United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.2

2nd 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)*

SUMMARY RECORDS OF MEETINGS OF THE COMMITTEE OF THE WHOLE

FIRST MEETING

Wednesday, 27 March 1968, at 3.30 p.m.

Chairman: Mr. ELIAS (Nigeria)

Election of the Vice-Chairman of the Committee of the Whole

1. The CHAIRMAN called for nominations for the office of Vice-Chairman of the Committee of the Whole.

2. Mr. BLIX (Sweden) proposed Mr. Smejkal (Czechoslovakia).

3. Mr. SECARIN (Romania), Mr. KRISHNA RAO (India), Mr. SUAREZ (Mexico) and Mr. KELLOU (Algeria) seconded the proposal.

Mr. Smejkal (Czechoslovakia) was elected Vice-Chairman by acclamation.

Election of the Rapporteur of the Committee of the Whole

4. The CHAIRMAN called for nominations for the office of Rapporteur. In accordance with rule 48 of the rules of procedure, the Rapporteur would also be a member of the Drafting Committee.

5. Mr. RODRIGUEZ (Chile) proposed Mr. Jiménez de Aréchaga (Uruguay).

6. Mr. WERSHOF (Canada), Mr. YASSEEN (Iraq), Mr. SMEJKAL (Czechoslovakia) and Mr. de CASTRO (Spain) seconded the proposal.

Mr. Jiménez de Aréchaga (Uruguay) was elected Rapporteur by acclamation.

The meeting rose at 4.25 p.m.

SECOND MEETING

Thursday, 28 March 1968, at 10.50 a.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

1. The CHAIRMAN invited the Committee to consider the draft articles on the law of treaties adopted by the International Law Commission at its eighteenth session (A/6309/Rev.1, part II). [1]

Article 1 (The scope of the present articles) [2]

2. Mr. BLIX (Sweden) said he had submitted his amendment to article 1 (A/CONF.39/C.1/L.10) because he did not think it was correct to state that the convention related to treaties concluded between States, when in fact it also applied to the conclusion of such treaties.

3. Mr. KEARNEY (United States of America), introducing his amendment to article 1 (A/CONF.39/C.1/L.15), explained that the article raised a very important problem, as it limited the scope of the convention to treaties concluded between States, thus excluding treaties concluded by international organizations. That approach to the problem of codifying the law of treaties took into account neither the development of international law during the twentieth century nor the growth of the activities of international organizations, which generally had treaty-making capacity. At the present time, international organizations were important elements of the world community, there were already a great many agreements to which they were parties and the number would certainly increase. In the draft provisionally adopted in 1962, article 1 had defined the term treaty as applying to treaties " concluded between two or more States or other subjects of international law ".

4. The exclusion of international organizations from the scope of the convention would create serious difficulties in the future. Many representatives of international organizations were participating in the work of the Conference and might well express their views on that question. It would be desirable to set up a working group, which would include representatives of selected international organizations, to consider the requisite changes. The United States had wished to take into account the comments made in the Sixth Committee of the General Assembly by various developing countries, in particular Liberia, Ceylon, Dahomey and Kuwait, which had wished the scope of article 1 to be extended to treaties concluded by international organizations.

5. If his amendment were adopted, it would be necessary to make a number of changes in the draft, in particular in article 3, which did not state what the effects of the convention on international organizations would be.

6. Mr. USTOR (Hungary), introducing his amendment (A/CONF.39/C.1/L.18), said that article 1 had been useful in the context of the work of the International Law Commission, but he saw no need to retain it, since the scope of the proposed convention on the law of treaties was already stated in the title of the draft and was perfectly clear from the definition of the term " treaty " in article 2.

7. Mr. KRISHNA RAO (India) said that the wording of article 1 was simple and neat. At its fourteenth session the International Law Commission had decided to exclude treaties other than those concluded between

[1] Reprinted in *Yearbook of the International Law Commission, 1966*, vol. II, pp. 177 *et seq.*

[2] The following amendments had been submitted: Sweden, A/CONF.39/C.1/L.10; United States of America, A/CONF.39/C.1/L.15; Hungary, A/CONF.39/C.1/L.18; Republic of Viet-Nam, A/CONF.39/C.1/L.27; Congo (Brazzaville), A/CONF.39/C.1/L.32.

