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Summary record of the 1944th meeting

Topic:
Jurisdictional immunities of States and their property

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

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. Lacleta 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 RAPPORTEUR[3] (*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.

1. Mr. McAFFREY said that he had some comments to offer on draft articles 26 and 27, on which he had not spoken in his earlier statement (1942nd meeting).

2. Draft article 26, on service of process, was necessary in order to provide guidance as to how to serve process on foreign States. Usually, there was some hesitation as to whether process was to be served on the minister for foreign affairs or on the embassy of the foreign State concerned. In the United States of America a private lawyer often did not know how to effect service on a foreign State and attempts had been made to serve process on the embassy of the State concerned. Since 1976, however, the *Foreign Sovereign Immunities Act*[5] of that date had required (sect. 1608) that service be made in other ways, very similar to those set out in paragraph 1 of draft article 26.

3. He found the text of article 26 generally acceptable, but supported the suggestion by Mr. Tomuschat (*ibid.*) that, in paragraph 1, the word "may" should be replaced by "shall" in order to make it clear that the methods of service specified were the required ones. Otherwise, litigants might try to resort to other methods. He suggested that the methods indicated in paragraph 1 should be listed in hierarchical order. It would thus be clearly shown that the first method to use was "any special arrangement" between the forum State and the other State concerned; if there was no such arrangement, the method should be in accordance with "any international convention" binding on both States; finally, if no such instrument existed, service should be effected by registered mail or through diplomatic channels.

4. The use of registered mail or diplomatic channels raised the question of determining to whom the process should be addressed and dispatched. His own understanding was that it should be addressed to the head of the Ministry of Foreign Affairs. It should not simply be addressed to that ministry, because any clerk could then sign the receipt—an operation which would constitute effective service.

5. When service was effected by registered mail or through diplomatic channels, it would be advisable to require the summons and other papers in the case to be translated into the official language of the foreign State concerned. If that were not done, it might take some time for the foreign State to find out what the suit was about. Meanwhile the receipt would have been signed and service validly effected. He agreed with Mr. Razafindralambo (1943rd meeting) that the documents should be dispatched by a clerk of the court of the forum State rather than by a private litigant, in order to make clear the official nature of the documents.

6. Doubts had been expressed about the advisability of allowing service by registered mail because of the unreliability of the post in some countries. He saw no objection to dispatch by registered mail: so long as the papers were addressed to the head of the Ministry of Foreign Affairs and a signed receipt was required, no problem would arise. If the document did not reach its destination, or if it reached its destination but the receipt was not returned to the sender by the post office, the position would be that service had not been effected. Of course, registered mail must always be viewed as a subsidiary means of service, to be used failing other methods.

7. Turning to draft article 27, he noted that paragraph 1 concerned what was known in his country's legal system as injunctive relief. Such relief could be of two kinds: an affirmative order to perform certain acts, or a negative order to refrain from certain conduct. It was worth noting that, even in litigation between private individuals, United States courts were very hesitant to order affirmative relief.

8. Like Mr. Ushakov (*ibid.*), he thought that paragraph 1 needed clarification, for it was couched in unduly general terms. As far as affirmative orders were concerned, there were certain forms of relief against a foreign State that could be sought from a court. For example, a foreign State could be ordered to comply with an arbitration agreement. It should also be possible to order a foreign State to perform a contract, for example for the delivery of goods—the alternative being payment of compensation. A negative order might be an order not to remove property or assets from the territory of the forum State.

9. As to the wording of paragraph 1, he suggested that a saving clause be introduced concerning orders relating to property, to cover the situation dealt with in draft article 22. It could take the form of an opening proviso such as: "Without prejudice to orders relating to property". He further suggested that the words "other than the payment of money" be inserted after the words "to perform a specific act". That addition would make it clear that the court of the forum State had the power to order payment of money in a suit against a foreign State.

