Document:-

A/CN.4/SR.2178

Summary record of the 2178th 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**

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.

[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.

5. A similar issue arose with regard to the inviolability of premises under draft article 8. Did the term "premises" cover only the headquarters of the organization or other "offices" as well? Article 8 could possibly be interpreted as allowing for different privileges and immunities to be extended to the premises of different kinds of offices maintained by the United Nations family of organizations. That question posed many practical problems, on which he would like more information from the Special Rapporteur, since he had not had the time to study the numerous headquarters agreements which could have shed some light on matters.

6. As for the other articles, he wished at the present stage to raise only one point arising out of draft article 10. The introductory clause stated: "Without being restricted by controls, inspections, regulations or moratoria of any kind" and was followed by the provision in subparagraph (*a*) reading: "International organizations may hold funds, gold or currency of any kind and operate bank accounts in any currency". That was followed by a provision in subparagraph (*b*) on the free transfer of funds, which would allow international organizations freely to "convert any currency held by them into any other currency". Those provisions would exempt an international organization from all foreign-exchange regulations in the host country. He did not know wether the text of article 10 was based on some standard provision in many headquarters agreements, but such broad exemption from exchange control by the host State could surely create certain practical problems. He would therefore welcome some guidance and enlightenment from the Special Rapporteur on the practical treatment of that question in the United Nations and the specialized agencies.

7. Mr. ROUCOUNAS said that, in conformity with the tentative outline set out in his third report (A/CN.4/401, para. 31), the Special Rapporteur dealt in his fourth report (A/CN.4/424) with the privileges and immunities of international organizations. Later, the Special Rapporteur would be dealing with the privileges and immunities of officials and with those of "experts on mission for, and of persons having official business with" international organizations. Actually, the problem of experts on mission for the United Nations had been the subject of a very recent advisory opinion of the ICJ, handed down on 15 December 1989.[5]

8. The problem of the privileges and immunities of international organizations, because of its rapid development and diversification, was of particular interest to the Commission. Inevitably, many legal questions arose in connection with the relations between international organizations and their member States, as well as relations with non-member States. In the case of the present topic, the Commission was not called upon to engage in a discussion of theoretical issues or in consolidating the rules contained in the numerous instruments at present in force. The latter task would serve little purpose, and the Commission should instead endeavour to detect those elements of the law of international organizations that called for expert examination. When the representatives of a Government and an international organization met to discuss and sign a headquarters agreement, both sides knew what they wanted. The position of the Commission was quite different. It should seek to analyse the real problems that had emerged in the past few decades in the matter of the privileges and immunities of international organizations, with a view to suggesting possible solutions.

9. He fully endorsed the observation by the Special Rapporteur in his third report (A/CN.4/401, para. 29) attaching particular importance to headquarters agreements. For one and the same organization there were sometimes several generations of agreements, concluded to deal with real problems as they had emerged in practice. For the United Nations, it could thus be said that there were three generations: first for New York and Geneva, secondly for Nairobi, and thirdly for Vienna.

10. While matters could be said to work smoothly for the United Nations, certain other intergovernmental organizations had run into difficulties, and even experienced serious crisis. For example, some four years earlier, the International Tin Council had exhausted its financial reserves and had had to suspend the operation of its buffer stock; as a result, a large number of legal problems had arisen, despite the existence of an article on privileges and immunities in the Sixth International Tin Agreement and of detailed provisions in the 1972 headquarters agreement between the Council and the United Kingdom. The disputes between the Council and its creditors had come before domestic courts in the United Kingdom, and the organization had invoked immunity. The courts had also gone into the question of the scope of the rights of the member States. The Court of Appeal's extensive decision merited thorough examination. For his part, he would draw attention to two elements. First, the judges had not been attracted at all by the notion of a customary international rule conferring immunity from jurisdiction on international organizations; and, secondly, they did not appear to have considered the earlier work of the International Law Commission.

