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A/CN.4/SR.1551

Summary record of the 1551st 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:-

1979, vol. I

44. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov seemed to believe that only States, in the final analysis, determined what was normal practice, but that knowledge of such practice reached international organizations, which were supposed to refer to it. He could see no objection to expressing that nuance in paragraph 2, and even in paragraph 4, of variant B.

45. Speaking as a member of the Commission, he agreed with Mr. Ushakov that there was no normal practice common to all international organizations, although there was an incipient tendency, for example, to entrust certain functions to a permanent and single representative of an organization, in the person of its secretary-general. In the case of States, however, the practice specified in article 7 of the Vienna Convention was established. While it was true that it would be dangerous to look for constitutional similarities between international organizations to identify a general practice, the fact remained that each organization could have its own normal practice. There were admittedly international organizations whose constituent instruments contained no provisions concerning competence to conclude treaties, but a practice generally developed from which a rule emerged, and it was on that basis that a normal practice could be considered to exist. A State that relied on such practice on the part of an international organization was therefore in a position requiring some degree of protection.

46. For instance, an economic organization might conclude economic assistance agreements with States, even though its constituent instrument made no provision for such agreements. If, after concluding six agreements of that kind with different States, it concluded another with a seventh State, that State would rely on that practice. Even if the preceding agreements had been concluded by a director of the organization, and the governing council noticed, at the time of conclusion of the seventh agreement, that the director was not competent for that purpose, there would already be a certain practice of the organization, especially if some time had elapsed before the governing council had become aware of the situation. That practice might be changed, but, out of consideration for the partner States, the six earlier agreements could not be held to be invalid.

47. The Commission had already recognized that the practice of an international organization was not born in a day, and it could not now deny the existence of such practice. Of course, international organizations might commit abuses; but it was also possible that an organization's normal practice might make good the shortcomings of its constitutional instrument and enable it to carry on and perform its functions. Hence to consider the agreements concluded by virtue of such practice invalid would be to strike the organization a mortal blow.

The meeting rose at 1 p.m.

1551st MEETING

Wednesday, 13 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319, A/CN.4/L.296)

[Item 4 of the agenda]

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

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties)[1] (*continued*)

1. Mr. PINTO said that verification of the constitutionality of treaties was a matter for each individual State. It was not for a treaty partner to ascertain the constitutionality of a State's expression of consent. That did not mean, however, that the law did not require a basic minimum of prudence and circumspection on the part of the treaty partners. The treaty partner must behave with a normal degree of caution and care to be able to claim reliance on a State's competence to conclude a treaty. The treaty partner did not have to go beyond what normal prudent practice in such a case demanded. It might, for example, ask to see the full powers of the person expressing the State's consent, or ask that a high governmental legal official should testify that all necessary validations, consents and constitutional approvals had been given. Whatever practice was considered normal for relations between the parties concerned would be sufficient, and the treaty partner was not required to go into the details of the legal system of the co-contracting State. The other requirement was that a treaty partner should act in good faith and should not avail itself of prior knowledge of the fact of incompetence in order to accomplish some illegal purpose of its own. If the normal practice had been observed and good faith was not in question, a treaty partner was entitled to rely on a State's implied representation that its expression of consent to be bound by the treaty was valid, and a State could not deny the validity of the treaty on the ground that some aspect of its internal law had not been complied with.

2. Article 46 of the Vienna Convention[2] stated an exception to that rule, and the Special Rapporteur pro-

[1] For text, see 1550th meeting, para. 22.

[2] See 1546th meeting, foot-note 1.

posed that draft article 46 should preserve that exception. Article 46 of the Convention was very concise. The rule and the exception were telescoped, and the rule had to be deduced from the statement of the exception. The Special Rapporteur proposed that draft article 46 should follow the same lines. To promote the stability of treaty relationships, the treaty partner was entitled to rely on the implied representation by a State of the constitutionality of its expression of consent, unless the violation of its internal law was both manifest and fundamental. If the violation of internal law should have been known to the treaty partner, in other words, if it was "objectively evident" because it was both readily apparent and of a fundamental nature, the State could claim that the non-fulfilment of its internal law vitiated its consent to be bound and that the treaty partner should have known, and did in fact know, and could not take advantage of the State, which was then at a genuine disadvantage. Before such a situation could occur, however, the violation of internal law must be very clearly evident, by reason both of its form and of its substance.

