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Summary record of the 1945th meeting

Topic:
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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.

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

ARTICLE 3 (Interpretative provisions), para. 1

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

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

1. The CHAIRMAN invited comments on the provisions of part I of the draft articles still to be examined, namely article 2, paragraphs 1 (*e*) and 2, article 3, paragraph 1, and articles 4 and 5.

2. Mr. TOMUSCHAT, referring to paragraph 1 (*e*) of draft article 2, said that it would be advisable to spell out exactly what was meant by the word "interests", since it was not clear what it covered. Also, it was important to use terms that were easy to translate into other languages, including those that were not official languages of the United Nations. In German, for example, an "interest" was a broad notion comprising political interests that were, of course, irrelevant in the context of the draft articles. Possibly the expression "legally protected interest", which appeared in another article, could be used instead.

3. Paragraph 2 of article 2 seemed to state a truism. The draft articles could not alter the meaning ascribed to a term in the internal law of any State or by the rules of any international organization. The aim of the Commission was to frame autonomous concepts and, although the terms used would initially be expressed in English, French and Spanish, such terms did not have to be construed in accordance with the English, French, Spanish or any other national legal system. The position would perhaps be clearer if the order of the provisions of paragraph 2 were reversed, along the following lines:

> "2. The use of terms within any national legal system or by any international organization does not determine the meaning of such terms under the present convention."

4. He also had doubts about the definition of the expression "State" in draft article 3, paragraph 1 (*a*). In his view, a clear distinction should be drawn between entities and juridical persons, on the one hand, and State organs, on the other. Those entities should be specified, as in part 1 of the draft articles on State responsibility,[5] which dealt, in articles 5, 6 and 7 respectively, with the State, territorial governmental entities, and other entities endowed with elements of governmental authority. On that basis, paragraph 1 (*a*) (i) and (ii) of draft article 3 could be redrafted to read:

> "(*a*) the expression 'State' includes:
>
> (i) the central State with all its organs and departments, including in particular the sovereign or head of State;
>
> (ii) political subdivisions of a State with all their organs and departments;"

5. There was a lacuna in draft article 3, paragraph 1 (*b*), in the definition of the term "judicial functions": as in the definition of "court" laid down in draft article 2, paragraph 1 (*a*), no mention was made of the judge. Moreover, all the judicial functions listed in paragraph 1 (*b*) of draft article 3 could also be performed by administrative agencies. If the Commission did not mention the judicial institution, with its special characteristics, it might fall short of recognized international standards as laid down in article 14 of the International Covenant on Civil and Political Rights,[6] under which a court, and hence the judge, was defined as a "competent, independent and impartial" institution "established by law". Admittedly, article 14 of the Covenant set an ideal, and the draft articles would perhaps be concerned with immunity from proceedings before an institution that did not fully live up to that standard, but it was none the less essential to refer to the core element constituted by the specific institution which the judge represented.

6. He was not certain whether draft article 4 was really necessary but, in any event, the drafting required further consideration. Not all States were parties to the various conventions prepared by the Commission and adopted at plenipotentiary conferences, for customary rules of international law still remained in force between some States. It should therefore be made clear that, in

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[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, paras. 5-8.

[5] See *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[6] United Nations, *Treaty Series*, vol. 999, p. 171.

addition to the recognized diplomatic and consular immunities, the draft articles did not prejudge the immunities arising out of customary rules of international law.

7. Mr. FLITAN said that the definition of "State property" contained in draft article 2, paragraph 1 (*e*), raised a number of problems stemming from the use of the words "according to its internal law". Many situations could arise where the applicable law would be determined by rules relating to the solution of conflicts of laws. In one case the *lex rei sitae* might be applied, and in another the *lex patriae*. In a case of succession, for example, under some legal systems, if there was no successor, property would revert to the State of which the owner was a national, while under other systems, such property would be considered as *res nullius* and would revert to the State on whose territory it was situated. For that reason, it was not possible to affirm in the introduction to the draft articles that the term "State property" was in all cases dependent on internal law. He therefore proposed that that definition should be deleted from article 2.

