Document:-

A/CN.4/SR.2027

Summary record of the 2027th meeting

Topic:

Status, privileges and immunities of international organizations, their officials, experts, etc.

Extract from the Yearbook of the International Law Commission:-

1987, **vol. I**

regional international organizations, such as the European Communities and organizations in socialist countries, concerning pension schemes for officials transferred from one organization to another.

6. The Commission must not forget that the United Nations Secretariat was being put to the test by the current policy of austerity. He was therefore somewhat concerned by the fact that the Commission might more and more frequently be dealing with topics for which it would need outside assistance. If it was to overcome all the obstacles involved in exploratory work, it would no longer be able to work on its own, as in the golden age of its consideration of the law of treaties. He was convinced that the Commission had to explain that aspect of the problem to the Sixth Committee of the General Assembly and tell it why it had to spend so much time on particular topics. It was for the Commission to weigh the problems involved in the topics it had before it and to determine which ones would require lengthy exploratory work, as well as outside assistance.

7. The CHAIRMAN said that the meeting would rise to enable the Planning Group's Working Group on Working Methods to meet.

The meeting rose at 10.40 a.m.

2027th MEETING

Tuesday, 7 July 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY
later: Mr. Edilbert RAZAFINDRALAMBO
later: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/391 and Add.1,[1] A/CN.4/401,[2] A/CN.4/L.383 and Add.1-3,[3] ST/LEG/17)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SHI congratulated the Special Rapporteur on his reports and said that the schematic outline proposed in the third report (A/CN.4/401, para. 34) made a definite contribution to the Commission's work on the topic. He also thanked the Secretariat for its very useful study on the practice of international organizations (A/CN.4/L.383 and Add.1-3). He subscribed to most of the views expressed by previous speakers on the scope of the topic and the general approach to it, and, on the whole, had no difficulty in accepting the Special Rapporteur's proposed outline. He wished, however, to raise certain points for the Special Rapporteur's consideration in formulating the draft articles.

2. First, he unreservedly agreed with the Commission's conclusions on the general approach to the topic, as stated in the Special Rapporteur's second report (A/CN.4/391 and Add.1, paras. 10 and 15), namely that the Commission should, in view of the complex issues involved, proceed with great caution, adopting a pragmatic approach in formulating specific draft articles and avoiding protracted debates of a theoretical or doctrinal nature. That was an important point to which due regard should be paid, particularly since the 1975 Vienna Convention on the Representation of States, which had been concluded on the basis of the Commission's work on the first part of the topic, had still not received the necessary ratifications for entry into force.

3. Secondly, given the difficulties inherent in arriving at a precise and comprehensive definition of international organizations, the Commission should be satisfied with the definition laid down in the 1975 Vienna Convention and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

4. Thirdly, for the reasons stated by Mr. Tomuschat (2025th meeting), the scope of the draft articles should be confined to international organizations of a universal character. In that connection, the privileges and immunities of international organizations formed only one part of relations between States and such organizations; the draft should therefore also include specific provisions on the obligations of international organizations and their officials towards States.

5. Fourthly, as the Special Rapporteur had rightly noted in his second report (A/CN.4/391 and Add.1, paras. 59-60), the internal personality of international organizations was accepted by member States without much difficulty, but States were more reticent where international personality was concerned. That was because internal personality operated within the framework of the municipal law of member States, whereas international personality involved sensitive theoretical and political issues. In general, States were not prepared to regard international organizations as subjects of international law and active members of the international community on a par with sovereign States. Mr. Arangio-Ruiz (2025th meeting) had been right to say that the Special Rapporteur should not include in the draft articles any general provisions on the objective personality of international organizations.

6. Fifthly, the nature of the privileges and immunities of international organizations and their officials, and the questions of waiver of immunity and protection of

[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One).
[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).
[3] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

international officials, should receive ample and realistic treatment.

7. Sixthly, the privileges and immunities of international officials who were nationals of the host State was a sensitive matter and should be studied carefully in the light of the treaties in force and the practice of States and international organizations. The draft should contain specific provisions in that connection.

