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Second report on the second part of the topic of relations between States and international organizations by Mr. Abdullah El-Erian, Special Rapporteur

Topic:

Representation of States in their relations with international organizations

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Second report on the second part of the topic of relations between States and international organizations

by Mr. Abdullah El-Erian, Special Rapporteur

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ABBREVIATIONS

ASEAN	Association of South East Asian Nations
CMEA	Council for Mutual Economic Assistance
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
ESCAP	Economic and Social Commission for Asia and the Pacific
IAEA	International Atomic Energy Agency
I.C.J.	International Court of Justice
I.C.J. Reports	I.C.J. *Reports of Judgments, Advisory Opinions and Orders*
OAS	Organization of American States
OAU	Organization of African Unity
OPEC	Organization of Petroleum Exporting Countries
SEATO	South-East Asia Treaty Organization
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
WHO	World Health Organization

CHAPTER I

The basis of the present report

1. The International Law Commission divided its work on the topic "Relations between States and international organizations" into two parts, concentrating first on that part of the topic relating to the status, privileges and immunities of representatives of States to international organizations. The draft articles which it adopted at its twenty-third session in 1971 on this part of the topic were referred by the General Assembly to a diplomatic conference. That conference met in Vienna in 1975 and adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.[1]

2. At its twenty-eighth session in 1976, the Commission reverted to the remaining second part of the topic. At that session, it requested the Special Rapporteur on the topic to prepare a preliminary report to enable it to take the necessary decisions and to define its course of action on the second part of the topic of relations between States and international organizations, namely, "the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States".[2]

3. At the twenty-ninth session of the Commission in 1977, the Special Rapporteur submitted a preliminary report on the second part of the topic of relations between States and international organizations.[3] The report consisted of five chapters. Chapter I described the background of the preliminary study and defined its scope. Chapter II traced the evolution of the international law relating to the legal status and immunities of international organizations. Chapter III analysed recent developments in the field of relations between States and international organizations which had occurred since the adoption by the Commission in 1971 of its draft articles on the first part of the topic of relations between States and international organizations and which had a bearing on the subject matter of the report. Chapter IV of the report dealt with a number of general questions of a preliminary character. They included: the place of custom in the law of international immunities; differences between inter-State diplomatic relations and relations between States and international organizations; legal capacity of international organizations; and scope of privileges and immunities, and uniformity or adaptation of international immunities. Chapter V contained a series of conclusions and recommendations.

4. The Commission discussed the preliminary report at its 1452nd, 1453rd and 1454th meetings, held on 4, 5 and 6 July 1977. Among the questions raised in the course of the discussion were: the need for an analysis of the practice of States and international organizations in the field of international immunities and its impact on the United Nations system; the

[1] *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207. The Convention is hereafter referred to as the "1975 Vienna Convention".

[2] *Yearbook ... 1976*, vol. II (Part Two), p. 164, document A/31/10, para. 173.

[3] *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304.

need to study the internal law of States regulating international immunities; the possibility of extending the scope of the study to all international organizations, whether universal or regional; the need to take account of the particularities of diplomatic law in its application to relations between States and international organizations; and the need to reconcile the functional requirements of international organizations and the security interests of host States.

5. Furthermore, the Special Rapporteur, in his preliminary report, indicated his belief that:

> Bearing in mind that many years have elapsed since the preparation of the replies by the United Nations and the specialized agencies to the questionnaire addressed to them by the Legal Counsel of the United Nations ... it would be useful if the United Nations and the specialized agencies were requested to provide the Special Rapporteur with any additional information on the practice in the years following the preparation of their replies.[4]

In the same paragraph, he also stated that "such information would be particularly helpful in the area of the category of experts on missions for, and of persons having official business with, the organization". He further pointed out that another area in which information was needed was that relating to resident representatives and observers who might represent or be sent by one international organization to another international organization.

6. At its 1454th meeting, the Commission decided to authorize the Special Rapporteur to continue with his study on the lines indicated in his preliminary report and to prepare a further report on the second part of the topic of relations between States and international organizations, having regard to the views expressed and the questions raised during the debate at the twenty-ninth session. The Commission also agreed to the Special Rapporteur seeking additional information and expressed the hope that he would carry out research in the normal way, including investigations into the agreements and practices of international organizations, whether within or outside the United Nations family, and also the legislation and practice of States.[5]

7. By paragraph 6 of its resolution 32/151 of 19 December 1977, the General Assembly endorsed "the conclusions reached by the International Law Commission regarding the second part of the topic of relations between States and international organizations".

8. As recalled in the preliminary report of the Special Rapporteur,[6] in order to assist the Commission in its work on the topic relations between States and international organizations, the Legal Counsel of the United Nations, by a letter dated 5 January 1965, requested the legal advisers of the specialized agencies and IAEA to submit replies to two questionnaires: one on the status, privileges and immunities of representatives of member States to specialized agencies and IAEA; the other on the status, privileges and immunities of these organizations other than those relating to representatives. On the basis of the thorough and helpful replies received as well as of materials gathered by the United Nations Office of Legal Affairs, the Secretariat prepared a study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".[7]

9. By a letter dated 13 March 1978 addressed to the heads of the specialized agencies and IAEA respectively, the Legal Counsel of the United Nations stated that:

> To assist the Special Rapporteur and the Commission, the United Nations Secretariat at Headquarters has undertaken to examine its own files and to collect materials on the practice of the Organization regarding its status, privileges and immunities during the period from 1 January 1966 to the present. Furthermore, you will find enclosed a questionnaire, largely identical to the relevant one sent in 1965, which is aimed at eliciting information concerning the practice of the specialized agencies and IAEA additional to that submitted previously, namely, information on the practice relating to the status, privileges and immunities of the specialized agencies and IAEA, their officials, experts and other persons engaged in their activities not being representatives of States.

10. Furthermore, the Legal Council pointed out in this letter:

> As in 1965 the questionnaire closely follows the structure of the Convention on the Privileges and Immunities of the Specialized Agencies. This format was chosen to make possible a uniform treatment of the material by all the specialized agencies, and to facilitate comparisons between their replies. It should be emphasized however, that the additional information sought by the Special Rapporteur under his mandate from the Commission relates not only to the Specialized Agencies Convention – or, in the case of the IAEA, the Agreement on the Privileges and Immunities of the IAEA – but equally to the constituent treaties of the agencies, the agreements with host Governments regarding the headquarters of the agencies, and relevant experience of the agencies concerning the implementation in practice of these international instruments. Any relevant material derived from these sources should be analysed and described under the appropriate sections of the questionnaire.
>
> The questionnaire attempts to indicate the principal problems which, so far as we know, have arisen in practice, but our information may not be complete and consequently the questions may not be exhaustive of the subject. If problems which are not covered by the questionnaire have arisen in your organization during the period under consideration and you think they should be brought to the attention of the Special Rapporteur, you are requested to be good enough to describe them in your replies. Also the questionnaire was designed for all the specialized agencies, and its terminology may not be completely adapted to your organization; we would be obliged, however, if you would be kind enough to apply the questions to the special position of your organization in the light of their purpose of eliciting all information which will be useful to the International Law Commission.
>
> It is hoped that the replies will not be limited to short answers to the questions, but that, so far as useful and possible, you will furnish materials in relation to your organization – including reso-

[4] *Ibid.*, p. 155, para. 78.

[5] *Yearbook ... 1977*, vol. II (Part Two), p. 127, document A/32/10, paras. 94–95.

[6] *Yearbook ... 1977*, vol. II (Part One), p. 141, document A/CN.4/304, para. 6.

[7] *Yearbook ... 1967*, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

lutions, diplomatic correspondence, judicial decisions, legal opinions, agreements, etc. – showing in detail the positions taken both in intergovernmental organizations and by States, and the solutions, if any, which have been arrived at, so that the Special Rapporteur may be afforded a clear view of international practice on points which have given difficulty during the period.

11. The Special Rapporteur has already been in touch with the legal advisers of a number of the specialized agencies as well as those of a number of regional organizations. The Codification Division of the United Nations Office of Legal Affairs furnished the Special Rapporteur with a collection of data including a complete set of the *United Nations Juridical Yearbook* (1962–1975). It contains legislative texts and treaty provisions concerning the legal status of the United Nations and related intergovernmental organizations, thus offering an important source supplementing the 1960 and 1961 relevant volumes of the United Nations Legislative Series.[8] In addition, the *Juridical Yearbook* reproduces selected legal opinions which sometimes deal with questions which have arisen in practice relating to privileges and immunities. The Codification Division also furnished the Special Rapporteur with extracts from the records of the Sixth Committee at the thirty-second session of the General Assembly, setting out the comments of delegations on the part of the report of the Commission relating to the second part of the topic of relations between States and international organizations.

[8] *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vols. I and II (United Nations publications, Sales Nos. 60.V.2 and 61.V.3, respectively).

CHAPTER II

Summary of the Commission's discussion at its twenty-ninth session

12. The Commission, as noted above,[9] discussed the preliminary report of the Special Rapporteur at its 1452nd to 1454th meetings, held on 4, 5 and 6 July 1977.

A. The question of the advisability of codifying the second part of the topic

13. Mr. Sette Câmara[10] noted that there had not yet been any attempt to codify the international law relating to the legal status and immunities of international organizations. He stated that he had no doubt that the topic was ripe for codification. If it were codified, it would become the last in a series of codification instruments relating to diplomatic law, which included the 1961 Vienna Convention on Diplomatic Relations,[11] the 1963 Vienna Convention on Consular Relations,[12] the 1969 Convention on Special Missions[13] and the 1975 Vienna Convention.[14]

14. Mr. Tabibi[15] pointed out that the codification and harmonization of the rules relating to the status, privileges and immunities of international organizations were of vital importance, especially as international organizations now had offices throughout the world which would greatly benefit from a set of rules applicable on a world-wide scale.

15. Mr. Šahović[16] agreed in principle with the Special Rapporteur's views. He stated, however, that he was not unaware of the reasons for which the Commission had previously decided to defer consideration of the second part of the topic. He referred to the Special Rapporteur's opinion to the effect that most of those reasons no longer existed and commented that he himself believed that there must still be factors which militated against such an undertaking or were, at least, calculated to make the task of the Special Rapporteur and of the Commission very difficult.

16. Mr. Calle y Calle[17] stated that it might be claimed that it was premature to undertake codification of the rules relating to the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who were not representatives of States. It could be asserted that the question was already regulated by treaties, and more particularly by headquarters agreements. But he believed that the sooner the subject was properly regulated, the greater the benefits would be to both States and international organizations. Hence, from a variety of different conventions, it was necessary to select general rules to fill any existing gaps.

17. Mr. Dadzie[18] stated that the preliminary report of the Special Rapporteur clearly established that there was a sufficiently large corpus of rules for the Commission to undertake the work of codification.

18. Mr. Verosta[19] counselled caution in the Commission's approach to the codification of the second part of the topic. He pointed out that at the present

[9] See para. 4 above.

