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Report of the Sub-committee on treaties concluded between States and international organizations or between two or more international organizations

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QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 5]

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Report of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations

[*Original text: English and French*]
[*1 July 1971*]

ABBREVIATIONS

OAS	Organization of American States
OAU	Organization of African Unity

[The text of the report is reproduced in the report of the Commission on its twenty-third session. See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 71, document A/8410/Rev.1, chap. IV, annex.]

ANNEX I

Questionnaire prepared by the Chairman of the Sub-Committee

[*Original text: French*]

Introduction

1. At its twenty-second session, the International Law Commission adopted, with several drafting changes, a report of the Sub-Committee which it had established to study the question of treaties concluded between States and international organizations or between two or more international organizations. [a] The report contained the following proposal:

That, by 1 November, the Chairman submit to members of the Sub-Committee a questionnaire regarding the method of treating the topic and its scope, accompanied by an introduction. Members would be asked to send their replies to this questionnaire, together with any other comments they might wish to make, to the Sub-Committee, if possible by 1 February 1971. [b]

2. The purpose of this document is to meet the request implicit in the text quoted above. It has been drafted in a very concise form, not only because time is short but also in view of the necessity, before studying the question in depth, of having the preliminary working paper requested of the Secretary-General available in principle by 1 January 1971. [c]

3. The topic has already been studied and discussed in the Commission and at the United Nations Conference on the Law of Treaties. From an examination of the studies, reports, papers and statements on the question, two conflicting trends are immediately discernible.

4. On the one hand, the rules relating to treaties between international organizations appear to be the same as those relating to treaties between States. What would

[a] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

[b] *Ibid.*

[c] *Ibid.*

be needed, therefore, would simply be an editing of the articles of the Vienna Convention on the Law of Treaties [d] which would merely need a few drafting changes and adaptations to fit the special nature of international organizations, particularly and primarily as regards the rules concerning the conclusion of treaties. This procedure had been mooted when the Commission had expressed its intention, at the first reading of the draft articles, to extend them to treaties to which international organizations were the parties, and it was also the underlying idea behind the statements of those at the Conference on the Law of Treaties who favoured that solution.

5. On the other hand, however, the topic appears to be fraught with difficulties: not only is the practice applied in that connexion less well-known, but it is very diversified and raises complicated juridical problems. From the juridical standpoint, every organization has features quite different from those of any other organization, and only by taking the greatest precautions can there be any hope of formulating general rules. It is not correct to consider the organization as being on a par with a State, for it is made up of States which have not ceased to be States by reason of their membership of the organization, and to regard the organization as a subject of law is no more than a technical means of reducing the will of the several member States to a single will. To give only one example of the problems which cannot be avoided, one need only consider the final phase of the work to be undertaken. The normal outcome would be to produce a series of draft articles which could be embodied in a future convention; but is it conceivable that the parties to a convention concerning treaties between organizations would be the organizations themselves? Or would States be the parties? Not to speak of the question whether the States are members of the organization concerned or not?

6. At the moment, these questions are entirely premature, quite apart from the fact that neither the Commission nor the States participating in the Conference on the Law of Treaties had any hesitation about proposing and adopting articles bound to have an impact on the status of intergovernmental organizations generally. Nevertheless, it is impossible to disregard the fact that the international organizations which were consulted on the articles subsequently embodied in the Convention on the Law of Treaties were almost unanimous in stressing their desire not to have their "present practices" or even their "evolving practices" challenged; and they asked, accordingly, to be brought in at all stages of an undertaking which might culminate in the preparation of draft articles concerning their agreements.

7. It is not unlikely that the Commission will find a middle way, as it has done in the past, and under more arduous conditions, in respect of other topics.

8. To assist the Commission in drawing up a rough outline of how the work should proceed, the following commentated questionnaire has been prepared on the basis of certain elementary subdivisions. The members of the Sub-Committee are requested to express their views on the question, to reply to the questionnaire and to develop it.

Questionnaire

I. Delimitation of the scope of the Commission's work

A. *What treaties should the studies cover?*

1. What the General Assembly had in mind, in resolution 2501 (XXIV), were treaties between States and international organizations and treaties between two or more international organizations. That interpretation is clear. However, a few quick thoughts about the text of the Vienna Convention on the Law of Treaties raise two kinds of questions concerning certain possible *exclusions* as well as certain *distinctions* which could greatly facilitate the study of the subject. Both types of question could be put in the following manner:

(1) *Should unwritten agreements be excluded?*

2. In the case of treaties between States, the International Law Commission, and then the United Nations Conference on the Law of Treaties, excluded unwritten agreements from the Vienna Convention [e] but without defining what constituted an unwritten agreement. A study of practice in this connexion will undoubtedly confirm the fact that verbal agreements or agreements resulting from one written text and verbal consent thereto, tacit consent or behaviour, or a combination of verbal consent, tacit consent and behaviour, occupy a very large place in the life of organizations, where they assume even more diversified forms than in State practice; consequently, there might be a temptation to include them. On the other hand, it is a little odd for the Commission to treat this subject differently from the way it dealt with treaties between States. Furhermore, it must be recognized that unwritten treaties cannot be discussed without dealing with difficult problems beyond the scope of the law of treaties: acquiescence, custom, estoppel, etc. Might it not be advisable, therefore, to deal only with written agreements? But might it not then be necessary to define what constitutes a written agreement in more precise terms?

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

3. The Vienna Convention on the Law of Treaties applies to constituent instruments of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization (article 5). It also contains other provisions (article 3, sub-paragraph (*c*) and arti-

[d] For the text of the Convention on the Law of Treaties, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

[e] *Ibid.*, pp. 7 and 289 (aricle 2 of the draft articles adopted by the International Law Commission and of the Vienna Convention on the Law of Treaties).

cle 20, para. 3) covering one particular point relating to international organizations.

4. Obviously, the rules of the Vienna Convention should as far as possible not now be called into question; they have been validated by the signatures of States, and any inquiry or proposal which would alter the texts adopted would inevitably feed arguments to those who oppose its ratification. The only question is whether it will be possible to avoid, not modifying the articles, but taking up points which the authors of the Vienna Convention, for the purposes of that Convention, had not felt should be elucidated. There may be difficulty in replying to this question pending a thorough study. The simplest example is that of the scope of the formula "any relevant rules of the organization". Certain opinions have been expressed on this subject in connexion with article 5, but it may not be possible to avoid raising that again on a broader basis in a study which will deal with the competence of organizations to conclude treaties.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

5. This question, which goes to the heart of the subject, may be altogether premature, but it may still be useful to make exploratory comments on it.

