Document:-

A/CN.4/SR.2176

Summary record of the 2176th meeting

Topic:

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

Extract from the Yearbook of the International Law Commission:-

1990, **vol. I**

on the author State was likely to temper quantitatively and qualitatively the obligation of *restitutio in integrum*, but it could not be easily applied to compensation. Retaining the criterion in the latter case would certainly be tantamount to giving a State, even a prosperous one, complete latitude in claiming that the compensation to which it was bound was excessively heavy. There again, equity must enter into play.

36. With regard to draft article 9, on interest, he noted that most members of the Commission who had spoken on the subject regarded it as essential. He did not himself have strong feelings on the question but, if article 9 were deleted, it would be necessary to incorporate a provision on interest in article 8 to avoid creating the impression that the award of interest was excluded.

37. Concerning satisfaction, which was dealt with in draft article 10, he was quite prepared to delete the reference to "punitive" damages (para. 1). Clearly, he had not intended to provide for States the type of physical punishment that might be imposed on individuals, but it did sometimes happen that arbitral tribunals awarded punitive damages as satisfaction.

38. The fact of the matter was that satisfaction existed and had a role to play. That role had been contested by Mr. Graefrath (2168th meeting), who had argued that satisfaction was primarily a diplomatic practice and rhetorical and that it was therefore open to question whether it reflected a rule of law or simply diplomatic practice. He himself could not, for a number of reasons, accept the idea that diplomatic practice was not an element from which the existence of rules of international law could be deduced. Where else did general international law come from if not from diplomatic practice? The number of disputes settled by judicial or arbitral means was negligible compared to the number of conflicts settled by diplomatic means. After all, United Nations practice was itself diplomatic, the Organization being a system of multilateral diplomacy. Diplomatic practice was, in fact, much more abundant than that referred to in the second report.

39. In paragraph 1 of article 10, he suggested that the words "moral or legal injury" be retained for the time being for lack of a better solution. He was convinced that the very purpose of satisfaction was to repair that type of injury. All internationally wrongful acts entailed legal injury. Paragraph 1 aimed to take account of the fact that cases occurred in which compensation covered satisfaction. That had been so in the first "*Rainbow Warrior*" case (see A/CN.4/425 and Add.1, para. 134), in which the Secretary-General of the United Nations had set an amount for compensation which, in the opinion of most commentators, far exceeded the damage sustained.

40. Lastly, the fault, wilful intent or negligence of the State committing the wrongful act was an essential point, as a number of members had stressed. The Commission must examine the question of fault independently of part 1 of the draft articles. The term lent itself to a number of interpretations in the case of "international delicts" and even more so in that of "international crimes".

41. He thanked members of the Commission for their observations and apologized for perhaps not having replied to all the questions raised.

42. The CHAIRMAN thanked the Special Rapporteur for his clear and detailed summing-up. He asked the Commission whether it wished to refer draft articles 8 to 10 to the Drafting Committee, it being understood that the Committee would take fully into account the comments made and opinions expressed during the discussion.

43. Mr. McCAFFREY said that, while he would not oppose referral of the draft articles to the Drafting Committee, like some other members of the Commission he had certain reservations about the approach taken in the articles. He regretted that the Commission did not have time to discuss that approach in the light of the Special Rapporteur's summing-up.

44. Mr. DÍAZ GONZÁLEZ said that he agreed with Mr. McCaffrey. There were substantial differences of opinion among the members of the Commission. In his view, it would be premature to refer the articles to the Drafting Committee, but he would not oppose such referral if that were the decision of the majority of the Commission, in accordance with its usual practice.

45. Following a procedural discussion in which Mr. ARANGIO-RUIZ (Special Rapporteur), Mr. MAHIOU (Chairman of the Drafting Committee), Mr. KOROMA and Mr. BEESLEY took part, Mr. CALERO RODRIGUES, speaking on a point of order, requested that the discussion be postponed.

46. The CHAIRMAN, noting that the Commission had not completed its discussion of agenda item 3, suggested that it resume its consideration of the topic when the Special Rapporteur's presence made it possible to do so.

It was so agreed.

The meeting rose at 1.25 p.m.

