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Summary record of the 2177th meeting

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

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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,

Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, 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) (*continued*) (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 (*continued*)

ARTICLES 1 TO 11[4] (*continued*)

1. Mr. MAHIOU said that the Commission should have more time as from its current session to devote to consideration of the topic and to the preparation of the draft articles. He first wished to make a general comment on the Special Rapporteur's fourth report (A/CN.4/424). While he was grateful to the Special Rapporteur for placing before the Commission the elements necessary for its consideration and for analysis of the topic and the draft articles, it was unfortunate that certain information, which would have served to enrich the debate and the Special Rapporteur's work itself, was lacking or inadequate. It was likewise unfortunate that, in the mimeographed version of the report, the footnotes did not refer to certain treaty provisions and judicial decisions which, although sometimes mentioned by the Special Rapporteur, were mentioned too elliptically. The supplementary study prepared by the Secretariat on "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" (A/CN.4/L.383 and Add.1-3) did contain quite a few texts and made it possible to understand the references cited by the Special Rapporteur, but it was difficult to refer to.

2. A number of interesting ideas and conclusions had been put forward in the fourth report which pinpointed the main problems at issue. For example, the Special Rapporteur referred (A/CN.4/424, para. 28) to the scope of the principle of the equality of an organization's member States, in particular in certain areas such as fiscal matters. With regard to the last sentence of the paragraph in question, the State in whose territory the headquarters of the organization was located was actually favoured in one way or another by comparison with other States inasmuch as it could levy certain taxes, particularly indirect taxes, which could be imposed on goods used in international organizations, fiscal immunity not being applicable to certain kinds of taxes, including consumer taxes. Such a State could, furthermore, levy taxes on the emoluments or salaries of certain officials who were its nationals and who, in principle, did not enjoy certain immunities, including exemption from taxes. It was therefore necessary to lay down precise provisions with a view to introducing a relative conception of the equality of States, a strict application of which might prove to be too complicated.

3. The same was true of the privileges and immunities granted to officials of international organizations (*ibid.*, para. 31). In that connection, the Special Rapporteur spoke of the assimilation of officials of international organizations to diplomatic personnel. That concept, which was useful in understanding certain matters, could also stand in the way of a proper analysis of privileges and immunities. What was meant by "assimilation"? Were there any differences between the two categories of persons in question and what were those differences? He would have liked some clarifications in that regard.

4. It would also have been helpful if the judicial decisions mentioned in paragraph 69 of the report could have been quoted so as to show their exact content, scope and possible interpretation, particularly since the position of the Italian courts referred to was far from uniform: the differences related not only to the existence, extent and scope of the privileges and immunities of the organization in question, but also to the view taken of its jurisdictional immunity. The jurisprudence of other States should also have been taken into account.

5. He had some doubts about certain other points and difficulty in following all of the Special Rapporteur's conclusions, perhaps because the line of reasoning was not well enough developed. Referring to paragraphs 32 and 33 of the report, which condensed in a remarkable manner a whole series of important points concerning the basis and extent of the immunities of international organizations—in particular by comparison with those of States—and highlighted the difficulties that remained in the international sphere, he noted that, in the Special Rapporteur's view, those privileges and immunities were granted to international organizations "in conventions . . . or possibly by custom, in their capacity as international legal persons". Did privileges and immunities have any legal source other than treaties? The Special Rapporteur cautiously referred to custom, but did not explain what he had in mind. It would be interesting to know what that possibility involved.

6. Another problem concerned the link between international legal personality and the privileges and immunities that could derive therefrom. Certain consequences could be inferred from the establishment of a clear and distinct link between those two elements. There again, however, the Special Rapporteur raised a question which was admittedly interesting, but without suggesting a solution. If reference were had to State

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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 the texts, see 2176th meeting, para. 1.

practice, it would be seen that there was at least one agreement in which that link was clearly established, namely the 1946 Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council,[5] article I of which read:

The Swiss Federal Council recognizes the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the Organization cannot be sued before the Swiss Courts without its express consent.

Under the terms of that article, jurisdictional immunity was a consequence of legal personality. As pointed out by certain commentators, including Christian Dominicé, however, the headquarters agreements subsequently concluded by Switzerland did not contain such a clause.

