Document:-
A/CN.4/SR.1243

Summary record of the 1243rd meeting

Topic:
<multiple topics>

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

56. The question of agreements concluded by subsidiary organs was also governed by the internal law of the organization, on which any rule on the subject should be based.

The meeting rose at 1 p.m.

1243rd MEETING

Friday, 6 July 1973, at 9.40 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

(continued)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion and present his conclusions.

2. Mr. REUTER (Special Rapporteur) said he inferred from the discussion that the Commission wished him to continue his work and submit to it, at its next session, a third report containing the beginning of a set of draft articles. He was glad to be able to speak henceforth as a rapporteur, that was to say, as one responsible for expressing no longer his own ideas, but those of the Commission. The following seemed to be the gist of the exchange of views that had taken place.

3. So far as method was concerned, the Commission had generally approved the method followed so far and had agreed that it should continue to be applied in the immediate future. The Secretariat would therefore be asked to transmit his second report and the summary records of the discussion on it to the organizations which had furnished information and to those which had not yet done so, requesting them to comment on the second report in the same way as on the first. The Secretariat would also point out to the organizations that it was desirable that they should authorize the Special Rapporteur to publish the information which they furnished or had furnished, after amending or amplifying it, if necessary, according to their instructions. The organizations should also be asked for information on new points, in particular the point raised by Mr. Kearney and Mr. Ustor concerning the distinction between agreements which were international agreements proper and those which were really contracts.

4. The theoretical answer to that question was simple: agreements which were subject to public international law were international agreements; those which were subject to any other rule of law, whether internal or transnational, were not. As to the distinction made in fact, however, it would be useful to have some information on the practice of the organizations in a matter which affected their finances, their premises and their supplies; if any conclusions could be drawn from that information, he would put them before the Commission, which would decide whether they could form the subject-matter of a draft article. In addition he would ask the Secretariat to see whether any of the constituent instruments of the international organizations, especially the United Nations, contained provisions which expressly limited the organization's capacity. That seemed to be the case with certain international commodity agreements; but generally speaking the capacity of organizations was governed by practice.

5. With further reference to method, he wished to reply to some suggestions which had been made. Mr. Ustor had asked whether the Special Rapporteur might not be able to extend the scope of this study by recourse to data processing. Computerized studies of treaties in general had been made in the United States and in some European universities and were of great interest of purposes of political science, but it was questionable whether the results they could provide would be of immediate interest for the Commission's study and whether the United Nations would be prepared to meet the cost, which would be very high. However, he would consult the Secretariat on that point.

6. Mr. Tsuruoka had said that he would send him comments in writing on his second report. Generally speaking, he was greatly in favour of the practice of submitting written observations and he invited members of the Commission who had been unable to participate in the discussion, or who had had to confine their remarks to essentials, to adopt it if they thought it important to draw his attention to any particular point. Despite the extra work it entailed, that method was one to be recommended for the Commission's future work.

7. He agreed with Mr. Hambro that it was highly desirable that all the members of the Commission should be familiar with the comments which the international organizations had sent him, and he would ask them to authorize publication, if necessary in an amended form.

8. Several members of the Commission, including Mr. Tabibi, had suggested that the legal advisers of the international organizations should take part in the Commission's discussions as observers. That would be a most judicious way of giving effect to General Assembly resolution 2501 (XXIV), which recommended the Commission to study the question in consultation with the principal international organizations. The time would even come when their participation would be essential. However, those concerned would obviously have to be consulted informally beforehand, and he and the Commission would have to be absolutely sure of their conclusions and their respective positions before engaging in a "confrontation" of that kind. For the moment, it was no more than a possibility to be considered for the

future. The time to exploit that possibility would have to be decided in due course, with the greatest circumspection.