8. Again, the term "interests", referred to by Mr. Tomuschat, was used in many articles of the draft, including article 15, and although its exact connotation might be difficult to understand, a detailed study of that concept would entail a review of a number of articles which had already been provisionally adopted by the Commission. Furthermore, paragraph 1 (*e*) should be brought into line with draft article 21, since the Special Rapporteur's definition of "State property" had been made chiefly in the light of part IV, which dealt with immunity of States from enforcement in respect of their property. The terms used by the Special Rapporteur in article 21 reflected the same concern as he had endeavoured to express in paragraph 1 (*e*) by providing for the case of a State which was not the owner of the property, but operated or used it.

9. Draft article 2, paragraph 2, raised problems of a purely drafting nature. There was a lack of symmetry between the words "in the internal law of any State" and "by the rules of any international organization" which should be remedied.

10. In draft article 3, paragraph 1 (*b*) (ii), there was no need for an explicit reference to "determination of questions of law and of fact". There again, such questions were settled differently under different legal systems. In some countries, questions of fact never went as far as the appeal court, which alone was empowered to decide on points of law, whereas in others, the supreme court might be called upon to deal with questions of fact as well as of law. Consequently, he did not see the advantage of having a separate provision on that point.

11. Mr. RIPHAGEN said that he shared Mr. Flitan's views regarding draft article 2. It was impossible to refer to the internal law of the State concerned, since, in the normal course of events, the operation or use of property was automatically governed by the *lex rei sitae*. The interests or rights of ownership of property of one State on the territory of another State would not be determined in accordance with the internal law of the owning State.

12. The problem regarding draft article 3, paragraph 1 (*a*) (i), should be dealt with at the same time as that raised by draft article 25, since there were limits to how far the State could be assimilated to the personal sovereign or head of State. Paragraph 1 (*a*) (iv) was not very well drafted. In other draft articles, reference was made to State bodies which did not exercise the governmental authority of the State and had no powers outside the territory of their State under the general rules of public international law. Consequently, by excluding from the definition of the term "State" those bodies which did not exercise governmental authority, it was possible to become involved in a vicious circle.

13. It was also difficult to understand what was meant by the term "legal proceeding" in paragraph 1 (*b*) (v). The Special Rapporteur had probably intended to emphasize the link that must exist with legal proceedings *par excellence* before the courts; but then what were those courts? Even if it was just a matter of drafting, the Commission should give it due consideration. The same observations could be made of draft article 4 (vi), which referred to "internationally protected persons under the Convention ... of 1973". In that connection, the Commission should not overlook draft article 25 and should aim for clarity.

14. Mr. MAHIOU said that he shared the views expressed by Mr. Flitan and Mr. Riphagen regarding the difficulties to which draft article 2, paragraph 1 (*e*), might give rise because of the reference to internal law. While it was understandable that recognition of a title to property should be subject to the internal law of the State deemed to be the owner of the property, that would appear to be more difficult in the case of operation or use of property situated in the territory of another State, since such operation or use must conform to the legislation prevailing in that State. Indeed, it was difficult to see how the internal law of one State could interfere with the internal law of the forum State in the case of commercial interests, for example. Mr. Flitan's proposal to delete the reference to internal law, a reference which raised more problems than it solved, was therefore sound.

15. Draft article 3 raised a drafting problem. He could see no logic in the subdivisions of paragraph 1 (*a*). In drawing up that empirical list, the Special Rapporteur had apparently sought simply to indicate the persons, organs and organizations which might represent the State and against which a proceeding could be instituted. Might it not be possible to use simpler formulations, yet follow a more logical structure? In that regard, he suggested differentiating between, first, the central State, in the shape of the usual official organs representing it (sovereign, head of State, ministers), then other entities with legal personality and political status such as federated States, administrative bodies such as the public authorities and other political or administrative subdivisions with legal personality distinct from that of the State but which, for the purposes of the draft articles, would be considered as "States", and finally, on a third level, all essentially administrative

bodies which, though having no legal personality separate from that of the State or one of its subdivisions, nevertheless participated in one way or another in the exercise of governmental authority, so that they could be considered as States. From the drafting point of view, he would prefer to delete from paragraph 1 (*a*) (iv) the term "instrumentalities", which had little meaning. He would submit more specific proposals on those three levels of subdivisions to the Drafting Committee.

16. As to article 3, paragraph 1 (*b*) (iii), the words "administration of justice in all its aspects" covered all aspects of judicial functions and should really appear at the beginning of subparagraph (*b*). Actually, it would be sufficient to state that "the expression 'judicial functions' includes the administration of justice in all its aspects". He nevertheless appreciated the fact that it might be desirable to mention a number of acts, either because of their importance, or because they were referred to in the draft articles. The introductory clause of paragraph 1 (*b*) could then be followed by the word "including" and a list of the acts in question, thereby simplifying the drafting.