States from the scope of the draft articles. It had done so in order to avoid complicating and delaying the drafting of the articles, in view of the many special characteristics of treaties concluded by international organizations. The Commission, believing that " the best was the enemy of the good ", had chosen to draft a less comprehensive and less ambitious, but more realistic set of articles. The comments of the representatives of States in the Sixth Committee in 1966 and 1967 and the written comments of Governments showed that the vast majority of Governments had accepted the limitation of the scope of the draft.

8. Although the contrary opinion of some States was known, they had only just made a specific proposal to enlarge the scope of the convention. Such a change would necessitate further extensive study, which might well hold up the Conference's work and delay the conclusion of the convention for perhaps five years.

9. The capacity of international organizations to make treaties was not in question. Article 3 of the draft recognized it explicitly, just as it recognized the applicability to such treaties of the relevant rules set forth in the draft. Article 4 also limited the Convention's scope by providing that treaties which were constituent instruments of an international organization or adopted within an international organization should be subject to any relevant rules of that organization.

10. It would be inadvisable to embark on a course which would oblige the Committee of the Whole to assume the role of the International Law Commission, for no working group could successfully undertake an operation which would involve revising the entire draft convention. Citing some of the many articles which would have to be amended if the scope of the convention was enlarged, he urged that in accordance with its mandate, the Conference should try to adopt a modest and satisfactory convention, even if it was not the best and most comprehensive possible. He was accordingly in favour of retaining article 1 as drafted by the International Law Commission.

11. As to the proposal to substitute the word " apply " for the word " relate " (A/CONF.39/C.1/L.15), he would leave it to the Drafting Committee to find the best solution.

12. Mr. ALVARADO (Peru) said he regretted that the provisions relating to bilateral treaties and those relating to multilateral treaties had not been separated in the draft. It would be preferable to divide the articles into three parts: the first part would contain the provisions common to all treaties, the second would relate to bilateral treaties and the third to multilateral treaties. With the method adopted by the International Law Commission there was some danger of provisions applicable solely to bilateral treaties being applied to multilateral treaties. He hoped that when the Drafting Committee came to examine the proposed amendments as a whole, it would bear his comment in mind.

13. Mr. YAPOBI (Ivory Coast) said that the Ivory Coast delegation had been inclined to favour extending the scope of article 1. However, impressed by the arguments of the Indian representative, and taking a practical view, it now supported the retention of the article as it stood in the draft, since the International Law Commission itself, after studying the matter for so many years, had had to exclude treaties concluded by international organizations. In any case, under article 3 the relevant rules of the draft could manifestly apply to treaties concluded by international organizations.

14. Mr TORNARITIS (Cyprus) said that he understood the reasons for the International Law Commission's choice, but he thought that, from a strictly legal point of view, it would be unrealistic to exclude from the scope of the convention a class of treaties as important as treaties concluded by international organizations, whose activities were constantly expanding. He hoped that some way of filling that gap would be found later. In addition, he thought that the retention of the word " concluded " in article 1 would give rise to difficulties.

15. Sir Lalita RAJAPAKSE (Ceylon) said he recognized that treaties concluded between States and treaties concluded by international organizations had similar characteristics, but he hesitated to support the proposition that they should be governed by the same body of principles.

16. Customary law relating to treaties between States had been subjected to the slow action of history for centuries, whereas the principles governing the relationships of international organizations *inter se*, as well as with States, had had only some decades in which to mature. He therefore considered that the eminent jurists of the International Law Commission, who had devoted nearly twenty years to drafting the articles, had been right not to include treaties concluded by international organizations.

17. There was all the more reason for the Conference to refrain from undertaking an extensive revision of the draft, since it had only a few weeks at its disposal. For the problem was not only to adapt the articles to the special characteristics of treaties concluded by international organizations—a formidable task in itself—but also to determine which special characteristics were to be retained or rejected.

18. He shared the United States representative's desire that the principles applicable to treaties concluded by international organizations should develop in a way that would ensure the stability of international relations, but any hasty attempt made at the present Conference, at that late stage, would not achieve the end in view. To attempt to subject such treaties to rules similar to those which had proved satisfactory for relations between States might even inhibit the progress of a trend which, in the practice of organizations, tended to depart from the traditional rules applicable to relations between States.

19. He did not share the fear that the provisions of the draft might come to be applied, as customary law, to treaties concluded by international organizations. If it was the final clause of article 3 which conveyed that impression, it could be amended to remove the ambiguity.

20. The régime of treaties concluded by international organizations could be studied later, and many of the principles embodied in the draft articles would then be readopted for application to such treaties. But such

an extension would require thorough study. It would be advisable to consider the example of special missions, the study of which had been separated from that of permanent diplomatic missions by the Vienna Conference of 1961.

