# United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations

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**A/CONF.129/C.1/SR.15**

**15th meeting of the Committee of the Whole**

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were links between the question they dealt with and various existing provisions of the draft articles. The sponsors might, however, wish to introduce their proposals.

81. Ms. WILMSHURST (United Kingdom) said that since consultations were still in progress between the United Kingdom and Italian delegations, it would be preferable not to introduce the United Kingdom proposal (A/CONF.129/C.1/L.27) until those consultations had reached a satisfactory conclusion.

82. Mr. GAJA (Italy) said that his delegation would also prefer to postpone the presentation of its amendment (A/CONF.129/C.1/L.42), in the hope that a joint text would be elaborated.

*The meeting rose at 5.55 p.m.*

# 15th meeting

**Monday, 3 March 1986, at 11.10 a.m.**

*Chairman*: Mr. SHASH (Egypt)

*In the absence of the Chairman, Mr. Nascimento e Silva (Brazil), Vice-Chairman, took the Chair.*

### Tribute to the memory of Mr. Olof Palme, Prime Minister of Sweden

1. The CHAIRMAN asked the Committee to observe a minute of silence in tribute to the memory of Mr. Olof Palme, Prime Minister of Sweden, who had been assassinated on Friday, 28 February 1986. Olof Palme had been a very distinguished statesman and had been entrusted with very important responsibilities by the United Nations in the course of his exceptional career.

2. He requested the representative of Sweden to convey the heartfelt condolences of the Conference to the family of Olof Palme and to the Swedish Government and people.

*The members of the Committee observed a minute of silence in tribute to the memory of Mr. Olof Palme.*

3. Mr. KRONHOLM (Sweden) expressed his sincere gratitude for the message of sympathy, which he would convey to the family of Olof Palme and to the Government and people of his country.

### Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11] (*continued*)

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

*Paragraph 6*

4. The CHAIRMAN invited the Committee to consider paragraph 6 of article 30 and the amendments to it by Argentina and by Australia and Canada, together with the United Nations amendment to article 27 (A/CONF.129/C.1/L.37), which its sponsor had suggested should be discussed in connection with that paragraph.

5. Mrs. OLIVEROS (Argentina), introducing her delegation's amendment (A/CONF.129/C.1/L.44), said that treaty interpretation was one of the most important and difficult tasks of Ministries for Foreign Affairs. Their sole guide must be the actual text of the treaty, for attempts to interpret it according to the intention of the parties or the object and purpose of the treaty usually led to unnecessary controversy. Her delegation believed that in the interests of clarity, the text of a treaty should not contain cross-references to another instrument. Where it was desirable to refer to a provision of another text, that provision should be reproduced in full.

6. The International Law Commission's draft of article 30, paragraph 6, mentioned Article 103 of the Charter of the United Nations, which read: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The term "Members of the United Nations" meant, in accordance with Article 4 of the Charter, the States which accepted the obligations which the Charter contained. The reference to Article 103 of the Charter was thus exclusively to States, and not to international organizations, which were not Members of the United Nations.

7. Accordingly, if article 30, paragraph 6, was left as it stood, the important rule which it laid down would apply only to the States and not to the organizations which ratified the future convention. Her delegation's amendment sought to remedy that defect by replacing the present text of paragraph 6 by language which reproduced in full the rule embodied in Article 103 of the Charter of the United Nations, thus making it clear that the rule applied both to States and to international organizations.

8. Mr. HERRON (Australia), introducing the amendment in document A/CONF.129/C.1/L.45 on behalf of his own delegation and that of Canada, said that only paragraph 6 of article 30 was before the Committee. However, given the connection between the proposal to delete that paragraph and the suggested addition to paragraph 1 of the article, he trusted that the Committee would be willing to consider the amendment as a whole.

9. The purpose of the amendment was to remove a provision which the International Law Commission had described in paragraph (1) of its commentary to the article (see A/CONF.129/4) as "deliberately ambiguous", and to insert in the article a saving clause identical to the one in article 30 of the 1969 Vienna Convention on the Law of Treaties.[1]

10. There had been uncertainty in the Commission whether the application of Article 103 of the Charter of the United Nations could be extended to international organizations. While the view of the amendment's sponsors was that the Article was binding on the United Nations itself, the main ground for their proposal was structural, namely, that if there was to be a saving clause, it should be at the beginning of paragraph 1, as in the 1969 Vienna Convention. It would thus clearly have the same application to the rights and obligations of States as it had in that Convention, and it might or might not apply to international organizations, depending on how the law on the subject was interpreted.