7. According to paragraphs 32 and 57 of the report, international organizations could "require" of States the privileges and immunities they needed. Yet the first sentence of paragraph 33 contradicted that statement somewhat because it referred to "the immunities granted". Could privileges and immunities be required of States or were they granted by States? It was necessary to be clear about the conclusions to be drawn from those two contrary statements.

8. Paragraphs 32 and 33, which were intensely thought-provoking, prompted a further comment. The comparison with States was inevitable and also enlightening, provided, however, that the similarities and differences of situation were identified and the special characteristics of the situation of one group as compared with that of the other were noted. In the Special Rapporteur's view, the immunities granted to international organizations would be wider than those recognized for States owing to the tendency to restrict the immunities enjoyed by States and because States could be said to represent selfish interests, unlike international organizations whose objectives were regarded as much broader. He had doubts about the Special Rapporteur's conclusion and explanation. In the first place, only a minority of States were now in favour of a restrictive approach to State immunity. The conclusion therefore had to be toned down. Secondly, the doctrine of the absolute immunity of international organizations—which was supposedly connected with their purposes, such purposes being common to several States and sometimes even to all States—was no longer accepted either without reservation, inasmuch as international organizations of a universal character sometimes had very sectoral, functional and specific interests that it was difficult to compare with those of States: the latter interests, though perhaps peculiar to one State, concerned the life of a national group in all its political, economic, social and cultural dimensions, past, present and future. It was therefore difficult to see how the objective pursued by a State could be reduced, with a view to decreasing the immunities it enjoyed, while at the same time expanding the objectives of international organizations with a view to promoting a broadened conception of their immunities as compared with those of States.

[5] United Nations, *Treaty Series*, vol. 1, p. 163.

9. The entirely plausible view which the Special Rapporteur gave of international organizations, and perhaps even of international law and the international order, could create problems if it was taken as the starting-point for defining privileges and immunities. He was thinking in particular of the last sentence of paragraph 89 of the report, which read: "The basis must be sought in the fact that a national, subordinate legal order cannot demand submission of or coerce an international, higher legal order", and which reflected a certain conception of international law even if the Special Rapporteur prudently used the verb form "must be". It was open to question whether that monist conception of international law could serve as the basis for a codification endeavour and for the preparation of draft articles, since many States might deem it unacceptable to introduce such ranking as between the international legal order and the internal legal order. He therefore drew attention to the need for caution with regard to certain statements, which might simply be in the nature of a slip of the pen on the Special Rapporteur's part rather than settled conclusions that would certainly give rise to debate.

10. Another example of a question likely to cause controversy was the enjoyment of "absolute" immunity by international organizations (A/CN.4/424, para. 80). That again was perhaps an overstatement which generalized upon the special situation of the relations between an international organization and its members. The word "absolute", however, went much further and could be invoked against third States, and that raised more complex problems regarding the scope of privileges and immunities *vis-à-vis* third States.

11. In the light of those considerations, he thought that, while the Special Rapporteur's fourth report contained all the necessary background information for an understanding of the elements of the problem, certain clarifications were required.

12. Turning to the draft articles, which had begun to give form to the topic, he said that, on the whole, he agreed with the Special Rapporteur's approach. He wondered whether the content of draft article 1, on the use of terms, should be agreed forthwith or whether it was necessary to wait until a later stage in the study of the topic before identifying all the concepts to be defined. He had in mind in particular the premises, property, assets and personnel of international organizations. Should the article contain definitions of all those concepts?

13. With regard to draft article 2, should the scope of the draft be limited to international organizations of a universal character or should it be extended to regional organizations? Like the Special Rapporteur, he considered that, initially, it would be better to deal solely with the former and to decide at a later stage to what extent the draft could apply to organizations of more limited scope.

14. Should draft article 5 be confined to subparagraphs (*a*), (*b*) and (*c*) or should the words "in particular" be added in view of developments in the international community?

15. He wondered whether it should be made clear that draft articles 7 and 8 referred to property, funds, assets and premises intended exclusively for the exercise of the official functions of international organizations—since that was done only in connection with premises in paragraph 1 of article 8—or whether it would be preferable to deal with the question in the article on definitions. Also, should a single article be devoted to jurisdictional immunity or should there be another article dealing with immunity from execution? Even if an international organization waived jurisdictional immunity, it did not on that account waive immunity from execution.

