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Summary record of the 1585th meeting

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

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remains of small account in the lives of men. This is the scale of things by which we must judge whether idealism in international law should be rejected as an illusion unworthy of the trained intellect or cherished as the vital energy without which the law cannot fulfil its mission in the service of mankind. So stated the choice becomes a simple one for those who have not lost faith in human destiny.³

7. Those thoughts were offered for contemplation in the hope that, although the Commission was meeting in unusually troubled times, its work would be crowned with success.

Mr. Calle y Calle was elected first Vice-Chairman by acclamation.

Mr. Thiam was elected second Vice-Chairman by acclamation.

Mr. Verosta was elected Chairman of the Drafting Committee by acclamation.

Mr. Yankov was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/326)

The provisional agenda (A/CN.4/326) was adopted unanimously.

Organization of work

The Commission decided to begin its work by considering item 3 of its agenda (Question of treaties concluded between States and international organizations or between two or more international organizations).

The meeting rose at 4.15 p.m.

³ *Ibid.*, p. 6.

1585th MEETING

Tuesday, 6 May 1980, at 11.50 a.m.

Chairman: Mr. C. W. PINTO

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

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

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his ninth report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/327).

2. Mr. REUTER (Special Rapporteur) said that his ninth report completed the submission in first reading of the draft articles adapting the articles of the Vienna Convention on the Law of Treaties¹ to the special case of treaties concluded between States and international organizations or between two or more international organizations.

3. He had not considered it necessary to propose articles concerning final provisions, since it was customary to leave the task of preparing those articles to the conference responsible for adopting the draft convention. Nevertheless, he had proposed a draft article corresponding to article 66 of the Vienna Convention, one which, although it was contained in the body of the Convention, could, by virtue of its subject-matter, be considered as a final clause. The Commission would therefore have to decide whether article 66 of the Vienna Convention should be transposed to the draft articles. The other articles proposed to the Commission did not appear to present any major problems. Some of them (articles 61, 64, 68, 71, 72, 75 and 80) did not differ from the corresponding articles of the Vienna Convention: most of the others (articles 65, 69, 70, 74, 76, 77, 78 and 79) entailed only minor drafting changes; and only a few articles (62, 63, 67 and 73) involved questions of principle, some of which had already arisen in connexion with other articles.

ARTICLE 61 (Supervening impossibility of performance)

4. Mr. REUTER (Special Rapporteur) introduced draft article 61 (A/CN.4/327) which read:

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

¹ For the text of the Convention (hereinafter referred to as the "Vienna Convention"), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

5. Draft article 61 reproduced unchanged the text of the corresponding article of the Vienna Convention, an article whose title suggested that it covered all cases of *force majeure*. However, as he had noted in his commentary, article 61 of the Vienna Convention actually covered only cases resulting from “the permanent disappearance or destruction of an object indispensable for the execution of the treaty”, whereas in its draft articles on State responsibility² the Commission had provided a much more comprehensive and detailed definition of *force majeure*. Nevertheless, he had deemed it preferable to remain as faithful as possible to the Vienna Convention, in accordance with the approach adopted thus far by the Commission.

6. Mr. USHAKOV asked what was meant by “the permanent disappearance or destruction of an object indispensable for the execution of the treaty”, since the interpretation and application of draft article 61, particularly paragraph 1 thereof, would depend to a large extent on the meaning ascribed to that phrase.

7. He also asked whether, in the context of article 61, the position of a State party to a treaty was the same as that of an international organization party to the treaty. In the case of an international organization, the permanent disappearance or destruction of an object indispensable for the execution of the treaty might result from a decision taken by that international organization within the limits of its competence. For example, if an international organization concluded a technical or financial assistance treaty with a State and the States members of the organization refused to allocate the funds necessary for the granting of such assistance, could that be considered as the permanent disappearance or destruction of an object indispensable for the execution of the treaty? In short, could a decision taken by an international organization in accordance with its rules be considered as a breach of a treaty obligation? In that respect, he thought that there was a difference between the position of an international organization and the position of a State, and it should be clarified.

8. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov’s first question related to the interpretation of article 61 of the Vienna Convention. That article could be interpreted narrowly by limiting it to a very specific case of *force majeure*, namely the physical disappearance of an object indispensable for the execution of the treaty. In the case of a treaty relating to the legal régime of an island, for example, it was quite obvious that, if the island disappeared in a cataclysm, the object of the treaty disappeared at the same time. That interpretation was based on two very valid arguments. Firstly, the use of the indefinite article before the word “object” gave that word a physical sense. Secondly, article 73 of the Vienna Convention contained a

reservation concerning all questions relating to responsibility. Yet the spirit of the Vienna Convention was such that the question of *force majeure* formed an integral part of the question of responsibility. The *sedes materiae* of *force majeure* might therefore be said to be the question of responsibility, rather than the law of treaties. Article 60 of the Vienna Convention did, it was true, deal with certain consequences of a wrongful act, but only in so far as the operation of a treaty was concerned; it did not take up the question of responsibility as a whole. The words “the permanent disappearance or destruction of an object indispensable for the execution of the treaty” could therefore be taken in a restrictive sense. Nevertheless, there were still some points at which the law of treaties and the question of responsibility converged, and article 61 was one of them.