10. Paragraph 2 of draft article 27 was a difficult provision. Some forms of sanction would appear to be possible against a foreign State. Criminal sanctions would always be excluded, of course, and as he understood it, that was the purpose of the words "by way of committal". On the purely civil plane, however, if a defendant State refused to comply with an order to produce certain documents or evidence, the sanction was usually that the court would assume the truth of the allegation made by the plaintiff in the case. Such was United States court practice in private litigation, and a rule of that kind could apply to a foreign State.

11. Lastly, with regard to paragraph 3, he agreed that, where a foreign State was the plaintiff in a case, security could be required from it for costs that might be payable in the event of that State losing the case.

12. Mr. MAHIOU said that draft articles 25 to 28 might seem innocuous at first sight, but they raised a number of problems which had come to light during the discussion.

[5] *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97; reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 55 *et seq.*

13. In the case of draft article 25, the question was whether a text on the jurisdictional immunities of States should include provisions on the immunities *ratione personae* of personal sovereigns and heads of State. Admittedly it was possible to take the view that such provisions would usefully supplement the diplomatic conventions in force, that it would be wise to set out State practice under the rules of customary international law, and that it was essential to try to distinguish State property from the private property of personal sovereigns and heads of State, since the legal rules applicable were not the same in both cases. But other arguments militated against adopting provisions of that kind. Since the draft articles were concerned with the jurisdictional immunities of the State as a legal person and not the immunities of its representatives as natural persons, immunities *ratione personae*, which were already governed by the diplomatic conventions in force, might be regarded as having no place in the draft.

14. Again, the various problems raised by the formulation of article 25 were an argument for deleting it. If it was decided to retain the article, its scope—which some members believed should extend to heads of Government, and even to ministers or the family of a personal sovereign or head of State—and the definition of the terms "personal sovereign" and "head of State" were bound to raise difficulties. There were several categories of personal sovereigns and heads of State. Some monarchs represented the State without really exercising any power, whereas others were sovereign as well as head of State and even head of Government; the same was true of heads of State who often, particularly in Africa, were also head of Government and sometimes held a number of ministerial posts. In many socialist countries and third world countries, however, the person holding the highest office of the State performed none of those functions and that complicated matters even more.

15. It must be borne in mind that personal sovereigns and heads of State were in a special situation, even under internal law. They had gradually become unaccountable not only politically—for political responsibility was usually assumed by the head of Government—but also legally, since in many countries they enjoyed immunity from the jurisdiction of the national courts. When he travelled abroad officially, a head of State or a sovereign enjoyed the immunities of a head of mission under the diplomatic conventions in force and the relevant rules of customary international law. But what would happen if, during a private or incognito visit abroad, or in the use of property owned abroad, a sovereign or a head of State caused damage? Would it be possible to institute proceedings against him? Could he invoke his status as head of State or sovereign to claim immunity from jurisdiction? Or would he have to answer for the consequences of his acts like anyone else?

16. Those questions were closely linked with the jurisdictional immunities of States, since it would often be necessary to determine what private property of the personal sovereign or head of State was being used for State purposes and thus enjoyed the immunities and privileges the Commission was in the process of defining, and what property was being used exclusively for personal purposes, so that legal proceedings could be instituted in respect of it.

17. It was from that angle that the question of the immunities *ratione personae* of personal sovereigns and heads of State should be considered. The object was not to fill any gaps by defining the immunities enjoyed by personal sovereigns and heads of State, but simply to take into account the immunities accorded to them under the diplomatic conventions and other rules of international law; and it should be stipulated that a personal sovereign or head of State enjoyed immunity from jurisdiction in respect of all property, even private property, that he used for State purposes, which must be distinguished from property used strictly for personal purposes.

18. For those reasons, therefore, it would be better to delete draft article 25, although the issues it dealt with should not be left aside. The best course would be simply to insert in draft article 4, in a new subparagraph (*d*), a reference to the immunities and privileges of personal sovereigns and heads of State recognized under the diplomatic conventions and other rules of international law in force. Similarly, a further provision could be inserted in article 15, establishing that the private property of a personal sovereign or head of State used for governmental purposes, including State missions, enjoyed immunity from jurisdiction, as did State property.