3. The question before the Commission was whether such a rule and such an exception existed, and should be provided for, in treaty relations between States and international organizations or between international organizations. The view had been expressed that the rule and the exception confirmed in article 46 of the Vienna Convention, while reasonable in the case of inter-State relations, could not be applied directly to treaty relations with international organizations. It had also been pointed out that the State was master of its own internal law, and therefore had some flexibility in the way consent would be legally expressed or amended and in remedying violations of internal law and maintaining the validity of treaties to protect third parties. International organizations, on the other hand, had no such flexibility and were rigidly bound in their actions by the scope of the competence given them by their constituent instruments. The term "manifest" did not have the same value in relation to States and organizations, since facts became "manifest" to States in a more comprehensive way than they did to international organizations. He fully agreed with those comments, and had stated on previous occasions that there were fundamental differences between States and international organizations which prevented them, as a general rule from being treated on the same footing. Those differences related to their internal organization, the scope of their competence and their decision-making procedures. But the most fundamental factor that set an international organization apart was that it was the creature of its members, and that it had a clearly defined and paramount social function and purpose which it was created, designed and required to fulfil.

4. In the light of those considerations, it would be preferable not to transpose article 46 of the Vienna Convention, as it stood, into the context of relations between States and international organizations or between international organizations, but to take due account of the special nature of those relations, bearing in mind the social character and purpose of the organization as a treaty partner. Consequently, while a rule on the lines of article 46 should certainly be included in the draft, it should be a differential rule for States and organizations. His preference was therefore for variant B.

5. However, variant B as it stood had gaps and ambiguities which the Drafting Committee would no doubt eliminate. As Mr. Ushakov (1550th meeting) had shown, the content of the term "normal practice" was not clear. It was possible, nevertheless, to speak of normal practice between a State and an organization of which it was a member. A whole body of firm procedures had been developed to ensure that negotiations between organizations and their members for the conclusion of a treaty would produce maximum disclosure of information on both sides. In fact, variant B seemed designed to apply to relations between organizations and non-member States, as was suggested by the definition of a "manifest" violation in paragraph 4.

6. If the differential approach represented by variant B were adopted, it would be necessary, first, to clarify the reference to "normal practice", making it fit each individual case; secondly, to make some reference, however general, to the rules that might apply to the great number of agreements between States and international organizations of which they were members; and thirdly, having regard to the social purpose of international organizations, further to restrict the application of the rule in paragraph 3, so as to cover not only cases where the violation was "manifest" and "fundamental" but also those cases where invalidation of the treaty would result in a situation incompatible with the object and purpose of the organization.

7. Mr. EVENSEN shared many of the doubts about article 46 expressed by Mr. Ushakov and Mr. Pinto. The differences between international organizations and States were such that the Commission should adopt a rather cautious approach in drawing a parallel between them in respect of the matters contemplated in article 47 (A/CN.4/319). Yet it was clear that, although the value of the provisions of article 47 was more theoretical than practical, it would none the less be useful for international organizations to be able to rely on rules that would make it easier for them to conclude international treaties and to gain the acceptance of States as treaty partners. A balance should therefore be struck between those considerations in establishing the terms of article 46, and he considered that variant B would best serve that purpose.

8. Nevertheless, he was concerned about the rather ambiguous fashion in which paragraph 4 of variant B was drafted. The criterion of "normal practice" might prove difficult to apply to an international organization, especially in regard to its treaty-making capacity. Again, the rule to be applied to States was not particularly clear, since it was not expressly specified—nor was it perhaps even intended to be specified—that paragraph 4 related solely to States that were not members of the organization concerned. From the present wording of the paragraph it might well be inferred that the knowledge available to a State that was not a

member of the organization was to be the criterion for determining whether a violation was manifest or not. Obviously, despite the wording of paragraph 4, another criterion should apply in the case of States that were members of the organization concerned.