[10] *Yearbook ... 1977*, vol. I, p. 204, 1452nd meeting, paras. 24–25.

[11] United Nations, *Treaty Series*, vol. 500, p. 95.

[12] *Ibid.*, vol. 596, p. 261.

[13] General Assembly resolution 2530 (XXIV), annex.

[14] For reference, see foot-note 1 above.

[15] *Yearbook ... 1977*, vol. I, p. 205, 1452nd meeting, para. 27.

[16] *Ibid.*, paras. 31 and 34.

[17] *Ibid.*, p. 206, para. 40.

[18] *Ibid.*, p. 207, para. 45.

[19] *Ibid.*, para. 48.

stage, the Commission could not be sure of the outcome of the work; it might take the form of a convention, an additional protocol to the 1975 Vienna Convention, or perhaps something of even lesser standing.

19. Mr. Sucharitkul[20] stated that he fully endorsed the tentative conclusions reached by the Special Rapporteur in his preliminary report.

20. Mr. Reuter[21] drew the Commission's attention to the fact that the topic, like that of State succession, covered a vast area and the Special Rapporteur should be given wide discretion, so that he could start with the most tractable problems.

21. Mr. Francis[22] stated that it was difficult to see how the Commission could avoid, or be made to avoid, proceeding further with the topic, which brought into focus the need to complement other branches of diplomatic law already codified by the Commission.

22. Mr. Schwebel[23] cautioned that a reasonable balance should be struck between the privileges and immunities of international organizations and the jurisdiction of host States.

23. Mr. Quentin-Baxter,[24] while not opposing further work on the topic of relations between States and international organizations, sounded a note of prudence to the effect that the second part of the topic was pre-eminently one which called for such a low-key approach. In his opinion, the best course would be to proceed gradually and the Commission might well find sufficient reward at the end of its enquiries if it pursued them gently.

24. Mr. Tsuruoka[25] pointed out that he assumed that the Commission intended to draw up an international legal instrument designed to promote the activities of international organizations, which were rendering increasingly valuable services to the peace and prosperity of States and to the well-being of peoples in many fields. He emphasized that it was necessary to work out general rules which were simple and well-balanced and to avoid the pitfalls of detail and inflexibility.

25. Mr. Ushakov[26] stated that he thought that the question of the status of international organizations was ripe for codification and that the Commission could find a general basis for the work in the existing conventional and customary rules. He pointed out that there were nearly 300 international organizations, which included organizations of a universal character and regional organizations. Those organizations had their headquarters in the territory of a member State or a non-member State, and some of them had permanent organs in the territory of other States. Consequently, the topic of relations between States and international organizations was extremely important for the whole of the international community, for over half the States in the world were now host States.

26. Sir Francis Vallat[27] shared the view that the Special Rapporteur should be asked to proceed with his study of the second part of the topic. He referred to certain risks involved in the endeavours of the Commission to codify such a subject as the legal status of international organizations. He pointed out that there was some fear of uniformity, because it was thought that, once uniformity had been achieved, international organizations might obtain maximum rather than minimum privileges and immunities. The possibility that the rules to be formulated by the Commission might constitute a kind of minimum standard as referred to by some members of the Commission would also, in the opinion of Sir Francis Vallat, involve a risk, because a minimum standard might encourage international organizations established in the future to ask for the minimum and then more. He was therefore of the opinion that the Commission would be right in not trying to codify every aspect of the status, privileges and immunities of international organizations.

B. The question of the scope of the topic

27. Sir Francis Vallat,[28] in his capacity as Chairman of the Commission, stated at the start of the debate on the preliminary report of the Special Rapporteur that he was not certain whether the Special Rapporteur intended consideration of the second part of the topic to be confined to international organizations of a universal character. Clarification of that point would be useful to the international organizations, specialized agencies and host States, which would be requested to provide information on their practice in regard to the status, privileges and immunities of international organizations and their officials.

28. Mr. Calle y Calle[29] said that he was inclined to think that the Commission's work should cover all international organizations, not simply the organizations in the United Nations family.

29. Mr. Dadzie[30] considered that the task of the progressive development of international law demanded that the rules to be formulated by the Commission should apply to all international organizations and not exclusively to those of a universal character.

30. Mr. Verosta,[31] stated that, before proceeding further, the Commission should perhaps press for a decision by the Special Rapporteur on whether the draft articles would be confined to international or-

[20] *Ibid.*, para. 50.
[21] *Ibid.*, p. 210, 1453rd meeting, para. 13.
[22] *Ibid.*, para. 14.
[23] *Ibid.*, para. 18.
[24] *Ibid.*, p. 211, paras. 24 and 27.
[25] *Ibid.*, para. 29.
[26] *Ibid.*, p. 212, paras. 32 and 35.
[27] *Ibid.*, paras. 38–39.
[28] *Ibid.*, p. 205, para. 30.
[29] *Ibid.*, p. 206, para. 41.
[30] *Ibid.*, p. 207, para. 46.
[31] *Ibid.*, para. 48.

ganizations of a universal character or would also include regional organizations.

31. Mr. Sucharitkul[32] said that he was inclined to believe that the Commission should consider the privileges and immunities of all international organizations.

32. Mr. Reuter[33] warned the Commission not to be unduly influenced, in defining the scope of the second part of the topic, with its decision to broaden the scope of the draft articles on treaties concluded between States and international organizations or between two or more international organizations of which he is the Special Rapporteur and making them applicable to all international organizations, whether of a universal character or regional. The drafting of articles relating to treaties to which international organizations were parties must necessarily remain within the sphere of general international law. For such treaties did exist, and they were subject to rules which could not be the rules of any international organization; an international organization, by definition, would not agree to conclude a treaty with another international organization if it had to submit to the rules of that other organization. The 1975 Vienna Convention had an entirely different object. In that sphere, special rules of international law existed for each organization, so that it had not been a matter of drafting rules which had originally been rules of general international law, but of unifying rules of special international law. For the second time, the Commission was preparing to undertake such work for the unification of public international law, the results of which would correspond to the unification of private international law. Mr. Reuter concluded that, in these circumstances, he would be inclined to say that the wider the circle of international organizations covered, the more numerous would be the special laws unified and, consequently, the more complete the Commissions' work. From the point of view of the unification of law alone, such should indeed be the Commission's object but, on the other hand, it must show moderation and reason. It could not expect at the outset to unify the law of every individual international organization in existence. It was, of course, desirable that it should succeed in doing so, but that seemed unlikely. It might be that conclusions similar to those which the Commission had been obliged to accept in its earlier work, and at the United Nations Conference on the Representation of States in their Relations with International Organizations (Vienna, 1975), would again be unavoidable.

33. Mr. Quentin-Baxter[34] stated that it was too early to establish the definitive scope of further work on the subject, and he fully shared the view that the Commission should begin by considering organizations in the United Nations system. Nevertheless, he believed that the value of the draft would greatly depend on whether other smaller, regional organizations could relate it to their own circumstances; in other words, on whether it was a draft which would help them to understand the essential laws of their own existence and of their relationship to States.

34. Mr. Tsuruoka[35] said he was in favour of limiting the scope of the study, if only because the Commission would not have time to draw up rules applicable to all international organizations. The rules governing international organizations were very numerous and diverse. To overcome the disadvantages of limiting the subject, the Commission could draft an article similar to article 3 of the Vienna Convention on the Law of Treaties,[36] reserving wider application of the instrument.

35. Mr. Ushakov[37] stated that it was too soon to decide whether the study should be confined to international organizations of a universal character. Before taking that decision, the Commission should consult the United Nations, the specialized agencies and States in order to ascertain their views and obtain information.

36. Sir Francis Vallat[38] noted that the question had been raised whether the study should be confined to relations between States and international organizations of a universal character. That question had not been answered during the discussion and his own view was that it was not a question which the Commission should answer at present; it would require further investigation and the advice and guidance of the Special Rapporteur.

C. The subject-matter of the envisaged study

37. In his preliminary report, the Special Rapporteur referred to three categories of privileges and immunities which might constitute the subject-matter of the study: (*a*) the organization; (*b*) officials of the organization; (*c*) experts on missions for and persons having official business with the organizations and not being representatives of States.[39] He also referred to resident representatives and observers which may represent or be sent by one international organization to another international organization.[40]

38. Several members of the Commission endorsed the tentative suggestion of the Special Rapporteur regarding the definition of the subject-matter of the study. Some members of the Commission elaborated on the suggestion of the Special Rapporteur and presented a number of refinements and amplifications.

[32] *Ibid.*, para. 52.

[33] *Ibid.*, p. 209, paras. 9–10.

[34] *Ibid.*, p. 211, para. 25.

[35] *Ibid.*, para. 31.

[36] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289. (Hereafter referred to as "the Vienna Convention".)

[37] *Yearbook ... 1977*, vol. I, p. 212, 1453rd meeting, para. 35.

[38] *Ibid.*, para. 38.

[39] *Yearbook ... 1977*, vol. II (Part One), p. 153, document A/CN.4/304, paras. 70–73.

[40] *Ibid.*, p. 155, para. 78.

39. Mr. Calle y Calle[41] said the Commission should take a broad view and should not let itself be bogged down by the problem of defining an international organization. It was now proceeding on the basis of the simplest possible definition, namely, that an international organization was an intergovernmental organization. Nor should the Commission go further into the problem of the legal capacity of international organizations, although both those matters were now becoming clearer as a result of decisions by the International Court of Justice and the very existence of international organizations.

40. Mr. Dadzie[42] stated he had been particularly interested to note the Special Rapporteur's comments on experts performing missions for international organizations. As someone who had been the representative of a State and, in recent years, the representative of an international organization to such important bodies as OAU, he fully endorsed the Special Rapporteur's comment that it was essential to study the question of the representation of one international organization in its relations with another.

41. Mr. Reuter[43] noted that the question of the privileges and immunities of an international organization was linked with that of the privileges and immunities of an international official, but the latter raised delicate problems, including tax problems, which States were loath to discuss. Indeed, some States refused their own nationals who were officials of international organizations the privileges and immunities they granted international officials of other nationalities. That situation had led to many compromises in the United Nations. He therefore considered that a few problems should be selected for consideration at the first stage, such as those concerning international organizations, and that the much more delicate problems relating to international officials should be left till later.

42. Mr. Tsuruoka[44] stated that it was necessary to decide not only which international organizations should be covered, but also to which officials of international organizations the future draft articles should be addressed. He added that one question to which the Special Rapporteur had referred, and which should be clarified some time, was the precise status of the members of the Commission.

43. Mr. Ushakov[45] pointed out that, besides relations between States and international organizations, it was also necessary to study the problem of relations between international organizations, for many of them had representatives attached to other international organizations. For instance, CMEA had a permanent observer at the United Nations General Assembly in New York. The question which arose in both cases, and which had not yet been settled, was that of the legal status and privileges and immunities of the representatives of international organizations.