16. The wording of draft article 10, and of subparagraph (*b*) in particular, should probably be reviewed and improved. If an international organization was established in a State whose currency was not convertible, could it transfer "funds" in local currency? Subparagraph (*b*) did not seem to solve that kind of problem. The wording of subparagraph (*c*), which might pose more problems than it solved, also seemed to require clarification. For example, what was meant by the phrase "pay due regard to any representations"? What kind of obligations did that entail for the parties concerned?

17. Mr. Sreenivasa RAO said that he agreed with the approach adopted by the Special Rapporteur in his fourth report (A/CN.4/424), which was clear and concise. His conclusions showed that the topic had already given rise to considerable doctrinal debate and that it would always be controversial.

18. In defining international organizations, the Special Rapporteur had rightly decided to be pragmatic and give a simple definition providing that an international organization was an intergovernmental or inter-State organization. He had also correctly decided not to list the various types of international organizations. As he had shown, a classification would be not only impossible, but also irrelevant from the Commission's legal perspective, especially in respect of privileges and immunities.

19. The Special Rapporteur had therefore taken the principle of the functional needs of international organizations as the basis for their privileges and immunities. That solution had the advantage of avoiding the many problems which would arise if it were assumed that such privileges and immunities derived directly from legal personality. As the Special Rapporteur had also said, caution would require that any text on privileges and immunities should contain only general provisions which could be supplemented or modified according to the characteristics of each individual case so as to meet the functional needs of the organization concerned.

20. In his analysis, the Special Rapporteur set out a few other basic principles which were generally accepted: international organizations must not abuse their privileges and immunities, which were granted to them for the exercise of their official functions; they could not be sued, unless they waived their immunity, and, even in that case, a separate waiver was necessary for measures of execution; they had to establish procedures for the settlement of disputes, such as arbitration, advisory opinions or an administrative tribunal; their premises were inviolable, so that the host State must not only refrain from entering them, but must also protect them from any outside disturbance that might affect the exercise of the functions of the organizations; and such premises must not become places of asylum or refuge for persons who were trying to avoid arrest under the law of the host State, who were being sought for extradition or who were attempting to avoid service of legal process.

21. However, those principles called for two comments. In the report (*ibid.*, para. 112), the Special Rapporteur referred to one exception to the principle of immunity, where expropriation was deemed necessary in the public interest. He was not sure how well that exception was accepted in current doctrine and practice and would welcome clarifications on that point. Secondly, the Special Rapporteur noted (*ibid.*, para. 115) that, according to the legal literature and State practice, international organizations were free to hold and transfer funds and currencies. That privilege was, however, subject to the special requirements of the organization concerned, to the financial situation of the host State and hence to the provisions of the headquarters agreement they had concluded. On that point as well, the Special Rapporteur should make his position clear.

22. Turning to the draft articles, he said that, in article 1 on the use of terms, the words "of a universal character" in paragraph 1 (*a*) were acceptable on the understanding that, if the Commission decided to include international organizations of a regional or other character in its study, appropriate provision would be made for them in the definition. The words "its established practice" in paragraph 1 (*b*) seemed unnecessary in a definitional article. Such practice was constantly changing and was subject to interpretation and could therefore not be stated in the form of a rule. The words "of a world-wide character" in paragraph 1 (*c*) were much too vague and might cause confusion. Further thought should be given to the difference between the terms "universal" and "world-wide". The saving clause in paragraph 2 should be deleted, since it added nothing and could create doubts about the scope of the draft articles.

23. Draft article 2 was well thought out, although the words "when the latter have accepted them" in paragraph 1 could be deleted, since they stated the obvious.

24. Draft article 3 was brief, but none the less deceptive: saying that the present articles were without prejudice to the rules of the organization implied that the organization was wholly exempt from the basic principles, which were, however, as had been seen, always subordinate to its functional needs. The article should therefore be redrafted. In that connection, he broadly agreed with Mr. Tomuschat (2176th meeting) that the articles should be worded and presented more clearly and not only reflect, but also fill the gaps in, existing practice.

