Document:-
A/CN.4/SR.1701

Summary record of the 1701st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1982, vol. I

tion was conceivable, for a number of reasons, but it was extremely difficult to formulate it clearly. In the circumstances, it would be preferable to dispense with such an exercise, since it was unnecessary.

45. Among the members of the Commission who had spoken, Mr. Ushakov alone had called for a special reference to be made to international organizations. Clearly, as many members had noted, international organizations must be afforded protection. A rule did exist for that purpose, namely, the one laid down in article 46, and there could be no others. It could not be stated as a general principle that, where the powers and functions of an international organization were involved—which was always the case—that organization could withdraw from an obligation, or that, where its powers and functions were involved, all of its obligations were entered into subject to a basic proviso, namely, that the organization could regard its functions and powers as compelling it to withdraw from its obligations. Such a condition was provided for in French law under the name "potestative condition": one whereby a person entering into a commitment reserved the right to free himself from that commitment at his discretion. To incorporate it into the draft articles—and he did not believe that that was the intention of Mr. Ushakov, who did not consider that international organizations were unable to enter into an irrevocable commitment—would be tantamount to saying that the rule of *pacta sunt servanda*, stated in article 46, was not applicable to international organizations. It was Mr. Ushakov's view that, in the case of the Security Council, for example, the real question was whether the Council, if it so desired, could sign an agreement which froze and immobilized a resolution. In Mr. Ushakov's opinion, it could not do so and that was why he wished the principle in question to be reiterated. It might be pointed out that that was no absolute answer to the questions raised, since it was possible to say—although the Commission was not competent to do so—that the Security Council, acting under the provisions of Chapters VI or VII of the Charter, could never, even by the insertion of a clause in an agreement, freeze its competence, and that if it did so, the agreement was unconstitutional. Consequently, protection was afforded by article 46, and it was not necessary to include a special reference in the article under consideration. Either article 46 was applicable, or it was not.

46. Nevertheless, there remained the question of whether the article under consideration could include a reference to some sort of exception, one which, logically speaking, was not absolutely necessary but would nevertheless meet the concern expressed by Mr. Ushakov.

47. Consequently, he proposed that the article should be referred to the Drafting Committee, which should, in particular, take into account the criticisms expressed on the alternatives proposed in the eleventh report and find satisfactory formulations.

It was so decided.[8]

[8] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2, 13 and 14.

48. Mr. USHAKOV said he agreed that the article should be referred to the Drafting Committee. He reserved the right to reply, at the following meeting, to the Special Rapporteur's interpretation of his statement at the beginning of the meeting.

The meeting rose at 1 p.m.

1701st MEETING

Thursday, 6 May 1982, at 11.20 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Filling of casual vacancies in the Commission (article 11 of the Statute) (*concluded*)* (A/CN.4/355 and Add.1 and 2)

[Agenda item 1]

1. The CHAIRMAN announced that at a private meeting, Mr. Ahmed Mahiou had been elected to fill the casual vacancy in the Commission caused by the election of Mr. Bedjaoui to the International Court of Justice. He read out a telegram which had been sent to Mr. Mahiou congratulating him and inviting him to join the Commission at Geneva.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING[2] (*continued*)

ARTICLE 28 (Non-retroactivity of treaties)

2. The CHAIRMAN invited the Commission to consider draft article 28, which read:

Article 28. Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

3. Mr. USHAKOV said that article 28 had not given rise to any difficulties in the Commission and was ab-

* Resumed from the 1699th meeting.

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

solutely identical to the corresponding article in the Vienna Convention on the Law of Treaties. The rule of non-retroactivity of international obligations, and particularly treaties, was well-established in international law, and it was obvious that it applied to treaties to which international organizations were parties. In practice, it might be necessary to provide for the retroactive application of a treaty or convention. The question had arisen with regard to the 1978 Vienna Convention on Succession of States in Respect of Treaties. Since that Convention concerned new States, and particularly newly-independent States, it had been necessary to provide for them to become parties to the instrument and obtain its retroactive application. Under article 7 of that Convention, a successor State might make a declaration that it would apply the Convention in respect of its own succession of States, which had occurred before the entry into force of the Convention, in relation to any other State Party to the Convention that accepted its declaration. But that was, of course, an exception to the general rule set out in the article under consideration. As drafted, the latter provision presented no difficulty.

