Document:-
A/CN.4/SR.1586

Summary record of the 1586th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1980, vol. I

1586th MEETING

Wednesday, 7 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Tribute to the memory of Mr. Alfred Verdross

1. The CHAIRMAN said it was his sad duty to report with deep regret the death on 27 April 1980 of Professor Alfred Verdross, a former member of the International Law Commission.

2. Among his many other achievements, Mr. Verdross had been a trusted adviser of the Austrian Government; an accomplished diplomat; professor emeritus and doctor *honoris causa* of the Universities of Frankfurt, Paris, Salamanca, Vienna, Salzburg, Salonika and many others; a member of the European Court of Human Rights and of the Permanent Court of Arbitration; and the recipient of honours from many Governments. He had influenced the development of international law and legal philosophy not only through a long and distinguished career of public service, but also and, perhaps more lastingly, as a teacher of students from Austria and many other countries throughout the world.

3. Mr. Verdross had been a member of the Commission from 1957 to 1966 and had made a substantial contribution to the elaboration of the Commission's draft on diplomatic relations and immunities. He had been elected President of the United Nations Conference on Diplomatic Intercourse and Immunities, which was held in Vienna in 1961, a high responsibility which he had fulfilled with authority and fairness.

4. The passing of Professor Verdross removed a friend from the Commission's midst and was a great loss to legal philosophy and to the legal profession.

On the proposal of the Chairman, the members of the Commission observed a minute of silence.

5. Mr. VEROSTA thanked the members of the Commission for the condolences they had expressed on the death of Professor Verdross, with whom he had worked for many years. Professor Verdross had made valuable contributions to the development of international law and was the author of many learned publications. His interest in the philosophy of law had led him to conduct research on the law of classical antiquity and to follow the course of human thought throughout the centuries. His work on the occidental philosophy of law, its fundamentals and main problems[1] had brought him wide acclaim.

6. The CHAIRMAN invited Mr. Nettel, Permanent Representative of Austria to the United Nations Office and specialized agencies at Geneva, to address the Commission.

7. Mr. NETTEL (Austria) thanked the members of the Commission for their tribute to the memory of Professor Verdross. He would convey the Commission's condolences to Professor Verdross's family and to the Austrian Government.

Entry into force of the Vienna Convention on the Law of Treaties

8. The CHAIRMAN said that the Vienna Convention on the Law of Treaties, of 23 May 1969,[2] had entered into force on 27 January 1980. The Convention was a major instrument which would be one of the most enduring and the matrix of other developments in the field of treaty law, including the law concerning treaties concluded between States and international organizations or between two or more international organizations.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 61 (Supervening impossibility of performance)[3] (*concluded*)

9. Mr. FRANCIS said that he had no objection to the wording of draft article 61, which could be referred to the Drafting Committee. He did, however, have a few comments to make as a result of some of the points raised at the preceding meeting.

10. He considered that if the Commission found any obvious ambiguities in the text of the Vienna Convention[4] it was duty bound to adapt the wording of that text to the subject-matter under consideration. In that connexion, he agreed that the commentary to the

[1] *Abendländische Rechtsphilosophie* (Vienna, Springer, 1958).

[2] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

[3] For text, see 1585th meeting, para. 4.

[4] See 1585th meeting, foot-note 1.

articles was the place in which such adaptations should be explained. He was not sure, however, whether the case mentioned by Mr. Ushakov of financial difficulties of an international organization could be dealt with in that way. In his own opinion, article 61 adequately covered the question of the impossibility of performance. Since all the eventualities could not be foreseen in advance, it would be presumptuous of him to suggest that the financial issue was not covered by the provisions of draft article 61, but he would suggest that that situation could also be covered by article 62,[5] paragraph 4. Indeed, he would venture to say that the situation that had arisen in 1978 when a member State had withdrawn from the International Labour Organisation, or the hypothetical situation in which the States Members of the United Nations withheld their financial contributions for a certain time, thus throwing the finances of the Organization into disarray, could be covered either by draft article 61 or by draft article 62, because neither of those two situations could be said to have been created by the organizations in question.

11. Mr. ŠAHOVIĆ said that the Special Rapporteur had been right to reproduce, unchanged, the text of article 61 of the Vienna Convention. In the first place, that article codified a general rule and, secondly, while the Vienna Convention need not be regarded as a sacrosanct instrument, it was beyond question an important element in international law as a whole.

