Document:-

A/CN.4/SR.1436

Summary record of the 1436th meeting

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

Extract from the Yearbook of the International Law Commission:-

1977, vol. I

internal law of another State as justification for its failure to perform a treaty.

53. Lastly, he thought that the rules of an international organization might include the rules of one of its organs, such as the rules of the European Commission of Human Rights or even a declaration concerning the agricultural policy of EEC.

The meeting rose at 1 p.m.

1436th MEETING

Wednesday, 8 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/285,[1] A/CN.4/290 and Add.1,[2] A/CN.4/298)

[Item 4 of the agenda]

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

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)[3] (*concluded*)

1. The CHAIRMAN, referring to the suggestion he had made at the previous meeting that the Commission should give further thought to the problems raised by article 27, said that, since that article was expressed in negative form or in the form of a saving clause, it did not really matter how broad the meaning of the words "the rules of the organization" was. The real problem to be solved would arise in connexion with article 46. He therefore suggested that, pending the examination of that article, the words "Without prejudice to article 46", in article 27, should be placed in square brackets.

2. Mr. DÍAZ GONZÁLEZ said that, although logic and pragmatism were not necessarily incompatible, he was of the opinion that, in the case of article 27, they had converged rather than moved on parallel lines. Thus, even though article 27 offered the advantages of being the logical consequence of the preceding articles and, in particular, of article 6,[4] and of laying a foundation for subsequent articles, and even though it had been drafted pragmatically so as not to cause unnecessary complications, he thought that greater emphasis should have been placed on the distinction between the capacity of States and the capacity of international organizations to conclude or to be bound by treaties.

3. When a State consented to be bound by a treaty, it did so in full awareness of the consequences of its act. It could, if necessary, adapt its internal law to the provisions of the treaty it had concluded, which would prevail over its internal law if there was a conflict between them. As Mr. Njenga had pointed out at the previous meeting,[5] however, article 6 limited the capacity of international organizations to conclude treaties. Thus, the representatives of international organizations could not sign treaties, and the competent organs of international organizations could not consent to them, if the obligations they imposed were not within the limits of the specific functions provided for in the constituent instruments of the organizations. Those constituent instruments were, moreover, nothing less than multilateral treaties, which in many cases required the agreement of a two-thirds majority of the parties in order to be amended. He therefore believed that, when an international organization signed a treaty, its representative was acting only on behalf of the organization and not on behalf of its member States.

4. Mr. TABIBI said that, on the face of it, article 27 seemed quite simple and straightforward. The problem of a manifest violation of the internal law of a State was relatively easy to solve because it involved only one State. But article 27, subparagraph (*b*), raised considerable difficulties because international organizations did not exist in the abstract; they reflected the views and interests of their member States. The problem of the violation of the rules of an international organization was therefore a very serious one. An example was provided by the case of the Congo in 1960, which had involved all the States Members of the United Nations. A number of Security Council and General Assembly resolutions had authorized the Secretary-General to assign civilian and military representatives to the Congo. The arrangements which those representatives had made had affected the interests of the Organization and of all its Member States, which were much more important than the interests of a single State. Thus, the problems raised by article 27, subparagraph (*b*), were very delicate ones to which the Commission should pay particularly close attention, because that article was related not only to article 46 but also to articles 5 and 7 of the Vienna Convention.[6]

5. Mr. ŠAHOVIĆ said there was no denying the need to extend to international organizations the rule stated in article 27 of the Vienna Convention, which was a direct consequence of the *pacta sunt servanda* rule stated in article 26. Most of the members of the Commission had nevertheless emphasized the difficulties of applying

[1] *Yearbook ... 1975*, vol. II, p. 25.

[2] *Yearbook ... 1976*, vol. II (Part One), p. 137.

[3] For text, see 1435th meeting, para. 37.

[4] See 1429th meeting, foot-note 3.

[5] 1435th meeting, para. 44.

[6] See 1429th meeting, foot-note 4.

that rule to international organizations because of their specific nature. In his opinion, those difficulties were not insurmountable. He was prepared to take part in the efforts of the Drafting Committee to find a better wording, but thought it would be better not to tamper with the principle stated by the Special Rapporteur in article 27. The meaning which the Special Rapporteur had given to the words "rules of the organization" seemed logical and, furthermore, corresponded to the definition contained in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[7]

6. Mr. VEROSTA said that, despite the Special Rapporteur's explanations in paragraph (4) of his commentary to article 27 (A/CN.4/285), he wondered whether article 2 should not include a definition of the "rules of the organization", since article 6 already contained the expression "relevant rules of that organization".