6. It has been pointed out time and again that as far as possible the Vienna Convention avoided any classification of treaties, particularly any classification based on the purpose of the treaty, although the purpose of the treaty is very often referred to in the abstract in order to compel respect for the régime by which the treaty is to be governed. And there is no doubt that the Commission should be guided by the same approach in this case. It should be noted, however, that not only is the distinction already made between treaties between States and international organizations, on the one hand, and treaties between international organizations, on the other, but that treaties concluded by an international organization always raise the question of the position of the organization in relation to its own members, which is not the case with treaties between States (except if we consider federal States). The probability is, therefore, that it will be necessary to explore certain distinctions based on the actual purpose of the treaty. To illustrate the problem: an organization could accede to a treaty under conditions exactly parallelling those applying to a State so that if an organization was internationally responsible for certain territories, it would on their behalf be able to accede to conventions designed to apply to those territories under the same conditions as States in respect of public health, postal services, protection of the environment, etc. Or to take another example, an international loan granted under a treaty to an international organization does not, on the face of it, call for a régime different from that applied in the case of the same loan made by a State. A reservation has to be made in both these examples, of course, in respect of the rules relating to the conclusion of the agreement itself. Similar observations are surely appropriate in the case of the many agreements on administrative and technical co-operation concluded between international organizations; true, their purpose is specific, but in practice organizations behave in the same way as any two national administrations which have decided, under comparable agreements, to give each other mutual aid in such fields as administration, waterways, technology and the like. They actually are second-degree co-operation agreements, so to speak; the States co-operate within the two organizations concerned, and the two organizations in turn co-operate with each other.

7. Much more difficult are the problems which may arise where the field of activity is one in which the organization is acting as surrogate *for its own members to a certain extent, but not completely.* This happens in cases where the international organization organizes armed forces for the purpose of intervention, or where it engages in joint technical or scientific projects. In such cases, assuming that its statutes authorize it to do so, would an organization be able to become a party to specific international conventions governing the use of armed force or the exploration of space? And even assuming that it can only accede to such conventions if the latter expressly authorize it to do so, what should be the particular modalities for its accession if we are to respect the position of States members of the organization but not parties to the particular convention? Various attitudes may be adopted towards those questions; would it be preferable, for instance, for the Commission to disregard those problems for the moment? Current practice already provides certain indications in this connexion.

B. *To what international organization will the Commission's proposals apply?*

8. The Commission is faced at the outset with a choice between two solutions, each of which can claim support because the Commission opted in its favour on a previous occasion.

9. The Vienna Convention on the Law of Treaties contains certain rules relating to the role of international organizations in respect of treaties; it covers *all* governmental international organizations. On the other hand, the draft articles on representatives of States to international organizations applies only to representatives of States to organizations of universal character, i.e., those with a membership and responsibilities on a world-wide scale (article 1, para. (*b*) and article 2). [t]

10. It might be argued that it is impossible to agree on a solution without taking account of the organizations which will be required to participate in the studies to be conducted. The point may also be made that everything depends on the nature of the proposals which the Commission will decide to adopt. Should it decide not to go beyond very general proposals, it would be easier to allow very wide scope for developing them; on the other hand, the likelihood is that it would be possible

[t] See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 196-197, document A/7209/Rev.1, chap. II, sect. E.

to cover only certain organizations belonging to a category which may be determined by criteria other than its universal character.

II. How to deal with the subject

11. It is obvious that the only way of approaching the question of methodology is to deal only with the present stage of preparation of the subject-matter, in other words, to give the Rapporteur who would presumably be appointed at the Commission's next session some guidelines for his initial approach to the subject without committing the Commission or any future Rapporteur regarding the methods which should be employed. Two different groups of questions can be singled out.

A. *How to determine the subject-matter*

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

12. The only possible answer seems to be in the affirmative. In the first place, the unanimous view already expressed, in particular in connexion with the United Nations Conference on the Law of Treaties, is that the rules applicable to treaties to which international organizations are parties differ only slightly from the rules laid down in the Convention on the Law of Treaties, and should differ from them as little as possible. There is the further point that the rule stated in sub-paragraph (*c*) of article 3 of this Convention precludes any marked discrepancy between the rules applicable respectively to treaties between States and to treaties to which international organizations are parties. Still another point is that the organizations which submitted observations at the Conference on the Law of Treaties took the draft articles as a point of departure, and that this would be the simplest method, for them at any rate, of attacking a problem which they have already touched on.

13. This would imply a careful reading of the articles of the Vienna Convention in order to sort out those which would require only drafting changes, those requiring changes in substance or major additions and those which would remain unchanged.

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

14. Although purportedly substantive inquiries on this problem would be premature, it is most important that a tentative idea be obtained as soon as possible of the number of major points involved. This is one of the areas for which the views of all the members of the Sub-Committee and the Commission would be most welcome, however tentative. The following paragraph provides examples, in question form, of the sort of suggestions which might be made.

15. Should a text be formulated on the subject of the competence of international organizations to conclude treaties? We know that they do not have the same competence as States: it is limited by the organization's constituent instrument. Can it be developed on the basis of practice? Must the delicate balance provided in respect of States in article 46 of the Vienna Convention be called into question in the case of international organizations? This, incidentally, is a problem which cannot be discussed without considering the position taken by the parties to the treaty to which the organization is to accede. Should we consider the possibility of a particular mode of participation in treaties by organizations? And if so, to which treaties would this apply?

16. It is fairly evident that the rules embodied in articles 7-17 of the Vienna Convention have to be revamped, but the question is whether this should be done by amending each article or by using another method. For the time being, no opinion can be expressed on this point.

17. The rules laid down by the Vienna Convention in articles 34-38, on the other hand, require careful study in the light of the close relations existing between an organization and its members. A preliminary question arises under the Convention itself. Can an organization be said to be a third party in relation to its constituent instrument? Or in relation to a treaty concluded within it? Or to any treaty affecting its operation? This problem is a familiar one in practice and has already been raised in the Commission, but it does not form part of the subject-matter now being discussed, for it bears on treaties which are definitely governed by the Convention. However, it is not unrelated to the inverse problem: how far and for which treaties can it be said that a State member of an organization is a third party in respect of a treaty concluded by the organization? Or, to put it more simply, do the strict rules laid down in articles 34-38 of the Vienna Convention apply to the effects of a treaty concluded by an international organization on the member States of the organization?

18. Is it possible to maintain the strict rule established in article 47 in the case of a treaty concluded by an organization with its own members? If so, would not articles 48 and 50 require certain adjustments? Would not violation of the constituant charter of the organization in an agreement of this kind constitute a further reason for invalidation?

19. Article 54 has made provision a very broad application of the right of States to withdraw by common agreement from the obligations of a treaty by terminating it. There may be some doubt whether this rule applies to certain constituent instruments, although this is a question which concerns the Vienna Convention. However, can so liberal a rule be laid down in respect of treaties concluded by an organization with certain member States, regardless of the interests of other member States not parties to the agreement?

20. Should an examination be made, by analogy with the rule laid down in article 63, of the effect on the application of a treaty concluded between an organization and a State of the latter's ceasing to be a member of the organization?

21. Would it be advisable to envisage procedures for conciliation, arbitration and judicial settlement, other than those provided for in article 66?

22. Should a study be made of the provisions concerning depositaries, notifications, registration and correction or errors, possibly by differentiating between the various kinds of treaties to which an organization may be party?

