Document:-
A/CN.4/SR.2233

Summary record of the 2233rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

11. Mention should be made in that connection of the diplomatic bag and the diplomatic courier. The Commission and the Sixth Committee had considered whether the draft articles elaborated on that topic should be restricted to States or should also be extended to international organizations. Opinions on the matter had been divided. The Special Rapporteur on the diplomatic bag and diplomatic courier had suggested the inclusion of a new paragraph 2 in draft article 1 on the diplomatic courier and the diplomatic bag, to cover the official communications of an international organization with a State or with other international organizations, which he had cited in his fifth report. After lengthy discussion, views being expressed both for and against, the Commission had decided not to include the paragraph. It had been pointed out that the repeated insistence by some Commission members on differentiating between States and international organizations was inopportune. International organizations, it had been said, were established by States, and they used diplomatic couriers and diplomatic bags without any serious objection ever being raised. Both the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies, as well as many international instruments such as headquarters agreements and technical assistance agreements, contained similar specific provisions on the subject. However, given the difference of opinions, the Commission had opted for confining the scope of the draft articles to couriers and bags of States in order not to jeopardize the acceptability of the draft articles. At the same time, it had believed it appropriate for States to be given the choice to extend, if they so wished, the applicability of the draft articles to couriers and bags of, at least, international organizations of a universal character. It had therefore prepared and approved a draft optional protocol two on the status of the courier and the bag of international organizations of a universal character[4] which stated, in article I, that:

> The articles also apply to a courier and a bag employed for the official communications of an international organization of a universal character:
>
> (*a*) With its missions and offices, wherever situated, and for the official communications of these missions and offices with each other;
>
> (*b*) With other international organizations of a universal character.

12. As to the question of fiscal immunities, the sixth report ended with part V of the draft, namely articles 18 to 22. The fiscal immunity which States granted each other in their mutual relations was, in fact, the counterpart of equality. Under the principle of sovereignty and equality between States, a State could not be viewed as being subject to the tax-levying authority of another State. The principle was established by both custom and practice; it had been confirmed in bilateral and multilateral agreements, or even by unilateral decisions of States, at least as regarded property intended for State purposes. The tax exemption granted to intergovernmental international organizations also appeared to be justified by the same principle of equality between member States. A State could not levy taxes on other States through an international organization, and the host State must not derive unjustified fiscal benefit from the presence of an international organization on its territory. Moreover, in order to perform their official functions effectively, intergovernmental international organizations must enjoy the greatest possible independence in relation to the States of which they were composed. The principle of the free movement of the articles and capital of international organizations constituted one of the basic elements for preserving and guaranteeing their independence, and enabling them to fulfil the purposes for which they were established. However, States naturally had the right to protect themselves against any abuse or erroneous interpretation of the principle which might distort its true aim. The report therefore focused on two basic principles: the free movement of the articles of international organizations, and the protection of States against abuse or misinterpretation.

13. The CHAIRMAN thanked the Special Rapporteur for his presentation of the two reports.

The meeting rose at 10.40 a.m.

2233rd MEETING

Tuesday, 2 July 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Cooperation with other bodies

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Njenga to address the Commission in his capacity as Secretary-General of the Asian-African Legal Consultative Committee.

2. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee greatly valued its long-standing links with the International Law Commission. As Secretary-General of the Committee, he could speak with conviction of the commitment to strengthen those bonds in the mutual interests of the two bodies.

[4] Adopted by the Commission at its forty-first session. See *Yearbook ... 1989*, vol. I, 2132nd meeting, para. 56.

3. The Committee had been particularly happy to welcome the outgoing Chairman of the Commission, Mr. Shi, at its thirtieth session held in Cairo in April 1991. The Legal Counsel of the United Nations, Mr. Fleischhauer, had been unable to attend the session owing to other obligations, but had been represented by the Secretary to the Commission, Mr. Kotliar, who had read out a message from the Secretary-General of the Organization.

