

Document:-
A/CN.4/SR.1592

Summary record of the 1592nd 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:-
1980, vol. I

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1592nd MEETING

Friday, 16 May 1980, at 10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

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

[Item 3 of the agenda]

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

ARTICLE 73 (Cases of State succession, succession of international organizations, succession of a State to an international organization and succession of an international organization to a State, responsibility of a State or of an international organization and outbreak of hostilities¹ (*concluded*))

1. Mr. RIPHAGEN said that treaties to which an international organization could be a party differed widely, although broadly speaking they fell into three main categories: first, those which placed an international organization on the same footing as the other parties, such as a headquarters agreement between the United Nations and a host country; secondly, those which placed an international organization in a somewhat inferior position because it did not enjoy full participation, as in the case covered by subparagraph 3 (b) of draft article 19 *ter*;² and thirdly, those treaties which placed an international organization in a superior position, such as the mandate agreements between the League of Nations and a Member State.

2. In his view, the draft articles were not sufficiently clear as to the different effects that the various categories of treaty could have on the position of international organizations that were parties to them. It did, however, contain certain indications. For instance, subparagraph 3 (a) of draft article 19 *ter*, which laid down a procedural rule, provided that the tasks assigned to the international organization by the treaty would affect that organization's position regarding reservations, while article 62,³ which laid down a substantive rule relating to a fundamental change of circumstances, suggested that different considerations

would apply when the parties to the treaty were not in a position of complete equality. In his opinion, a problem of a general nature was involved, since the differences in treaties to which an international organization might be a party could result in departures from the general rules. The Commission might wish to consider how that problem affected the wording of draft article 73.

3. The CHAIRMAN, speaking as a member of the Commission, said that he recognized the need for a provision along the lines of article 73 of the Vienna Convention,⁴ so as to cover the cases to which the treaty principles did not apply.

4. The use of the term "succession" had given rise to considerable discussion in the Commission. It had rightly been noted that, in the context of "succession of States", the meaning of that term had crystallized in the specific sense of succession to rights in regard to territory, but the same meaning did not apply in the case of replacement of one organization by another, or of an international organization by a State, or of a State by an international organization. For want of a better term however, he had no objection to the use of "succession" in the context of draft article 73, since it introduced the idea of an orderly and uninterrupted transfer of powers from one entity to another, without prejudice to the extent of the powers so transferred. Such transfer could be partial or complete, but it was obvious that the predecessor State or organization could not transfer to the successor State or organization greater powers than it actually possessed. The Drafting Committee might, however, have some more appropriate term to suggest for the Commission's consideration.

5. Like Mr. Tsuruoka and other members of the Commission, he thought that the title of the draft article was unduly long. It could simply be: "Succession, international responsibility and outbreak of hostilities", since those matters were elaborated upon in the body of the draft article.

6. Mr. REUTER (Special Rapporteur), summing up the discussion, noted that, on the whole, the members of the Commission were in favour of a provision such as draft article 73. They hoped that it would be drafted in the light of the corresponding provision of the Vienna Convention, but many of them had wondered whether it would not be advisable to supplement, clarify or expand the cases enumerated in the Vienna Convention. The wording to be used for that purpose posed some difficulties. Mr. Tsuruoka had taken the view (1591st meeting) that the text should depart as little as possible from that of the Vienna Convention. Mr. Ushakov had suggested (*ibid.*) that the draft article should be split in two, bearing in mind article 3 of the Vienna Convention, which reserved the possibility of

¹ For text, see 1591st meeting, para. 22.

² See 1585th meeting, foot-note 3.

³ For text, see 1586th meeting, para. 33.

⁴ See 1585th meeting, foot-note 1.

applying the Convention to the relations of States as between themselves under international agreements to which other subjects of international law were also parties.

7. It was not the treaties covered by the draft article that he himself was disinclined to dissociate, but the relations in question, whether they were relations between States, or relations between one or more States and one or more international organizations, or between several international organizations. Not only would such dissociation lead to complications, it would not be keeping with the intention of the authors of article 73 of the Vienna Convention. That provision existed because of the fears expressed at the United Nations Conference on the Law of Treaties in connexion with part V of the Convention. Article 42 had been drafted in order to allay those apprehensions, and it was apparent from that article that the only cases in which a treaty could be invalidated, terminated or suspended were those provided for in the Convention. Article 73 had been prepared because it was obvious that the Convention did not cover every possible case; it was a safeguard clause listing three matters on which there were perhaps some rules that, in cases not provided for by the Vienna Convention, would have the effect of terminating or suspending a treaty (not to mention the highly unlikely case in which it would be void). One such matter, included as the result of an amendment proposed by Hungary and Poland,⁵ was an outbreak of hostilities. In that respect, the Conference had not had to decide whether there was still a rule of international law which established that certain treaties were suspended or terminated in the event of hostilities. With regard to those three matters, it had simply adopted a negative attitude, and it was apparent that the Vienna Convention did not rule out the existence, in other fields, of cases in which treaties would be suspended or terminated.