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

23. The Vienna Convention (article 73) deliberately did not deal with most of the questions relating to international responsibility, and all of the questions relating to State succession and "the outbreak of hostilities". In so far as the aim is to remain faithful to the approach of the Vienna Convention, the same course will be followed. However, since texts will presumably be drawn up for certain of these subjects, the normal thing would be to incorporate the results in the study to be undertaken. This seems to apply to the subject of State succession. One might consider whether problems of the succession of organizations should not likewise be considered. Although the problem does not seem to arise except as regards succession in the functions of depositary of treaties between States, it might also arise in the case or agreements between organizations and States. The question of the effect of hostilities on a headquarters agreement is not a theoretical one, either, but it is not clear whether it would be of sufficient interest to warrant its study, since the Commission has not even considered undertaking a study of any kind on the more important and more general problem of the effect of measures of coercion on treaties between States in the case of armed coercion or international sanctions.

B. PARTICIPATION OF THE INTERNATIONAL ORGANIZATIONS IN THE WORK

24. This is a very difficult question. The request made to the Secretary-General to provide information and studies has provided a tentative solution. Perhaps it could be agreed that until the future rapporteur arrives at the stage where be can say he is in a position to propose draft articles, the Commission will need additional briefing before undertaking other measures. This, indeed, is a problem. Subject to the needs which the future rapporteur might feel as his work progresses, the tendency might be to show circumspection before considering any consultation or official participation of organizations other than the United Nations in a study whose precise purpose can only gradually become apparent. If that point of view is accepted, the conclusion would be that there is no reason to propose any measures to the Commission other than those which it adopted at its twenty-second session. [g]

[g] *Ibid., 1970,* vol. II, p. 310, document A/8010/Rev.1, para. 89.

ANNEX II

Replies by Members of the Sub-Committee to the Questionnaire prepared by its Chairman

1. Mr. Castrén (18 November 1970)

[*Original text: French*]

1. I should like at the outset to congratulate Professor Reuter, who has prepared an excellent preliminary working paper. He raises several preliminary problems that should be studied before we deal with the main subject.

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. *What treaties should the studies cover?*

(1) *Should unwritten agreements be excluded?*

2. I consider that unwritten agreements should be excluded from the Commission's study despite their prevalence in the practice of international organizations. The study should be confined, as at the United Nations Conference on the Law of Treaties, to the most important agreements, which, as a general rule, are concluded in written form. Furthermore, it does not seem necessary at this stage to define what constitutes a written agreement in terms more precise than those in article 2, paragraph 1 (*a*) of the Vienna Convention on the Law of Treaties. [a] As to mixed agreements, resulting from written consent on the one hand and verbal or tacit consent on the other, I should be inclined to place them in the category of verbal agreements.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

3. I agree with Professor Reuter that the rules of the Vienna Convention should not now be called into question but that it might perhaps be desirable, without modifying the articles of the Convention, to elucidate some of its rules and expressions which are of particular importance for international organizations parties to a given treaty.

[a] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

4. The question whether distinctions will have to be made between the categories of treaties to be considered appears to be linked with the problem of the competence of international organizations to conclude treaties. Since this competence is more limited than that of sovereign States, the probability is that it will be necessary to explore certain distinctions based on the actual purpose of the treaty. As to the question whether an organization would be able to become a party to specific international conventions governing the use of armed force or the exploration of space—a question which is now of immediate interest—I think it could be studied in due course.

B. *To what international organizations will the Commission's proposals apply?*

5. It is difficult to decide whether the Commission's study should include all governmental international organizations or only the most important ones. I tend to favour the first alternative, and that seems to be the intention of those who participated in the Vienna Conference and adopted the text of the Convention on the Law of Treaties and the resolution on international organizations. [b] It does not seem necessary for the Commission to limit itself to very general proposals. It is always possible to include in the draft rules an escape clause permitting any necessary derogation. Experience has shown how difficult it is to divide governmental international organizations into different categories, such as universal organizations and others.

II. How to deal with the subject

A. *How to determine the subject-matter*

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

6. I agree that the Commission should tackle the subject by taking the articles of the Vienna Convention as the starting point and then considering which of them would require changes or additions of a different character.

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

7. It follows from what I have indicated above that special rules would have to be formulated concerning the competence of international organizations to conclude treaties. It is possible that this competence could be developed on the basis of the relevant practice established within the organization concerned. It would appear that article 46 of the Vienna Convention might be applied *mutatis mutandis* in the case of international organizations. I hesitate to say whether we should consider the possibility of a particular mode of participation by international organizations in treaties or certain categories of treaties. This question deserves careful study.

8. I consider that the rules embodied in articles 7-17 of the Vienna Convention will have to be revamped, account being taken of the particular characteristics of international organizations. In some cases it would appear that the adaptation could be made simply by replacing the State by the international organization and the representative of the State by the Secretary-General or another competent organ of the organization in the various acts relating to the conclusion of treaties, but certain of these articles would require more substantial changes.

9. The application to international organizations of articles 34-38 of the Vienna Convention raises complex questions. At first sight it would appear that, strictly speaking, an international organization is a third party in relation to its constituent instrument, a treaty concluded within it or a treaty affecting its operation, but in the first case (constituent instrument) the treaty binds the organization without its consent. A State member of an inernational organization, on the other hand, could not be considered a third party in relation to a treaty concluded by that organization, since the latter acts on behalf of its members. Member States are not formally parties to such treaties but they are bound to respect them.

10. The rule established in article 47 of the Vienna Convention is clearly valid in the case of a treaty concluded by an international organization with its own members in so far as they are concerned. As to the organization itself, it could be argued that member States should know the limits of the competence of the organization to conclude treaties. Articles 48 and 50 would also appear to be applicable without adjustment to the contractual relations between international organizations and their members. The violation of the constituent instrument of the international organization in an agreement concluded between the organization and its members does not, in my opinion, constitute a further reason for invalidation but rather falls within the scope of article 46.

11. I see no reason why article 54 of the Vienna Convention should not apply to treaties concluded by an international organization with certain member States. In this case too, the organization acts on behalf of all its members, and the States not parties to the agreement have the right to participate in the discussions concerning the termination of the agreement.

12. I think an examination should be made of the effects of a State's ceasing to be a member of an international organization on the application of a treaty concluded between the organization and that State, but not in the context of the rule laid down in article 63 of the Vienna Convention, since there is no real analogy between these two cases. In principle, such a treaty should remain in force if it does not imply continued membership or if the ground of fundamental change of circumstances cannot be invoked.

[b] *Ibid.*, p. 285, Resolution relating to article 1 of the Vienna Convention on the Law of Treaties.

13. It is, of course, possible in the case of international organizations to envisage procedures for conciliation, arbitration and judicial settlement other than those provided for in article 66 of the Vienna Convention, but I am not now in a position to make any suggestion in that connexion.

14. It would seem at first glance that the provisions of the Vienna Convention concerning depositaries, notifications, corrections and registration could be applied, with certain drafting changes, to all categories of treaties the parties or certain of the parties to which are international organizations.

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

15. I agree that there is no need for a study of points of treaty law which were deliberately neglected by the Vienna Convention, namely, most of the questions relating to international responsiblity and all the questions relating to State succession and the outbreak of hostilities. However, I also agree with the suggestion that, since texts will presumably be drawn up for certain of these subjects, the results could be incorporated in the study to be undertaken. As to the problems of the succession of international organizations, it should be remembered that the Commission decided to deal with them at a later date in connexion with international succession.

