

Document:-
A/CN.4/SR.2234

Summary record of the 2234th meeting

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

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

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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

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 22³ (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

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

the archives of an international organization should not include the issue of respect for and protection of the emblems, names and even, in certain cases, the flags of international organizations. There had been cases, cited in some instances in the *United Nations Juridical Yearbook*, where the use of the emblem or the name of an international organization had raised legal issues. In his opinion, and the Special Rapporteur concurred, it was appropriate to consider that matter under the present topic.

5. As to publications and communications facilities, he endorsed the Special Rapporteur's emphasis, again within a functional framework, on the right to freedom of expression. To his knowledge, there had been only one case, termed "unprecedented" by the United Nations Secretariat, in which a Member State had tried to impede the publication of United Nations documents. In that connection, a memorandum, prepared by the United Nations Office of Legal Affairs on 29 October 1981 had stated clearly that the freedom of the United Nations to publish and circulate documents without restriction was guaranteed both by the Charter of the United Nations and by the Convention on the Privileges and Immunities of the United Nations.

6. In his report, the Special Rapporteur amply demonstrated that United Nations publications did indeed benefit from fiscal immunities and exemptions from customs duties. Furthermore, section 7 (c) of the Convention on the Privileges and Immunities of the United Nations provided that, with respect to its publications, the United Nations was exempt from any customs duties and any import or export prohibitions or restrictions. Moreover, from the legal point of view, international organizations were free to resell publications which had benefited from fiscal immunities and exemptions from customs duties.

7. The provisions of the Convention on the Privileges and Immunities of the United Nations pertaining to communication by radio and telegraph had on the whole been strictly applied, not only by the host States but by the international organizations themselves. There had none the less been a number of cases where the United Nations had had to remind its own agencies or subsidiary bodies of the necessity for the strict application of those provisions. In regard to a case in which an intergovernmental agency had requested the right to use an antenna authorized for United Nations utilization, the Office of Legal Affairs had taken the position that all means of communication authorized for the United Nations should be limited strictly to use by that organization.

8. The report cited certain basic texts on telecommunications, which had been elaborated some time ago. Meanwhile, there had been substantial changes in the international regulation of telecommunications and impressive developments in telecommunications law, which had been reflected in more recent conventions, including successive versions of the 1932 International Telecommunication Convention, as well as in the 1989 ITU Statute. Those developments had undoubtedly had an effect on the way in which international organizations used telecommunications and the Commission should bear that fact in mind in considering the present topic.

9. As to the draft articles in the fifth report, he wondered whether it might not be appropriate to introduce into article 12 a reference to the positive obligation to protect the archives of international organizations. Article 15 stated that

Official correspondence and official communications mean all correspondence and communications relating to an organization and its functions.

Yet, the article did not make any reference to correspondence and communications issued by or intended for an organization. Perhaps the Commission should make the wording of the article more precise. Article 16, on the right of international organizations to use codes and to dispatch and receive their official communications by courier or in sealed bags, stipulated that those matters would be governed by the relevant provisions of the multilateral conventions in force. The article did not, however, refer to any rules, other than those provided for under the conventions, that might be applicable. He wondered about the value of an article that confined itself to citing existing conventions. It might be more appropriate for the article to set out provisions corresponding to those in the conventions in question.

10. Mr. NJENGA congratulated the Special Rapporteur on the meticulous care with which he had prepared his two scholarly reports.

11. With the emergence of international organizations as major actors on the international scene, there had inevitably been an increase in their number and in the variety of activities in which they were engaged. All international organizations should, of course, be deemed to have legal personality since, as stated by ICJ in its advisory opinion in the case concerning *Reparation for injuries suffered in the service of the United Nations*, they were "capable of possessing international rights and duties".⁴ On the other hand, given the diverse nature of their activities and functions, they could not be fully equated to States, for as ICJ had opined in the same case:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights; and their nature depends upon the needs of the community.⁵

It was difficult, therefore, to determine which of the privileges and immunities originally designed for States should be extended *ipso facto* to international organizations, and to what extent.