4. The Committee had greatly appreciated the comprehensive and informative account Mr. Shi had given of the Commission's progress of work at its forty-second session. Mr. Shi had also stressed how much the members of the Commission had appreciated the interesting comments made by the members of the Committee on the topics on which the Commission was working and how glad they had been to learn that the Committee was interested in, or working on, topics that were often similar or closely related to those on the Commission's agenda. All of that attested to the need to strengthen the exchange of views and experiences between the two bodies.

5. The Committee attached great value to the role of the Commission in the progressive development and codification of international law. The meticulous detail with which it approached its task in order to break fresh ground on matters of vital importance to the international community was to be commended and was universally appreciated. Three items on the Commission's agenda were of particular interest to Governments in the Asian-African region: international liability for injurious consequences arising out of acts not prohibited by international law; jurisdictional immunities of States and their property; and the law of the non-navigational uses of international watercourses. In the case of the two last-mentioned topics, that interest was due to the fact that they were also on the Committee's work programme and had been for some time. The Committee had started to consider the question of the jurisdictional immunities of States as far back as 1958, at its second session.

6. More recently, the Committee had deliberated upon certain aspects of the law relating to the jurisdictional immunities of States and their property in connection with certain developments that had taken place in some of its member countries. In addition to having been debated at the sessions of the Committee, the topic had also been the theme of three meetings of the legal advisers of the member Governments of the Committee in 1984, 1987 and 1989. Now that the Commission had completed its second reading of the draft articles on the subject, the interest of the Committee could hardly be overemphasized. Indeed, at its thirtieth session, the Committee had requested its secretariat to prepare detailed notes and comments on those draft articles and also on the draft articles on the law of the non-navigational uses of international watercourses, the first reading of which had just been concluded by the Commission.

7. As to some of the other substantive items considered by the Committee at its thirtieth session and the current work programme of its secretariat, following the adoption by the General Assembly of resolution 44/23 declaring the period 1990-1999 as the United Nations Decade of International Law, the secretariat of the Committee had prepared a note for the twenty-ninth session of the Committee on the role of the Committee in the realization of the objectives of the Decade. The Committee had called for an in-depth study on the Decade, which it had submitted to the United Nations Legal Counsel, setting forth its proposals and views. It was a matter of satisfaction to the Committee that it had been one of the few bodies to deal in that way with all the objectives of the Decade. In that connection, the Committee had been pleased to learn from Mr. Vukas, Chairman of the Working Group on the Decade of International Law, who had attended the Committee session in Cairo, that the Working Group had viewed with favour the notes and comments prepared by its secretariat. The item would remain on the programme of work of the secretariat and on the agenda of the Committee in the years ahead and the Committee hoped in that way to make an active contribution to the achievement of the objectives of the Decade. In that connection, at the thirtieth session of the Committee, the hope had been expressed that, at its current session, the Commission would consider ways of achieving the objectives of the Decade and that, when drawing up its quinquennial programme of work, it would make its views on the Decade known; the Committee eagerly awaited those views.

8. The Committee also hoped, *inter alia*, to undertake an in-depth study on the enhanced utilization of ICJ in the broader context of the purpose of promoting methods for the peaceful settlement of disputes between States, including resort to and full respect for ICJ as spelt out in General Assembly resolution 44/23. The representative of the Court had offered to cooperate in that venture.

9. The Committee had always attached great importance to the law of the sea and its contribution to the work of the Third United Nations Conference on the Law of the Sea was well known. The law of the sea was, therefore, a third area in which the Committee's secretariat had taken an initiative by preparing a study on the significance and cost of ratification of the 1982 United Nations Convention on the Law of the Sea. In that study, the secretariat had urged those member States which had not already done so to ratify the Convention. In Cairo, several delegates had expressed the view that the study would allay the fears of the developing countries concerning the financial implications of ratification of the Convention and had commended the secretariat for being one of the few remaining organizations that continued vigorously to promote the ratification of the Convention on the Law of the Sea. That study could be made available to any members of the Commission wishing to consult it.