B. *Participation of the international organizations in the work*

16. As regards the question of the participation of international organizations in our work, I share Professor Reuter's view that there is no reason to propose any measures to the Commission other than those which it adopted at its twenty-second session. [c]

2. Mr. Tsuruoka (13 January 1971)

[*Original text: French*]

I. Delimitation of the scope of the Commission's work

A. *What treaties should the studies cover?*

(1) *Should unwritten agreements be excluded?*

1. The studies should be confined to written agreements. As to the question whether it is necessary to define what constitutes a written agreement in more precise terms, the Commission would do well to wait until a later stage in its work before taking a decision on this subject.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

2. It is desirable, in principle, to avoid reverting to questions which were the subject of articles of the Vienna Convention. However, the Commission should not hesitate to take up certain points the study of which it considers necessary or useful in order to accomplish its work. In such cases, it should seek formulations which would not be incompatible with the rules of the Vienna Convention. It can be expected to be successful in this task, as it has been in the past.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

3. Distinctions will have to be made between the categories of treaties to be considered. A distinction could, for example, be made between two categories of treaties: on the one hand, treaties which an international organization may conclude just as if it were a State; on the other, treaties which an international organization concludes as a special entity different from a State.

B. *To what international organizations will the Commission's proposals apply?*

4. The Commission's proposals should cover every kind of governmental international organization having competence to conclude treaties, for most of the proposals will be applicable to conventional relations between States and organizations or between two or more organizations without distinction as to the type or importance of the organizations, provided the organizations are competent to conclude treaties.

II. How to deal with the subject

A. *How to determine the subject-matter*

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

5. The only possible answer is in the affirmative, as the author of the questionnaire very correctly states.

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

6. A text should be formulated on the subject of the competence of international organizations to conclude treaties. The following three hypotheses should be considered: (*a*) the hypothesis according to which the constituent instrument expressly indicates that the international organization has competence to conclude treaties; (*b*) the hypothesis according to which it is clear from the provisions of the constituent instrument that the international organization has competence to conclude certain treaties; (*c*) the hypothesis according to which the constituent instrument does not bar the international organization from concluding treaties and

[c] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

the conclusion of treaties by the organization is sanctioned by practice.

7. For the time being, it is very difficult to express an opinion on the points referred to in paragraph 16 of the questionnaire.

8. On the other hand, one is tempted to say that an organization is a third party in relation to its constituent instrument, as it is in relation to a treaty concluded within it and a treaty affecting its operation. It should be noted here that articles 34-38 of the Vienna Convention do not apply to international organizations; they apply only to sovereign States.

9. The rights and obligations of a State member of an organization in respect of a treaty concluded by that organization would appear to be determined by the constituent instrument and the treaty in question.

10. So liberal a rule as that embodied in article 54 of the Vienna Convention could not be laid down in respect of treaties concluded by an organization with certain member States regardless of the interests of other member States not parties to the agreement.

11. An examination could be made, by analogy with the rule laid down in article 63 of the Vienna Convention, of the effect on the application of a treaty concluded between an organization and a State of the latter's ceasing to be a member of the organization.

12. With regard to judicial settlement, article 66 of the Vienna Convention as it is formulated does not apply to international organizations (see Article 96 of the United Nations Charter). As to the procedures for conciliation and arbitration provided for in the annex to the Vienna Convention, they accord so important a role to the United Nations Secretary-General that the objectivity of the system in relation to international bodies is likely to be called into question.

13. The provisions concerning depositaries, notifications, corrections and registration will not require any major modification.

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

14. It would be better not to deal with questions relating to international responsibility because international responsibility and conventional relations, which are the two fields of international law, are quite distinct one from the other.

15. Succession in relation to treaties is a field of international law which consists of two parts: the succession of States and the succession of organizations. It would therefore be reasonable to incorporate the results obtained from the study of the succession of States in the study of the succession of organizations.

16. The question of the effect of hostilities on a headquarters agreement could be left aside for the reasons given by the author of the questionnaire.

B. *Participation of the international organizations in the work*

17. There would be no reason to propose any measures to the Commission other than those which it adopted at its twenty-second session.

3. Mr. Sette Câmara (14 January 1971)

[*Original text: English*]

I. Delimitation of the scope of the Commission's work

A. *What treaties should the studies cover?*

(1) *Should unwritten agreements be excluded?*

1. During its twenty-second session the International Law Commission made arrangements to start the consideration of the preliminary problems concerning the question of treaties concluded between States and international organizations, or between two or more international organizations, in pursuance of General Assembly resolution 2501 (XXIV), of 12 November 1969. In particular, the Commission approved a decision to defer the consideration of those preliminary problems to a sub-committee. At its 1078th meeting, the Commission adopted, with several drafting changes, the report of the Sub-Committee, according to which a questionnaire drawn up by its Chairman, Professor Paul Reuter, regarding the method of treating the topic and its scope, should be submitted to the members of the Sub-Committee. [a] The following are the views of José Sette Câmara, member of the Sub-Committee, concerning the questions proposed by Professor Reuter.

2. The first problem raised in the questionnaire deals with the form of treaties within the context of the present studies, namely, the question of unwritten agreements.

3. In the previous presentation of the problem before us—i.e. the agreements between international organizations and States, and between two or more organizations—the word "treaty" has always been retained. Therefore we are dealing with "treaties", even though with a special kind of treaty, in the conclusion of which a subject of international law other than States intervenes.

4. The Vienna Convention on the Law of Treaties has expressly excluded unwritten agreements from its scope, according to the wording of article 2, sub-paragraph 1 (*a*). During the exhaustive discussion of the several reports and drafts on the law of treaties in the Commission, it was never seriously contended that the draft convention should include oral agreements. In fact, that special kind of agreement is nothing but a rare curiosity, of which some writers succeed in digging up one or two historical examples. That is the case with Fauchille, who mentions the interview of Pillau, in 1697, in which

[a] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, paras. 88-89.

the Tsar Peter the Great and the Elector of Brandenburg pledged mutual assistance against foreign aggressors through a verbal understanding. [b]

5. The Vienna Convention rightly confined itself to written agreements since it would have brought confusion to its text to include the somewhat diffuse area of unwritten agreements, with problems of tacit consent and even pure silence (*qui tacet consentire videtur*) as a means for the conclusion of international conventions.

6. If the validity of this dictum applies to treaties between States, it should do so even more in dealing with treaties between States and international organizations and between two or more international organizations.

7. International agreements, since primitive times, have required some form of solemn expression, so that the manifestation of will on one side or the other can be clearly ascertained in case of dispute. In modern times, since the League of Nations, a device was introduced in the procedure of treaty-making: registration of treaties. The idea of registration of treaties with universal organizations was inspired by the need to suppress secret diplomacy. Article 18 of the League of Nations Covenant carried a categorical statement, according to which no treaty or international engagement should be binding until registered. Article 102 of the Charter of the United Nations adopted a more realistic approach, which makes registration necessary only for the invocation of a treaty before an organ of the United Nations. With the twenty-five years of effective existence of the Organization, registration became an institution of international life, and the thousands and thousands of treaties registered and published in the United Nations *Treaty Series* made of this collection an indispensable repository of international legislation, a sort of living *corpus* of positive international law.

