United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.9

9th 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)*

Copyright © United Nations

but the position changed when it entered into force. Ordinary treaties were applied by the States parties to them through their executive, legislative and judicial organs. A treaty which was the constituent instrument of an organization was applied both by the parties as members of the organization and by the organs of the organization. That produced a whole series of consequences which the draft convention could not cover. The inclusion of constituent instruments of international organizations in article 4 was therefore justified.

42. Treaties concluded within an organization did not have the same unity. Some treaties were adopted merely for reasons of convenience, and there would be no justification for trying to infer legal consequences from that fact. When the Convention on Diplomatic Relations had been drawn up, for instance, it had been agreed to deal with special missions separately from permanent missions. The General Assembly had decided not to convene a conference to deal with the draft articles on special missions, but to pursue the topic itself. If article 4 of the draft convention on the law of treaties had been in force at that time, the Convention on Diplomatic Relations would have been subject to it, whereas the draft articles on special missions might have escaped its provisions. Such a difference in treatment was unjustifiable.

43. The question therefore arose in what cases the application of a special legal régime was justified. The French delegation thought it was justified for treaties whose adoption constituted the actual function of the organization—treaties which were inseparable from its constituent instrument and from its very existence. The observer for the ILO had explained the part played in that connexion by the international labour conventions in achieving the aims of that organization. Treaties of that kind should be governed by special rules as to their interpretation, validity and application. The purpose of the French amendment (A/CONF.39/C.1/L.55) was to restrict the application of article 4 to agreements concluded under a treaty which was the constituent instrument of an international organization. The amendment stressed the need for a direct link between the treaty adopted by the organization and the constituent instrument of the organization, because it was that link which justified the special régime.

44. The French delegation also considered that the present wording of article 4, which stated that the application of the draft articles " shall be subject to any relevant rules of the organization ", was too vague, since it was difficult to decide what was to be understood by " relevant rules ". In a convention as important as the one being drawn up, it was necessary to be more precise, so the French amendment read " any relevant rules resulting from the treaty ".

45. The amendment in document A/CONF.39/C.1/L.55 was a drafting amendment, but it also contained substantive changes. The French delegation wished it to be referred to the Drafting Committee for Consideration in the light of the comments made by delegations in the Committee of the Whole.

The meeting rose at 1.5 p.m.

NINTH MEETING

Tuesday, 2 April 1968, at 3.15 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 4 (Treaties which are constituent instruments of international organizations or which are adopted within international organizations *(continued)*)

1. The CHAIRMAN invited the Committee to continue its consideration of article 4. [1]

2. Mr. CALLE Y CALLE (Peru), introducing his amendment (A/CONF.39/C.1/L.58), said that the purpose of article 4 was to make a general reservation to the application of the draft articles in the case of treaties which were constituent instruments of international organizations or had been adopted within international organizations. His delegation did not support the proposals to delete that article since there were sound practical reasons for making those two categories of treaties subject to special rules. However, the provisions of article 4 went too far since they would have the effect of establishing two separate bodies of treaty law, one for States concluding treaties among themselves in the ordinary way and another for States concluding treaties among themselves, but within the framework of international organizations.

3. The purpose of the Peruvian amendment was to introduce a less radical formula which would make the draft articles applicable in principle to the two categories of treaties in question but subject to the proviso " without prejudice to any relevant special provisions laid down in such constituent instruments or adopted by virtue of them " (A/CONF.39/C.1/L.58). That language made it clear that the special provisions adopted by an international organization in accordance with its constitution prevailed as *lex specialis* over the *lex generalis* embodied in the draft articles. In the Peruvian amendment the expression " within an international organization " had been modified to " within the competence of an international organization ". That more precise language placed the emphasis on the legal aspects of the matter and on the constitutional validity of the treaty-making procedure, instead of on the mere fact that a treaty had been concluded " within an international organization ".

4. He noted that the Ukrainian amendment (A/CONF.39/C.1/L.12) was intended to serve a somewhat similar purpose, so, while he insisted on the substance of his proposal, he would be content to leave the drafting to the Drafting Committee.

5. Mr. FRANCIS (Jamaica), introducing the joint amendment by his delegation and that of Trinidad and Tobago (A/CONF.39/C.1/L.75), said that its main purpose was to confine the application of article 4 to the constituent instruments of international organizations; treaties concluded within international organizations would thus be subject to the general law of treaties. While there were good reasons for extending special

[1] For the list of the amendments submitted, see 8th meeting, footnote 1.

treatment to treaties which were the constituent instruments of international organizations, the other category of treaties did not differ from ordinary treaties between States.

6. By virtue of article 1, treaties between States and international organizations had been excluded from the scope of the draft. Consequently, a treaty concluded within the framework of an international organization could only be a treaty between States which happened to be members of the organization. From a legal point of view, there was no valid reason for establishing a different set of rules for that type of treaty.