19. The question of methods of service of process, dealt with in draft article 26, paragraph 1, should be considered from two different viewpoints: that of the State and that of a private individual acting against the State. For the defendant State, which must be officially notified of the proceedings instituted against it, notification through diplomatic channels was obviously the most appropriate method. A private individual, however, often had to show proof—for example, for purposes of compensation—that process had been served; in that case, a registered letter requiring a signed receipt was very useful, since it provided such proof. Article 26, paragraph 1, should therefore specify that service of process should be effected through diplomatic channels or, when necessary, by registered mail requiring a signed receipt.

20. The provision in paragraph 2 seemed at first sight to be obvious. Nevertheless, it must be recognized that the State's appearance in court did not wipe out any irregularity in the service of process. The State should therefore be able to invoke irregularity, particularly when the date of service of process was taken into account in calculating the time-limit for introducing a counter-claim. Allowing the State to object would obviously have no effect on the merits of the case, nor would it change the consequences of the State's appearance in court.

21. Draft article 27, paragraph 1, was useful, but was drafted in such vague terms that it might well give rise to different interpretations. The State was sovereign, so certain obligations could not be imposed on it. But since personal appearance was often mandatory in criminal proceedings, it was necessary to ensure that, when a State was summoned to appear in such proceedings, no

coercive measures could be taken against its representative to compel him to appear. The problem was essentially one of drafting and could be resolved by the Drafting Committee.

22. Separate provision should be made in draft article 28 for restriction or extension of immunities and privileges required as a result of a treaty, convention or any other international agreement. Distinctions should also be drawn, on the one hand, between measures taken unilaterally, or countermeasures, and measures taken by agreement, and on the other hand, between measures to extend immunities and privileges and measures to restrict them. Those three categories of measures should be dealt with separately, so that article 28 would not call into question the privileges and immunities accorded to States under international law.

23. Sir Ian SINCLAIR said that the problem with regard to draft article 25 was that the text proposed by the Special Rapporteur embodied a provision of substance. The article attempted to provide a substantive answer to the question of the extent of the immunities enjoyed by a personal sovereign or head of State in respect of acts performed in a personal capacity. In drafting that article, the Special Rapporteur had drawn heavily on article 31 of the 1961 Vienna Convention on Diplomatic Relations, equating a sovereign or head of State with an ambassador. That approach was a fairly logical one and the same solution was to be found in the United Kingdom *State Immunity Act 1978*.[6]

24. The question arose, however, whether an article of that kind was necessary in the draft. His own feeling was that article 25 was not absolutely essential, since it dealt with a form of personal diplomatic immunity, whereas the draft related to the immunities of the State. The debate had shown that any attempt to draft a provision of substance along the lines of article 25 would lead to serious difficulties. It would raise the controversial question of the treatment to be extended to a head of Government and a minister for foreign affairs. Inevitably, also, the question of the members of the household and private servants of a sovereign or head of State would have to be dealt with, as it was in the existing diplomatic conventions.

25. It had been suggested that the problem should be dealt with in article 4, the purpose of which was to preserve immunities under existing conventions. In that draft article, a reference had been added by the Special Rapporteur to "internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973". That Convention mentioned the minister for foreign affairs, the prime minister and other dignitaries, but unfortunately it did not deal with immunity from civil jurisdiction.

26. His own feeling was that article 4 was perhaps not the right place to deal with the problem. In draft article 3, paragraph 1 (*a*) (i), the expression "State" was defined as including "the sovereign or head of State", which meant the sovereign or head of State acting in a public capacity. What was needed to solve the problem was a reservation safeguarding the situation under the rules of customary law governing acts performed in a private capacity or relating to private property. He therefore suggested that article 25 should be converted into a procedural or safeguard provision, which might read as follows:

> "The present articles are without prejudice to the extent of immunity, whether immunity from jurisdiction or immunity from measures of constraint against private property, enjoyed by a personal sovereign or head of State under international law in respect of acts performed in his personal capacity."