9. On one important point, which concerned the actual definition of the topic, almost general agreement had been reached and the Commission thus appeared to have taken a decision: the studies and the draft articles were to be based on the definition of an "international organization" given in article 2 of the Vienna Convention on the Law of Treaties. Some members, however, had qualified their position. Mr. Hambro and Mr. El-Erian wished a distinction to be made in certain articles between universal organizations and regional organizations. He would certainly bear that comment in mind, as well as the question raised by Mr. Ushakov, namely, whether the same rules were applicable to agreements concluded between organizations as to agreements concluded between States and organizations, or whether there were separate rules for each kind of agreement. He could say at once that the rules differed on at least one point: the provisions of article 7 of the Vienna Convention, concerning full powers, were applicable to agreements concluded between States and organizations, but not to agreements concluded between organizations.

10. With further reference to the definition of the topic, although the members of the Commission had, in general, considered that a set of draft articles, if any, should follow the general structure of the Vienna Convention, some of them, including Sir Francis Vallat, had wondered how far that Convention should be strictly adhered to, and had expressed the view that the Special Rapporteur should have some degree of latitude. It would clearly be absurd to depart without reason from such a "miraculous" instrument as the Vienna Convention, but if it proved necessary that must be done. All the members of the Commission seemed to share that view.

11. As to the questions of agreements concluded by subsidiary organs, participation by an international organization in a treaty concluded on behalf of a territory it represented, and agreements concluded between organs of the same organization, which he had raised in his second report, the Commission had considered, as he did, that they were not yet ripe for study and should not be pursued further, either with the organizations or in the Commission's work. He wished to stress two points, however. First, it was desirable that international organizations should always state on whose behalf an agreement was concluded—who committed whom—but it would not be advisable to lay down such a condition in an article at once, because it might at present be convenient for the international organizations to be indefinite about the identity of the parties, as, for instance, in the case of Namibia. It would therefore be preferable to leave the matter aside.

12. The second point concerned representation of a State by an organization and representation of an organization by another organization. The members of the Commission had generally agreed that, to the extent that the Vienna Convention had not settled those questions, they should be shelved. Mr. Ushakov had observed that, under the Vienna Convention, representation might be by an organ, but not by a person. But article 7 of the Vienna Convention, concerning full powers, referred to persons. In that connexion the Commission had appeared doubtful whether a sufficiently general practice yet existed to show what persons were authorized, in virtue of their functions, to represent an international organization. Mr. Yasseen had expressed the opinion that it would be difficult to legislate on a matter which involved the practice, since in any case, for the time being at least, that practice respected the independence of the organizations. The question therefore remained open and he would examine it again to see whether he could formulate any proposals.

13. On the question of the capacity of international organizations to conclude treaties, three schools of thought had emerged. The first not only wished the future draft to include articles on the capacity of international organizations to conclude treaties, but wished those articles to be based on the idea that such capacity was inherent in an international organization. That amounted to making the international community into an instrument which attributed competence and conferred capacity to conclude treaties on new subjects of law, merely by virtue of their existence. Although he had said in his second report (A/CN.4/271) that he was not in favour of an article on capacity, he nevertheless considered that first school of thought to be that of the future.

14. The second school, corresponding to the position taken by Mr. Ushakov, held that as the topic under study concerned the agreements of international organizations and those agreements existed, the Commission was not called upon to pronounce on the capacity of the organizations to conclude them, which was another subject for study. A similar position had been taken by Mr. Quentin-Baxter, who considered that a provision on capacity would constitute a kind of disguised definition of an international organization, while Mr. Yasseen had taken the view that the practice of the international organizations constituted their sphere of independence and must be fully respected, and that if the Commission attempted to regulate the matter it might encroach upon that independence.

15. The third and last school of thought was in favour of introducing one or more articles on capacity into the draft, but wished their formulation to stop short of the idea of inherent capacity.

16. The conclusion he draw from the discussion, therefore, was that he should propose one or more draft articles on capacity. He would accordingly abandon the opinion he had expressed in his second report, propose a choice of wording accompanied by commentaries, and try to work out solutions acceptable to as many members of the Commission as possible.

