

Document:-
A/CN.4/SR.928

Summary record of the 928th meeting

Topic:
Programme of work

Extract from the Yearbook of the International Law Commission:-
1967, vol. I

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

permanent diplomatic mission of the sending State or upon the submission of letters of credence or full powers."

46. Only a few drafting changes had been made to article 11. Speaking as a member of the Commission, he proposed that the words "or with another... organ" in paragraph 1 should be replaced by "or with the other... organ".

47. The CHAIRMAN said that there was a slight difference between the English and French texts of paragraph 1. The English text referred to "another appropriate organ" whereas the French text referred to "*un autre organe compétent*".

48. Mr. AGO said that the wording of article 11 should be brought into line with that of article 8.

49. Mr. CASTRÉN said that when article 11 was being considered, some members had proposed the deletion of paragraph 2. Since paragraph 1 determined the commencement of the functions of a special mission in a positive manner, it seemed pointless to add a clause containing a negative provision. In his opinion, paragraph 2 could be included in the commentary.

50. Mr. BARTOŠ, Special Rapporteur, said he was in favour of retaining paragraph 2. Several members had thought it necessary from the psychological point of view to specify that the commencement of the functions of a special mission did not depend upon presentation of the mission by the permanent diplomatic mission of the sending State or upon the submission of letters of credence or full powers, since certain countries placed obstacles in the way of the functioning of special missions. Paragraph 2 was therefore necessary, and could be very useful, despite its negative form.

51. Mr. AGO thought that the final phrase of paragraph 1 should read "or with the other appropriate organ agreed on".

52. Mr. BARTOŠ, Special Rapporteur, said that in some countries it was not the Ministry of Foreign Affairs that dealt with military, trade or cultural missions. In his opinion, the word "designated" could be deleted, but the words "or with the other appropriate organ in the receiving State" should be retained.

53. Mr. USHAKOV suggested that the expression used in article 8, "or such other organ as may have been agreed on", should also be used in article 11.

54. The CHAIRMAN said that the English text might be amended to read "... contact with the Ministry of Foreign Affairs or other agreed organ of the receiving State".

55. He suggested that the Commission approve article 11 in principle and refer it to the Drafting Committee for final rewording.

*It was so agreed.*⁹

The meeting rose at 1 p.m.

⁹ For resumption of discussion, see 930th meeting, paras. 92-102.

928th MEETING

Friday, 23 June 1967, at 10.45 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Organization of Future Work

(A/CN.4/195, 196; A/CN.4/L.119)

(resumed from the 917th meeting)

[Item 6 of the agenda]

1. The CHAIRMAN said that the Officers of the Commission had reached no final conclusions on the organization of future work, but had asked him to communicate their preliminary views to the Commission. The two main problems were to secure work for the Commission's next session and to establish a general pattern for the future. The Officers had considered the state of the material before the Commission. Mr. El-Erian had submitted his second report on relations between States and inter-governmental organizations (A/CN.4/195), but had not yet submitted a set of draft articles. A letter would be sent to Mr. El-Erian asking him whether there was any likelihood of his being able to provide a set of draft articles for the Commission's next session. Mr. Ago had been asked whether there was any possibility of his providing some general articles on State responsibility as a basis for discussion, but had said that that would be difficult and he would prefer to submit a fuller report, with articles, in 1969.

2. As Chairman of the Sub-Committee on Succession of States and Governments and before being appointed Special Rapporteur, Mr. Lachs had submitted a preliminary report on State succession, which was annexed to the Commission's report on its fifteenth session.¹ The General Assembly was urging the Commission to proceed with its work on that subject, which was particularly important because there were so many new States. The Commission should therefore appoint a new Special Rapporteur on State succession in place of Mr. Lachs, who had been elected to the International Court. The Officers had noted that the Sub-Committee, in its 1963 report, had advised that the subject should be dealt with under three broad headings: succession in respect of treaties, succession in respect of rights and duties resulting from sources other than treaties, and succession in respect of membership of international organizations.² Moreover, Mr. Lachs had repeated that opinion in a recent conversation with him (the Chairman). Although there were no hard and fast lines of demarcation between the three topics, the Officers had concluded that they should be treated separately, but with close co-ordination to

¹ *Yearbook of the International Law Commission, 1963*, vol. II, p. 260.