2176th MEETING

Tuesday, 19 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (A/CN.4/401,[1] A/CN.4/424,[2] A/CN.4/L.383 and Add.1-3,[3] A/CN.4/L.443, sect. G, ST/LEG/17)

[Agenda item 8]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 11

1. The CHAIRMAN recalled that the Special Rapporteur had introduced his fourth report on the topic (A/CN.4/424) at the previous session,[4] but that it had not been discussed by the Commission due to lack of time. The Special Rapporteur's fifth report (A/CN.4/432) was now also before the Commission, but it would not be considered at the present session due to lack of time. He invited the Commission to consider the fourth report, as well as draft articles 1 to 11 contained therein, which read:

PART I. INTRODUCTION

Article 1. Terms used

1. For the purposes of the present articles:

(*a*) "international organization" means an intergovernmental organization of a universal character;

(*b*) "relevant rules of the organization" means, in particular, the constituent instruments of the organization, its decisions and resolutions adopted in accordance therewith and its established practice;

(*c*) "organization of a universal character" means the United Nations, the specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are of a world-wide character;

(*d*) "organization" means the international organization in question;

(*e*) "host State" means the State in whose territory:

(i) the organization has its seat or an office; or

(ii) a meeting of one of its organs or a conference convened by it is held.

2. The provisions of paragraph 1 of this article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

Article 2. Scope of the present articles

1. The present articles apply to international organizations of a universal character in their relations with States when the latter have accepted them.

2. The fact that the present articles do not apply to other international organizations is without prejudice to the application of any of the rules set forth in the articles which would be applicable under international law independently of the present articles [Convention].

3. Nothing in the present articles [Convention] shall preclude the conclusion of agreements between States or between international organizations making the articles [Convention] applicable in whole or in part to international organizations other than those referred to in paragraph 1 of this article.

Article 3. Relationship between the present articles [Convention] and the relevant rules of international organizations

The provisions of the present articles [Convention] are without prejudice to any relevant rules of the organization.

Article 4. Relationship between the present articles [Convention] and other international agreements

The provisions of the present articles [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 privileges and immunities of international organizations of a universal character.

PART II. LEGAL PERSONALITY

Article 5

International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

(*a*) contract;

(*b*) acquire and dispose of movable and immovable property; and

(*c*) institute legal proceedings.

Article 6

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization and by international law.

PART III. PROPERTY, FUNDS AND ASSETS

Article 7

International organizations, their property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or coercion.

Article 8

1. The premises of international organizations used solely for the performance of their official functions shall be inviolable. The property, funds and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference or coercion, whether by executive, administrative, judicial or legislative action.

2. International organizations shall notify the host State of the location and description of the premises and the date on which occupation begins. They shall also notify the host State of the vacation of premises and the date of such vacation.

3. The dates of the notification provided for in paragraph 2 of this article, except where otherwise agreed by the parties concerned, shall determine when the enjoyment of the inviolability of the premises, as provided for in paragraph 1 of this article, begins and ends.

Article 9

Without prejudice to the provisions of the present articles [Convention], international organizations shall not allow their headquarters to serve as a refuge for persons trying to evade arrest under the legal provisions of the host country, or sought by the authorities of that country with a view to the execution of a judicial decision, or wanted on account of *flagrans crimen*, or against whom a court order or deportation order has been issued by the authorities of the host country.

Article 10

Without being restricted by controls, inspections, regulations or moratoria of any kind:

(*a*) International organizations may hold funds, gold or currency of any kind and operate bank accounts in any currency;

(*b*) International organizations may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency;

(*c*) International organizations shall, in exercising their rights under subparagraphs (*a*) and (*b*) of this article, pay due regard to any representations made by the Government of any member State party to the present particles [Convention] in so far as it is considered that effect can be given to such representations without detriment to their own interests.

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

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

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

[4] For a summary of the Special Rapporteur's introduction, see *Yearbook ... 1989*, vol. II (Part Two), pp. 133 *et seq.*, paras. 708-726; see also *Yearbook ... 1989*, vol. I, pp. 282-283, 2133rd meeting, paras. 2-19.

Article 11

Notwithstanding the provisions of article 10, subparagraphs (*a*) and (*b*), the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question, by mutual agreement of the parties concerned.

2. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that he would invite the Commission, in considering his fourth report (A/CN.4/424), also to refer to his second report,[5] which contained a draft article on which the Commission had not yet taken a decision. It had in fact been agreed to defer consideration of the matter pending his submission of a schematic outline of the subject-matter to be covered by the various draft articles.[6] He had accordingly submitted that schematic outline in his third report (A/CN.4/401, para. 34) and it had been approved by the Commission at its thirty-ninth session, and by the General Assembly at its forty-second session, in 1987. Furthermore, in resolutions 42/156 and 43/169, of 7 December 1987 and 9 December 1988 respectively, the General Assembly had recommended that the Commission should continue its work on the topic. In the debate held in the Sixth Committee at the Assembly's forty-second session, a large number of representatives had stressed the role of international organizations and the importance of the topic. They had welcomed the Commission's work and endorsed its request that he continue his study of the topic in accordance with the schematic outline and in the light of the exchange of views that had taken place in the Commission.[7] Those considerations had provided the basis for his further work on the topic and for his fourth report.

3. He also wished to place before the Commission his fifth report (A/CN.4/432), which consisted of two parts, one dealing with the archives of international organizations, which was intended to supplement part III of the draft articles, and the other with publication and communications facilities, which were the subject of part IV of the draft. The corresponding draft articles would be set forth in an addendum to the fifth report which he would be submitting in due course.[8] He would introduce the fifth report when the Commission began discussing it, which he trusted would be at the next session. In the meantime, he would continue his work along the lines approved by the Commission and the General Assembly.

4. Mr. HAYES thanked the Special Rapporteur for his thought-provoking fourth report (A/CN.4/424) and said that, although the early work on the second part of the topic had covered regional as well as universal organizations, the Commission had decided at its thirty-ninth session, in 1987, that the topic should be confined to intergovernmental organizations of a universal character, the final decision in the matter to be left until later. That approach was reflected in the fourth report and was justified by the outcome of the work thus far. At its thirty-ninth session, the Commission had also agreed, with respect to methodology, that it should endeavour to combine the codification of existing rules and practice with the identification of lacunae.[9] As noted by the Special Rapporteur, such a course had been endorsed in the Sixth Committee of the General Assembly, thus providing the Commission with a clear direction for its work. The schematic outline submitted in the third report (A/CN.4/401, para. 34) furnished the necessary framework on the basis of which the Special Rapporteur had proceeded in preparing his fourth report.

5. There were, in his view, two theoretical questions that had to be faced, since they would inevitably influence future work on the topic. The first concerned the legal personality and legal capacity of an international organization, which he believed derived from the constituent instrument of the organization. It was none the less difficult to imagine how an international organization could be established without being vested with legal personality. Accordingly, he had no objection to the general thrust of draft article 5. It followed therefrom that States not parties to the constituent instrument could decide for themselves whether to recognize the legal personality of an international organization; and it also followed, of course, that such legal personality was independent of that recognition.

6. The second question concerned legal rights, and in particular privileges and immunities, which he believed did not derive from the fact of international personality but rather depended on the powers and functions of the organization as set forth in its constituent instrument. Thus he endorsed the view of Dominicé cited in the report (A/CN.4/424, para. 32), a view that also found support in the jurisprudence of the ICJ, particularly in such advisory opinions as those handed down in the cases concerning *Reparation for Injuries Suffered in the Service of the United Nations* (1949), the *International Status of South West Africa* (1950) and *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (1962). The first of those advisory opinions, for instance, stated that "the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice".[10]

7. Accordingly, he favoured the functional approach to the drafting of provisions and agreed with the Special Rapporteur's statement in the first sentence of paragraph 27 of the report. More broadly, it was his opinion that the Commission's efforts should be directed at preparing a general framework of provisions that would be common to all international organizations of a universal character but would leave other areas to be developed according to the specific purpose and functions of the organization concerned. Again, that

[5] *Yearbook ... 1985*, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1.

[6] *Yearbook ... 1985*, vol. II (Part Two), p. 67, para. 267 (*d*) and (*e*).

[7] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-second session of the General Assembly" (A/CN.4/L.420), para. 223.

[8] Since it was not considered by the Commission at the present session, the fifth report will be reproduced in consolidated form in *Yearbook ... 1991*, vol. II (Part One), as document A/CN.4/438.

[9] See *Yearbook ... 1987*, vol. II (Part Two), p. 52, para. 219.

[10] *I.C.J. Reports 1949*, p. 180.

seemed to be in keeping with the Special Rapporteur's suggestions (A/CN.4/424, paras. 51-52).