25. Draft article 7, in which the second sentence could be redrafted along the lines suggested by Mr. Al-

Baharna (*ibid.*, para. 28), and draft article 8 were acceptable. Draft article 9 was also acceptable, subject to minor drafting changes in the part referring to *flagrans crimen.*

26. With regard to draft article 10, on financial and fiscal immunities, it must be remembered that, at that level as well, the relationship between the international organization and the host State was governed by the headquarters agreement and that point should be mentioned. Moreover, as Mr. Hayes (2176th meeting) had recommended, subparagraph (*c*) should specify that every international organization had to pay due regard to representations made to it not only by any State party to the future convention, but also by the host State and by any State which entered into a relationship with it as a result of a transfer of funds, gold or currency, whether or not those States were members of the organization.

27. Draft article 11 did not seem to add much, but a decision on what should be done with it could not be taken until it had been agreed what would happen to the articles that preceded it.

28. In conclusion, he said he was not sure that any purpose was served by the work the Commission was now doing. Was it really necessary to formulate draft articles that reproduced standard treaty provisions without elaborating on them? The General Assembly should have thought about that problem, but, if the Special Rapporteur decided that the existing law on the subject could not be improved on, he was fully entitled to tell the Commission so. The Commission could, in turn, advise the General Assembly accordingly, with all due respect and caution. Before arriving at any such conclusion, however, there was still a great deal of work to be done and a long way to go before deciding that there was no point in continuing.

29. Mr. PAWLAK congratulated the Special Rapporteur on the clarity and concision of his fourth report (A/CN.4/424), an important document that provided some answers to questions raised during the debates on the topic both in the Commission and in the Sixth Committee of the General Assembly. He fully supported the Special Rapporteur's criterion that privileges and immunities should reflect the functional requirements of international organizations.

30. Before commenting on the draft articles, he had two general comments to make. First, the international community was showing greater interest in the progress the Commission was making in its study of the topic because of the increasingly important role being played by international organizations in international relations. In order to meet those expectations, the Commission must therefore complete the draft articles as rapidly as possible. Secondly, the Commission must not limit itself to reproducing the existing rules contained in treaties and agreements; it must also take account of judicial opinions and decisions and of State practice. Its main concern must be to prepare articles which would enable international organizations properly to perform the functions assigned to them in their constituent instruments. In that connection, he agreed with the Special Rapporteur's conclusion (*ibid.*, para. 14) that the Commission should continue to follow the pragmatic approach it had adopted during the discussion of other drafts, such as that on the law of treaties. It should be borne in mind, however, that some States, and especially host States, were not in favour of any increase in the immunities of international organizations. A balance therefore had to be struck between their interests and the interests of the organizations themselves.

31. Turning to the proposed articles, he said that he understood the word "universal" in draft article 1, paragraph 1 (*a*), to mean both that an international organization was global in character and that it was open to all States. If that was true, it should be explained in the commentary. In paragraph 1 (*c*), the word "similar" was vague and redundant, since it was unclear what it referred to, and it would be better to delete it. The words "responsibilities" and "worldwide" in that subparagraph should be replaced by "functions" and "global", respectively. Moreover, the list of terms in article 1 was not exhaustive and other definitions should be included.

32. In draft article 2, he supported Mr. Al-Baharna's proposal (2176th meeting) that the phrase "when the latter have accepted them" in paragraph 1 should be deleted. He also doubted whether paragraph 2 was really needed: it was not necessary to confirm in the draft articles that the rules of international law were applicable.

33. The reservations expressed by some members of the Commission with regard to draft article 3 were readily understandable. The draft articles would not enter into force automatically, but when States had acceded to them, and those States would decide on the rules of international organizations. That question required further consideration.

34. He had no comment to make on draft article 4. Draft article 5, however, should be reworded to reflect the primacy of international law over internal law. It might be enough to say that "International organizations shall enjoy legal personality" and to delete any reference to either international or internal law. In that connection, he supported Mr. Tomuschat's proposal (*ibid.*) for combining articles 5 and 6, both of which dealt with the capacity of international organizations as subjects of law.

35. In draft article 7, he thought that the words "every form of legal process" should be replaced by the word "jurisdiction" and that it should be spelt out what kinds of jurisdiction, civil or administrative, international organizations were immune from. The Special Rapporteur dealt with that very important question in the report (A/CN.4/424, paras. 24-33 and 57-59), but his conclusions were not very clear and were not reflected in the article. As Mr. Al-Baharna had suggested, the article should probably also deal with waiver of immunity from execution.