² *Ibid.*, p. 261, para. 13.

prevent differences in approach. They had considered it advisable to leave aside for the time being the topic of succession in respect of membership of international organizations, because it had affinities with the topic on which Mr. El-Erian was to report. Succession in respect of treaties, which had close connexions with the law of treaties, should be dealt with first, since that priority had been emphasized in the Sixth Committee of the General Assembly. Succession in respect of rights and duties resulting from sources other than treaties was a much broader topic, which would take longer to complete and should therefore be given second priority.

3. A telegram had been received from Mr. Bedjaoui saying that he would be prepared to act as Special Rapporteur on State succession and to submit a report at the next session. The Officers had asked him (the Chairman), as the former Special Rapporteur on the law of treaties, to act as Special Rapporteur on succession in respect of treaties, and he had agreed to submit a report with articles at the next session. The Officers had further suggested that Mr. Bedjaoui should be invited to be Special Rapporteur for the second topic, namely, State succession in respect of rights and duties resulting from sources other than treaties.

4. He invited members to comment on those preliminary suggestions by the Officers of the Commission and to give their general views on the future work of the Commission.

5. Mr. TAMMES said he had given much thought to new topics for the Commission's consideration, in the belief that a discussion on the Commission's future work was, in fact, a discussion on the future of the Commission itself; for the long-term codification and progressive development of international law should remain the prerogative of the International Law Commission, and should not be assigned to other bodies less well equipped for the task. Discussions in the General Assembly had shown that delegations were looking forward to the mention of some new topics, even though the completion of those already on the Commission's agenda might take several years. In its search for promising areas for practical work, and in taking stock of what had already been accomplished, the Commission should try to explore the whole field of public international law.

6. So far as the sources of international law were concerned, the Commission had recently completed a very far-reaching and comprehensive draft on the law of treaties, and it would be difficult to suggest another source of international law that was as wide in scope. A limited counterpart to the law of treaties could, however, be found in the topic of unilateral acts, concerning which ample research and practice were available and which greatly needed clarification and systematization. The topic covered recognition as a positive act acknowledging a given situation to be a legal situation and, conversely, protests rejecting changes in a legal situation. It also included the principle of estoppel applied by the International Court of Justice. Other unilateral acts which might possibly be dealt with in a systematic draft were proclamations, waivers and renunciations.

7. The subjects of international law had at one time been suggested as a topic in itself, but since part of the subject-matter came within the scope of relations between States and inter-governmental organizations and another part within the scope of human rights, there did not seem to be much left for new work by the Commission.

8. The study of the functions of international law would lead the Commission to the question of delimitation of the jurisdiction of States by prohibitive rules, which had been the main concern of international law before the modern law of co-ordination, co-operation, co-existence and protection had developed. What might be termed the spatial dimensions of national jurisdiction and international régimes such as the law of the sea, Antarctica, and outer space, had either already been dealt with or were being considered. Similarly, the delimitation of State jurisdiction *ratione personae* had, so far as its most urgent aspect was concerned, been reflected in the Commission's work on statelessness; but the delimitation of jurisdiction *ratione materiae*, which raised the question whether acts of foreign States could, under international law, be indirectly subjected to the judgement and scrutiny of national courts, might well be studied. The delimitation of jurisdiction *ratione temporis* was a very broad and important topic, but was largely covered by State succession. The utilization of international rivers was a topic in which territorial sovereignty and international co-operation were equally involved, and it might be appropriate to lend the authority of the Commission and of plenipotentiary conferences to what had already been done by such private bodies as the International Law Association.

9. The keystone of international law was the whole system of methods, legal remedies and sanctions covered by the term "implementation". The Commission was not in a position to do much work on arbitration, because rules on arbitral procedure had already been prepared elsewhere. Nevertheless, a specific question of practical significance had arisen in connexion with the South West Africa case, and the Commission might well take up the problem of enabling the United Nations and other international organizations to have the status of litigating parties in cases before the International Court of Justice. The legal and institutional aspects of implementation as a whole, and the consequences of legal acts, were referred to in the report of the Sub-Committee on State Responsibility quoted in Mr. Ago's note on that topic (A/CN.4/196).

10. He thought it would not be contrary to the Commission's terms of reference for it to draw up a statute for a new auxiliary body of the United Nations to study, for instance, methods of fact-finding, which the General Assembly had unanimously decided to place on the agenda for its twenty-second session. The Commission might well give the General Assembly guidance on certain underlying legal and institutional principles of fact-finding, as a contribution to the instrumentality of peace entirely independent of the other means of peaceful settlement, such as arbitration, conciliation and judicial settlement, referred to in Article 33 of the Charter.