44. Sir Francis Vallat[46] stated that, with regard to the subject-matter of the study, he noted that most members of the Commission assumed that it would deal with the effect of the existence and operation of international organizations in the territory of States; in other words, with the effect or lack of effect of internal law on international organizations, not with the international relations of organizations and States or the international relations of organizations *inter se*. He drew attention to that assumption in order to stress the fact that, at present, it would be unwise for the Commission to place undue restrictions on the subject-matter of the study. Moreover, if that assumption was correct, it would mean that the study should deal with three basic questions, namely, the capacity or status of international organizations in internal law, the privileges of international organizations, and the immunities of international organizations.

45. He had specially mentioned such capacity, because he thought that one of the basic questions to be answered in the study was whether an international organization had legal capacity to contract within the system of internal law and to act as a body corporate by virtue only of its establishment and existence. He was particularly aware of the importance of that question because in the United Kingdom it had had to be decided whether a commodity council, to which the relevant agreement had accorded only the capacity of a body corporate, but no privileges and immunities, was governed by United Kingdom legislation, which dealt essentially with capacity in the context of privileges and immunities. Although that problem had been solved by the adoption of the necessary Order in Council, it had clearly shown that the question of the capacity or status of an international organization was separate from the question of its privileges and immunities.

46. In that connexion, he thought the study should deal with the scope and content of Articles 104 and 105 of the Charter of the United Nations, which also made a distinction between the legal capacity necessary for the exercise of the Organization's functions and the privileges and immunities necessary for the fulfilment of its purposes. It should also be borne in mind, however, that if the study dealt with the status, privileges and immunities of an international organization itself, as distinct from those of its officials and experts, it would be moving away from diplomatic law and towards the subject of State immunity, which the Commission had not yet examined, but which it might take up as a topic parallel to that being studied by the Special Rapporteur. Although there was, in a sense, a parallel between State immunity and the immunity of an international organization, there was also a very fundamental difference between those concepts, for

[41] *Yearbook ... 1977*, vol. I, p. 206, 1452nd meeting, para. 42.

[42] *Ibid.*, p. 207, para. 44.

[43] *Ibid.*, p. 210, 1453rd meeting, para. 13.

[44] *Ibid.*, p. 211, para. 31.

[45] *Ibid.*, p. 212, para. 33.

[46] *Ibid.*, p. 213, paras. 41–43.

State immunity was based on the idea of a State's sovereignty and absolute immunity from foreign jurisdiction, whereas the immunity of an international organization derived from its constituent instruments and any relevant agreements that conferred on it the privileges and immunities necessary for the exercise of its functions. The parallel between those two concepts could be seen, however, in cases where, for example, local courts dealt with questions of immunity and of waiver in very much the same manner for international organizations as for States.

D. The theoretical basis of immunities of international organizations

47. Mr. Sette Câmara[47] said that, in undertaking the task of codification of the international law relating to the legal status and immunities of international organizations, the Commission should not adopt the view that it was through the generosity of host Governments that officials of international organizations were entitled to certain privileges and immunities; it should take the view that officials of international organizations needed such privileges and immunities in order to carry out the tasks entrusted to them. Those privileges and immunities had, until now, been governed piecemeal by agreements whose provisions varied considerably. It would be the Commission's task to organize those provisions in an additional protocol, a code or a declaration, so that, although they might constitute residual rules, they would nevertheless be generally applicable to as many international organizations as possible. In attempting to formulate such rules, the Commission should pay particular attention to the provisions of Articles 104 and 105 of the Charter of the United Nations and the corresponding articles of the constituent instruments of the specialized agencies.

48. Mr. Tabibi[48] stated that he believed that the rules to be formulated by the Commission, no matter what form they took, should protect both the interests of host Governments, for which security was of crucial importance, and the interests of international organizations, which should be able to continue their work of promoting international peace and co-operation.

49. Mr. Šahović[49] pointed out that, in his preliminary report, the Special Rapporteur had indicated the general evolution of law on the subject, but he should now proceed to a much more concrete analysis of the situation, taking account of new developments. His first task would be to make sure of the value of the existing conventional rules on which he intended to base his work. To that end, it was important to make a comprehensive study of practice. He emphasized the need to base future reports on a systematic analysis of existing practice and legal rules.

50. Mr. Calle y Calle[50] pointed out that, in formulating the rules governing relations between States and international organizations, it should be borne in mind that they were relations between States and the bodies they set up to carry out functions which they could not perform themselves. While it was true that, for certain matters, earlier historical precedents could be found, the true point of departure was the Charter signed at San Francisco in 1945. It had been followed in 1946 by the Convention on the Privileges and Immunities of the United Nations[51] and, in 1947, by the Convention on the Privileges and Immunities of the Specialized Agencies.[52] The 1946 Convention was now in force for 112 States. It could therefore be regarded as truly universal.

51. Mr. Sucharitkul[53] stated that the legal basis for the status of international organizations and the privileges and immunities accorded to such organizations or their officials was to be found in the various types of conventions of a general character – for instance, the 1946 Convention and the 1947 Convention – and also the various bilateral agreements, special agreements and headquarters agreements. In addition, a perusal of the *United Nations Juridical Yearbook*, for example, clearly showed some of the national legislation which gave effect to the various conventions and agreements. The privileges and immunities of an international organization, of whatever type, were necessarily qualified or limited by the functions of the organization and its officials. They were limited because the organization and its officials were not immune from substantive law, but only from jurisdiction.

52. Mr. Reuter[54] pointed out that the granting of the privileges of an international official depended upon the functions of the international organization. A customary rule could be considered to exist according to which the privileges and immunities of an international official were based on, and limited by, the requirements of his functions. In his opinion, that was a very general rule, however, and it was necessary to ascertain, for example, whether the organization was obliged to suspend those privileges and immunities when the functions were not being exercised.

53. Mr. Francis[55] said that the growth of the legal status of international organizations and the privileges and immunities granted to them and to their officials resulted from the enlightened interplay of the foreseeable requirements of international organizations and the fundamental requirements of the internal law of States. Over the years, a wide range of customary rules had emerged and no one could deny

[47] *Ibid.*, p. 204, 1452nd meeting, para. 24.

[48] *Ibid.*, p. 205, para. 28.

[49] *Ibid.*, pp. 205–206, paras. 32 and 34.

[50] *Ibid.*, p. 206, para. 39.

[51] United Nations, *Treaty Series*, vol. 1, p. 15. Hereafter referred to as the "1946 Convention".

[52] *Ibid.*, vol. 33, p. 261. Hereafter referred to as the "1947 Convention".

[53] *Yearbook ... 1977*, vol. I, p. 207, 1452nd meeting, paras. 51–52.

[54] *Ibid.*, p. 209, 1453rd meeting, para. 12.

[55] *Ibid.*, p. 210, paras. 14–15.

that, at the present time, a large body of such rules was applicable to international organizations and to their accredited officials.

54. Mr. Schwebel[56] stated that international organizations must have functional privileges and immunities. He cautioned, however, that a reasonable balance should be struck between the privileges and immunities of international organizations and the jurisdiction of host States. It was particularly important to bear in mind the limited character of privileges and immunities, because of the popular reaction to what was often considered an undue extension of them. In his opinion, the real problem related to diplomatic privileges and immunities, not to those accorded to the secretariats of international organizations.

55. Mr. Quentin-Baxter[57] said that at the doctrinal level, the nature of custom in its application to international organizations was clearly a matter of great difficulty and complexity. At the level of common sense, however, it was plain that States had developed some customary rules or common conceptions in their approach to international organizations and officials.

56. Mr. Tsuruoka[58] pointed out that, in the sphere of privileges and immunities of international organizations, the rules were evolving so much that it was difficult to foresee where the trend would lead. It was necessary to consider the interests both of those who benefited from privileges and immunities and those who granted them.

57. Mr. Ushakov[59] stated that the existing rules of diplomatic law of international organizations were based on the common principle that an international organization, in order to exist, must enjoy a special status in the State, whether a member or a non-member, in whose territory it had headquarters. For without a headquarters agreement establishing that status, an international organization could neither exist nor operate as such. The privileges and immunities of the officials of an international organization were also indispensable for its existence and operation. That was a general rule on which all relations between States and international organizations were based.

58. Sir Francis Vallat[60] commented on paragraph 59 of the report of the Special Rapporteur, where reference had been made to the views expressed in Parliament by the Minister of State during the introduction of the 1944 British Diplomatic Privileges (Extension) Act.[61] He pointed out that those views had been expressed at a very early stage in the development of thinking on the status, privileges and immunities of international organizations, and since that time there had been many developments in statute law. At present, there was little doubt that the predominant view in United Kingdom government circles was that the functional approach was the right one and that the source of the privileges and immunities of international organizations lay in the relevant agreements. The wealth of treaties and legislation which had appeared since 1944 had had a definite impact on the basic theory of the status, privileges and immunities of international organizations, and it was now generally agreed that organizations enjoyed privileges and immunities in order to exercise the functions entrusted to them.

E. The form to be given to the eventual codification

59. Mr. Sette Câmara[62] thought that it would be the Commission's task to organize the provisions of agreements relating to the privileges and immunities of international organizations and their officials, which had until now been governed piecemeal, in an additional protocol, a code or a declaration, so that, although they might constitute residual rules, they would nevertheless be generally applicable to as many international organizations as possible.

60. Mr. Tabibi[63] believed that the rules to be formulated by the Commission, no matter what form they took, would contribute to the codification and harmonization of the rules relating to the status, privileges and immunities of international organizations, which was of vital importance, especially as international organizations now had offices throughout the world which would greatly benefit from a set of rules applicable on a world-wide scale.

61. Mr. Calle y Calle[64] stated that the work of the Commission, if it was to take the form of an additional protocol, would complement the provisions of the 1975 Vienna Convention.

62. Mr. Verosta[65] pointed out that at the present stage, the Commission could not be sure of the outcome of the work; it might take the form of a convention, an additional protocol to the 1975 Vienna Convention, or perhaps something of even lesser standing.

[56] *Ibid.*, paras. 19–20.

[57] *Ibid.*, p. 211, para. 23.

[58] *Ibid.*, para. 29.

[59] *Ibid.*, p. 212, para. 33.

[60] *Ibid.*, para. 36.

[61] "When ... at the end of 1944, the British Diplomatic Privileges (Extension) Act, which provided for immunities, privileges and capacities of the international organizations, their staff, and the representatives of member Governments, was introduced in Parliament, the Minister of State explained that, where a number of Governments joined together to create an international organization to fulfil some public purpose, the organization should have the same status, immunities and privileges as the foreign Governments members thereof enjoyed under ordinary law. He elaborated that, in principle, they were entitled to it as a matter of international law which the courts would regard as being part of common law. However, legislation was regarded as desirable in order to put the legal position beyond dispute and to define with precision the extent of the prerogatives." (*Yearbook ... 1977*, vol. II (Part One), p. 151, document A/CN.4/304, para. 59.)

