

Document:-
A/CN.4/SR.1248

Summary record of the 1248th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1973, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

Commentary to article 6
(Irrelevance of the position of the organ
in the organization of the State)
(A/CN.4/L.198/Add.7)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

44. Sir Francis VALLAT proposed that, in the English text, the words "On this view" at the beginning of the second sentence, should be replaced by "On that theory".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (17)

Paragraphs (4) to (17) were approved.

The commentary to article 6, as amended, was approved.

Section B of chapter II of the draft report, as amended, was approved.

A. INTRODUCTION (*resumed from the 1244th meeting*)

45. Mr. TORRES-BERNARDEZ (Secretariat), referring to the discussion which had arisen concerning the translation of the French expression "*mise en œuvre*" into English by "implementation" in paragraph 31 of the introduction to the chapter on State responsibility (A/CN.4/L.198),³ said that the same English rendering had been used by the Commission in its 1970 report.⁴ Perhaps, therefore, the term "implementation" might be retained in the English text and followed by the French expression "*mise en œuvre*" in brackets.

It was so agreed.

Chapter I

ORGANIZATION OF THE SESSION
(*resumed from the 1243rd meeting*)

F. LETTER FROM THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION TO THE PRESIDENT OF THE ECONOMIC AND SOCIAL COUNCIL (A/CN.4/L.200/Add.1)

46. The CHAIRMAN drew the Commission's attention to the letter he had prepared, in collaboration with the officers and former chairmen of the Commission, in response to the request received from the Economic and Social Council for comments on the report of the *Ad hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid*.⁵ The text of the letter had been compiled, after careful thought, by a group specially appointed for the purpose and presided over by Mr. Yasseen.

³ See 1244th meeting, paras. 20 and 21.

⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66 (d).

⁵ See 1201st meeting, paras. 1 and 4-6.

47. Mr. BILGE said he did not think the text before the Commission exactly answered the question which had been put to it. The African States wished to know the Commission's opinion on certain specific points.

48. The CHAIRMAN pointed out that the reasons why the Commission had confined itself to general observations were clearly stated in paragraph 3.

49. He suggested that the Commission should approve the conclusions expressed in the letter and decide to transmit it to the President of the Economic and Social Council.

It was so agreed.

Chapter I as a whole, as amended, was approved.

Chapter V

QUESTION OF TREATIES CONCLUDED BETWEEN STATES
AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO
OR MORE INTERNATIONAL ORGANIZATIONS

50. The CHAIRMAN invited the Commission to examine chapter V of its report (A/CN.4/L.201) paragraph by paragraph.

Paragraphs 1 to 7

Paragraphs 1 to 7 were approved.

Paragraph 8

51. Sir Francis VALLAT said that the question of the capacity of international organizations to conclude international agreements was one of the most important questions that had arisen during the discussion. To the best of his recollection, the Special Rapporteur had promised to prepare one or more draft articles on the subject of capacity, and he therefore proposed that a short sentence to that effect should be added at the end of the paragraph.

It was so agreed.

Paragraph 8 was approved subject to that amendment.

Paragraphs 9 and 10

Paragraphs 9 and 10 were approved.

Chapter V as a whole, as amended, was approved.

The meeting rose at 1 p.m.

1248th MEETING

Thursday, 12 July 1973, at 9.30 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Hambro, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

**Draft report of the Commission on the work
of its twenty-fifth session**

(A/CN.4/L.195/Add.3; A/CN.4/L.202)

(continued)

Chapter III

SUCCESSION OF STATES IN RESPECT OF MATTERS
OTHER THAN TREATIES (*resumed from previous meeting*)

**B. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT
OF MATTERS OTHER THAN TREATIES (continued)**

1. The CHAIRMAN invited the Commission to continue its examination of the commentaries to the draft articles on succession of States in respect of matters other than treaties (A/CN.4/L.195/Add.3), beginning with the commentary to article 6.

Commentary to article 6

(Rights of the successor State to State
property passing to it)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

2. The CHAIRMAN observed that the English and French texts of the opening phrase of the first sentence differed considerably. He proposed that the French text should be brought into line with the English translation, which conveyed the meaning better. That could be done by replacing the words “*L'article 6 donne une expression unique à*” by the words “*L'article 6 exprime en une seule disposition*”.

Paragraph (2) was approved with that amendment.

Paragraph (3)

3. Sir Francis VALLAT proposed that the final words in the penultimate sentence “... imply a break” should be expanded to read “... imply a break in continuity”.

