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A/CN.4/SR.1558

Summary record of the 1558th 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:-

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municate" had been interpreted by certain members of the Commission.

41. Mr. USHAKOV believed that to say that a person could be authorized by an international organization to bind it by a treaty would be contrary to the practice of international organizations and their constituent instruments, since it would permit persons to replace the competent organs of organizations and possibly to act against the will of those organs.

42. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 50 to the Drafting Committee.

It was so decided. [14]

The meeting rose at 1 p.m.

[14] For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

1558th MEETING

Friday, 22 June 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Ushakov, Sir Francis Vallat.

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

[Item 4 of the agenda]

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

ARTICLE 51 (Coercion of a representative of a State or of an international organization)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 51 (A/CN.4/319), which read:

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

2. Mr. REUTER (Special Rapporteur) said that article 51 called for the same comments as article 50. It followed from the discussion on the latter text (1557th meeting) that article 51 should also be divided into two paragraphs, one dealing with States and the other with international organizations.

3. Mr. USHAKOV considered that article 51 raised the same problem as article 50. He therefore proposed that it be referred to the Drafting Committee.

4. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 51 to the Drafting Committee.

It was so decided. [1]

ARTICLE 52 (Coercion of a State or of an international organization by the threat or use of force)

5. The CHAIRMAN invited the Special Rapporteur to introduce draft article 52 (A/CN.4/319), which read:

Article 52. Coercion of a State or of an international organization by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

6. Mr. REUTER (Special Rapporteur) said that, apart from its title, draft article 52 reproduced without change the corresponding text of the Vienna Convention. [2]

7. Mr. USHAKOV wondered what was meant by "the threat or use of force" in the case of a treaty between two or more international organizations. He also wondered what was meant by the word "threat": was it the armed threat contemplated in the Vienna Convention, or any kind of political, diplomatic or economic pressure? In any case, he did not see how reference could be made to one international organization coercing another by the threat or use of force.

8. He therefore proposed that draft article 52 be divided into two paragraphs, one dealing with treaties between States and international organizations and the other with treaties between two or more international organizations.

9. Sir Francis VALLAT shared Mr. Ushakov's misgivings in so far as the United Nations Charter had in fact been drafted to govern relations between States, not relations between international organizations, and was worded accordingly. On the other hand, if regard were had to the principles of international law rather than of the Charter as such, there would seem to be a very real need for a provision on the lines of draft article 52, to cover the possibility of an international organization using force contrary to those principles.

[1] For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

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

For example, supposing that an organization were established by six States for their collective self-defence, the question might arise whether the use of force by that organization was a genuine exercise of the right of self-defence in accordance with the principles of the Charter, or whether it consituted an attack on the territorial integrity and political independence of another State. Such an attack was a possibility, both in law and in fact, although it was obviously to be hoped that it would never happen, and could lead to the imposition of a treaty on the State attacked. There would surely be a lacuna in the draft articles if provision were not made for that kind of situation, and he, for one, would not be prepared to assert in those circumstances, on the basis of the limitation of the Charter to Member States, that such action was not contrary to the principles of international law embodied in the Charter and that the treaty in question should therefore not be regarded as void.

10. His reasoning on article 52, as on all the draft articles, was that it should be worded to meet contingencies, so that it would apply where it properly fell to be applied. That, again, was a problem which he thought should be exposed in the commentary.

11. Although an armed conflict between two organizations was perhaps a somewhat far-fetched idea, it was still a possibility that it would be unwise to exclude. A conflict between States could take place, for instance, under the guise of a conflict between two international organizations.

12. Mr. SCHWEBEL associated himself with Sir Francis Vallat's remarks.

13. Article 53 of the United Nations Charter provided for the use of force through regional arrangements or agencies, and it was of course to be hoped that such force would be applied only in accordance with the terms of the Charter, but he wondered whether modern history in fact gave grounds for confidence in that regard. There had been cases of military and other alliances using force against a State or proclaiming the intention of doing so under circumstances which, to put it charitably, were highly dubious and had raised serious questions of violation of the Charter and of international law. He did not think that the possibility of a State or group of States using force against an international organization could be excluded. An international organization might well be subjected to the threat or even the use of force by a powerful State. He was not thinking in that context of organizations such as UNESCO or ILO, but of the many other organizations that existed, such as customs unions and associations of a small number of States having a co-operative economic character. There could also be cases of two international organizations using force against each other. Again, he was thinking not of organizations such as UNESCO and ILO, but of, say, regional organizations set up for defence purposes. One man's view of what was defensive might be another man's view of what was offensive. That did not mean that it was not possible to make an objective judgement, but judgements often differed and any such difference might well be expressed through an organization as well as through a State. In principle, therefore, he could see no grounds for objecting to the inclusion of an article on the lines proposed.