7. Mr. USHAKOV said that article 27 and article 46 of the Vienna Convention were very different; article 27 related to performance of a valid treaty, whereas article 46 related to competence to conclude treaties and provided that a State could, in certain cases, invoke a violation of its internal law as vitiating its consent. Thus, the rule set out in article 27 was without prejudice to article 46 since it applied only if the treaty was valid.

8. Mr. CALLE Y CALLE said that, as Mr. Šahović and Mr. Díaz González had pointed out, article 27, relating to the observance of treaties, gave effect to the *pacta sunt servanda* principle, which simply meant that the States parties to a treaty could not invoke their internal law as justification for their failure to perform that treaty or to respect the rules it created.

9. The case of international organizations was somewhat different, however, and he agreed with Mr. Verosta that the Commission should clarify the meaning of the expression "rules of the organization", used in article 27, subparagraph (*b*). Article 6 contained the expression "relevant rules of that organization", which related to the constitutionality of the will of organizations and was closely linked with the validity of treaties. For treaties were validly concluded if they were concluded in accordance with the valid constituent instrument of the organization. That rule raised a problem, however, because the constituent instruments of some organizations did not contain provisions relating to their capacity to conclude treaties. In some cases, therefore, that capacity could only be presumed. Fortunately, however, there were other articles, such as article 46, which took account of cases in which the representatives or organs of an international organization went beyond the limits of their powers and manifestly violated the rules of the organization.

10. Mr. EL-ERIAN said that article 27 was a logical corollary of article 26, which embodied the *pacta sunt servanda* principle. It was therefore important to define the modalities of application of that basic principle, which was the cornerstone of the law of treaties. Indeed, some jurists, such as Hans Kelsen, visualized the obligations of the international community as a pyramidal structure with the *pacta sunt servanda* principle at its base. The Commission's problem was to determine how that basic principle was to be applied to the case of treaties concluded by international organizations, to which article 27, subparagraph (*b*), related.

11. In the case of relations between States, the problem was not very complicated because the stability of international relations required the primacy of international law. Thus, States could not invoke their internal law to free themselves from their obligations under international law, whether customary or conventional, general or special. It was much easier to identify a violation of the internal or constitutional law of a State than a violation of the rules of an international organization, which, over the years, had come to mean not only its constituent instrument but also the rules deriving from its practice, resolutions, decisions and rules of procedure. In that connexion, he drew the Commission's attention to the definition of the expression "rules of the organization" contained in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

12. Although he had no difficulty in accepting the rule that the internal law of a State could not be invoked as a justification for failure to perform a treaty, he did not see how the same rule could be adopted in article 27, subparagraph (*b*), which would apply to treaties concluded between States and international organizations and treaties concluded between two or more international organizations. That rule was put to the test much more frequently in inter-State relations, where the treaty-making process was subject to checks and balances. In the case of treaties concluded between States and international organizations, there had been very few instances in which international organizations had invoked their rules as a justification for non-performance of a treaty. He therefore considered that the Drafting Committee should try to improve the wording of article 27, subparagraph (*b*).

13. Mr. AGO said that article 27 concerned a problem related to the performance of a valid treaty, and that excluded cases in which the validity of the treaty could be called in question. Could a parallel be drawn in regard to that problem between the position of a State and that of an international organization? It was obvious that a State could not invoke its internal law to justify failure to fulfil an international obligation imposed on it by the treaty. That was why States sometimes hesitated to assume international obligations, the fulfilment of which would pose problems of internal law. For instance, the United States was hesitant to ratify some international labour conventions because, under its internal legal system, the individual federated States were competent in matters of labour law whereas the federal State was competent to conclude treaties. Thus, the federal State might be placed in a delicate situation if internal difficulties arose with regard to the fulfilment of obligations it had assumed at the international level.