4. The CHAIRMAN noted that that amendment would not affect the French text.

5. Mr. QUENTIN-BAXTER proposed that, in the first sentence the words “and not the more traditional notion” should be deleted; they were not really necessary.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the amendments proposed by Sir Francis Vallat and Mr. Quentin-Baxter.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

7. Sir Francis VALLAT proposed that the words “at the moment of succession” should be inserted in the third sentence after the words “Although, however,”.

Paragraph (4) was approved with that amendment.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

The commentary to article 6, as amended, was approved.

Commentary to article 7

(Date of the passing of State property)

8. Mr. USHAKOV reiterated the reservations he had made during the discussion on article 7,¹ as recorded in paragraph (7) of the commentary.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

9. Following a remark by Mr. USHAKOV, the CHAIRMAN suggested that, in the first sentence of the paragraph, the word “often” should be replaced by the word “sometimes”.

It was so agreed.

10. Mr. USHAKOV, referring to the last sentence, said it was nowhere specified that only States could agree on a date for the passing of State property other than the date of succession. The opening proviso of article 7, “Unless otherwise agreed or decided,” did not necessarily mean agreed or decided by States.

11. Following a remark by Mr. BARTOŠ, the CHAIRMAN suggested that the last sentence of paragraph (3) should be deleted.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

12. Mr. USHAKOV, referring to the first sentence, said he was not satisfied with the words “on the date at which certain State property should pass from the predecessor State to the successor State”; article 7 did not impose any obligation as to the passing of the property.

13. Mr. HAMBRO suggested that the words “should pass” be replaced by the words “had passed”.

14. The CHAIRMAN suggested the words: “what was the date of the passing”.

The Chairman's suggestion was adopted.

15. Mr. USHAKOV said the second sentence might give the impression that an international court could decide otherwise on its own initiative, whereas it was essential that the States parties to the dispute should first apply to it.

16. Mr. BARTOŠ thought that the sentence was correct, because States sometimes stipulated by treaty that in the event of a dispute an arbitral tribunal would decide the date of the passing of the property.

17. Mr. USHAKOV, referring to the last sentence, observed that, although it was true that no agreement could be signed with a former colony before the date of

¹ See 1239th meeting, paras. 22-25 and 50.

succession, it would be going too far to say that it was for an organ to determine the date of the passing of the property. It was unthinkable that a former colony, having fought for independence and won it, should then have to wait for an organ to decide the date on which State property passed.

18. The CHAIRMAN observed that it was quite conceivable that the independence of a State, having been fought for and won, should then be confirmed by a decision of an international organ, such as the Security Council.

19. Mr. AGO said that the Special Rapporteur had had in mind not so much the case in which an international organ determined the date of the passing of the property as the case in which that date was determined by the metropolitan Power. As an example, the Special Rapporteur had mentioned the Evian agreements, which were not true international agreements, and had indicated that the measures adopted on that occasion had been taken by France in the form of unilateral decisions.²

20. Mr. BARTOŠ said he was in favour of retaining the last sentence of paragraph (4) in order to convey the Special Rapporteur's idea clearly. It sometimes happened that, by mutual consent, certain property was left for a time with the predecessor State: for example, to allow it to train staff.

21. After an exchange of view in which Mr. USHAKOV, Mr. AGO, Mr. USTOR and Sir Francis VALLAT took part, the CHAIRMAN suggested that the last sentence of paragraph (4) should be deleted.

It was so agreed.

22. Mr. AGO proposed that the words "in practice", in the first sentence, should be deleted. They did not apply to State practice as usually distinguished from judicial opinion.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

23. Mr. USHAKOV found it surprising that the first sentence should expressly refer to "organs" which might be called upon to take a decision in the matter. An organization, such as the United Nations, could equally well take such a decision.

24. The CHAIRMAN explained that the sentence reflected a discussion in the Commission, in the course of which some members had expressed the hope that the commentary would indicate that the use of the word "decided" did not imply a unilateral decision by one of the States concerned, but could refer to the case in which the decision was taken by an organ such as the Security Council.³ In the context, the term "organ" had to be construed very broadly, so as to cover any international authority which might take such a decision. Obviously the term could apply to the United Nations.

² See 1232nd meeting, para. 56.

³ See 1239th meeting, paras. 21 *et seq.*

25. Mr. BARTOŠ said he was in favour of the term "organ", which applied equally well to a collegiate body and to an individual representing an organ. It was not uncommon for a treaty to specify that the date of the passing of State property would be determined, in the event of a dispute, by the President of the Swiss Federal Court or the President of the International Court of Justice.