11. The Australian delegation, for its part, wished paragraph 6 to be deleted regardless of the decision taken about paragraph 1. It was not convinced that article 30 needed to refer to Article 103 of the Charter at all.

12. Mr. BERNAL (Mexico) said that the International Law Commission's commentary acknowledged the fact that the Commission had failed to solve a difficult problem. The hierarchical supremacy of the Charter of the United Nations over all other treaty obligations of Member States was a basic principle which had been clearly recognized in the 1969 Vienna Convention. Consequently, the obligations imposed by the Charter took precedence over any other obligation arising from a subsequent treaty, regardless of the subjects of international law which were parties to that treaty. The purpose of the two amendments before the Committee was the same, namely, to establish that in the event of conflict between the provisions of a subsequent treaty and those of the Charter of the United Nations the latter would prevail. The amendment by Australia and Canada had the merit of placing the saving clause in the most appropriate place, while the Argentine proposal was more explicit. The two proposals might conveniently be merged.

13. Mr. BOUCETTA (Morocco) wondered whether any failure to mention Article 103 of the Charter in article 30 would allow international organizations to conclude treaties without taking into account the provisions of the Charter. Such a situation would obviously be unacceptable. States had conferred primacy in their relations as individual entities on the obligations imposed on them by the Charter of the United Nations; it would therefore be paradoxical if they permitted themselves the possibility, when acting collectively through international organizations, of disregarding those obligations. His delegation therefore supported the proposal to introduce a proviso concerning Article 103 of the Charter into article 30, paragraph 1.

14. Mr. RASOOL (Pakistan) said that the intentional ambiguity underlying paragraph 6 resulted mainly from a controversy over the application of the principles of the Charter of the United Nations to the treaties concluded by international organizations. The present position was that States, through an international organization, might be able to avoid their obligations under the Charter. His delegation therefore opposed paragraph 6 as it stood. It would prefer the Argentine proposal for amending it, among other things because the text proposed by Argentina avoided a cross-reference.

15. Mr. KOLOMA (Mozambique) said that Article 103 of the Charter of the United Nations applied to Members of the United Nations, which were unequivocally defined in Articles 3 and 4 as States; consequently, the article could not be said to apply to international organizations. Nevertheless, his delegation felt strongly that the content of Article 103 of the Charter, suitably adapted, should be embodied in the draft convention, either as a general article or as a separate paragraph of article 30. Of the different proposals put forward to that effect, it favoured the Argentine amendment.

16. Mr. DALTON (United States of America) said that in his view the reference by the International Law Commission in paragraph (1) of the commentary to article 30 to what it said were "deliberately ambiguous terms" was—to say the least—infelicitous. While he realized that it was impossible to draft a text on the highly complex subject of treaty law in such a way as to solve every conceivable problem in advance, the text must establish adequate guidelines that should make it possible to deal with foreseen and unforeseen difficulties if and when they occurred. He believed that in the present instance to speak of a possible conflict between the obligations existing under a treaty and those existing under the Charter of the United Nations, rather than between their provisions, would probably be as much as the text could do, as well as being a prudent course in the circumstances. It would avoid the risks inherent in treating the entire Charter as *jus cogens*, which it was not, and thereby opening the way to a great number of possible problems. He therefore suggested that the word "provisions" in the text proposed by Argentina should be replaced by the word "obligations". If the delegation of Argentina could accept that, paragraph 6 and the amended proposal might be referred to the Drafting Committee.

17. Mr. RIPHAGEN (Netherlands) pointed out that Article 103 of the Charter of the United Nations —which he believed should apply to international organizations—did in fact contemplate conflicts of "obligations", not of "provisions". That should be fully understood if any reference was made to the Article. As to the siting of such a reference, its proper place was perhaps not in article 30 but in a separate article, whereby it would have more general application. The article would establish a rule that in all cases of conflict between the obligations of international organizations parties to the treaty and those arising under the Charter of the United Nations, the latter would prevail.