8. Consequently, if the Commission sought in draft article 73 to improve on the text of the corresponding provision of the Vienna Convention and to mention other cases it would in no way be stating that such cases did exist. It would simply be recognizing the existence of areas that still had to be explored, like the *terra incognita* of the ancient geographers. That would be so if it mentioned the responsibility of international organizations.

9. However, the Vienna Convention had entered into force and the Commission would be assuming a heavy responsibility if it endeavoured to interpret that instrument by trying, for example, to assess the scope of such expressions as "succession of States" and "outbreak of hostilities". In doing so, it would run the

risk of creating uneasiness not only among States that were planning to ratify or accede to the Vienna Convention but also among those which were already bound by the Convention. It was therefore more prudent to consider the background of the Convention and to interpret the matters listed in article 73 in their broadest sense.

10. It could be assumed, for example, that the expression "succession of States" had been used at the Conference on the Law of Treaties in a very broad sense. Could it be asserted, without giving rise to doubts among certain States parties to the Vienna Convention, that the concept of succession of States in respect of treaties excluded succession of Governments? After all, some States maintained that succession of Governments had certain effects on treaties. Such a Government held that a number of treaties concluded on behalf of the State which it represented had been concluded by a usurper, so that the State was no longer bound by them. However, other treaties dating from the reign of the usurper had been concluded by a Government which it recognized as the Government of that State. Moreover, in the age of monarchies, it had been thought that treaties would lapse upon the death of the monarch and that they had to be renewed by the succeeding monarch. Accordingly, it would be wise for the Commission to refrain from asserting that no economic or social change could have any effect on treaties and that it considered that the expression "succession of States" referred to all problems connected with the concepts of the continuity and the identity of the State.

11. It was obvious that the expression "responsibility of a State" did not cover only the cases referred to in the set of draft articles being elaborated on the subject; it could extend to sanctions and countermeasures. As to the question of whether the expression "outbreak of hostilities" extended to armed action preceded by other measures of coercion, he observed that coercive measures, even if taken by a State, could be legal in character only when they took the form of application of sanctions or countermeasures. It was important, therefore, to refrain from interpreting such expressions in the Vienna Convention and, in cases of doubt, to take them in their broadest sense.

12. Some of the suggested amendments or additions would, if accepted, have consequences both for the treaties referred to in the draft and for treaties between States. Adding more to the article under consideration than was in the corresponding article in the Vienna Convention would sometimes bring out certain flaws in that instrument. That risk was not in itself serious enough for the Commission to abandon the undertaking, but it did call for hesitation.

13. For instance, the Vienna Convention contained nothing about recognition, since that question was highly political. It might well be asked, however, whether the legal rules that might exist on recognition and withdrawal of recognition had an effect on treaties.

⁵ 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. 199, document A/CONF.39/14, para. 636 (a).

Some people would take the view that the question came under the concept of "succession of States", if indeed that expression also covered succession of Governments—in other words, the whole topic of the continuity and the identity of the State.

14. Moreover, if the article under consideration covered, if not an outbreak of hostilities by an international organization, then at least certain measures that could be taken by an international organization, such an assumption would, as often as not, have repercussions on the relations between States and would reveal a lacuna in the Vienna Convention. For that reason, he would have preferred not to depart from that Convention, although, after hearing the discussion, that no longer seemed possible. If the subject were not so complicated, the Commission might solve the problem by affirming, as the General Assembly had done for the purposes of the definition of aggression, that the term "State" included the concept of a group of States.