14. Mr. RIPHAGEN said that, as he read article 52, it was not restricted to the use of force by one of the parties to a treaty, since the use of force by a third party could also invalidate the treaty. Moreover, it did not presuppose the use of force by an international organization, although that was possible too. He therefore considered that article 52 was necessary and should be retained in the form proposed.

15. Mr. PINTO agreed on the need to retain draft article 52, but would like to know whether the Special Rapporteur intended to amplify the commentary by specifying that the article covered the use not only of armed force but also of other types of force. That question was bound to arise at any diplomatic conference at which the draft articles were considered.

16. Mr. NJENGA said he could accept draft article 52 in so far as an international organization might use force to procure the conclusion of a treaty, although that possibility was somewhat remote. However, he did not see what was to be gained by including the phrase "embodied in the Charter of the United Nations". In his view it was misleading, since, in effect, it referred to Article 2, paragraph 4, of the Charter, which opened with the words "all Members shall refrain..." and thus clearly had nothing to do with international organizations. He therefore considered that the reference to the Charter should be deleted. It would then be possible to take account not only of military force but also of other kinds of force—the point made by Mr. Pinto—and of current developments, as reflected in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[3] and of any results achieved by the Special Committee on enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations. In other words, he believed that the article would be unduly limited by the reference to the Charter, and for no good reason.

17. Mr. SCHWEBEL said he would be most interested to hear the Special Rapporteur's views on the important point raised by Mr. Njenga. His own immediate reaction was that there would be merit in retaining the reference to the Charter since it was a standard reference, whose core was readily recognized as lying in Article 2, paragraph 4. Mr. Njenga had observed that the opening words of that paragraph were "All Members shall refrain...". He would respond by pointing out, first, that, as shown in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the United Nations had deliberately interpreted that provision as applying not only to all Members but to all States,

[3] General Assembly resolution 2625 (XXV), annex.

and, secondly, that Article 2 of the Charter provided that: "The Organization and its Members... shall act in accordance with the following principles". If those principles were binding on the United Nations *qua* organization, why should they not also be binding on other international organizations?

18. A further point was that, even if—despite the terms of the opening phrase of Article 2 of the Charter—the obligations were regarded as binding only on States and not on international organizations, the sole concern of the Commission in that context was with organizations of States, in other words, with intergovernmental organizations. If States, in their individual capacity, undertook what was obviously a *jus cogens* obligation, they must also be bound thereby in their collective capacity, when they acted through the medium of an international organization.

19. Mr. FRANCIS said that he also agreed on the need for article 52, because the possibility of the threat or use of force against or by an international organization was not so very remote. For example, an organization that had sent peace-keeping forces into a territory might make use of their presence to secure the host country's signature to a treaty. Conversely, it was not inconceivable that the chief executive of a United Nations regional office might be compelled by the threat of an intemperate head of State—say, to occupy the regional headquarters building—to take certain action in regard to the negotiation of a treaty.

20. Whether or not the reference to the Charter should be retained in the draft article would depend on the answer to Mr. Pinto's question. During the debates in the Sixth Committee of the General Assembly on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, as well as on the Definition of Aggression, the smaller States had argued that the concept of force should include not only armed force but also other kinds of force, although there had been a body of opinion that favoured the traditional meaning. Consequently, if it was the Special Rapporteur's intention to broaden the concept of force in draft article 52, it would make for greater flexibility to omit the phrase "embodied in the Charter of the United Nations".

21. Sir Francis VALLAT said that the term "force" had been the subject of close scrutiny at the United Nations Conference on the Law of Treaties, which had adopted a resolution concerning measures that could be described as falling short of armed force.[4] He regarded it as axiomatic that the wording of draft article 52 would be interpreted in essentially the same way as the selfsame wording contained in article 52 of the Vienna Convention, which had been considered in detail and at great length before being adopted by the Conference. The Commission's present task was to adapt the terms of the Conference on the Law of Treaties to meet the needs of international organizations, and it seemed unnecessary to alter the terms of article 52 of the Vienna Convention simply because the draft article covered not only States but also international organizations.