11. The Special Rapporteur's observations in his fourth report with regard to the basis for the jurisdictional immunity of international organizations, namely functional requirements (A/CN.4/424, paras. 24 *et seq.*), were interesting, but one should not underestimate a trend that was gradually emerging, namely the fact that the doctrine of the absolute immunity of States from jurisdiction was losing ground. It was reflected in a passage cited by the Special Rapporteur (*ibid.*, para. 61) from the summary of practice relating to the United Nations contained in 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). The Special Rapporteur, with the intention of avoiding generalizations, also cited the examples of ILO, FAO, IBRD and certain other organizations

[5] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, I.C.J. Reports 1989*, p. 177.

(A/CN.4/424, paras. 69 *et seq.*), and the sections of the report on the inviolability of the property and premises of international organizations adopted a general approach which largely reflected the existing situation.

12. Draft articles 1 to 4 presented a degree of unity. Article 1 reproduced the language of the various codification conventions on the subject of international organizations; for instance, the words "its established practice", in paragraph 1 (*b*), echoed a similar phrase in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and were now accepted. Article 2, however, was merely stating the obvious by making the present articles dependent on acceptance by States. As for international organizations themselves, it was not clear whether it was necessary for them, too, to accept the articles, yet the Commission's aim in the draft was precisely to reinforce their international legal personality. The provision in paragraph 3 of article 2 was really an invitation to other international organizations to accept the articles. Article 3 made a prediction which could not be verified until the work was completed.

13. As to part II of the draft, on legal personality, he expressed some doubt whether the reference in article 5 to international law was appropriate.

14. Draft article 7, in part III, reproduced the wording of article II, section 2, of the 1946 Convention on the Privileges and Immunities of the United Nations. Again, draft article 10 reproduced article II, sections 5 and 6. Although he appreciated that the Special Rapporteur, as a matter of caution, was reluctant to depart from so fundamental a text, he noted that the 1946 Convention was still in force and that the Commission had not been asked to amend it. Accordingly, he hesitated to comment on it, and would welcome some clarification of the Commission's task in that regard.

15. Mr. PELLET said that, as a newcomer to the Commission, he could not conceal his surprise at the custom whereby members voiced extravagant praise of a report before proceeding to make criticisms which were often quite severe. Special Rapporteur's reports could not but be excellent. The report now before the Commission (A/CN.4/424) was no exception, and the comments on its excellence were, he felt, merely statements of the obvious. He preferred to refrain from general value judgments.

16. On several occasions, the Special Rapporteur mentioned the need to adopt a "pragmatic" approach to the subject-matter and to avoid protracted theoretical discussion. It was a troubling remark because, as both a teacher and a practitioner of international law, he personally found the interaction of theory and practice to be a source of mutual enrichment. Fortunately, the Special Rapporteur did not always adhere to the guidelines he had set himself. On several occasions he sought to develop a theory, for instance when considering the classification of international organizations or examining the fundamental rules applicable to them. Those were welcome digressions although Mr. Mahiou (2177th meeting) had rightly said that the Special Rapporteur sometimes neglected to draw the necessary conclusions from his own theories.

17. On the whole, the Special Rapporteur adhered to the functional theory of international organizations, according to which such organizations had legal personality under international law, but their legal capacity was circumscribed by the aims set out in their constituent instruments. As a consequence, they had all the powers necessary to achieve those aims, but no others. It was therefore to be expected that, in defining the powers of international organizations, the Special Rapporteur would reach the conclusions which followed logically from the functional approach. However, the provisions of articles 5 and 6, in part II of the draft, and of articles 7 *et seq.*, in part III, were drawn from existing texts and were mainly suited to the larger organizations. Moreover, if the functional theory were followed, the capacity of an international organization would be governed not by the "relevant rules" of the organization, as draft article 6 put it, but by the aims of the organization, from which it derived all necessary powers. That was perhaps a drafting problem; but the same could not be said of draft articles 7, 8 and 10, which reflected a very broad approach to the immunities enjoyed by international organizations. Their immunity from legal process was treated as absolute, except where voluntarily waived, and no waiver could extend to any measure of execution or coercion.