21. The International Law Commission should study the régime of treaties concluded by international organizations and submit a report to the Sixth Committee with a view to the subsequent formulation of rules applicable to such treaties. The amendment submitted by the United States representative would upset the draft before the Conference. It would necessitate such extensive changes that it might not only hold up the work of the Conference, but even oblige it to adjourn in order to refer the question back to the International Law Commission for study.

22. Mr. FRANCIS (Jamaica) said that the principle on which the United States amendment was based had already been discussed at length, and at its eighteenth session, the International Law Commission, in view of the opinion expressed by the majority of States, had confirmed its decision to limit the scope of the draft convention to treaties concluded between States. The questions before the Conference were whether that principle could be accepted without upsetting the balance of the entire draft articles and whether the United States amendment could be embodied in the draft without seriously delaying the work of the Conference. The United States representative recognized that the adoption of his amendment would entail substantial alterations to the draft, since he had proposed the setting-up of a working group. That procedure would have two disadvantages: first, the Committee of the Whole would have nothing to do while the working group was discussing the matter, and secondly, the question would arise of whether international organizations should not participate in the Conference. It would probably be best not to amend article 1 as to substance. On the other hand, if the Conference was willing to accept the considerations involved in the United States amendment, it would be necessary either to provide for the possibility of drawing up a separate instrument which could be annexed to the convention, or to make slight alterations to articles 1 and 3, so that the convention could apply to agreements concluded between States and international organizations by consent of the entities concerned.

23. Mr. MOUDILENO (Congo, Brazzaville) said he had nothing against the substance of the idea expressed in article 1. However, the participants in the Conference, although jurists, also represented Governments. Since any text drawn up by States and adopted by them was called a treaty, it would be preferable to say: " the present treaty establishes the rules relating to treaties ". The words " treaties " and " States " would be defined in article 2.

24. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said he thought it desirable to extend the scope of the draft articles, owing to the importance, particularly to developing countries, of treaties concluded " between two or more States or other subjects of international law ". It was true that the amending of article 1 might delay the conclusion of the Conference's work, but what mattered most was the result obtained.

25. Mr. MARESCA (Italy), taking the three first amendments to article 1 in turn, said they would respectively shorten, lengthen and delete the article. With regard to the Swedish amendment (A/CONF.39/C.1/L.10), it would be a pity to delete the word " concluded ", which aptly described the process by which an agreement was formed, was perfected and entered into force. The deletion of article 1, as proposed in document A/CONF. 39/C.1/L.18, would entail the risk of the convention being applied to agreements which had nothing to do with international agreements. On the subject of the United States amendment (A/CONF.39/C.1/L.15), he recalled what had taken place in 1961 at the United Nations Conference on Diplomatic Intercourse and Immunities. The purpose of that Conference had been to codify diplomatic law. Two topics had been involved: permanent missions and special missions. The problem of special missions had been so important that the Conference had set up a sub-committee to examine it.[3] Similarly, there was no denying that treaties concluded by other " subjects of international law " raised a problem. It would therefore be desirable to set up a working group to study the matter so that the Conference could reach a properly informed decision.

26. Mr. KHLESTOV (Union of Soviet Socialist Republics) pointed out that the amendment of one of the draft articles was not the sole purpose of the United States proposal (A/CONF.39/C.1/L.15). The General Assembly, in resolution 2166 (XXI), had referred to the Conference the draft articles prepared by the International Law Commission. In that connexion, the outstanding quality of the Commission's work, having regard to the interests of many States, should be emphasized. There might be a few shortcomings, but as a whole the draft was excellent. It related solely to treaties concluded between States. The United States amendment would extend the scope of the convention to cover treaties concluded between States and international organizations. That idea was not new. It had been carefully examined by the Commission, which had rejected it and decided, at its fourteenth session, to limit the scope of the draft to treaties concluded between States; agreements between international organizations had their own special characteristics, which it would have been too complicated to allow for in the draft. If the United States amendment was adopted, a very large number of articles would have to be recast. The problem would be entirely changed and would have to be considered from quite a different standpoint; the Conference would be doomed to failure from the outset. There was no denying that treaties concluded by international organizations raised numerous problems, but the topic was being studied both by international lawyers and by the International Law Commission. The important thing at the moment was to ensure that the Conference was successful. Consequently, the delegation of the USSR could not support the United States amendment.