[62] *Yearbook ... 1977*, vol. I, p. 204, 1452nd meeting, para. 24.

[63] *Ibid.*, p. 205, paras. 27–28.

[64] *Ibid.*, p. 206, para. 42.

[65] *Ibid.*, p. 207, para. 48.

63. Mr. Tsuruoka[66] said that he assumed that the Commission intended to draw up an international legal instrument designed to promote the activities of international organizations, which were rendering increasingly valuable services to the peace and prosperity of States and to the well-being of peoples in many fields.

F. Methodology and processing of data

64. Mr. Sette Câmara[67] pointed out that, although diplomatic activities were as old as society itself, the question of the status, privileges and immunities of international organizations, which came under the heading of multilateral diplomacy, was relatively new, in the sense that it had become a matter of concern only in the past 50 or 60 years. Moreover, there had not yet been any attempt to codify the international law relating to the legal status and immunities of international organizations. In attempting to formulate such rules, the Commission should pay particular attention to the provisions of Articles 104 and 105 of the Charter of the United Nations and the corresponding articles of the constituent instruments of the specialized agencies.

65. Mr. Tabibi[68] emphasized that the Commission had decided to deal with the practical aspects of the second part of the topic of relations between States and international organizations. In its task of codifying that second part, the Commission would be able to benefit greatly from the experience it had gained in studying the first part of that topic and the question of treaties between States and international organizations or between two or more international organizations. It would also be able to base its work on the experience gained over the years by the many Governments which were now hosts to international organizations. He stated that it might be advisable to request host Governments, such as those of the United States of America, France, Italy, Switzerland and Austria, to provide information on the main questions of concern to them in connexion with the topic under consideration. The Programme and Co-ordination Committee of the Economic and Social Council might be requested to suggest that host Governments should provide the Special Rapporteur with information.

66. Mr. Šahović[69] suggested that an endeavour should be made to propose solutions to the problems raised by the codification of legal rules relating to the status and to the privileges and immunities of international organizations. He pointed out that, in his preliminary report, the Special Rapporteur had indicated the general evolution of law on the subject, but he should now proceed to a much more concrete analysis of the situation, taking account of new developments. His first task would be to make sure of the value of the existing conventional rules on which he intended to base his work. To that end, it was important to make a comprehensive study of practice.

67. Mr. Calle y Calle[70] stated that the Commission should take a broad view and should not let itself be bogged down by the problem of defining an international organization. It was now proceeding on the basis of the simplest possible definition, namely, that an international organization was an intergovernmental organization. Nor should the Commission go further into the problem of the legal capacity of international organizations, although both those matters were now becoming clearer as a result of decisions by the International Court of Justice and the very existence of international organizations. The main task was, he said, to guide the development of the law pertaining to international organizations and to ensure that its development was orderly and harmonious. It was essential to prevent the emergence of strange or hybrid bodies claiming a special status. In short, he believed, the Commission should endeavour to channel, plan and organize what was a dynamic branch of present-day law.

68. Mr. Verosta[71] suggested that a number of other regional organizations could be included in the list in paragraph 31 of the Special Rapporteur's preliminary report[72] – for example, the Organization of the Danube Commission, or OPEC. The treaty between the OPEC States was short, but the headquarters agreement between OPEC and Austria was quite elaborate. He said he was gratified to learn that the Special Rapporteur would attempt to obtain information from the regional organizations, for without such material it would not be possible to enlarge the scope of the articles later, if that course was found advisable. In any event, it would be a mistake, he felt, to undertake complete codification at the present time, for any rules laid down now or in the near future might well be counter-productive, especially in the case of regional organizations.

69. Mr. Sucharitkul[73] pointed out that a perusal of the *United Nations Juridical Yearbook*, for example, clearly showed some of the national legislation which gave effect to the various conventions and agreements relating to the immunities of international organizations. The status of an international organization was meaningful only if it was recognized at two levels: the international and the national. In other words, an international organization had to be given full legal capacity under public international law and it had to be recognized under the internal law of its member countries, especially that of the country in which it had its headquarters. An inter-

[66] *Ibid.*, p. 211, 1453rd meeting, para. 29.

[67] *Ibid.*, p. 204, 1452nd meeting, para. 24.

[68] *Ibid.*, p. 205, paras. 27–29.

[69] *Ibid.*, para. 32.

[70] *Ibid.*, pp. 206–207, paras. 42–43.

[71] *Ibid.*, p. 207, paras. 48–49.

[72] The Special Rapporteur referred, in paragraph 31 of his preliminary report (*Yearbook ... 1977*, vol. II (Part One), p. 145, document A/CN.4/304) to the following regional organizations: the League of Arab States, OAS, the Council of Europe, ECSC, EEC, CMEA, EFTA, and OAU.

[73] *Yearbook ... 1977*, vol. I, p. 207, 1452nd meeting, para. 51, and p. 208, 1453rd meeting, paras. 4–5.

national organization usually entered into contracts and possessed movable and immovable property; hence, recognition of its status under internal law was absolutely vital. He said that the Government of Japan had granted certain privileges and immunities to the United Nations University, but that the University was what might be termed a lesser organ and its head could not be compared with the Secretary-General of the United Nations; the scope of his immunities was restricted by the nature of his functions. Obviously, the practice of States was of great significance. National courts sometimes applied the principles relating to immunities as principles of international law, though the courts in the United Kingdom regarded those principles as being already incorporated into internal law. The difficult practice in the United States of America, resulting from the recent legislation concerning suits against foreign Governments, would probably have some effect on suits against international organizations. He observed that the group of States which form ASEAN had come to adopt what the Special Rapporteur had aptly termed customary practice. ASEAN meetings at various levels had been granted the traditional or customary privileges and immunities accorded to "organizations of a similar character", though exactly what was meant by that expression was doubtless open to different interpretations. His own country, Thailand, afforded an example of particularly rich experience in State practice – for instance, the arrangements made for ESCAP, the South East Asian Ministers of Education Secretariat and SEATO, an organization which had recently been dissolved but nonetheless, for the purpose of legal studies, gave a complete picture of the formation of headquarters agreements and bilateral arrangements.

70. Mr. Reuter[74] pointed out that it was not so much between the universal or regional character of international organizations that it was necessary to distinguish, as between the major administrative political organizations, such as the United Nations and its specialized agencies, and the ever-increasing number of organizations of a more or less operational character which performed banking or commercial functions. As Special Rapporteur responsible for the study of treaties to which international organizations were parties, he had examined the compilation in five volumes entitled "Economic co-operation and integration among developing countries: compilation of the principal legal instruments".[75] He had noted that the question of the privileges and immunities of the bodies concerned was discussed there, and that certain analogies could be drawn with the major specialized agencies, though at first sight the position of an organization such as WHO was not at all similar to that of a body such as the African Development Bank. That was why it was important not to set limits to the Special Rapporteur's work. It might, however, be considered advisable, at least to start with, to confine that work to organizations in the United Nations family, since the Commission itself was one of them. Admittedly, the United Nations had set up regional organizations which carried out certain operational activities, but it was for the Special Rapporteur to delimit the scope of his subject.

71. Mr. Reuter[76] also stated that a customary rule could be considered to exist according to which the privileges and immunities of an international official were based on, and limited by, the requirements of his functions. That was a very general rule, however, and it was necessary to ascertain, for example, whether the organization was obliged to suspend those privileges and immunities when the functions were not being exercised. If so, by what criterion would it be recognized that the functions were no longer involved? There was a wealth of jurisprudence on the liability of the international officials involved in traffic accidents and the Commission's work would only be useful if it managed to work out rather more specific formulas than those generally used.

72. Mr. Francis[77] pointed out that, some years ago, when he had been the legal adviser of the Ministry of Foreign Affairs in his country, a representative of OAS had arrived in Jamaica to establish a regional office. At that time there had been no question but that, even in the absence of an agreement, the representative of the organization was entitled to certain basic privileges. Customary law unquestionably played an important role in the present topic and had, he said, been dealt with most constructively by the Special Rapporteur.

73. Mr. Francis[78] referred to a passage in the preliminary report of the Special Rapporteur[79] indicating the lack of uniformity in the treatment of experts on missions for international organizations and stated this lack of uniformity applied also to the treatment of persons having official business with international organizations, who were generally granted the right of transit. In that connexion, the important question was whether, in view of the functional needs of international organizations, the right of transit was sufficient. In his opinion, persons in such a position should be afforded a measure of protection that went beyond the right of transit. He also emphasized that the role of experts was now very different from that envisaged when the 1946 and 1947 Conventions on the Privileges and Immunities of the United Nations and on the Specialized Agencies were respectively concluded. Furthermore, he stated that it would be useful to obtain more complete and up-to-date information from the specialized agencies. Almost certainly, he said, it would be possible in the end to arrive at conclusions acceptable to all Commission members, which would go to

[74] *Ibid.*, p. 209, para. 11.

[75] TD/B/609/Add.1, vols. I, II, III (and Corr.1), IV, V.

[76] *Yearbook ... 1977*, vol. I, p. 209, 1453rd meeting, para. 12.

[77] *Ibid.*, p. 210, para. 15.

[78] *Ibid.*, paras. 16–18.

[79] *Yearbook ... 1977*, vol. II (Part One), p. 153, document A/CN.4/304, para. 72.

make up a body of rules that were not confined entirely to international organizations of a universal character.

74. Mr. Schwebel[80] said that it was particularly important to bear in mind the limited character of privileges and immunities of international organizations, because of the popular reaction to what was often considered an undue extension of them. A reasonable balance should be struck between those privileges and immunities and the jurisdiction of host States, not only for reasons of equity, but also in order to improve the popular image of international organizations – a matter which could not be lightly discounted.

75. Mr. Quentin-Baxter[81] stated that, at the doctrinal level, the nature of custom in its application to international organizations was clearly a matter of great difficulty and complexity. At the level of common sense, however, it was plain that States had developed some customary rules or common conceptions in their approach to international organizations and officials. It would be wise for the Commission, he said, to move tentatively, allowing time for State practice to develop, and to preserve a sense of priorities which would rank sovereign immunities above the equally difficult problems concerning the immunities of officials of international organizations. The Special Rapporteur had emphasized that the Commission preferred to follow an empirical method and to deal with problems that were of immediate practical interest to States and for which there was at least a reasonable possibility of an agreed solution. The subject had been, he stressed, rightly described as one which fell within the field of diplomatic law and did not raise the enormous theoretical problems that surrounded the question of the personality, capacity and role of international organizations.

