

United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.7

7th meeting of the Committee of the Whole

*Extract from the Official Records of the United Nations Conference on the Law of
Treaties, First Session (Summary records of the plenary meetings and
of the meetings of the Committee of the Whole)*

state that those rules were not applicable by virtue of the convention. The last part of sub-paragraph (b) was not clear and for that reason the Swiss delegation had proposed its deletion. The amendment was one of drafting only, and the Swiss delegation was prepared to withdraw it in favour of the Gabon amendment (A/CONF.39/C.1/L.41).

48. Mr. DE CASTRO (Spain) explained that his delegation's amendment (A/CONF.39/C.1/L.34) was only concerned with a matter of drafting in the Spanish text.

The meeting rose at 1.10 p.m.

SEVENTH MEETING

Monday, 1 April 1968, at 3.20 p.m

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December, 1966 (continued)

Article 3 (International agreements not within the scope of the present articles) (continued)

1. The CHAIRMAN invited the Committee to continue its consideration of article 3 of the International Law Commission's draft¹.

2. Mr. JENKS (Observer for the International Labour Organisation), speaking at the invitation of the Chairman, said he was gratified at the Committee's decision to recommend that the question of agreements to which subjects of international law other than States were parties should be examined by the International Law Commission. The International Labour Office would be glad to co-operate fully in that task, which must include the question of how any codification of such rules was to become binding on the international organizations concerned, how it was to provide for any adaptations of the general rules necessary to meet the special circumstances of particular organizations and how it was to permit future development and growth.

3. Articles 3 and 4 of the draft stated principles of vital significance for the long-term development of international organizations and of international law. Article 4 stated both a rule and an exception. The rule was that treaties adopted within an international organization were subject in principle to the general law of treaties, and the exception was that the rule was not applicable in respect of matters for which a *lex specialis* existed by virtue of any relevant rules, including the established practice of the organization concerned.

4. The rule was important because it would create confusion if there were a different law of treaties for the instruments adopted within each of the forty international and regional organizations, a number which might continue to increase. Few of them could be expected to evolve a distinctive body of practice and none could claim that its practice or needs were special in respect of

the whole of the law of treaties. The ILO certainly made no such claim.

5. The exception was equally important because there were cases in which an organization had special rules and a well-established body of practice governing conventions which created a body of international obligations more coherent, stable and better-adapted to requirements of the situation than could be secured by applying the more flexible provisions of the general law. The International Labour Organisation was responsible for 128 international labour conventions ratified by over 115 member States, and some 1,200 declarations of application in respect of other territories. That network of obligations was governed by the provisions of the ILO Constitution and by a well-established body of practice tested over almost fifty years. The ILO was not the only organization with a distinctive body of treaty practice, but only the League of Nations and the United Nations together possessed comparable experience as to duration, scale and variety of action. The Conference was entitled to know how the draft articles would affect the ILO's discharge of its responsibilities, and the ILO was entitled to expect that the Conference would give full regard to the obligations of members of the United Nations as members of the International Labour Organisation.

6. In some cases there was a clear incompatibility between ILO's rules and practice and the provisions of the draft articles and a change in the former, which could not in any case operate retroactively in respect of conventions to which member States had already become parties, would be inconsistent with the Organisation's constitutional structure and with the object of labour conventions. In other cases, the ILO's rules and practice and the provisions of the draft articles could be rendered compatible only by a strained interpretation of the one or the other or by some artificial modification of the ILO's existing rules, for which there was no particular need. In still other cases, in order to obtain a reasonable and equitable result, the draft articles would have to be read in the light of established ILO rules and practice.

7. In some instances it would be unprofitable to discuss to which of those categories a case belonged.

8. Article 8 provided that the adoption of a text drawn up at an international conference took place by a vote of two-thirds of the states participating in the conference, unless by the same majority it was decided to apply a different rule. The ILO rule was quite different; there a two-thirds majority was required of the votes cast by the delegations present, and half of the delegates eligible to vote did not represent Governments.

9. Article 9 provided that the text of a treaty was established as authentic and definitive by such a procedure as might be provided for in the text or was agreed upon by participating States, or failing that by authentication of the representatives of States, whereas under the ILO Constitution, ILO conventions were authenticated by the signatures of the President of the Conference and the Director-General.

10. Article 12 dealt with accession. ILO conventions were concluded within the constitutional obligations relating to their application, and accessions which did not include those obligations were therefore inconceivable.

¹ For the list of the amendments submitted, see 6th meeting, footnote 4.