11. Finally, pending the completion of its work on broad topics, the Commission might usefully consider less comprehensive, though important, subjects which would

not take up so much time. For instance, some aspects of the massive programme on State responsibility might be suitable for more limited, separate consideration, on the understanding that the final results would be systematized in a single codification. Incidentally, it might be wise to consider a new name for the whole undertaking, since the term "State responsibility" laid too much emphasis on the consequences of an illegal act, as against the legality of the act itself, with which most of the questions included in the programme were concerned.

12. Mr. CASTRÉN said that the two very extensive topics—State responsibility and the succession of States and Governments—included in the programme of work would occupy the Commission for several years. Other topics, such as relations between States and inter-governmental organizations, for which Mr. El-Erian was Special Rapporteur, the right of asylum and the juridical régime of historic waters, to which priority was to have been given, had not yet been taken up, apart from an introductory report on relations between States and inter-governmental organizations. The first part of Mr. El-Erian's second report (A/CN.4/195) had already been circulated, but when completed, that report would not be sufficient to provide work for the whole of the 1968 session.

13. In his view, the Commission should undertake as soon as possible a detailed study of the question of State succession in respect of treaties, as a separate topic for which a special rapporteur would be appointed. It seemed to him that Sir Humphrey Waldock, who had already examined certain aspects of the question when Special Rapporteur on the law of treaties, was particularly well qualified for that task.

14. A certain amount of preparatory work had already been done on succession of States and Governments. In 1963, the Sub-Committee on that topic had submitted a report in which it had stated that special attention should be paid to problems of succession arising as a result of the birth of new States after the Second World War, to contemporary needs and to the principles of the United Nations Charter.³ The objectives proposed in the report had been a survey and evaluation of the state of the law and practice on succession and the preparation of draft articles. The Secretariat had prepared three studies on the subject: a memorandum on the succession of States in relation to membership in the United Nations,⁴ a document on succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary,⁵ and a digest of the decisions of international tribunals relating to State succession.⁶ The Sub-Committee had subsequently requested the Secretariat⁷ to prepare three other documents: (a) an analytical restatement of the material furnished by Governments in accordance with requests already made by the

Secretariat; (b) a working paper covering the practice of specialized agencies and other international organizations in the field of succession; (c) a revised version of the digest of the decisions of international tribunals relating to State succession. Those documents should be brought up-to-date and completed, so as to facilitate the work of the future special rapporteur.

15. The Commission might request the Secretariat to draft, in consultation with the future special rapporteur, a questionnaire for all governments, which might consist of the following questions: (1) Within what limits is State succession in respect of treaties accepted? (2) Should treaties be divided into multilateral and bilateral treaties or differentiated in some other way? (3) In what circumstances did the State in question come into being and accede to independence? (4) Is the consent of the other party to a treaty required in the event of succession? (5) What is the treaty position where a State has lost some of its territory? (6) How are treaty problems affected by the creation or dissolution of unions of States? (7) What practice will be followed by the Government or State itself as regards succession in respect of treaties? The Secretariat might also ask international organizations for information about recent practice in the matter of succession in respect of treaties.

16. The programme was so extensive that the Special Rapporteur might perhaps submit a preliminary report on questions of principle, if he had not completed his draft of articles in time for the next session.

17. He was in favour of the proposal by the Officers of the Commission that the third item of the agenda for the next session should be "Succession in respect of rights and duties resulting from sources other than treaties". A special rapporteur for that topic should be appointed at once and he fully approved the appointment of Mr. Bedjaoui.

18. Mr. REUTER said it was the custom of the General Assembly to refer broad general topics to the Commission; the two topics on its programme would keep the Commission busy for years. In the past, the Commission had followed a different policy and had confined itself to drawing up what might be called guides or models of an optional character. Admittedly, such guides did not excite so much interest as the far-reaching work which the Commission was now undertaking, but the question arose whether it was right to abandon the former system in order to prepare draft conventions to which some States hesitated to accede for technical reasons or because the atmosphere was not propitious. It might be advisable for the Commission to undertake each year, in addition to those ambitious projects which it should in no circumstances lay aside, some more modest task such as the draft convention on special missions, which was of limited scope and almost certain to be brought into force.

19. Mr. BARTOŠ said he was in full agreement with Mr. Castrén. The Secretariat prepared documentation on all the subjects which the Commission was to consider, but if the topic was only taken up three or four years later, circumstances had changed; there had been developments in case law and new factors had made their

³ *Ibid.*, p. 261, para. 6.