9. Lastly, the requirement of good faith obviously applied to all the parties to a treaty. Unfortunately, that requirement was mentioned at the end of the paragraph, in such a way that it could be taken to apply only to international organizations and not to States.

10. Mr. REUTER (Special Rapporteur) pointed out that the article under consideration dealt separately with the consent of States and that of international organizations. Not only paragraph 1, but also paragraph 2 of variant B concerned the consent of States. The reference to good faith, which appeared in both variants A and B, accordingly applied to States, as it came at the end of paragraph 3 of variant A and at the end of paragraph 2 of variant B. If the Commission considered that it should not depart from the Vienna Convention in regard to the consent of States, it would be enough to refrain from adding the words "or any international organization", which he had proposed orally (1550th meeting, para. 23), in variant B. But it was obvious that, when an organization approached a State with a view to concluding an agreement, it was in the same position as any State with regard to evaluation of the consent of States.

11. Mr. SCHWEBEL was inclined to favour variant A. The basic rule stated in article 46 of the Vienna Convention was sound, and should obviously be reproduced in the present draft insofar as States were concerned. It should also apply in some measure to international organizations; otherwise, as the Special Rapporteur had eloquently emphasized, the commitments assumed by international organizations would be subject to recall as a result of a violation of a provision of the rules of the international organization concerned, regardless of how unreasonable it might have been to consider that the State with which the organization entered into the treaty had been on notice of the violation. The treaties concluded by international organizations could not be aleatory and they must be no less binding on international organizations than they were on States.

12. Naturally, that fundamental approach called for further refinement. Fortunately, variant A did in fact go further, since it restricted the authority of an international organization, like that of a State, to repudiate a treaty on the ground of violation of provisions concerning its capacity to conclude the treaty in question to instances in which the rule violated was of fundamental importance and the violation itself was manifest. The rules of an international organization were broadly, but correctly, defined in article 2, paragraph 1(*j*),[3] as the constituent instruments, relevant decisions and resolutions, and established practice of the organization. He could imagine a case in which an international organization concluded a treaty, not in violation of its constituent instrument or even of its relevant decisions and resolutions, which meant, presumably, its rules of procedure or rules of like formality, but in violation of an established practice which, however, was not a practice that was notorious or even noteworthy. In that event, the international organization concerned should not be able to plead the invalidity of the treaty if the violation of its authority to conclude the treaty had not been manifest and had not involved a rule of fundamental importance.

13. The difficulty with regard to variant B was that it would restrict the thrust of article 46 to cases in which the violation of the international organization's authority would be objectively evident to any State that was not a member of the organization and to another contracting international organization. Admittedly, that might be the very purpose for suggesting variant B. But if a small member State of a United Nations agency, a State that was rich neither in legal nor other resources, concluded a technical assistance agreement with that agency in accordance with the agency's practice, should the agency be able to void the agreement on the ground that, even if the violation of its authority was not manifest and even if it did not concern a rule of fundamental importance, all the members of the agency must be presumed to be on notice of all of its rules? The merit of so exigent a rule was obvious in the case of organizations with restricted membership, such as EEC, since every member could reasonably be expected to have actual or presumed knowledge of the Community's rules on treaty making. But such an approach was far less reasonable in the case of universal organizations. He very much doubted whether every State in the world could be regarded as having so intimate a knowledge of the rules and practice of every universal organization to which it belonged. It should be remembered that even States with large foreign services were not always in full control of their treaty making. It was something of a myth to claim that treaty making was under cohesive control and to say that a State, if it had waived one of its constitutional rules, had done so deliberately. Many treaties were concluded not by foreign services but by State agencies that were very ill-acquainted with the rules on treaty making. Could smaller States, which barely managed to maintain a permanent mission at the headquarters of the organization concerned, be presumed to have full knowledge of the rules of technical agencies such as ICAO, WMO or WHO, or even of the United Nations?