18. The same principle applied to the inviolability of the premises of international organizations, and to their financial assets. Admittedly, under draft article 11 the immunity could be limited "in the light of the functional requirements of the organization in question", but that was a purely voluntary restriction which did not tally with the functional theory. In his partiality for his subject, the Special Rapporteur had verged on granting virtual sovereignty to international organizations. For instance, in the fourth report, the Special Rapporteur quoted with approval the finding of the New York County Supreme Court in the *Matter of Menon* that the United Nations "holds sovereign status" (A/CN.4/424, para 62). That was quite unacceptable: States had sovereignty, but international organizations certainly did not. The Special Rapporteur went even further in paragraph 89 of the report, apparently suggesting that international organizations belonged to a higher legal order than States, and thereby raising the problems of monism and dualism. For his own part, he subscribed to the view that international organizations were no more than instruments at the service of their member States and of the aims jointly pursued by those States. For that purpose, they enjoyed a large measure of legal personality, but it did not amount to sovereignty; that was clear from the famous 1949 advisory opinion of the I.C.J.[6]

19. His conclusion was that the legal personality of international organizations must be of a functional order, in other words it must be such as to justify,

[6] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, *I.C.J. Reports 1949*, p. 174.

wholly but exclusively, the powers they needed in order to fulfil the purposes set out in their constituent instruments. Draft articles 6 and 7 should be modified accordingly. As for draft article 5, he agreed with other members of the Commission that it would be advisable to draw a distinction between the legal personality enjoyed under international law and that enjoyed under internal law. The two types of personality, and their consequences, should be dealt with in separate articles. Secondly, in the light of the functional theory he wondered why the only capacity mentioned in article 6 was the capacity to conclude treaties. Mention should also be made of the capacity to contract and to acquire property, the right of legation and the capacity to act in legal proceedings, such as arbitration proceedings. The same remarks applied to draft articles 7 to 10. Undoubtedly, it would be necessary in some respects to discard or adapt traditional solutions to certain problems. Mr. Calero Rodrigues (2177th meeting) had argued that draft articles which differed markedly from existing instruments were unlikely to be accepted. Personally, he did not wholly agree and, like Mr. Tomuschat (2176th meeting), thought that a coherent draft which filled the existing gaps and solved real problems would be welcomed.

20. If international organizations were to have sweeping powers that could be limited only by an express waiver on their part, he wondered who would determine the privileges and immunities of any particular organization. The organizations themselves were prone to seek considerable extensions of their privileges and immunities. The Commission should provide for a procedure whereby such questions could be resolved, for example "binding advisory opinions" similar to those resulting from the review proceedings of international administrative tribunals.

21. On the question of immunity from jurisdiction, he feared that serious denials of justice could occur if, for example, an international organization was able to resist the submission of a dispute to a national court and there was no international tribunal competent to resolve it. As the Special Rapporteur had pointed out, organizations sometimes referred disputes arising from contracts to arbitration. The boldest solution would be to establish an international tribunal or to institute a procedure for binding advisory opinions. Whatever the solution chosen, some form of binding dispute-settlement machinery must be set up.

22. Mr. FRANCIS, referring to a remark made by Mr. Calero Rodrigues at the previous meeting, said that the first part of the topic could not have been designated differently since it had dealt with a variety of situations arising in the relations between States and international organizations. As to the second part of the topic, it would not be an injustice to the original intention if the Drafting Committee, subject to the agreement of the General Assembly, included the wording suggested by Mr. Calero Rodrigues (2177th meeting, para. 47).

23. Commenting on the amount of theoretical discussion in the fourth report (A/CN.4/424), he said that he welcomed the analytical treatment of international organizations and thought it was the Special Rapporteur's right to include in his report whatever subject-matter he deemed appropriate. It was important, however, to avoid extending the scope of topics; otherwise States might be reluctant to accept any convention which emerged. Significant changes in State practice should, of course, be mentioned in the Special Rapporteur's study.