36. Draft article 8 required some rewording, especially in paragraph 3, but that could be left to the Drafting Committee. Draft article 9 raised few problems, but its scope was confined to the "headquarters" of organizations and could be extended to cover their "offices" or

"premises" in general. The question was discussed in the report (*ibid.*, para. 107), but the conclusions reached were not fully reflected in the proposed text.

37. Draft article 10 did not give rise to any major problems, but it did raise the question of absolute rights in connection with financial operations. It was understood that States might or, indeed, must monitor financial operations by international organizations in accordance with their constituent instruments. The point would be clearer if article 10 referred to those instruments.

38. Draft article 11 was a useful provision, but it should be revised. In the Sixth Committee, there had been some surprise at the proviso that "the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question". Those words gave the impression that the proposed common régime was not based solely on those functional requirements.

39. Mr. SEPÚLVEDA GUTIÉRREZ said that he had read the Special Rapporteur's very precise and detailed fourth report (A/CN.4/424) with great interest. The report, which was the result of an enormous amount of work, was particularly convincing as it took account, in a highly pragmatic manner, of the realities of international life. The 11 draft articles submitted provided a good basis for the discussion on the topic and the Special Rapporteur was to be congratulated on them.

40. Referring to the doubts expressed by some members of the Commission as to the usefulness of a new instrument, he said that, in his view, the draft met a special need. The international community had expressed a clear wish, through the General Assembly, that a régime should be drawn up for relations between States and international organizations. Also, there were lacunae in existing treaties and headquarters agreements that had sometimes given rise to disputes. The draft under preparation was a contribution to the progressive development and codification of international law which, no matter how modest it might be, was sufficient justification for the undertaking.

41. The definition of the expression "international organization" in paragraph 1 of draft article 1, though not perfect, was acceptable for the time being; in any event, it was clear from the report (*ibid.*, paras. 42-48) that it would be difficult to arrive at a precise definition. The last part of paragraph 1 (*c*) of the article, starting with the words "any similar organization", should be reformulated, and the meaning of the words "world-wide character", for instance, should be defined. The Special Rapporteur would probably be able to find more suitable wording.

42. Draft article 3 could be more explicit, and the words "are without prejudice", which had an unfortunate connotation, should be replaced.

43. Greater clarity and precision were required in draft article 5, which concerned legal personality under international law and under internal law. Draft article 6, which repeated the provisions of existing instruments, was superfluous.

44. Draft article 11 appeared to duplicate other provisions, such as article 4. It could probably be improved.

45. Lastly, the draft articles should, in his view, be referred to the Drafting Committee.

46. Mr. CALERO RODRIGUES said that the Special Rapporteur's fourth report (A/CN.4/424) attested to his complete mastery of the difficult topic with which he had to deal. He was working with the caution the Commission had recommended, but was making steady progress in a very constructive manner. He therefore deserved to be congratulated.

47. In his view, the title of the topic, which was misleading, should read: "Privileges and immunities of international organizations and their officials". The Commission did not choose its topics, however: they were referred to it by the General Assembly. Some of those topics were more interesting in that they inspired greater creativity. Some, like the law of the non-navigational uses of international watercourses, involved the elaboration of a legal instrument. Others raised issues which did not lend themselves to an immediate solution, but opened up wide perspectives in international law; that applied, for example, to the draft Code of Crimes against the Peace and Security of Mankind. In yet other cases—and he had in mind the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law—it was necessary not only to draw up a legal instrument, but also to study in detail certain basic concepts of international law. In the case of the present topic, however, there was no need for any new instrument, since the 1946 Convention on the Privileges and Immunities of the United Nations, conventions on the specialized agencies and various headquarters and other agreements already existed and, as was apparent from the supplementary study prepared by the Secretariat on "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" (A/CN.4/L.383 and Add.1-3), had not given rise to any problems in their application; it was a matter not of resolving conceptual problems, but of carrying out a task of codification, and a purely repetitive one at that. International organizations would certainly not accept any limitation on the privileges and immunities granted to them under existing instruments, while States for their part would not accept any extension of those privileges and immunities. So the situation was blocked, and, no matter how effective the work of the Commission and of the Special Rapporteur might be, it could be of only limited value. That was clearly illustrated by the comments made with regard to draft article 10. Several members of the Commission had criticized the language used in that article, but the Special Rapporteur had simply repeated the corresponding provisions of the Convention on the Privileges and Immunities of the United Nations (art. II, sects. 5 and 6), which was still in force and which could not be changed. In considering the draft articles, therefore, it was necessary to bear in mind that the instruments in force left the Special Rapporteur and the Commission very little room for manoeuvre.