12. There was no reason to preclude the possibility of the rule laid down in article 61 being applied to international organizations, since the Commission had recognized the treaty-making capacity of such organizations. The mode of operation of the rule could simply be discussed in the commentary, due consideration being given to the special position of international organizations as subjects of international law. However, the Commission should not overemphasize the possible limitations of the application of the rule to international organizations. The Commission might cite examples of the application of that provision, though without differentiating between treaties in such a way as to rob the rule of its generality.

13. In explaining the concept of the permanent disappearance or destruction of an object indispensable for the execution of the treaty, the Special Rapporteur had said that the object must be a physical one. Yet, he (Mr. Šahović) thought that the rule in article 61 might conceivably also be invoked in the case of the disappearance of a legal situation, regardless of whether the relevant treaty was between States, between States and organizations, or between two or more organizations. For example, treaties relating to Trust Territories had been concluded between the United Nations and certain States. When those Territories ceased to be subject to the regime of trusteeship, the Organization ceased to be bound to perform the obligations arising under such treaties.

14. It was probably not desirable to stress the concept of *force majeure*, although it might be the reason for the impossibility of performance. In drafting the Vienna Convention, both the Commission and the United Nations Conference on the Law of Treaties had taken traditional institutions as their basis but had refrained from referring to them by name, preferring to leave their identity to be established by practice and doctrine. While *force majeure* was admittedly the underlying concept of article 61, that concept was nevertheless more closely akin to the area of State responsibility.

15. Mr. BARBOZA said he agreed with other members of the Commission that draft article 61 as proposed by the Special Rapporteur should be adopted. His reason was that, as Sir Francis Vallat had pointed out (1585th meeting), it was the Commission's task to follow the text of the Vienna Convention as closely as possible and to depart from it, when necessary, only when required to by differences between States and international organizations.

16. Although he fully agreed with Mr. Šahović that it was better not to reopen the discussion of the substance of questions already discussed at the Conference on the Law of Treaties, he wondered why draft article 61 referred exclusively to the case of "the permanent disappearance or destruction of an object indispensible for the execution of the treaty". It appeared from the discussion held at the preceding meeting that that case was really one of *force majeure*. He suggested, therefore, that the Commission might refer directly to article 31 of its draft on State responsibility.[6]

17. He further agreed with Mr. Šahović that the disappearance or destruction of an object might not be due exclusively to *force majeure*. For example, what would happen if a State that was to use a certain object to execute a treaty destroyed the object as a result of a state of necessity? In his opinion, article 61, paragraph 2, would not apply in such a case. Another case might be imagined in which a State deliberately destroyed an object indispensable for the execution of a treaty and offered another similar object for that purpose. That case could also not be considered one of *force majeure*, but rather as a typical case of destruction or disappearance of the object coming under the law of treaties, and not under that of State responsibility in general.

18. At the previous meeting, Mr. Ushakov had raised the question whether, under draft article 61, States and international organizations were equal for the purposes of the treaty. In his (Mr. Barboza's) opinion, there was no doubt that they were, since the draft

[5] See para. 33 below.

[6] See 1585th meeting, foot-note 2.

article under consideration referred to the "object" indispensable for the execution of the treaty and not to the "subject" of the treaty, whether referring to States or to international organizations. Neither States nor international organizations could comply with the treaty if an object indispensable to that compliance had been destroyed. The text referred explicitly to the physical destruction of the object. Mr. Ushakov had also referred to the case in which an international organization was unable to fulfil its treaty obligations because of financial difficulties or because of the amendment of its constituent instrument. He (Mr. Barboza) was of the opinion that, in a case where an international organization changed fundamentally or even disappeared, it would not be article 61 that applied, but, rather, draft article 73, on cases of State succession and succession of international organizations (A/CN.4/327).

19. Mr. SCHWEBEL said that, although he regretted that draft article 61 was not more broadly worded, he understood why it could not be, and therefore agreed that it should be referred to the Drafting Committee.

20. He had been struck by a passage in the introduction to the Special Rapporteur's ninth report (A/CN.4/327), which read: "[...] the content of any eventual final clauses will depend entirely on the final form to be given to the draft and on the way in which international organizations will be associated with its entry into force, questions which will be settled at a later stage". Would those questions be submitted to the Commission for its consideration, or would they be considered only by a conference held with a view to the adoption of a future convention on the topic under consideration? In particular, he wished to know whether the Special Rapporteur had in mind the possibility that international organizations as such could become parties to a future convention.