76. Mr. Tsuruoka[82] stated that the rules drawn up by the Commission were not entirely residuary. As the late Mr. Bartos, former Special Rapporteur for the topic of special missions, had pointed out when submitting his draft articles, there was a minimum number of imperative rules even when the subjects of international law concerned were left wide latitude. And where the status and the privileges and immunities of international organizations were concerned, the Commission was not going to leave the field entirely open to the independent will of those concerned. That was an additional reason for formulating simple rules and seeking compromise solutions. Such solutions were also dictated by the fact that in that sphere the rules were evolving so much that it was difficult to foresee where the trend would lead. Moreover, it was necessary to consider the interests both of those who benefited from privileges and immunities and of those who granted them. In that connexion, he pointed out that the question of the privileges and immunities to be granted to the United Nations University at Tokyo and to the members of its staff had been the subject of heated discussion in the Japanese Government. It was necessary to find solutions that offered a compromise between theory and pragmatism, and in some cases the Commission should not hesitate to engage in progressive development of international law.

77. Mr. Ushakov[83] pointed out that the topic of relations between States and international organizations was extremely important for the whole of the international community, for over half the States in the world were now host States. The headquarters of CMEA was in Moscow and almost all the socialist countries had the headquarters of an international organization in their territory. There was already a wealth of practice and well-established customary and conventional rules on the subject, deriving from the headquarters agreements concluded between States and international organizations. But relations between States and international organizations differed widely from one headquarters agreement to another, and the rules governing them should be unified.

78. He also stated[84] that the existing rules of diplomatic law were not imperative rules, but always subsidiary or residuary rules. There was thus no risk of their being too rigid or too flexible, because international organizations and States could derogate from them. He did not think that they were always special rules, since they were based on the common principle that an international organization, in order to exist, must enjoy a special status in the State, whether a member or a non-member, in whose territory it had its headquarters. For without a headquarters agreement establishing that status, an international organization could neither exist nor operate as such. The privileges and immunities of the officials of an international organization were also indispensible for its existence and operation. That was a general rule on which all relations between States and international organizations were based.

79. Sir Francis Vallat[85] stated that the Special Rapporteur should be given the fullest freedom to examine any material he thought might be useful, whether it related to organizations of a universal character, members of the United Nations family, regional organizations or other types of organization. The Special Rapporteur should examine a good deal of national legislation in order to arrive at some conclusions concerning the relationship between international organizations and the exercise of State jurisdiction, for it was through a study of the interplay of international treaties and national legislation that the Commission would be able to decide which rules should be included in a codification instrument.

[80] *Yearbook... 1977*, vol. I, p. 210, 1453rd meeting, paras. 19–21.

[81] *Ibid.*, p. 211, paras. 24–25.

[82] *Ibid.*, para. 30.

[83] *Ibid.*, pp. 211–212, paras. 32–33.

[84] *Ibid.*, p. 212, para. 34.

[85] *Ibid.*, para. 40.

80. He specially mentioned[86] the capacity or status of international organizations in internal law because he thought that one of the basic questions to be answered in the study was whether an international organization had legal capacity to contract within the system of internal law and to act as a body corporate by virtue only of its establishment and existence. He was particularly aware of the importance of that question because in the United Kingdom it had had to be decided whether a commodity council, to which the relevant agreement had accorded only the capacity of a body corporate but no privileges and immunities, was governed by United Kingdom legislation, which dealt essentially with capacity in the context of privileges and immunities. Although that problem had been solved by the adoption of the necessary Order in Council, it had clearly shown that the question of the capacity or status of an international organization was separate from the question of its privileges and immunities.

[86] *Ibid.*, p. 213, para. 42.

CHAPTER III

Summary of the Sixth Committee's discussion at the thirty-second session of the General Assembly

81. Statements made by representatives at the Sixth Committee, during its consideration at the thirty-second session of the General Assembly of the report of the Commission on the work of its twenty-ninth session,[87] were mainly devoted to the major items on the present agenda of the Commission on which it had prepared draft articles with commentaries. They are: State responsibility, succession of States in respect of matters other than treaties, and the question of treaties concluded between States and international organizations or between two or more international organizations. The work of the Commission at its twenty-ninth session on the second part of the topic "Relations between States and international organizations" was reflected in chapter V of its report, entitled "Other decisions and conclusions of the Commission", which indicated the groundwork and preliminary decisions made by the Commission on a number of items, work on which may be said to be still in the initial stages. They are: the law of the non-navigational uses of international watercourses, status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and the second part of the topic "Relations between States and international organizations". As chapter V had the character of a progress report, the subjects referred to therein, including the second part of the topic of relations between States and international organizations, did not evoke the detailed discussion in the Sixth Committee which is usually accorded to the major topics regarding which the Commission submits to the General Assembly draft articles with commentaries.

82. Apart from certain reservations expressed by a few delegations in the Sixth Committee regarding the desirability of giving a high degree of priority to work on the topic or the implications of such work for the position of the General Conventions on the privileges and immunities of the United Nations and the specialized agencies and headquarters agreements, the decision of the Commission to resume its work on the second part of the topic was endorsed by the Sixth Committee.

83. Introducing the report of the Commission to the Sixth Committee, the Chairman of the Commission at its twenty-ninth session, (Sir Francis Vallat),[88] pointed out that at the moment the Commission had not attempted to answer the basic question whether the second part of the subject should, like the first, be limited to organizations of a universal character or should extend to other international organizations. That question, which required further study, was linked to the twofold danger, inherent in the subject, of overlapping or conflicting with the General Conventions on the privileges and immunities of the United Nations and the specialized agencies and of establishing standards which tended to maximize privileges and immunities rather than to confine them to what was functionally required for each international organization.

84. The representative of Brazil[89] stated that, in undertaking the task of studying the second part of the topic concerning relations between States and international organizations, the Commission should base its approach on the principle of functionalism. The privileges and immunities of officials of international organizations were not due to the generosity of host States but were indispensable if the officials were to carry out the tasks entrusted to them. So far such privileges and immunities had been established in a piecemeal fashion, and the Commission's task was to unify them and turn them into an instrument which, although it might consist of residual rules, could be applied to as many international organizations as possible. His delegation considered that the topic of the status, privileges and immunities of international organizations and their officials was

[87] *Yearbook ... 1977*, vol. II (Part Two), p. 1, document A/32/10.

[88] *Official Records of the General Assembly, Thirty-second Session, Sixth Committee*, 25th meeting, para. 16; and *ibid., Sixth Committee, Sessional Fascicle*, corrigendum.

[89] *Ibid.*, 30th meeting, para. 40; and *ibid., Sixth Committee, Sessional Fascicle*, corrigendum.

ripe for codification; its codification would complete the cycle of instruments on diplomatic law.

85. The representative of Romania[90] said the Commission had taken well-founded and relevant decisions on the law of the non-navigational uses of international watercourses, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and the second part of the topic "Relations between States and international organizations."

86. The representative of Israel[91] questioned the usefulness of the work the Commission intended to do in the sphere of relations between States and international organizations, since those relations were already adequately regulated by conventions, practice and Article 105 of the Charter. The Sixth Committee should avoid encouraging another codification effort which might well prove abortive, like that which had culminated in the 1975 Vienna Convention.

87. The representative of Spain[92] stated that his delegation was not convinced that it would be useful to take up again the study of relations between States and international organizations so long as the 1975 Vienna Convention had not been generally accepted.

88. The representative of Thailand[93] stated that his delegation welcomed the Commission's decisions and conclusions, particularly those relating to the articles on the most-favoured-nation clause, to the continued study of the topic of the law of the non-navigational uses of international watercourses, to the further study of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and to further study of the second part of the topic "Relations between States and international organizations".

89. The representative of France[94] stated that his delegation favoured the continuation of work on the privileges and immunities of international organizations. However, it regretted the fact that the Commission had chosen to subdivide its work on relations between States and international organizations.

90. The representative of Burundi[95] said that, with regard to relations between States and international organizations, the Commission's discussions, as reflected in paragraphs 94 and 95 of its report,[96] seemed to indicate the best approach for work on that topic.

91. The representative of New Zealand[97] stated that his delegation had read chapter V of the report of the Commission with great interest. Since the various questions which the Commission proposed to study were all of interest, it should include them in its programme of work as soon as possible and set to work forthwith on preparatory studies concerning them.

92. The representative of Egypt[98] said that his delegation noted with satisfaction the progress made by the Commission at its twenty-ninth session with regard to the second part of the topic of relations between States and international organizations.

93. The representative of India[99] stated that with regard to chapter V of the report of the Commission, he supported the decisions taken by the Commission with regard to its future programme of work.

94. The representative of the United States[100] said that he doubted the desirability of giving a high degree of priority to work on the second part of the question of relations between States and international organizations.

95. The representative of Venezuela[101] stated his delegation agreed with the decisions referred to in chapter V of the Commission's report.

96. The representative of Somalia[102] said that he was pleased to note that an important question, the second part of the topic of relations between States and international organizations, was currently being studied by the Commission.

97. The position taken by the Sixth Committee on the decisions of the Commission regarding the second part of the topic of relations between States and international organizations was summarized in its report to the General Assembly on agenda item 112 ("Report of the International Law Commission on the work of its twenty-ninth session") as follows:

197. Several representatives expressed satisfaction that the Commission had taken up the study of the second part of the topic concerning relations between States and international organizations on the basis of a preliminary report submitted by the Special Rapporteur, Mr. A. El-Erian. It was noted that the Commission's discussion of the report seemed to indicate that it could now consider that part of the topic, as it was ripe for codification, thereby completing its work of codifying diplomatic law. The view was expressed that in undertaking such a task, the Commission should base its approach on the principle of functionalism; the privileges and immunities of officials of international organi-

[90] *Ibid.*, 32nd meeting, para 33; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[91] *Ibid.*, 36th meeting, para. 44; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[92] *Ibid.*, 39th meeting, para. 16; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[93] *Ibid.*, para. 27; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[94] *Ibid.*, 42nd meeting, para. 27; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[95] *Ibid.*, para. 57; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[96] *Yearbook ... 1977,* vol. II (Part Two), p. 127, document A/32/10.

[97] *Official Records of the General Assembly, Thirty-second Session, Sixth Committee,* 42nd meeting, para. 79; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[98] *Ibid.*, 43rd meeting, para. 18; and *ibid., Sixth Committee, Sessional Fascicle,* Corrigendum.

[99] *Ibid.*, para. 41; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[100] *Ibid.*, 44th meeting, para. 42; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[101] *Ibid.*, para. 47; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

[102] *Ibid.*, 45th meeting, para. 22; and *ibid., Sixth Committee, Sessional Fascicle,* corrigendum.

zations were indispensable to carry out the tasks entrusted to them. So far such privileges and immunities had been established in a piecemeal fashion, and the Commission's task was to formulate general rules susceptible of being embodied in an instrument which, although it might be residual in character, could help in unifying present practices and be applied by international organizations in cases of lacunae in the existing special conventions.