22. In discussing the threat or use of force, it was natural to take account of the first part of Article 2, paragraph 4, of the Charter, which referred to the threat or use of force "against the territorial integrity or political independence of any State", but it was equally natural to overlook the latter part of the paragraph, which required that States should refrain from the threat or use of force "in any other manner inconsistent with the purposes of the United Nations". The legal implications of the whole of that paragraph would be covered if the draft article followed the wording of the Vienna Convention. He was well aware that the interpretation of Article 2, paragraph 4, of the Charter was open to discussion, but the many purposes of the United Nations were enumerated in Article 1 of the Charter, so that the scope of Article 2, paragraph 4, was not as restricted as the discussion appeared to indicate. The reference to the principles of international law embodied in the Charter showed the intention to use a sufficiently broad form of words that was hallowed by usage and for which there was a precedent in article 52 of the Vienna Convention. Hence it would be wise not to tamper with that wording.

23. Mr. FRANCIS said his concern was simply to determine whether the traditional interpretation of the concept of force had changed since the discussions at the United Nations Conference on the Law of Treaties, in other words, during the elaboration of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States or during the deliberations of the Special Committee on the Question of Defining Aggression. He pointed out that in 1977, during the Sixth Committee's consideration of the item concerning the conclusion of a world treaty on the non-use of force in international relations, the view had been expressed that force should be regarded as something more than armed force alone.[5]

24. Mr. PINTO said that the object of his earlier question had been to ascertain whether the Special Rapporteur intended to indicate in his commentary that the interpretation of the phrase "principles of international law embodied in the Charter of the United Nations" had evolved or whether, since the draft articles simply adapted the terms of the Vienna Convention to international organizations, there was no need for further elaboration of the concept of force to meet some of the preoccupations that would undoubtedly be expressed at any diplomatic conference convened to consider the draft articles.

[4] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, document A/CONF.39/26, annex.

[5] See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 220.

25. Ten years had passed since the Conference on the Law of Treaties, and in his opinion it could not be affirmed that the concept of force had remained unchanged. Presumably Mr. Njenga considered the phrase "principles of international law embodied in the Charter of the United Nations" to be inadequate not because the Charter did not relate to interational organizations, but rather because it failed to take full account of all the possibilities for the use of force by international organizations that had now emerged. If the commentary did not include any explanations concerning draft article 52, it might give the impression that the Commission had been unaware of the developments that had taken place.

26. Mr. RIPHAGEN said that, having been present at the Conference on the Law of Treaties and taken part in the discussions on the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, he was in favour of retaining the wording of draft article 52 as it stood. At the Conference, the stability of treaties had been a prime consideration for many States. The Commission should not act hastily and approve an article that would have the effect of invalidating a treaty; it should be remembered that the use of force included the legitimate use of force by States—for instance, in self-defence or on the orders of the Security Council. The legitimate use of force might lead to the conclusion of a peace treaty, and it was very easy to imagine circumstances in which an international organization, such as the United Nations, would be a party to a peace treaty. The States represented at the Conference on the Law of Treaties had been well aware that it was not possible to declare all peace treaties invalid. Moreover, as was apparent from its title, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operating among States in accordance with the Charter of the United Nations in fact elaborated on the principles of the Charter. Consequently draft article 52 should also be interpreted in the light of that Declaration.

27. For those reasons, he thought the wording proposed was perfectly satisfactory and he wished to reiterate that, to his mind, the article was not confined to the use of force by a party to a treaty; it also covered the use of force by a third State or by an international organization or on the orders of an international organization.

28. Mr. USHAKOV considered that for treaties between States and international organizations the rule of the Vienna Convention should be retained as it stood. Article 3 of the Vienna Convention specified that the fact that the Convention did not apply "to international agreements concluded between States and other subjects of international law or between such other subjects of international law... shall not affect... 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 Vienna Convention was thus applicable to relations between States, even under agreements to which international organizations were parties. Consequently, if a State used threats or force against another State or an international organization to procure the conclusion of a treaty between States and international organizations, the Vienna Convention applied.

29. Nevertheless, the text of the Convention could not be retained for treaties concluded between international organizations only. It was not possible in that case to refer to the principles of the United Nations Charter, since States and international organizations that were not members of the United Nations were not bound by the Charter.