9. It would be easier to answer Mr. Ushakov’s second question on the basis by a restrictive interpretation of article 61, since what must be determined was whether, in the case of an assistance treaty concluded between an international organization and a State, financial difficulties resulting from a deliberate attitude on the part of the members of the organization would lead to the application of paragraph 1 or of paragraph 2 of the article. The Commission had not considered the question of the general responsibility of international organizations, and it might well be asked whether, in the event of failure to perform an obligation, responsibility lay solely with the international organization itself, or with the organization and its members, or simply with the members of the organization.

10. Mr. Ushakov’s third question, which was a variation on his second question, reopened the discussion of draft article 27.³ In that connexion, it should be remembered that an international organization could conclude two sorts of agreement. It could conclude an autonomous agreement, which was not subject to the implementation of a decision of the organization. In such a case, it could not invoke its internal functions as a ground for not performing an obligation under the agreement. But it could also take a decision which called for the conclusion of an agreement in order for the decision to be implemented. For example, the United Nations Security Council could, by virtue of the powers conferred on it by the Charter, take a decision relating to peace keeping and implementation of that decision would entail the conclusion of an agreement between the Organization and one or more States. Such an agreement was not autonomous, since it was contingent on the decision taken. If the decision was valid only for a given period, the agreement terminated when that period expired. The Organization could also legitimately cancel, modify or suspend its decision.

² See *Yearbook . . . 1979*, vol. II (Part Two), p. 93, document A/34/10, chap. III, sect. B, 1, art. 31.

³ For the text of all the draft articles adopted so far by the Commission, *ibid.*, pp. 138 *et seq.*, document A/34/10, chap. IV, sect. B, 1.

11. Sir Francis VALLAT said that, in his view, article 61 of the Vienna Convention, the text of which had been adopted for the draft article under consideration, was entirely satisfactory. It was sound in concept and, on the whole, well drafted; any difficulties of interpretation to which it might admittedly give rise were not enough to hinder the adoption of its wording. In practice, it would be comparatively easy to say whether or not an object indispensable for the execution of a given treaty had been destroyed and, clearly, the disappearance of one of the parties would always amount to the destruction or disappearance of such an object. For instance, to take the somewhat hypothetical case of a treaty between Scotland and an island in the Pacific for the shipment, by a named ship, of whisky made in a certain distillery in Scotland, if the ship or the distillery was destroyed or the island disappeared, any one of those occurrences would amount to the disappearance of an object indispensable for the execution of the treaty. On the other hand, if performance of a treaty for the general supply of whisky was rendered more difficult because a given distillery was destroyed, that would not amount to the destruction of such an object.

12. There was, however, another, virtually overriding, consideration which had been borne in mind throughout the Commission's work on the draft articles, namely, that the Commission's mandate was to adapt the Vienna Convention for the purpose of treaties to which one or more international organizations were parties and not to draft new substantive provisions.

13. In that connexion, it would perhaps be a fitting moment for the Commission to record with satisfaction the entry into force on 27 January 1980 of the Vienna Convention, which represented a landmark in the history of the law of treaties and of international law in general.

14. Mr. USHAKOV said that in the context of draft article 61 the position of international organizations was slightly different from that of States, since, under draft article 27,

A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

whereas an international organization party to a treaty could invoke its rules as justification for its failure to perform the treaty if the performance of the treaty was "subject to the exercise of the functions and powers of the organization".

15. In the case of an assistance treaty between an international organization and a State, a lack of the funds necessary for the performance of the treaty could be considered as the consequence of a decision taken by the organization in accordance with its constituent instrument. Hence it could be asked whether such a decision by the international organ-

ization could be invoked under the terms of paragraph 1 of draft article 61 or whether, by virtue of paragraph 2, it constituted a breach of an obligation under the treaty. Consequently, could an international organization invoke its constituent instrument in order not to perform a treaty, or did the obligations deriving from the treaty take precedence over its constituent instrument?

16. He proposed that the text of article 61 of the Vienna Convention should be retained, but that the commentary should indicate that the text could be interpreted in two different ways in the case of international organizations.

17. Mr. VEROSTA said that some of the difficulties presented by draft article 61 had to do with the word "permanent", since in the case of an assistance treaty concluded between an international organization and a State, a lack of funds invoked by the organization as ground for not performing the treaty might be only temporary. The possibility of the temporary disappearance of an object indispensable for the execution of the treaty should therefore be covered in the commentary.

18. Mr. DÍAZ GONZÁLEZ said that he saw no particular difficulty in adopting the draft article. In the first place, it was simply a matter of transcribing the corresponding provisions of the Vienna Convention as faithfully as possible; secondly, in regard to the physical disappearance of *an*, as opposed to *the*, object indispensable for the execution of the treaty, there was no significant difference between international organizations and States. In the event of the permanent physical disappearance or destruction of such an object, the parties to the treaty, whether States or international organizations, would find it impossible to comply with the terms of the treaty. Moreover, paragraph 1 of the draft article provided for temporary impossibility, in which event the treaty in question would merely be suspended: that provision would cover the case of an international organization which did not have sufficient funds in its budget to fulfil its obligations under the treaty, for the organization might well have enough funds to do so in the future and the physical disappearance of the object would not be absolute. If, however, the treaty was in breach of the organization's constituent instrument, the question of impossibility resulting from the temporary or permanent disappearance of an object indispensable for the execution of the treaty would not arise: there would be a defect in the treaty, since the treaty would have been concluded in breach of the constituent instrument and would be rendered void *ab initio*.

19. For those reasons, he considered that the article should be referred to the Drafting Committee as it stood and that no addition to the commentary was required.

The meeting rose at 1 p.m.