15. Above all, it was necessary to take the problems one by one and to begin with the easiest. Since article 73 of the Vienna Convention referred to "responsibility of a State" and not just "responsibility", it seemed only right, in the article under consideration, to refer to the "responsibility of a State or of an international organization". The question of an outbreak of hostilities was therefore made simpler. After all, once it was recognized that the responsibility of an international organization did exist and that the question of responsibility could be extended to cover sanctions and countermeasures, the problems that arose in connexion with the notion of an outbreak of hostilities came under the heading of responsibility. Accordingly, the expression "outbreak of hostilities between States" did not create any difficulties; at most, it could be supplemented—as Sir Francis Vallat had suggested at the previous meeting—with a phrase such as: "whether or not involving an international organization".

16. The question remained of possible changes in the relations between an international organization and its member States. He had used the term "succession" in all cases because it was based on a certain amount of common sense. In private law, succession related to rights and obligations; as applied to States, it was also connected with the transfer of rights and obligations.

17. Unlike Mr. Riphagen (1591st meeting), he thought that the establishment of an international organization, in the same way as the dissolution of an international organization, could have effects on treaties other than treaties concluded between States. For example, twelve States might conclude a convention on the publication of customs tariffs and four of those States might then establish a customs union. Would the obligations assumed by those four States under the convention in question come to an end? Would the international organization become a party to that convention as a matter of right? Those

questions undoubtedly fell within the purview of the Vienna Convention, since they involved a treaty concluded between States, but they had been passed over in silence in that instrument. Conversely, if some twenty States concluded a treaty with a pre-existing customs union and six of them subsequently decided to set up another customs union, the question would be that of the effects of the establishment of that international organization on a treaty between States and an organization.

18. Mr. Ushakov, for his part, at the previous meeting had envisaged the case in which an international organization, after concluding a treaty, found that member States withdrew from the organization. The problem of the effects of such a situation on treaties was bound up with that of the identity and the continuity of international organizations, for which no solution had yet been found. The effects of the expulsion of a member State came within an equally unknown field. It was nevertheless true that situations of that kind could have effects on treaties, and that a reservation was absolutely necessary.

19. Perhaps the Drafting Committee might make a reservation in cases in which a question arose "because of a change in the relations between the organization and its member States", a formula that covered not only cases of the birth or dissolution of an organization and withdrawal of a member State but also cases in which the competence of an international organization was changed without any change in its member States.

20. Mr. USHAKOV said he endorsed the Special Rapporteur's appeals for caution in interfering too much with the text of the Vienna Convention. The proposed wording for the article under consideration had the disadvantage of unduly enlarging the scope of the Convention, and particularly article 3 thereof. Draft article 73 covered any "treaty" of any kind. Hence it might be inferred, for example, that a State succession could affect a treaty concluded between international organizations, that the responsibility of an international organization could affect the relations between States parties to a treaty which they had concluded with one or more international organizations, or again, that an outbreak of hostilities between States could affect a treaty concluded between international organizations. For that reason, he had already proposed that relations between States under the Vienna Convention should be singled out for separate treatment by specifying that, in the case of a treaty concluded between two or more States and one or more international organizations, the situation was that envisaged in the Vienna Convention. The Commission could then deal with the other cases. The Drafting Committee, taking due account of the need to avoid broadening the scope of the Vienna Convention, might try to word the article under consideration from that point of view.

21. Mr. REUTER (Special Rapporteur) expressed the hope that Mr. Ushakov would submit a written proposal to the Drafting Committee.

22. On the one hand, Mr. Ushakov would like to divide the article under consideration into two subparagraphs, the first relating to treaties between two or more States and one or more international organizations and the second to treaties between international organizations. With regard to treaties in the latter category, it was often more difficult to invoke the matters enumerated in article 73. On the other hand, with regard to treaties in the first category, Mr. Ushakov would like to single out relations between States in order to ensure that such relations were subject exclusively to the Vienna Convention, since relations between international organizations, and especially relations between international organizations and States, might call for a lengthier enumeration. It would be more difficult to convince him (Mr. Reuter) about the latter point than about the division of the draft article into two paragraphs.

23. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 73 to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 74 (Diplomatic and consular relations and the conclusion of treaties)

24. The CHAIRMAN invited the Special Rapporteur to introduce draft article 74 (A/CN.4/327), which read:

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States and one or more international organizations. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

25. Mr. REUTER (Special Rapporteur) said that draft article 74 was on the same lines as article 63,⁷ which had already been considered by the Commission and was related to the over-all problems of diplomatic or consular relations on the one hand, and the law of treaties on the other.

26. He drew attention to an ambiguity, for which he was responsible, in the second sentence of the draft article. In that provision the word “treaty” did not signify every kind of treaty but a treaty “between two or more States and one or more international organizations”, a point that should be made clear.