17. Lastly, draft article 4 should be formulated in conjunction with draft article 28, because of the linkage between the draft articles under consideration and a number of existing conventions.

18. Sir Ian SINCLAIR said he understood full well the disquiet that some members might feel at the use of a general word such as "interests" in the context of the definition of State property laid down in draft article 2, paragraph 1 (*e*). In terms of international conventions, however, it was not unusual to adopt such a formulation to cover the totality of rights, in the strict sense, and the other interests, in a broader sense, that were protected by law in relation to property. Indeed, Mr. Tomuschat would recall that, in the Federal Republic of Germany, there was an arbitral commission on property, rights and interests under the Bonn Conventions of 1952[7] which had already developed a considerable body of jurisprudence. In his view, therefore, the three elements—property, rights and interests—should be retained, perhaps with an explanation in the commentary of what was meant by interests. Certainly, under the law in the United Kingdom, there might be an interest in relation to the foreclosure of a mortgage which, strictly speaking, was neither property in itself nor a right in property, but an equitable interest falling short of a right. Unless such interests were covered by the draft, the phrase "property and rights" was likely to be the subject of very narrow interpretations in the years ahead.

19. He agreed entirely with Mr. Flitan that the words "according to its internal law", in the same subparagraph, could give rise to very considerable problems. The property, rights and interests which a State might assert in connection with proceedings before a court of another State might depend on a transaction that was governed not by the internal law of the forum State, but, for instance, by a contract governed by another system of law. If any reference were to be made to the law concerned, it should perhaps be to the "applicable law", but he wondered whether it was in fact advisable to refer at all to the system of law under which property rights and interests arose. It was a point that would require close consideration, particularly since, as drafted, paragraph 1 (*e*) of article 2 also seemed to be in contradiction with paragraph 2 of that article.

20. As to draft article 3, he would prefer to maintain the distinction in paragraph 1 (*a*) (i) and (ii) between the sovereign or head of State—though with the addition of the words "acting in his public capacity"—and the central Government and its various organs or departments, if only to take account of the fact that some sovereigns and heads of State did not really form part of the central Government and its various organs and departments but occupied an essentially symbolic position.

21. While he could basically accept the comments regarding paragraph 1 (*a*) (iii), that text might none the less give rise to a problem. If the words "in the exercise of its governmental authority" were deleted, leaving simply "political subdivisions of a State", the question would arise whether immunity could be claimed by subdivisions such as municipalities. He understood that there was some jurisprudence in that connection to which the Special Rapporteur might wish to draw the Commission's attention.

22. He agreed in principle with the concept set out in paragraph 1 (*a*) (iv), although there were some drafting problems. Specifically, he would suggest that the words "agencies or instrumentalities acting as organs of a State" should be replaced by "entities acting ...".

23. The definition of "judicial functions" in paragraph 1 (*b*) of article 3 could be made much shorter and more concise. Basically, it was only necessary to cover adjudication of litigation by an impartial and independent court, and the administration of justice in all its aspects by such a court. There was no need for a specific reference to the determination of questions of law and of fact, something which should be left entirely to the law of the State concerned. In some countries, only a court of law could determine questions of fact, courts of appeal being competent to determine questions of law. A general definition of judicial functions that covered adjudication of litigation by an impartial and independent court would inevitably cover the determination of any question of law or fact by whatever court was competent according to the law of the State concerned.

24. Paragraph 1 (*b*) (iv) was also unnecessary, and paragraph 1 (*b*) (v) was superfluous. The latter could create problems by confusing certain functions exercised under the authority of a court, for instance the functions of the *parquet*, with the functions of the court itself, which were limited to adjudication and the administration of justice in all its aspects.

25. Draft article 4 was necessary in principle but its drafting called for careful examination. One point that would have to be determined, for example, was whether

[7] See Annex to the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on 26 May 1952 (as amended by Schedule IV to the Protocol signed at Paris on 23 October 1954) (United Nations, *Treaty Series*, vol. 332, p. 316).

to include observer delegations in item (v). Item (vi) was not necessary because the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents was designed to protect such persons but did not confer jurisdictional immunities upon them. He would, however, welcome the Special Rapporteur's views on that point.