10. The control of transboundary movements of hazardous wastes and their disposal, particularly in the African-Asian region, was viewed by many members of the Committee as a vitally important aspect of acts not prohibited by international law. Many member States of the Committee had already expressed their concern on that score at the Conference of Plenipotentiaries convened in Basel in 1989. The Committee's secretariat had been actively involved in the meetings of legal and technical experts organized by OAU in Addis Ababa in December 1989 and at the beginning of May 1990 to prepare for a Conference of Plenipotentiaries with a view to

the adoption of an African convention on the subject. In Cairo, participants had paid a tribute to the role played by the Committee's secretariat in the formulation and adoption of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements of Hazardous Wastes within Africa. The secretariat had also been associated with the Ad Hoc Working Group of Legal and Technical Experts to Develop Elements which might be included in a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes, set up by UNEP, as envisaged by the Basel Convention. The Committee had been among the first international organizations to urge its member States to ratify the Basel Convention and to bring it into force, and several of them had already ratified it.

11. The secretariat of the Committee was also involved in helping its members to prepare for UNCED to be held in Brazil in June 1992. The secretariat had actively participated in the meetings of the Preparatory Committee of UNCED and, as in other areas, had worked in tandem with other regional and international organizations. The secretariat of the Committee proposed to hold an intersessional meeting at ministerial level to review the work of the Preparatory Committee of UNCED and, in particular, that of its Working Group III (Legal issues), so as to give the members of the Committee an opportunity to adopt a common stand on the protection of the environment and climate without prejudicing their right to sustainable development.

12. In addition, the Committee was now working on the preparation of documents and studies on such diverse subjects as the status and treatment of refugees, a question on which the secretariat of the Committee was organizing a seminar in October 1991 in New Delhi in cooperation with the United Nations High Commissioner for Refugees and thanks to a generous grant from the Ford Foundation; the deportation of Palestinians as a violation of international law, particularly the Geneva Conventions of 1949; the criteria for distinguishing between international terrorism and national liberation movements; the extradition of fugitive offenders; the debt burden of developing countries; the concept of a peace zone in international law; the Indian Ocean as a zone of peace; the legal framework for international joint ventures; international trade law matters; and the undertaking of a feasibility study on the establishment of a centre for research and development of legal regimes applicable to economic activities in developing countries in Asia and Africa. The work on all those topics was continuing. The items listed were among those that were to be considered at the Committee's thirty-first session in 1992. It was gratifying to note that the International Law Commission was considering putting some of those topics on its own long-term programme of work.

13. At the Committee's thirtieth session, he had been re-elected Secretary-General for a period of three years starting in May 1991. On behalf of the Committee, he extended to the Chairman of the International Law Commission an invitation to participate in the Committee's thirty-first session, which was scheduled to be held in Islamabad, Pakistan, in 1992.

14. Mr. McCAFFREY, speaking on behalf of the members of the Commission from the Group of Western European and Other States, thanked the Secretary-General of the Asian-African Legal Consultative Committee for his very informative and stimulating statement.

15. He said that he had always been impressed by the number of areas in which the Committee was working. Of all the organizations, it was undoubtedly the Committee which had done the most intensive work in connection with the United Nations Decade of International Law. For years, moreover, it had been studying two topics which were on the Commission's agenda: the jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses. He was aware that the Committee followed the Commission's work with great interest and hoped that it would welcome the conclusions the Commission had reached on those two topics at the current session. He was also sure that, during his new term of office, Mr. Njenga would exercise as competently as in the past his functions as Secretary-General of a body which provided very valuable services to its members, for example, in helping them prepare their comments on the Commission's report to the Sixth Committee of the General Assembly.

16. The CHAIRMAN, speaking as a member of the Commission, also congratulated Mr. Njenga on his re-election as Secretary-General of the Asian-African Legal Consultative Committee.

17. Mr. MAHIOU, speaking on behalf of the members of the Commission from African States, thanked Mr. Njenga, first, for having given such very useful information on the Committee's work, which was, fortunately, continuing despite the financial problems faced by the member countries, and, secondly, for having helped to establish and maintain close and personal ties between the Committee and the Commission. On many points, the concerns of the two bodies were the same. He was thinking in particular of two topics on which the Commission had just adopted a set of draft articles on second and first reading, respectively, namely, the jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses. Those two topics were of particular interest to the Committee because of the problems of the Asian-African region in those fields.