8. Draft article 1, on the use of terms, was necessarily of a more provisional nature than the other articles, as it would have to be reviewed in the light of the substantive provisions. So far as article 1 was concerned, therefore, at the present stage he would only discuss the definition of an international organization. Since the articles were concerned not with international organizations as such but with the relations between those organizations and States, it was necessary only to say what was meant by the expression "international organization", rather than to define what an international organization was, thus following the pragmatic approach of earlier treaties. It should, however, be possible to do so more concisely than in three subparagraphs, namely paragraph 1 (*a*), (*c*) and (*d*) of article 1. Those provisions could well be merged into a definition of one single term, bearing in mind article 2, on the scope of the draft.

9. He would welcome clarification both of the phrase "when the latter have accepted them", in paragraph 1 of draft article 2, and of paragraph 3 of the article.

10. Legal personality, as dealt with in draft article 5, signified, of course, primarily legal personality under international law. The reference to internal law in the first sentence of the article might therefore require adjustment. While the areas of legal capacity covered in subparagraphs (*a*), (*b*) and (*c*) were the ones most frequently provided for in legal instruments and acknowledged in practice—and hence were appropriate for inclusion in the article—the reference in the introductory clause to the instrument by which international organizations were established might stand in need of modification.

11. Draft article 6, which contained a practical provision dealing with treaty-making capacity, steered a sensible course between conflicting views.

12. He agreed with the statement by the Special Rapporteur (*ibid.*, para. 24) that the autonomy, independence and functional effectiveness of an international organization required some degree of immunity from legal process. The first sentence of draft article 7, which appeared in many relevant agreements, appeared to have stood the test of time, and such immunity properly covered not only the international organization, but also its property, funds and assets. The second sentence of the article, however, should be so drafted as to make it quite clear that, as in the case of diplomatic immunity, a separate waiver was required in respect of measures of execution.

13. Inviolability of premises was a *sine qua non* for the fulfilment by an international organization of its functions and, as noted in the report (*ibid.*, para. 100), such inviolability was firmly supported by both the literature and practice. The provisions of many agreements were amalgamated in paragraph 1 of draft article 8, whereby the limitation of inviolability to premises used solely for official purposes was maintained, while paragraphs 2 and 3 represented a desirable development of the law. He would none the less urge a further effort in that direction by means of a carefully worded provision under which a State would be required to afford protection of premises—a question convincingly addressed by the Special Rapporteur in the report. It was gratifying to note that article 8 did not provide for an exception with regard to expropriation, a subject mentioned in paragraph 112 of the report.

14. He endorsed draft article 9, on the non-availability of the premises of an international organization as a refuge.

15. Draft article 10 followed the provisions of other relevant agreements which had apparently operated satisfactorily. However, subparagraph (*c*) could perhaps be adapted to cover the situation of a host country that was not a member of the international organization. Also, the article did not deal with such matters as taxes and customs duties, which would presumably be dealt with in a later draft.

16. He wondered whether the point dealt with in draft article 11 was not already covered by article 4, on the relationship between the present articles and other international agreements.

17. The topic had been somewhat neglected during the term of office of the Commission's current members, possibly for reasons that had more to do with other topics than with any lack of concern. In view of the interest of a large number of States in the matter, however, every effort should be made to move ahead with greater expedition. He was pleased to note that the Special Rapporteur's fifth report (A/CN.4/432) was now before the Commission and looked forward to a debate on it at the next session.

18. Mr. TOMUSCHAT commended the Special Rapporteur on the clarity and precision of his fourth report (A/CN.4/424). Although the topic might at first appear straightforward, the very purpose of the draft articles and their future place within the existing framework of relevant instruments were far from being settled. All the issues involved were already covered by the two general conventions on the privileges and immunities of the United Nations and the specialized agencies[11] and in the headquarters agreements concluded between the organizations and the host countries. The draft articles under consideration should therefore ultimately be aimed at overcoming the variety of legal régimes established by the many instruments in force and introduce improvements, fill in gaps and correct discrepancies, provided, of course, that the States and organizations concerned were willing to give precedence to the new legal régime that would eventually emerge. Indeed, the Commission had not been very successful in meeting a similar challenge posed by the drafting of unified rules on the status of the diplomatic courier and the diplomatic bag: the artificial distinction between a diplomatic bag and a consular bag had been maintained because it had been felt that existing treaty law could not be modified. The Commission's consideration of relations between States and international organizations would be justified only if it eventually led

[11] 1946 Convention on the Privileges and Immunities of the United Nations (United Nations, *Treaty Series*, vol. 1, p. 15); and 1947 Convention on the Privileges and Immunities of the Specialized Agencies (*ibid.*, vol. 33, p. 261).

to the modification of existing rules in the interest of the international community and was not a purely academic exercise.