8. If that is so, it would indeed be inadmissible that the very treaties in which international organizations, amongst which the United Nations is for obvious reasons the leading body, appear as contracting parties, should be concluded in an unwritten form, and thereby escape registration.

9. Moreover, treaties entered into by international organizations lack the historical sedimentation of the procedure of conclusion, which is so characteristic of the treaties between States. The formal and solemn stage of ratification, for which parliamentary approval, through constitutional procedures, is necessary, does not appear in clear form. Therefore unwritten treaties would be less admissible in the field which is the object of our present studies than in agreements between States.

10. In previous work of scientific research and codification it seems clear that oral agreements were excluded. The draft convention on the law of treaties prepared by the Research in International Law of the Harvard Law School [c] contains in article 1, paragraph (*a*), a definition of a treaty as a "formal instrument of agreement". In article 2, paragraph (*b*), it states that an agreement by exchange of notes is not included in the term "treaty". It is obvious that oral agreements, with more reason, are considered to be outside the scope of the draft convention.

11. The Convention on Treaties adopted by the Sixth International Conference of American States, at Havana on 20 February 1928, [d] states expressly in article 2: "The written form is an essential condition of treaties". The draft of the International Commission of American Jurists [e] as it was called at the time—drawn up at Rio de Janeiro, 1927, on which the Havana Convention was based, also stipulates in article 2: "Treaties must be in writing".

12. For all those reasons, question 1 should be answered by an emphatic affirmative: yes, unwritten agreements should be excluded.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

13. The Vienna Convention is the result of twenty years of patient work of research and of extended debates in the International Law Commission, starting in 1949 and finishing with the adoption of the final text on May 23, 1969. It would be a mistake to reopen discussion on the substance of articles approved therein. Moreover as the commentary accompanying Professor Reuter's questionnaire underlines, the articles contained in the Convention have been validated by the signature of State plenipotentiaries and confirmed by a number of ratifications. If doubt is raised concerning the context of some of the articles, ratification by new States will probably be withheld.

14. It is nonetheless necessary that a few points emerging from the articles be taken apart and thoroughly dissected. These relate to the articles which deal directly with problems concerning treaties concluded by international organizations, like article 3, paragraph (*c*), article 5, article 20, paragraph 3. A deep exploration of the problems related thereto will be only natural, as they touch the scope of our work, and could hardly raise new difficulties concerning the forthcoming ratifications. Apart from those specific articles, the Convention should be respected in its present form. That does not exclude, of course, the examination of the wording of the articles, one by one, with a view to determine which points should be developed and completed to cover the problems within our sphere of work.

[b] P. Fauchille, *Traité de droit international public* (Paris, Rousseau, 1926), t. I, p. 306.

[c] *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 29, No. 4 (October 1935), pp. 686 and 698.

[d] See *Sixth International Conference of American States, Final Act* (Havana, Rambla, 1928), p. 138.

[e] See Comisión Internacional de Jurisconsultos (Sesiones celebradas en Rio de Janeiro, Brasil, 18 de abril—20 de mayo de 1927), *Derecho Internacional Público* (Washington, D.C., Pan-American Union, 1927), p. 11 [Spanish text].

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

15. Treaties do not lend themselves to being classified in categories, types or classes. They cover a limitless field, since they spring from the will of States, and other subjects of international law, and circumstances may cause that will to vary *ad infinitum*. Traditional doctrine has always been hesitant about the classification of treaties. Some authors have tried to group them under different labels, according to a scale of importance, which produced enumerations such as "treaty", "convention", "protocol ", "agreement", "arrangement", declaration", "act", "covenant", "statute", etc. But practice rejected this kind of classification, since the name given to the instrument was almost always the mere result of the momentary whims of the contracting parties. Codification has departed from attempts at classification. The Vienna Convention does not deal with the establishment of treaty categories.

16. If it has been so with treaties concluded by States, where sound practice could favour their distribution into different categories, one should with much more reason avoid stepping on the quicksand of international organization treaty practice, with the mind set on classifying such treaties. To show how difficult it is to undertake such a task, it is enough to refer to the position taken by Clive Parry, who tries to survey the treaty relations of the United Nations under what he calls "the more or less precise heads of the treaty-making power which are to be found in the Charter". [f] He starts with the reference to agreements under Article 43 of the Charter —a class which so far does not include any signed instrument—since there has been no understanding on the organization of the armed forces to be made available to the Security Council, according to that article. In the second group, he includes agreements with other organizations concluded under Article 57, which made it mandatory upon specialized agencies "to be brought into relationship" with the United Nations. The article in question provides "an agreement to agree", and, of course, it opens the way for an enormous range of international treaties on the most varied subjects. The next category is the one dealing with agreements related to privileges and immunities. It is obvious that Parry's classification is based on early practice of the United Nations and that it is confined to treaties within the framework of the world organization. It is a rather narrow distribution into categories, to which we could hardly subscribe.

17. If distinction has to be made between categories of treaties, let us make it as the work progresses, without trying to establish a classification *a priori*. Even though, as Professor Reuter's paper suggests, "it will be necessary to explore certain distinctions based on the actual purpose of the treaty",[g] let us avoid the fetters of a rigid distribution into different categories.

18. The examples provided by Professor Reuter [h] do demonstrate that distinction should be made between certain kinds of treaties, but they hardly prove that treaties should be grouped in different categories.

19. We should follow the example of the previous work of codification the Convention adopted by the Sixth International American Conference, the International Commission of American Jurists draft, the Harvard draft convention, and the Vienna Convention itself) and avoid a casuistic approach to the problem. It would be impossible to accertain and foresee all sorts of treaties in which international organizations will play the role of contracting party. Professor Reuter wonders about the legal status, as far as it concerns international organizations, of international conventions governing the use of armed forces or the exploration of space. In the near future we may have international organizations engaged directly in the exploration of mineral resources of celestial bodies, or even in some kind of special agriculture to be developed on the surface of the moon, or in isolating, collecting and preparing for human use, the immense riches of the oceans. The future scope of conventions in which international organizations will be contracting parties is vast indeed.

20. What the Commission should do is to try to formulate the essential principles that will fit the present practice of international organizations and which can be adapted to future use, so as to provide a legal directive for the treaty-making power of international organizations.

B. *To what international organization will the Commission's proposals apply?*

21. Professor Reuter's paper rightly points out that the Vienna Convention "contains certain rules relating to the role of international organizations in respect to treaties" [i] covering all international organizations. He stresses the different approach adopted in the draft articles on representatives of States to international organizations, which are deemed to apply only to representatives of States to organizations of a universal character.

22. The different treatment is logical and realistic. The draft articles contemplate a special status to be extended to the representatives of States, entailing a series of immunities and privileges. The Commission chose the right way when it tried to restrict to the minimum possible, the number of people enjoying such a special status. It is even in the interests of the representatives themselves that their status should not be extended to all kinds of organizations. Otherwise, host States could hardly ensure complete respect for the provisions dealing with the matter.