14. If international organizations were afforded exceptional opportunities to avoid their treaty commitments, such a course would not be conducive to the achievement of their objects, which after all represented the reason why they were established by States. The treaty-making capacity of international organizations should be given full scope for development, in keeping with the rules of the organizations. Nevertheless those rules themselves, as had been recognized in the Com-

[3] See 1546th meeting, foot-note 4.

mission's definition of them, must also be capable of some development. Jefferson, as the first President of the Senate of the United States of America, had written a remarkable set of parliamentary rules and commentaries, which had for many decades played a most influential role in the workings of the Senate. He had perceptively considered the scope of treaty-making power, but some of the restrictions he had placed on it had been overtaken by the events of history and the liberal interpretation of the Constitution that was characteristic of the United States Supreme Court. For example, Jefferson had maintained that treaties could be made only on the accepted subjects of treaties. It was inconceivable that the treaty-making capacity of the United States could now be restricted to the subjects of treaty making in the eighteenth century; it would not be possible, for instance, to conclude treaties on the non-proliferation of nuclear weapons. Obviously, it could be rightly claimed that an international organization was not the same as a State, which possessed plenary and residual powers. It was more than likely that, if the United Nations survived for 200 years, the objects and purposes of the Charter were broad enough to accommodate treaties on a wide variety of subjects, but that might not hold true for other international organizations, which would have greater need for a liberal interpretation of their rules.

15. Accordingly, the Commission should take the longer view, as the United States Supreme Court had done after Jefferson's time, when Justice Holmes had written that the Court had been interpreting a Constitution whose development could not have been foreseen by the most gifted of its begetters. The constitutions of international organizations should be viewed in a similar spirit. Clearly, that did not mean that international organizations should be permitted, or required, to void treaties which they concluded in an arbitrary manner, which would not be conducive either to the integrity of the treaty-making process or to the growth of international organizations.

16. Mr. JAGOTA favoured variant A, the formulation for which the Special Rapporteur had courageously expressed his own preference.

17. Of course, he recognized that there were basic differences between States and international organizations. As Mr. Ushakov had pointed out, the present draft articles would not be necessary if such differences did not exist, for the provisions of the Vienna Convention could then be applied *mutatis mutandis* to international organizations. In fact, those differences had already been borne in mind in preparing the draft articles and, in some instances, different provisions had been made for international organizations. For example, article 7 spoke of "full powers" for States and of "powers" for international organizations. At the previous session, the Commission had also drawn a distinction when it had dealt with the rights and obligations of third States and third international organizations in connexion with treaties between States and international organizations or between international organizations, so that the granting of a right would depend in one case on agreement or on implied consent, but in the other case exclusively on agreement given in accordance with the rules of the international organization.[4]

18. In the matter of the stability of treaty relations or the continued validity of treaties, it was essential to take account of those differences. He considered, however, that the necessary distinction should not be made in article 45[5] or in article 46. The terms of article 46 could be invoked by a State which, having violated a provision of its internal law regarding competence to conclude treaties, could assert that the treaty was void because the person who had expressed consent to be bound by the treaty had not been competent to do so or had acted unconstitutionally. Similarly, the article could be invoked by an international organization, which could claim that the person who had expressed consent had not been competent or had violated a basic rule of the organization. Obviously, it must be a rule of fundamental importance, for otherwise the article would entitle the organization to change its mind about the treaty at any time. Article 7, paragraphs 3 (*b*) and 4 (*b*), determined who could be considered as representing an international organization for the purposes of authenticating the text of a treaty and of communicating consent to be bound by a treaty. Nevertheless, an international organization still had an opportunity, under article 8 of the draft, to confirm a treaty, notwithstanding the fact that the person representing the organization had not acted in accordance with its rules. On the other hand, in regard to any violation covered by article 46, could an international organization say that it was not ready to confirm the treaty in accordance with article 8 and that, in fact, it wished the treaty to be void *ab initio* because the person representing the organization had not been competent to do so?

19. It was impossible for States to ascertain fully the "rules" of an international organization, which were defined in article 2, paragraph 1 (*j*), as consisting not only of the organization's constituent instruments, but also of its relevant decisions and resolutions and established practice. Consequently, a State could not ensure compliance with all the relevant rules of an international organization, but the organization itself could invoke failure to comply with those rules as a ground for invalidating a treaty.