26. Mr. USHAKOV said that his observations would be of a preliminary character, since the draft articles called for further reflection. He wondered, first of all, whether it was necessary to define the term "State property" in article 2, given the fact that it did not occur as such in any of the draft articles. The only reference was to "its property" after a mention of the word "State". Consequently, the term "property" called for another definition. As he had pointed out earlier,[8] the best approach would be to use the definition worked out by the Commission itself and adopted by States in article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[9] which stated:

> For the purposes of the articles in the present Part, "State property of the predecessor State" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

In the case of the definition under consideration, the date from which the property was owned by the State—the date on which the legal proceeding was instituted, for example—should also be indicated. The question whether or not particular property belonged to the State could be determined only by the internal law of the State concerned, since an individual buying property could be acting on his own behalf or on behalf of the State. For all the necessary explanations in that regard, it was essential to refer to the commentary to article 8 of the draft articles[10] that were the basis for the 1983 Vienna Convention.

27. Again, he did not understand the reason for the reference to the operation and use of property. A State could use property on the territory of another State without necessarily owning it. The important thing in the case in point was the property belonging to the State in accordance with its internal law. In the body of the draft, the Drafting Committee had placed a number of explanations in square brackets, indicating that the definition of "State property" would make them redundant. His own view was that it would be better to delete the square brackets and retain the explanations.

28. Draft article 3 was odd. In his view, the term "State" should mean the State. Instead of defining the State, the Special Rapporteur had sought in article 3 to define the component parts of the State, namely its organs. For what purpose? Each State was equipped with its own organs, which varied from one country to another. In part 1 of the draft articles on State responsibility,[11] the Commission had, in article 5, defined "attribution to the State of the conduct of its organs" by referring to the internal law of that State:

> For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

29. As worded, draft article 3 gave the impression that States were obliged to have a sovereign or head of State. However, in the Soviet Union, for example, the State was headed by a collegiate body, the Presidium of the Supreme Soviet, although the Chairman of the Presidium naturally had a role to play in international relations. Was it to be understood that the central Government was also to be assimilated to the State? Not at all. Any attempt to define what was meant by "State" must take account of the fact that it comprised a socio-political entity endowed with a territory, a population, an administration exercising governmental authority, and sovereignty. Article 3 listed organs which could not exist in some States or could have completely different designations, depending on the country. It was even possible to conceive of States without any organs, States in which, for example, decisions were taken by the people by referendum. It would seem extremely risky and unnecessary to define the concept of the State, for the same reason that the term "international organization" had never actually been defined: it had been deemed sufficient to describe such an organization as an intergovernmental organization. The attempt to arrive at a definition of "State" was pointless when paragraph 3 of article 7 as provisionally adopted explained that a proceeding against an organ of the State was a proceeding against that State. The Commission could simply stipulate that an organ of the State meant an organ considered as such under the internal law of the State concerned.

30. The "judicial functions" referred to in draft article 3, paragraph 1 (*b*), should also be defined by the internal law of each State. It was inconceivable that a given definition of "judicial functions" should be imposed on States, since such a definition might well be acceptable to one State but not to another.

31. It was questionable whether article 4 was necessary but, if the Commission decided to retain it, it should be redrafted. In principle, article 5 had a place in the draft. However, he was surprised to note that it was concerned with relations between States, whereas the draft dealt with jurisdictional immunities of States and their property. Consequently, that text too should be redrafted.

32. Mr. McCAFFREY agreed that it might be better to speak in draft article 2, paragraph 1 (*e*), of "legally protected interests", rather than "interests", so as to avoid any difficulties of transposition between languages and between legal systems. However, since the word "interest" was used in article 15, which had already been provisionally adopted, the matter could perhaps be left for the time being and the Commission could revert to it on second reading. It might also be preferable to delete the word "otherwise" from the expression "owned, operated or otherwise used", given the recognized distinction made in most legal systems between ownership and use of property. Alternatively, the provision could be couched in more general terms, along the following lines:

[8] See *Yearbook ... 1985*, vol. I, p. 257, 1920th meeting, para. 10.

[9] A/CONF.117/14.

[10] *Yearbook ... 1981*, vol. II (Part Two), pp. 25-26.

[11] See footnote 5 above.