19. In the light of those considerations, he disagreed with the content of draft article 4 (*a*). Indeed, the relationship between existing agreements and the present articles must be more clearly defined if the latter were to amend or supplement existing rules. However, in view of the scope and magnitude of the problems involved, it might be advisable to reconsider that issue at a later stage, just before the entire draft was completed.

20. He agreed with the Special Rapporteur that the draft should be confined to world-wide international organizations, namely those open to all States. Nevertheless, despite the view expressed by the Special Rapporteur (*ibid.*, para. 38), he believed that the commodity organizations set up under UNCTAD should not be excluded from the scope of the draft, provided they were open to all States, either as consumers or as producers, a condition that OPEC, for example, did not meet.

21. Draft article 5 was likely to be confusing, because it covered two types of legal personality, namely domestic and international. In that connection, he endorsed the comments made by Mr. Hayes and proposed that the Commission should follow the example of the EEC Treaty,[12] which, in article 210, provided that the Community enjoyed legal personality under international law, and then went on to grant it legal personality under the internal law of the member States. However, a single article could provide for the legal personality of international organizations under international law and for their treaty-making powers, which clearly derived from such personality. A second article could then provide for their legal personality under internal law and illustrate its scope by reference to contracts, the acquisition and disposal of property and the institution of legal proceedings.

22. The principle of the jurisdictional immunity of international organizations should not be open to challenge, for as a person under international law, and placed on the same level as the host State, they could not be regarded as being generally subordinate to the jurisdiction of local courts. However, a question did arise as to whether or not they should be subject to the same exceptions to and limitations on immunity as those applicable to States now that the doctrine of restricted immunity, as opposed to absolute immunity, had become widely accepted. The concept of absolute immunity had prevailed at the time the two general conventions on the privileges and immunities of the United Nations and the specialized agencies had been elaborated. Granting international organizations a better status than that enjoyed by States might at first glance seem questionable, but he tended to agree with the Special Rapporteur that the existing rule should not be changed, because subjecting international organizations to the jurisdiction of domestic courts, which would automatically be the outcome of a restriction analogous to that imposed on States, would seriously impair the independence of international organizations. Accordingly, he did not agree with the exceptions enumerated by the European Committee on Legal Co-operation (*ibid.*, para. 111). Nevertheless, procedures and mechanisms must be established to enable private citizens involved in disputes with international organizations to assert their rights. Assuming that such cases lay outside the jurisdiction of domestic courts, they could perhaps be referred to arbitral bodies. At any rate, a rule must be laid down to provide for alternative remedies, because it could not be assumed that international organizations could do no wrong.

23. The general relationship between an international organization and the host country could be considered in two different ways: either an international organization enjoying legal personality under international law was generally exempt from the jurisdiction of the host country, or it enjoyed only the immunities specifically granted to it, as was the case under the existing conventions on privileges and immunities. The possibility that an international organization might claim a general exemption from national jurisdiction must be expressly ruled out in the draft articles.

24. Articles 8, 9 and 10 were acceptable, subject to minor drafting changes. The Special Rapporteur was none the less likely to run into serious difficulty at a later stage, especially in drafting general rules on taxation.

25. Mr. AL-BAHARNA thanked the Special Rapporteur for his fourth report (A/CN.4/424) and said that he supported the approach mentioned in the first sentence of paragraph 7 thereof. Nevertheless, the Commission must be very cautious in laying down general norms applicable to all international organizations, first because each organization had its own particular régime, which called for special treatment, and, secondly, because of the question of relations between the organization and the host country.

26. Draft article 3, no doubt a replica of article 3 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, was inconsistent with the Special Rapporteur's general approach, since it seemed to imply that the proposed convention would be without effect on the law applicable to an organization. If so, the future convention would be pointless. The Commission should therefore reconsider draft article 3, which could perhaps be strengthened by a provision to the effect that the proposed convention supplemented the relevant rules of the organization. The same comments applied, *mutatis mutandis*, to draft article 4 (*a*), which was a replica of article 4 (*a*) of the 1975 Vienna Convention.

27. Except for the words "and by international law", draft article 6 was the same as article 6 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. However, the addition was welcome, because it strengthened the formulation contained in the 1986 Convention.

[12] See *Treaties establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1987), p. 207.