8. Lastly, the Commission could perhaps include in its future reports to the General Assembly a section on international conventions concluded on the basis of drafts formulated by the Commission, following the practice of UNCITRAL. That would serve to remind States of the need for ratification or acceptance of, or accession to, the conventions in question. In the case of the topic under consideration, ratification of or accession to the 1975 Vienna Convention by an ever-increasing number of States would undoubtedly facilitate the Commission's present work.

9. Mr. BARSEGOV said that the Special Rapporteur's third report (A/CN.4/401) dealt directly with the issues to be resolved, and the documents prepared by the Secretariat (A/CN.4/L.383 and Add.1-3, ST/LEG/17) were a useful contribution to the debate. Relations between international organizations and States were one of the major issues of the present day, for such organizations were an important part of the institutional arrangements for intergovernmental co-operation, and they were playing an increasingly greater role. The study of the present topic, which was entirely in keeping with the development of international relations and of international law—in other words, which was aimed at *rapprochement* between States, the strengthening of interdependence and enhanced co-operation—should be geared directly to perfecting the ways and means of such co-operation. The formulation of a definitive legal framework should therefore seek to ensure that all member States, particularly host States, respected the character of international organizations and fostered the development of their activities, without discrimination in regard to their officials.

10. The problems posed by the activities of international organizations were not new and the Commission had gained sound experience in the matter. Codifying the rules governing the status of international organizations, filling gaps in the law, strengthening the privileges and immunities of organizations and protecting them from political whims could all make an essential contribution to the development of diplomatic law in the broadest sense and, at the same time, to the strengthening of the rule of law in international life. For example, the progressive development of the law had led to the adoption of the 1975 Vienna Convention on the Representation of States and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

11. However, there were new aspects to the problem of regulating relations between such large entities, and some members, like Mr. Barboza, feared that, in the absence of fundamental rules on the subject, the Commission would be moving into uncharted territory. Accordingly, the subject-matter had to be accurately demarcated and placed in the general context of the development of international law. Only such a general standpoint would make it possible to determine the essential points and the overall directions leading to a solution.

12. Yet the scope of the régime to be prepared had still not been defined, and the Commission was still at the stage of defining the topic and formulating an outline. That was particularly surprising in view of the number of years already devoted to the topic and the fact that several reports had been submitted. At the present session, the ideas advanced had been as numerous as they had been varied. Some members suggested that the régime should be extended to cover regional organizations, while others proposed that it be limited to universal organizations. Others sought a solution in a classification of organizations according to their activities, rightly fearing that articles attempting to cover all types of organization, including those that would emerge in the future, might well be excessively abstract and thus of less value than the instruments already in force. In that regard, Mr. Mahiou (2025th meeting) was right, particularly since there was an even more pressing need for a precise classification as a result of the diversity of existing international organizations, having very broad attributes, as did the United Nations, or very narrow ones, as did those working in the industrial or commercial field.

13. As to organizations of a universal character, principally the United Nations and the specialized agencies, the views expressed were so numerous and so contradictory that it might well be asked whether a new régime should really be superimposed on a subject-matter that was already amply developed. The number of such organizations was increasing continually and the régime could therefore be built up by analogy. To that end, it would be enough to spell out and codify the rules of international law that defined the status of international organizations, to view the aim of such work as maintaining the development of the law at the same level, and to endeavour to utilize the existing treaty provisions, in keeping with the needs of the present day. For example, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies referred to the 1946 Convention on the Privileges and Immunities of the United Nations. In any event, the efficacy of the treaties in force should be not doubted: account simply had to be taken of the new requirements of international life.

14. The Commission should certainly pursue its endeavours, but was it sure that it would not find itself in an impasse? Such was the diversity of international organizations that it was questionable whether they lent themselves to a standard definition. In keeping with the logic underlying the consideration of the first part of the topic, the focus could be placed on organizations of a universal character, to the exclusion of others. The elaboration of a convention applicable to that kind of organization would be of considerable importance, for delegations, observers and permanent missions were indispensable in the new international diplomacy. In that sense, it could be said that the 1975 Vienna Convention

on the Representation of States marked a decisive stage in strengthening the legal status of such organizations.