27. With regard to draft article 26, and more particularly to the methods of service of process mentioned in paragraph 1, he did not believe that the use of registered mail was appropriate. The diplomatic channel provided a method whereby the individual litigant could ensure that the process reached the appropriate body in the foreign State. The litigant might well be unaware of the exact ministry or department to which the document should be directed, and recourse to the diplomatic channel would guarantee that the papers reached the correct destination.

28. On draft article 28, he did not have much to add to his earlier comments (1942nd meeting) except to stress the triangular relationship involved. It was necessary to consider the interests of the private litigant, the forum State and the foreign State—all three of which should be safeguarded. It had been suggested by Mr. Ushakov (1943rd meeting) that article 47 of the 1961 Vienna Convention on Diplomatic Relations should be used as a model in redrafting article 28. That suggestion was an attractive one, but it must be remembered that the relationship in article 47 of the 1961 Vienna Convention was a bilateral one, involving only the sending State and the receiving State. It would also be necessary to clarify the concept of "more favourable treatment" used in paragraph 2 (*b*) of article 47.

29. Lastly, he agreed with Mr. Riphagen (1942nd meeting) on the need to safeguard an assured minimum or "hard core" of immunities, which could not be restricted. Those immunities applied to acts performed in the exercise of governmental authority. He also agreed with the suggestion that extension and restriction of immunities should receive separate treatment.

30. Mr. DÍAZ GONZÁLEZ said that it was extremely difficult to study the draft articles on jurisdictional immunities on the basis of the translation into Spanish and other languages. To grasp the meaning of the various provisions, the reader had to refer back to the English text in every case. It was not simply a matter of translation, however. The problem went deeper. It originated in the fact that the text had been conceived with one single legal system in mind, namely the common-law system. The legal concepts and terms used belonged exclusively to that system, so that a literal translation of the draft articles made no sense.

31. The term "proceeding", for example, had been translated literally into Spanish as *procedimiento*, a term which signified all the formalities necessary to

[6] United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715; reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 41 *et seq.*

bring a case before the courts, whereas the correct terms would be *proceso, litigio* or *demanda*. A further example was the Spanish translation of the title of draft article 26, "Service of process and judgment in default of appearance", which had been rendered as *Citación y fallo en rebeldía*. A State could not, by definition, be *rebelde* (rebellious). The proper expression was *fallo por ausencia o en contumacia*. Again, in article 26, paragraph 1, the term *mandamiento* for "writ" meant the commandments of God and was obviously incorrect. In that instance the text should refer to *notificación* or *mandato*.

32. It was impossible to work on the English text alone. The countries which would be signing the convention on the jurisdictional immunities of States and their property were not all English-speaking, nor, by any means, were they all common-law countries. The Spanish-speaking countries, with a population of 300 million in all, along with the French-speaking countries, the USSR, China and others, had legal systems and structures completely different from the one on which the draft articles were based. He would have comments and suggestions to make in the Drafting Committee on the way in which the provisions of the English text were to be translated, or rather transposed, into Spanish.

33. In the circumstances it was impossible to make any comments on the various draft articles, but he would none the less point out that, as observed by Mr. Ushakov (1943rd meeting) and Mr. Mahiou, draft article 25 was pointless, since it dealt with issues already covered not only by articles 4 and 13 of the draft, but also by the diplomatic conventions in force.