⁴ *Yearbook of the International Law Commission, 1962*, vol. II, p. 101.

⁵ *Ibid.*, p. 106.

⁶ *Ibid.*, p. 131.

⁷ *Yearbook of the International Law Commission, 1963*, vol. II, p. 262, para. 16.

appearance. The Commission should therefore ask the Secretariat, despite the extra work entailed, to carry out further research and to send a questionnaire to States and to inter-governmental organizations. The questionnaire should be drawn up with the assistance of each of the Special Rapporteurs, who would find useful information for their reports in the replies received. Members of the Commission, for their part, should make themselves acquainted with recent developments in the subjects included in the programme of future work and examine the new factors which had arisen in practice or case law.

20. There appeared to be two schools of thought in the Commission about the long-term programme. Mr. Reuter had adopted a cautious attitude and stressed that the Commission should be wary of taking up certain topics; the members of the Sixth Committee, on the other hand, had more ambitious views and were urging the Commission to draw up rules that would help to solve the problems troubling the world. The old rules were, indeed, inadequate and new rules based on requirements or personal views had not yet crystallized. It was the duty of the International Law Commission to codify those rules, which, though legal in form, tended to produce political effects. The Commission should therefore continue its work on codification, not for reasons of prestige but in order to fulfil its obligations to the international community.

21. Mr. RAMANGASOAVINA said he approved of the proposals made by the Officers of the Commission regarding its future work. He was particularly glad that Mr. Bedjaoui had been appointed Rapporteur for the topic of succession of States and Governments. Mr. Bedjaoui's abilities were well known to the Commission and he belonged to a country which had recently become independent; consequently, he was better equipped than anyone else to consider all the aspects of the problem, which was of interest to the new States.

22. Mr. USHAKOV said that the three topics—relations between States and inter-governmental organizations, State responsibility, and succession of States and Governments—would provide an amply sufficient programme of work for the next few years.

23. He would like to know exactly what work had been entrusted to the Chairman and Mr. Bedjaoui in connexion with the preparation of the report on the succession of States and Governments.

24. The CHAIRMAN explained that the intention of the Officers was that he himself should submit to the Commission, at its next session, a report with draft articles on State succession in respect of treaties. The Special Rapporteur for the second topic of the succession of States and Governments would have to examine a wide variety of questions; the intention was that Mr. Bedjaoui should submit a general report to the Commission at its next session. The Commission would discuss that report and issue directives as to particular aspects of the subject which should be covered in the second topic.

25. Mr. USHAKOV said that the Commission should obtain Mr. Bedjaoui's consent before asking him to submit a general report at the next session.

26. Mr. JIMÉNEZ de ARÉCHAGA explained that Mr. Bedjaoui would be free to determine the scope of the report which he would submit to the Commission at its next session. The recommendation of the Officers was not intended to restrict his authority dealing with the topic, but merely to give him some indication of what the Commission expected from him for the following year.

27. Mr. KEARNEY expressed his appreciation to the Chairman for having agreed to act as Special Rapporteur for succession of States and Governments in respect of treaties. The Chairman's willingness to accept that task after his extensive work on the law of treaties over the past five years was of great importance to the Commission and would ensure that it had before it sufficient material to occupy the whole of its next session.

28. The over-all proposals made by the Officers of the Commission seemed to him to show a very reasonable approach to its work. As to the Commission's procedures on the scheduling of its work, however, he wished to express his concern in the light of the experience of the present session. The Commission should so arrange its work as to ensure that it always had a sufficient backlog of material on which to work at any given moment.

29. Mr. AGO said that, although some of the suggestions made were very attractive, members of the Commission should resign themselves to drawing up an order of priorities for the subjects to be included in the long-term programme. The codification of international law was a long-term task. The Commission should take into account the new situation resulting from the wholesale entry into the international community of new States which rightly or wrongly called in question the content of classical international law. Those new States had the impression that they had not played a sufficient part in the formation of international law and it was therefore necessary to review its basic rules so that it might gain general acceptance. With that end in view, the Commission should concentrate on the main branches of international law and if necessary leave aside certain questions which, though of great interest, were less important. It was encouraging to know that the General Assembly fully supported that programme. Despite the understandable misgivings of certain States, the Commission should also for the time being abandon its traditional method of drawing up model rules and instead devote itself to the codification of international law by means of international conventions, with a view to adapting international law to the needs of the contemporary world.