198. On the other hand, some representatives doubted the desirability of giving a high degree of priority to work on the matter. Further still, some representatives questioned the usefulness of the work the Commission intended to do in the sphere of relations between States and international organizations. The view was expressed that that work would not prove useful so long as the 1975 Vienna Convention had not been generally accepted. It was also said that those relations were already adequately regulated by special conventions, practice and Article 105 of the United Nations Charter, and that the Sixth Committee should avoid encouraging another codification effort which might well prove abortive.[103]

[103] *Ibid., Annexes*, agenda item 112, document A/32/433, paras. 197–198.

CHAPTER IV

Examination of general questions in the light of the discussions of the Commission and the Sixth Committee

98. As mentioned earlier in this report,[104] section IV of the preliminary report submitted by the Special Rapporteur in 1977[105] dealt with a number of general questions of a preliminary character. They included: the place of custom in the law of international immunities; differences between inter-State diplomatic relations and relations between States and international organizations; legal capacity of international organizations; and scope of privileges and immunities and uniformity or adaptation of international immunities. As appears from the summary of the discussion of the preliminary report in the Commission at its twenty-ninth session in 1977,[106] a number of general questions were raised by the members of the Commission. Among these questions were: the need for an analysis of the practice of States and international organizations in the fields of international immunities and its impact on the United Nations system; the need to study the internal law of States regulating international immunities; the possibility of extending the scope of the study to all international organizations, whether universal or regional; the need to take account of the particularities of diplomatic law in its application to relations between States and international organizations; and the need to reconcile the functional requirements of international organizations and the security interests of host States. As regards the discussion in the Sixth Committee[107] some representatives raised the following general questions: the relation between the second part of the topic and the general acceptance of the 1975 Vienna Convention; the adequate regulation of the subject matter by existing special conventions and practice; and the advisability of undertaking another codification in the field of the diplomatic law of relations between States and international organizations.

99. In examining the general questions raised in the discussions in the Commission and the Sixth Committee, the Special Rapporteur has deemed it appropriate to group them into the following basic categories: the impact of institutional evolution and functional expansion in the field of international organizations; the contribution of national law to the legislative sources of international immunities; the case for codification of the law of international immunities and the place of regional organizations in the regime of international immunities.

A. The impact of institutional evolution and functional expansion in the field of international organizations

100. Since the adoption by the United Nations General Assembly of the 1946 and 1947 General Conventions, a number of developments have taken place which have had their impact on the United Nations system. Two dominant themes among those developments, which are of particular relevance to the legal status of international organizations, are institutional evolution and functional expansion. These two distinct phenomena of contemporary international legal order have, however, an organic relationship and operational interaction, which have resulted in both a quantitative and qualitative renovation of institutionalized inter-State co-operation. An illustration of the mutual impact between institutional evolution and functional expansion is to be found in the emergence of the institutions of permanent missions and permanent observer missions to international organizations, following the creation of the United Nations in 1945. On the one hand, the practice of establishing permanent representation at the headquarters of international organizations served as a means of following more closely the activities of the organization in periods between sessions of different organs of the organization. This

[104] See para. 3 above.

[105] *Yearbook ... 1977*, vol. II (Part One), p. 151, document A/CN.4/304.

[106] See Chapter II above.

[107] See Chapter III above.

resulted in the addition of the liaison element to the functions of the representatives of States to international organizations. On the other hand, the increase in the functions of the international organization and its assumption of a universal character led States which are not members of the United Nations to send permanent observer missions to enable them to follow the work of the universal organization more closely.

101. It is not possible within the confines of the present report, or for its purposes, to give an account of the different aspects of the institutional evolution or the functional expansion which has taken place in the United Nations, the specialized agencies and other international organizations of universal or regional character during the last 30 years. It suffices, therefore, to refer to some of these aspects as illustrative examples of their impact on the law of immunities of international organizations. These examples are drawn from the practice of the United Nations. At the next stage of work on this topic, it would be necessary, of course, to study the practice of the specialized agencies as well as regional organizations in the light of the replies by the former to the questionnaire addressed to them by the Legal Counsel of the United Nations [108] and the information supplied by the latter to the Special Rapporteur as a result of his personal contacts which he has already initiated with a number of regional organizations.

102. In the course of his work on the first part of the topic of relations between States and international organizations, the Special Rapporteur outlined the development of the institutions of "permanent missions" and "permanent observer missions" to international organizations,[109] which constitutes one of the salient features of the institutional evolution within the framework of the international order established by the Charter of the United Nations in the aftermath of the Second World War. It may be briefly recalled that, while some members of the League of Nations had permanent delegates in Geneva, who were usually members of the diplomatic missions accredited to Switzerland, the practice had not been generally accepted of accrediting permanent delegations to the League of Nations.[110] An early commentary on the Charter of the United Nations noted that, since the new organization had come into being, it had become common practice among its members to maintain permanent delegations at the interim headquarters, and that in April 1948, 45 members had permanent delegations [111] (the total membership was then 57). The General Assembly took note of this practice, recognized its useful contribution to the realization of the purposes of the United Nations and established by resolution 257 A (III) of 3 December 1948 the regulations governing the appointment of permanent representatives, their accreditation and their powers. Permanent observers have been sent by non-member States to the Headquarters of the United Nations at New York and to its European Office at Geneva. Since 1946, a permanent observer has been maintained by the Swiss Government at New York, and later at Geneva. Observers have also been appointed by a number of States before they became members of the United Nations. Besides Switzerland, as noted above, the Democratic People's Republic of Korea, the Holy See, Monaco, San Marino and the Republic of Korea, which are not, at the present time, members of the Organization, maintain permanent observer missions.

103. The practice of sending permanent representatives was not confined to the area of representation of States to international organizations. It also grew in the opposite direction, namely, representation of international organizations to States. There are at present resident representatives of the United Nations at its offices of public information and of UNDP in a number of countries. Observers are also exchanged between the United Nations and the specialized agencies on a reciprocal basis. A number of regional organizations have also established permanent observers at the Headquarters of the United Nations at New York and its European Office at Geneva.

104. Of equally substantial bearing on the refining of the modalities of the immunities of international organizations and the widening of their scope and field of application is the increasing expansion of the activities of the United Nations and other related organizations as a consequence of the theory of functionalism. According to an authority on the theory and functioning of international organizations:

> The theory of functionalism is essentially an assertion and defense of the proposition that the development of international economic and social co-operation is a major prerequisite for the ultimate solution of political conflicts and elimination of war ...
>
> ...
>
> The 'functional' sector of international organization is that part of the mass of organized international activities which relates directly to economic, social, technical, and humanitarian matters–that is, to problems which may be tentatively described as non-policital. Functional activities are immediately and explicitly concerned with such values as prosperity, welfare, social justice and the 'good life', rather than the prevention of war and elimination of national insecurity.[112]

The development of this type of activity, which had its beginning in the public international unions of the nineteenth century and is now assuming wide-ranging dimensions under the auspices of the United Nations and the specialized agencies, represents a far-reaching orientation in the centre of gravity of

[108] Seee paras. 9 and 10 above.

[109] See *Yearbook ... 1967*, vol. II, pp. 143 *et seq.*, document A/CN.4/195 and Add.1, paras. 61–79; and *Yearbook ... 1970*, vol. II, p. 6, document A/CN.4/227 and Add.1 and 2, part II.

[110] See P. B. Potter, "Permanent delegations to the League of Nations", *Geneva Special Studies* (Geneva, League of Nations Association of the United States, 1930), vol. I, No. 8.

[111] L. M. Goodrich and E. Hambro, *Charter of the United Nations–Commentary and Documents*, 2nd edition, revised (Boston, World Peace Foundation, 1949) pp. 228–229.

[112] I. L. Claude, Jr., *Swords into Plowshares–The Problems and Progess of International Organizations*, 3rd edition, revised (New York, Random House, 1964), pp. 345, 344.

international organization. It translates into action one of the basic underlying philosophies of the Charter, namely, the creation of conditions of economic development and social progress and stability conducive to the attainment of international peace and security. As such, it seeks to fulfil the objective embodied in Article 55 of the Charter, which reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

105. The steady enlargement and diversification of the functional programmes of the United Nations and its related agencies and subsidiary organs has come to be considered a major feature of the United Nations system in operation. Particular attention has been devoted to the promotion of economic and social progress in the developing countries. The leading components of the organizational system have combined their efforts most notably in the expanded Technical Assistance Programme and the collateral operations of the Special Fund, which were later combined as a new United Nations Development Programme. The Secretary-General of the United Nations was authorized by the General Assembly to supplement these programmes by assisting Governments to secure the temporary services of qualified personnel to perform administrative and executive functions (the OPEX Programme). The bearing of all these developments on the scope of international immunities has been multifold. The establishment of permanent offices for UNDP in a great number of countries resulted in the institution of "resident representatives" of international organizations. The sending of *ad hoc* missions and panels and the assignment of experts to assist Governments in the planning and implementation of development projects extended the work and category of experts and persons engaged in the services of the United Nations far beyond those envisaged in the 1946 Convention.

B. The contribution of national law to the legislative sources of international immunities

106. The basic provisions which regulate the privileges and immunities of international organizations are embodied in their constituent instruments, headquarters agreements and general conventions on privileges and immunities. Legislation governing international immunities designed primarily to give effect to these varied international instruments has now been enacted in a large number of countries. United Kingdom and United States legislation anticipated all but the earliest of the current international instruments.[113] At the end of 1944, the United Kingdom enacted the British Diplomatic Privileges (Extension) Act, which provided for immunities, privileges and capacities of international organizations, their staff, and the representatives of member Governments. This legislation has been amended in the light of the provisions of the above-mentioned international instruments to conform thereto, particularly in regard to the extent to which immunities are applicable to nationals. The Congress of the United States enacted in 1945 the International Organizations Immunities Act.[114] On 4 August 1947, a joint resolution of the United States Congress was approved by the President, authorizing him to bring into effect an agreement between the United States and the United Nations for the purpose of establishing the permanent headquarters of the United Nations in the United States and authorizing the taking of measures necessary to facilitate compliance with the provisions of such agreement and for other purposes. A number of United States executive orders and administrative regulations were also promulgated to supplement the above-mentioned legislation.[115] Given the federal character of the United States, it was also necessary for the State of New York, where the Headquarters of the United Nations exists, to enact a number of laws to enable it to grant the necessary privileges, immunities and facilities to the United Nations.[116] Other countries in which legislation now exists include Australia, Austria, Canada, Colombia, Cuba, Denmark, Ecuador, Finland, Federal Republic of Germany, Ghana, Greece, Guatemala, Hungary, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Pakistan, Peru, Poland, Republic of Korea, Switzerland, Sweden, Thailand, South Africa, Venezuela and Yugoslavia.[117]

107. Special mention should be made of Switzerland, which is not a member of the United Nations and not a party to the 1946 Convention, but which was one of the first countries to enact legislation in this field. The following is the text of one of the Swiss basic legislative acts:

Le Conseil fédéral suisse décide qu'à partir du 1er janvier 1948 les privilèges et immunités accordés aux collaborateurs diplomatiques des chefs de mission accrédités auprès de la Confédération suisse seront également accordés à certains fonctionnaires de rang élevé de l'Office européen des Nations Unies.