26. Sir Francis VALLAT said that from a logical point of view Mr. Ushakov was perfectly right. He therefore proposed that the words "what organs" should be replaced by the word "who".

27. Mr. QUENTIN-BAXTER supported that proposal.

28. Mr. USHAKOV observed that the second part of paragraph (5) implied that the Commission had decided that, in principle, the date of the passing of the property could be determined by an international court. In reality the Commission had taken no decision on that point.

29. The CHAIRMAN explained that the situation resulted from the article itself, which did not specify who could decide otherwise.

30. Mr. AGO proposed that paragraph (5) should be deleted and that the following sentence should be added at the end of paragraph (4): "However, the Commission did not intend to specify from whom a decision might come".

31. Mr. QUENTIN-BAXTER said he feared that, since the preceding paragraph had been shortened, the deletion of paragraph (5) would leave the reader in the dark as to the reason for including the words "or decided" in article 7.

32. The CHAIRMAN said that, if there were no further objections, he would take it that the Commission accepted Mr. Ago's proposal.

It was so agreed.

Paragraph (6)

33. Sir Francis VALLAT proposed that the words "In their opinion" should be inserted at the beginning of the second sentence to show that it represented the views of only certain members of the Commission.

Paragraph (6) was approved with that amendment.

Paragraph (7)

34. Mr. USHAKOV proposed that the words "of the date of the passing of State property" should be inserted after the words "a definition" in the second sentence.

Paragraph (7) was approved with that amendment.

The commentary to article 7, as amended, was approved.

Text of Article 8

35. Following an observation by Mr. USHAKOV, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to reconsider the wording of the French text of article 8, in order to improve it.

It was so agreed.

36. After an exchange of views in which Mr. USHAKOV, Mr. AGO, Mr. THIAM, Sir Francis VALLAT, Mr. TSURUOKA and Mr. USTOR took part, the CHAIRMAN suggested that the words “*se faisant*” should be inserted before the word “*conformément*” in the French text of article 8.

It was so agreed.

Commentary to article 8

(Passing of State property without compensation)

Paragraph (1)

37. The CHAIRMAN suggested that the French text of the second sentence should be amended to correspond to the amended wording of article 8.

It was so agreed.

Paragraph (1) was approved subject to that amendment to the French text.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

38. After an exchange of views in which Mr. THIAM, Mr. USHAKOV, Mr. TSURUOKA and Sir Francis VALLAT took part, the CHAIRMAN suggested that the opening phrase of paragraph (3), “Although provisionally accepting the rule that State property passes without compensation”, should be deleted, in order to avoid stressing the provisional character of the acceptance or giving the impression that the other members of the Commission had accepted the rule finally.

Paragraph (3) was approved with that amendment.

Paragraph (4)

39. Mr. USHAKOV observed that the Commission had not taken any formal decision to study the questions mentioned in the second and third sentences.

40. After an exchange of views in which Mr. RAMANGASOAVINA, Mr. USHAKOV and Mr. AGO took part, the CHAIRMAN suggested that only the first sentence should be retained and that it should be amended to read: “The first subsidiary clause of article 8 reserves the rights of third parties, a question which the Commission proposes to study at a later stage”.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

The commentary to article 8, as amended, was approved.

Section B of Chapter III of the draft report, as amended, was approved.

Mr. Castañeda took the Chair.

Chapter VI

REVIEW OF THE COMMISSION'S PROGRAMME OF WORK
(A/CN.4/L.202)

Paragraphs 1 to 19

Paragraphs 1 to 19 were approved without comment.

Paragraph 20

41. Mr. AGO proposed that the words “in part” should be inserted before the words “went far back”, in the first sentence.

Paragraph 20 was approved with that amendment.

Paragraph 21

Paragraph 21 was approved.

Paragraph 22

42. Mr. TAMMES (Rapporteur) proposed that the word “only” should be deleted from the second sentence.

Paragraph 22 was approved with that amendment.

Paragraphs 23 to 26

Paragraphs 23 to 26 were approved.

Paragraph 27

43. Mr. AGO said that he could not subscribe to the philosophy set out in paragraph 27 because the Commission had always endeavoured to distinguish between criminal law relating to individuals and international criminal law. He therefore proposed that, in the second sentence, the words “the sense of the new international law was already laid down” should be replaced by the words “interest in this field was already expressed”; for as he saw it, the reference was to human rights and not to international law as a whole. He also proposed the deletion of the words “under international law” at the end of the third sentence, since he could not accept the notion of responsibility of individuals under international law; the deletion of the words “of duties and responsibilities directly under international law” in the fifth sentence; and the deletion of the whole of the last sentence, because, in his opinion, the Commission had already given a very precise definition of the concept of offences of international concern in its draft Code of Offences against the Peace and Security of Mankind.⁴

44. Mr. USHAKOV said that the last sentence was totally unacceptable, since it did not reflect the Commission's views at all. It was dangerous, in his opinion, to assert that there were offences of international concern, because individuals were responsible under internal law and not under international law.