24. Mr. Calero Rodrigues had referred to the scope of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. In the 15 years that had elapsed since 1975, there had been in all 24 ratifications of the Convention, 17 in the 1970s and 7 in the 1980s—not a very encouraging record. Moreover, only two Western European States, the Holy See and Turkey, had signed the Convention, and neither had ratified it. In those circumstances, the Commission should be wary of extending the scope of the draft articles except on the basis of State practice, which should include the practice of developing countries.

25. The immunity of international organizations in their relations with States was, in his opinion, virtually absolute. The Special Rapporteur had distinguished between immunity for *acta jure imperii* and for *acta jure gestionis*; but he had not mentioned that the United Nations was not, apparently, taxed on rental income from private enterprises operating in its premises, such as Lloyds Bank and Chemical Bank. That was a good example of a type of immunity which was enjoyed by international organizations but would not be available to States.

26. With reference to Mr. Pellet's remarks on the *Matter of Menon* case (*ibid.*, para. 62), he was delighted with the finding of the New York County Supreme Court and did not agree that it was tantamount to treating the United Nations as a sovereign entity. What it meant was that the United Nations, and other international organizations, enjoyed very considerable immunity.

27. In paragraph 1 (*b*) of draft article 1, the word "relevant" should be deleted in order to ensure uniformity of language with both the 1975 Vienna Convention on the Representation of States and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. He did not particularly favour the reference to "membership and responsibilities" in paragraph 1 (*c*), but had found that the same concept appeared, albeit in a different formulation, in the two Conventions he had just mentioned.

28. In draft article 2, paragraph 1, the words "when the latter have accepted them" could well be deleted. It was important to note that, in Geneva, the host country to the United Nations Office was not a Member of the Organization.

29. With regard to part III of the draft, on property, funds and assets, he agreed with Mr. Al-Baharna (2176th meeting) that article 7 should deal with real estate separately from funds and assets. Similarly, in article 8 there should be a reference to the inviolability of the property, and not only the premises, of interna-

tional organizations. Property could be dealt with in a separate paragraph of the article.

30. In conclusion, he considered that the draft articles could be referred to the Drafting Committee.

31. Mr. McCAFFREY thanked the Special Rapporteur for a helpful fourth report (A/CN.4/424), which identified the relevant issues, and for persevering in a virtually thankless task, at least in terms of the interest shown in the topic. In future, however, the Special Rapporteur might also wish to survey some of the relevant doctrine, treaty practice and judicial decisions in the matter.

32. He agreed entirely with Mr. Calero Rodrigues (2177th meeting) about the nature of the Commission's work in the present instance. The fact that the Commission was more or less saddled with the topic did not, however, mean that it had to give short shrift to other topics in order to pay some attention to it. His suggestion, therefore, was that a decision should be taken to suspend further work on the topic until the Commission had completed the second reading of at least two of the other topics on its agenda. One of the Commission's problems was that it was expected to make progress on each topic on its agenda at every session. As a result, the quality of its work suffered, and it ended up trying to consider in the Drafting Committee articles that had been discussed in the plenary Commission one, two or even three years before. If the topic were shelved, work on other topics could move forward in a somewhat more orderly fashion.

33. The Commission was faced with the dilemma of having to steer a course between Scylla and Charybdis—between the 1946 Convention on the Privileges and Immunities of the United Nations, from which it could not deviate in any way, and other "lesser" international organizations of a universal character for which the privileges and immunities of the United Nations were simply not appropriate. He saw no way out of the predicament unless the Commission abandoned ship or changed its tack radically—and he was not even sure that the latter course would be of much help.