4. Sir Ian SINCLAIR said that Mr. Ushakov had been correct to draw attention to the significance of article 28. Similarly, he perceived no difficulties in establishing the general principle of non-retroactivity of treaties, subject, of course, to the qualifying clause at the beginning of the article: "Unless a different intention appears from the treaty or is otherwise established". He had participated in the United Nations Conference on Succession of States in Respect of Treaties, where, as Mr. Ushakov had pointed out, it had been necessary to find a particular solution to take account of the desire of certain newly-independent States to have the benefit of the Convention adopted there in respect of their own succession. Such a solution had been found in article 7, which represented, in his view, an application of the qualifying clause in the present draft article 28. That clause was essential to provide the flexibility needed to deal with situations such as that which had arisen concerning the Vienna Convention on Succession of States in Respect of Treaties. Accordingly, he shared Mr. Ushakov's view that article 28 presented no problems, and he would be happy to see it referred to the Drafting Committee.

5. Chief AKINJIDE said that he would like an explanation of the qualifying clause at the beginning of article 28. He feared that it could be interpreted as binding for newly-independent States, in which case they would not enjoy the necessary protection.

6. Sir Ian SINCLAIR observed that the rule followed in the Vienna Convention on Succession of States in Respect of Treaties was that of the "clean slate", meaning that there was no obligation upon any newly-independent State to accept a treaty which had been applied to its territory before independence by the metropolitan Power. The problem that had arisen in Vienna had been that a number of newly-independent States had wished to have the benefit of the Convention in respect of their own successions, which had occurred before the drawing-up of that instrument. Article 7 of the Convention therefore permitted a limited degree of retroactivity, provided that there were consensual declarations by the newly-independent State and the predecessor State. However, had article 28 of the Vienna Convention on the Law of Treaties not contained its opening clause, it would not have been possible to construct that limited degree of retroactivity. He therefore attached considerable importance to having a degree of flexibility written into article 28 of the current draft, in case a similar problem should arise in the future.

7. Mr. USHAKOV pointed out that the question raised concerned the succession of States in respect of treaties rather than the non-retroactivity of treaties with regard to acts or facts which took place before the date of entry into force of a treaty for a particular State. Article 73 of the Vienna Convention on the Law of Treaties and article 73 of the draft articles under consideration contained a reservation on questions that might arise in regard to a treaty because of a succession of States. However, the question whether a newly-independent State should honour a treaty concluded by an administering Power came within the scope of the succession of States in respect of treaties. When a newly-independent State accepted such a treaty, the treaty was applicable to it as of that moment. On the other hand, should that State wish the treaty to apply to an act which had occurred prior to the entry into force of the instrument for itself, a unilateral act would not be enough: the successor State must declare that it was prepared to apply the treaty from the date of succession, and the other States parties concerned must give their consent to such application. The application of a treaty from the moment it was accepted by the newly-independent State was therefore not to be confused with its application to the advent of the newly-independent State, if that State so wished and the other interested States so agreed. It therefore followed that a newly-independent State was in no way obliged to take over treaties concluded by its predecessor State. If it accepted them, it did so of its own free will, whether the treaties applied from the date on which the new State came into being or the date on which it accepted them.

8. Mr. NJENGA said he trusted that the explanations by Sir Ian Sinclair and Mr. Ushakov had allayed Chief Akinjide's fears concerning the opening words of article 28. There would be many cases in which a newly-independent State would desire the continuance of the obligations and benefits deriving from a treaty concluded before its independence. For example, many newly-independent States had agreements with international organizations, such as loan agreements with the World Bank; it would hardly be in their interest to apply the "clean slate" principle. That remark could also apply to agreements concerning customs unions, such as the one which had been concluded in East Africa. The first part of article 28, then, provided a flexibility that was necessary with regard to certain treaties. In his view, the article could be referred to the Drafting Committee.