45. Mr. TAMMES (Rapporteur) pointed out that since the early 1950s there had been an increasingly marked tendency to recognize the responsibility of individuals under international law and that it was possible to speak of “offences of international concern”, for example, in

⁴ See *Yearbook of the International Law Commission, 1954*, vol. II, p. 151, document A/2693, para. 54.

the case of *apartheid*, war crimes and crimes against the peace and security of mankind. The expression "offences of international concern" was used in chapter XVII of the Survey of International Law (A/CN.4/245).

46. Mr. BARTOŠ agreed with the Rapporteur. The Charter of the Nürnberg Tribunal and the Judgments of the Nürnberg and Tokyo Tribunals had affirmed the existence of international crimes. In his opinion, internal law could not rule out international responsibility and the rules of international law should be placed above the rules of States.

47. Sir Francis VALLAT said that, if it deleted the last sentence, the Commission would only be closing its eyes to an important problem; it should, on the contrary, recognize the existence of that problem and try to solve it. He therefore opposed the deletion of the last sentence.

48. Mr. TABIBI agreed with Sir Francis Vallat. As the Rapporteur had pointed out, as long ago as the 1950s—in the middle of the cold war—the Commission had dealt with offences of international concern by formulating the Nürnberg Principles and preparing the draft Code of Offences against the Peace and Security of Mankind. Now that close co-operation had been established between the great Powers, there was all the more reason why it should rethink the concept of offences of international concern, in the interests of the peace and security of mankind.

49. Mr. AGO agreed to the retention of the last sentence on condition that the concluding words "both of a political and of an anti-social nature" were deleted, and that the words "to rethink the whole concept of offences of international concern" were amended to read "in which to re-examine the question of offences of international concern committed by individuals", so as to avoid any possible confusion.

50. Mr. TAMMES (Rapporteur) accepted the amendments proposed by Mr. Ago, but pointed out that the concept of offences of international concern applied only to individuals, never to States, as witness the definition given in the draft Code of Offences against the Peace and Security of Mankind.

51. Sir Francis VALLAT proposed that, in the second sentence, the words "sense" and "laid down" should be replaced by the words "seed" and "planted".

52. Mr. TAMMES (Rapporteur) accepted that amendment and proposed that, in order to take into account Mr. Ago's reservations, the word "the" before the words "new international law" should be replaced by "this". He also proposed that the third sentence, and the words "of duties and responsibilities directly under international law" in the fifth sentence, should be deleted.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the amendments submitted by Mr. Ago, Sir Francis Vallat and the Rapporteur.

It was so agreed.

Paragraph 27, as amended, was approved.

Paragraph 28

54. The CHAIRMAN, speaking as a member of the Commission, suggested that it would be appropriate to add a further example of recent developments in international law. He was thinking of the acceptance by the General Assembly of the concept of the "common heritage of mankind" in relation to the sea-bed and ocean floor beyond the limits of national jurisdiction and the resources of the area.⁵

55. Mr. TAMMES (Rapporteur) said he would be prepared to include a passage on that important matter in the report. He believed, however, that it would be more appropriate in paragraph 29, in connexion with the law-making activities following after technical innovations, particularly those relating to the law of the sea, outer space and the human environment.

56. Mr. USHAKOV observed that the relevant General Assembly resolutions had only expressed an idea; they had not laid down any rules of international law. The forthcoming Conference on the Law of the Sea might perhaps formulate rules of law on the matter, but so far that had not been done.

57. The CHAIRMAN, speaking as a member of the Commission, said that the passage of the report under discussion gave an account of contemporary trends in the development of international law. It was by no means confined to a description of actual legal rules. In any case, the General Assembly resolution which had established the concept of the "common heritage of mankind" and recognized the need for institutional arrangements for the exploration and exploitation of sea-bed resources, had been adopted unanimously.

58. Mr. HAMBRO supported the inclusion in the report of a passage dealing with that important development in international law. Suitable language would, of course, have to be found in order to ensure unanimous acceptance by the Commission. The passage could state, for example, that the acceptance of new concepts such as that of the common heritage of mankind had marked an important development in international law.