34. He agreed that the title of the topic might appropriately be changed to "Privileges and immunities of international organizations and their officials", in order for it to reflect the subject of the draft more closely. As to specific draft articles, it would have been helpful for the Special Rapporteur to add comments giving some explanation of why certain terms had been used. It was necessary, in his view, to explore in greater depth which existing international organizations should be contemplated by draft article 1 and to have a clearer understanding of the categories of as yet non-existent international organizations that should also be covered. Paragraph 1 (*c*), in particular, required clarification in that regard, especially in the light of the suggestion that the expression "international organization" be defined, in paragraph 1 (*a*), as an organization that was "open" to membership by any State. While he experienced no difficulty with that suggestion in the abstract, he was not certain that functional necessity dictated that organizations consisting of 10 or fewer States, to which reference had also been made, should have the same kind of sweeping privileges and immunities as did the United Nations.

35. It had been suggested that the words "when the latter have accepted them", in paragraph 1 of draft article 2, should be deleted, on the ground that they would imply that the draft set forth some kind of overriding rules that could affect the interpretation of existing instruments. In his opinion, however, those words were essential for the acceptability of the draft articles as a whole.

36. Articles 5 and 6 of part II of the draft, on legal personality, could be combined. In the first sentence of article 5, he wondered what the significance was of the word "shall". Did it reflect an intention that "henceforth" international organizations would enjoy legal personality? The word "shall" was a little out of place and could be deleted. Again, he was not clear about the precise significance of the reference in the same sentence to the enjoyment by international organizations of "legal personality under international law", which was a matter that should be governed by the criterion of functional necessity. Possibly that provision could be qualified by adding the words "to the extent provided by their constituent instruments". Also, he wondered whether subparagraph (*c*) did not in effect call into question Article 34, paragraph 1, of the Statute of the ICJ. Was it being suggested that international organizations should have the right to sue and be sued before that Court? If so, that would indeed be going very far.

37. He would further suggest that the title of part III of the draft, "Property, funds and assets", should be amended to reflect the subject-matter more clearly, namely jurisdictional immunities, the status of premises, and freedom to transfer funds and other assets. It might in fact be advisable to divide part III into two, or even three, chapters, with article 10 forming a chapter on its own.

38. Draft article 7 should indeed be aligned with the draft articles on jurisdictional immunities of States and their property, at least in so far as the basic methodology and terminology were concerned. He was not, however, entirely convinced by the Special Rapporteur's arguments in the report (A/CN.4/424, paras. 24-33) concerning the basis for immunity from legal process, which was an extremely restrictive concept, at least under English law. In the first place, he did not see why it was "undeniable" that some degree of immunity from legal process "must" be granted, as the Special Rapporteur maintained (*ibid.*, para. 24). He could conceive of international organizations of a universal character that might, for functional reasons, require no jurisdictional immunity. Even if "some" degree of immunity "must" be granted, it was a *non sequitur* to argue that international organizations should enjoy greater immunity than the States that formed them. Admittedly, jurisdictional immunities of an extraordinary nature might have to be conferred upon a certain special class of international organizations—"super" international organizations, as it were—but the functional approach itself seemed to dictate that the Commission should try not to generalize something

that was uniquely necessary in the case of those "super" organizations.

39. He would therefore concur that the whole concept of functional necessity was in essence a relative and not an absolute one. In other words, what was necessary for one international organization was not necessary for another. In that connection, he also agreed that the sweeping dictum of the New York County Supreme Court in the *Matter of Menon* (*ibid.*, para. 62) was rather alarming. He would, however, point out that that had been a decision of a lower trial court, whose jurisdiction was limited to family matters. Moreover, had the decision in question been delivered after the United States *Foreign Sovereign Immunities Act of 1976*, the court might have moderated its terms. In his view, the rule with regard to jurisdictional immunities had more aptly been stated by the European Committee on Legal Co-operation, as set forth in the report (*ibid.*, para. 111), than in draft article 7, and his conclusion was reinforced by Mr. Roucounas's account of the experience of the International Tin Council. The fact that certain agreements, such as the 1946 Convention on the Privileges and Immunities of the United Nations, went beyond that restrictive approach should not give rise to any problem, since there was obviously no peremptory norm of international law, and a saving clause, such as that set forth in draft article 4, would preserve such régimes.