9. Chief AKINJIDE said that he would like to see how the article would apply to boundary disputes in Africa. For the moment, however, he was satisfied with the explanations of his colleagues.

10. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed that article 28 should be referred to the Drafting Committee.

It was so decided.[3]

ARTICLE 29 (Territorial scope of treaties between one or more States and one or more international organizations)

11. The CHAIRMAN invited the Commission to consider draft article 29, which read:

Article 29. Territorial scope of treaties between one or more States and one or more international organizations

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

12. Mr. EL RASHEED MOHAMED AHMED observed that article 29, like article 28, was a reproduction of the corresponding position of the Vienna Convention on the Law of Treaties. However, the idea of territory did not apply both to States and to international organizations, but only to States. He therefore wondered whether article 29 of the Vienna Convention was not sufficient to guarantee that a treaty would be binding on a State in the whole of its territory, in which case draft article 29 was redundant.

13. Mr. FRANCIS said that he believed that draft article 29 should be retained for two reasons. First, the Commission had taken a decision to maintain a parallel between the draft convention and the parent instrument, the Vienna Convention. Omitting article 29 would therefore create a vacuum in the draft. Second, article 29 of the Vienna Convention had established a general rule regarding treaties between States. However, a State party could conceivably claim that a treaty between a State and an international organization was a different treaty entirely, and it would be wise to maintain article 29 in the draft to cater for that eventuality.

14. Mr. FLITAN recognized that the fact that article 29 of the Vienna Convention and draft article 29 led to exactly the same conclusion might raise doubts as to the usefulness of the latter provision. However, unlike article 29 of the Vienna Convention, draft article 29 did not concern treaties between States but treaties between one or more States and one or more international organizations. Although the conclusion was bound to be the same in both cases, since it was a question of the territorial scope of treaties and the concept of territory was valid only for States, it was absolutely essential to maintain the rule set out in the draft on treaties concluded between States and international organizations, since the Vienna Convention applied only to treaties concluded between States.

15. Mr. NJENGA said that, in his view, article 29 was necessary. Indeed, the Commission had agreed that it should work on the basis of a text that could stand on its own, so that reference would not have to be made to the Vienna Convention. If article 29 were left out, there would be a gap in the draft articles. He was, however, uncertain whether article 29 would apply in the case of treaties concluded between international organizations.

16. Sir Ian SINCLAIR said that there might be certain categories of treaties that did not necessarily have a territorial scope, and that treaties between international organizations might be classified in that category. Such treaties might be "personal", without any territorial consequences.

17. He agreed with preceding speakers that article 29 should be included in the draft under discussion. As an illustration of the type of problem with which it coped, he referred to the case in which the United Nations concluded an agreement with State X concerning privileges and immunities for the participants in a symposium to be held in the territory of State X under United Nations auspices. In such a case, a rule of the kind embodied in article 29 was essential in order to indicate to State X the territorial scope of its obligations under its agreement with the United Nations. That rule must be expressly stated in article 29. Otherwise, there might be some implication that a different rule applied, whereas, in fact, the Commission was seeking to apply the same rule in respect of treaties between States and international organizations and in respect of treaties between States alone.

18. Mr. NI said that at first glance he had been inclined to think that article 29 was not necessary, because article 29 of the Vienna Convention clearly related to the territorial scope of treaties and it was difficult to see how treaties between States and international organizations could involve questions of territory.