27. Mr. QUENTIN-BAXTER noted that the first sentence of draft article 74 was so condensed that it defeated the intention. The relations referred to in that sentence were in fact the relations between States that were parties to treaties between two or more States and one or more international organizations.

28. He therefore suggested that the last part of the first sentence, following the word “prevent”, should be amended to read: “the conclusion between those States of treaties between two or more States and one or more international organizations”. The Special Rapporteur’s point could then be met by rewording the first part of the second sentence to read: “The conclusion of such a treaty . . .”.

29. Mr. USHAKOV supported the idea of clarifying the meaning of the word “treaty” in the second sentence of the draft article by adding the words “between two or more States and one or more international organizations”. It might also be useful to make it clear that the first sentence referred to treaties “between two or more of those States and one or more international organizations”. He would not press that point for the moment, however. His comment was principally intended for the Drafting Committee.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 74 to the Drafting Committee.

*It was so decided.*⁸

ARTICLE 75 (Case of an aggressor State)

31. The CHAIRMAN invited the Special Rapporteur to introduce draft article 75 (A/CN.4/327), which read:

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression.

32. Mr. REUTER (Special Rapporteur) pointed out that the corresponding article of the Vienna Convention, which had been adopted by an overwhelming majority, none the less gave rise to certain legal and political problems. At the time, the Conference on the Law of Treaties could envisage only treaties between States, but it was now conceivable that the problem covered by article 75 might arise in the case of a treaty falling under the terms of the present set of draft articles; hence the need to make such a provision.

33. Draft article 75 related only to aggression by a single State, yet he had not considered it necessary to

⁶ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

⁷ For text, see 1587th meeting, para. 40.

⁸ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

expand on that idea. General Assembly resolution 3314 (XXIX), setting out the Definition of Aggression, was not binding on States, but practice and the approval of States conferred some importance on the Definition, which covered the case of aggression by a group of States.

34. On a question which he had hitherto overlooked, he wondered whether the word "treaty" should be taken in its broadest sense or whether it should be viewed in a narrow sense. In the case covered by the Vienna Convention, an aggressor State which had not expressly participated in the adoption of measures taken in conformity with the Charter could, by virtue of articles 34 to 37, concerning the inapplicability of treaties to third parties, claim that it was not bound by the treaty. Article 75 would thus be a derogation from the rule of the relativity of treaties, in which case the expression "in relation to a treaty" should be retained; however, he experienced some doubt in that regard.

35. Mr. ŠAHOVIĆ said that there was no difficulty as to the substance of the draft article, but clarification was needed on certain points, and particularly on the interpretation to be given to the expression "aggressor State". He was not opposed to the idea that, in the Definition of Aggression, the term "State" might include the concept of "a group of States", but he wondered whether international organizations could be completely assimilated with groups of States.

36. An international organization was indeed a group of States, but he questioned whether it was possible to dispense with explanations in the context of the draft articles, since the concept of an international organization had to be very broad. The problem also depended on the Commission's practice and on the interpretation given by States to the expression "international organization". That expression had already been clearly defined in article 2⁹ and in article 1 of the 1975 Vienna Convention,¹⁰ under which international organizations comprised intergovernmental organizations, and some of them, such as the United Nations and the specialized agencies, were of a universal character. He was convinced that the Special Rapporteur would find a satisfactory answer to that question, which should at least be referred to in the commentary.

37. Mr. USHAKOV said that the expression "in relation to a treaty" gave rise to difficulties, since certain obligations could also derive from a treaty, such as a treaty between international organizations. The result would be a corollary to the corresponding provision of the Vienna Convention. As for "measures taken in conformity with the Charter of the United Nations", such measures could not include those taken in the case of an outbreak of hostilities—an eventuality

that was covered by draft article 73 and one to which he had already raised objections. The consequences of the measures taken against an aggressor State, even against a member State, might be treated as *terra incognita* in the context of the draft articles, but provisions applicable to the relations between international organizations and the member States would have to be included. Lastly, with reference to foot-note 49 of the report (A/CN.4/327), he did not consider it possible for an international organization to be viewed as a group of States. Draft article 75 could therefore be referred to the Drafting Committee.