20. Hence it was important that article 46 should lay down strict rules. Such rules were set out for States in paragraph 1, and for international organizations in paragraph 2 of variant A. In the latter instance, the rule of the organization must be of fundamental importance and the violation must be manifest. The Special Rapporteur had indicated that the violation must be manifest in terms of practice, something that

[4] See *Yearbook... 1978*, vol. II (Part Two), p. 124, document A/33/10, para. 132.

[5] See 1548th meeting, para. 6.

was relatively easy to determine in the case of State practice in treaty making, but altogether more difficult in the case of the practice of international organizations. Should it be the practice of international organizations in general, or simply the practice of the particular organization invoking the terms of article 46? And if the violation was to be manifest to a State, should a distinction be made between non-member States and member States of the organization concerned? Presumably, the member States were better acquainted with the rules of the organization and in a better position to know whether the rule in question was of fundamental importance. The problem in that case was to determine whether the evidence of the violation to a member State should be deemed relevant or should be excluded. If it were to be excluded, the organization could at any time repudiate a treaty concluded with one of its member States. However, in paragraph (18) of his commentary (A/CN.4/319), the Special Rapporteur had provided an answer to the problem that might arise in EEC, for instance. The fate of a treaty concluded between the Community and one of its members would be determined by the special system of law governing the relations between EEC and its member States, not by the provisions of draft article 46. However, the Special Rapporteur had noted, in foot-note 30 of his report, that the definition of the evidence proposed in article 46, paragraph 4, would not apply to treaties between universal organizations and their member States, which would mean that it would be easier for the United Nations to invoke any violation of a fundamental rule in connexion with treaties concluded with member States.

21. His own view was that article 46, paragraph 4, was neither necessary nor useful and that it would create difficulties; for the United Nations could invoke it by claiming that the rule violated was of fundamental importance, even though the other treaty partners considered the rule to be of minor importance. Naturally, if a fundamental rule of the United Nations were violated, the treaty should be declared void; but even in other situations the United Nations itself would not suffer, because, under Article 103 of the Charter, the obligations of Member States under the Charter would prevail over their obligations under the treaty in question. Hence paragraph 4 of article 46 could simply be deleted.

22. He fully agreed with the Special Rapporteur that, for the purposes of article 46, the question whether a rule of an international organization was of fundamental importance or not should be determined with reference to the practice of that organization alone.

23. In conclusion, he considered that article 46 should consist of paragraph 1, in its present form, and paragraphs 2 and 3 of variant A. In the latter paragraph, it would be advisable to insert, after the word "practice", the words "among States and of that organization, respectively,". The inclusion of commas before and after the word "respectively" would cover Mr. Evensen's point concerning the requirement of good faith.

24. Mr. REUTER (Special Rapporteur), replying to the comments made so far on draft article 46, noted that there was almost general agreement on two points.

25. First, the members of the Commission seemed to be in favour of keeping to the rules of the Vienna Convention in regard to the consent of States. If a decision were taken to that effect, it would obviously have implications for the preceding articles of the draft. It would therefore be advisable for the Drafting Committee to consider article 46 before article 45. It followed logically that the Commission should also approve paragraph 2 of variant B, since that paragraph related only to the consent of States. The wording used might be improved to make it clear that the normal practice referred to was not that of States, but that which could be deduced from relations with States. It did not seem that the practice of an international organization in regard to the consent of a State differed from that of States.

26. Secondly, the members of the Commission as a whole seemed to think that it would be dangerous to refer to a general practice of international organizations. There were so many differences between international organizations that each one should be left to define its own practice.

27. On other points, there were misunderstandings between him and certain members of the Commission. For instance, when the fundamental difference between States and international organizations was emphasized, as it had been by Mr. Ushakov, there was some temptation to consider that variant A assimilated organizations to States, whereas variant B took the difference into account. In reality, both variants were based on assimilation, as was clear from the resemblance between paragraph 3 of variant A and paragraph 2 of variant B, and between paragraph 2 of variant A and paragraph 3 of variant B. Those members of the Commission who, like Mr. Schwebel and Mr. Jagota, had favoured variant A, had thus been opting for assimilation, while those who had spoken in favour of variant B had probably been advocating a greater degree of differentiation.