40. The concept and meaning of inviolability as used in paragraph 1 of draft article 8 should be spelt out in greater detail. Once again, he doubted that there was the same functional need for inviolability in the case of the premises of an international organization as there was in the case of the premises of an embassy or other mission of a State.

41. He agreed that draft article 9 should be extended to cover other offices or premises of international organizations. Draft article 10 seemed to go beyond functional necessity, at least for some international organizations.

42. Obviously, it was not possible to call into question the provisions of the Convention on the Privileges and Immunities of the United Nations, but draft article 4 appeared adequate to preserve that régime as well as the régime established under other agreements which might go further than, or not as far as, the present articles. He therefore thought that draft article 11 was unnecessary, in view of the terms of article 4.

43. Mr. BARSEGOV thanked the Special Rapporteur for his fourth report (A/CN.4/424), which reflected a deep understanding of the problems inherent in the topic. Considering the wide variety of international organizations already in existence, the fulfilment of the task at hand required a synthesis of the diverse practice in the field. The Special Rapporteur had succeeded in taking account of the comments made in the Commission and in the Sixth Committee of the General Assembly. Current changes in the world were opening up new prospects for the development of international organizations and the strengthening of their role, notably in economic and political affairs. There were also new perspectives for the development of international organizations which were difficult to anticipate. During the discussion, concern had been expressed that the aim of the work on the topic was not quite clear. The task of progressive development and codification of international law did not exclude a review of existing rules, where necessary. However, he could not agree to the one-sided approach whereby existing rules would be reviewed only in such a way as to weaken the rights, immunities and privileges which international organizations enjoyed, particularly at a time when their importance was growing.

44. At the outset, the Commission had decided to avoid theoretical discussions as far as possible and the Special Rapporteur had been successful in that respect, since the definition of an international organization in draft article 1, paragraph 1 (*a*), confined itself to saying that the expression "international organization" meant an intergovernmental organization of a universal character. However, as Mr. Hayes (2176th meeting) had rightly pointed out, theoretical issues could not be avoided and would have to be faced later. In fact, the Commission was already confronted by such issues as the nature of the privileges and immunities of international organizations. Further theoretical issues arose in regard to the specific nature of the legal personality and capacity of an international organization as a subject of international law.

45. As to the draft articles themselves, paragraph 1 (*c*) of article 1 should be made more precise. First, since the membership of an international organization could hardly be anything other than international, it was of little use as a criterion in defining such an organization. Secondly, the word "responsibilities" was inappropriate and should perhaps be replaced by another term, possibly "functions", as had been suggested by other members of the Commission. Thirdly, the reason for making specific reference to IAEA was not sufficiently clear. He assumed that the Special Rapporteur's intention had been to refer to different types of international organizations, but, in his view, the expression "international organization" could be defined in a descriptive way rather than in an illustrative manner through specific examples.

46. Draft articles 3 and 4 also lacked precision, notably in regard to the relationship between the present articles and the constituent instruments of existing organizations and international agreements already in force.

47. The subject-matter of draft articles 5 and 6 would, more than other provisions, require further research. He could not agree to the proposal that the references to international law and internal law in article 5 be omitted, lest the article should become completely meaningless. Furthermore, in the report, the correlation between the concept of an international organization as a legal person and that of an international organization as a subject of international law was somewhat difficult to grasp. The difference between the concept of legal personality under international law and that of legal personality under internal law was not clear. At any rate, the reference in article 5 to the internal law of member States, on an equal footing with international

law, was inappropriate. The legal personality of an international organization should be regarded as a reflection of the legal capacity conferred upon it under international law and international agreements: hence the crucial significance of the constituent instruments of individual organizations. Stronger emphasis must accordingly be given to that point in the draft articles. Indeed, States establishing an international organization conferred legal capacity, i.e. capacity to have rights and duties and to participate in the elaboration, adoption and application of rules of international law, but also specific functions for the protection of the law. By adopting constituent instruments of international organizations, States established new subjects of international law which, together with them, performed legislative functions and functions relating to law enforcement and the protection of the law in the sphere of intergovernmental relations. Consequently, the subsequent existence of international organizations no longer depended on the positions of individual States, but on the agreement of all the member States. The question of the internal law of an individual State in relation to the establishment of the legal personality of an international organization therefore called for further consideration.

