Document:-
**A/CN.4/SR.2133**

# Summary record of the 2133rd meeting

Topic:
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-
**1989**, **vol. I**

66. Mr. YANKOV (Special Rapporteur) said that the form the draft articles should ultimately take would be the subject of a passage for inclusion in the Commission's report on its present session. In the relevant General Assembly resolution, the Commission had been instructed to formulate "an appropriate legal instrument". The question had been discussed on a number of occasions, more particularly in connection with the consideration of his eighth report (see A/CN.4/417, paras. 32-38), and the Commission had then agreed that the draft articles would take the form of a draft convention.

67. Mr. TOMUSCHAT pointed out that, in certain cases, such as that of the 1969 Convention on Special Missions, draft articles adopted by the Commission on a particular topic had been referred not to a diplomatic conference, but to the Sixth Committee of the General Assembly for adoption as a convention. That procedure spared Governments the expense of sending representatives to a conference. The matter was of particular importance to developing countries. He would suggest that the General Assembly could decide whether to convene a conference of plenipotentiaries or to have the future convention adopted within the framework of the Sixth Committee.

68. The CHAIRMAN said that, under the draft recommendation he had proposed, it was indeed the General Assembly that would decide how the future convention would be adopted. The main point of the recommendation was that the draft articles should become a convention.

69. Mr. DÍAZ GONZÁLEZ drew attention to article 23, paragraph 1 (*c*), of the Commission's statute, whereby the Commission was empowered to recommend to the General Assembly "To recommend the draft to Members with a view to the conclusion of a convention". Under paragraph 1 (*d*), the Commission could recommend to the General Assembly "To convoke a conference to conclude a convention". Pursuant to those provisions, it could be left to the General Assembly to decide which body would adopt the future convention.

70. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the draft recommendation he had proposed.

*The draft recommendation was adopted.*

DRAFT RESOLUTION OF THE COMMISSION

71. Mr. REUTER, speaking as the longest-serving member of the Commission, said that, in conformity with tradition, on the conclusion of the work on a topic, it was appropriate for the Commission to express its gratitude and appreciation to the Special Rapporteur. He accordingly proposed the following draft resolution, on the understanding that the final wording could be adjusted by the Secretariat in the light of the appropriate precedents:

"*The International Law Commission,*

"*Having adopted* the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

"*Desires to express* to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

72. As the senior member of the Commission, he felt he could add a few words to express the hope that members would do their best to be present in the Commission and the Drafting Committee when a matter of interest to them was being discussed. The Commission suffered from an over-abundance of talent, which meant that some members were often called away to other important duties. As a result, their statements did not always take place at the most appropriate moment for the Commission.

73. Mr. McCAFFREY and Mr. FRANCIS said that they heartily endorsed the tribute paid by Mr. Reuter to the Special Rapporteur.

74. Mr. THIAM said that members who did not take the floor also shared the feelings of gratitude and admiration for the Special Rapporteur and would be expressing those feelings by supporting the draft resolution proposed by Mr. Reuter.

75. The CHAIRMAN said that the draft resolution proposed by Mr. Reuter would be considered together with the corresponding part of the Commission's draft report. At that time, there would be an opportunity for members to pay a well-deserved tribute to the Special Rapporteur.

76. He proposed that the Commission should adjourn to allow the Planning Group to meet.

*It was so agreed.*

*The meeting rose at 12.10 p.m.*

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## 2133rd MEETING

*Friday, 7 July 1989, at 10 a.m.*

*Chairman*: Mr. Bernhard GRAEFRATH

*Present*: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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**Relations between States and international organizations (second part of the topic) (A/CN.4/401,[1] A/CN.4/424,[2] A/CN.4/L.383 and Add.1-3,[3] A/CN.4/L.420, sect. E, ST/LEG/17)**

[Agenda item 8]

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

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

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

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report on the topic (A/CN.4/424), which contained draft articles 1 to 11.

2. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that he regretted having, for the second time, to submit a report which, owing to lack of time, would not be discussed. Yet the topic entrusted to him was of fundamental importance in view of the increasing interdependence of human groups characteristic of the second half of the twentieth century. Extraordinary technological advances, particularly in means of communication and transport, were bringing people closer together and gave them a feeling of solidarity and an awareness of belonging to one single human race. That awareness was reflected in the co-operation of States, which together were trying to solve a whole range of problems—political, social, economic, cultural, humanitarian, technical and others—the magnitude of which exceeded the capacities of the individual members of the international community.

3. In order to regulate, direct and give practical effect to their co-operation, States had recourse to the main means available to them under international law: the treaty. It was by treaty that they established the permanent functional organs, independent of themselves, which they needed to attain their objectives. In so doing, States had recognized what Mr. Reuter had called the "regulatory power" of international bodies, which enabled them to act faster and more effectively than traditional diplomatic conferences.

4. Since the Second World War, the proliferation of international organizations of a universal or regional character had helped to transform international relations. The development of the new international law was based on the multilateral co-operation of States. The new international economic law, international criminal law, environmental law and diplomatic law itself were evolving on the basis of the new multilateral relations and of the concept of inter-State co-operation, which was a consequence of the growing interdependence of the different human groups inhabiting the Earth. In the modern world, international relations were no longer the concern of States alone.

5. Every legal system logically determined the entities having the rights and duties recognized under the rules it laid down. Before the appearance of international organizations, States had been the only subjects of international law recognized as having international personality. Now international organizations also had international personality, as the ICJ had held in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, in which it had concluded that such personality should be understood to mean "capable of possessing international rights and duties".[4]

6. Such personality had many practical consequences. For example, international organizations contributed to the development of international law by observing customary rules, drawing up international agreements and adopting international norms. They could incur international responsibility, but they could also assert their rights internationally and exercise "functional protection", analogous to diplomatic protection, in respect of their officials or agents. They could also be parties to international arbitration. The regulatory provisions which denied them access to certain permanent bodies, such as the ICJ, were not consonant with the present state of the international community, or with its foreseeable development.

7. Naturally, the personality of international organizations could not be as comprehensive as that of States. In the words of the ICJ in the advisory opinion cited above: "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] Moreover, the competence of international organizations was delimited by the provisions of their constituent instruments and the general functions entrusted to them. None the less, the extent of their competence and their international personality had not only opened up new chapters in international administrative law, but had transformed the very concept of positive international law, which was no longer just a law of relations between States, but also a law of international organizations.

8. In short, it could be said that, whereas States had been the original subjects of international law and were still at the heart of international life, in which the concept of sovereignty—that essential attribute of the State—had a decisive influence, international organizations, created by the will of States, had international personality at a secondary level. As for individuals, they acquired such personality indirectly through the machinery set up by international organizations, to which individuals had access.

9. How was the expression "international organization" to be understood? In general, legal writers had welcomed a definition proposed in 1956 during the Commission's work on the codification of the law of treaties, according to which an "international organization" was "a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member States".[6] But that definition had not been accepted either by the United Nations Conference on the Law of Treaties or by subsequent codification conferences. Article 2 of the 1969 Vienna Convention on the Law of Treaties, whose sole purpose was to determine the scope of that Convention, merely stated, in paragraph 1 (i): "'international organization' means an intergovernmental organization". That definition was consistent with the terminology adopted by the United Nations, which described international organizations as intergovernmental organizations, in contradistinction to non-governmental organizations.

10. Two French jurists, Reuter and Combacau, had described an international organization as "an entity which has been set up by means of a treaty concluded by States to engage in co-operation in a particular field and which has its own organs that are responsible for engaging in independent activities".[7]

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[4] *I.C.J. Reports 1949*, p. 174, at p. 179.

[5] *Ibid.*, p. 178.

[6] Draft article 3 (*b*) submitted by Sir Gerald Fitzmaurice in his first report on the law of treaties (*Yearbook ... 1956*, vol. II, p. 108, document A/CN.4/101).

[7] See the Special Rapporteur's second report, *Yearbook ... 1985*, vol. II (Part One), p. 106, document A/CN.4/391 and Add.1, footnote 17.