17. As to the effects on third parties of certain agreements concerning international organizations, two kinds of agreement had been envisaged: agreements between States and agreements between organizations. As to agreements between States, in so far as they created new rights and duties for an organization not a party to them, Mr. Ushakov had said that they were outside the scope of the topic under study. That objection could perhaps be disposed of if it were acknowledged that, as provided in the Vienna Convention, an agreement could

produce effects for third parties by virtue of a collateral agreement. The collateral agreement, however, would be concluded between an organization and States and, consequently, would not come under the Vienna Convention; it would therefore fall directly within the topic under study. In any case, the majority of members of the Commission had agreed that the provisions of the Vienna Convention on that point should be transferred and that it was for him to do so.

18. Mr. Tammes had dwelt on the question of agreements between international organizations and their effects on member States, and seemed to have been thinking of the privileged situation in which an international organization was entitled to legislate on behalf of its member States, as in the case of a Customs union. In such cases, given that the organization was entitled to conclude international agreements, those agreements must of necessity be binding on the member States. He hoped to find a reasonable and universally acceptable solution to that problem without departing too far from the machinery of the Vienna Convention, which the Commission had taken great pains to elaborate, although in his opinion that machinery was not entirely satisfactory; for instance, an international organization was not a third party in relation to its constituent instrument.

19. In conclusion, he thought he would be able to prepare a short set of draft articles without undue delay. He hoped that the topic would be one which could be disposed of quickly. That would show that the Vienna Convention, which remained the Commission's masterwork, was made to last and to extend its influence.

20. Mr. AGO expressed his admiration for the way in which the Special Rapporteur had dealt with his topic. He himself considered that the framework of the Vienna Convention should be adhered to as closely as possible. In addition to the reasons given by the Special Rapporteur, it should be remembered that the Vienna Convention and the convention which might one day result from the Special Rapporteur's work would have to complement each other and would be applied together. Consequently, in dealing with the treaties of international organizations, no departure should be made from the Vienna Convention except where absolutely necessary.

21. The Special Rapporteur still had a long and arduous task before him, owing to the great differences which divided treaties concluded between States from treaties to which international organizations were parties. Those differences appeared in many matters: in particular, the conclusion of treaties, and in general, the whole subject-matter of part V of the Vienna Convention, which dealt with invalidity, termination and suspension of the operation of treaties. All the situations contemplated in that part of the Convention would have to be reviewed. The notions of error, coercion and corruption were difficult to accept in regard to treaties concluded by international organizations. The provisions of the Vienna Convention concerning fundamental change of circumstances, *jus cogens* and the settlement of disputes could not be applied as they stood to the treaties of international organizations. As to the capacity of international organizations to conclude treaties, it certainly seemed that a residuary rule would be necessary, even though a general rule was perhaps in process of formation.

22. Like the Special Rapporteur, he wished to emphasize the rapid expansion of international organizations and the growing number of treaties they were concluding; those treaties were less and less of an exception, and it was important that the Commission should take account of the foreseeable trend in that direction.

23. The CHAIRMAN declared the discussion on item 4 of the agenda closed.

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

(A/CN.4/L.198; A/CN.4/L.200)

Chapter I

ORGANIZATION OF THE SESSION

24. The CHAIRMAN invited the Commission to examine chapter I of its draft report (A/CN.4/L.200) paragraph by paragraph.

Paragraphs 1-5 were approved.

Paragraph 6

25. Mr. BARTOŠ suggested that, at the end of paragraph 6, it should be mentioned that two small groups, each composed of three members of the Commission, had been set up, one to study the question of *apartheid* from the point of view of international criminal law and the other to consider the commemoration of the Commission's twenty-fifth anniversary.

It was so agreed.

Subject to that addition, paragraph 6 was approved.

Paragraphs 7-10 were approved.

Chapter II

STATE RESPONSIBILITY

A. Introduction (A/CN.4/L.198)

Paragraphs 1-11 were approved.

Paragraph 12

26. After a brief exchange of views in which Mr. HAMBRO, Mr. AGO (Special Rapporteur), Mr. Ustor, the Chairman, Mr. Sette Câmara, Mr. Bartoš and Mr. Kearney took part, the Chairman proposed the deletion of the second sentence of paragraph 12, reading: "All the members of the Commission present at the twenty-first session participated in the discussion", which was not strictly accurate. He pointed out that if a statement of that kind was approved, it would also have to be made in other parts of the report.