48. Although the justification for the immunities of international organizations given in paragraph 33 of the report was not exhaustive, the Special Rapporteur's arguments on the subject were convincing. In particular, international organizations did not possess means of defence inherent in States as sovereign entities. The rationale for the immunity enjoyed by international organizations was that they, unlike States which pursued their own interests, acted in the interests and on behalf of all States. As pointed out by the Special Rapporteur, the extent of an international organization's privileges and immunities should primarily depend on its objectives and functions. In that respect, the classification of international organizations would be important in settling the issues covered by articles 7 to 11 of part III of the draft, whose title, "Property, funds and assets", was inappropriate, as had already been pointed out.

49. There were no valid grounds for juxtaposing the immunities of international organizations and those of States, and fears that international organizations would enjoy greater immunities than individual States were unfounded. Yet that did not imply that the interests of individual States could be violated through the granting of absolute immunity to international organizations. It was equally obvious, however, that the interests of a community of States should not be violated either. Actually, recognition of the immunities of international organizations in accordance with their respective functions would ultimately be in the interest of States themselves, as members of the international community.

50. Furthermore, the emergence of new types of international organizations dealing directly with productive activities such as mining, processing and distribution of minerals from the sea-bed, as part of the common heritage of mankind, and other organizations vested with certain features of supranationality called for more extensive immunities and privileges, in accordance with their duties and functions. International organizations such as the International Sea-Bed Authority were bound to be in possession of confidential commercial information, a fact which must obviously be taken into account in dealing, for example, with the question of the inviolability of premises, the subject of draft article 8. In that connection, although he had no doubts in principle about the substance of draft article 9, since international organizations must obviously not be used for purposes incompatible with their functions, it did raise certain issues with regard to the way in which the principle of inviolability should be applied, the extent of application and the meaning of the concept itself.

51. The text of draft article 10 might not need to be changed, yet the nature of the controls referred to must be clarified. The reference was presumably to controls exercised by the host country, not the member States, on the basis of the relevant constituent instrument.

52. In his opinion, the proposed texts could serve as a starting-point for further work on the draft articles.

53. Mr. SOLARI TUDELA congratulated the Special Rapporteur on a clear fourth report (A/CN.4/424) which reflected a detailed study of both practice and doctrine, while demonstrating the importance of the topic.

54. It had been said that all that was involved was an exercise in codification: the relevant norms already existed, there was nothing to add to them, and States would not accept anything new. A comparison had also been made between the present topic and the topic concerning the status of the diplomatic bag, in which it had proved necessary to refer back to existing norms after it had been decided that no distinction could be made between the diplomatic bag and the consular bag. He could not agree with that view, as there were situations for which the Commission must legislate. Only recently, the Security Council had had to move from New York to Geneva, with all that that had entailed in terms of the transfer of staff and documentation, because the headquarters agreement between the United Nations and the host country had not been interpreted by that country in such a way as to allow the normal operation of the Security Council when Yasser Arafat had wished to address the Council. It was perhaps a function of the draft articles under consideration to solve that kind of problem.

55. In addition, the comparison with the topic concerning the diplomatic bag did not seem to be relevant. He was not disputing the fact that a régime covering the diplomatic bag and consular bag was necessary, for there was a whole series of disparate norms to be codified. None the less, it had to be recognized that, with developments in means of communication, the diplomatic bag had lost some of its importance in recent years and would inevitably continue to do so. The position with regard to international organizations was different: those organizations had assumed considerable importance, and would do so increasingly in the future. A convention of the kind under discussion was therefore of the utmost importance.