21. Mr. THIAM said that, in practice, it had not yet been decided whether the Commission could stray from the language of the Vienna Convention. In his commentary to article 61, the Special Rapporteur had been anxious "to remain faithful to a line of conduct which involves abstaining from any effort to improve the text of a convention definitively adopted for treaties between States". Besides, in the past the existence of the Vienna Convention had always been invoked in order to resist proposed modifications, whether of substance or of form. Nevertheless, he asked for clarification on the point.

22. Mr. VEROSTA said that, while it was a principle of the Commission to follow the language of the Vienna Convention, it should nevertheless consider carefully the impact which treaties concluded between States and organizations or between two or more organizations, could have on that Convention, failing which it would not be discharging its task to the full.

23. In his view, the title of article 61 was too broad, given the terms of paragraph 1. While it was open to the Commission, of course, simply to enlarge the scope of the article in the commentary, it would encounter the same problem when dealing with paragraph 1 of article 62, for it would then have to specify whether there was a fundamental change of circumstances if, for example, as a result of the withdrawal of a number of member States from an international organization which had previously concluded a financial assistance treaty with a State, the organization's budget no longer enabled it to defray current expenditures. In short, it might be worthwhile reviewing article 61 and its commentary after article 62 had been considered.

24. Mr. REUTER (Special Rapporteur) said that he would reply to two specific questions before reviewing the comments made in the course of the debate.

25. In reply to Mr. Thiam, he said that it had been decided that the Commission was free to depart from the Vienna Convention, and that it even had a duty to do so, whenever the special nature of international organizations so required; conversely, it should refrain from doing so if such departures would result in changes, in respect of the treaties to which the draft articles related, concerning relations between States. Such relations were, in principle, subject to the same rules as those contained in the Vienna Convention. Admittedly, the title of article 61 of the Vienna Convention could give rise to confusion, but there was no question of modifying the text of a convention in force and thereby possibly creating even greater confusion.

26. In reply to Mr. Schwebel's question concerning the future disposition of the draft articles, he said that there were a number of options, but both the Special Rapporteur and the Commission itself were at the disposal of States and international organizations, which would inform them of their preferences. It was possible that no further action would be taken on the draft articles, as had happened in the case of the draft on arbitration procedure; alternatively, it might become a convention open only to States, or an instrument with which international organizations could be associated.

27. The members of the Commission seemed to be generally agreed that draft article 61 should be referred to the Drafting Committee and—subject to a proposal by Mr. Ushakov (1585th meeting, para. 16)—that neither the title nor the text of the article should be changed. The members of the Commission as a whole had found the commentary to article 61 to be too brief. Not only should it be more substantial, but the passage relating to *force majeure* should be redrafted. It would probably be more prudent, after all, to retain the wording of article 61 of the Vienna Convention, whose drafters had been at pains to affirm that certain situations which could give rise to questions of responsibility outside the scope of the Vienna Convention had effects on the operation of treaties. The

drafters of the Vienna Convention had refrained from adopting a very clear-cut position on a number of legal concepts, such as *force majeure*, fortuitous event and state of necessity. Consequently, the Commission could not now impose a specific interpretation of that instrument. In view of draft article 73, which dealt *inter alia* with State responsibility, the Commission should state explicitly in the commentary to article 61 that the latter did not govern any question of responsibility. The commentary should refer, in addition, to all draft articles on which the application of article 61 could have an impact, particularly articles 62 and 73.

28. It had been generally agreed that it was not the Commission's task to enumerate the cases in which the draft articles being prepared could apply. Its task was one of pre-codification and should be limited to offering guidelines, so as not to hamper the work of codification. No one disputed that the application of draft article 61 might present more difficulties for international organizations than for States, as Mr. Ushakov had pointed out at the previous meeting. Yet it would be wrong to infer that it was always simple for a State to define the concept of an object indispensable for the execution of a treaty. If the purpose of the treaty was the delivery of a unique object, such as a work of art, the destruction of the object obviously came within the terms of article 61, paragraph 1. If, however, the treaty involved the delivery of a generic object, such as a certain quantity of wheat, the destruction of the object might involve the application of paragraph 1 of article 61 or bring into operation paragraph 2. The question of the finances of an international organization fell generally within the area of cases of succession of an international organization to a State or of an international organization to an international organization, which were dealt with in draft article 73. Cases of financial difficulties were, of course, conceivable that would come within the scope of article 61. If a sum of money to be transferred by an international organization to a State became unavailable or lost its value, it was possible that the international organization would be released from its obligation. Situations could be envisaged that were less clear-cut: the Commission should mention them in the commentary, though without giving too many examples.