7. When the draft convention entered into force, some States would need to enact legislation in order to give effect to some of its provisions. Similarly, certain international organizations might have to amend some of their rules, or even revise their constituent instruments, in order to take its provisions into account. In that event his Government would give its full co-operation to those organizations, in order to facilitate that process.

8. Though the amendment (A/CONF.39/C.1/L.75) raised the issue of principle, he would have no objection to its being referred to the Drafting Committee.

9. Mr. MOUDILENO (Congo, Brazzaville), introducing his delegation's proposal to delete article 4 (A/CONF.39/C.1/L.76), said that he saw no reason to make a special category of treaties which were constituent instruments of international organizations, or had been concluded within international organizations. All such treaties were treaties concluded between States and were therefore within the scope of the draft articles as set forth in article 1. In particular, treaties concluded within international organizations were the outcome of State activity, to which the same rules should apply as to similar activity outside those organizations.

10. He had no wish to belittle the importance of international organizations or of their activities. If it were desired to recognize their importance in the draft, he would suggest that article 4 should be reworded to read: " In accordance with article 1, the present articles shall apply *ipso jure* to treaties which are constituent instruments of international intergovernmental organizations or which are adopted within such organizations ".

11. Mr. GOLSONG (Observer for the Council of Europe) speaking at the invitation of the Chairman, said that the discussion had revealed the complexity of the special problems which the codification of the law of treaties involved with regard to the practice so far followed in the matter by international organizations.

12. The problems to which the observer for the ILO had referred at the seventh meeting arose in similar manner for a regional organization like the Council of Europe, which had sponsored some sixty treaties affecting not only its member States but some twenty-five States represented at the present Conference. Moreover, some of those treaties protected not only the nationals of member States but all persons, whatever their nationality. All those treaties had been drawn up and applied by virtue of special rules which did not necessarily coincide with those embodied in the draft articles, and for that reason article 4 was necessary for his organization as well as for others which were more universal in character.

13. The basic rule embodied in article 4 was not the result of the work of international secretariats; it had emerged from the decisions taken and the attitudes adopted by States. It thus reflected a development of State practice based on the interests of States. The fact that an increasing number of multilateral treaties were concluded within international organizations showed that the flexibility of that procedure was in the interest of States.

14. At the previous meeting, the United States representative had invited officials of international organizations to make known their needs. In response to that request, he would stress that the needs in question were those of the States members of the organizations and not those of international administrations.

15. The representative of Sweden, in advocating the deletion of article 4, had claimed that, with the exception of a few articles such as articles 48 and 49, to which perhaps such articles 23 and 59 should be added, none of the provisions of the draft articles stated rules of *jus cogens*, and had then gone on to argue that, since it was open to States to depart from the rules of *jus dispositivum* which constituted the bulk of the draft, article 4 was not necessary.

16. Deletion of article 4 might be acceptable if all the delegations shared the views of the Swedish delegation, but that was by no means the case. It was significant that the United States amendment (A/CONF.39/C.1/L.21) to delete article 4 was based on the totally different argument that States should not evade the rules embodied in the draft articles by concluding their treaties within international organizations.

17. The United States amendment listed eight articles which, in the event of the deletion of article 4, would require amending in order to take into account the needs of international organizations, and added that " the views of interested international organizations might be sought regarding the completeness " of that list of articles. The experience of the Council of Europe showed that there were no less than twenty-seven articles which would have to be amended. That figure clearly indicated the magnitude of the problem and demonstrated that a general clause on the lines of article 4 was preferable. It was significant that the International Law Commission had at an early stage of its work endeavoured to solve the problem piecemeal in connexion with each separate article, but had reached the conclusion that a general article was necessary.

18. With regard to the treaties covered by article 4, the amendment proposed by Spain (A/CONF.39/C.1/L.35/Rev.1) constituted a useful contribution in that it attempted to clarify the various types of treaties concerned. There might still be some difficulty, however, in drawing a clear line between the constitutent instruments of international organizations and treaties adopted within those organizations, particularly with respect to treaties establishing appropriate institutional machinery, such as the important European Convention on Human Rights. On the other hand, although that Convention had been adopted within the framework of the Council of Europe, it was doubtful whether it had been adopted by virtue of the constitutent instrument of that organization; the French amendment (A/CONF.31/C.1/L.55) should therefore be carefully examined.

19. The fact that the term " adopted " was used in article 4 made it advisable to explain the use of that term in article 2, paragraph 1, as proposed in the French amendment (A/CONF.39/C.1/L.24) to that article. The meaning of the term was explained in paragraph (1) of the commentary to article 8 but not in the draft articles themselves.

20. With regard to the question of the " relevant rules " of an organization, those rules should include the established practices of the organization in the exercise of its competence. If there were any doubt on that point, the best method of clearing it up would be to adopt the United Kingdom amendment to introduce in article 4 the words " and established practices " (A/CONF.39/C.1/L.39).