15. At the present time, the Commission's task was to prepare draft articles intended to lay the legal foundation for the functioning of the executive organs of international organizations, as well as of a much wider group of organizations, including those on which there was no foreign government representation. In that regard, the Special Rapporteur had enumerated in his second report (A/CN.4/391 and Add.1, para. 54) the instruments in which international organizations had been given the status of a subject of law, and it could be seen that, apart from the major Conventions of 1946 and 1947, there were many instruments that concerned organizations other than those of the United Nations. However, the Special Rapporteur *a priori* restricted the field of application of the proposed régime to the subject-matter covered by the 1975 Vienna Convention, and it was a fact that, as Mr. Reuter had said, strengthening the privileges and immunities of international organizations was outmoded. That was apparent from the statements made in the Sixth Committee of the General Assembly, which the Special Rapporteur cited in his third report (A/CN.4/401, para. 8). In those circumstances, was it possible to engage in the work of codification by enhancing the status of the United Nations and the specialized agencies and by expanding the rights and privileges of those organizations? That would doubtless constitute progressive development of the law in a field where development was necessary, but it would also without doubt be a waste of energy and resources to deal with questions that had already been settled, when the concrete activities of those organizations were already guaranteed.

16. There should be no misunderstanding: he was entirely in favour of strengthening the rights and privileges of the United Nations and organizations of a universal character, whose importance for peace and co-operation was invaluable. But a clear idea of the aim to be pursued was essential. If the point was really to strengthen privileges and immunities, he was quite ready to make his contribution, but he could not go along with an exercise which watered them down on the pretext of developing or unifying the law. Accordingly, if the Commission took the view that the requirements essential for such development were met, there was nothing more to be said. Otherwise, it would perhaps be better for the Commission to consider directing its attention to other questions: to the organizations and institutions whose situation had not yet been sufficiently studied.

17. In his opinion, the definition of the present topic was tied in with the relations between the Commission and the General Assembly. The difficulties the Commission was experiencing in formulating the topic originated in a mistaken methodological approach: the Commission had embarked on the work without any accurate idea of the problem to be dealt with or its theoretical bases. The Special Rapporteur had said in his second report (A/CN.4/391 and Add.1, para. 30): "When the time comes to prepare the . . . draft articles, it will have to be decided to which organizations the draft applies." But that was precisely where the work should have started. It was not for the Commission, but for the General Assembly, to define the topic to be studied. To find a way out of the situation, the Commission should prepare a number of variant texts, accompanied by commentaries, and refer the dossier to the Sixth Committee for its opinion. It would also be advisable for the Special Rapporteur to reflect on the scope of the draft articles, in the light of the comments made in the course of the discussion, and state his conclusions at the Commission's next session.

18. The schematic outline proposed in the third report (A/CN.4/401, para. 34) posed fewer problems. It was based on the traditional pattern of conventions and included 11 sections. One member of the Commission would like further elaboration of sections 1, 4 and 5 of the outline. But it was difficult to decide on the merits of the outline without first defining the organizations to which it related. Other members had proposed that the question of the privileges and immunities of experts should be considered; but there, too, everything would depend on the definition of international organizations.

19. Lastly, he willingly complied with the Special Rapporteur's request that the discussion be limited to the scope of the draft articles and the schematic outline. He simply regretted that such a limitation failed to do justice to the extensive deliberations and reports on the topic, more particularly on the fundamental theoretical issues discussed both in the third report and at previous sessions, namely the definition of international organizations and their legal capacity and personality. The new members of the Commission were thus deprived of the opportunity of stating their views on all those questions. Accordingly, he had no choice but to reserve the right to speak on those matters when the problem of the scope of the topic had been settled and the Commission ultimately embarked on the formulation of the draft articles.

Mr. Razafindralambo took the Chair.

20. Mr. SEPÚLVEDA GUTIÉRREZ said that the Special Rapporteur's third report (A/CN.4/401) had the twofold merit of taking full stock of the situation and indicating the path to be followed. He also wished to thank the Secretariat for its comprehensive document on the status, privileges and immunities of regional organizations (ST/LEG/17). The present topic was all the more worth while in that international organizations were daily playing a more important role and there were numerous lacunae in the law applicable to them, including practices which were not yet harmonized and developments which often went beyond the letter of the constituent instruments. On those points, the third report was indeed thought-provoking. Nevertheless, he would confine himself to a few general aspects of the question, in the hope of helping the Special Rapporteur in his work.