The Chairman's proposal was adopted.

Paragraph 12, as amended, was approved.

Paragraphs 13 and 14 were approved.

Paragraph 15

27. After a brief exchange of views, in which Mr. Hambro, Mr. Bartoš, Mr. Tsuruoka and Mr. Ago (Special Rapporteur) took part, the CHAIRMAN noted that the members of the Commission were in favour of retaining the words "Because of the limited time at its disposal" at the beginning of paragraph 15, to emphasize that the Commission's sessions were not long enough.

28. He suggested that, after the reference made in paragraph 15 to particular meetings, the session at which those meetings had taken place should be mentioned in brackets.

It was so agree.

Subject to that addition, paragraph 15 was approved.

Paragraph 16 was approved.

Paragraph 17

29. The CHAIRMAN asked the Secretariat to check whether the General Assembly, in its resolution 2634 (XXV), had not stressed the urgency of the need to continue the work on State responsibility. If so, that urgency should be mentioned in paragraph 17.

Subject to that addition, if necessary, paragraph 17 was approved.

Paragraphs 18-20 were approved.

Paragraph 21

30. The CHAIRMAN suggested that paragraph 21 should be divided into two separate paragraphs, one relating the events of 1971 and the other to those of 1972.

It was so agreed.

Paragraph 21, as amended, was approved.

Paragraphs 22 and 23 were approved.

Title of section 2

31. Mr. TSURUOKA proposed that the concluding words of the title, "now being prepared", should be deleted, as they were unnecessary.

32. Mr. AGO (Special Rapporteur) accepted that proposal. The shorter title "General remarks on the draft articles" was sufficient.

The title of section 2, as amended, was approved.

Paragraph 24

33. Mr. KEARNEY proposed that, in the last sentence, the word "codification" should be deleted. The possibility should not be ruled out that the convention which would emerge from the draft articles might contain elements of progressive development as well as codification.

34. Mr. AGO (Special Rapporteur) said that he had no objection to the proposed deletion, although he maintained that codification always involved some element of progressive development.

Paragraph 24 was approved with the amendment proposed by Mr. Kearney.

Paragraph 25

35. Mr. KEARNEY proposed that, in the English text only, the second sentence should be split into two sentences by deleting the conjunction "but" and substituting a full stop for the semicolon.

It was so agreed.

Paragraph 25, as amended, was approved.

Paragraph 26

36. Mr. KEARNEY said he had two remarks to make on paragraph 26 which touched to some extent on substance.

37. In the first place, in view of the further discussion which had taken place in the Commission he thought the term "responsibility" should be used only in connexion with internationally wrongful acts and that, with reference to the possible injurious consequences arising out of the performance of certain lawful activities, the more suitable term "liability" should be used. He therefore proposed that before the words "for possible injurious consequences", in the second sentence of paragraph 26, the word "responsibility" should be replaced in the English text by the word "liability".

It was so agreed.

38. Mr. AGO (Special Rapporteur) said that the change was pertinent so far as the English text was concerned. The word "liability" implied the necessity to make reparation and was therefore the right word in that context; "*responsabilité*" appeared to be the only word available in French to express both notions.

39. The CHAIRMAN pointed out that the difference between the concept of responsibility for internationally wrongful acts and that of liability for the injurious consequences arising out of certain lawful, but hazardous activities, was made clear in the rest of the paragraph. Indeed, the penultimate sentence specifically stated that it was "only because of the relative poverty of legal language" that the same term was habitually used to designate both responsibility for wrongful acts and liability for the consequences of certain lawful activities.

40. Mr. KEARNEY said that his second remark related to the words "definitively prohibited" in the second sentence. Those words were very obscure. It should be remembered that, in certain cases, dangerous activities might be merely regulated, rather than totally prohibited.