38. Sir Francis VALLAT said that one point of concern was the concept of the use of armed force by a group of States, whether acting individually or through an international organization. It was all too easy to push the possibility to one side on the assumption that it would never happen, but he doubted whether that was the right attitude. For example, Article 53 of the Charter of the United Nations provided for the possibility of enforcement action taken under regional arrangements or by regional agencies. It was not putting any undue interpretation on that Article to say that a regional arrangement or agency might, and indeed did, include an international organization, or to say that enforcement action might and did include the use of armed force. It could perhaps be argued that action under Article 53 of the Charter must be taken only with the authorization of the Security Council, except in the case of an enemy State or former enemy State. But life was not so simple. It was perfectly possible that a regional agency might, in an emergency, take armed action before obtaining such authorization. Would that not be a case of aggression in substance, even if it did not fall strictly within the definition of the term—and should it not therefore be covered by draft article 73 or, if such authorization was granted in conformity with the Charter, by article 75? The whole question merited examination within the context of those two draft articles, which, as Mr. Šahović had rightly pointed out, were interrelated.

39. Mr. REUTER (Special Rapporteur) said he too was of the opinion that a group of States did not necessarily constitute an international organization. The General Assembly had chosen such a vague term devoid of legal substance so as to cover all possible cases, including that of international organizations properly speaking. In the context of draft article 75, the international organizations in question would be those which, as such, had treaty-making capacity, i.e. to act in the sphere of international law. Hence, it was not a question of placing international organizations on the same footing as groups of States, but the Definition of Aggression, which applied to so vague a notion as that of a group of States, must also apply to international organizations.

40. Mr. USHAKOV, referring to Sir Francis Vallat's comments, said that it was not the Commission's task to interpret the Charter, and specifically Article 53

⁹ See 1585th meeting, foot-note 3.

¹⁰ See 1587th meeting, foot-note 12.

thereof. He wished to point out, however, that in his opinion regional organizations could not take coercive measures against a State without the authorization of the Security Council.

41. Sir Francis VALLAT observed that there were circumstances in which the Commission had to take a position with regard to the obvious meaning of an international instrument. He fully agreed that, in principle, a regional organization should not take coercive action without the authorization of the Security Council. Nevertheless, his point had been that perhaps the Commission could not afford to overlook the possibility that a regional organization might take such action without obtaining the necessary authorization.

42. The CHAIRMAN, noting that there were no further comments, invited the Commission to refer draft article 75 to the Drafting Committee.

*It was so decided.*¹¹

ARTICLE 76 (Depositaries of treaties)

43. The CHAIRMAN invited the Special Rapporteur to introduce part VII of the draft articles (Depositaries, notifications, corrections and registration), and specifically draft article 76 (A/CN.4/327), which read:

Article 76. Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and the international organizations having participated in the negotiations, either in the treaty itself or in some other manner. The depositary may be one or more States, one or more international organizations or the chief administrative officer of one or more international organizations.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

44. Mr. REUTER (Special Rapporteur) said that part VII of the draft consisted mainly of technical articles, which required careful reading but did not appear to pose any serious difficulties. The principles enunciated in article 76 of the Vienna Convention had been adopted unanimously. In order to adapt that provision to the present set of draft articles, it had been necessary to refer to international organizations along with States.

45. There was a minor problem in that the Vienna Convention had provided for the possibility of more than one depositary, a practice that had become widespread in order to honour certain States and to

meet political requirements. The question therefore was whether the option of designating more than one depositary should be extended to international organizations. He had considered it useful to provide for that possibility, since there was no reason to deny international organizations the benefit of such an arrangement, but he would support any solution favoured by members of the Commission.

The meeting rose at 11.55 a.m.

1593rd MEETING

Monday, 19 May 1980, at 3.05 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

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

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPOREUR (continued)

ARTICLE 76 (Depositaries of treaties)¹ (concluded)

1. Mr. USHAKOV proposed that, in order to bring the wording of the first sentence of draft article 76, paragraph 1, into line with that of the following articles, the words "or by the international organizations having participated in the negotiations" should be added after the words "by the negotiating States and the international organizations having participated in the negotiations". He also noted that the words "the chief administrative officer of one or more international organizations" might give rise to incorrect interpretations.

2. The text of article 76 of the Vienna Convention² did not rule out the possibility of the States parties to a treaty designating two international organizations as depositaries, although no such case had yet occurred in practice. The list given in the article was indicative rather than exhaustive; the Commission might therefore reproduce the text of the Vienna Convention word for word, so as to avoid conflicts of interpretation between the draft articles and the Convention.

¹¹ For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

¹ For text, see 1592nd meeting, para. 43.

² See 1585th meeting, foot-note 1.