34. Mr. ARANGIO-RUIZ said that draft article 25 really had no place in a text defining the jurisdictional immunities of States and their property. When a head of State acted as an organ of the State, the only question that arose was whether, in that instance, the State enjoyed immunity. If so, the head of State also enjoyed immunity. On the other hand, matters pertaining to the activities of a head of State as a private person should not be dealt with in the draft articles. Those matters should continue to be covered either by the rules of customary international law or, less commonly, by international conventions. Probably the best course, as suggested by Sir Ian Sinclair, would be to delete article 25 and state specifically that the draft articles on jurisdictional immunities of States and their property did not cover the immunities *ratione personae* of personal sovereigns and heads of State or of persons connected with them. It would even be necessary to go a little further and mention other persons holding high office in the State.

35. Mr. FRANCIS said that he would confine his remarks to article 25, which should not be deleted from the draft. States came and went, but the institution of head of State would always remain. In dealing with the problem of sovereigns and other heads of State, the Commission should bear in mind the relevant provisions of earlier conventions and the rules of customary international law. The 1969 Convention on Special Missions made provision for the head of State on special mission. The 1975 Vienna Convention on the Representation of States dealt with the "Status of the Head of State and persons of high rank" in its article 50.

36. It should be noted that the head of State did not enjoy immunities only when he was on public business in a foreign country. Even if he went abroad in a private capacity, comity dictated that notice be given of his journey, so that he could be treated with respect and given diplomatic protection.

37. An effort should be made to arrive at a satisfactory solution. One suggestion had been to deal with the matter in article 4, another to transfer it to article 15. For his part, he favoured the idea of a separate article put forward by Sir Ian Sinclair. The commentary to that article could deal with the question of members of the family and household of the head of State.

38. As he saw it, the draft articles should be the last word on the subject. Admittedly there were difficulties, but the Commission should be bold enough to face them. He therefore urged that the provisions of article 25 should be retained in some form, since their omission would leave an undesirable gap in the draft.

39. The CHAIRMAN, speaking as a member of the Commission, expressed doubt about the need for draft article 25, which in his view was rather confusing. For while the draft articles under consideration dealt as a whole with the jurisdictional immunities of States and their organs, draft article 25 was more concerned with the protection of individuals in the performance of their political or diplomatic functions. That was a quite separate question—even though there were some points of convergence—which was already dealt with in a number of diplomatic conventions.

40. The text of article 25 itself also raised problems relating to the different constitutional systems of countries, as Mr. Ushakov (1943rd meeting) and Mr. Mahiou, among others, had observed. Given the confusion, duplication and constitutional difficulties created by the article, it might be preferable not to retain it, especially as it appeared impossible to state without reservation that a head of State had immunity from criminal jurisdiction. For it must be borne in mind that the Commission also had before it the draft Code of Offences against the Peace and Security of Mankind, which was basically concerned with heads of State and Government who might be found guilty of committing such offences in the performance of their functions. Hence, if draft article 25 was to be retained, the Commission should consider including a reservation on that possibility.

41. In regard to draft article 28, he had difficulty with the fact that the Special Rapporteur had placed the restriction and extension of immunities on an equal footing. Just as it seemed desirable to extend immunities, it seemed difficult to restrict them *ad infinitum*, at the risk of bringing international life to a standstill. The best course would be to draft two separate provisions, one restrictive, relating to limitations, and the other non-restrictive, relating to extensions.

42. Turning to questions of procedure and terminology, he drew the Special Rapporteur's attention to

paragraph 2 of draft article 25, which referred to measures of attachment or execution and might give the impression that only those two measures came into question. Garnishment, preventive attachment and sequestration should not be overlooked, however. A broader formulation would therefore be required, since all measures of execution could not be listed in the draft article.

43. With regard to the service procedures enumerated in paragraph 1 of draft article 26, he observed that registered mail did not always reach the addressee in developing countries. It would therefore be well to find a procedure which could be used in all situations. In paragraphs 3 and 4, the use of the words "of appearance" after "judgment in default" seemed to suggest that judgment could be rendered in default only if the State failed to appear, though there were certainly other forms of default. He urged the Special Rapporteur not to refer to procedures that were too closely linked to a particular legal system and suggested that, on that point, reference should simply be made to the procedure of the forum State.