21. He did not believe that it would be possible to limit the general provision of article 4 to " any relevant rules resulting from the treaty " which was the constituent instrument of an international organization, as proposed by France (A/CONF.39/C.1/L.55). The established practice of the International Labour Organisation, for example, a practice which had been accepted by certain States with some hesitation, was that international labour conventions were not signed. That practice was not based on the text of the Constitution of the International Labour Organisation, and would therefore fall outside the terms of the French amendment. If the purpose of that amendment was to prevent *ultra vires* acts by international organizations, the Peruvian amendment (A/CONF.39/C.1/L.58) would seem to be directed to solving the same problem but its language was more adequate.

22. Mr. YACCOUB (Observer for the League of Arab States), speaking at the invitation of the Chairman, said that he wished to make a few comments on article 4 without binding his organization with regard to it.

23. He felt that article 4 should be retained as it stood because it introduced an element of flexibility which was necessary to the life of international organizations. The constituent instrument of the League of Arab States contained a number of provisions embodying special rules in the matter of the law of treaties. For instance, its article 4 made provision for the competence of the Council of the League to adopt the text of draft conventions for submission to member States; article 7 specified that a unanimous decision of the Council was binding on all the member States, but that a majority decision was binding only on those States which had voted for it. Under article 17, every member State was bound to deposit with the League secretariat a copy of any treaty signed by it with another country, whether a member of the League or not.

24. He favoured the United Kingdom amendment (A/CONF.39/C.1/L.39) to introduce a reference to the established practices of international organizations, and also the French amendment to article 2 (A/CONF.39/C.1/L.24) to include a definition of " restricted international treaty ".

25. Mr. MAGNIN (Observer for the United International Bureaux for the Protection of Intellectual and Industrial Property—BIRPI), speaking at the invitation of the Chairman, said that in view of the large number of treaties for which international organizations were responsible, a draft treaty designed to codify the written or unwritten rules concerning the conclusion of treaties must of course take into account the relevant practice of those organizations. Draft article 4 spoke of treaties which were constituent instruments of international organizations or which were adopted " within " international organizations. Various amendments, and certain delegations in their oral statements, had used other expressions concerning, for example, treaties concluded " under the auspices " or " within the framework " of international organizations. Such questions of drafting were debatable; what mattered was that the practices of all international organizations should be reserved. According to article 2, paragraph (i), the expression " international organization " meant an intergovernmental organization. There were several types of intergovernmental organizations; the international Unions for the protection of intellectual property, of which BIRPI was the permanent secretariat, played a considerable role where treaties were concerned. In the document submitted to the Conference concerning article 26 (A/CONF.39/7, section B 5), BIRPI had stressed the importance of those Unions and, in particular, of the Paris Union for the Protection of Industrial Property and the Berne Union for the Protection of Literary and Artistic Works, each of which comprised some 100 States. The Acts of those Unions and the revisions adopted at regular intervals were treaties. However, they were treaties of a particular type in that, because the Union formed a united whole, a State which was a party only to the latest of those treaties was implicitly bound to a State which was a party only to an earlier treaty in the same series. It was therefore understandable that, for the adoption of such treaties, the States concerned should have laid down special rules different from those applicable to ordinary treaties which were those to which the International Law Commission's draft text referred and in whose conclusion States acted in some degree as severally independent entities. One such rule was that of unanimity, which the States had confirmed as recently as June 1967 on revising the Berne Convention at the Stockholm Diplomatic Conference. That rule, together with all those which the States had found it necessary to observe within the Unions, must naturally be reserved.

26. In his opinion, the best way to accomplish that would be to adopt a general provision of the same type as that laid down in article 4; such a provision could be prepared by the Drafting Committee. Alternatively it would of course be possible to provide for the insertion of reservations in various articles of the treaty, as suggested by the United States delegation. That, however, would be a more complicated procedure, for such reservations would have to be inserted in many articles and there would be no assurance that nothing had been overlooked at one point or another.

27. However, if it was recognized, as the representatives of Sweden and Switzerland had pointed out, that with specified exceptions the provisions of the treaty did not possess the quality of *jus cogens* but were in reality nothing more than recommendations, the problem raised concerning draft article 4 would be less pressing.

28. Mr. BROCHES (Observer for the International Bank for Reconstruction and Development), speaking at the invitation of the Chairman, said he endorsed the

plea of the observer for the International Labour Organisation for the retention of article 4. The International Bank, in a memorandum submitted to the Conference, had expressed the view that both the constituent instruments of international organizations and the treaties adopted within them needed special treatment (A/CONF.39/7/Add.1 and Corr. 1, paragraphs 11 *et seq.*). It had also suggested additions intended to clarify the meaning of the phrase " relevant rules of the organization " so as to indicate that they included the constituent instruments themselves as well as *ad hoc* decisions, which together with standing rules constituted established practice.