30. He believed, therefore, that the rule of the Vienna Convention should be retained for treaties between States and international organizations and that a separate rule should be drafted for treaties between two or more international organizations. In his view, it would be impossible to draft a single rule for both kinds of treaty, since such a rule would not apply to international organizations other than the United Nations. Thus it would not be a general rule applicable to all situations.

31. With regard to the use of armed force, the question arose whether, in the example given by Sir Francis Vallat, the use of armed force between two international defence organizations would be directed against one of those organizations *per se* or against its member States. In the former case, would the armed force be directed against the headquarters of the organization, its organs, its secretariat or its executive director?

32. In the case of simple economic or financial pressure, could an international monetary fund, for example, refuse to grant a loan to a State because the conclusion of the loan agreement had been procured by some kind of pressure? He thought the Commission should elucidate all those points in the commentary.

33. Sir Francis VALLAT said that Mr. Riphagen's pertinent comment regarding the use of force on the orders of the Security Council brought to mind the provisions of Chapter VIII of the Charter, concerning regional arrangements, which were relevant to the discussion. Article 53 of the Charter contemplated quite clearly not only the use of armed force, but also the illegal use of force by regional agencies. The Article provided that "the Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority", but that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council"; it then proceeded to specify an exception, namely, "measures against any enemy State". Thus the Charter established very definite principles of law with respect to regional agencies, which must, in the nature of things, be regarded as international organizations.

34. Mr. REUTER (Special Rapporteur) said that the Commission should not take a position on the nature of force, but confine itself to recalling, in its commentary, what had been said on the subject at the

Conference on the Law of Treaties. It should also ask the Secretariat to extract from United Nations records the statements made on that subject in the General Assembly.

35. He pointed out that the Conference on the Law of Treaties could have referred, in article 52 of the Vienna Convention, only to the Charter of the United Nations. The reason why it had referred to the principles of international law embodied in the Charter was that it had intended the article to apply also to treaties concluded prior to the Charter. For it had considered that, during the period immediately preceding the adoption of the Charter, States had concluded a number of treaties that should be regarded as void. The commission had been asked how long those principles had been in existence, since if they had always existed most territorial treaties could be challenged, which would endanger the international territorial order. The Commission had said that it was not qualified to answer that question, but that the principles had certainly been in force in or about 1928, when the League of Nations had adopted its main instruments.

36. In connexion with the definition of aggression, the General Assembly had already raised the question whether an international organization could resort to the unlawful use of armed force. Article 1 of the Definition of Aggression[6] specified that the term "State" "includes the concept of a 'group of States' where appropriate". In his view, what was at issue was not so much whether a distinction ought to be made between treaties concluded between States and international organizations and treaties concluded between international organizations only, as whether an international organization could use force unlawfully.

37. The CHAIRMAN said that if there were no objections he would take it that the Commission decided to refer draft article 52 to the Drafting Committee.

It was so decided.[7]

The meeting rose at 1 p.m.

[6] General Assembly resolution 3314 (XXIX), annex.

[7] For consideration of the text proposed by the Drafting Committee, see 1576th meeting.

1559th MEETING

Monday, 25 June 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Welcome to Mr. Barboza

1. The CHAIRMAN congratulated Mr. Barboza on his election and welcomed him to the Commission.

2. Mr. BARBOZA thanked the Commission for the welcome extended to him and for the honour of being elected to its membership—an honour that entailed an obligation to contribute to the best of his ability towards maintaining the Commission's traditionally high standards of work.

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

[Item 4 of the agenda]

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

ARTICLE 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))

3. The CHAIRMAN invited the Special Rapporteur to introduce draft article 53 (A/CN.4/319), which read:

***Article 53. Treaties conflicting with a peremptory norm of general international law* (jus cogens)**

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

4. Mr. REUTER (Special Rapporteur) pointed out that draft article 53 was identical with the corresponding article of the Vienna Convention,[1] which stipulated that States could not derogate from peremptory norms of general international law. As international organizations were established by treaties concluded by States, it was unthinkable that they should be exempted from compliance with those norms. It was therefore appropriate to include in the draft an article equivalent to article 53 of the Vienna Convention.

5. It was open to question whether the phrase "the international community of States" was altogether appropriate in the article under consideration and whether the words "and international organizations" should not be added. In his opinion, the addition of those words would only cause difficulties. The international community of States was a unitary notion, which did not call for any mention of international organizations.

6. Mr. TSURUOKA approved of the draft article under consideration.

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