44. In draft article 27, it was regrettable that paragraph 1 made no distinction between rules of substance and rules of procedure, despite the fact that the article was entitled "Procedural privileges". He, too, doubted the suitability of the terms used in paragraph 2. In view of the difficulty of finding satisfactory wording, perhaps States should simply be called upon to comply with any procedures in which they were concerned. The United States of America had ways of making States comply with judgments of a court, including the imposition of fines. To suggest that States could refuse to comply with any measure imposed on them by a court was to encourage them in a regrettable course. The provision should therefore be drafted in such a way that States would not consider themselves authorized to take excessive liberties.

45. Mr. REUTER said that, while he had listened carefully to the arguments of members of the Commission who were anxious to define a "hard core" of immunities from which no derogation would be permitted, he found their viewpoint entirely fanciful, since the draft articles brought into play two opposing concepts: governmental authority and administration, the former constituting the hard core in question. But that distinction was not so easy to make. Some States would take the view that a given treaty extended immunities, while others would maintain the opposite. Hence draft article 28 was, after all, more satisfactory as it stood.

46. Referring to the comments made by Mr. Díaz González concerning the inconsistency between the Spanish and English texts, he recalled having made the same observation (1942nd meeting) in regard to the French text. There, however, it was not so much a problem of translation as of substance. Should reference be made to internal legal systems or should rules of international law be developed? Reference could be made to six or seven internal systems on the basis of the official languages, but even within a single linguistic community, differences in interpretation arose. For example, in two common-law countries—the United States of America and the United Kingdom—the concept of trust had different meanings.

47. He therefore suggested that the provision devoted to definitions should include definitions of the terms used by the Special Rapporteur, because they most accurately reflected his thinking. Those definitions would be independent of any particular internal legal system and would be developed solely for the purposes of a rule of international law. For example, the term "service of process" used in the draft articles signified the act whereby, in each legal system, an individual was notified that proceedings had been instituted against him. By giving definitions of that type, the Commission would simplify translation into the various official languages, although it would also increase the work of the Special Rapporteur. Technical terms could then be included in two glossaries: one of a given internal legal system and the other of public international law. Without that second glossary, the Commission would continually be in difficulties.

48. Mr. SUCHARITKUL (Special Rapporteur), summing up the debate, noted that the complaints regarding terminology, which recurred each year, were, in the present case, due to the highly complex nature of the topic. There should not be much danger of confusion, however, since the members of the Commission were all experts in their respective countries' legal systems and the Drafting Committee would also be in a position to clarify matters further. He, too, as Special Rapporteur, was responsible for trying to dispel any doubts that arose in connection with the English and other language versions, but it should be remembered that English was not his mother tongue, nor was his country's legal system based on the common law.

49. At a time of general apprehension about the licence allowed to the advanced countries to seize the property of foreign States, and the spate of lawsuits thus arising, it was necessary to maintain a balance. In Western society, the emphasis was perhaps on the individuals who made up the State and without whom there would be no State; in African and Asian society, on the other hand, if States did not have political and economic independence, the individual had no chance of subsisting.

50. Draft article 25 posed a problem of substance concerning the personal immunities of sovereigns and heads of State. As one who had been accredited by, but not always to, a sovereign, he could not accept the suggestion that he had favoured the sovereign over the head of State. It was his view that the Commission could not ignore a part of international law which it had set out to progressively develop and codify. The Commission had completed a series of conventions dealing with various aspects of State immunities, such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the 1975 Vienna Convention on the Representation of States. It had now turned its attention to State immunities in general, irrespective of how those

immunities were termed. After all, as had frequently been recognized in European case-law, the immunities of diplomats were State immunities and, as such, could be waived by the State even where personal immunities were concerned; the same applied to the immunities of a sovereign.