"(*e*) 'State property' means all property belonging to a State, in particular rights and interests which are owned, operated or used by a State."

33. He too was inclined to agree that the words "according to its internal law" could be deleted. If they were retained, a problem could arise regarding any real property situated in the forum State for, as was universally recognized, the forum State alone had the right, and indeed the power, to determine ownership of real property situated within its borders. In the circumstances, it was not possible, in his view, to refer only to the internal law of the State where such a State was a defendant in proceedings. Furthermore, under the legal system of the United States of America, any such reference to internal law would exclude the rules of private international law. He also tended to agree that the terms of paragraph 2 of draft article 2 should be reversed, as suggested by Mr. Tomuschat.

34. As to draft article 3 and the definition of "State" as including its various organs and instrumentalities, it might be appropriate to discriminate between those organs and instrumentalities in matters of jurisdiction and execution of judgments. In that regard, Mr. Mahiou had made a useful suggestion to establish a hierarchy so as to distinguish between the organs of the State itself, in other words the central Government, on the one hand, and entities with a separate personality, on the other. Perhaps Mr. Mahiou would propose a suitable form of language in the Drafting Committee. Similarly attractive was the suggestion by Mr. Tomuschat for a definition along the lines of that to be found in part 1 of the draft articles on State responsibility.[12]

35. Clearly, the formulation of paragraph 1 (*a*) (i) had to be reconciled with whatever decision the Commission took with regard to draft article 25. Careful consideration should be given to the suggestion by Sir Ian Sinclair (para. 20 above) to insert the words "acting in his public capacity" after the words "the sovereign or head of State". Introduction of those words would none the less lead to difficulties with regard to the application of article 12, concerning commercial contracts.

36. According to paragraph 1 (*a*) (iii), the political subdivisions of a State were included in the expression "State". The position was the same in the United States *Foreign Sovereign Immunities Act of 1976*. There was some ambiguity, however, regarding the meaning of the word "its" in the expression "in the exercise of its governmental authority"; presumably that word meant "of the State". Moreover, that proviso could come into conflict with provisions which allowed jurisdiction over a foreign State acting in a *jure gestionis* capacity.

37. With regard to paragraph I (*a*) (iv), the words "acting as organs" and the phrase "in the exercise of its governmental authority" could be deleted, so that the text would simply read:

"(iv) agencies or instrumentalities of a State, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central Government;"

[12] See footnote 5 above.

38. In connection with paragraph 1 (*b*), on the interpretation of the expression "judicial functions", Mr. Mahiou was right to say that item (iii) covered the essentials and that the remaining items of the subparagraph, if retained, should serve as mere examples. His own suggestion would be to adopt Sir Ian Sinclair's proposal to insert the words "by an impartial and independent court" after the words "adjudication of litigation or dispute settlement", which formed the present subparagraph (*b*) (i). Subparagraph (*b*) (ii) to (v) should be deleted, since they would only create uncertainty and confusion.

39. In draft article 4, the word "any" should be inserted before the words "jurisdictional immunities" in the introductory phrase. Not all the conventions listed in article 4 were in force and not all of them were unanimously accepted as expressing rules of international law. Insertion of the word "any" would have the effect of not prejudging whether any of the immunities specified in the various instruments listed was actually enjoyed or not.

40. Lastly, article 5, on non-retroactivity, had a place in the draft, for the practice of States varied considerably in the matter.

41. Mr. ARANGIO-RUIZ said that, in draft article 2, paragraph 1 (*e*), it had to be made clear what was meant by "interests", particularly since it was difficult to link the idea of purely material interests, which were in some sense over and above the law, with the idea of operation or use. It was unnecessary to refer in the same subparagraph to any "internal law" whatever. It should be left to the competent court to determine whether the applicable law was the internal law of the plaintiff State, the law of the forum or the *lex rei sitae* if the property in question was located in another State. Since the subject-matter would be governed by an international convention, the plaintiff State could, in the event of a genuine dispute, obviously challenge before an arbitral tribunal the rules actually decided on.

42. Paragraph 2 of article 2 had to be redrafted because, as it stood, it might imply that internal law took precedence over international law—something that was inadmissible.