18. Other questions to which the Committee attached great importance also went to the heart of topics being considered by the Commission. For example, the problem of hazardous wastes was one of the important aspects of the topic of international liability of States for injurious consequences arising out of acts not prohibited by international law. Lastly, he noted that the Committee had established an entire list of subjects for research and study, which he believed could provide the Commission with useful inspiration for the preparation of its own agenda, with a view both to the codification and to the progressive development of international law.

19. Mr. BARSEGOV joined the previous speakers in thanking Mr. Njenga for his very interesting and very detailed statement. He said that the activities of the

Asian-African Legal Consultative Committee reflected the concerns of the Eastern European countries, which followed its work with very great interest. He would not refer to each of the points mentioned by Mr. Njenga, since the list of questions dealt with by the Committee was quite impressive, but he would like the statement by the Secretary-General of the Asian-African Legal Consultative Committee to be reflected fully in the summary record of the meeting and he also expressed the hope that the Commission would have access to the documents concerning the work of the Committee to which Mr. Njenga had referred.

20. Mr. SEPÚLVEDA GUTIÉRREZ, speaking on behalf of the members of the Commission from Latin American States, also thanked the Secretary-General of the Asian-African Legal Consultative Committee for his excellent statement, which made it possible to have a better understanding of the problems of the Asian-African region. Mr. Njenga was very well known in the Latin American region too for his fine qualities as a jurist, his organizational abilities and his lofty ideals, and his work was sure to have an impact on the progressive development of international law. There were obvious similarities between the Asian-African region and the Latin American region: they shared the same ideals and the same interests and contacts between them should be encouraged.

21. Mr. SHI congratulated Mr. Njenga on his re-election as Secretary-General of the Asian-African Legal Consultative Committee. He had had the honour of representing the Commission at the Committee's thirtieth session, which had been held in Cairo, and had been very impressed by the importance which the delegations of the member countries of the Committee attached to the work of the Commission and by the seriousness with which they had spoken on the topics on the Commission's agenda. In the statement he had made as outgoing Chairman at the Commission's current session, he had also referred to the very interesting ideas put forward by the Committee with regard, for example, to the jurisdictional immunities of States and their property. He had, moreover, been struck by the similarities between some of the topics on the Committee's agenda and those under consideration by the Commission. That confirmed his belief that cooperation between the Commission and the Committee should not only continue, but that coordination between the work of the two bodies should be strengthened. It was not enough for them to send observers to each other's meetings. More specific ways of working together had to be considered.

22. Mr. JACOVIDES also congratulated Mr. Njenga on his re-election, which was a fitting reward for his dedication to the work of the Asian-African Legal Consultative Committee. His own country had been a member of the Committee for many years and he had had the privilege of attending several of its sessions, particularly in Beijing and Cairo. He had always considered it desirable to establish the closest possible cooperation between the Commission and regional bodies such as the Asian-African Legal Consultative Committee so that regional points of view might be taken more fully into account.

23. As Mr. Shi had quite rightly pointed out, the two bodies had much to learn from one another. Mr. Njenga's statement had given the members of the Commission a better understanding of the concerns of two major regions of the world, Asia and Africa. It was also interesting to note that the Committee placed particular emphasis on the success of the United Nations Decade of International Law, on growing resort to ICJ and on the law of the sea. He was sure the Committee would also be able to make a major contribution in other areas, such as the code of crimes against the peace and security of mankind and State responsibility. In conclusion, he invited the Committee and its Secretary-General to continue their praiseworthy efforts with a view to the codification and progressive development of international law and wished them every success in their work.

24. Mr. Sreenivasa RAO expressed his congratulations to Mr. Njenga on his re-election to the office of Secretary-General of the Asian-African Legal Consultative Committee.