14. Was the situation identical in the case of an international organization? Could an international organization have an internal legal system that prevented it from

[7] See 1435th meeting, foot-note 10.

performing a treaty which it was competent to conclude? That possibility could not perhaps be excluded. However, the rule stated in article 27 of the Vienna Convention was a rule of international responsibility. It was no accident that the same rule appeared in article 4 of the draft articles on State responsibility, which stated:

> An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.[8]

There could be no doubt, however, that if it adopted article 27, subparagraph (*b*), the Commission might have to envisage the possibility of international responsibility being incurred by an international organization for failure to fulfil an obligation validly assumed at the international level. In principle, he had no objection to such a hypothesis and could well imagine that it might one day be possible to speak of the responsibility of an international organization for an internationally wrongful act. However, the Commission must understand what it would be undertaking by adopting the rule stated in article 27, subparagraph (*b*), which might lead it a very long way.

15. Mr. FRANCIS said that he had given a great deal of thought to the issue being discussed in connexion with article 27 and had come to the conclusion that sufficient emphasis had not been placed on the distinction between the constituent instruments of international organizations and the constitutions of States. The scope and purpose of all State constitutions were essentially the same, namely, to regulate the internal order of States. To the extent that the constituent instruments of international organizations helped to regulate the internal affairs of those organizations, they could be compared to the constitutions of States. The comparison could not be taken too far, however, because a constituent instrument such as the Charter of the United Nations was more than the "internal law" of the Organization. It was also a multilateral treaty which regulated relations between the Organization and its Member States, and it could, in some cases, regulate the conduct of non-member States. Those three features made it quite different from the constitution of a State.

16. In that connexion, he drew attention to paragraph (4) of the Special Rapporteur's commentary to article 30 (A/CN.4/285), the last sentence of which read:

> ... it is quite clear that if the United Nations was to conclude an international treaty which was contrary to the provisions of the Charter, there would be not merely a question of priority, but a question of nullity since it seems—and this is a question which will be discussed later in connexion with a draft article corresponding to article 46 of the 1969 Convention—that such a treaty might be null and void.

That sentence made it quite clear to him that the Special Rapporteur had to conclude that, if an act violated the basic instrument of an international organization, the principle of *pacta sunt servanda* would not apply at all. It was also quite clear from that sentence that the Special Rapporteur had contemplated excluding such a situation from the scope of article 27. He therefore hoped that, in considering article 27, the Drafting Committee would pay close attention to the difference between the internal law of States and the constituent instruments of international organizations, as exemplified by the Charter of the United Nations.

17. Mr. SCHWEBEL said that article 27, subparagraph (*b*), was not, of course, an invitation to an international organization to conclude a treaty which was not in accordance with its rules. It was a recognition that a case could occur in which an organization that had concluded a treaty might wish to justify failure to perform it on the ground that the performance or conclusion of the treaty was not in accordance with its rules. In that connexion, the Commission should, as Mr. Ago had suggested, envisage the possibility that an organization might act in violation of a treaty of or customary international law and thereby incur international responsibility.

18. With regard to Mr. Tabibi's reference to the United Nations operations in the Congo, his own impression was that, in a marginal sense, the Congo operations might have provided an example of a violation of international law, in that some units of the United Nations Force in the Congo had been accused of acting in ways that violated international legal principles relating to the treatment of civilians, and the Secretary-General had apparently accepted responsibility on behalf of the Organization, which at any rate had paid compensation to the victims of such acts.

19. He would venture to give another hypothetical example. If, under Article 43 of the Charter, the Security Council entered into an agreement with a State or a group of States which placed forces at its disposal and if, in approving such an agreement between the United Nations and the State or States concerned, the Security Council acted with an abstaining vote of one or more of its permanent Members, he wondered whether the United Nations might be able to say that it was not bound by such a treaty on the ground that, in agreeing to it, it had not acted in accordance with its rules and, in particular, with Article 27 of the Charter, which provided for the concurring votes of the permanent members of the Security Council. Such an example might seem rather far-fetched in the light of the history of the interpretation of article 27 of the Charter and of the advisory opinion of the International Court of Justice in the *Namibia* case, that an abstention did not amount to a veto,[9] but he thought it was the kind of case that could conceivably occur when an international organization resorted to an exculpatory argument. In the light of such a possibility, however unlikely it might be, he thought that the principle which the Special Rapporteur had enunciated in article 27 was a sound one. Subparagraph (*b*) might, however, be improved by the Drafting Committee, which could take account of the view expressed by Mr. Francis.

[8] *Yearbook ... 1976*, vol. II (Part Two), p. 73, document A/31/10, chap. III, sect. B, subsect. I.

[9] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *I.C.J. Reports 1971*, p. 22.

20. Mr. QUENTIN-BAXTER said that, although the relationship between capacity to conclude treaties and article 27 was a fundamental one, there seemed to be a contradiction between the rule stated in article 27, subparagraph (*b*), and the basic rule in article 6, which provided that international organizations had limited capacity to conclude treaties. The more he thought about the problem, however, the more he was convinced that the apparent contradiction was, in fact, only apparent and not real, because there could never be full equality between the contractual capacity of international organizations and the contractual capacity of States. The real problem was that of determining when the situation changed and came to be dominated by the rule stated in article 27, as tempered by the rule which would correspond to article 46 of the Vienna Convention.

21. He had some doubts about the advisability of trying to change the present wording of article 27, subparagraph (*b*). As other members of the Commission had noted, the words "rules of the organization" had come to mean so much, and were so well defined in commentaries, that the whole delicate structure of the interpretation of constituent instruments was now based on them. He found it difficult to see where a new dividing line could be drawn. As Mr. Francis had pointed out, the rule which the Commission would state in article 46 would, of course, be very important, but, in article 27, it was saying that, in view of the limited contractual capacity of international organizations, those organizations could be expected to work within the limits of that capacity so that none of the other parties to treaties would be at a disadvantage. Moreover, he thought it quite possible that the internal processes leading to the ratification of treaties by international organizations would help to develop the rules of those organizations and would be pertinent to the interpretation of their constituent instruments.

22. Mr. TABIBI said that the rule proposed in article 27 did not make a clear distinction between the capacity of States and the capacity of international organizations to conclude treaties. It was therefore necessary to explain the meaning of the words "rules of the organization" for, unlike the constitutions of States, the constituent instruments of international organizations did not specify how those organizations were to carry out their functions. Moreover, international organizations concluded treaties not only on the basis of their constituent instruments but also on the basis of their practice, which was evolving daily, whereas the constitutions of States changed only very slowly. A definition of the words "rules of the organization" should therefore be included both in the text of article 27 and in the commentary to that article.

23. Mr. RIPHAGEN said he did not see how the Commission could omit to draft an article such as article 27, which was the logical consequence of the *pacta sunt servanda* rule that a party to a treaty could not invoke other rules to justify non-compliance with the treaty it had concluded.

24. In referring to specific examples, the Commission should distinguish clearly between the problem of competence, the problem of the validity of treaties, and the problem of responsibility for non-compliance, to which Mr. Ago had referred.

25. The United Nations and its Charter were usually referred to when specific examples were given of treaties concluded between States and international organizations or between two or more international organizations. The Charter was, however, a very particular type of constituent instrument because it contained rules for the Organization itself as well as rules which could be said to be universal, or rules of *jus cogens*, which prevailed over all other existing rules. Other international organizations also had to be taken into account because some of their constituent instruments did not contain universal rules or rules of *jus cogens*. To solve that problem, it might be specified that article 27 referred only to the rules of the United Nations. Some of the other fears expressed in regard to article 27 might also be allayed if that article was made to include a reference to Article 103 of the United Nations Charter, which provided for the case in which the obligations of the Members of the United Nations under the Charter conflicted with their obligations under any other international agreement.

26. Mr. DADZIE said he shared the view that the wording of article 27 posed some problems. The difference between the capacity of States and the capacity of international organizations to conclude treaties lay in the fact that States could, by virtue of their sovereign powers, enter into treaties and then deal with the performance of those treaties later, if necessary by amending their rules of internal law, whereas international organizations could conclude treaties only if they were permitted to do so by their constituent instruments; if they concluded treaties, they could not invoke the rules contained in their constituent instruments as a justification for their failure to perform the treaties.

27. It also seemed to him that the problems the Commission was now discussing were not real problems. Indeed, he could not conceive of a situation in which an international organization concluded a treaty in accordance with its rules and then invoked those rules to justify its inability to perform the treaty. The real problem was that the rules of international organizations were not always expressed in writing and that some rules had developed from their practice. Thus, it was not always easy to ascertain that a particular organization would subsequently find it difficult to perform a treaty.

28. In order to solve that problem, he suggested that the Drafting Committee might consider amending article 27, subparagraph (*b*), by adding the words "and practices" after the words "by the rules".

29. The CHAIRMAN, speaking as a member of the Commission, said it was quite clear that both parts of article 27 were necessary. Although he was convinced that a reference to "the rules of the organization" should be included in the article, he was not sure whether a definition of those words was necessary, particularly in the light of developments which had taken place since 1969, when no definition of the meaning of the words "rules of the organization" had been included in the Vienna Convention. In 1975, a definition of those words had been given in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. He therefore suggested that the Drafting

Committee might consider the possibility of preparing a definition on the lines of that contained in the 1975 Vienna Convention. He also hoped that the Drafting Committee would take account of the suggestion he had made at the beginning of the meeting because he thought that the Commission would encounter a number of problems when it came to discuss article 46.

30. Mr. REUTER (Special Rapporteur), summarizing the discussion on article 27, noted that, in the main, the Commission favoured a provision dealing separately with States and international organizations. In the case of States, its wish seemed to be to keep closer to the corresponding provision of the Vienna Convention. On the other hand, many members had expressed doubt or hesitation about the wording, but not the content, of subparagraph (*b*). He would therefore discuss the main points which caused them concern.

31. To begin with, it should be made clear, as a number of members had pointed out, that article 27 was based on the presumption of a treaty that was not only in force but was also valid. It was therefore necessary to reserve both article 46 and any other provisions of the Vienna Convention that might affect, if not the validity, at least the applicability of the treaty. Another point had been raised by Mr. Ago in connexion with the expression "failure to perform", and it had been taken up by other members of the Commission. In formulating article 27, the Commission was not entering the realm of responsibility; it was not deciding whether international organizations were active or passive subjects of responsibility. To assert that an international organization could not justify failure to perform a treaty by invoking its own rules did not mean that the organization incurred responsibility.

32. Nevertheless, since many members had mentioned the problem of the validity of the treaty, he wished to clarify certain points, first in regard to States and then in regard to international organizations, to see whether their position differed from that of States. With regard to States, a relatively simple case had been suggested in which a State that was bound by a treaty was unable to have the law necessary for performance of that treaty passed by its parliament. Judicial decisions were numerous and clear on that point; a State could not invoke an act of one of its organs as justification for failure to perform a treaty. One member had raised the question whether a State could invoke a constitutional obstacle as justification for not performing a valid treaty. It was, indeed, conceivable that a State which had validly concluded a treaty in conformity with its constitution might experience difficulties when it came to performing the treaty. For example, the constitution, although it required the State to enact a financial law, might also contain an obstacle to the enactment of that law. At the Second International Peace Conference (The Hague, 1907), when States had signed the convention relative to the creation of an international prize court, it had been planned to set up a tribunal to hear appeals from judgments of national courts. Before the conclusion of the convention, however, the United States had discovered that its Constitution presented an obstacle to the application of the proposed régime. A protocol had therefore been added to the convention, providing for the award of compensation instead of the setting aside of national judgments by decision of the international prize court.

33. Turning to another example, he wondered whether a State could validly conclude a treaty if it was aware, when doing so, that it might not have all the necessary means to perform the treaty. In doing that, the State would be taking a risk. That was true of some federal States, such as Canada. According to decisions of the Supreme Court of Canada, the Canadian federation could validly enter into binding commitments but there was no certainty that it would be able to fulfil them. In the event of non-performance, it would at least owe compensation. His conclusion was that the constitutions of some States might contain an obstacle to the performance of a treaty. Consequently, when the Vienna Convention provided that a party to a treaty could not invoke the provisions of its internal law as justification for its failure to perform the treaty, a State's constitution fell within the concept of internal law. Although there was no international jurisprudence on that point in regard to treaties, there was in regard to international custom.

34. Where international organizations were concerned, the drafting of article 46 might prove difficult, as the Chairman had observed, but article 27 did place international organizations and States within the same framework. First of all, the treaty to which the international organization was a party had to be considered to be valid and in force. For an international organization, the problem should in principle be posed in the same terms as for a State. An international organization could validly bind itself by a treaty, even if it was not absolutely certain of being able to perform it. That was true of the United Nations, for example, when it signed financial agreements. If it had no funds, it would nevertheless remain a debtor. One could even imagine a customs union, possessing international personality, which was competent to establish rules for determining the customs value of imports into the union and to conclude an agreement on that subject. The agreement would not, however, be implemented by the customs union itself but by officials of its member States at customs posts on the periphery of the union. If some of those officials broke the agreement, the union could not claim that it was not responsible because it had not committed the breach or because its constituent instrument did not give it the means to perform the agreement.

35. Although it was not strictly necessary for the purposes of article 27, he could imagine an even more complicated example. EEC, applying a clause of the treaty it had concluded with the United States, might grant United States ships the same rights as those granted to the Community by the United States. If a French patrol vessel became guilty of conduct contrary to the agreement in regard to a United States ship, the United States could make a claim either against France or against EEC or against both, depending on the content of the jurisdictional clause in the treaty. That example showed the need—which had often been mentioned—not only to protect States against the organization of which they were members, but also to protect States which entered into contractual relations with the organization. It was

one aspect of the problem that was already adumbrated in article 27.

36. Lastly, many drafting suggestions had been made during the discussion. Personally, he thought the rules of the organization necessarily included its constitutional rules and also some of its acts in law. He hesitated to use the French word *acte* in the article because it was difficult to translate into English. As to whether a special provision should be drafted to define the expression "rules of the organization", other articles of the draft might call for different definitions. The Commission could nevertheless formulate a general definition, even if it had to be changed later. It could also amend article 27 or merely expand the commentary. As those questions lay with the Drafting Committee, he thought the article could be referred to it.

37. The CHAIRMAN suggested that it might be useful if the commentary to article 27 fully reflected the Commission's discussion of the article and also contained some references to the relevant jurisprudence of the International Court of Justice, such as its advisory opinions in the cases of *Certain Expenses of the United Nations*[10] and the *Effects of Awards of Compensation made by the United Nations Administrative Tribunal.*[11]

38. Mr. USHAKOV said he thought the Special Rapporteur's examples showed that, while in some cases an international organization could not invoke its own rules as justification for failure to perform a treaty, other examples could be quoted to show the opposite. For instance, the Security Council might conclude a perfectly valid agreement with a State, to send troops of that State to a certain region for several years to maintain international peace. A few months later, the Security Council might decide, still in conformity with the Charter of the United Nations, to replace the troops of the State in question by troops from another State. If the first State protested, could the Security Council invoke the provisions of the Charter in support of its new decision? In his opinion, article 27, subparagraph (*b*), did not provide a satisfactory answer to that question. He believed the Charter could be invoked, not only to justify the second decision by the Security Council but also to support a subsequent decision by another organ, such as the General Assembly. The article under consideration was not so simple as it appeared and it would be wrong to rely only on some examples and ignore others which indicated the contrary.

39. Mr. REUTER (Special Rapporteur) said he agreed that it was always dangerous to quote particular examples, but he was not troubled by the example given by Mr. Ushakov. The real problem in that case was to ascertain what commitment the United Nations had assumed. Pursuant to a decision by the Security Council, the United Nations entered into an agreement with a State, in which that decision would no doubt be mentioned. The implication seemed to be that the decision could be revoked in the event of a contrary decision by the Security Council, and that consequently the agreement would terminate. The question was one which depended on the law of the United Nations or even the interpretation of the agreement, but did not concern the Commission. On the other hand, if the Security Council entered into a commitment it was manifestly not entitled to assume, the case would fall under article 46.

40. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 27 to the Drafting Committee.

It was so agreed.[12]

ARTICLE 28 (Non-retroactivity of treaties)

41. The CHAIRMAN invited the Special Rapporteur to introduce draft article 28, which read:

Article 28. Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

42. Mr. REUTER (Special Rapporteur) said that the text of article 28 was identical with that of the corresponding article of the Vienna Convention. Admittedly, the Vienna Convention enunciated a very general principle which, like any general formula, was open to criticism, but it was not his task to criticize it.

43. Mr. SETTE CÂMARA said he thought there was very little ground for discussion on article 28, since the rule it laid down could be placed on the same footing as that of the *pacta sunt servanda* rule and the text was identical with that of the corresponding article of the Vienna Convention. He would, however, be grateful if the Special Rapporteur would say whether the Commission could accept a situation in which it had to consider the possibility of retroactive application of a relevant rule of an international organization. To take the example given by Mr. Ushakov, if a peace-keeping force had been established by a valid treaty but a subsequent decision of the international organization concerned sought to withdraw it, could one of the States parties to the treaty plead for the maintenance of the force on the ground that the treaty had been valid when signed and that the decision of the organization was a supervening rule which had no retroactive effect?

44. Mr. REUTER (Special Rapporteur) said that the article reserved all possibilities, depending on the intentions, and it was drafted so flexibly that it should not present any danger. It might even be thought that the rule it stated was rather vague.

45. The CHAIRMAN said that, while the Commission could, of course, adjust the text of the Vienna Convention to take account of the characteristics of international organizations, he doubted whether it could usefully redraft provisions of that instrument, which, like article 28, laid down general principles in language chosen after long discussion. The Commission would save time if it bore that point in mind.

[10] See 1435th meeting, foot-note 11.

[11] Effects of awards of compensation made by the United Nations Administrative Tribunal, Advisory Opinion, *I.C.J. Reports 1954*, p. 47.

[12] For the consideration of the text proposed by the Drafting Committee, see 1451st meeting, paras. 47 *et seq.*, and 1459th meeting, paras. 6 *et seq.*

46. Mr. SETTE CÂMARA said he had asked his question of the Special Rapporteur largely as a matter of curiosity. It did, however, seem strange that, although both article 27 and article 28 of the present draft laid down general rules, mention of the relevant rules of international organizations had been made only in the former.

47. The CHAIRMAN emphasized that it was not his intention to prevent the consideration of points which, like that just raised by Mr. Sette Câmara, related exclusively to international organizations, but merely to avoid renewed discussion of article 28 of the Vienna Convention as such.

The meeting rose at 1 p.m.

1437th MEETING

Thursday, 9 June 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT
later: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Co-operation with other bodies

[Item 10 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Valladão (Observer for the Inter-American Juridical Committee) to address the Commission.

2. Mr. VALLADÃO (Observer for the Inter-American Juridical Committee) said that the Inter-American Juridical Committee, which had been established by the Third International Conference of American States (Rio de Janeiro, 1906), had originally been known as the International Commission of American Jurists and that its mandate had been to formulate a code of public international law and a code of private international law governing relations between the countries of America. On the basis of a draft code of public international law prepared by Mr. Epitàcio Pessôa and a draft code of private international law prepared by Mr. Lafayette Pareira, that Commission had elaborated two important drafts in 1912 and in 1927, which had become multilateral treaties, signed at Havana in 1928. Those treaties, which had been ratified and were still in force, had been the world's first multilateral treaties of public international law. They dealt with such subjects as the status of foreigners, treaties, diplomatic staff, consular staff, maritime neutrality, asylum and the rights and duties of States in civil wars. A Convention on Extradition, which was still in force, had been signed at the Seventh International Conference of American States (Montevideo, 1933). The International Commission of American Jurists had pursued its activities and, when the Inter-American Juridical Committee was established, the two bodies had continued to work side by side for some time. In 1948, the Charter of the Organization of American States had established the Inter-American Council of Jurists, which it had entrusted with the task of assessing the Committee's work, but, when the Charter was revised in 1967, the Council was dissolved and the Committee became the sole codification body.

3. The Committee had continued to provide legal assistance to OAS, particularly by preparing draft treaties and conventions of public and private international law, several of which were in force. As examples, he referred to the Convention on Territorial Asylum and the Convention on Diplomatic Asylum (Tenth Inter-American Conference, Caracas, 1954) and to the conventions adopted by the Inter-American Specialized Conference on Private International Law (Panama City, 1975), particularly in the areas of international trade law and international procedural law.

4. When the United Nations established the International Law Commission in 1947, several international multilateral instruments prepared by the International Commission of American Jurists, which had preceded the Inter-American Juridical Committee, were already in force. Eight of those instruments related to questions of public international law and one was a code of private international law. That was one of the reasons why article 26, paragraph 4, of the Statute of the International Law Commission recognized "the advisability of consultation by the Commission with intergovernmental organizations whose task is the codification of international law, such as those of the Pan-American Union". Similarly, the Statute of the Inter-American Juridical Committee, formulated in 1948, provided in article 22 for the invitation of representatives of international institutions of a world-wide character. The meeting of the two bodies had thus been inevitable.

5. The Committee's mandate was broader than the Commission's. Although both had been entrusted with the task of promoting the progressive development of international law and its codification, the Committee was, in addition, the advisory body of OAS. Accordingly, it studied problems relating to the integration of the developing countries of the American continent and the possibilities of harmonizing their legislation. In the field of international law, it studied questions of public international law and private international law. Referring to the codification and progressive development of international law, he pointed out that, as early as 1906, at the time of the establishment of the International Commission of American Jurists, Mr. Amaro Cavalcanti, the distinguished representative of Brazil, had considered that the partial and gradual condification of international law was preferable to the elaboration of a comprehensive and definitive code; that view had been endorsed nearly 30 years later by the Seventh International Conference