43. In draft article 3, the Special Rapporteur had been a little too generous in drawing up the list of entities which were an integral part of the State. The reference to the sovereign or head of State and to the various organs or departments of the central Government was superfluous, for they obviously formed part of the State. Mention should be made only of entities about which there might be some doubt, such as political subdivisions. It was often difficult to determine the difference between political subdivisions and administrative subdivisions because the borderline between the two was not very clear. The most delicate problem, however, was that of entities which had no territorial seat and which could not be classified either as political subdivisions or as administrative subdivisions.

44. The term "judicial functions" in article 3, paragraph 1 (*b*), was clear enough not to have to be interpreted.

45. Draft article 4 dealt with matters that were governed not only by international conventions, but also, to some extent, by rules of customary international law. It should therefore be considered in detail.

46. Mr. OGISO said that he supported the idea of deleting the words "according to its internal law" in draft article 2, paragraph 1 (*e*), for the reasons advanced by the members who were of that view.

47. As to draft article 3, paragraph 1 (*b*), he saw no need for a definition of "judicial functions", a term that appeared only once in the text of the draft articles, namely in draft article 2, paragraph 1 (*a*), defining the term "court". Any attempt to draft a definition of "judicial functions" would involve difficulties because of the differences existing between various national legal systems and national practices.

48. It would, on the other hand, be useful to include a precise definition of "judicial measures of constraint", since the discussions in the Drafting Committee on draft articles 21, 22 and 23 had shown that that term had a slightly different meaning from "measures of enforcement". In that connection, the question arose whether consent by a State to judicial measures of constraint should be interpreted as automatically including interim measures for pre-judgment attachment. Measures of that kind were often ordered by a court for the purpose of preserving assets for possible attachment when final judgment was rendered. The power of courts in that respect was open to abuse and consideration should therefore be given to the question whether consent to enforcement should automatically be interpreted as including interim measures. Accordingly, he urged the Special Rapporteur to consider introducing a definition of "judicial measures of constraint" into the draft and deleting the definition of "judicial functions".

49. Mr. BALANDA, referring to draft articles 2 and 3, said that the Commission had already provisionally defined the term "court" and also had to define the term "judicial functions", making sure that the two definitions were in accord with each other.

50. In draft article 3, paragraph 1 (*b*) (iii), the definition of the term "judicial functions" included the "administration of justice in all its aspects", a very general wording that was entirely satisfactory. If the Commission decided to retain it, however, it would on second reading of draft article 2 have to change the definition of the word "court", which was much too restrictive and was not consistent with the interpretation of the term "judicial functions" in article 3, paragraph 1 (*b*) (iii). "Justice in all its aspects" was not administered solely by organs empowered to exercise judicial functions. In some legal systems there were, for example, administrative courts which also took part in the administration of justice. It would therefore be more accurate to refer to "jurisdictional functions" rather than to "judicial functions".

51. Again, it would not be wise to specify, as one member had proposed, that the administration of justice should be ensured by an impartial and independent body. The public prosecutor's department, for example, was not an impartial and independent body. Introduction of those two adjectives, which were usually used to characterize judges, who had to rule according to the dictates of their conscience without orders or guidelines from the executive, would limit the scope of the word "court" and the words "judicial functions" when the aim should be to expand it.

52. As to draft article 2, paragraph 1 (*e*), the "interests" referred to in article 15 did not have to be mentioned in the definition of State property. Some members had questioned whether it was appropriate to refer in paragraph 1 (*e*) to "internal law"; yet without an exhaustive definition of "State property", it was difficult to see how the Commission could avoid referring to "internal law". Reference had to be made to some legal system, and the system could only be internal law. The words "according to its internal law" could none the less be replaced by the words "under internal law", which might refer both to the internal law of the State which invoked immunity and to that of the forum State. A reference to internal law would, moreover, not exclude the rules of private international law, most of which were rules of internal law with an element of extraneousness.

53. In draft article 3, paragraph 1 (*a*), the State was regarded solely as a legal person. Consequently, the "sovereign or head of State" should not be included in the enumeration. As to paragraph 1 (*a*) (iii), it would be necessary, in order to take account of the different types of State organization, to replace the words "political subdivisions" by "politico-administrative subdivisions" and refer to the internal law of each State by adding the words "according to internal law". The expression "governmental authority" was also quite inappropriate, for, in most countries, the central Government alone exercised governmental authority and did not share it with political subdivisions, which thus had no possibility of action at the international level. In paragraph 1 (*a*) (iv), it was not at all clear what was meant by the term "instrumentalities", which could therefore be deleted, as could the words "and whether or not forming part of the operational machinery of the central Government". It was pointless to go into such great detail.