11. It was interesting to note that the definitions proposed in the numerous legal and political publications dealing with the question all mentioned three constituent elements of an international organization: (*a*) the basis, consisting of a treaty which, from the legal point of view, was the constituent instrument and reflected a political will to co-operate in certain areas; (*b*) the institutional structure, which guaranteed a measure of permanence and stability in the functioning of the organization; (*c*) the means, which consisted of the functions and powers of the organization and reflected some degree of autonomy *vis-à-vis* its members. In legal terms, that autonomy was reflected in the existence of decision-making machinery which in turn reflected the organization's own will—which was not necessarily the same as that of each of its members—thereby attesting to the reality of its legal personality.

12. The 1947 Convention on the Privileges and Immunities of the Specialized Agencies did not speak of "international organizations". In article I (Definitions and scope), section 1 referred only to "specialized agencies", which it listed and to which it added "Any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter".

13. From the start of its work on the law of treaties, the Commission had adopted a pragmatic position, which was reflected in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. He had adopted the same position in his study of the present topic, in order to avoid any discussion of a doctrinal nature.

14. The first point to be noted in that context was that, in addition to the capacity to contract which intergovernmental international organizations possessed (capacity to contract, to acquire and sell movable and immovable property and to institute or be a party to legal proceedings), the United Nations and its specialized agencies enjoyed certain privileges and immunities that were recognized in general treaties and headquarters agreements, as well as in supplementary instruments. In that connection, he cited a passage from his fourth report (A/CN.4/424, paras. 27-31) and referred to the first treaty to have granted privileges to international officials—the 1826 Treaty of Panama.

15. The privileges and immunities granted to international organizations and their officials and agents were based essentially on the principle *ne impediatur officia*, the intention being to enable them to perform their duties without hindrance. According to Jacques Secretan, the basis for those privileges and immunities was the independence necessary for functions performed in the interests of the international community.

16. Although the Covenant of the League of Nations had referred to "diplomatic privileges and immunities" (Art. 7, para. 4), almost all of the instruments relating to existing international organizations had discarded that formula in favour of the principle *ne impediatur officia*. The Charter of the United Nations provided in Article 105, paragraph 1, that: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes." Paragraph 2 of the same Article confirmed that principle in the following terms: "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." The *ne impediatur officia* principle allowed privileges and immunities to be granted when the interests of the function so required and set the limits beyond which there was no need to grant them.

17. After citing paragraph 32 of his fourth report, he stressed that the privileges and immunities of international organizations and their officials were now based on solid legal instruments, which established a right unrelated to any consideration of comity. Furthermore, since international organizations could not enjoy the protection conferred by territorial sovereignty, as States could, their only protection lay in the immunities granted to them. The extent of their immunity was justified by the fact that States were political entities which pursued their own interests, whereas international organizations were service agencies, which acted on behalf of all of their members.

18. Referring to the general structure of the draft articles he was preparing, he said that, in accordance with the schematic outline proposed in his third report (A/CN.4/401, para. 34) and approved by the Commission, part I consisted of an introduction containing articles on the terms used, the scope of the draft articles and the relationship between the draft articles and the relevant rules of international organizations, and between the draft articles and other international agreements. Part II dealt with legal personality. Part III, which dealt with property, funds and assets, would be completed by a section on the archives of international organizations. Part IV would include provisions on the facilities of international organizations in respect of communications. Part V would deal with the privileges and immunities of international officials.

19. Finally, he trusted that, if it was not to be discussed at the current session, the topic of relations between States and international organizations (second part of the topic) would be considered by the Commission at its next session.

20. Mr. ARANGIO-RUIZ asked whether the Special Rapporteur could arrange for the text of his introductory statement to be circulated.

21. The CHAIRMAN said that the secretariat was at the Special Rapporteur's disposal for that purpose. He thanked him for the timely submission of his report and for the patience and understanding he had shown with respect to the constraints imposed by shortage of time.

22. Mr. ILLUECA, congratulating the Special Rapporteur on the quality of his fourth report (A/CN.4/424), which made an important contribution to the study of the topic and attested to the depth of his thinking, recalled that 14 years had elapsed since the consideration of the first part of the topic had culminated in the adoption of a convention. That instrument—the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character—drew attention, in the very first paragraph of the preamble, to the increasingly important role of multilateral diplomacy in relations between States and the responsibilities of international organizations of a universal character within the international community. In his view, that importance and those responsibilities had further increased with time, particularly for the developing

countries, and it was essential for the future of the United Nations and other international organizations of a universal character that the study of the second part of the topic be successfully completed. He therefore urged—as he would in the Sixth Committee of the General Assembly—that at its next session the Commission should devote all the necessary time to consideration of the topic.