29. However, suggestions had been made for the deletion or restriction of article 4. One of the delegations advancing such a proposal had indicated certain consequential changes that might as a result be made in several other draft articles; it had also asked that the views of interested international organizations be obtained as to the completeness of its list (A/CONF.39/C.1/L.21). The following observations by the Bank, which related to about thirty articles, were made in response to that request.

30. If article 4 were deleted, constituent instruments would be equated with other multilateral treaties, thus disregarding the substantial differences between them and, in particular, the special necessity for preserving the integrity of the former. Such a move would require changes in at least articles 14, 37, 41, 57, 59 and 62.

31. If article 14, paragraph 1, were made applicable to constituent instruments of international organizations, it would permit contracting States to accept as valid the consent of a State to be bound by part of the treaty only, and thus leave a potential gap in the constituent instrument.

32. He noted in connexion with paragraph 3 (*c*) of article 27 and with article 38, that even if article 4 were deleted, the " practice in the application of the treaty " should be understood as including the practice of the organization whose constituent instrument was involved.

33. Article 37, dealing with modifications of treaties agreed by certain States *inter se*, could not be applicable to multilateral agreements which were constituent instruments, nor were the rules in article 41 concerning separability appropriate for them. The provisions regarding termination and suspension in article 57 should, as far as constituent instruments were concerned, be made expressly subject to any provisions in such treaties concerning breach—which might require a modification of paragraph 4.

34. In cases where constituent instruments contained provisions for termination and withdrawal, those provisions should be regarded as exhaustive, and parties should not be permitted to invoke a fundamental change of circumstances as a ground for termination or withdrawal under article 59.

35. The scope of the application of article 62 would be diminished by some of the changes he was advocating; nevertheless, a special proviso might be needed in paragraph 4 concerning the settlement of disputes, in order to prevent a member of an international organization challenging the validity of the instrument from claiming that the provision regarding disputes was also invalid.

36. When States created an international organization, they assumed obligations with respect to each other and to the organization itself. Moreover, they also authorized it to enter into obligations with States, both members and non-members, with other international organizations and with individuals. While States were free to establish and dissolve an organization, they should not be free to terminate or suspend its constituent instrument in such a way as to prevent the organization from discharging its commitments. For example, the Bank's Articles of Agreement provided substantial protection to the organization and to its lenders by reserving 80 per cent of the capital subscription of each member for the sole purpose of enabling the Bank to meet its obligations to those lenders.

37. If article 4 were to disappear, a number of changes in other articles would be necessary to safeguard such commitments, at least within the terms of the constituent instrument. For example, article 26 might be expanded by a provision to the effect that it was without prejudice to the rights and obligations of States under treaties which were constituent instruments. Similarly, articles 51 and 54 should contain a qualification concerning such treaties. Article 65, paragraph 2 (*b*), should stipulate that the acts performed by an international organization under its constituent instrument before its nullity was invoked should not be rendered unlawful. Articles 66, 67 and 68 might be amended so as to indicate that termination, nullity and suspension could not affect the acquired rights, obligations or legal situations of the international organization of which the treaty was a constituent instrument.

38. Finally, changes would be needed in articles 62, 63, 72 and 74 to provide for notifications to be made to the organizations themselves if certain steps were taken in connexion with their constituent instruments.

39. If treaties adopted within international organizations were removed from the scope of article 4, provisions in the draft articles that at present referred to decisions or undertakings by " negotiating States " would have to be amended in order to take account of such treaties, particularly when the adoption took place in an organ that was not a plenary organ, such as the Executive Directors of the Bank or the Board of Governors of the International Atomic Energy Agency. Those provisions included articles 6, 8, 9, 10, 11, 12, 14, 17, 53, 71 and 74. It would perhaps be easier to devise such amendments if a suitable term were adopted for what he might call " the sponsoring organization ".

40. Major amendments would be needed in article 17 to provide that reservations should require the acceptance of the competent organ of the sponsoring organization, except in cases of constituent instruments which had entered into force, when the competent organ of the new organization would be the judge of the acceptability of the reservation.

41. In its written submission, the Bank had suggested an addition to article 27 concerning the interpretation of multilateral treaties.

42. It might also be necessary to provide in article 18, paragraph 1, in article 72, paragraph 2, and in article 73 for notifying sponsoring organizations of certain steps taken in connexion with treaties adopted within them.

43. Mr. CAHA (Observer for the Universal Postal Union), speaking at the invitation of the Chairman, said that the task of the Universal Postal Union (UPU) since its inception in 1874 had been primarily legislative. The treaties concluded by UPU were essentially treaties about technical postal matters, and UPU had its own rules and practice with regard to the conclusion of treaties. As an example, he mentioned the different majorities required for the adoption of a legislative text, ranging from the majority of States members present and voting to the majority of States members of the Union represented in the Congress or the Committee. There was also the question of the entry into force of the Acts of the Union and in particular the practice with regard to reservations, which had to be confirmed in the final protocol of the Act concerned.