30. The General Assembly had frequently recommended the Commission to consider the topic of State responsibility. In the reports and in the draft initially submitted,⁸ however, the question had been considered from the point of view of the treatment of aliens and of the responsibility of States for injuries on their territory to the person or property of aliens, and that had given rise to serious difficulties. In 1962 the Commission had decided to consider the general principles of international responsibility proper, in other words the situation resulting from

⁸ See volume II of the *Yearbook of the International Law Commission* for the years 1956-1961.

the infringement of an international obligation of whatever kind. The Commission had adopted unanimously the conclusions submitted to it by the Sub-Committee it had set up to study the question.⁹ Now that the Commission had a new membership, he would like to know whether it confirmed the instructions then given to the Special Rapporteur, so that he would be sure of continuing his work on the topic with the full support of the other members.

31. The Commission had decided¹⁰ that, after completing its study of the law of treaties, it would give priority to State responsibility and State succession. In his view those two topics should still have absolute priority.

32. Later, the Commission should also turn its attention to other topics, such as relations between States and inter-governmental organizations. Another topic that should be borne in mind was that of unilateral acts, to which Mr. Tammes had referred. The Commission might also be requested by an appropriate organ of the United Nations to give its opinion on topics such as international bays, international rivers and international straits. In any case, the future programme could be reviewed at meetings from time to time.

33. So far as the short-term programme was concerned, his view was that in 1968 the Commission should consider the topic of State succession in respect of treaties. As that topic was linked with the problem of codifying the law of treaties, the Commission should prepare a report on it with a view to the two forthcoming international conferences on the law of treaties, and he was particularly grateful to the Chairman for having undertaken to prepare such a report.

34. He hoped to submit his report on State responsibility in 1969. Mr. Bedjaoui's report on State succession might also be included in the programme for 1969. If Mr. Bedjaoui wished, he could of course submit in March 1968 a first report on that part of the law of State succession which he had been asked to study. The Commission would then make a preliminary study of it and give Mr. Bedjaoui instructions for the preparation of the final report to be submitted in 1969.

35. Mr. USHAKOV drew attention to paragraph 6 of Mr. Ago's note on State responsibility (A/CN.4/196) in which it was stated that the questions set out in the programme of work "were intended solely to serve as an *aide-mémoire* for the Special Rapporteur when he came to study the substance of particular aspects of the definition of the general rules governing the international responsibility of States, and that the Special Rapporteur would not be obliged to pursue one solution in preference to another in that respect". He personally had some doubts about the programme of work and he therefore thought it would be preferable to consider the report rather than the programme itself, as the programme was merely an *aide-mémoire*.

⁹ *Yearbook of the International Law Commission, 1963*, vol. II, p. 224, para. 55.

¹⁰ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev. 1, part II, para. 74.

36. With regard to paragraph 5 of Mr. Ago's note, he agreed with those members of the Commission who had felt that emphasis should be placed on State responsibility in the maintenance of peace.

37. As far as the report on State succession was concerned, he would once more urge the Commission to consult Mr. Bedjaoui before coming to a final decision.

38. Mr. BARTOŠ said that the new topics proposed by members of the Commission should be mentioned in the report.

39. The CHAIRMAN said that the Officers of the Commission might, at a forthcoming meeting, explain in greater detail the proposed division of the topic of succession of States and Governments.

40. When the Commission resumed consideration of item 6 of the agenda, it would also be called upon to confirm the directives it had given to the Special Rapporteur on State responsibility, concerning the general manner of dealing with that topic.

41. He suggested that Mr. Tammes should also take that opportunity of submitting more definite proposals on possible new topics, giving some indication of his own preferences and the reasons for giving priority to one or more of those new topics.

42. For the time being, he understood that the proposals put forward by the Officers of the Commission had been found broadly acceptable.

43. A letter would be written to Mr. Bedjaoui informing him of the views of the Officers of the Commission and requesting him to say whether he accepted the proposal that he should be Special Rapporteur on the second topic. The Commission would resume its discussion of item 6 of the agenda after it had received a reply from him.¹¹

The meeting rose at 12.35 p.m.

¹¹ For resumption of discussion, see 929th meeting, paras. 62-81.

929th MEETING

Tuesday, 27 June 1967, at 10.5 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the 927th meeting)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(resumed from the 927th meeting)

1. The CHAIRMAN invited the Second Vice-Chairman to introduce the Drafting Committee's proposals for