28. Under international law, it was broadly accepted that the immunities and privileges of international organizations were governed by the doctrine of functional necessity. Yet the practical application of that doctrine varied from one organization to another, depending essentially on the organization's character and functions. Although the property and assets of all international organizations were immune from every form of attachment, enforcement or execution, some organizations, unlike the United Nations, enjoyed only limited immunity from suit, as was evident from their constituent instruments in the case of the International Bank for Reconstruction and Development, the International Finance Corporation and the International Development Association, for example. In that respect, he had misgivings about the formulation of draft article 7, which appeared to go against the constituent instruments of those international financial institutions. On the other hand, he had no substantive objection to the way in which the article covered immunity of property. Article 7 should therefore be divided into two parts, the first providing for immunity from suit in accordance with the relevant rules of the constituent instrument, and the second providing for immunity of property from legal process. As for the operation of the doctrine of waiver, the provision should be further strengthened by replacing the second sentence of article 7 by the following clause: "Waiver of immunity from legal process shall not be held to imply waiver of immunity in respect of the execution of the judgment or order, for which separate waiver shall be necessary."

29. With regard to draft article 8, he agreed with the Special Rapporteur that the inviolability of the premises of international organizations was not based on extraterritoriality, but was a right inherent in personality. In the legal literature, it was recognized that all the principles on diplomatic inviolability applied to the premises of international organizations. According to State practice, inviolability of such premises meant that States must not only refrain from entering them, but also protect them from any threat or disturbance. However, the wording proposed by the Special Rapporteur for the first sentence of paragraph 1 differed from the stipulation in article 22, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations that "The premises of the mission shall be inviolable". He preferred the latter formulation, because the phrase "used solely for the performance of their official functions" might restrict the inviolability of international organizations. The Special Rapporteur himself acknowledged in the report that "all the principles on diplomatic inviolability are applicable to the premises of international organizations" (*ibid.*, para. 100). The Commission should therefore reconsider paragraph 1 of article 8. It should also incorporate in the article the rule that no agent of the host State could enter the premises of an international organization without its consent. A provision to that effect would underscore the principle of inviolability, and would be in accord with the 1961 Vienna Convention.

30. He agreed with the principle underlying draft article 9, namely that international organizations should not become a safe haven for fugitives from justice or for criminal offenders. He was unsure, however, whether the provision should be so detailed and, in particular, thought it better to remove the reference to persons "wanted on account of *flagrans crimen*". The concept of *flagrans crimen* did not necessarily prevail in all countries; moreover, such persons might be included among those "trying to evade arrest under the legal provisions of the host country". The last phrase, "or against whom a court order or deportation order has been issued by the authorities of the host country", was slightly obscure and could be replaced by the formula "or against whom a deportation order has been issued by the courts of the host State", which would fully meet the needs of the host State.

31. He had no objection to draft article 10, but draft article 11 was unnecessary. The effect of article 11 would be to introduce an element of uncertainty as to the scope of article 10, and make it difficult in some cases to determine which "functional requirements" should be taken into consideration for the purpose of limiting the provisions of article 10 (*a*) and (*b*). The fiscal autonomy and independence enjoyed by international organizations made it pointless to include a provision such as article 11.

32. The CHAIRMAN, speaking as a member of the Commission, said that he welcomed the Special Rapporteur's pragmatic approach, which reflected the Commission's decision to concentrate on the formulation of specific draft articles and to avoid protracted discussion of a doctrinaire, theoretical nature. He agreed with the view referred to in paragraph 7 of the fourth report (A/CN.4/424) that the draft articles should not be confined to the consolidation and codification of the existing legal régime—which was already embodied in a number of legal instruments—but should also endeavour to remedy the shortcomings of that régime, as experienced over the years by international organizations in their relations with host countries. If international organizations were to function effectively and fulfil the purposes for which they had been established, it was essential to make good the existing deficiencies.

33. The Special Rapporteur wisely avoided any precise definition of international organizations in paragraph 1 (*a*) of draft article 1, for no two organizations had identical purposes and functions. It was enough to equate them with intergovernmental organizations within the meaning of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. However, the words "of a universal character" in paragraph 1 (*a*), and also in paragraph 1 of article 2, should be placed in square brackets, for as the Special Rapporteur pointed out (*ibid.*, para. 20) the Commission had concluded that the study of the topic should include regional organizations. The adjective "relevant" in paragraph 1 (*b*) was unnecessary, since the meaning of the expression "rules of the organization" was the same as in the 1986 Vienna Convention. Deleting that

word would ensure consistency in the use of terms. As to the definition of the "host State" in paragraph 1 (*e*), the Special Rapporteur might consider including a reference to States visited by officials of international organizations on official missions or business.