28. He had originally opted for assimilation, but had found that the idea of a manifest violation differed according to whether it related to an agreement concluded between an organization and one or more of its members, or an agreement concluded with non-member States. For the member States could be expected to know the rules of the organization better than other States. True, in taking the United Nations as an example, he had not made a felicitous choice, as Mr. Schwebel had demonstrated. He had also had to admit that, in the case of a treaty between an organization and one or more of its members, the question of invalidity was not subject to rules of general international law, and in particular to the rules set out in draft article 46. Cases of that kind must be settled by the special law and practice of the organization. That idea had both theoretical and practical advantages; not only did it take into account the particular nature of

each organization, but it obviated the need to draft rules that would be equally applicable to the United Nations and to a regional bank or a specialized agency with practice covering so long a period as that of ILO. In view of Mr. Evensen's appeals for caution, it might be wondered whether as many questions as possible should not be left to the law of each organization.

29. There had, however, been several criticisms of that position. It had been pointed out that it was impossible to take the same position with regard to a large international organization like the United Nations as to small organizations, and that the text of article 46 was not clear. He had already explained his views on those two points. It had also been observed that at the end of variant B, which tended towards assimilation, he had included a paragraph making an important exception, while recognizing that the concept of fundamental rules was acceptable. Mr. Ushakov seemed inclined to think that for an organization all rules were fundamental, which would make it necessary to amend paragraph 3. Other members of the Commission, like Mr. Pinto, had emphasized the importance of the purposes of each individual organization. It might well be thought that the Commission would seek to define the fundamental rules of international organizations in general, and to attribute special importance to the purposes of each of them. In that connexion, the Commission should bear in mind the advisory opinion of the International Court of Justice concerning *Certain expenses of the United Nations,* which made it clear that the expenses in question had been expenses of the United Nations because they had been consistent with the general purposes of the Organization. Personally, he feared that any definition of the fundamental nature of the rules would lead to abandoning the attempt to lay down valid rules for all international organizations. In the case of treaties between States, the Commission had not specified which rules of internal law were of fundamental importance, and it should follow the same line with regard to international organizations.

30. Both Mr. Jagota and Mr. Schwebel had been in favour of complete assimilation of the rules concerning the consent of international organizations to those concerning the consent of States. Mr. Jagota had gone even further than the Special Rapporteur himself, since he had thought it unnecessary to distinguish between agreements concluded by an organization with its member States and agreements concluded with non-member States. Mr. Schwebel had shown that the practice of States in regard to the conclusion of treaties was not simple, and that the rule in article 46 was flexible enough. Moreover, Mr. Jagota had shown how much the Commission was bound by the preceding articles, particularly article 7. The new wording he had proposed for paragraph 3 of variant A (see para. 23 above) would be excellent if the Commission followed the line he had indicated.

31. Mr. Ushakov thought that a distinction should be made between the consent of international organizations and that of States, because the fundamental rules of international organizations could not be determined in advance. The wording he proposed for article 46 (A/CN.4/L.296)[6] differed in more than one respect from the corresponding article of the Vienna Convention.

32. Mr. QUENTIN-BAXTER said that draft article 46 was the necessary counterpart to draft article 6. For fundamental reasons, the competence of States was different from that of international organizations. Even if the same words were used in draft article 46 in respect of States and international organizations, article 46 would not play the same part in the draft as it did in the Vienna Convention. In the Vienna Convention, the rule in question derived from, and gave precision to, the fundamental rule that States had a general competence, which they were not permitted to deny in ordinary circumstances, whereas the rule in the text under consideration was the necessary counterpart to the restricted competence of international organizations.

33. The aim should be to provide for as great a degree of assimilation as possible between the positions of States and international organizations, since the latter had become actors, as well as instruments, in the world of States and must as far as possible take account of, and ally themselves with, the rules made by States to govern their relations.

34. It was possible to adopt a common text for States and international organizations, with some changes. First, whereas the Vienna Convention spoke of the "internal law" of a State, the draft articles contained in addition the defined term "rules of the organization". It was not possible to ignore that term by referring simply to the internal law of the organization. Furthermore, the expression "normal practice" could not be used generically in relation to organizations. Even with the amendment proposed by Mr. Jagota, he would find it difficult to accept variant A.