44. The deletion of article 4 would certainly create problems for the Union, and he believed that a satisfactory draft could be devised on the basis of the International Law Commission's draft and of the United Kingdom and French amendments.

45. Mrs. BOKOR-SZEGÖ (Hungary) said she was in favour of the Commission's article 4 as it stood and hoped that the promulgation of the present convention would induce international organizations to bring their rules of procedure into line with its provisions.

46. She supported the Ukrainian amendment (A/CONF. 39/C.1/L.12) which stressed that the rules in the draft should apply to all types of treaty, taking into account the relevant rules of international organizations; it harmonized the general with the particular, as did the Peruvian amendment (A/CONF.39/C.1/L.58).

47. She was not in favour either of the United States amendment (A/CONF.39/C.1/L.21)—because it would be difficult to specify exceptions in every relevant article—or of the Ceylonese amendment (A/CONF.39/C.1/L.53). The Spanish amendment (A/CONF.39/C.1/L.35/Rev. 1) would give rise to protracted and unnecessary discussions. The United Kingdom amendment (A/CONF.39/C.1/L.39) would create uncertainty and endanger the stability of contractual relations between States.

48. She agreed with the French representative that there was no difference in principle between treaties concluded within international organizations and those concluded under the auspices of an international organization.

49. Mr. KRAMER (Netherlands) said that the text of article 4 suggested that there need be no uniform rules for two categories of treaties but that the rule of each organization would prevail. It implied that each organization was competent to decide what rules governed its constituent instrument or any treaty adopted within the organization. It seemed to him unwise to allow such latitude. Nor did he favour withdrawing from the application of the convention a substantial number of international agreements; it would be preferable to bring them within its scope.

50. He was unable to understand why the exemption from the general law of treaties should be identical for constituent instruments of international organizations and treaties adopted within them, because the two were widely different.

51. Article 4 was too sweeping and needed considerable redrafting. He was unable to support the proposal by Sweden and the Philippines (A/CONF.39/C.1/L.52 and Add. 1) to delete it altogether, since that would leave certain very real practical problems unsolved. He was inclined to favour the Spanish and United States amendments, which would indicate where *lex generalis* had to give way to *lex specialis*.

52. The final decision on article 4 would have to be postponed until its implications for each article in the draft and the exceptions required had been decided.

53. Mr. MERON (Israel) said there seemed to be general sympathy for the basic proposition that some exemption from the rules of the draft convention in favour of the *lex specialis* of the international organizations was necessary. Although the underlying idea was that the convention should not interfere with the treaty-making practices of the international organizations, the proposed exemption seemed to involve both procedure and substance. The decision whether a treaty was adopted within the international organization or under its auspices was a matter of diplomatic convenience, affected by financial and technical considerations, and was not a good basis for a legal distinction. Thus, different rules would be applicable to conventions such as the Vienna Conventions on Diplomatic and Consular Relations, adopted by plenipotentiary conferences, and the draft on special missions, which would be dealt with by the Sixth Committee of the General Assembly.

54. Israel took the view that a more material criterion should be sought in the actual connexion of the treaty with the organization within which it had been drawn up, so that the treaty had a material link with the constitution of the organization. The ILO Conventions were a good example of such agreements; but many treaties drawn up within the United Nations had at best a tenuous connexion with the organization, whose machinery was used primarily as a matter of convenience, and the connexion was even less evident in the case of agreements drawn up at conferences convened by United Nations bodies in which non-member States had participated.

55. The Committee had to decide whether article 4 should be deleted, or whether substantial changes could improve it. His delegation believed that deletion of the article would not solve any problems. The United States delegation recognized that fact in proposing specific exemptions in various articles (A/CONF.39/C.1/L.21); the International Law Commission also had originally taken that approach, but had abandoned it in 1963, on finding that it would create considerable difficulties.

56. In choosing between a general exception and specific exceptions, his delegation preferred the general, for four reasons. First, it was better not to complicate the text of the convention by detailed amendments to specific articles. Secondly, since the principle *expressio unius est exclusio alterius* would apply, great care must be taken not to omit the amendment of any article which might have even an indirect effect on the treaty-making of international organizations; it was doubtful whether the Conference could undertake such an exhaustive examination of the draft. Thirdly, proper latitude must be left for future developments in international law and in international organizations, and the article as it

stood provided the necessary flexibility. Finally, the needs of some international organizations were different from those of the United Nations, and it would be very difficult to provide for those needs by the method of specific amendments.