21. Like other members, he thought that the scope of the draft should be confined to intergovernmental organizations of a universal character, for it was already a quite difficult and wide-ranging subject. In addition, regional organizations had purposes, goals and relations with States that were highly varied. The Commission could revert to them after defining the régime applicable to organizations of a universal character. That did not

mean that regional organizations were unimportant to the member States, since they supplemented the work of organizations of a universal character, even though there were enormous differences between the two kinds of bodies—for example, in the field of human rights or collective security—and there were also duplications in functions, sometimes to the detriment of some States or indeed to the international community as a whole. For all those reasons, the Commission should, for the time being, focus solely on international organizations of a universal character.

22. The schematic outline proposed by the Special Rapporteur (A/CN.4/401, para. 34) took a broad view, moved in the right direction and, above all, was in keeping with the mandate assigned to the Commission by the General Assembly. Clearly, the various sections would have to be developed and supplemented. But it was the only outline admissible in view of the Commission's objective, and nothing could be cut out without mutilating it. Moreover, at its next session, the Commission would have the time to move ahead in its work and could gain from the experience of its 14 new members. For the Special Rapporteur, it would be an opportunity to submit a new study reflecting the views expressed in the course of the discussions and making it possible to tackle the preparation of the articles.

23. In more general terms, it was difficult to ascertain the nature of the normative instrument that was to be prepared. Was it to be a parallel convention supplementing the 1975 Vienna Convention, a separate convention covering all the possible types of relations that the various categories of international organizations could maintain, or a series of recommendations that could lead to a code of conduct? The Commission would have to decide, but should do so without haste, for everything would depend on its choice.

24. As to the content of the future instrument, the Special Rapporteur stated in his third report (*ibid.*, para. 36) that the aim was to harmonize "an elaborate and varied network of treaty law" and to consolidate "a wealth of practice". The question was to determine how to proceed. Perhaps it would be useful to have a detailed presentation of the information supplied by the Special Rapporteur in that regard. Generally speaking, however, the aim seemed to be not to expand the privileges and immunities enjoyed by international organizations, for there was obvious resistance in that respect from the member States, but to supplement and spell out provisions which had not been clear from the start or were open to various interpretations. The point was to reorganize, not to innovate.

25. Mr. OGISO congratulated the Special Rapporteur on his third report (A/CN.4/401), which carefully summarized the deliberations on the topic in the Commission and in the Sixth Committee of the General Assembly. Members who had already spoken seemed to have made two major points: first, that the Commission should adopt a pragmatic approach and avoid discussions of a doctrinal nature; and secondly, that the scope of the draft convention should be limited to international organizations of a universal character. While both views were acceptable in the main, he had some hesitation about proceeding too quickly to the process of drafting articles without further studying certain theoretical assumptions. It would be regrettable if the Commission decided at the present stage to leave aside the question of international legal personality—even if a discussion of the issue did run into some obstacles—and to confine itself to consideration of the existing conventions. Furthermore, the host countries of the various specialized agencies did not at present seem to take a very positive attitude to a review of the relevant conventions, and he wondered whether such a review would produce constructive results.

26. In his second report (A/CN.4/391 and Add.1, paras. 15 and 31), the Special Rapporteur had proposed formulating general rules governing the legal status of international organizations, remarking that an international organization acted and operated in the international community with its own personality, even though its personality was not clearly defined. However, the personality of an international organization derived from certain objective criteria and gave rise to various categories of status. He would therefore like to raise two questions which should be clarified in the Special Rapporteur's next report: first, what elements constituted the pre-conditions of international personality; and secondly, what was the relationship between the capacity to operate on an international level and the legal personality of an international organization?

27. Mr. CALERO RODRIGUES congratulated the Special Rapporteur on his third report (A/CN.4/401), in which he affirmed his intention to display prudence and pragmatism. He welcomed that departure from the approach the Special Rapporteur had adopted in his second report (A/CN.4/391 and Add.1), which had dealt with fundamental principles. It was, of course, important to formulate fundamental principles in preparing the draft articles, but those articles should be concerned mainly with the privileges and immunities of international organizations. The question of their status should therefore be incidental, for even if the Commission wished to do so, he did not think that it would ever be able to draw up a statute for international organizations or a charter of their rights and duties. Status should be regarded only as a basis for the development of privileges and immunities; in that way, doctrinal entanglements and possibly insurmountable difficulties would be avoided.