**The law of the non-navigational uses of international watercourses (*concluded*)* (A/CN.4/412 and Add.1 and 2,[8] A/CN.4/421 and Add.1 and 2,[9] A/CN.4/L.431, sect. C, ILC(XLI)/Conf.Room Doc.4)**

[Agenda item 6]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

PARTS VII AND VIII OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

*and*

ARTICLE 25 (Regulation of international watercourses)[10] (*concluded*)

23. Mr. McCAFFREY (Special Rapporteur), continuing his introduction of chapters II and III of his fifth report (A/CN.4/421 and Add.1 and 2), containing draft articles 24 and 25 respectively, said that chapter II related to a question that would be dealt with in the final clauses, namely the relationship between non-navigational and navigational uses. It came before chapter III because it was the last of the chapters dealing with fundamental questions. Chapter III dealt with the regulation of international watercourses, one of the "other matters" which, as indicated in the outline proposed in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7), could be covered in the draft articles themselves or in annexes, since they were not fundamental questions.

24. At the next session, in accordance with the schedule for submission of remaining material set out in his fourth report (*ibid.*, para. 8), he would introduce questions relating to the management of international watercourses, the security of hydraulic installations and the settlement of disputes.

25. With regard to draft article 24—which was, of course, a provisional number—he observed that the Commission had already recognized the interrelationship between navigational and non-navigational uses in article 2, on the scope of the draft, as provisionally adopted, paragraph 2 of which—quoted in his fifth report (A/CN.4/421 and Add.1 and 2, para. 121)—showed the course to be followed. The basic point was that there was no longer any absolute priority of uses, and he referred members in that connection to the account given in his report (*ibid.*, paras. 122-124) of the demise of the priority formerly accorded to navigation.

26. Accordingly, article 24, paragraph 1, provided that neither navigation nor any other use enjoyed an inherent priority over other uses. The Commission could, of course, consider indicating, if not priorities, an order of preference in that paragraph. There was general recognition that protection of the environment and of the quality of water was assuming a particular urgency and the Commission might wish, for example, to provide some indication in the article that domestic and agricultural uses should not be foreclosed by other uses.

27. Turning to chapter III of the report, he explained that, in the context of the present topic, the expression "regulation of international watercourses" had a specific meaning, namely the control of the water in a watercourse, by works or other measures, in order to prevent harmful effects and maximize the benefits of the watercourse (*ibid.*, para. 129). That subtopic was therefore broader than that of water-related hazards and dangers, dealt with in chapter I of the report, which was concerned only with measures designed to prevent the harmful effects of water. State practice, as described in the report (*ibid.*, paras. 132-138), demonstrated the importance States attached to regulation.

28. Draft article 25 was a very modest provision—perhaps even too simple—and the Commission might at its next session consider the insertion in paragraph 1 of a provision requiring watercourse States to consult with each other, at the request of any one of them, for the purpose of regulation.

29. Paragraph 2 stated an obligation which reflected actual practice. On that point he referred members to the 1961 Treaty between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River basin.[11] That instrument was typical of the trends in that area.

30. Lastly, it was desirable that, at its next session, the Commission should allocate a sufficient number of meetings for consideration of the topic, both in plenary and in the Drafting Committee. The Drafting Committee had not in fact been able to consider the topic at the present session, although four draft articles had already been referred to it. If sufficient time were not allocated, the Commission would not be able to complete the first reading of the draft, as planned, before the end of the term of office of its current members in 1991.

*The meeting rose at 11 a.m.*

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* Resumed from the 2126th meeting.

[8] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

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

[10] For the texts, see 2126th meeting, para. 81.

[11] United Nations, *Treaty Series*, vol. 542, p. 244.

## 2134th MEETING

*Tuesday, 11 July 1989, at 10 a.m.*

*Chairman*: Mr. Bernhard GRAEFRATH

*Present*: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.