[1] See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

18. The reticence of the International Law Commission to pronounce on the applicability of Article 103 of the Charter to international organizations reflected its traditional attitude towards matters concerning the content of the Charter. But the Conference was entitled to pronounce on the subject, and should do so explicitly. Once it had decided on the substance of the matter, the rest would be a matter of drafting.

19. Mr. TUERK (Austria) agreed that Article 103 of the Charter of the United Nations should apply to international organizations. It was inconceivable that States should be able at law to form an international organization under conditions that relieved them of their obligations under the Charter. He believed that, of the proposals before the Committee concerning article 30, paragraph 6, the amendment by Australia and Canada dealt with the question of Article 103 in the most appropriate place.

20. He had sympathy for the explanation given in support of the Argentine proposal, but felt that if the text contained no direct reference to Article 103, it would stray too far from the Vienna Convention on the Law of Treaties. Were the Argentine proposal nevertheless considered acceptable, it should be amended as suggested by the United States. The Austrian delegation would have no objection to the matter being treated in a separate article.

21. Mrs. OLIVEROS (Argentina) said that her delegation accepted the change suggested by the United States. It could agree to the amended wording of its proposal being included in the draft as a separate article.

22. Mr. BARRETO (Portugal) supported the wording proposed by Argentina, which, for the reasons given by the Netherlands representative, should form a separate article.

23. Mrs. THAKORE (India) said that the Argentine proposal had the merit of being clearer than the proposal by Australia and Canada, and was improved by the change made by the United States. It should be referred to the Drafting Committee together with the Netherlands suggestion for a separate article concerning Article 103 of the Charter.

24. Mr. YIN Yubiao (China) observed that the proposals by Australia and Canada and by Argentina dealt with the same matter, and both deserved support. He believed that Article 103 of the Charter should apply to international organizations, which were instruments for collective action by States, and that the Conference should state so explicitly. He suggested that both the amendments should be referred to the Drafting Committee.

25. Mr. CRUZ FABRES (Chile) supported the Argentine proposal as amended by the United States. In view of the importance of the principle involved, the matter might well form the subject of a separate article.

26. Mr. SZASZ (United Nations) said that a reference to Article 103 of the Charter was perhaps even more important in article 30 of the draft convention than in the corresponding article of the 1969 Convention. It had a bearing not only on the question of successive treaties but also on the recurrent issue of the relations between the constituent instruments of international organizations and the treaties they concluded. Although the International Law Commission might have explained its action as to Article 103 of the Charter in somewhat unfortunate terms, the fact that it occupied a paragraph of its own in the Commission's draft seemed to reflect that the latter shared the view of the importance of this matter.

27. In its written comments on paragraph 6 of the draft article, the United Nations had pointd out that Article 103 of the Charter could also have a bearing on other articles of the draft;[2] that still seemed true as far as articles 27 and 46 were concerned, for example. The suggestion by the Netherlands that a reference to Article 103 of the Charter might form the subject of a separate article therefore seemed very pertinent. Yet if that course was adopted, and if the new article indicated that all the other provisions of the draft were subject to Article 103 of the Charter of the United Nations, the future convention would be unique; the incorrect and unacceptable inference might be drawn from it that other treaties not containing a similar reference to Article 103 of the Charter were not so limited. Such an inference was less likely to be drawn were the reference to Article 103 attached to a specific article or articles in the draft convention; then it could be argued that the reference had been included *pro memoria* —purely as a reminder of the rightful pre-eminence that should be accorded to the Charter.

28. One solution to the problem might be to incorporate the reference to Article 103 in the preamble which in all likelihood would be prefixed to the future convention. The final preambular paragraph of the 1969 Convention seemed to offer a suitable model as far as wording and context were concerned.

29. If neither that solution nor the one put forward by the Netherlands was found acceptable, the United Nations would continue to believe that a reference to Article 103 of the Charter should appear in article 30 —perhaps in the manner proposed by Australia and Canada, thereby ensuring reasonable conformity with the 1969 Vienna Convention—as well as in articles 27 and 46.