25. Tracing the origins of the Committee, he recalled that it had been set up in the 1950s, following the release of many African and Asian countries from the colonial yoke, in order to bring together the few experienced jurists in those regions and place them at the service of their countries, and through their countries, at the service of the international community, so that the task of the progressive development and codification of international law could be carried out in a spirit of tolerance, justice and equity for all, and especially for the developing countries. The international community was indebted to the Committee, for instance, in the field of the law of treaties and in that of the law of the sea as a result of the adoption of the concept of the exclusive economic zone. It was gratifying to note that the same tradition was continuing and that, in addition to its advisory role, the Committee enjoyed an unrivalled reputation in the world community of internationalists for its work, which it could also undertake at the request of any of its member States. It was, moreover, quite natural, as Mr. Sepúlveda Gutiérrez had noted, that developing countries should all be involved in the progressive development and codification of international law.

Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/438,[1] A/CN.4/439,[2] A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

[1] This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 *and*

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22[3] (*continued*)

26. Mr. HAYES recalled that, at the preceding session, during the debate on the fourth report,[4] he had stated that he strongly favoured the functional approach advocated by the Special Rapporteur in paragraph 27 of the report, as well as the idea which seemed to be put forward in paragraphs 51 and 52 of that report that the Commission's objective should be to prepare a general framework of provisions common to all international organizations of a universal character, leaving the details to be developed according to the specific purpose and functions of the organization concerned.[5] It was in the light of those two criteria that he intended to examine the draft articles contained in the reports.

27. The fifth report (A/CN.4/438) dealt first with the question of archives. The confidentiality—he preferred that term to "secrecy", which could have a sinister ring in English—of the archives, whether documents for internal use, such as personnel files, or for external use, such as correspondence with member States and other international organizations, appeared to be essential to enable international organizations to perform their functions. They must therefore enjoy inviolability of their archives and only absolute inviolability would suffice. That functional justification was borne out by the provisions of several instruments, including the Convention on the Privileges and Immunities of the United Nations. Paragraph 1 of draft article 12 proposed by the Special Rapporteur was based on article II, section 4, of that Convention and, in his view, it was an appropriate provision. However, he was not sure whether paragraph 2, which purported to give an exhaustive list of the "archives" of international organizations, was detailed enough: perhaps reference should also be made to modern means of communication, such as computers, word processors, electronic mail, and the like. Although he was not a specialist in that field, he thought that the risks of "computer viruses" and "hacking" would fully justify such a precaution.

28. The second subject covered in the fifth report was publication and communications facilities. There again, it was difficult to imagine an international organization for which freedom of publication and communication would not be a functional necessity. That freedom was, moreover, fully reflected in the relevant legal instruments, which specifically provided that the United Nations and the specialized agencies must enjoy treatment no less favourable than that enjoyed by Governments and diplomatic missions. That would obviously include the use of particular diplomatic means of communication such as coded messages, couriers, diplomatic bags, and so forth. Draft articles 14 and 16 proposed by the Special Rapporteur and based on the relevant provisions of the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies were therefore entirely appropriate. However, he wondered whether article 15 was really necessary. Its paragraph 1 seemed to duplicate article 12 on the inviolability of archives and documents and the definition given in paragraph 2 seemed to be superfluous. He also wondered whether the question of publications and the question of communications should not be treated separately; they certainly overlapped in some respects, but they also raised very different problems. Moreover, existing international law seemed to be much more restrictive in respect of publications than in respect of communications. The two main conventions on the subject, the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies, merely exempted the publications of those organizations from customs duties and from prohibitions and restrictions on imports and exports. Draft article 13 went further, providing that international organizations could freely circulate and distribute their publications in the territory of each State party. In that connection, there was an interesting comment in the report of the subcommittee on the privileges and immunities of international organizations of the European Committee on Legal Cooperation, concerning the need to protect public order, quoted by the Special Rapporteur in his fifth report. He wondered whether draft article 17, which enabled a State to take the necessary measures to protect its security, should not also have an exemption based on the need to protect public order.