35. He wondered whether, given the context, it was necessary for the Commission to concern itself very much in the text with distinguishing between States that were members of an organization and those that were not. The expression "any State" could not possibly be interpreted as meaning only States that were members of an organization, except in the case of treaties to which only States members of an organization could be parties. While he could not agree with Mr. Schwebel that variant A was adequate, he shared the view that in many contexts it would be unrealistic to draw too clear a distinction between States that were members of an organization and those that were not.

36. Another point to be considered was that persons acting on behalf of an organization did not necessarily have a conspectus of its rules, but tended to be guided largely by the negotiating officials of the organization concerned. It was to be hoped that the principle of good faith would be sufficient to ensure that organiza-

[6] Text reproduced in the summary record of the 1552nd meeting, para. 15.

tions stood by their bargains. As the Special Rapporteur had noted in his commentary, from what was known of the practice of international organizations there was no indication that sharp differences of opinion commonly arose between States and organizations in questions of that kind, for the very obvious reason that organizations were the creatures of States, and that it was their purpose to serve them rather than to seek to reduce their responsibilities towards them. Furthermore, policy provided a major safeguard for both parties. If it was considered that something had been done incorrectly, at least States that were members of the organization concerned would be in a position to urge the organization to follow a proper course. It was not necessary to make a sharp distinction between law and policy, and efforts should be made to assimilate the position of States to that of international organizations, as the Special Rapporteur had tried to do in variant B.

37. Part of the essential difference between States and international organizations was that the constitutions and rules of organizations were public property and that States dealing with them were notified of the nature of those rules. However, the expression "rules of the organization", used in paragraph 3 of variant B, went beyond what was meant by the established practice of an organization. As a practical matter, organizations dealing with States under treaties should accept some limitation on the degree to which they could rely on the intricacies of their own rules in disclaiming obligations. That was the condition on which they enjoyed the privilege of entering into treaty relations with States.

38. Another pertinent factor was the importance attached to the term "manifest". In the context of paragraph 3 of variant B alone, the difficulty of determining what constituted a rule of fundamental importance would usually be overcome by the use of the term "manifest". Anything that was contained in the constitution, or that had been promulgated in decisions of which all had been given notice, would be manifest. Much else would not be manifest. However, in paragraph 4 of variant B a different balance existed. In paragraph 3, the condition relating to a rule of fundamental importance was coextensive with the term "manifest", so that the test of what was manifest remained unchanged. In paragraph 4, on the other hand, a knowledge of the normal practice of an organization seemed to be imputed to the other organization concerned, so that the term "manifest" had built into it an imputed knowledge. That distinction between established practice, as defined under "rules of the organization" in article 2, paragraph 1 (*j*), and normal practice, as used in draft article 46, was probably not intentional. But if the meaning of the term "manifest" was to be governed by the expression "normal practice", then the advantage of using the term "manifest" would be lost.

The meeting rose at 12.55 p.m.

1552nd MEETING

Thursday, 14 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Ghali, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Welcome to Mr. Ghali

1. The CHAIRMAN congratulated Mr. Ghali on his election and welcomed him on behalf of the Commission.

2. Mr. Ghali thanked the members of the Commission for electing him. He had been able to appreciate to the full the practical importance of international law, especially the principle of *pacta sunt servanda*, during the difficult negotiations that had led up to the conclusion, at Washington, of the Peace Treaty between Egypt and Israel. That Treaty was based on the rules of international law, and when there had been differences of opinion concerning the interpretation of its provisions, it had always been to international law that the parties had turned. He considered that international law was an essential instrument for overcoming political difficulties.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/319, A/CN.4/L.296)

[Item 4 of the agenda]

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

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties) [1] (*concluded*)

3. Mr. TABIBI said that, in the contemporary community of nations, the role of international organizations had become a fact of everyday life. The constituent instruments of those organizations reflected the collective opinion of sovereign States, and all the decisions made in international organizations, such as the United Nations, were made by sovereign States. Moreover, those organizations derived their power from their member States, through their constituent instruments. Consequently, although there were obvious differences between them, the same trends could be observed in international organizations as in sovereign

[1] For text, see 1550th meeting, para. 22.