30. Mr. REIMANN (Switzerland) said his delegation considered that the application of the future convention must not lead to a violation of Article 103 of the Charter of the United Nations. The provision in that Article might usefully find reflection in the text of the instrument. His delegation had been particularly impressed by the very explicit Argentine proposal, and welcomed its sponsor's agreement that it should refer to possible conflicts of obligations and not of provisions. In regard to the place in the draft at which Article 103 of the Charter would be reflected, his delegation was open to suggestions, including the interesting one advanced by the representative of the United Nations that a suitable place for it might be the preamble to the draft convention.

[2] See *Yearbook of the International Law Commission, 1981*, vol. II, Part II (United Nations publication, Sales No. E.82.V.4 (Part II)), p. 198.

31. Mr. SOMDA (Burkina Faso) said that in his delegation's view, inasmuch as international organizations were not parties to the Charter of the United Nations, the question at issue could not be fully solved by the Australian and Canadian amendment. The amended Argentine proposal had the merit of being more explicit, and would prevent differences of interpretation arising in the future. His delegation therefore supported it and would have no objection to its forming the subject of a separate article.

32. Mr. SUCRE FIGARELLA (Venezuela) said that a general reference in the draft convention to the Charter of the United Nations as the higher-ranking legal instrument would be more appropriate than a specific reference to Article 103 of the Charter, and would cover international organizations as well as States. His delegation therefore supported the amended Argentine proposal; it introduced a necessary clarification into the draft. The amended wording could either be embodied in article 30 itself or form the subject of a separate article.

33. Mr. STEFANINI (France) said that the issue underlying article 30, paragraph 6, was extremely complex. Although his delegation had not objected to article 30 of the 1969 Vienna Convention, its position in regard to the present draft article was somewhat different. It was inclined to agree that, since international organizations were instruments of collective action by States, the latter should not be able to escape obligations imposed on them by the Charter through treaties concluded by international organizations of which they were members. But it did not think the Conference should embark on a discussion of that issue. The best solution, his delegation felt, would be to adopt the International Law Commission's text, in which the reference to Article 103 of the Charter appeared in a separate paragraph, but it would not object to the amendments proposed to paragraph 6 being referred to the Drafting Committee.

34. Mr. DROUSHIOTIS (Cyprus) said that his delegation supported the proposals by Argentina and by Australia and Canada, for the reasons stated by their sponsors.

35. Mr. GERVÁS (Spain) said that he approved the amended Argentine proposal, since it was clearer and more explicit than the Australian and Canadian amendment while being identical with it in content. He endorsed the Venezuelan representative's view of the Argentine proposal. He considered, however, that it would be advisable to refer both amendments to the Drafting Committee.

36. Mrs. DIAGO (Cuba) said that the Charter of the United Nations, by virtue of its Article 103, applied to States; that was reflected in paragraph 6 of article 30 of the Draft convention. His delegation too supported the Argentine proposal, since it would make the paragraph a provision of a general nature and thus applicable to the draft as a whole. He would have no objection if the provision formed the subject of a separate paragraph.

37. Mr. NEGREIROS (Peru) said it was clear from Article 103 of the Charter that the Charter applied to Members of the United Nations and not to international organizations. In order to avoid differences of interpretation, not only about contractual obligations but also as to which of the instruments concerned should take precedence over the other, the rule in article 30, paragraph 6, should be stated in clear and categorical terms. It was not enough to refer solely to Article 103 of the Charter, and he therefore supported the amended Argentine proposal.

38. Mr. RESTREPO PIEDRARÍTA (Colombia) expressed his delegation's support for the Argentine proposal as orally amended by the United States. He would like the basic rule which it set out to take the form of a separate article. It was a rule of the utmost importance in regard to what was known as the hierarchy of norms in the international legal order.

39. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation favoured the inclusion in article 30 of a reference to the Charter of the United Nations. The amended Argentine proposal and the Australian and Canadian amendment should be referred to the Drafting Committee.

40. Mr. BOHTE (Yugoslavia) said that, while his delegation appreciated the International Law Commission's cautious approach to paragraph 6, it endorsed the attempts which the amended Argentine proposal and the Australian and Canadian proposal made to improve the paragraph. It found the former proposal the more precise of the two. Nevertheless, it considered that both proposals should be referred to the Drafting Committee, along with the suggestion made by the United Nations representative.