28. The essence of the topic was concerned with the need to recognize that international organizations had an objective international legal personality—to borrow the expression used by the ICJ in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*,[4] which had dealt with the capacity of the United Nations to bring international claims—and that, inasmuch as international organizations, along with States, played a role in international life, they were entitled to certain privileges and immunities in order to facilitate their task. That right had already been recognized in international practice and in the practice of States, but the question that remained was: for which international organizations should

[4] *I.C.J. Reports 1949*, p. 174.

privileges and immunities be recognized? As the matter had already been decided in principle, he considered that the Commission should continue to define the various privileges and immunities and, when a list had been drawn up, it could decide to which international organizations the list would apply.

29. The background to the topic, which the Commission had been invited to consider in 1958 and had been placed on its agenda in 1962, also dictated the need for a pragmatic approach. In that connection, he noted that the Special Rapporteur, in compliance with the wishes of the Commission, included in his third report (A/CN.4/401, para. 31) a list of the privileges and immunities of an international organization and subdivided them into different groups. That list had in effect been taken from the preliminary report of the previous Special Rapporteur, the late Abdullah El-Erian, who had presented[5] an indicative catalogue of the privileges and immunities enjoyed by the United Nations and the specialized agencies at the time, and it could be accepted as a basis for the Commission's work. Mr. Reuter (2026th meeting) had suggested that the list should be regarded as a programme of research rather than of practical performance. He agreed up to a point, but not entirely, for presumably the Commission was not going to engage solely in a programme of research into each and every privilege and immunity. Moreover, every privilege and immunity would not necessarily remain on the list. In any event, performance and research should go hand in hand.

30. The Special Rapporteur also presented a schematic outline for the drafting of the articles (A/CN.4/401, para. 34), which was apparently a slightly modified version of the first list. For his own part, he was not quite sure whether those modifications were improvements, and he particularly had doubts about the reference in section 4.A (*b*) to freedom of assembly, which was not a felicitous expression. Similarly, sections 1 to 3 and 7 to 11 of the outline were presented in a somewhat disorganized manner. There too, the Special Rapporteur would presumably introduce a more logical order in future, possibly along the lines of that adopted for the articles of the first part of the topic. On the other hand, sections 4 and 5 were well organized and in a way reflected the eventual content of the relevant articles.

31. He would be very interested to hear how the Special Rapporteur planned to proceed, particularly since many members considered that the topic was not ripe for development and had doubts about the theoretical bases for the articles. The topic had, however, been before the Commission for many years and his fear was that, if some significant progress were not made, the same discussion would recur all over again when the new membership was elected in four years' time, with the result that the topic would never get off the ground. It was true that the Commission should proceed with prudence, as indeed it did in all its deliberations, but that quality should not be overdone, for otherwise it would make no progress at all in its work. He was none the less confident that, under the guidance of the Special Rapporteur, the Commission would move ahead at a pace consistent with its obligations to the General Assembly.

Mr. McCaffrey resumed the Chair.

32. Mr. AL-BAHARNA said that he would begin with a few general observations. The first related to the approach to the present topic. The previous Special Rapporteur, Abdullah El-Erian, had recommended a pragmatic approach, so as to formulate specific draft articles and avoid doctrinal issues. For his own part, he would certainly like to avoid a discussion of the theoretical aspects of the topic, but he failed to see how the Commission could altogether escape considering the theory of the powers and functions of international organizations. There were considerable differences among States and among scholars as to whether international organizations were based upon the "delegation of powers" or "implied or inherent powers". The practice of the United Nations had shown time and again that those were not merely academic questions, but very real issues, the answers to which had varied according to the theory of international organizations. Fortunately, the ICJ, in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, had provided an authoritative answer by affirming:

> . . . Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. . . .[6]

33. That principle of international law—which the Commission should bear in mind in its consideration of the status, privileges and immunities of international organizations—had both positive and negative implications: positive inasmuch as it stated that the powers of the Organization transcended its constituent instrument, and negative inasmuch as those powers were limited by considerations of functional necessity.