41. Mr. AGO (Special Rapporteur) said that the second sentence was intended to take into account a remark by Mr. Kearney to the effect that certain activities were halfway between the lawful and the wrongful. It was true that rules of international law, especially customary rules, applied to activities that had been lawful before becoming wrongful. For instance, before the 1963 Treaty, nuclear tests had been considered lawful. At the present time, underground tests had not yet been prohibited, though they could not really be regarded as lawful. The words "not yet... definitively prohibited" were intended to reflect that trend.

42. Mr. SETTE CÂMARA pointed out that an activity could be regulated in such a way that, if it was performed

in breach of the regulations, the legal consequences would be the same as if it was prohibited.

43. Mr. RAMANGASOAVINA suggested that reference should be made to "activities not yet regulated by international law", without specifying whether the regulation entailed prohibition or authorization.

44. Mr. AGO (Special Rapporteur) observed that the effect of a regulation was to make an activity lawful when it was performed in a certain way and wrongful when it was performed in another way. For example, the transport of oil was regulated in such a way that it was lawful in certain cases and wrongful in others, in which responsibility was consequently incurred.

45. Mr. KEARNEY said that, where an activity was regulated, the problem which arose could be a matter of degree. A distinction had to be drawn between prohibited activities and activities which implied the assumption of a risk. The whole problem was that of drawing the dividing line between primary obligations and secondary obligations.

46. Mr. HAMBRO said he thought the purpose of paragraph 26 was to reflect the discussion in the Commission on the important question of what might be called the "moving frontiers" between lawful and wrongful acts. As a result of legal developments, certain actions which were at present lawful might soon become wrongful.

47. The CHAIRMAN speaking as a member of the Commission, said that it might perhaps be better to use a less categorical formula than "activities which international law may not yet have definitively prohibited". Those words were followed by a number of examples, such as activities in the atmosphere and in outer space. Many international lawyers believed that certain activities coming under those headings were already prohibited by contemporary international law.

48. Mr. AGO (Special Rapporteur) proposed that a clear distinction be made between responsibility for an internationally wrongful act and the obligation to stand surety for the possible consequences of lawful activities and other activities which, for the time being, were still lawful, but were on the point of being prohibited.

49. Mr. YASSEEN suggested the wording "activities which are still lawful, but particularly dangerous".

50. Mr. SETTE CÂMARA suggested the wording "certain activities not yet considered illicit under general international law".

51. Sir Francis VALLAT said that he would have no objection to that change of language, but was concerned at the examples given and the controversy surrounding some of them.

52. The CHAIRMAN, speaking as a member of the Commission, said he understood that concern. He suggested that the difficulty be overcome by deleting the words "such as certain maritime activities, activities in the atmosphere or in outer space, and nuclear and other activities, particularly in connexion with the protection of the environment".

53. Mr. KEARNEY supported that suggestion and proposed that the preceding words "or activities which international law has not yet definitively prohibited" should be replaced by the words "such as those which because of their nature give rise to special hazards".

The meeting rose at 11.50 a.m.

1244th MEETING

Monday, 9 July 1973, at 3.15 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, 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, Mr. Yasseen.

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

(A/CN.4/L.198)

(continued)

Chapter II

STATE RESPONSIBILITY

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the introduction to chapter II of its draft report (A/CN.4/L.198).

A. INTRODUCTION

Paragraph 26 (continued)

2. The CHAIRMAN reminded the Commission that at the previous meeting, on Mr. Kearney's proposal,[1] it had agreed to replace the word "responsibility" by the word "liability" in the English text of the second sentence, where it related to the consequences of lawful activities.

3. Mr. AGO (Special Rapporteur) proposed that, in the French text, the words "*la responsabilité pour*", in that passage, should be replaced by the words "*l'obligation de réparer*".

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted that proposal.

It was so agreed.

5. The CHAIRMAN reminded the Commission that at the previous meeting Mr. Kearney had also proposed that the last part of the second sentence, from the words "or activities which", should be replaced by the words "such as those which because of their nature give rise to special hazards".[2]

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[1] See previous meeting, para. 37.

[2] *Ibid.*, para. 53.