29. With regard to the sixth report (A/CN.4/439), he noted that the tax exemption granted to international organizations was based fairly and squarely, as the Special Rapporteur had explained in the report, on the principle that a host State should not derive unjustified fiscal benefit from the presence of an international organization on its territory. In that connection, the Special Rapporteur referred to the fiscal immunities of diplomatic missions, as established by practice and codified in the Vienna Convention on Diplomatic Relations. He also referred to the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. He reviewed the relevant provisions of those conventions which established a distinction between direct and indirect taxes and between what might be called fiscal taxes and charges for services; he also stressed the difference between official and non-official activities of an international organization.

30. The Special Rapporteur based the principle of exempting international organizations from customs duties on the premise that, in order to pursue their objectives and exercise their functions, those organizations required complete independence, including the freedom of movement of articles, goods, and so forth. He nevertheless referred to the limits which States had placed on that freedom in order to protect themselves, with reason, against any abuses. In that field, as in that of direct taxation, the question arose of the distinction between official functions and other activities and the problem of the resale of goods which had been imported duty-free was of particular importance. He appreciated the way in which the Special Rapporteur had supported his arguments with

[3] For texts, see 2232nd meeting, para. 2.

[4] *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/424.

[5] *Yearbook ... 1990*, vol. I, 2176th meeting, para. 7.

abundant examples from conventional law and practice; moreover, the conclusions of the Special Rapporteur, as reflected in draft articles 18 to 22, were generally well justified. Draft articles 18, 20 and 21 were adaptations of corresponding provisions in the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. He nevertheless wondered whether article 20 (*b*) on publications should not be incorporated into draft article 13, so that the question of publications could be dealt with in a single article.

31. Unlike the other articles mentioned above, draft article 19 was based mainly on the provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, which were also an excellent precedent for granting a tax exemption to international organizations for functional purposes. That exemption was provided for, in different terms, in other relevant instruments as well.

32. In conclusion, he believed that the thrust of the draft articles proposed by the Special Rapporteur was acceptable and that further refinements should be left to the Drafting Committee.

33. Mr. JACOVIDES thanked the Special Rapporteur for having provided a clear picture in his fifth report of the issues involved and the practice followed with regard to the archives and the publication and communications facilities of international organizations, accompanied by the corresponding draft articles 12 to 17.

34. As the Special Rapporteur had rightly pointed out in his report, international organizations, like States, were in permanent communication with member States and with each other; they maintained a steady correspondence with public and private institutions and with individuals and they kept files and had a body of documentation that was essential to their operations. The confidentiality—rather than secrecy, as had been pointed out by Mr. Hayes—and the privacy of their archives must be protected and guaranteed. It was therefore a valid premise that, like States, international organizations were subjects of international law and should enjoy inviolability of their archives. That principle was, moreover, spelt out in international conventions, such as the Convention on the Privileges and Immunities of the United Nations, and was generally accepted in practice. He had no difficulty in accepting the idea that the right to confidentiality was essential to the freedom of action and effective functioning of international organizations. He therefore endorsed draft article 12 proposed by the Special Rapporteur. With regard to the definition of archives, it was his view that paragraph 2 should, for the sake of clarity, be included in the body of the draft article; the wording of that paragraph could be considered in detail by the Drafting Committee, taking into consideration Mr. Hayes' interesting suggestion that modern means of communication, such as computers, and word-processing systems, should be added to the elements already listed.

35. Similarly, it could hardly be disputed that communication facilities were essential to the effective functioning of international organizations: such facilities must permit organizations to communicate freely with member States and other organizations, to disseminate their ideas and to publicize the results of the tasks entrusted to them. He took note of the analysis of State practice in respect of publications, as provided by the Special Rapporteur in his report, and he readily agreed that, for their official communications, international organizations should enjoy treatment no less favourable than that accorded to Governments, as established, moreover, in the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. As a general rule, the inviolability of communications—correspondence, telegraph, telephone, radio—of international organizations should be equivalent to that of communications of diplomatic missions, in so far as the needs of international organizations, in particular the United Nations, were as important as the needs of the government agencies of the host country.

36. The means of communication of international organizations should in principle be the same as those used by States or diplomatic missions. However, it had to be acknowledged that not all international organizations needed to use couriers or to have special facilities for sealed bags, codes and ciphers unless that was justified by their operations, and that was clearly the case with the United Nations, as provided for in the Convention on the Privileges and Immunities of the United Nations.