51. It was not possible, however, to cover all the intricate rules of customary international law that governed the immunities enjoyed by sovereigns and heads of State in their personal capacity, and the Commission might wish to propose that the matter be dealt with as another, separate topic. In that connection, he would cite by way of example the case of Malaysia—a member State of ASEAN—which had 13 sovereigns from among whom a king (or, under Indian law, "foreign ruler") was elected by rotation every four years. The Commission should not overlook such cases or lay itself open to a charge of having ignored the status of heads of State. Whatever the shortcomings of international practice in the matter, some reference to it should be made.

52. He approved of Sir Ian Sinclair's suggested wording (para. 26 above) to the effect that the present articles were without prejudice to the extent of the immunities enjoyed by the sovereign or head of State in his private capacity and also in respect of his private property. Two further provisions should perhaps be added, however: first, that in their public capacity sovereigns and heads of States enjoyed the immunities prescribed in the articles; and secondly, that in their private capacity they enjoyed immunity from civil and criminal jurisdiction during their tenure of office, in accordance with, or as customary under, international law. A *renvoi* to customary international law could then be made. He was prepared to submit a new version of article 25 along those lines to the Drafting Committee, after which the article could be referred back to the Commission to decide whether or not to retain it. His own view was that there was room in the draft for an article on the status of the sovereign or head of State. The question whether it should also cover heads of Government should be discussed briefly in the commentary, which might thus provide the Commission with a basis for further study. He did not think that the content of draft article 25 could be adequately reflected in draft articles 3 or 4.

53. The difficulties concerning terminology were even more apparent in draft article 26, which went more deeply into procedures. The remarks made by Mr. Mahiou and Mr. McCaffrey had, however, done much to clarify matters. It should be noted that the article, which was concerned with how to serve process, dealt solely with cases in which proceedings had already been instituted, but the question of immunity had yet to be decided. He agreed with Mr. Tomuschat (1942nd meeting) that the provision in paragraph 1 of article 26 would be more positive if the word "may" were replaced by the word "shall". He also agreed that provision should be made for recourse to be had, in the first instance, to any special arrangement that existed; then to diplomatic channels; and lastly, if the Commission so wished, to the use of registered mail. That third means of service was still the practice in some countries, and the Commission should try to follow existing State practice rather than ignore it and impose new procedures.

54. With regard to draft article 27, he thought that the title "Procedural immunities" suggested by Mr. Ushakov (1943rd meeting) would sound rather strange, in English at least. "Sovereign immunity" was bad enough, and he had tried to have that term changed in article 236 of the 1982 United Nations Convention on the Law of the Sea, but without success. English legislation preferred the term "State immunity". There again, a problem of terminology was involved.

55. In paragraph 1 of draft article 27, he had tried to distance himself from the common-law system and to paraphrase, in a way that was perhaps not altogether intelligible, what in common law was known as specific performance. However, he fully subscribed to the clarifications provided in that connection by Mr. Razafindralambo (*ibid*), Mr. McCaffrey and Mr. Mahiou.

56. As to draft article 28, he agreed with Sir Ian Sinclair that immunities should always be accorded for acts performed in the exercise of governmental functions. He also considered that a reference to article 47 of the 1961 Vienna Convention on Diplomatic Relations, as suggested by Mr. Tomuschat (1942nd meeting) and Mr. Ushakov (1943rd meeting), would be useful.

57. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 25, 26, 27 and 28 to the Drafting Committee.

It was so agreed.[7]

The meeting rose at 1 p.m.

[7] For consideration of the texts proposed by the Drafting Committee, see 1969th meeting, paras. 68-108 (new articles 24, 25, 26 and 27); and 1969th meeting, paras. 109-113, 1970th meeting, paras. 1-45, 1971st meeting, paras. 2-27 and 68-84, and 1972nd meeting, paras. 1-16 (article 28).

1945th MEETING

Wednesday, 14 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jagota, Mr. Lacleta 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.