29. The Drafting Committee might feel inclined to add some further provisions to article 61, even though the members of the Commission apparently did not favour the idea of enlarging the article.

30. Mr. SCHWEBEL said he had gathered from the Special Rapporteur's explanation that the Commission had not yet considered whether international organizations would be parties to a future convention on the topic under consideration. The Special Rapporteur had also said that he was waiting until the comments of States and international organizations had been received before formulating on opinion on that question.

31. He (Mr. Schwebel) thought that, at some stage, the Commission should discuss that question, because it would be prejudged if the decision was left to a conference attended by States only. Merely asking international organizations to submit their comments and views on the question was not the same as saying that they could become parties to a future convention. In his view, the draft articles under consideration would affect the conduct of international organizations, and it was therefore no frivolous matter to consider whether they should or should not be parties to a future convention and have the full weight of their views brought to bear on the matter.

32. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer draft article 61 to the Drafting Committee, on the understanding that the commentary to the draft article might be expanded.

It was so decided.[7]

ARTICLE 62 (Fundamental change of circumstances)

33. The CHAIRMAN invited the Special Rapporteur to introduce draft article 62 (A/CN.4/327), which read:

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty concluded between several States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

34. Mr. REUTER (Special Rapporteur) said that article 62 of the Vienna Convention tried to balance two conflicting requirements: on the one hand, to ensure respect for treaties which had been concluded,

[7] For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

and on the other, to admit that in certain exceptional circumstances those treaties might lose their binding force. The article, which had been adopted unanimously by the Commission, had been approved at the United Nations Conference on the Law of Treaties by a very large majority of States. Hence he saw no reason for not reproducing it in the draft articles or for changing its substance.

35. By reason of the generality of article 62 of the Vienna Convention, on the other hand, its application to specific situations where States were concerned was a delicate matter, and *a fortiori* it was delicate where international organizations were concerned. In the case of States, the word "circumstances" referred to conditions external to the State, whereas in the case of international organizations it could also refer to an internal situation. For example, the withdrawal of some of the members of an international organization might be regarded as a fundamental change of circumstances, and where that happened it was debatable whether the organization was still the same or whether it had become a different entity. A fundamental change of circumstances might therefore raise the problem of the continuing identity of an international organization.

36. He said that he could, of course, have reproduced verbatim the language of paragraph 2 (*a*) of article 62 of the Vienna Convention, under which the article did not apply to treaties establishing a boundary—by which were meant not only delimitation treaties but also treaties of cession. But that would have implied that a treaty between two or more organizations was capable of establishing a boundary, in other words, that an international organization had capacity to participate in the establishment of a boundary by treaty. Yet surely it was inconceivable that an international organization should have capacity to dispose of a State's territory by treaty if that power had not been delegated to it by a treaty between States. For example, the General Assembly had disposed of the former Italian colonies by virtue of an express provision—article 23—of the Treaty of Peace with Italy of 10 February 1947.[8] Manifestly, an international organization could not really own territory in the traditional sense of the word, for if it did it would cease to be an international organization—that is, an intergovernmental organization, according to the meaning of the definition in paragraph 1 (*i*) of draft article 2[9]—but would be a State. It was in the light of those considerations that he had slightly amended the text of article 62 of the Vienna Convention, so that the proviso in subparagraph 2 (*a*) of that article would apply only to a treaty to which at least two States were parties, for it was conceivable that two States might entrust the task of determining the status of a territory to a body like the International Court of Justice.

37. Mr. SCHWEBEL said he agreed that international organizations did not have authority to enter into boundary treaties, although, very exceptionally, they might be entrusted with specific territorial responsibility, as had happened in the example of the former Italian colonies. It could happen also that international courts might establish boundaries, although such courts, not being intergovernmental bodies, did not typically come within the meaning of the definition of international organizations as laid down in the draft articles; the members of the International Court of Justice, for example, did not represent Governments. On that basis, he considered that the Special Rapporteur had been right in holding that, as a general principle, international organizations did not have authority to establish or disestablish boundaries, whether such boundaries were the subject of a treaty of peace or of some other agreement.

38. At the same time, he was not altogether persuaded that paragraph 2 of article 62 as drafted would serve its purpose, and therefore he suggested that it be amended to read:

> "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty concluded between States establishing a boundary, which treaty accords relevant functions to one or more international organizations".