19. On second thought, however, he had decided that article 29 should be retained, because the Commission was in the process of drafting articles which had already taken the shape of a convention that would be a counterpart or a mirror of the Vienna Convention. If the Commission omitted article 29, it might, as Sir Ian Sinclair had said, give the impression either that the rule in question did not apply or that a different rule applied to treaties between States and international organizations. In fact, however, the rule embodied in article 29 did apply to such treaties. If it was ultimately decided that the draft articles should take the form of a mere declaration, provisions such as article 29, which might not be considered applicable in all cases, could be deleted.

20. Mr. SUCHARITKUL agreed that it was necessary for article 29 to be included in the draft under consideration. With regard to the point raised by

[3] For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 *et seq.*

Mr. Njenga concerning treaties concluded by international organizations, he pointed out that, while it was quite correct to say that an international organization had no territory as such, many intergovernmental organizations did have responsibilities and powers over what could be described as "treaty areas", a term that had been used by OAS, NATO, CENTO and other collective defense organizations. The United Nations, an organization of a universal character, had, for example, responsibility for matters relating to outer space, and it could conclude agreements and treaties binding it in respect of that "treaty area".

21. The CHAIRMAN suggested that the text of article 29 should be referred to the Drafting Committee.

It was so decided.[4]

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)

22. The CHAIRMAN invited the Commission to consider article 30, which read:

Article 30. Application of successive treaties relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated [or suspended in operation under article 59], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) as between two States, two international organizations, or one State and one international organization which are parties to both treaties, the same rule applies as in paragraph 3;

(*b*) as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice [to article 41] [or to any question of the termination or suspension of the operation of a treaty under article 60 or] to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an international organization not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

23. Mr. USHAKOV said that while article 30, which the Commission had approved on first reading, gave rise to no substantive comment, the wording of paragraph 4 was not entirely satisfactory. Its inelegance, which was particularly marked in subparagraph (*b*), arose from the fact that, as the draft articles concerned treaties concluded between States and international organizations or between international organizations, reference had to be made to the various types of relations possible, namely "as between a State party to both treaties and a State party to only one of the treaties, as between a State party to both treaties and an international organization party to only one of the treaties, as between an international organization party to both treaties and an international organization party to only one of the treaties, and as between an international organization party to both treaties and a State party to only one of the treaties", whereas article 30, subparagraph 4 (*b*), of the Vienna Convention on the Law of Treaties, on which the provision in question was based, spoke only of relations "as between a State party to both treaties and a State party to only one of the treaties", for the very good reason that that Convention governed only treaties between States.

24. The Special Rapporteur had endeavoured to render the wording of paragraph 4 less cumbersome. Unfortunately, the text proposed in his eleventh report (A/CN.4/353, para. 19) did not cover all the possibilities and was not sufficiently precise. In subparagraph (*a*), it would be better to use the wording of the Vienna Convention, namely "as between [the] parties to both treaties", rather than "as between two parties, which are each parties to both treaties". There were also difficulties with regard to subparagraph (*b*). Since the parties to the treaties covered in the draft articles under consideration could be either States or international organizations, to refer to relations "as between two parties, of which one is a party to both treaties and the other to only one of the treaties" was too vague. It was also clumsy. Once again, taking the Vienna Convention as the model, it should be stated what those two parties were (States or international organizations) and—as in the text adopted at the first reading—which was a party to both treaties and which a party to only one of the treaties. Despite its inelegance, the earlier text was more satisfactory than that proposed by the Special Rapporteur, because it gave all the necessary information. He none the less hoped that the Drafting Committee would be able to improve on the text adopted on first reading by proposing a formula that was more elegant but equally precise.

25. Mr. FLITAN did not think that the text of paragraph 4 as proposed by the Special Rapporteur posed any problems of understanding. It was quite clear from the title of article 30 and the text of paragraph 1 that the treaties referred to in paragraph 4 were not limited in number. Paragraph 4 referred to "both treaties" because there were usually two successive treaties, and it was normal to take into account the commonest situation.