37. The question of the use of the diplomatic bag by international organizations was the most controversial and had been discussed at length during the consideration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, after which the Commission had decided to limit the scope of the draft articles to couriers and bags sent by States, while, at the same time adopting draft optional protocol two, annexed to the draft articles, and extending, on an optional basis, the applicability of the draft articles at least to couriers and bags of international organizations of a universal character.[6]

38. In his report, the Special Rapporteur reviewed State practice with regard to postal services and existing special postal agreements, such as that for the United Nations peace-keeping force in Cyprus, as well as the security issues raised, from the standpoint of States, by the use of telecommunications and radio stations. In that latter case, it was understandable that States could take an unfavourable view of the fact that international organizations were replacing them in the exercise of functions traditionally within their exclusive competence. The answer might be to strike a balance so that the basic interests of both international organizations and States were protected, in accordance, moreover, with current practice.

39. Draft articles 13 to 17 on publication and communications facilities, as proposed by the Special Rapporteur on the basis of his analysis, seemed to be on the right track. The articles were appropriately based on the principle that international organizations should enjoy

[6] See 2232nd meeting, footnote 4.

maximum facilities, subject to the consent of the host State in the case of the installation and use of wireless transmitters and subject to considerations of the security of the State concerned. Consequently, the articles deserved to be favourably considered by the Commission.

40. In conclusion, he said he had little doubt that international organizations, as much as States, needed to benefit from the inviolability and protection of their archives and to have at their disposal publication and communications facilities, on the understanding that such benefits should correspond to their functional needs, should not be excessive and should not encroach unduly on their prerogatives.

41. He reserved the right to make a statement at a later stage on the Special Rapporteur's sixth report (A/CN.4/439).

The meeting rose at 11.20 a.m.

2234th MEETING

Wednesday, 3 July 1991, at 10.25 a.m.

Chairman: Mr. Abdul G. KOROMA

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

Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/438,[1] A/CN.4/439,[2] A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 *and*

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22[3] (*continued*)

1. Mr. ROUCOUNAS recalled that the first part of the topic had found expression in the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. According to the United Nations list of ratifications, to date only about 25 States had acceded to the Convention. Indeed, the majority of the States which acted as hosts to international organizations were not party to the Convention. There were clearly a number of factors responsible for the relatively limited success of the Commission's efforts to codify and progressively develop the law in that area. Nevertheless, the limited number of accessions to the Convention was a signal to the Commission that it had to proceed with caution in elaborating the second part of the topic.

2. He thanked the Special Rapporteur for his comprehensive fifth report, which dealt with relatively easy questions that had not given rise to serious controversy. While the language used in the fifth report might sometimes convey the misleading impression of calling for an increase in the authority of international organizations, the Special Rapporteur had, in fact, limited his considerations to purely functional issues.

3. In considering the case of an international organization's archives, the Special Rapporteur drew an appropriate distinction between inviolability and confidentiality. Inviolability involved preventing third parties from obtaining information about the contents of the archives, using the archives without authorization, violating the secrecy of the archives or destroying their contents. The corollary to that notion was the requirement that States should refrain from any kind of administrative or jurisdictional coercion. Confidentiality was a more general concept which encompassed not only the archives of an international organization but also some of its procedures. Generally speaking, the rule of confidentiality was respected in spite of the difficulties inherent in doing so, particularly in organizations with a large membership. For example, in his experience, there had been only one occasion on which a person from outside the United Nations had been able to gain access to the confidential information being considered by the Commission on Human Rights in its capacity as a closed commission of inquiry.

4. The report indicated that access by officials of an international organization to its archives was regulated by the organization itself and was covered by its internal regulations. In contrast, protection of the inviolability of the archives of an international organization against interference from persons outside the organization, an aspect which thus far had not been regulated in a satisfactory fashion, involved the obligation to refrain and protect, as was the rule in diplomatic law. In that connection, he wondered if the subject of the inviolability of

[1] This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook... 1991*, vol. II (Part One).

[3] For texts, see 2232nd meeting, para. 2.