56. Turning to the draft articles, he agreed that an international organization should be defined, as in article 1, paragraph 1 (*a*), as "an intergovernmental organization of a universal character". To his mind, universality did not mean that all countries, or even a majority of countries, would become members of a particular organization. It meant that the constitution or statutes of the organization allowed it to open its doors to any country that wished to become a member. In that connection, the Special Rapporteur had pointed out that certain international organizations, such as those of commodity exporters, could not be of a universal character. The question of regional organizations, which also had to be settled, could be dealt with either by means of an optional clause incorporated in the body of the future convention, whereby States could recognize the provisions of the convention with respect to regional organizations, or by means of an optional protocol to the convention.

57. He agreed that article 4 somewhat stultified the draft convention, in that norms should be capable of modification and, to a certain extent, the article denied that possibility.

58. Immunity in the specific case of an international organization, as dealt with in draft article 7, needed to be more wide-ranging because of the very nature of an international organization. Whereas State immunity existed to protect the interests and assets of a State, the immunity of an international organization existed to defend the interests of all the member States of the organization. It was therefore in the interest of all States for an international organization to have wider immunity.

59. He differed slightly with the Special Rapporteur on the question of inviolability of premises. In the report (*ibid.*, para. 89), the Special Rapporteur based such inviolability on article 22 of the 1961 Vienna Convention on Diplomatic Relations, while opting for criteria that were perhaps not quite as wide-ranging as those laid down in that provision. On the other hand, his own impression was that the inviolability in question was not as restricted as that of consular premises.

60. His main point of difference with the Special Rapporteur, however, concerned the consequences of inviolability, in which connection he noted that draft article 9 provided for an exemption in the case of the use of the headquarters of an international organization as a refuge. In his opinion, article 9 was unnecessary and the effect of including it in the draft would be that refuge would no longer be granted as it now was—pursuant to a human right or on the basis of the application of humanitarian law—but would be the result of a right relating to the inviolability of a diplomatic mission. Persons such as those referred to in article 9 should not be granted refuge either in diplomatic missions or in the headquarters of international organizations, although he would not exclude the possibility of the headquarters of an international organization being used as a refuge in extremely serious cases, for example to save the life of a person wanted for political reasons.

61. Draft articles 10 and 11 were acceptable.

62. Mr. BENNOUNA thanked the Special Rapporteur for the additional information contained in his fourth report (A/CN.4/424), but he thought that the deeper the Commission delved into the present topic, the more perplexing it became. The basic problem confronting the Commission centred on methodology, an issue which would have to be settled sooner or later if any definite progress was to be made on the draft articles. Indeed, the exercise would remain pointless unless the ultimate objective was clearly defined first. In that connection, he did not share Mr. Pellet's optimism regarding prospects for breaking new ground. On the contrary, any attempt to work out general rules on the basis of the principles put forward by Mr. Pellet would surely lead to a dead end, because the Commission was, in effect, caught between the provisions of draft article 4, whereby the proposed convention was to be without prejudice to existing instruments, and those of draft article 11, whereby "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". Those two constraints made it difficult to imagine how general rules concerned primarily with the immunities of international organizations and their staff could possibly be codified.

63. Alternatively, the Commission could of course draft a framework agreement, merely setting forth broad principles that could be used to interpret or supplement existing instruments, provided that they were consistent with them. In that case, it might suffice to generalize the rules applicable to the United Nations and some of the specialized agencies, as had already been done in some of the draft articles. However, not only would that approach go against the functional theory advocated by Mr. Pellet, but it would also call into question the very purpose of the entire exercise, since the matters in question were already covered and the organizations concerned were not complaining, although they might do so if an attempt were made to change the current system. Even the practice that had developed following the adoption of the relevant conventions and constituent instruments could hardly serve as a basis for general rules, because it tended to vary from one organization to another, depending on specific circumstances and the conduct of the States members of each individual organization. In the light of those considerations, it might be advisable to establish a small working group to define more clearly what it was that the Commission sought to achieve.

64. Lastly, given the intractability of the topic under consideration, the efforts made by the Special Rapporteur in dealing with it were commendable, although further progress now depended on clarification of the basic issues mentioned above.

The meeting rose at 1.05 p.m.