12. Though international organizations had legal personality both under international law and under the internal law of their member States, their *raison d'être* lay in the functions and purposes for which they had been established. Accordingly, the functional requirements of the organization must be one of the main criteria, if not the only criterion, for determining the extent of the privileges and immunities accorded to it. In view of the wide variety of functions assigned to the various international organizations, however, it was difficult to lay down general provisions within a framework convention of the type contemplated, and the task was further complicated by the fact that the headquarters agreements of most international organizations already provided for a special

⁴ *I.C.J. Reports 1949*, p. 179.

⁵ *Ibid.*, p. 178.

regime to govern their relations with the host country. It was none the less important to establish what might be termed the irreducible minimum to which any international organization should be entitled.

13. It was in the light of those difficulties that he had considered the Special Rapporteur's fifth and sixth reports, together with the proposed draft articles, which were, in his view, justified by the wealth of precedent cited and by the Special Rapporteur's exhaustive analysis.

14. The Special Rapporteur explained the rationale for the protection and safekeeping of archives in the following terms:

In order to preserve, protect and safeguard the confidentiality of these archives and to protect not only their own security and their right to privacy and private property but also the security and privacy of documentation addressed or entrusted to them, particularly by member States, international intergovernmental organizations must enjoy inviolability of their archives.

The right to privacy of the archives was so fundamental that no international organization could function if that right was not respected by the host country. It also reflected a principle which could be regarded as having entered the realm of customary law, as was apparent from the Special Rapporteur's survey of the headquarters agreements of different organizations and of State practice in both peace time and war time. In addition, it was confirmed by the relevant provisions of the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies and, in particular, by the headquarters agreements of the various regional organizations of the United Nations. On the basis of those considerations, draft article 12 was acceptable. To convey more clearly the all-encompassing nature of paragraph 2, however, the Drafting Committee might wish to replace the words "shall be understood to mean", in that paragraph, by "shall include".

15. In regard to that section of the fifth report concerning publication and communications facilities, he agreed that, if an international organization did not enjoy unhindered and uncensored freedom of publication and communication, it would lose its *raison d'être*. That principle was therefore to be regarded as part of the irreducible minimum of privileges for an international organization. As the Special Rapporteur pointed out :

International organizations must have the most extensive communications facilities if they are to function properly: they must be able to communicate freely with member States or other organizations, and be able to propagate and disseminate ideas and the results of the work entrusted to them.

Even in that case, the Special Rapporteur had carefully restricted himself to the functional needs of an international organization by referring to the unhindered dissemination of the results of the work entrusted to the organization: without such freedom of publication an international organization would cease to be functional. The principle had now been generally accepted, as the Special Rapporteur clearly demonstrated with his references to a number of headquarters agreements and also to State practice, which was cited exhaustively in the re-

port. Draft article 13, which took account of that practice, was therefore acceptable.

16. He agreed entirely with the Special Rapporteur that:

Naturally, the means of communication to be made available to international organizations cannot but be identical to those employed by States or diplomatic missions.

Although the principle of assimilating international organizations to diplomatic missions was fully justified, the criterion of functional necessity should none the less caution against extending an unduly elaborate range of means of communication to each and every international organization. Some organizations, such as the United Nations, should, of course, be entitled to the whole range—including diplomatic couriers, postal services and radio stations—but for most international organizations, more modest, albeit secure and uncensored, means of communication would suffice. All that was required, therefore, was to state the general principle and to leave the details to be worked out between the international organization and host government concerned under the headquarters agreement. The cautious approach adopted by the Commission in the articles on the status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier should be emulated. There was no doubt that it was in the legitimate interests of the host country to adopt appropriate security precautions and to prevent any abuse of the privileges in question.

17. Consequently, he did not disagree with draft articles 14 to 17, but some of them were too elaborate and could be abbreviated by simply stating the basic principle. Article 14, for instance, could stop with the words "diplomatic missions", and he would even omit the last sentence.