23. The case of the future rules on treaties to which international organizations are parties, is completely different. Those will be norms purporting to give a legal

[f] C. Parry, "The treaty-making power of the United Nations", in the *British Year Book of International Law, 1949* (London), p. 131.

[g] See above, annex I, Questionnaire, para. 6.

[h] *Ibid.*

[i] *Ibid.*, para. 9.

and uniform directive to the law of treaties to be applied to instruments to which international organizations are parties. The future articles that will complement the Vienna Convention should be open to all international organizations without limitations of any kind, provided that they are intergovernmental organizations. One could go as far as to say that regional organizations like OAS and OAU, for example, should be able to accept those rules if they chose to do so. International law will be only enhanced by the widest possible acceptance of the future rules on the formulation of which we are engaged. After all, treaties are a means of developing peaceful co-operation among nations, as the preamble of the Vienna Convention clearly states.

II. How to deal with the subject

A. *How to determine the subject matter*

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as a starting point?*

24. In fact, the future work on treaties concluded by international organizations should be carried out within the framework of the Vienna Convention. As has been said before, the Vienna Convention represents the crystalization of years and years of research, reporting, debating and drafting in the field of the law of treaties. Anything that will be done on codification of the law of treaties outside the Convention will be complementary to it and should be adjusted to its contours. Article 3, paragraph (*c*), of the Convention provides the guide to the kind of treaties with which we will be dealing in relation to it. Moreover paragraph (*b*) of the same article makes reference to the rules of international law embodied in the Convention which will be valid for treaties in which subjects of international law other than States are parties, independent of the Convention.

25. The Resolution relating to article 1 of the Vienna Convention on the Law of Treaties, [j] which underlines the importance of the task the Commission is about to embark on, as a complement to the Convention itself, is another indication of the strong ties that bind together the work previously done and the study on treaties concluded by international organizations with States or between two or more international organizations.

26. The Commission should avoid plunging into a theoretical discussion of the problem of international personality in order to define the subjects of international law other than States. That has been done by writers in the past, and nobody is disputing the fact that international organizations possess international personality, that is to say, are able to act as subjects of international law.

27. At the fourteenth session of the Commission, a long debate took place on whether the draft convention should include an article affirming that subjects of international law other than States might be invested with the capacity of becoming a party to treaties by dispositions of particular international law or custom. [k] During that debate the majority of members supported the position maintained by Professor Rosenne, according to which "the topic of international personality was a vast subject, which the Commission might eventually investigate, but at that stage it might simply be taken as existent". [l]

28. The trend of the discussions during the fourteenth session of the Commission was to avoid the drafting of a special article on the definition of international personality. The capacity of international organizations to make treaties was widely recognized, as arising from express provisions in the constitutions of the said organizations (which are international treaties themselves) or from implicit powers contained in those constitutions.

29. The International Court of Justice stated very clearly the fact that the United Nations possesses international personality to permit it to claim for damages as a result of injuries done to its servants in the course of their duties. The Advisory Opinion (11 April 1949) on reparation for injuries suffered in the service of the United Nations duly clarifies the problems of international personality of international organizations, though making the point of stressing that their personality, rights and duties are not the same as those of a State. [m]

30. This point has been developed by Clive Parry so as to reach the conclusion that the natural person of international law is the State, and that international organizations may be described as detaining a *sui generis* personality. [n]

31. Therefore, though we should avoid going deep into a detailed discussion of the problem of the legal personality of international organizations, and though we should accept it as definitively affirmed by doctrine and practice, we are bound, nonetheless, to consider the question of the sources of the treaty-making power of international organizations as a basic point for the future development of our work.

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

32. There is no doubt that the articles of the Vienna Convention should be the starting point of the Commission's exploration of the ground left aside, for the time being, by the Conference on the Law of Treaties. It is by their perusal, and by considering their sources and consequences, that the Commission will be in a position to formulate the new rules governing treaties

[j] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, document A/CONF.39/26, annex.

[k] See *Yearbook of the International Law Commission, 1962*, vol. I, pp. 57 *et seq.*, 639th-640th meetings.

[l] *Ibid.*, p. 62, 639th meeting, para. 59.

[m] *I.C.J. Reports 1949*, p. 179.

[n] C. Parry, *op. cit.* pp. 110-111.

concluded by international organizations with States or between two or more international organizations.

33. Before we undertake the work of examination of the articles of the Vienna Convention with a view to modifying and adapting them to the problems of treaties to which international organizations are parties, a decision must be taken on the way to be followed. It is important to know if we are going to take the Vienna Convention as a whole, as the substance of positive international law, whose rules are applicable to subjects of international law other than those which are parties to the Convention, according to article 3, paragraph (*b*), or if we are going to try to draft a new complete text, including all provisions of the Vienna Convention adapted and completed to cover the problem of treaties in which international organizations are parties. If the preference of the Commission should be in favour of drawing up a whole and complete series of texts, I think a point should be made of not altering the wording of the articles of the Vienna Convention, with the exception of the modifications and additions called for by the problem of international organizations. Otherwise, our work will be tantamount to the gigantic task of drafting a new convention on the law of treaties. As has been said in replying to question I, A, 2 of the questionnaire, we should avoid reverting to the questions which were the subject of the articles of the Vienna Convention. If discussion is opened anew on the basic problems of the law of treaties, controversy may take place in the Commission on some of the approved articles, jeopardizing the efforts that are under way to speed up the procedure of ratification of such an important Convention by as many States as possible.

34. I think that the Commission should start the examination of the articles of the Vienna Convention one by one, with a view to drafting new articles when necessary, or to introducing changes in the present articles, so as to cover the scope of our task, without forgetting the need to respect the phraseology of the rules already approved.

35. With this in mind I venture to present a few observations on some of the articles of the Vienna Convention.

Part I. Introduction

[articles 1-5]

Article 1: A similar wording should be found, so as to state that the future draft shall apply to treaties concluded between States and international organizations, or between two or more international organizations.

Article 2: Paragraph1 (*a*); The text should be revamped so as to cover the kind of treaties which will be the object of our studies. Unwritten treaties should continue to be excluded for reasons already given.

Paragraph 1 (*b*): The text on the means of expressing consent to be bound by a treaty should be retained, though the concept of "ratification" may require some exploration, because as far as it regards international organizations, the accomplishment of ratification through all its stages, including parliamentary approval, may differ substantially from the current practice in relation to States.

Paragraph 1 (*c*): Needs re-drafting to specify the authority empowered with the right to issue the authorization to conclude treaties in international organizations.

Paragraph 1 (*d*): Nothing prevents international organizations from making reservations to treaties. Therefore, this text (as well as articles 19 to 23) might be studied with a view to being retained in a future draft with minor changes.

Paragraph 1 (*g*): Needs reformulation to cover international organizations.

Paragraph 1 (*i*): Should be kept in the future text.

Article 3: Must be redrafted in the affirmative form so as to state that the future articles would apply to treaties to which international organizations are parties, reserving the validity of agreements included in sub-paragraphs (*a*), (*b*) and (*c*) as far as they are not already covered by articles 1 and 3.

Article 4: It would be advisable to maintain the non-retroactivity rule without prejudice to the application of the principle contained in the future set of articles under international law.

