verbale* addressed to the Ministry of Foreign Affairs, a registered letter provided proof that process had been served on the addressee on a particular date, which made it possible to calculate time-limits.

54. The text of paragraph 2 should be redrafted, for it was not correct to say that "Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process ...".

55. Paragraph 3 provided that the period allowed a State for appearance was to be reasonably extended. But in internal law such time-limits took various forms: number of clear days, date fixed in advance, etc. If it was specified that the period should be extended, the draft article might be in conflict with the code of civil procedure of some particular country, which might provide that the time-limit was so many clear days or up to a fixed date. Hence the text should not go into details, but should be confined to a reference to the codes of civil procedure of States. With regard to the time-limit referred to in paragraph 4, he reminded the Commission that it had been proposed at the previous session that the period should be two months.

56. As to draft article 28, if States were allowed to restrict the very limited immunities provided for in the other articles, the whole of the draft on jurisdictional immunities, to which the Commission had already devoted so much effort, would become meaningless. Furthermore, a rule of non-discrimination should be expressly stated in the draft article.

57. Lastly, with regard to the possibility of including provisions on the settlement of disputes in the draft, he noted that the conventions and draft articles prepared by the Commission did not all contain such provisions. In the case of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, for example, Mr. Yankov, the Special Rapporteur, had not considered it necessary to provide machinery for the settlement of disputes. The Commission would therefore have to take a very definite line on that question and adhere to it. It could either choose to include provisions on the settlement of disputes in all the drafts it prepared or decide once and for all not to include such provisions. If the former course were adopted, of the draft articles proposed for part VI only draft article 32 could be retained.

The meeting rose at 1.10 p.m.

1944th MEETING

Tuesday, 13 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. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov

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 RAPporteur³ (continued)

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)⁴ (concluded)

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 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, para. 10.