39. Mr. QUENTIN BAXTER said that it would be well, in paragraph 2 of article 62, to follow the wording of article 19 *bis*, so that the paragraph would read:

> "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between States and one or more international organizations establishing a boundary".

40. So far as Mr. Schwebel's proposed amendment was concerned, he saw a difficulty in it, since a treaty which assigned functions to organizations was not necessarily a treaty between States and organizations.

41. The CHAIRMAN, speaking as a member of the Commission, said it seemed to him that, as drafted, paragraph 2 of article 62 might not cover an organization which was about to be formed. He had in mind the new International Sea-Bed Authority, which would have certain features commonly attributed to a State in that it was to be vested with extensive jurisdiction over the wide area of the sea-bed that lay beyond national jurisdiction. Under the draft convention conferring special powers on the Authority, a Commission on the Limits of the Continental Shelf[10]

[8] United Nations, *Treaty Series*, vol. 49, p. 3.

[9] See 1585th meeting, foot-note 3.

[10] "Informal Composite Negotiating Text/Revision 2", drawn up in April 1980 by the President of the Third United Nations Conference on the Law of the Sea and by the Chairmen of the main committees of the Conference (A/CONF.62/WP.10/Rev.2 and Corr.2–5). See, in particular, arts. 156, 157, 1 and 76 of the draft convention.

was to be established, which inevitably meant that the boundaries set by coastal States might be contested. As draft article 62 would probably not be adopted in final form before that convention had been concluded, some thought should perhaps be given to the matter with a view to ascertaining whether the Authority would be covered by the terms of the article.

42. The Authority would also have the right to set other types of boundaries, such as those delimiting the area of the sea-bed in which a given entity, which might well be a State, would have the right to carry on mining operations. Although that might not be a boundary in the traditional sense of a boundary between sovereignties, it would nonetheless be a physical boundary in property, agreed between an international organization and a State. He would be grateful for the Special Rapporteur's comments on that point.

43. Sir Francis VALLAT said he was not sure that a boundary, within the meaning of paragraph 2 of article 62, was invariably a territorial boundary in the traditional sense. In a recent case between Greece and Turkey,[11] the International Court of Justice had treated the delimitation of the boundary of the continental shelf appertaining to each of those States as a question that concerned territorial status. If one took the traditionalist view, one might argue that such a boundary was not, strictly speaking, a territorial boundary. Yet it seemed to him that, if one followed the view of the Court, the delimitation would create a boundary that should be treated for legal purposes as if it were a territorial boundary, and he therefore inclined to the view that it would be a boundary within the meaning of paragraph 2 of article 62. By the same token, a boundary established for customs purposes might perhaps be similarly regarded. Or did a boundary have to be one that simply divided the sovereignty between two States?

44. Furthermore, it was possible to visualize a case where a treaty between, say, the United Nations and a former mandatory power and relating to a mandated territory that was due to attain independence, made provision for certain international guarantees to be effected through the Organization. Should such a treaty, concluded between a State and an international organization, be excluded from the scope of the draft articles?

45. He would be grateful for the Special Rapporteur's comments on those points.

46. Mr. REUTER (Special Rapporteur) said he had based his reasoning on the traditional notion of territory, but that notion could obviously be extended. In reply to Mr. Pinto's question concerning the law of the sea, he said that where the limits of the territorial sea were at issue, the area was obviously a territory in the traditional sense of the word, but the problem was much more complicated where the limits of jurisdiction over the continental shelf were involved. An analogous problem arose in connexion with lines of demarcation or armistice lines, which were comparable to boundaries from the point of view of aggression only, but which it would be very dangerous to treat in general as on a par with territorial boundaries.

The meeting rose at 12.55 p.m.

1587th MEETING

Thursday, 8 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 62 (Fundamental change of circumstances)[1] (*concluded*)

1. Mr. REUTER (Special Rapporteur) said that the question whether the term "boundary" could be used to describe boundaries other than the traditional boundaries between States—as in the examples from the law of the sea cited by Mr. Pinto at the previous meeting—arose only in cases where boundaries that could not be established except by treaties to which one or more international organizations were parties. In cases of boundaries which could also be the subject of ordinary treaties between States the question did not arise, since treaties establishing boundaries fell within the scope of the Vienna Convention[2] (which had entered into force), and the introduction of new provisions on that topic would be tantamount to amending that convention.

2. Mr. USHAKOV said that, while he approved of draft article 62 submitted by the Special Rapporteur,

[11] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3.

[1] For text, see 1586th meeting, para. 33.

[2] See 1585th meeting, foot-note 1.