54. Draft article 4 spoke of jurisdictional immunities "accorded or extended to", but the word "accorded" was inappropriate. The future convention could only extend immunities and it was States that would accord them under the provisions of the convention.

55. Lastly, the principle of non-retroactivity was firmly established; hence draft article 5 could be deleted without adversely affecting the draft as a whole.

56. Mr. REUTER, referring to the overall style of the draft articles, said that the Special Rapporteur had chosen to use the descriptive method by first stating an abstract principle and then giving a number of examples. Although he had no criticism of that method, which was entirely defensible, some provisions should none the less be formulated in greater detail. Most of the problems to which attention had been drawn thus far were, moreover, of a drafting nature.

57. With regard to draft article 2, paragraph 1 (*e*), the desire to clarify the meaning of the words "property, rights and interests" was understandable, but it was doubtful whether any efforts in that direction would prove productive. The article dealt with elements of a patrimonial nature and it was probably that notion that should be retained.

58. In draft article 3, paragraph 1 (*b*) (ii), it would be preferable to say "determination with the force of *res judicata*". Furthermore, it would be necessary to make the French translation of the word "functions" uniform, for while the expression "judicial functions" had been correctly rendered as *fonctions judiciaires* in the introductory clause of paragraph 1 (*b*), the term "administrative ... functions", in paragraph 1 (*b*) (v), had been translated not as *fonctions administratives*, but as *pouvoirs administratifs* ... .

59. He had no objection to a list of international legal instruments in draft article 4, but it was somewhat strange to place conventions which were being implemented on the same footing as others which, although quite old, still had not entered into force. Moreover, item (v), in its present form, did not refer to any convention at all. Since the relevant convention was the one mentioned in item (iv), the two items should be merged.

60. Such relatively minor drafting problems could be resolved easily, but other matters were more important. With regard to draft article 2, for example, he would point out that the text on which the Commission was working was intended to state rules of international law: therefore the Commission could not confine itself to adopting paragraph 1 (*e*) and paragraph 2. Many other definitions would have to be included in that article.

61. While it was true that the law referred to in paragraph 1 (*e*) of article 2 was usually the internal law of the State invoking immunity from jurisdiction for property in respect of which it had a patrimonial right, that was not always the case. The internal law of the forum State, the *lex rei sitae* and, in some cases, even international law might well be involved. Some international instruments directly determined the attribution of a patrimonial right. Hence it would be unwise to refer expressly to internal law.

62. Draft article 3, entitled "Interpretative provisions", was not supposed to have the same purpose as draft article 2, entitled "Use of terms"; but the way in which article 3, paragraph 1 (*a*), was drafted suggested that it was intended to define the term "State". It would therefore be necessary to amend the introductory clause of paragraph 1 (*a*) and say: "The provisions of the present articles applicable to the State also apply to ...". The list of the entities in question would then follow.

63. Finally, draft article 3 called for certain more general observations. For a long time, the rule of State immunity had been nearly absolute. Gradually, however, a large number of States had come to make a distinction between acts *jure imperii* and acts *jure gestionis*. Some countries had considered that entities which were not really the State did not enjoy any immunity. The draft articles that the Commission was endeavouring to formulate should be designed to enable such entities to benefit from jurisdictional immunities when they exercised authority similar to that of the State. In considering the use of terms and the way in which some terms had been translated, however, he could not help wondering whether the Commission was actually following that course. The words "governmental authority", for example, had been incorrectly translated into French as *autorité souveraine*. Municipalities were not sovereign, but, like the State, they had public or governmental authority and, in exercising such authority, they must benefit from the same immunities as the State.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

64. Mr. YANKOV, speaking on behalf of Mr. Barboza, Chairman of the Planning Group, proposed that the membership of the Group should be as follows: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Mahiou, Mr. Malek, Mr. Ogiso, Mr. Reuter, Mr. Roukounas, Sir Ian Sinclair and Mr. Tomuschat. The Group was open-ended and other members of the Commission would be welcome to attend its meetings.

It was so agreed.

The meeting rose at 1.10 p.m.

1946th MEETING

Thursday, 15 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. Huang, Mr. Jagota, Mr. Koroma, 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.