Article 5: The article deserves a thorough study, with a view to developing it into a definition of the treaty-making power of international organizations depends on specific or tacit rules endowing the organization with the faculty to conclude treaties, it is very important that the legal régime of treaties which are the constituent instruments of international organizations should be examined.

Part II. Conclusion and entry into force of treaties

Section 1: Conclusion of treaties

[articles 6-18]

Article 6: It seems necessary that a formula that will establish the conditions under which international organizations possess the capacity to conclude treaties should be drafted.

Article 7: The problem of full powers must also be reformulated so as to cover the practice concerning those persons who are invested with the representation of international organizations for the purpose of concluding treaties, either by the issuance of some special kind of documents, or by virtue of their own functions.

Article 8: Problems of confirmation or denial of validity of treaties concluded *ultra vires* should also be tackled in a special article.

Article 9: The adoption of the text at international conferences becomes very important in treaties to which international organizations are parties, because the approval of the plenary conference replaces to some degree the parliamentary approval of treaties between States as a procedural step towards ratification.

Article 10: Mutatis mutandis, the rules governing authentication of texts will apply also to treaties in which international organizations are parties.

Article 11: The means of expressing consent are also the same with the exception of ratification, which in international organizations cannot take place according to the formal model of previous parliamentary authorization.

Article 12: Signature is likely to become the normal means of expressing the consent to be bound by a treaty on the part of international organizations, since ratification in its classical form cannot take place. Article 12 should be examined and reformulated in the light of its importance in the treaty-making procedure of international organizations.

Article 14: Ratification, the most important stage of the treaty-making procedure of States, does not appear, at least in its traditional form, in treaties made by international organizations. If it is to be kept, it will be within the sense of pure

confirmation, under the form of *a posteriori* approval by the competent organ. Anyway, the matter requires careful study.

Articles 16 and *17:* These provisions, duly amended, could be retained in the future series of rules.

Article 18: International organizations could hardly perpetrate acts capable of defeating the object and purpose of a treaty, prior to its entering into force, since member States, which might be the other parties, would take care to control their activities.

Section 2: Reservations

[articles 19-23]

Articles 19 to *23* should apply in the pertinent provisions to treaties in which international organizations participate.

Article 20: Paragraph 3: This provision, dealing with reservations to a treaty which is a constituent instrument of an international organization, should deserve close consideration, with a view to clarifying what is meant by "the acceptance of the competent organ of that organization".

Section 3: Entry into force and provisional application of treaties

[articles 24-25]

These provisions, dealing with entry into force and provisional application of treaties, should also be explored for adaptation to the new articles in the pertinent provisions.

PART III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

[articles 26-38]

Part III as a whole, and in particular articles 31-33: To the extent that these provisions are concerned with the codified general principles of the law of treaties, they should apply to future rules governing treaties to which international organizations are parties, either by their repetition in the body of the future series of articles, or by reference to the Vienna Convention texts.

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

[articles 39-41]

These provisions, concerning amendment and modification of treaties, should be discussed so that they may be adapted to the mode complex means of expressing the will of international organizations.

PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

[articles 42-72]

Articles 42 to 72 also contain rules governing all kinds of treaties. These rules should be carefully studied in order to be incorporated into the future set of articles or be established as a subsidiary body of norms governing treaties concluded by international organizations with States or between two or more international organizations.

Articles like 48, 49, 50, 51, and 52, concerning error, fraud and corruption of a representative, which could hardly apply to the wide-open procedure of treaty-making of international organizations, are to be disregarded.

PART VI. MISCELLANEOUS PROVISIONS

[articles 73-75]

These provisions deserved close reading.

Article 74: Could be replaced by a rule concerning the capacity of States claiming to be members of certain international organizations to conclude treaties with the latter. That would be the corresponding formulation in the field of international organizations.

PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

[articles 76-80]

These provisions, dealing with depositaries, notifications, corrections and registration, should be scrutinized for minor changes so as to be adapted to the practice of international organizations.

PART VIII. FINAL PROVISIONS

[articles 81-85 and annex]

These provisions concern only the Vienna Convention, and therefore are not relevant to the scope of our studies.

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

36. The work leading up to the United Nations Conference on the Law of Treaties, namely the twenty years of thorough research in the International Law Commission, was so fruitful that one could hardly speak of points of law which were neglected by the Vienna Convention, even if some points were deliberately disregarded.

37. The fact is that some theoretical discussions were put aside as sterile and perhaps obsolete, and some other points were not tackled because their drafting by the Commission depended on the progress of its programme of work. That was the case with problems dealing with the international legal personality of international organizations, discussed in the 639th meeting of the Commission, [o] and the ensuing debate on the capacity to become a party to a treaty.

38. Now, without reopening the discussion of the problem of the international legal personality of international organizations, we should investigate carefully the question of their capacity to make treaties, the so called *jus contrahendi* of international organizations. The important thing is to establish on which grounds international organizations can conclude treaties, since it is beyond doubt that there are limitations to their treaty-making power and that they cannot contract by treaty generally.

39. It would be appropriate to study the clauses in international organization constitutions, from which treaty-making power derives, trying to establish their nature and the circumstances in which they occur, so as to arrive at a theory of the sources of the capacity of international organizations to conclude treaties. Another important point is to investigate whether such capacity may spring from tacit authorization or if it will always call for express provisions.

[o] See *Yearbook of the International Law Commission, 1962*, vol I, pp. 57 *et seq.*

40. As with other points deliberately not dealt with by the Vienna Convention, like international responsibility, State succession and the outbreak of hostilities, we must recognize that the Conference on the Law of Treaties was not at the time in a position to settle problems which were not yet solved by the Commission concerning such matters. As the work of the Commission progresses we will have before us texts that should be taken up with a view to being incorporated in the future set of articles. That will probably be so with State responsibility and succession of States in respect of treaties.

41. Problems of succession of international organizations should be dealt with likewise. In this matter we have an early and important example in the agreements with the League of Nations for the general succession by the United Nations. These are a clear-cut instance of succession between international organizations and deserve an attentive study.

42. Some thought should also be given to the question of the effect of hostilities on a headquarters agreement. The problem is by no means a theoretical one, and may occur at any time. It offers much more interest for our task than the general problem of coercion on treaties between States in the case of armed coercion or international sanctions, cited by Professor Reuter. [p] Coercion could hardly occur in respect of international organizations and treaties to which they are parties. The impact of hostilities on a headquarters agreement is something that has to be considered as offering immediate interest, since it may indeed happen at any time.

43. One point which should deserve detailed study is the one concerned with the organs through which the treaty-making power of international organizations is exercisable. Some writers have rightly contended that "the law of international organizations does not as yet contain any clear rules for determining where the treaty-making power of organizations resides". [q] In fact the authorization to conclude treaties, emanating from clauses of the organization's constitution or from a general resolution, might in practice devolve upon different organs of the same organization. It would be of paramount importance to trace what Detter calls the "whereabouts of the treaty-making power within the organization". [r]

B. *Participation of the international organizations in the work*

44. In my reply to question I, B, it was contended that we should favour the idea of extending the future set of articles to be prepared by the Commission to the maximum possible range of international organizations, regardless of their universal or regional character. Of course the participation of various international organizations in the studies to be conducted by the Sub-Committee, and subsequently by the International Law Commission, is another problem. It will hardly be possible to invite a large number of organizations without jeopardizing the good conduct of the work. One solution could be to invite only the organizations and specialized and related agencies that were represented in the United Nations Conference on the Law of Treaties. But considering the high degree of interest that the work will certainly create among international organizations, it would perhaps be advisable that the participation of other organizations should be considered and in certain cases accepted.