...

Le Directeur de l'Office européen des Nations Unies établira une liste des fonctionnaires de rang élevé entrant en ligne de compte et la soumettra au Département politique. La même procédure vaudra pour les désignations ultérieures.

Les hauts fonctionnaires mis au bénéfice de la section 16 de l'arrangement provisoire du 19 avril 1946 ne seront pas compris dans cette liste, étant donné qu'ils jouissent déjà des mêmes

[113] See C. W. Jenks, *International Immunities* (London, Stevens, 1961), pp. 11–12.

[114] See *Legislative texts and treaty provisions* ... (*op. cit.*), vol. I, p. 128.

[115] *Ibid.*, pp. 134–144.

[116] *Ibid.*, pp. 152–158.

[117] For a list of countries where legislation exists, see:*ibid.*, vol. I and II, and *United Nations Juridical Yearbook*, 1963 to 1975.

privilèges et immunités que les chefs de mission diplomatique accrédités auprès de la Confédération suisse.[118]

108. A comparative analysis of the national legislation now existing will be necessary at the subsequent stage of work on this topic. A passing glance at national legislation is presented in this exploratory report only as an indication of the extent to which provision for appropriate immunities has now been made in detail in the national law of States as well as in international agreements.

109. One of the legal issues on which a comparative analysis of national legislation could provide guidance is the *municipal* legal status of international organizations. It is to be noted that some of the municipal legislation which effectuates the prerogatives of international organizations have likened the organizations to bodies corporate. The United Kingdom International Organizations (Immunities and Privileges) Act of 1950, the Canadian Privileges and Immunities (United Nations) Act of 1952 and the Canadian Order in Council of 1947, as well as the New Zealand Diplomatic Immunities and Privileges Act of 1957 and the Diplomatic Privileges (United Nations) Order of 1959, contain just such provisions. Each of them declares that the organization in question shall have "the legal capacities of a body corporate".[119]

110. The tendency to consider international organizations as bodies corporate under municipal law has given rise to a great deal of controversy in doctrine. Some writers maintain that there are two significant differences between a national corporation and an international organization endowed with corporate personality. In the first place, as Weissberg points out,[120] the municipal capacity of an international organization, which is a privilege, is customarily coupled with jurisdictional immunity. Crosswell observes that:

> Although the legal status of the organizations, akin to corporate personality, carries with it the usual power to acquire the benefits and burdens of legal obligations, the duties to which an international organization becomes subject in a legal transaction are duties of implicit obligation rather than absolute obligation. They exist fully in the legal sense, but cannot be enforced against the organization unless consent has been given in the form of waiver, express or implied.[121]

In the second place, the legal capacity of an international organization does not rest, as in the case of national corporations, on municipal law, but is instead grounded in international law. This notion has been expressed by Jenks as follows:

> The legal capacity of public international organizations, like that of individual foreign States, derives from public international law; municipal legislation may be necessary to secure effective recognition of this capacity for municipal purposes, but the function of such legislation is declaratory and not constitutive ... [I]t is as inherently fantastic as it is destructive of any international legal order to regard the existence and extent of legal personality provided for in the constituent instrument of an international organization as being derived from, dependent upon, and limited by the constitution and laws of its individual member States.[122]

C. The case for codification of the law of international immunities

111. In the debates in the Commission and the Sixth Committee, as reviewed in chapters II and III of this project, certain reservations and qualifications were expressed regarding the advisability of undertaking at the present time the task of codifying the second part of the topic of relations between States and international organizations, namely, the legal status, privileges and immunities of international organizations. Concern was manifested in particular as to the implications of such a codification on the headquarters agreements and the 1946 and 1947 Conventions. It was also contended that, in the sphere of privileges and immunities of international organizations, the rules were evolving so much that codification work may check the evolution of this branch of international law. This difficulty is not new and the Commission encountered it in the first part of the topic, namely, the status of representatives of States to international organizations. Both the Commission and the United Nations Conference on the Representation of States in Their Relations with International Organizations took great care to safeguard the position of the conventions on the privileges and immunities of the United Nations and the specialized agencies and the headquarters of those organizations. Thus paragraph 7 of the preamble of the 1975 Vienna Convention[123] reads:

> *Taking account* of the Convention on the Privileges and Immunities of the United Nations of 1946, the Convention on the Privileges and Immunities of the Specialized Agencies of 1947 and other agreements in force between States and between States and international organizations;

The implications of this statement in the statement in the preamble of the Convention are explicitly and elaborately laid down and defined in article 4:

> *Article 4. Relationship between the present Convention and other international agreements*
>
> The provisions of the present Convention
>
> (*a*) are without prejudice to other international agreements in force between States or between States and international organizations of a universal character, and
>
> (*b*) shall not preclude the conclusion of other international agreements regarding the representation of States in their relations with international organizations of a universal character or their representation at conferences convened by or under the auspices of such organizations.

[118] *Legislative texts and treaty provisions ... (op. cit.)*, vol. I, p. 92.

[119] *Ibid.*, pp. 11, 12, 59, 65 and 119.

[120] G. Weissberg, *The International Status of the United Nations* (New York, Oceana, 1961), p. 147.

[121] C. M. Crosswell, *Protection of International Personnel* (New York, Oceana, 1952), p. 19.

[122] C. W. Jenks, "The legal personality of international organizations", *British Year Book of International Law, 1945* (London), vol. 22, pp. 270–271.

[123] For reference, see foot-note 1 above.

112. Article 4 is particularly significant. Its purpose is twofold. First, it is intended to reserve the position of existing international agreements regulating the subject matter. Thus,while intended to provide a uniform regime, the rules of the Convention are without prejudice to different rules which may be laid down in such agreements. Secondly, it is recognized that situations may arise in the future in which States establishing a new international organization may find it necessary to adopt different rules more appropriate to that organization. The rules of the Convention are not intended in any way to preclude any further development of the law in this area.[124]

113. In the discussion of the Sixth Committee, some representatives questioned the usefulness of the work the Commission intended to do in relation to the second part of the topic of relations between States and international organizations (legal status, privileges and immunities of international organizations). The view was expressed that that work would not prove useful so long as the 1975 Vienna Convention had not been generally accepted. The Special Rapporteur wishes to make two observations in this respect. First, the Commission has on a number of occasions in the past deemed it possible to start the consideration of a topic which constituted a subject closely related to, or even an offspring of, a convention before the entry of the latter into force and its general acceptance. Such was the course of action taken by the Commission in relation to the topics of "special missions" , "succession of States in respect of treaties", and "question of treaties concluded between States and international organizations or between two or more international organizations". Second, while the two parts of the topic of relations between States and international organizations have admittedly an organic relationship, each one of them constitues a self-contained unit capable of being the subject of separate codification. This concept was accepted by the Commission when it recommended in 1971 "that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the representation of States in their relations with international organizations and to conclude a convention on the subject"[125] This recommendation was accepted by the General Assembly. It is worth recalling that, when the General Assembly considered in 1971 the recommendation of the Commission, some representatives suggested that action on the first part of the topic should be deferred pending the completion of its second part. The following is a summary of the discussion which took place in this respect in the Sixth Committee, as recorded in its report to the General Assembly:

(e) *Timing for the elaboration of a convention on the topic*

119. Some representatives considered that it would be preferable to take up the question of the representation of States in their relations with international organizations only after the Commission had completed its study of the topic of relations between States and international organizations by considering the representation of organizations to States and in particular the question of the privileges and immunities of the organizations themselves and of their officials. The question of granting privileges and immunities to permanent missions and permanent observer missions within the meaning of article 1, as well as to delegations to organs and conferences, was intimately linked to the legal status of those organizations. The work of the Commission would thus form a whole and States would be able to state their views in full knowledge of all the facts; the two complementary questions could be dealt with in a single instrument.

120. On the other hand, it was considered that any such arguments could only be a pretext for perpetuating situations which were jeopardizing the independence of international organizations. The Commission currently had five topics under discussion, as set forth in chapters III and IV of its report. That would keep it occupied for several years, bearing in mind that the Commission met once a year for a short period of 10 weeks. The draft articles should therefore not be set aside until all the other aspects of the question of relations between States and international organizations had been studied.[126]

D. The place of regional organizations in the regime of international immunities

114. When the Commission discussed the preliminary report of the Special Rapporteur at its last session, there was general agreement that the work of the Commission on the second part of the topic of relations between States and international organizations should cover all international organizations, and not exclusively those of a universal character. This position is different from the one it took in relation to the first part of the topic.

115. In the course of the discussion of the work to be undertaken by the Commission on the representation of States to international organizations, the place of regional organizations in that work was the subject of divergencies of opinion among its members. In his first report on the first part of the topic submitted to the Commission in 1963,[127] the Special Rapporteur suggested that the Commission should concentrate its work on this subject first on international organizations of a universal character (the United Nations system) and prepare its draft articles with reference to these organizations only, and should examine later whether they could be applied to regional organizations as they stood, or whether they required modification. In explaining his suggestion, he stated that:

The study of regional organizations raised a number of problems, such as recognition by, and relationship with, non-member

[124] For a fuller account of the purposes of this article, see *Yearbook ..., 1971*, vol. II (Part One), pp. 287–288, document A/8410/Rev.1, chapter II, section D, draft articles on the representation of States in their relations with international organizations, commentaries to articles 3 and 4.

[125] *Ibid.*, p. 284, para. 57.

[126] *Official Records of the General Assembly, Twenty-sixth Session, Annexes*, agenda item 88, document A/8537, paras. 119–120.

[127] *Yearbook ... 1963*, vol. II, document A/CN.4/161 and Add.1, p. 159.

States, which would call for the formulation of special rules for those organizations.[128]

Some members of the Commission took issue with this suggestion. They thought that regional organizations should be included in the study, pointing out that relations between States and organizations of a universal character might not differ appreciably from relations between States and smaller regional organizations. They further pointed out that, if the Commission were to confine itself to the topic of the relations of organizations of a universal character with States, it would be leaving a serious gap, and that relations with States were apt to follow a very similar pattern, whether the organization in question was of a universal or a regional character. Several members of the Commission, however, expressed themselves in favour of the suggestion by the Special Rapporteur to exclude regional organizations at least from the initial stage of the study. They stated that any draft convention to be prepared concerning the relations between States and intergovernmental organizations should be concerned with those of a universal character and not with regional organizations, though the experience of the latter could be taken into account in the study. They argued that regional organizations were so diverse that uniform rules applicable to all of them could hardly be formulated. They therefore thought that it would probably be better to leave those regional organizations great latitude to settle their own relations with Governments. An interesting point of a constitutional character was raised by one member, who stated that some regional organizations had their own codification organs and it was undesirable that the Commission should invade the field assigned to them.

[128] *Ibid.*, vol. I, p. 298, 717th meeting, para. 109.

116. The Commission adopted an intermediary solution, which was embodied in paragraphs 2 and 4 of article 2 of its draft articles on the representation of States in their relations with international organizations:

Article 2. Scope of the present articles

1. The present articles apply to the representation of States in their relations with international organizations of universal character and to their representation at conferences convened by or under the auspices of such organizations.

2. The fact that the present articles do not relate to other international organizations is without prejudice to the application to the representation of States in their relations with such other organizations of any of the rules set forth in the present articles which would be applicable under international law independently of these articles.

3. The fact that the present articles do not relate to other conferences is without prejudice to the application to the representation of States at such other conferences of any of the rules set forth in the present articles which would be applicable under international law independently of these articles.

4. Nothing in the present articles shall preclude States from agreeing that the present articles apply in respect of:

(*a*) international organizations other than those of universal character, or

(*b*) conferences other than those convened by or under the auspices of such organizations.[129]

The position taken by the Commission was approved by the United Nations Conference on the Representation of States in Their Relations with International Organizations in 1975.

[129] *Yearbook ... 1971*, vol. II (Part One), pp. 286–287, document A/8410/Rev.1, chap. II, sect. D.

CHAPTER V

Conclusions

117. It is a matter of gratification that the discussions both in the International Law Commission and the Sixth Committee of the General Assembly have revealed general agreement on the desirability of the Commission's taking up the study of the second part of the topic "Relations between States and international organizations". Subject to a few reservations which concerned matters of approach and methodology rather than principle, members of the Commission and delegations to the Sixth Committee were in favour of a study of the immunities of international organizations with a view to completing the work of the Commission in the field of diplomatic law, which culminated in the adoption of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention.[130]

118. The second conclusion to be drawn from these discussions is that the work of the Commission on the second part of the topic should proceed with great prudence. For the determination of the form which the outcome of such work should take, it would be necessary to examine thoroughly existing international instruments as supplemented by national legislation and developed in practice. It is only following such an investigation that it would be possible to decide in favour of a comprehensive convention or a supplementary protocol whose objective would be the filling of gaps and the formulation of

[130] For references to texts of these instruments, see foot-notes 11, 12, 13 and 1 above, respectively.

rules to cover the new situations and recent developments which have taken place since the adoption of the 1946 and 1947 Conventions.

119. Several members of the Commission expressed themselves in favour of extending the scope of the envisaged study to include all international organizations, whether of a universal or regional character. Some members thought that the intermediary solution adopted by the Commission in connexion with the first part of the topic should be opted for in its work on the second part as well. Others sought the advice of the Special Rapporteur on the question of the place of regional organizations in the regime of international immunities.

120. The Special Rapporteur wishes to point out that his thinking on this issue has undergone significant change since 1963 when, in submitting his first report, he recommended to the Commission that its work on the topic should concentrate on international organizations of universal character (the United Nations system) and that it prepare its draft articles with reference to these organizations only.[131] A number of factors influenced that position taken by the Special Rapporteur. First, it is to be recalled that the Special Rapporteur presented a broad outline of the questions to be considered in connexion with the external relations of international organizations and the legal problems to which they give rise. The outline comprised, as a first group of such problems, the general principles of the international personality of international organizations. He thought that the study of such theoretical questions would present difficulties of a basically different character if the study were to apply to regional organizations. An illustration of the relevance of the universal character of an international organization to the general recognition of its possession of international personality is the finding of the International Court of Justice, in its advisory opinion of 11 April 1949 on "Reparation for injuries suffered in the service of the United Nations", that:

> ... fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone ...[132]

Second, the Special Rapporteur was conscious of the fact that, while within the framework of international organizations of a universal character the institution of permanent observer missions was becoming an established practice and the institution of permanent observer missions was developing steadily, the same could not be noted with regard to international organizations of a regional character. Third, unlike the situation in relation to international organizations of a universal character, the rather limited volume of legislative sources of the law of immunities and the evolving character of practice in relation to international organizations of a regional character at the time when the Commission initiated its work on the topic of relations between States and international organizations in 1963, caused the Special Rapporteur to believe that he would not be in a position to make the investigation necessary for the inclusion of regional organizations.

121. The above-mentioned factors which influenced the thinking of the Special Rapporteur during the initial years of his study of the first part of the topic of relations between States and international organizations, on the issue of the inclusion of regional organizations within the scope of the envisaged codification, at present appear in an entirely different perspective when viewed in the light of recent developments and in relation to the second part of the topic. First, the Commission has consistently adopted an approach in dealing with topics relating to international organizations of not favouring the course of engaging itself in such theoretical notions as the concept of an international organization, its international personality, or its treaty-making capacity. The Commission has preferred instead to deal with the practical aspects and concrete issues of the rules which govern the relations between States, and international organizations. Second, whether the questions which may constitute the subject-matter of the eventual codification of the legal status and immunities of international organizations are taken up within the frame work of international organizations of a universal character or of a regional character, they are by and large analogous. In his preliminary report submitted in 1977,[133] the Special Rapporteur included the following categories as beneficiaries of privileges and immunities: the organization; officials of the organization; experts on missions for, and persons having official business with, the organization; and resident representatives and observers sent by international organizations to States or by one international organization to another international organization. All these institutions exist at present within the framework of international organizations of a regional character. Third, the legislative sources, whether in the form of international instruments or national law, as well as practice in the area of regional organizations have become comparatively rich as a result of the increasing network of regional organizations and their subsidiary organs. The theory of functionalism has had its impact also in the domain of these organizations. The five-volume compilation of the principal legal instruments published by UNCTAD entitled "Economic co-operation and integration among developing countries"[134] contains an impressive list of organs established on the regional level and the text of a number of conventions on their privileges and immunities. The list includes:

Latin America: Inter-American Development Bank, Latin American Economic System, Central American Common Market, Central American Bank for

[131] See *Yearbook ... 1963*, vol. II, p. 185, document A/CN.4/161 and Add.1, para. 179.

[132] *I.C.J. Reports* 1949, p. 185.

[133] *Yearbook ... 1977*, vol. II (Part One), p. 139, document A/CN.4/304.

[134] TD/B/609/Add.1, vol. I, II, III and Corr.1, IV and V.

Economic Integration, Caribbean Community, Caribbean Development Bank, Caribbean Investment Corporation, East Caribbean Common Market, Latin American Free Trade Association, Andean Common Market, Andean Development Corporation and the River Plate Basin.

Africa: African Development Bank, Common Afro-Mauritian Organization, Lake Chad Basin Commission, River Niger Commission, Economic Community of West African States, West African Clearing House, West African Economic Community, Council of the Entente, Mutual Aid and Loan Guaranty Fund, Mano River Union, Organization for the Development of the Senegal River, West African Monetary Union, Central Bank of West African States, West African Development Bank, Central African Customs and Economic Union, Union of Central African States, Bank of the Central African States and East African Community.

Arab States, Asia and Oceania: Permanent Consultative Committee of the Maghreb Countries, Arab Economic Unity, Islamic Development Bank, Arab Bank for Economic Development in Africa, Arab Fund for Economic and Social Development, Arab Investment Company, Inter-Arab Investment Guarantee Corporation, Asian Development Bank, Asian Clearing Union, System of economic co-operation established by the Bangkok Agreement, Regional Co-operation for Development, Association of South-East Asian Nations, South Pacific Commission and South Pacific Bureau for Economic Co-operation.

122. It is therefore the considered opinion of the Special Rapporteur, that the Commission should adopt, for the purpose of its initial work on the second part of the topic, a broad outlook approach; the study should include regional organizations. The definitive decision to include such organizations in the eventual codification can only be made when the study is completed.

123. The same broad outlook approach should be adopted in relation to the subject matter of the study. Some members of the Commission suggested that a few problems should be selected for consideration at the first stage, such as those concerning the legal status and immunities of international organizations, and that the much more delicate problems relating to international officials should be left until later. The Special Rapporteur has given serious thought to this matter and submits that the decision on the priority issue should also be deferred pending the completion of the study.

124. The Special Rapporteur wishes to address himself to another point which was raised by some members of the Commission in relation to the subject matter of the study. Reference was made to the parallel to be drawn between jurisdictional immunities of States and those of international organizations. While recognizing the relationship between these two sets of jurisdictional immunities, it is to be noted that the rationale of immunities of States is sovereignty while the rationale of immunities of international organizations is their functional needs. Furthermore, the Commission recommended in 1977 the selection in the near future of the topic of jurisdictional immunities of States and their property for active consideration by the Commission,[135] an approach endorsed by the General Assembly in its resolution 32/151 of 19 December 1977. The Commission established at its present session a Working Group on that topic under the chairmanship of Mr. Sucharitkul to undertake the necessary exploratory work. That Working Group has recommended the appointment of a Special Rapporteur for the topic and the inclusion of the topic in the Commission's current programme of work. The Commission will therefore be aware of the orientation of its work on jurisdictional immunities of States when it examines immunities of international organizations.

125. The Special Rapporteur wishes to express his deep appreciation to the Legal Counsel of the United Nations for the comprehensive questionnaire which he addressed to the specialized agencies and IAEA with a view to eliciting information concerning the practice of the specialized agencies and IAEA, relating to their privileges and immunities, their officials and other persons engaged in their activities not being representatives of States.[136] He is confident that the materials which will be furnished by the United Nations and the specialized agencies and IAEA on the basis of the examination of their files during the period from 1 January 1966 to the present will be of great help to the Special Rapporteur and the Commission. He wishes also to express the hope that these materials will be later published in the *Yearbook* of the International Law Commission to secure their wider dissemination and practical accessibility. The study, which was prepared by the Codification Division of the Office of Legal Affairs and published in the Commission's *Yearbook* in 1967,[137] has proved to be an extremely rich and valuable source of information and research for both scholars and practitioners in the field of international law and international organization.

126. In concluding this report, the Special Rapporteur wishes also to express the hope that arrangements will be made to ensure the association of the specialized agencies and IAEA, as well as Switzerland, with the preparation of any draft articles to be proposed by the Commission on the second part of the topic similar to those made in connexion with the first part of the topic. When the Commission prepared its provisional draft articles on representation of States in their relations with international organizations, it decided to submit them not only to

[135] See *Yearbook ... 1977*, vol. II (Part Two), p. 130, document A/32/10, para. 110.

[136] See paras. 9 and 10 above.

[137] See para. 7 above.

Governments of Member States for their observations but also to the secretariats of the United Nations, the specialized agencies and IAEA for their observations. Again bearing in mind the position of Switzerland as the host State in relation to the United Nations Office at Geneva and to a number of specialized agencies, as well as the wish expressed by the Government of that country, the Commission deemed it useful to transmit the draft articles also to that Government for its observations.[138]

[138] See *Yearbook ... 1970*, vol. II, p. 276, document A/8010/Rev.1, para. 24.