57. With regard to the other amendments before the Committee, the Ukrainian amendment (A/CONF.39/C.1/L.12) introduced an element of ambiguity, for it failed to specify what rules would prevail in the event of a conflict. The Spanish amendment (A/CONF.39/C.1/L.35/Rev.1) introduced an unduly broad exemption, extending even to agreements deposited with an international organization, and further complicated the draft by citing a large number of articles. In the case of the United Kingdom amendment (A/CONF.39/C.1/L.39), it would be hard to determine exactly what was meant by "established practices"; the Secretary-General of the United Nations stated in his written comments (A/CONF.39/5) that the word "rules" in article 4 could be interpreted to mean " legally valid rules, adopted and applied in accordance with the constitutions of the organizations concerned". The Gabon amendment (A/CONF.39/C.1/L.42) seemed to be of a drafting nature and could be referred to the Drafting Committee. The Ceylonese amendment (A/CONF. 39/C.1/L.53) would not meet recognized needs of the international organizations, and the note to the amendment, explaining that treaties " adopted within " an international organization would not be covered and that consequential amendments would be required, would give rise to the same difficulties as the United States amendment.

58. Difficulties would also be caused by the French amendment (A/CONF.39/C.1/L.55), in determining what treaties were or were not concluded by virtue of constituent instruments; it might even be argued that all United Nations activities were carried on by virtue of the Charter. Similar problems arose in connexion with the Peruvian amendment (A/CONF.39/C.1/L.58).

59. The Israel delegation accordingly considered that the Commission's article 4, although imperfect, should be retained. In taking that position, it concurred with the view expressed in the Secretary-General's memorandum (A/CONF.39/5) that exercise of the rule-making authority would be limited to a few cases of genuine need of States or of depositaries, and that the general international law of treaties as embodied in the future convention would apply to the vast majority of problems concerning the treaties connected with international organizations.

60. Mr. THIERFELDER (Federal Republic of Germany) said that although the Commission had been right to lay down special rules for the categories of treaties dealt with in article 4, he doubted the wisdom of providing in general terms for exceptions in both categories of treaties, in view of the difference between the rules concerned. Thus, in the case of constituent instruments, the rules governing termination were particularly important, whereas in the case of treaties adopted within an international organization, it was the rules governing the adoption procedure that were most important. Without some differentiation, the over-all exception would be unduly broad.

61. His delegation could not support the amendment by Congo (Brazzaville) (A/CONF.39/C.1/L.76), while the Ceylonese amendment (A/CONF.39/C.1/L.53) and that of Jamaica and Trinidad and Tobago (A/CONF.39/C.1/L.75) would both have the effect of omitting one of the two categories of exemption altogether. Nor, since the question of the residuary nature of the articles was not yet sufficiently clear, could he support the Swedish and Philippine amendment (A/CONF.39/C.1/L.52).

62. On the other hand, he could sympathize with the reasoning behind the United States and Spanish amendments (A/CONF.39/C.1/L.21 and L.35/Rev. 1), which were both designed to limit the exception set out in article 4 and differed only in the technical means of achieving that purpose. The United States text seemed to be clearer than the Spanish, and should not give rise to many technical difficulties; if the majority of the Committee held the contrary opinion, a text along the lines of the Spanish amendment might be adopted, although that might entail some duplication of effort.

63. If the original form of article 4 were retained he doubted whether the Ukrainian amendment (A/CONF.39/C.1/L.12) would improve the text, since difficulties of interpretation might arise in cases of conflict. He thought that the reference to " established practices " in the United Kingdom amendment (A/CONF.39/C.1/L.39) was covered by the term " relevant rules ". The Gabon amendment (A/CONF.39/C.1/L.42) seemed to be concerned with a drafting point only.

64. It had been pointed out in the written comments of the Secretary-General of the United Nations and of the Council of Europe that the interpretation of the expression " adopted within international organizations " gave rise to difficulties. His delegation would submit that the difficulty lay less in the wording than in the variety of the practice of different organizations. The French and Peruvian amendments (A/CONF.39/C.1/L.55 and L.58) were attempts to clarify that point, but hardly seemed to improve the Commission's text. Accordingly, if a general approach was adopted, the Commission's text should be retained.

65. Mr. SMEJKAL (Czechoslovakia) said he had serious doubts over the wording of article 4, since the limitation of the application of the convention to the two categories of treaties might in practice give rise to the risk of eliminating them from the scope of the convention. His delegation therefore agreed with the International Law Commission that the limitation should apply only to treaties adopted within an international organization, and that treaties which were merely concluded under the auspices of such organizations or were deposited with them should not be subject to the relevant rules of the organization. That did not mean, however, that his delegation underestimated the practical difficulties stressed by the representatives of international organizations in their statements. The representative of the International Bank had wisely suggested that the *lex specialis* might be specified in the articles where an exemption was absolutely indispensable, and that that method might be used concurrently with a general formulation of article 4.