11. Articles 16 to 20 dealt with reservations. According to ILO practice, reservations incompatible with the object and purpose of the treaty were inadmissible, and that principle had been maintained consistently. The procedural arrangements concerning reservations embodied in the draft articles were inapplicable to the Organisation because of its tripartite character. Great flexibility was necessary in the application of certain international labour conventions to widely varying circumstances, but the provisions regarded by the International Labour Conference as wise and necessary were embodied in the terms of the conventions, and if proved inadequate could be revised at any time in accordance with regular procedures. Any other method would destroy the international labour code as a code of common standards.

12. ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in article 28.

13. On the subject of the relationship between successive treaties on the same subject and the amendment and modification of treaties, the ILO had wide experience and had created a substantial body of law and practice.

14. The ILO's rules governing the procedure for the revision of conventions and the legal consequences of revision differed from and were better adapted to those needs than article 36, which contained the saving clause "unless the treaty otherwise provides". Only some of the relevant rules were contained in the conventions; some derived from the Constitution and some from the procedural rules in the form of standing orders.

15. A few international labour conventions expressly permitted the modification of certain provisions by *inter se* agreements generally, on condition that the rights of other parties were not affected and that the *inter se* agreement provided equivalent protection. However, in the majority of labour conventions such agreements would be regarded as incompatible with the effective execution of the object and purpose of the treaty as a whole, as would be the case with a convention relating to one of the fundamental human rights. Such problems could not conveniently be dealt with by reference to article 37 of the draft. The ILO Constitution conferred rights to initiate proceedings relating to the application of a convention upon interested parties other than governments that were parties to the convention, and those rights which flowed directly from the Constitution would not be affected by any *inter se* arrangements.

16. Article 57 defined the consequences of a material breach of a multilateral treaty, while articles 62 to 64 set out the procedure to be followed when a breach was alleged. Articles 24 to 34 of the ILO Constitution specified the procedures applicable in the event of any failure by a member to secure the effective observance of an international labour convention it had ratified. They included provision for the appointment by the Governing Body, in appropriate cases, of a commission of inquiry to examine the alleged failure. Those articles of the Constitution constituted a *lex specialis* more appropriate for the application of international labour conventions than the necessarily general provisions of article 62 to 64.

17. He was not suggesting any modification of the general law as proposed in the draft articles, but asked for a clear

recognition that an international organization might have a *lex specialis* that could be modified by regular procedures, in accordance with established constitutional processes. The questions at issue were not limited to procedural ones and were too complex to be dealt with by detailed amendments to the draft articles and could only be properly covered by a broad and comprehensive provision. The practical importance of those procedures for member States depended on the extent to which they were parties to international labour conventions and must be assessed in the light of long-range considerations of general international policy.

18. The principle that conventions adopted within an international organization might be subject to a *lex specialis* was of long term as well as immediate importance.

19. International legislative techniques remained so defective that the way must be left open to develop specialized procedures for special purposes as the need arose. One of the prior requirements in codifying international law had been to ensure that it did not operate as a bar rather than as a stimulus to progressive development. If the law of treaties had been codified a generation ago, much of the present draft would have found no place in it. Article 4 provided the necessary flexibility for the progressive attainment of the long-term purposes of the United Nations Charter, and he hoped that it would be adopted substantially in its present form.

20. Mr. AUGÉ (Gabon) said his delegation had submitted an amendment (A/CONF.39/C.1/L.41) which was intended for the Drafting Committee's consideration and the purpose of which was to achieve greater clarity in article 3. The words "to which they would be subject independently of these articles" had been dropped, as no mention was made of them in the Commission's commentary. The introductory phrase "the fact that the present articles do not relate" had also been dropped.

21. Mr. KEBRETH (Ethiopia) said that article 3 was an important one, the purpose of which was to state the binding character of oral agreements and those concluded between States and other subjects of international law or between such other subjects. The Commission's main concern appeared to have been the question whether oral agreements and agreements not concluded strictly between States remained outside the purview of the law of treaties. The draft convention being worked out would have to become a parent instrument providing substantive rules to cover as far as possible all international agreements, for in the final analysis international organizations were the creation of States. In a broader sense, it might be said that article 3 was intended to serve as a vital link between the convention on the law of treaties and the customary laws of treaties that were as yet uncoded.

22. His delegation felt considerable uncertainty about the words "to which they would be subject independently of these articles". Through the use of those words, customary laws and the many practices and procedures, especially of international organizations, would apply. But the question remained of the application of the progressive and substantial principles contained in the convention. Any suggestion of a difference between the