27. Mr. SEATON (United Republic of Tanzania), referring to the comment made by the representative of Congo (Brazzaville), said that the draft instrument

[3] See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II (United Nations publication, Sales No.: 62.XI.1), pp. 49 and 50, paras. 13-16.

submitted to the Conference was certainly a convention. It would therefore be correct to say: " The present convention relates to treaties concluded between States ". That point could be referred to the Drafting Committee.

28. With regard to the United States amendment (A/CONF.39/C.1/L.15), the Tanzanian delegation thought it might be unrealistic to limit the application of the convention to treaties concluded between States at a time when the role of international organizations was assuming increasing importance. Moreover, it did not seem possible to draw a clear distinction between treaties concluded by those organizations and treaties concluded between States. International organizations were subject to the normal rules of international law, especially when a treaty had entered into force. Hence the question raised by the United States amendment was of great importance and needed careful consideration. In particular, it might not be possible to adopt the precise text proposed by the United States, which was susceptible of different interpretations. For instance, the meaning of the words " other subjects of international law " needed to be defined. In order not to delay the work of the Conference, it would probably be preferable not to attempt any far-reaching amendment of article 1 at that stage.

29. Mr. HARRY (Australia) stressed the importance his delegation attached to the codification and progressive development of the law of treaties. All countries were vitally concerned in upholding the principle *pacta sunt servanda.* Moreover, the small and middle-ranking States had a particular interest in a soundly-based system of international treaty law. Of course, the more powerful States were also interested, but the smaller ones, being in a weaker position to secure redress, were more dependent on the sanctity of treaties and liable to suffer from anything prejudicial to orderly international relations. Where treaties were not observed, justice was on the side of the big battalions.

30. The work of the Conference would be to discuss the International Law Commission's proposals by article or group of articles and to take decisions article by article. The Conference should nevertheless bear in mind the suggestion made by the Secretary-General in paragraph 15 of document A/CONF.39/3 that where the Committee encountered a portion of the draft presenting particular difficulties it should hold a debate on that portion as a whole and then refer it to a sub-committee or working group for consideration and report. The Secretary General had rightly suggested that treatment for part V of the draft articles.

31. With regard to article 1, the Australian delegation regretted that the International Law Commission had been obliged to limit its proposals to treaties between States. By so doing, it had excluded a class of treaties of increasing significance in international relations, namely treaties between States and international organizations. The Commission might also have excluded the type of treaty known as a " trilateral " treaty—a treaty to which State A, State B and international organization C were parties. The position in regard to those treaties was not completely clear. Should the draft articles not cover an agreement between States because an international organization was also party to it? Again, the Commission had omitted other important aspects of treaty law from its proposals; for example, the effect of the outbreak of hostilities, succession of States in relation to treaties, State responsibility, and the most-favoured-nation clause.

32. The Australian delegation understood the reasons which had prompted the International Law Commission to deal only with certain aspects of the law of treaties. But that course had disadvantages. It would be difficult for the participants in the Conference to bear in mind the implications for other fields of treaty law of the proposals submitted to it. The Conference would nevertheless have to take care that its decisions did not have undesirable implications for areas of treaty law not substantially before it.

33. It was too late to change completely the approach adopted by the Commission. Nevertheless, in the view of the Australian delegation, the Conference should seriously consider removing the limitation of the draft articles to treaties between States. The draft should be reworded so that treaties involving international organizations were in fact covered. Such a change would require a review of several articles, which it would certainly be difficult for the Committee of the Whole to undertake. The Australian delegation therefore favoured the setting-up of a working group to consider the matter and report to the Committee whether it would be feasible to extend the scope of the draft articles to include international organizations (and other subjects of international law); and, if so, to state what changes would be required in the draft articles.

The meeting rose at 1 p.m.

THIRD MEETING

Thursday, 28 March 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Tribute to the memory of Colonel Yuri Gagarin, Soviet astronaut

1. The CHAIRMAN said he had just been informed that Colonel Yuri Gagarin, the first man to fly in space, had been killed in a training flight accident. His death was a tragic loss not only to the Soviet Union but to the whole world, and he invited the Committee to observe a minute's silence in his memory.

The Committee observed a minute's silence.

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(resumed from the previous meeting)*

Article 1 (The scope of the present articles) *(continued)* [1]

2. The CHAIRMAN invited the Committee to continue its consideration of article 1.

[1] For the list of the amendments submitted, see the summary record of the 2nd meeting, footnote 1.