66. From the point of view of drafting, his delegation was in favour of limiting the scope of the general exemption along the lines of the Ukrainian amendment (A/CONF.39/C.1/L.12), which was in line with suggestions made by

Czechoslovakia and the Secretary-General of the United Nations in their written comments.

67. Mr. TSURUOKA (Japan) said that the Commission's text of article 4 did not clearly set out the scope of the exceptions contained in it. The general impression was that it extended a very broad right to derogate from any of the provisions of the convention to all international organizations, not only in respect of their constituent instruments, but also in respect of treaties adopted within those organizations. According to the Commission's text, the convention would apply to multilateral treaties, like the Vienna Convention on Diplomatic Relations, which were concluded at international conferences, whereas instruments such as the future convention on special missions would be subject to the relevant rules of the United Nations, simply because it would be adopted in the General Assembly. Such a differentiation seemed unjustified. The grant of such latitude to international organizations by express provisions might result in an interpretation *a contrario*, in other words in the interpretation that States were not allowed any such latitude in their treaty relationships under the convention now being discussed. It might be argued that similar flexibility should be allowed to States, which would also be placed in situations similar to those against which international organizations wished to secure safeguards under article 4. It would seem best to leave the matter to a flexible interpretation of the convention, and the Japanese delegation was therefore in favour of deleting article 4.

68. Mr. KRISPIS (Greece) said that article 4 was extremely important. In view of the large number of treaties being produced—some 600 a year—many of them through the constantly growing number of international organizations, the latest being the World Intellectual Property Organization established at the Stockholm Conference of July 1967, it was essential to specify the rules governing such instruments. His delegation believed that the best method was to lay down the *lex generalis* and to follow it by a statement of the *jus specialis*. If no general provision along the lines of article 4 was included in the convention, two different systems would be created, one for treaties concluded outside organizations and the other for treaties adopted within organizations. The deletion of article 4 would be tantamount to an attempt to solve the problem by ignoring it. The fact that a rule was *jus dispositivum* did not make it superfluous. On the other hand it was useful to have an indication that a rule was *jus dispositivum*, for instance by using the words " unless otherwise provided ".

69. His delegation could not support the Swedish and Philippine amendment (A/CONF.39/C.1/L.52), since the fact that an appropriate article was difficult to draft made it all the more important to exert every effort to avoid the creation of two systems of the law of treaties. Where *jus specialis* was concerned, his delegation had some sympathy with the United States and Spanish amendments (A/CONF.39/C.1/L.21 and L.35/Rev. 1), because their approach to the provision was analytical, whereas the International Law Commission had preferred the opposite approach.

70. With regard to the Commission's general text, he suggested that the words " drawn up and " be inserted before the word " adopted ", in accordance with paragraph (3) of the commentary. That suggestion was, however, subject to the Drafting Committee's decision on article 2, for if the definition of " adoption of the text of a treaty " proposed by the French delegation (A/CONF.39/C.1/L.24) was approved, the term " adopted " might suffice.

71. With regard to the other amendments, the proposal in the United Kingdom amendment (A/CONF.39/C.1/L.39) to insert the words " and established practices " gave rise to the question whether established practices were not the rules of international organizations: article 4 did not distinguish between written and unwritten rules, and established practices, provided that the relevant *longus usus* was accompanied by the necessary *opinio juris*, seemed to be covered by the term " any relevant rules ". The same argument applied to the introduction of the words " or decisions " in the Ceylonese amendment (A/CONF.39/C.1/L.53): under article 4 a rule might be interpreted to mean either the provision of a treaty or a decision of an international organization.

72. Adoption of the Commission's text as it stood would result in uneven application of the convention to the two categories of treaties in question. Where constituent instruments were concerned, the convention would be applicable, because the organization would not yet be in existence when the constituent instrument was drawn up, so that no relevant rules of the organization could apply; but where treaties were adopted within international organizations the opposite would be the case, for when such agreements came into force, they would have a life of their own, and such instruments as a convention on the law of treaties would apply to them, independently of the rules of the international organizations.

73. Mr. RUDA (Argentina) said the debate had shown that the rule laid down in article 4 was one of *lex lata*, codifying existing rules of customary law. The law established on a customary basis between States, added to long practice, resulted in rules differing from those of general international law existing in treaties. In his delegation's opinion, article 4 only reflected the current situation, and introduced no innovation.

74. The debate had also shown fairly wide agreement that constituent instruments of international organizations were subject to general treaty law as well as to rules peculiar to the organization. That view was substantiated by paragraph (2) of the commentary to the article. The problem before the Committee was therefore the formal one of how best to reflect those ideas in a single article.