18. Article 15 was well balanced and fully acceptable. Article 16 also was satisfactory in general, though he wondered whether it was necessary to refer to the diplomatic courier, which international organizations used only rarely. If an international organization had a particular need to make use of the services of a courier, the matter could perhaps be dealt with under the relevant headquarters agreement. Article 17 contained a virtually indispensable provision and, again, was fully acceptable.

19. As to the Special Rapporteur's sixth report, he fully endorsed the thrust of draft articles 18 to 22. The principle discussed in the report, which concerned fiscal immunities and exemptions from customs duties, was now to be regarded as part of customary law, and it derived from the sovereign equality of States, whereby a State could not be held liable for tax levied by the authorities of another State. That principle should apply fully to international organizations which were, after all, the creation of States: the host country must not do indirectly what it could not do directly and thus derive unjustified fiscal benefit from the fact of having an international organization on its territory. It was, moreover, an absolute principle and should apply to both direct and indirect taxes, and to other fiscal measures. It was only the practical difficulties of collecting the indirect taxes incorporated in the price of goods that perhaps warranted the inclusion of paragraph 1 of draft article 21. Para-

graph 2 of the article was, however, both necessary and acceptable, for when it came to large purchases, international organizations should be entitled to claim and to obtain a refund for indirect taxes.

20. Lastly, it would be of particular assistance at the next session of the Commission if the Special Rapporteur could prepare a brief outline of the remainder of the topic.

The meeting rose at 11.20 a.m.

2235th MEETING

Thursday, 4 July 1991, at 10 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 22³ (continued)

1. Mr. PELLET said that the consideration of the fifth and sixth reports on relations between States and interna-

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

tional organizations (A/CN.4/438 and A/CN.4/439 respectively) had not sparked much reaction in the Commission. That certainly did not imply any criticism of the work of the Special Rapporteur, Mr. Díaz González, whose two reports contained a wealth of material based on a meticulous study of practice. The reasons must be sought elsewhere and he could suggest two.

2. First, many members of the Commission did not see the need for the topic because the subject-matter was already covered to a large extent by many conventions relating in particular to each international organization or category of international organizations and it was unlikely that States parties and the international organizations concerned would denounce existing agreements in order to replace them by a future convention. At first sight, therefore, it was difficult to understand the scope of the exercise. However, careful consideration of the reports showed that, although such conventions did exist, their wording was quite different and perhaps an attempt should be made to identify their common denominator, but that did not necessarily mean drafting a convention. In that connection, he welcomed the statement by the Special Rapporteur at the end of his fifth report that he was concerned not to prejudge the final form of the draft articles. However, it was not certain that the existing conventions covered every aspect of the problems which might arise. He regretted that the Special Rapporteur was a bit too cautious in dealing in the articles he was proposing with the "traditional" aspects of the subject, but avoiding newer aspects which probably involved progressive development. He was, for example, not very forthcoming about the use of satellite telecommunications or the highly sensitive problems of privileges and immunities to which the likely increase in peace-keeping operations would give rise. In such new fields, however, it would be well worthwhile to extend and supplement existing instruments by means of treaty provisions. He also thought that it would be useful for the Commission to look into the problem of the settlement of disputes which might arise and which were not given much attention in existing instruments, such as in article VIII of the Convention on the Privileges and Immunities of the United Nations.

3. The second reason for the unease felt by the members of the Commission was that the discussion of the question was probably more within the competence of the Drafting Committee than that of the Commission as a whole. It was very difficult to express general ideas on the topic at such a late stage in the discussion and drafting process. If only to indicate his own interest in the topic and in the work done by the Special Rapporteur, he wished nevertheless to draw the Commission's attention to two points which he had already touched on the previous year, although from a slightly different angle.

4. The first was that, in his view, the Special Rapporteur was rather too generous towards international organizations and too confident that they would not abuse the quite substantial privileges and immunities which they tended to be given. He was less certain than the Special Rapporteur that an international organization should be allowed to decide whether or not to make use of exceptional means of communication. Of course, States should not tell it how to act, but its conduct must