26. There was, however, a serious flaw in subparagraphs (*a*) and (*b*) proposed by the Special Rapporteur. The use of the words "as between two parties" could be understood to mean that the parties in question were only States and that the subparagraphs therefore

[4] *Idem.*

applied only to treaties concluded between States. However, the case of such treaties, which was governed by the Vienna Convention, did not come within the scope of the draft articles under consideration. It would therefore be preferable to retain for paragraph 4 the text adopted on first reading, in which international organizations were specifically mentioned among the parties to the treaties.

27. With regard to paragraph 5, he favoured maintaining the words in square brackets, which also appeared in the corresponding provision of the Vienna Convention (art. 30, para. 5). Rather than trying to improve the provisions of that Convention, it would be better at the present stage to ensure the greatest possible uniformity between the two texts.

28. Mr. McCAFFREY suggested that, since the Commission's aim was to follow the provisions of the Vienna Convention as closely as possible, paragraph 1 of article 30, an introductory provision which applied to the remainder of the article, should be brought into line with the corresponding provision of the Vienna Convention. Paragraph 1 would thus open with the words "Subject to Article 103 of the Charter of the United Nations ...". Paragraph 6 of draft article 30, which had no counterpart in the Vienna Convention, could then be deleted.

29. He appreciated the Special Rapporteur's efforts to render the wording of article 30, paragraph 4, less cumbersome. If possible, the Commission should adopt the version that had been proposed in the Special Rapporteur's eleventh report (A/CN.4/353, para. 19), for it represented a definite linguistic improvement over the longer version.

30. The words "as between two parties" proposed in the Special Rapporteur's simplified version of subparagraphs 4 (*a*) and (*b*) nevertheless seemed to have given rise to difficulties. Since treaty provisions were often quoted out of context, it should be made clear that those subparagraphs referred to treaties between States and international organizations. It might therefore be helpful for the subparagraphs to begin with the words "as between a State and an international organization ...". This assumes it is not necessary to refer to those bodies as "parties" in the opening clause. That would not seem necessary, since they are described as such in the balance of each subparagraph.

31. He also suggested that, as a point of grammar, the words "which are each parties to both treaties" in the simplified version of subparagraph 4 (*a*) should be amended to read "each of which is a party to both treaties".

32. He fully agreed with Mr. Flitan that the words in square brackets in article 30, paragraph 5, should be retained in order to ensure conformity with the corresponding provision of the Vienna Convention.

The meeting rose at 1 p.m.

1702nd MEETING

Friday, 7 May 1982, at 10.10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,[1] A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 1]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING[2] (*continued*)

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)[3] (*concluded*)

1. Sir Ian SINCLAIR said that article 30 of the Vienna Convention, on which article 30 of the draft was closely modelled, had been one of the most difficult provisions to draft at the United Nations Conference on the Law of Treaties. Even in the case of treaties between States, the application of successive treaties relating to the same subject-matter gave rise to problems which did not yield to easy solutions. Most legal advisers to ministries of foreign affairs had, at one time or another, been confronted with difficult technical and legal issues arising out of successive treaties, particularly in the area of industrial or intellectual property rights.

2. Although it was obviously right that draft article 30 should be modelled on article 30 of the Vienna Convention, questions had been raised at the preceding meeting with regard to the scope and wording of paragraph 4. Mr. Flitan had, for example, expressed concern about the fact that article 30 as it now stood seemed to regulate the consequences for States of successive treaties relating to the same subject-matter, even though that question was already governed by article 30 of the Vienna Convention.

3. He continued to be puzzled by Mr. Flitan's comment. As he understood the position, article 1 stated that the draft articles applied to: "(*a*) treaties concluded between one or more States and one or more international organizations, and (*b*) treaties concluded between international organizations". The definition of the term "treaty" in article 2, subparagraph 1 (*a*), faithfully reflected the scope of the draft articles as defined in article 1. Article 30 thus applied only to successive treaties relating to the same subject-matter and concluded between one or more States and one or more international

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

[3] For the text, see 1701st meeting, para. 22.