75. He agreed with the Swedish representative that there was no reason why an organization should not conclude treaties in the form most appropriate to it, provided there was no conflict with peremptory norms of international law. That was the precise purpose of article 4, which raised no theoretical problems that might have an adverse effect on treaty law in general. In view of that general agreement on the substance of the article, he believed that it should be maintained in a general form, for otherwise the Committee would have to study a long series of specific exceptions, which would increase in number as the debate continued. For instance, the United States amendment (A/CONF.39/C.1/L.21) referred to eight articles, the observer for the Council of Europe had mentioned twenty-seven, and the observer for the

International Bank had referred to more than thirty. It therefore seemed preferable to make further efforts to draft a clear general provision.

76. Mr. BINDSCHEDLER (Switzerland) said that originally the Commission had contemplated not a binding convention but a code on the law of treaties. Undoubtedly the convention should not be *jus cogens* but *jus dispositivum* in character. Moreover, his delegation did not consider that *jus cogens* existed in international law. Thus States could derogate from the convention and adopt other provisions necessary to promote the progressive development of international law. Consequently the proviso about a contrary convention between the parties was superfluous from the legal point of view because States were always free to depart by mutual agreement from the rules laid down in the convention. The Swiss delegation would therefore have no strong objection to the adoption of the Swedish and Philippine proposal to delete the article, and supported the Swedish suggestion to include a general provision concerning the nature of the convention.

77. Nevertheless, it would still be advisable to include a clause along the lines of article 4 for practical and policy reasons, in order to provide guidance to States in the procedures of treaty-making. The Swiss delegation agreed in principle with the International Law Commission's text, and considered that it had been wise to exclude treaties concluded under the auspices of international organizations, since those agreements did not differ essentially from other multilateral treaties. The role of the organizations in such cases was purely technical, and he was therefore unable to support the Spanish amendment (A/CONF.39/C.1/L.35/Rev. 1).

78. Perhaps the limitation in respect of constituent instruments was unnecessary, since the organization would not yet exist when its constituent instrument was adopted, and the provision would therefore apply only to revisions of the instrument. On the other hand, treaties adopted within international organizations should be subject to special rules. The question whether the exception should be restricted to adoption could not be settled until the definition of the adoption of the text of a treaty had been finally formulated.

79. The Swiss delegation could not support the United States amendment (A/CONF.39/C.1/L.21), since there was always a danger that the enumeration would be incomplete.

80. On the question of the drafting of the general clause, he could support the Peruvian text (A/CONF.39/C.1/L.58), which stressed the general rule and subordinated the exception, whereas the Commission's text laid greater emphasis on the exception than on the rule. If the Peruvian amendment was not adopted, however, his delegation would be in favour of a combination of the Ukrainian and French amendments (A/CONF.39/C.1/L.12 and L.55), both of which restricted the scope of the article.

81. Finally, he considered that a decision on the article should be taken in the Committee of the Whole, not in the Drafting Committee, since questions of substance were involved.

The meeting rose at 6.10 p.m.

TENTH MEETING

Wednesday, 3 April 1968, at 11.5 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 *(continued)*

Article 4 (Treaties which are constituent instruments of international organizations or which are adopted within international organizations *(continued)* [1]

1. Mr. DENIS (Belgium) said that the amendment by Sweden and the Philippines (A/CONF.39/C.1/L.52 and Add.1) and the comments which had accompanied its introduction raised an important question of principle. Did the draft articles constitute rules from which States could derogate or would they be binding on States unless they provided expressly for derogations? The nature of each article from that point of view should be established by the Conference and specified in an appropriate formula, either in the text of each article or in an article of general application.

2. With regard to the purpose of article 4 itself, the Belgian delegation thought that the convention should allow for the fact that an increasing number of treaties were drawn up within international organizations. Clearly, treaties should not be exempted without good reason from the operation of the uniform régime established by the convention, but it was also important that the convention should not abolish the special régimes governing the activities of numerous international organizations with regard to the framing of treaties between States. The convention should therefore contain express provisions to that effect. Owing to the difficulty of an exhaustive enumeration of the articles open to derogation, the Belgian delegation favoured a provision of general application.

3. For the designation of treaties to be accorded the right to a special régime, the difficulty would be to decide whether or not a treaty had been adopted "within an international organization". The Peruvian amendment (A/CONF.39/C.1/L.58) referred to treaties adopted "within the competence of an international organization"; the French amendment (A/CONF.39/C.1/L.55) spoke of agreements concluded in virtue of a treaty which was the constitutent instrument of an international organization. Those two amendments had the advantage of introducing an element of law which was essential for the application of the exception, whereas the phrase "adopted within an international organization" referred to a *de facto* situation which might not necessarily be legally justified by the rules of the organization in question.

4. Mr. DIOP (Senegal) said that his delegation favoured the codification of international relations in principle but had to point out that the codification of principles hitherto derived from customary law should not entail the establishment of excessively rigid criteria which might paralyse the development of regional law. Inter-

[1] For the list of the amendments submitted, see 8th meeting, footnote 1.