48. That was true, for instance, of draft article 7, whose scope, incidentally, was wider than suggested by the title of part III of the draft (Property, funds and assets), of which article 7 was the opening provision. In the English text, where it would appear to be justified to refer to "immunity from jurisdiction"—that was in fact the expression used in the draft articles on jurisdictional immunities of States and their property—the expression "every form of legal process" had to be used on account of existing treaties. The same problem did not, however, arise in Spanish and French.

49. Furthermore, with regard to substance, while article 7 rendered exactly the idea that had to be conveyed, he was not convinced by the Special Rapporteur's analysis of the basis for immunity (A/CN.4/424, paras. 24-33). The statement that the granting of privileges and immunities was justified by the principle of equality among an organization's member States (*ibid.*, para. 28) raised doubts in his mind. Also, he failed to see why lack of territorial sovereignty should be a justification for the granting of immunities to international organizations, since States, which did have territorial sovereignty, also enjoyed immunities. Again, it was not really necessary to attempt, as the Special Rapporteur had done, to embark on a classification of international organizations on the basis of their composition, the purpose of their activities and their powers, only to conclude in the final analysis that no classification could provide general criteria for determining the extent of the privileges and immunities to be granted to organizations.

50. He could accept without difficulty the three principles set out by the Special Rapporteur in paragraph 57 of the report in respect of privileges and immunities.

51. With regard to waiver of immunity, the Special Rapporteur was right to recall (*ibid.*, para. 58) what the existing law was. Once again, in his view, that law could not be changed. In that connection, international organizations could not even waive immunity from execution, even in relation to commercial transactions, and, although the proposals of the European Committee on Legal Co-operation referred to in the report (*ibid.*, para. 111) were very interesting, they were unlikely to be adopted. Moreover, in practice, the very wide immunity enjoyed by international organizations had never posed any problems. The United Nations, for instance, generally included in the commercial contracts it signed an arbitration clause which removed any disputes from the courts, and therefore, in practice, the question of jurisdictional immunity never arose.

52. The Special Rapporteur had also rightly based the intangibility and inalienability of the assets of international organizations on the principle of the inalienability of the public domain. The assets of international organizations fell outside the scope of ordinary property law, since they benefited from the régime of public law whereby they were immune from any alienation or attachment. Personally, he considered that that immunity was too wide, since only property used by an organization in the exercise of its official functions should be protected and there was no reason for removing assets unconnected with those functions from any possible creditors of the organization. There again, however, the Commission was bound by existing law.

53. As to inviolability of the premises of international organizations, which, according to the Special Rapporteur (*ibid.*, para. 89), was virtually identical to that of diplomatic premises, he would rather compare it with the inviolability of consular premises, which, under the 1963 Vienna Convention on Consular Relations, was confined to "that part of the consular premises which is used exclusively for the purpose of the work of the consular post" (art. 31, para. 2). Under draft article 8, immunity was confined to the premises of international organizations "used solely for the performance of their official functions".

54. With regard to draft article 10, he agreed with those members who considered that the privileges granted to international organizations in financial matters were too wide. Once again, however, that was the existing law.

55. The Special Rapporteur had put the Commission on the right track: even if the undertaking was not very exciting intellectually, the Commission had a duty to fulfil its mandate.

56. Mr. GRAEFRATH said that he was grateful to the Special Rapporteur for having endeavoured to respond, in his fourth report (A/CN.4/424), to the suggestions made both in the Commission and in the Sixth Committee of the General Assembly with a view to promoting a consensus among States.