34. The provision in paragraph 3 of draft article 2 that States or international organizations might agree to make the present articles applicable to international organizations other than those referred to in paragraph 1 was unlikely to be acceptable to most States.

35. With regard to the legal personality of international organizations, he endorsed the Special Rapporteur's treatment of the subject-matter in two separate articles. He could accept the principle set out in draft article 5 that internal legal personality of international organizations was operative only within the limits of the territorial sovereignty of States, since it was now well established that organizations of a universal character did have legal capacity under internal law. Similarly, he could readily accept the principle enunciated in draft article 6 that the treaty-making capacity of an international organization was governed by the rules of the organization and by international law. That capacity had already been established in the 1986 Vienna Convention.

36. Part II of the draft articles did not delimit the international personality of international organizations in any other way, nor did it enumerate the resulting legal powers. In that area, doctrine and practice remained inconclusive, despite the general recognition of international organizations as subjects of international law. The Special Rapporteur had wisely avoided entering into the controversial aspects of the matter. However, the Special Rapporteur should perhaps seek to identify certain other specific legal powers at the international level which were accepted by States in general in their relations with international organizations. Such powers could be incorporated in the draft either in the form of an expanded article 6 or otherwise. It was already clear that those legal powers were limited by the functional competence conferred by the constituent instrument of the organization, and the words "International organizations shall enjoy legal personality under international law" in article 5 should be understood in that sense.

37. In part III of the draft, on the privileges and immunities of international organizations in respect of their property, funds and assets, the Special Rapporteur had rightly pursued a functional approach, in line with modern doctrine and practice. The report rightly stated (*ibid.*, para. 88) that the privilege of inviolability of an organization's premises was essential to the proper functioning of the organization. He disagreed, however, with the statement (*ibid.*, para. 89) that that inviolability derived from the fact that a national, subordinate legal order could not demand submission of or coerce an international, higher legal order. An explanation in those terms would merely invite doctrinal dispute, and it would be better to explain the inviolability in terms of the functional necessity of international organizations. He concurred with the Special Rapporteur's affirmation that "Inviolability of the premises obliges the State not only to abstain from certain acts but also to afford active protection of the premises" (*ibid.*, para. 105). In the same paragraph, it was pointed out that that principle had been recognized in many headquarters agreements or had been considered obligatory by States. Consequently, it might be desirable to make specific provision for it in draft article 8.

38. As the Special Rapporteur explained in the report (*ibid.*, para. 107), the important principle stated in draft article 9 drew on certain provisions in the headquarters agreements between the United Nations and the United States of America and between UNESCO and France. The article was justified by the functional approach to privileges and immunities and also offered a safeguard against abuses of the inviolability of premises. It also confirmed that, in general international law, international organizations did not recognize a right of asylum.

39. He had no difficulty in accepting draft articles 7 to 11 as submitted by the Special Rapporteur.

40. Mr. KOROMA queried the statement in draft article 5 that "International organizations shall enjoy legal personality under international law and under the internal law of their member States". It suggested that international organizations enjoyed international legal personality under both systems of law, whereas, in fact, two separate issues were involved. Problems could arise if any system of internal law denied that an international organization had legal personality. Moreover, the ambiguity of the wording could lead to breaches of the terms of the article. He hoped that the Special Rapporteur would either explain the interpretation to be given to the statement, or keep the two issues separate in the draft. He also wondered how draft articles 5 and 6 were to be reconciled, since the former included a reference to internal law and the latter did not.

41. Furthermore, the Special Rapporteur asserted in his fourth report that "Expropriation is . . . allowed as an exception to the principle of immunity, should it be necessary for purposes of public utility" (A/CN.4/424, para. 112). Yet the report had already made clear that, since international organizations represented all States, the host country was not to derive financial or other benefits from them. On that line of reasoning, expropriation of any kind would be illegal according to the principle of unjust enrichment, since the assets of international organizations belonged to the member States. He would welcome the Special Rapporteur's comments on that point.

The meeting rose at 11.25 a.m.

2177th MEETING

Wednesday, 20 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley,