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A/CN.4/SR.1435

Summary record of the 1435th 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

52. The Drafting Committee would also have to consider the question of notifications and communications, raised by Mr. Ushakov. That should not present any difficulties, however, since the international organizations designated in a treaty would probably always have the necessary means of communication.

53. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 23 to the Drafting Committee.

It was so agreed.[9]

Gilberto Amado Memorial Lecture

54. The CHAIRMAN announced that Judge Elias had informed the Committee for the Gilberto Amado Memorial Lecture that his duties at the International Court of Justice would unfortunately prevent him from accepting its invitation to give the lecture that year. In view of the difficulty a substitute speaker would have in preparing himself adequately if the lecture was to be delivered as usual before the end of the International Law Seminar, the Committee proposed that the lecture should be postponed until the following year, when Judge Elias had said he hoped to be available.

55. If there was no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

The meeting rose at 6 p.m.

[9] For the consideration of the text proposed by the Drafting Committee, see 1451st meeting, paras. 16-20.

1435th MEETING

Tuesday, 7 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 22 (Withdrawal of reservations and of objections to reservations) [3] (*concluded*) [4]

1. Mr. REUTER (Special Rapporteur), replying to a question asked by Mr. Calle y Calle at the previous meeting,[5] explained what he had had in mind when he had suggested, in the commentary to article 22 (A/CN.4/290 and Add.1), that it might be necessary "to complete article 22 and in particular to provide for wider notification when the withdrawal of an objection to a reservation results in a modification of the conventional régime to which a treaty is subject".

2. As he had already said, it was possible that a treaty concluded between States, but which had been open to one or two international organizations might at some time become a treaty between States only. In his opinion, such an "intermittent" treaty should continue to be governed by the draft articles. With regard to reservations and objections to reservations to a treaty of that kind, an international organization might formulate a reservation and two States might raise an objection to it, thus depriving the international organization of its status as a party in relation to them. For both those States, the treaty would then be a treaty between States only, whereas for the other States parties and the two organizations, it would still be a treaty between States and international organizations. If the two States in question subsequently withdrew their objection, the situation would return to normal; for them, the treaty would again be a treaty between States and international organizations and the rules of the draft articles would apply. In such a case, however, it would be advisable for all the parties, and not only the reserving party, to be notified of the withdrawal of the objection, as provided in draft article 22. In any event, his own opinion was that a treaty governed by the rules of the draft articles should be considered as remaining subject to them, even if it temporarily became a treaty between States only.

ARTICLE 24 (Entry into force) *and*

ARTICLE 25 (Provisional application)

3. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 24 and 25 in his fourth report (A/CN.4/285), which read:

Article 24. Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States and international organizations may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and international organizations.

3. When the consent of a State or international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States and international

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

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

[3] For text, see 1434th meeting, para. 30.

[4] See 1434th meeting, foot-note 7.

[5] *Ibid.*, para. 32.

organizations to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25. Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States or international organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States or international organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or organization notifies the other States or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

4. Mr. REUTER (Special Rapporteur) said that the two articles were based on the corresponding provisions of the Vienna Convention,[6] from which they differed only to the extent of the drafting changes needed in order to take account of international organizations. Since the text of article 24 of the Vienna Convention was extremely flexible, it could be adapted to any situation which might result from agreements concluded by international organizations. That was why he had not distinguished between treaties concluded between organizations and treaties concluded between States and international organizations. He had not made that distinction in draft article 25 either.

5. Mr. FRANCIS observed that article 2, paragraph 1 (*g*),[7] seemed to be based on the premise that there could be some difference between the negotiating posture of a State and that of an international organization, but that, when no such difference existed, an organization would assume the character of a "party", as defined in that provision. Article 24, paragraph 1, seemed to contemplate a situation in which the State and the international organizations concerned were on equal terms.

6. Similarly, the provisions of article 25, paragraph 1 (*a*), would give international organizations a voice in determining whether a treaty in the negotiation of which they had participated with States could apply provisionally. Article 25, paragraph 1 (*b*), however, seemed to imply that, where both international organizations and States had negotiated a treaty, only the latter could determine whether or not it should apply provisionally. Difficulties would also arise from article 25, paragraph 2, since an international organization would not be able to give the notice to which that provision referred to "other" States because it was not itself a State. If the intention was that international organizations should have the same rights with respect to the entry into force and the provisional application of treaties as the States with which they had negotiated those treaties, paragraph 1 (*b*), and paragraph 2 of article 25 would have to be amended.

7. Mr. REUTER (Special Rapporteur) said he thought the comments made by Mr. Francis raised a question of intention and a question of drafting. His intention had been to place States and international organizations on an equal footing, as that could not cause any difficulties. The drafting of the articles under consideration might be defective; an extremely simple solution would be to follow a procedure already adopted in other articles, which referred neither to States nor to international organizations but to "contracting parties".

8. Mr. USHAKOV said he was convinced that the same formula could not be applied to States and to international organizations and that there must be one provision for treaties concluded between international organizations and another for treaties concluded between States and international organizations.

9. According to article 24, paragraph 1, a treaty entered into force "in such manner and upon such date as it may provide or as the negotiating States and international organizations may agree". If that paragraph was divided into two provisions, the provision concerning treaties concluded between international organizations would not cause any difficulty: the agreement in question would be an agreement between the negotiating international organizations. But the same did not apply to treaties between States and international organizations, which might be concluded either by a large number of States and a single international organization or by a large number of international organizations and a single State. Would a refusal by the international organization, in the first case, or by the State, in the second, to consent to the entry into force of the treaty be enough to prevent its entry into force? The seriousness of the resultant difficulties would depend on the many possible variations between those two extreme cases.

10. The same was true of article 24, paragraph 2. If that provision related only to treaties concluded between international organizations, there would be no objection to basing it on the corresponding provision of the Vienna Convention. In the case of treaties between States and international organizations, however, paragraph 2 of article 24 raised the same problems as paragraph 1 where only a small number of international organizations or of States were parties.

11. Article 25 presented just the same difficulties. The case of treaties between international organizations and that of treaties between States and international organizations should again be dealt with separately, having regard to all the possible situations.

12. The difficulties he foresaw would depend on the final wording of articles 19 and 19*bis*. If those articles were drafted as he proposed, the drafting of the following articles would be greatly simplified.

13. Mr. CALLE Y CALLE said he agreed with the view expressed by the Special Rapporteur in his commentaries to articles 24 and 25 (A/CN.4/285) that, subject to drafting changes, the corresponding articles of the Vienna Convention were flexible enough to cover all imaginable hypotheses in regard to the entry into force or provisional application of treaties to which international organizations were parties. The simple wording reproduced by the Special Rapporteur had been discussed at length in the Commission, explained in its commentaries and adopted with-

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

[7] *Ibid.*, foot-note 3.

out difficulty by the United Nations Conference on the Law of Treaties. While he agreed with Mr. Ushakov that it was essential to make a distinction between States and international organizations in certain articles, he did not think that was necessary in articles 24 and 25.

14. Mr. ŠAHOVIĆ said he thought that all the comments made on articles 24 and 25 could be considered by the Drafting Committee. The Special Rapporteur had probably been right to use almost the same wording as the corresponding provisions of the Vienna Convention, for it was difficult to see how the basic rules on the entry into force and provisional application of treaties, which the Commission was now considering, could be otherwise expressed. In view of the method followed by the Commission in drafting other provisions, however, it might be advisable to adopt Mr. Ushakov's suggestion and subdivide the articles under consideration, so as to make them easier to understand. If he favoured such a solution, it was essentially for reasons of method; apart from that, he believed that, in their capacity as parties to treaties, States and international organizations should be on an equal footing.

15. In the light of the definitions given by the Commission in article 2, paragraph 1 (*e*), the word "negotiating" should not present any difficulties.

16. Mr. REUTER (Special Rapporteur) said that, in view of the concern expressed by Mr. Ushakov and of what Mr. Šahović had just said, he would try to draft separate provisions for treaties between international organizations and treaties between States and international organizations.

17. With regard to Mr. Ushakov's other comments, he stressed that, in the articles under consideration, he had deliberately placed States and international organizations on the same footing. All the members of the Commission seemed to approve of that position except Mr. Ushakov, who had nevertheless made it clear that his opposition depended on how articles 19 and 19*bis* would be drafted. He did not share the point of view of Mr. Ushakov, who did not see why, in a treaty concluded between a large number of international organizations and a single State, that State should take part, on the same footing as the international organizations, in drawing up an agreement on the entry into force or provisional application of the treaty. In taking that view, Mr. Ushakov was calling in question the notion of a party to a treaty. He (the Special Rapporteur) believed that the agreement of the single State was essential if, for example, the treaty related to assistance to be provided to that State by a number of international organizations. Similarly, it was inconceivable that a treaty concluded between a large number of States and an international organization, which made that organization responsible for nuclear monitoring, could enter into force or be applied provisionally without the organization's consent. If the Commission decided to give international organizations a special status, it would be necessary to amend not only articles 19 and 20 but also the following articles so that restrictive rules would apply to international organizations. If the Commission chose that course, he would defer to its wishes, although he held a different view. In the circumstances, he thought that articles 24 and 25 could be referred to the Drafting Committee for consideration in the light of articles 19 and 20.

18. Mr. USHAKOV said that his position was based on concrete cases. It was not a question of agreements between "parties", as the Special Rapporteur had said, but of agreements between "negotiating" States and international organizations. Article 3 (*c*) of the Vienna Convention reserved the application of that Convention to the relations of States as between themselves under international agreements to which other subjects of international law were also parties, and he did not see how the articles under consideration would make it possible to apply that provision to treaties to which a large number of States and a single international organization were parties. According to article 25, for example, it would be necessary for the negotiating international organization to agree to the provisional application of the treaty. If the future convention on the law of the sea provided for the participation of the United Nations and did not contain any provisions on entry into force or provisional application, the agreement of the United Nations would be necessary for the entry into force or provisional application of that instrument.

19. The CHAIRMAN said he hoped that the discussion on articles 24 and 25 need not be unduly prolonged since the point raised by Mr. Ushakov was essentially one which could be handled by the Drafting Committee.

20. Mr. DADZIE reminded the Commission that its task was to draft rules which would apply to the types of treaty mentioned in draft article 1. The question of the position of States in regard to treaties having been settled by the Vienna Convention, the Commission had to decide what status it ought to accord to international organizations in regard to treaties; that was not a question which could be referred to the Drafting Committee. It had been suggested, and he agreed, that international organizations ought to be placed on the same footing as States where treaties were concerned. If that was so, the Commission should not draft parallel rules for States and international organizations in regard to treaties to which both were parties.

21. He had little difficulty in accepting the substance of articles 24 and 25 and thought they could both be referred to the Drafting Committee.

22. The CHAIRMAN explained that his appeal for brevity had been made solely because the question whether the Commission should adopt the method of drafting in parallel, to which Mr. Dadzie had referred, had already been discussed at length in relation to earlier articles. While every member of the Commission naturally remained free to raise such points concerning individual articles as he wished, practice had shown that, once members had made their views clear in the Commission, it was better to leave to the Drafting Committee the discussion of issues which, like that mentioned by Mr. Dadzie, called for abstract decisions of principle. No such decision had been taken in the case in question. The starting point for the Commission's current work was the definition of a "party" to a treaty given in article 2, paragraph 1 (*g*).

23. Mr. FRANCIS said that, while, as a new member, he was grateful to the Chairman for his explanation of

the background to the present situation, he none the less thought that the Commission had left something undone at the start of its study of the topic.

24. Article 3, subparagraph (*c*) of the Vienna Convention envisaged "the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties"; the word "also" was important, for it showed that the participation in the agreements concerned of States and of "other subjects of international law", which included international organizations, was regarded as being equal participation. In his view, that was the starting point for the Commission's work. Accordingly while he did not agree with all that Mr. Ushakov had said, he believed that it would be useful and would enable the Commission to avoid the problems it had encountered in discussing articles 24 and 25 if a provision was inserted at the beginning of the draft to the effect that, although States and international organizations were not equal *per se*, the latter were to be considered as assimilated to the former for the purpose of the draft articles.

25. The CHAIRMAN pointed out that, although the matter had not yet been dealt with, the Special Rapporteur's fifth report showed that both he and the Commission were very conscious of the basic problem which might arise from the application of article 3, subparagraph (*c*) of the Vienna Convention. In view of the difficulty of the problem, the Commission would probably make better progress by taking it up at the end rather than at the beginning of its deliberations.

26. Mr. VEROSTA read out the definition of the term "treaty" contained in article 2, paragraph 1 (*a*), of the Vienna Convention. The definition covered bilateral treaties, multilateral treaties and multilateral treaties with limited participation. Whenever the Commission or the Conference on the Law of Treaties had not been able to take account of all those different kinds of treaty in a single provision, they had had to draft separate provisions. Thus, most of the provisions of the Vienna Convention related to bilateral treaties, but there were also some provisions relating either to multilateral treaties or to restricted multilateral treaties.

27. According to draft article 1, the draft articles did not apply to treaties in general but to two particular kinds of treaty, namely, treaties between one or more States and one or more international organizations and treaties between international organizations. Those were therefore the two categories of treaties which the Commission should take into account in formulating the draft articles. What Mr. Ushakov wanted was, in short, that the distinction made in article 1 should also be made in article 19 and the following articles. He (Mr. Verosta) thought it was for the Drafting Committee to decide whether separate provisions should be drafted for treaties concluded between international organizations only.

28. Mr. SCHWEBEL said that the excellent point made by Mr. Francis might best be incorporated in the commentary to the draft articles. The Special Rapporteur had shown in his reports how well the distinction between States and international organizations might be brought out in the commentary.

29. The point concerning the differences between international organizations and States was certainly a valid one, to which all the members of the Commission subscribed, but it should not be pressed too far. It should be borne in mind that international organizations were intergovernmental organizations which expressed the will, not of any single State, but of States acting collectively. As such, those organizations were international persons entitled to a full measure of respect.

30. It had been argued that, where the parties to a treaty comprised a large majority of States and only one or a few international organizations, the treaty was by its nature an inter-State treaty. He was not convinced that an attempt to categorize treaties according to the preponderant type of party would be a productive endeavour. As the Special Rapporteur had pointed out, it was possible to conceive of a treaty on nuclear matters, the great majority of the parties to which were States but in which an international organization played a critical role.

31. Mr. USHAKOV said he fully agreed with the Chairman's opinion in regard to the Drafting Committee's work. It was, indeed, impossible for the Commission to examine the draft articles in detail and to take definite positions on certain questions of principle because the answers to those questions depended on the specific provisions which would be adopted. The Drafting Committee's role was therefore a very important one, for it could examine the draft articles in detail and amend them or even draft new articles on the basis of the Commission's discussions. It was the Drafting Committee which did the most difficult and also the most fruitful work.

32. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer articles 24 and 25 to the Drafting Committee.

It was so agreed.[8]

ARTICLE 26 (*Pacta sunt servanda*)

33. The CHAIRMAN invited the Special Rapporteur to introduce article 26, which read:

***Article 26.* Pacta sunt servanda**

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

34. Mr. REUTER (Special Rapporteur) said that he had no particular comments to make on article 26.

35. Mr. CALLE Y CALLE said that, before article 26 was referred to the Drafting Committee, he wished to pay homage to the principle of *pacta sunt servanda*, which was of vital importance in the life of States, and to express his conviction that, whereas States might sometimes fail to perform treaties, international organizations, which were more susceptible to public opinion and to the influence of small and medium-sized States, would comply with that sacrosanct rule of international law in exemplary fashion.

[8] For the consideration of the text proposed by the Drafting Committee, see 1451st meeting, paras. 21-45.

36. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer article 26 to the Drafting Committee.

It was so agreed.[9]

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

37. The CHAIRMAN invited the Special Rapporteur to introduce article 27, which read:

Article 27. Internal law of a State, rules of an international organization and observance of treaties

Without prejudice to article 46, failure to perform a treaty may not be justified

(*a*) in the case of a State, by the provisions of its internal law;

(*b*) in the case of an international organization, by the rules of the organization.

38. Mr. REUTER (Special Rapporteur) said that, although article 27 appeared to be relatively simple, it raised questions both of terminology and of substance.

39. As to terminology, it might be asked what expression could be used, in the case of international organizations, to replace the expression "internal law" used in regard to States. The Commission had taken up that question before, particularly in connexion with article 2, paragraph 2, as he had indicated in his commentary to article 27, and it had decided in favour of the expression "rules of an international organization", which he had used in his draft article. A point in favour of that expression was that it had been used in the Vienna Convention and in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[10] both of which referred to the "relevant rules of the organization". He thought it preferable not to use the expression "internal law" with reference to international organizations, because it was not appropriate in all cases.

40. Article 27 also raised a question of substance. As he had said in paragraph 4 of his commentary, the expression "rules of the organization" was to be understood in a broad sense. According to the definition 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, that expression included the constituent instrument of the organization, such written rules as it might have been able to elaborate in the exercise of its powers and the unwritten rules resulting from the practices established by the organization. But a problem arose in regard to treaties concluded by the organization: should the rules of the organization include rules deriving from some of the treaties it had concluded, such as headquarters agreements? That problem was rather outside the scope of article 27, for it came within that of article 30, as he had indicated at the end of his commentary. The Commission could therefore take a decision on the matter after it had considered article 30. At that stage, it might well decide to add to article 27, as a precaution, the words "without prejudice to article 30".

41. Mr. SETTE CÂMARA said that, notwithstanding the Special Rapporteur's enlightening introduction of article 27, he had some doubts about subparagraph (*b*). The solution proposed by the Special Rapporteur in that subparagraph was clearly motivated by his desire to establish a parallelism between the Vienna Convention and the draft articles under consideration. There was, however, a substantial difference between article 6 of the Vienna Convention and draft article 6. Under article 6 of the Vienna Convention, the treaty-making capacity of States was completely unfettered and unlimited, and no reference was made to any restrictions on that capacity deriving from internal law. In the case of an international organization, on the other hand, the relevant rules of the organization defined and shaped the contours of its treaty-making capacity. Consequently, the rules of an international organization were quite different from the provisions of a State's internal law in the case contemplated in article 27.

42. He was, of course, aware of the provisions of article 46 of the Vienna Convention concerning manifest violations. If it was the intention of the Special Rapporteur to reproduce a similar kind of provision in the article under consideration, it might perhaps cover extreme cases. In any event, however, he did not see how the solution proposed in subparagraph (*b*) could be accepted without further clarification.

43. Mr. USHAKOV said he was not sure whether the rule stated in article 27 was justified in the case of international organizations. In the case of States, the rule in article 27 of the Vienna Convention provided that a State party to a treaty could not "invoke the provisions of its internal law as justification for its failure to perform a treaty". That meant that a State party to a treaty was required to amend its internal law if that law was not in conformity with the commitments it had assumed under the treaty. But could an international organization which was a party to a treaty be required to change its own rules if they were incompatible with performance of the treaty? Could it be required, for example, to amend its constituent instrument in order to bring it into line with the provisions of the treaty? That, in his opinion, was the real problem raised by article 27. To apply the strict rule of the Vienna Convention to international organizations might have very serious consequences for them.

44. Mr. NJENGA said he shared the doubts expressed by Mr. Sette Câmara and Mr. Ushakov concerning subparagraph (*b*). As he saw it, the relevant rules of an international organization were the very key to its capacity to enter into agreements with States or with other international organizations. Consequently, to imply that, notwithstanding such rules, international organizations could still incur legal responsibilities was going too far. A State could become a party to a treaty even if the provisions of that treaty contravened its constitution; but as could be seen from the provisions of draft article 6, the capacity of an international organization to conclude treaties was governed by the relevant rules of the organ-

[9] For the consideration of the text proposed by the Drafting Committee, see 1451st meeting, para. 46.

[10] *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

ization. Any attempt by an international organization to conclude a treaty which was contrary to its rules would give rise to a serious contradiction. It could, of course, be argued that such an attempt would be a manifest violation within the meaning of article 46 of the Vienna Convention. But if there was some rule which militated against the conclusion of an agreement by an international organization, it would be manifest in all cases since a potential party to such an agreement ought first to establish that it was within that organization's powers to conclude it.

45. Thus, to refer to the written rules and regulations of an international organization would do violence to the whole approach adopted by the Commission in the draft articles and would run counter to its acknowledgement of the restricted capacity of international organizations to conclude treaties. The difficulty might, perhaps, be overcome by referring, instead, to "the practices of the organization". Moreover, it could be seen from paragraph (4) of the Special Rapporteur's commentary to article 27 that he had intended the wording of subparagraph (*b*) to cover "the unwritten rules resulting from the practices established by the organization". It was possible to imagine a case in which, for instance, although the internal practice of an international organization required its executive head to represent it in treaty negotiations and to sign treaties on its behalf, those functions were in fact performed by a lesser official. In such a case, the correct procedure would not be known to the other negotiating parties from the constituent instrument of the organization concerned, and the organization could not be allowed to invoke its normal internal practice as a reason for invalidating its consent to be bound by the treaty. On the other hand, violation of the written rules or constituent instrument of an international organization would vitiate any legal consequences ensuing for States from a treaty thus irregularly concluded by the international organization concerned.

46. The CHAIRMAN said it was clear from the discussion that the Commission needed to analyse rather more closely the effect on international organizations of the rule laid down in subparagraph (*b*) and to consider the different types of situation that might arise in practice. For instance, it might be within the capacity of an international organization to contract a financial obligation, but that obligation might be vitiated by one of the organization's rules.

47. Mr. SCHWEBEL said it had been observed that the treaty-making power of a State was unlimited. That was not altogether true, at least in the case of the United States, which was restricted by the rules of its constitution. Although the Supreme Court had never found a case in which the United States had entered into a treaty unlawfully—"treaty" being used in the sense given to that term by the United States Constitution—it had found certain executive agreements having the international effects of a treaty to be unconstitutional.

48. Clearly, an international organization should not enter into a treaty in contravention of its internal rules. In the event that it did so, however, what would be the exact legal situation? Would the treaty become void and would the other parties to it have any recourse? One solution which should not be excluded *a priori* was amendment of the relevant rules of the organization concerned. That would not necessarily entail amendment of the organization's constituent instrument—an undertaking which, as Mr. Ushakov had rightly pointed out, was no simple matter—but might involve no more than revision of the rules of procedure of a particular organ of the organization or of the administrative regulations issued by its executive head. He had the impression that the advisory opinion of the International Court of Justice in the case *Certain Expenses of the United Nations* [11] might be relevant in that regard. Some passages of that opinion might be read as suggesting that an act of an international organization, even though not altogether regularly embarked upon or expressed, might have valid international effects.

49. If the rule on that question was not to be formulated as the Special Rapporteur had proposed, how should it be? So far, he had heard no better proposal. It was possible to imagine a case in which all the parties to a treaty had believed that an international organization had acted in conformity with its rules, but in which the organization concerned found it to its advantage to plead that it had not. The rule proposed by the Special Rapporteur would then be extremely useful.

50. Mr. FRANCIS said that article 27 covered the practical application of the *pacta sunt servanda* rule. The question was how to ensure observance of that rule while at the same time avoiding the pitfalls to which Mr. Sette Câmara and Mr. Ushakov had referred. He noted from paragraph (4) of the commentary to article 27 that the Special Rapporteur understood the expression "rules of the organization" to include not only the constituent instrument of the organization but also other written rules and unwritten rules resulting from the practices established by the organization. In his view, a distinction should be made between an act of an international organization which infringed its constituent instrument (and was therefore not only *ultra vires* but also unlawful) and an irregular act involving only a breach of the organization's secondary rules or its practice. The suggestion made by Mr. Njenga [12] might provide the basis for a possible solution. It might be stipulated that, in the case of an international organization, failure to perform a treaty could not be justified unless the organization had committed an act prohibited by its constituent instrument. That would be the only case in which the *pacta sunt servanda* rule would not apply.

51. Mr. SUCHARITKUL said that he agreed with the principle of the article proposed by the Special Rapporteur but wished to make three drafting comments. First, he noted that article 27 of the Vienna Convention stated that a party could not "invoke the provisions of its internal law" as justification for its failure to perform a treaty, whereas draft article 27 referred directly to the justification of failure to perform a treaty.

52. With regard to subparagraph (*a*), he wondered whether a State could not invoke the provisions of the

[11] Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, *I.C.J. Reports 1962*, p. 151.

[12] See para. 45 above.

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.