41. The CHAIRMAN suggested that the Argentine proposal, as amended orally by the United States, and the proposal by Australia and Canada should be referred to the Drafting Committee with a view to formulating the substance of article 30, paragraph 6, in an appropriate manner and deciding on the precise place of the new formulation in the draft convention.

*It was so decided.*

*Article 38* (Rules in a treaty becoming binding on third States or third organizations through international custom)

42. The CHAIRMAN said that no amendments had been proposed to article 38. He invited the Committee to consider the article.

43. Mr. STEFANINI (France) said that, in the discussion of the matter at the 1968-1969 United Nations Conference on the Law of Treaties, the French delegation had indicated that the reference in the text to the process of the development of customary law seemed injudicious in a legal instrument concerned with treaties between States.[3] The inclusion of a like article in the present text in regard to treaties between States and international organizations or between international organizations likewise seemed to add nothing to the clarity or balance of the text, and might cause confusion.

[3] See *Official Records of the United Nations Conference on the Law of Treaties*, (United Nations publication, Sales No. E.68.V.7), Summary records of the meetings of the Committee of the Whole, 35th meeting, para. 82.

It seemed particularly inappropriate that the draft convention should prejudice the way in which custom might affect the functioning of an international organization. His delegation did not believe that rules concerned with the institutional procedures of a particular international organization could, as a result of article 38, become generally applicable to other organizations. It continued to maintain that relations between an international organization and its member States did not generally lend themselves to the development of customary rules. However, his delegation would not oppose the adoption of article 38, since it had accepted the corresponding provision in the 1969 Vienna Convention.

44. Mr. CANÇADO TRINDADE (Brazil) said his delegation felt it necessary to distinguish three points in relation to article 38. The first was the question of the process whereby customary law was formulated, a matter not covered by article 38 but not unrelated to it. If by custom was meant the generalization of the practice of States accepted as law, evidence of custom was a relative matter. That was because some States publicized their national practice in international law in the form of digests or repertories of international law, and thus might be regarded as having influenced the development of customary law more than those that did not. If the same definition of custom was applied to international organizations a similar phenomenon would be found. Organizations such as the United Nations or the Organization of American States, whose practice was widely publicized through repertories and whose functions and powers were very widespread, might come to be regarded as influencing the development of customary law far more than a small technical organization engaged in specific operational activities in circumscribed sectors. However, that first point should not be confused with the purpose of article 38.

45. The second point concerned the interaction between treaties and customary law. For many years doctrine had conceded that treaties, as evidence of customary international law, might exert effects on non-parties, thus recognizing that treaty law could pass into customary law. The case law of the International Court of Justice contained examples of the interaction between treaties and custom: in the hostages case between the United States of America and Iran in 1980,[4] both treaties in force and general international law had been taken into account simultaneously; and in the Gulf of Maine case between the United States and Canada in 1984,[5] judicial recognition had been given to the view that signed but unratified codification conventions might contribute to the formation of customary law. In the latter case, the Court had had in mind certain portions of the United Nations Convention on the Law of the Sea.

46. His delegation's third and last point was the nature of the reservation embodied in article 38. After considerable discussion, the 1968-1969 United Nations Conference on the Law of Treaties had adopted, as the provision corresponding to the present draft article, the quite precise rule that for a norm to bind a third State as a customary norm of international law it ought to be "recognized as such". That requirement was maintained in the present draft. The point had been made at the 1968-1969 Conference that the provision simply endorsed the legitimacy of the process whereby rules expressed in treaties might become binding on non-parties through being recognized as customary rules. That did not mean, however, that treaties had legal effects in regard to third States or, by the same token, international organizations, for the source of the binding rules contained in them was custom, not the treaties themselves. Although article 38 did not, as he had already indicated, affect the process of formulation of customary law, that did not preclude the possibility that the effects of that process might extend to international organizations. His delegation could therefore support the text of article 38 as proposed by the International Law Commission.

47. The CHAIRMAN said that the Committee seemed prepared to accept the text of article 38 submitted by the Commission. Unless he heard any objection, he would take it that the Committee referred the text to the Drafting Committee.

*It was so decided.*

*The meeting rose at 12.40 p.m.*

[4] *United States Diplomatic and Consular Staff in Teheran, Judgment, I.C.J. Reports 1980*, p. 3.

[5] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246.