34. As to the scope of the topic, he too thought that the Commission's main concern should be with international organizations of a universal character. Any attempt to include regional organizations as well would involve both theoretical and practical difficulties. Furthermore, the aspects of relations to be codified should be defined at the very outset. In the time available, the Commission would not be able to deal with all aspects of relations between States and international organizations. On the other hand, the Commission could not limit its study to questions of status, privileges and immunities. He therefore suggested the adoption of a flexible approach that would cover only relations which might be characterized as "political" and at the same time take into consideration aspects other than status, privileges and immunities. Perhaps it was also desirable to include the question of the obligation of States not to seek to influence the Secretary-General and the staff of the United Nations in the discharge of their responsibilities, as well as the obligation of international officials not to seek or receive instructions from Governments.

35. On the question of methodology, the main problem was how to limit the topic to reasonable propor-

[5] *Yearbook . . . 1977*, vol. II (Part One), p. 153, document A/CN.4/304, paras. 70-71.

[6] *I.C.J. Reports 1949*, p. 182.

tions. He believed that, in the earlier discussions on the topic, the Special Rapporteur had been asked to adopt a selective approach and to consider problems concerning international organizations as a first stage, postponing consideration of more delicate problems, such as those relating to international officials, to a later stage. That point was mentioned in the third report (A/CN.4/401, para. 27).

36. In the interests of a more scientific methodology, the topic could be delimited on the one hand by the principles of international law inherent in international organizations and, on the other, by adopting an inductive approach to the whole problem. The constituent instruments of international organizations enunciated some basic principles of international law governing the relations between States and international organizations and their officials, and the Commission could draw on those principles in formulating operative rules for international organizations and their officials. In the case of the United Nations, Articles 100, 104 and 105 of the Charter would be relevant for that purpose. The interpretation of those provisions by the ICJ was particularly significant in that regard. In other words, the operative rules to be framed by the Commission should stem from the constituent instruments themselves as authoritatively construed by the ICJ. Such practice as was reflected in unilateral declarations by host States or in legal opinions of international organizations did not have the same authority. The Commission should keep that distinction in mind in assessing the juridical significance of the various sources of information available to it.

37. Consequently, the Commission should adopt an inductive approach to the study of the available sources, particularly the valuable studies prepared by the Secretariat in 1967 and 1985 on the practice of the United Nations and the specialized agencies. With that approach, the Commission should be able to formulate operative rules that were logically correct and politically acceptable to the community of States.

38. The fundamental issue underlying the topic, however, was the personality of international organizations. The view that international organizations had a personality of their own, distinct from that of their member States, had gained ground in international law since the above-mentioned advisory opinion of the ICJ in 1949. Consequently, international organizations enjoyed certain attributes in international relations. Nevertheless, those attributes could not be considered as having been determined once and for all, for they changed with the development of international relations. It was therefore essential to define them in such a way as not to jeopardize their future growth and development. In his second report, the Special Rapporteur had stated that "international organizations are recognized, although in some instances with certain limitations, as having legal personality and capacity" (A/CN.4/391 and Add.1, para. 56). It was therefore appropriate to examine what those limitations were and whether they were justifiable in international law.

39. In the same report (*ibid.*, para. 74), the Special Rapporteur had submitted, under the heading "Legal personality", two alternatives of the same text, one constituting article 1 and the other articles 1 and 2. In his view, those provisions were couched in unduly narrow terms. That was true, for example, of the phrase "to the extent compatible with the instrument establishing them", in paragraph 1 of article 1. Similarly, paragraph 1 (*a*), (*b*) and (*c*) gave the impression that international organizations had no attributes other than those expressly specified therein. The Commission should be careful not to do anything that might affect the growth of international organizations in the future, and should avoid a restrictive definition of their present powers.

40. He also had doubts regarding the words "and under the internal law of their member States", in the first sentence of paragraph 1. No doubt the internal law of some member States expressly accorded legal personality to international organizations, but that was not universally the case. Moreover, the position of international organizations under the internal law of member States was hardly relevant to compliance with international obligations. Hence the words in question seemed to be unnecessary.

41. On the other hand, he endorsed the Special Rapporteur's suggestion that paragraphs 1 and 2 of draft article 1 (alternative A) could be made two separate articles (alternative B). Draft article 2, on the treaty-making capacity of international organizations, would probably require strengthening. Not all the constituent instruments of international organizations expressly provided for the conclusion of treaties or international agreements, but such treaties and agreements were now the practice of the organizations and that would have to be reflected in article 2.

42. Mr. Sreenivasa RAO said that international organizations, which had come to play such an indispensable role in the affairs of the international community, symbolized the ever-present interdependence of peoples and nations. The part played by intergovernmental organizations of a universal character had a great impact on the development, interpretation and application of international law. Indeed, even intergovernmental organizations of regional or less than universal membership were fulfilling an important role in certain areas.

43. While those international organizations could be characterized as essentially political or functional, depending on their type of activity, the United Nations at the universal level and EEC at the regional level had to be singled out as having a more significant and special character and as possessing legal personality and capacity that were quite unique.

44. The legal personality and capacity of the United Nations were set out by the Charter itself, as were the extensive constitutional functions which it performed, not only on behalf of its Member States, but on behalf of the entire international community. The ICJ, for its part, had on more than one occasion clarified the content of the legal personality and capacity of the United Nations. There was thus no need to enter into detail on the subject of the personality of the United Nations and the doctrine of its "implied powers", except to note its capacity to contract and to acquire and dispose of movable and immovable property, which was beyond

question. Besides, the United Nations, its subsidiary bodies and its specialized agencies enjoyed full functional privileges, and their officials were recognized as international civil servants enjoying functional privileges and immunities for all their official activities.

45. There was thus a universally accepted practice with respect to the privileges and immunities applicable to the United Nations and its organs. Moreover, the special problems faced by Member States in their relations with organizations of the United Nations family, particularly at Headquarters, were customarily discussed in the Committee on Relations with the Host Country with a view to amicable settlement. EEC was different in that it purported to be more than a mere intergovernmental organization: it was the first of its kind, aiming at integration in certain selected areas. For present purposes, however, the Commission did not need to deal with EEC because of its special scope and character.

46. As to the other intergovernmental organizations, in almost every case they had special instruments governing their constitution, composition, functions and legal personality and capacity. Those constituent instruments determined in what respects the organization had legal personality and capacity: in most instances, it had the capacity to contract and to acquire and dispose of movable and immovable property. In that connection, draft article 1 as submitted by the Special Rapporteur in his second report (A/CN.4/391 and Add.1, para. 74) was acceptable.

47. As the Special Rapporteur recalled in his third report (A/CN.4/401, para. 23), the codification of the law on the topic, and its progressive development to the extent that there were any gaps or any need for harmonization in existing practice, were necessary to complement the Commission's work in the field of diplomatic law that had culminated in the 1961, 1963, 1969 and 1975 Conventions.

48. A number of issues and delicate policy questions should also be investigated with due attention and caution, such as those referred to in the second report (A/CN.4/391 and Add.1, para. 6) and the third report (A/CN.4/401, para. 22). In addition, a number of issues had been raised during the discussion regarding the relationship between the present topic and the existing treaties, agreements and special arrangements.

49. Another question had been raised as to whether the draft articles should be regarded as superseding existing arrangements, or whether they should instead be deemed to have a residual character to supplement the law where the existing instruments were silent or embodied mutually conflicting provisions. A further possibility was for the draft articles to take the form of recommendations or guidelines for use by States and international organizations in the negotiation of any questions relating to privileges and immunities.

50. In his view, the exercise in which the Commission was engaged should result in a set of draft articles which, whatever their form or ultimate status, would not affect the status of the existing treaties, agreements and arrangements. The draft articles should be seen as providing only the necessary guidelines and recommendations for States and international organizations to adopt as they saw fit.

51. With regard to the scope of the privileges and immunities to be granted, certain factors would be highly relevant, such as the permanence of organizations and their objectives, which might be political or diplomatic as opposed to purely commercial operations. Again, it was practically axiomatic that the privileges and immunities of an international organization and its officials were essentially functional, in other words intended to enable them to perform their functions unhindered. However, the privileges and immunities of officials were slightly more restricted than those of the organization itself, for which a minimum of privileges and immunities appeared to be indispensable, namely inviolability of premises and archives, privileged communications, immunity from legal process, exemption from the fiscal and financial regulations of States, particularly the host State, and the right to acquire and hold property and assets.

52. The Commission should also study the question of abuse of privileges and immunities, bearing in mind certain recent allegations of violations. It would have to display some sensitivity, focusing only on safeguards and general principles and avoiding any controversy.

53. The settlement of disputes should generally be confined to such known means as resort to the Committee on Relations with the Host Country, negotiations, good offices and mediation. A formal procedure for third-party determination was not suitable for relations between States and international organizations. The possibility of referral to the ICJ or to some specially constituted body for an advisory opinion would be appropriate, but only as a last resort.

54. Lastly, the outline proposed by the Special Rapporteur was largely acceptable, subject of course to the need to give careful thought to the many points made during the debate.

55. Mr. KOROMA said that he had already expressed his views on the present topic, which was very relevant and timely, at a previous session and would therefore confine himself to a brief examination of a few points raised by other members. It was hardly necessary to stress the importance of international organizations, which covered the entire spectrum of human activities, such as the maintenance of international peace and security, international economic and technical cooperation and economic development. It was enough to note the tendency of States to create more and more organizations.

56. It had been suggested that the scope of the topic should be restricted by excluding the problem of the legal personality and capacity of international organizations and also by concentrating on privileges and immunities. Such a course would be an over-simplification of the issues at stake. The Commission was the proper body to study such questions as the legal personality and capacity of international organizations: avoiding them would mean shirking its responsibilities.

57. Moreover, he did not believe that the question of the legal personality and capacity of organizations was

as difficult as had been suggested. In practice, it was the functions and responsibilities of an organization that were involved, and, for the most part, they were set forth in the constituent instrument. As Mr. Reuter (2024th meeting) had pointed out, the consequence of international personality was that international organizations had the capacity to conclude treaties and to assume certain responsibilities. That being so, it should be possible for the Commission to consider the matter and he strongly urged it to pronounce itself on that all-important issue.

58. In its advisory opinon of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ had recognized the personality of international organizations. Without equating the status of international organizations with that of States, it had acknowledged that the United Nations had been assigned certain functions and rights; that, in order to exercise those functions and rights, it had international personality and the capacity to conclude treaties; and that, although it was not on a par with States, the Organization was a subject of international law, having rights and duties and being endowed with legal capacity. The Court had concluded:

> . . . the Court's opinion is 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, together with capacity to bring international claims.[7]

That important opinion of the ICJ constituted the repudiation of a certain form of neo-positivism which tended to make the existence of the international personality of an international organization dependent on recognition by States. It was also interesting to note the recognition of the legal capacity of WHO by the ICJ in its advisory opinion of 20 December 1980 on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.[8]

59. He agreed with Mr. Calero Rodrigues's suggestion that the Commission should first concentrate on the privileges and immunities of the organizations themselves. He also agreed that the Commission's first task was to deal with international organizations of a universal character. Having done that, however, the Commission should also deal with regional organizations: it could not ignore such important bodies as OAS and OAU.

The meeting rose at 1 p.m.

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

[8] *I.C.J. Reports 1980*, p. 73.

2028th MEETING

Tuesday, 7 July 1987, at 3.05 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*)* (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.411)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

TITLES OF PARTS I AND II OF THE DRAFT *and* ARTICLES 1 TO 7

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the titles of parts I and II of the draft and draft articles 1 to 7 as adopted by the Committee (A/CN.4/L.411), which read:

PART I

INTRODUCTION

Article 1. [Use of terms][a]

Article 2. Scope of the present articles

1. The present articles apply to uses of international watercourse[s] [systems] and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse[s] [systems] and their waters.

2. The use of international watercourse[s] [systems] for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Article 3. Watercourse States

For the purposes of the present articles, a watercourse State is a State in whose territory part of an international watercourse [system] is situated.

Article 4. [Watercourse] [System] agreements

1. Watercourse States may enter into one or more agreements which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse [system] or part thereof. Such agreements shall, for the purposes of the present articles, be called [watercourse] [system] agreements.

2. Where a [watercourse] [system] agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse [system] or with respect to any part thereof or a particular project, programme or use, provided that

[a] The Drafting Committee agreed to leave aside for the time being the question of article 1 (Use of terms) and that of the use of the term "system" and to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980. Thus the word "system" appears in square brackets throughout the text.

* Resumed from the 2014th meeting.

[1] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).