57. It was true that most of the questions covered by the draft articles were already regulated by agreements on privileges and immunities and by specific headquarters agreements. It was therefore not a matter of codifying rules which existed only as customary law, but of determining the relationship that existed between the draft articles and the treaty law in force. A similar problem had arisen in the case of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. In his view, however, an article dealing with the question of that relationship should come at the end when there would be a clearer picture of the draft articles as a whole. The codification of those rules of law would, nevertheless, certainly help to determine and strengthen the position of international organizations as subjects of international law and would be very helpful for organizations yet to be established, although he considered that, for the time being, it would be preferable to confine the draft to international organizations of a universal character and appreciated the fact that the Special Rapporteur had drafted articles 1 to 6 along those lines.

58. The Commission would certainly have to return to article 1, on the use of terms, when the draft as a whole was before it, but it was important for it to agree now not to become involved in academic disputes concerning a general definition and to confine itself to explaining that the expression "international organization" meant an intergovernmental organization of a universal character. The words "whose membership and responsibilities are of a world-wide character" in

paragraph 1 (*c*) did not, however, make for a very felicitous definition of that universal character. He would have preferred some expression such as "aiming at world-wide membership", which would be more accurate, since it could be a long time before an international organization actually achieved world-wide membership.

59. Like other members of the Commission, he would have preferred a clear separation between the legal personality of an international organization under international law, which included the capacity to conclude treaties and to enjoy certain privileges and immunities, and its legal personality under the internal law of member States. In his view, draft article 5 should be confined to the international personality of the organization and perhaps also to its capacity to maintain official relations with States and other international organizations. Draft article 6 could then deal with its legal personality under the internal law of member States whereby it could conclude contracts, acquire property, and institute legal proceedings.

60. He agreed with the Special Rapporteur concerning the idea of a possible classification of international organizations according to their functions. That approach would reflect the fact that international organizations were not original subjects of international law, but derived their international personality from their constituent instrument, a treaty between States which determined their functions and purposes. As for the legal bases of the privileges and immunities of international organizations, he also agreed with the Special Rapporteur that, in that regard, two aspects had to be distinguished: on the one hand, functional requirements, determined by reference to the functions and purposes for which the organization had been set up (*ibid.*, para. 27), and, on the other, the principle of equality among the member States of the organization (*ibid.*, para. 28). Those two aspects were equally important, since, with the establishment of an international organization, a new subject of international law came into being, thereby imposing obligations on the member States and, in particular, an obligation on the host State to respect the immunity of the organization. That did not, of course, free the international organization of its duty to respect the laws and regulations of the host State. Draft article 7 might be better balanced if it referred to that duty, as did article 41 of the 1961 Vienna Convention on Diplomatic Relations.

61. Exceptions to the immunity of an international organization should never be presumed and should be accepted only if expressly laid down in the headquarters agreement.

62. Like the Special Rapporteur, he considered that the inviolability of the premises of an international organization did not mean only that the host State must refrain from any interference, but also that it had an obligation to protect such premises against any disturbance. He would appreciate it if that could be spelt out in draft article 8 as it had been in article 22 of the 1961 Vienna Convention. In that connection, he did not share the Special Rapporteur's view that the basis of the inviolability of the premises of international organizations must be sought in the fact that international law had to be regarded as a higher legal order (*ibid.*, para. 89). For his own part, he would rather find it in the principle of the sovereign equality of States, which had to be assured despite the fact that an international organization could have its headquarters in only one State.

63. Draft article 11 seemed superfluous since it dealt with a matter already covered by draft article 4. Like other members, he considered that the wording of article 4 (*a*) was not entirely satisfactory. He would, however, prefer the Commission to leave that question aside for the time being and revert to it when the draft as a whole was before it.

64. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), replying to Mr. Koroma's request (2176th meeting) for clarifications concerning the legal personality and capacity of international organizations, as dealt with in draft articles 5 and 6, and also concerning expropriation, said that, with regard to the first of those points, he would draw attention to the fact that, in his second report, he had proposed two alternative texts in that connection.[6] In response to the wishes of the majority of the members of the Commission and of representatives in the Sixth Committee of the General Assembly, who had preferred alternative B, he had dealt separately with the legal personality of international organizations and with their capacity to conclude treaties. As for the legal capacity of international organizations under internal law, he would refer Mr. Koroma to Article 104 of the Charter of the United Nations, which stipulated that the United Nations "shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". Similar provisions appeared in other agreements, such as the Constitution of UNESCO (art. XII), the headquarters agreement between Switzerland and the United Nations Office at Geneva (1946 Interim Arrangement) (art. I) and the Treaty establishing EEC (art. 211). The question had also been dealt with at length in his second report, submitted in 1985.[7]