59. Mr. SETTE CÂMARA said he saw some attraction in the idea of mentioning the General Assembly resolutions concerning the sea-bed. It should be remembered, however, that the whole matter was at present under consideration by other United Nations bodies, and rules of international law could be expected to emerge from that work. He thought it would be premature for the Commission to subscribe to a concept which was not yet a rule of international law, and suggested that, if a passage on the subject was included in the report, it should not mention the "common heritage of mankind".

60. Mr. TSURUOKA said that he agreed with Mr. Sette Câmara. The Commission should be careful not to appear to encourage the present tendency to extend the limits of national jurisdiction.

61. The CHAIRMAN, speaking as a member of the Commission, said that the adoption of the concept of the

⁵ See General Assembly resolution 2749 (XXV), paragraph 1.

“common heritage of mankind” had, on the contrary, the effect of restricting the extent of exclusive national jurisdiction.

62. Mr. TABIBI said he favoured the idea put forward by Mr. Castañeda. The problem was to find wording which would satisfy all the members of the Commission. The notion that the sea-bed and ocean floor and their subsoil were the common heritage of mankind constituted a genuine rule of international law. Indeed, since those areas lay under the high seas, they had belonged to all nations from time immemorial. The same was true of the resources to be found in the area. It was not possible to separate the rules governing the high seas from the General Assembly resolutions concerning the sea-bed.

63. The Organization of African Unity had adopted a declaration recognizing that the sea-bed and ocean floor, and the subsoil thereof under the high seas and beyond the limits of national jurisdiction, constituted the common heritage of mankind.

64. Mr. HAMBRO said it would be over-cautious to say that no rule of law existed on a matter on which resolutions had been adopted unanimously by the General Assembly. At its twenty-fifth session the General Assembly had solemnly adopted resolution 2750 (XXV), part A of which began with the words “Reaffirming that the area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction and its resources are the common heritage of mankind”. He therefore proposed that the Chairman and the Rapporteur should consult together and prepare, for submission to the Commission at its next meeting, a text expressing, in language acceptable to all members of the Commission, the idea that the acceptance of the concept of the “common heritage of mankind” as part of the vocabulary of international law was an indication of a certain development.

65. Mr. MARTÍNEZ MORENO supported that proposal and expressed the hope that the wording of the passage submitted to the Commission could be accepted unanimously, just as the General Assembly had adopted unanimously the concept of the common heritage of mankind not only for the sea-bed, but also for the moon and other celestial bodies. That concept had been formally endorsed by the Inter-American Juridical Committee.

66. Mr. USHAKOV observed that the question of the sea-bed had never been on the Commission’s programme of work in the past, nor was it included in the programme of future work.

67. The CHAIRMAN said he would consult with the Rapporteur on the drafting of a passage for inclusion in the report. The text would be submitted to the Commission at its next meeting.

68. Sir Francis VALLAT drew attention to the fact that the point under discussion was related not to paragraph 28, but rather to paragraph 29 or even paragraph 30.

The meeting rose at 1.10 p.m.

1249th MEETING

Friday, 13 July 1973, at 9.15 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsu-ruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-fifth session

(A/CN.4/L.202; A/CN.4/L.204)

Chapter VI

REVIEW OF THE COMMISSION’S PROGRAMME OF WORK

(continued)

1. The CHAIRMAN invited the Commission to continue its examination of chapter VI of the draft report on the work of its twenty-fifth session (A/CN.4/L.202).

Paragraph 28 (continued)

2. He announced that the Rapporteur preferred to insert at the end of paragraph 30 the text concerning the concept of the common heritage of mankind which the Commission, at its previous meeting, had requested him to submit for insertion at the end of paragraph 28.

Paragraph 28 was approved.

Paragraph 29

3. Mr. RAMANGASOAVINA criticized the words “have taken place outside the Commission’s competence”, which appeared in the second sentence; in his view it was not a question of competence. He proposed that the passage should be amended to read: “have taken place outside the Commission”.

4. The CHAIRMAN suggested that the words “The law-making activities” should be amended to read: “Certain law-making activities”.

5. Mr. TAMMES (Rapporteur) accepted those amendments.

6. Mr. USHAKOV said he could not accept the last sentence because he considered that the concept of international responsibility remained unchanged; what was changing was the concept of damage caused by certain activities.

7. Mr. USTOR associated himself with Mr. Ushakov’s reservation.

8. Mr. AGO proposed that the words “like international responsibility” in the last sentence should be deleted.

It was so agreed.

Paragraph 29, as amended, was approved.