65. With regard to expropriation, on which matter Mr. Koroma considered that the fourth report (A/CN.4/424) was not sufficiently explicit, the general view was that the property of an international organization could be expropriated only on the grounds of public interest. Such expropriation would have the effect of divesting the organization of its property for the benefit of a public authority. That result was unacceptable, first, because an international organization could not have fewer rights than the host State and, secondly, because it enjoyed, at the very least, rights equal to those of the State. The situation was clear: *vis-à-vis* the international organization, and within its sphere of competence, the member State was in a position of inferiority, as it were, and a "lesser" authority could not have greater rights than a "higher" authority. In many legal systems, the régime governing

[6] *Yearbook* ... *1985*, vol. II (Part One), pp. 112-113, document A/CN.4/391 and Add.1, para. 74.

[7] *Ibid.*, pp. 107 *et seq.*, paras. 31-73.

the immovable property of international organizations was modelled on the régime applicable to property in the public domain and, just as the latter was regarded as inalienable under internal law and thus exempt from any possibility of expropriation, the immovable property of international organizations was not subject to expropriation. Penalties could not be imposed on international organizations, first of all because they were legal persons, but also because their particular position in relation to the State prevented the latter from taking any kind of enforcement measures against them. In short, public property was inalienable under international law just as it was under internal law.

The meeting rose at 12.10 p.m. to enable the Working Group on the long-term programme of work to meet.

2178th MEETING

Thursday, 21 June 1990, at 10 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. 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) (*continued*) (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 (*continued*)

ARTICLES 1 TO 11[4] (*continued*)

1. Mr. OGISO said that it was his usual practice to avoid duplication with the statements made by other members of the Commission, but he shared the grave doubts already expressed about the utility or urgent necessity of the study of the present topic, in view of the many workable instruments that were in force and were helping to solve problems between host States and international organizations concerning the status, legal personality or privileges and immunities of the organizations. He was thinking in particular of the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies and the various headquarters agreements between host countries and the international organizations concerned. Nevertheless, he agreed that the Commission had no alternative but to complete its work on the topic, because of the mandate assigned to it by the General Assembly.

2. Another general comment related to the issue of the privileges and immunities of international organizations, on which he agreed with the view expressed by the Special Rapporteur in his fourth report that "functional requirements must be one of the main criteria ... used in determining the extent and range of the privileges and immunities that are to be accorded to a given organization" (A/CN.4/424, para. 27).

3. With regard to draft article 1, on the use of terms, he would like some clarification concerning the expression "international organization" in paragraph 1 (*a*), as well as the term "office" in paragraph 1 (*e*) (i), notwithstanding the fact that those terms were used in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Clarification was needed because the present draft dealt with international organizations that were rather different in character from those covered by the 1975 Vienna Convention. For example, draft article 5 provided for the legal capacity of "international organizations" in the host State and the member States. Draft article 8 provided for the inviolability of the premises of "international organizations". What, therefore, was the exact meaning of that expression, and also of the expression "international organizations of a universal character"? Were they intended to cover only those international organizations which had an independent legal personality or had the capacity to conclude international agreements? The question arose in respect of the United Nations: could the United Nations alone be described as an international organization of a universal character or could certain subsidiary organs, such as UNDP and UNHCR, or such bodies as ESCAP, which included some States outside the area of Asia and the Far East, be held to constitute international organizations of a universal character?

4. Again, what was the meaning of the term "office" in paragraph 1 (*e*) (i) of draft article 1? Did it refer solely to the headquarters of the organization or did it also cover the offices of subsidiary organs, particularly in the case of the United Nations, including offices of a temporary nature? He had in mind, for example, the field offices of UNHCR famine-relief operations and the field operations of United Nations peace-keeping forces. The Special Rapporteur appeared to intend to give different treatment to different types of organizations so far as the privileges and immunities to be extended to them on the basis of functional necessity were concerned.

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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 the texts, see 2176th meeting, para. 1.