45. A compromise solution could be to accept the direct participation, as observers, of those organizations which were present at the Conference on the Law of Treaties and which are listed in the Final Act. [s] At the same time the Commission, through its Chairman, could circulate invitations to all intergovernmental organizations and agencies of a certain importance asking for observations and suggestions based on their current practice. These contributions could be, in the course of the future work, organized into a working paper, which will provide important reference for the use of those actually engaged in the conduct of the studies.

4. Mr. Rosenne (14 January 1971)

[*Original text: English*]

I

1. At the outset we wish to express deep appreciation to the Chairman, Professor Paul Reuter, for the remarkably acute questionnaire which he has prepared in order to guide our deliberations in the present exploratory stage. We shall follow the Chairman in one respect in that before proceeding to formulate replies to his precisely enunciated questions we find it necessary to include some words of introduction.

2. We also wish to record our appreciation for the work accomplished by the Secretary-General in preparing the working paper A/CN.4/L.161 and Add.1 and 2. This document shows that despite the reticence of the Vienna Convention on the Law of Treaties itself, the topic has been the cause of considerable preoccupation to the International Law Commission since it began discussing the law of treaties in 1950. Having regard for its comprehensive survey of what is undoubtedly a complicated and prolonged discussion, it is suggested that our sub-committee may wish to recommend that after due editing, the working paper in its final form should be included in the Commission's *Yearbook*.

3. It is clear from the working paper that at no stage did the Commission ever investigate the question whether the rules relating to the treaties concluded between

[p] See above, annex I, Questionnaire, para. 23.

[q] T. I. H. Detter, "The organs of international organizations exercising their treaty-making power", in *The British Year Book of International Law, 1962* (London, 1964), p. 421.

[r] *Ibid.*, p. 444.

[s] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 283, document A/CONF.39/26, para. 4.

States and international organizations or between two or more international organizations are the same as those relating to treaties concluded between States alone. The most that can be said is that in the very early stages it was contemplated, without investigation, that the Commission migh be able to formulate its rules as governing indifferently treaties concluded between States and treaties concluded between States and other subjects of international law. However, the basis upon which such a conclusion might be feasible does not appear in any of the published records of the Commission. Rather to the contrary. Running through the Commission's work on the law of treaties is a serious—and apparently unanswered—questioning of the correctness of that assumption. This questioning was crystallized in a series of formal decisions by the Commission recorded, for instance, in the Secretary-General's working paper (A/CN.4/L.161, para. 23, 49, 65 and 66) and ultimately consolidated in the Commission's report on the first part of its seventeenth session [a] and repeated in its report on its eighteenth session. [b]

4. Significance must be attached to this analysis of the history of the matter. The suggestion is sometimes heard —for instance in paragraph 112 of the working paper —that certain of the draft articles adopted by the Commission in first reading in the period 1962-1964, because they were drafted in general terms, could, if interpreted literally, be applied to treaties concluded by any subject of international law having treaty-making capacity, and in particular by an international organization. Be that as it may, one may doubt that the matter is really one of interpretation, literal or otherwise, of the text of the articles, whether in one or other of the drafts of the Commission or as adopted in the Vienna Convention. The real point surely is that all the preliminary work and research, primarily by the special rapporteurs on the law of treaties and also by individual members of the Commission, was limited to treaties concluded between States. The problem of treaties concluded between States and international organizations was simply dropped from the intellectual horizons of the Commission and its members, who contented themselves with the very proper reservations which now appear in article 3 of the Vienna Convention.

5. There are two reasons in particular why it is probably necessary to stress these aspects, and the prudence which they engender, at this stage—and obviously this does not imply taking a position on the question whether or to what extent or how any of the rules formulated in the Vienna Convention could be applied in the case of treaties concluded between States and international organizations. The first reason relates to the inherent difference, which is a matter of kind and not merely of degree, between the will of a State to be a party to an international treaty and the formation of that will, and the will of an international organization to be a party to an international treaty and the formation of that will. The second reason relates to the question: What is the purpose which led the Conference on the Law of Treaties to recommend—and the General Assembly of the United Nations to endorse by resolution 2501 (XXIV)—the recommendation that the Commission should undertake the present study, [c] notwithstanding the fact that the Commission itself had made no similar suggestion?

6. There is a preliminary question of terminology to be noted, for which reference may be made to the report of the Sixth Committee which states:

> It was further said that it would be advisable, if only from the point of view of terminology, to reserve the term "treaty" for agreements between States and to use another expression for instruments to which a subject of international law other than a State was or might become a party. The establishment of a specific terminology for international agreements between States and international organizations or between two or more international organizations would have the added advantage of being more consonant with the provisions of articles 1 and 3 of the Vienna Convention on the Law of Treaties. [d]

7. Let us turn now to the first reason. Even if it is correct, as we believe to be the case, that the Vienna Convention is above all concerned not with the law of international obligations in general but with the law governing the instrument by which the consent of States to be bound by the obligations deriving from treaties is expressed, the preoccupation of the draftsmen of the Convention was with an elusive object, the will of the State. As is well known, this is a matter which has implications no less on the domestic level than on the international level, a fact which accounts for the particular delicacy and caution with which it has to be approached. If the formation of the will of the State is a domestic matter in which the domestic law is controlling (as indeed is recognized ultimately in articles 46 and perhaps 47 of the Vienna Convention), the expression of that will on the international level and its various incidences is a matter of international law. The suggestion sometimes made that articles such as 54 or 56 of the Convention could be applied to agreements concluded between States and international organizations simply because those articles are framed in general terms may be a *petitio principii*. In the Vienna Convention those articles are concerned with an international incidence of the will of a State formed domestically and controlled by domestic law, something which is impossible in respect to an international organization. The conclusion therefore is that if the study of treaties concluded between States and international organizations or between two or more international organizations is

[a] *Yearbook of the International Law Commission, 1965*, vol. II, p. 158, document A/6009, paras. 19-21.

[b] *Ibid., 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, para. 28.

[c] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, Resolution relating to article 1 of the Vienna Convention on the Law of Treaties.

[d] *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (*b*), document A/7746, para. 113.

to proceed, the focus must be shifted onto the systematics of the initiation, formulation and expression of the will of an international organization in all its various incidences.

8. The existence of a question as to the purpose for which this study is being undertaken is provoked, in our mind, by the short title given for the sake of brevity to the topic in paragraph 1 of document A/CN.4/L.161. However, the title of the topic, from which the terms of reference and the relevant conclusions as to the ultimate purpose of the study have to be deduced, cannot be divorced from the text of articles 1 and 3 of the Vienna Convention. In this respect it is our view that more weight has to be given to the discussion during the first part of the Commission's seventeenth session. [e] It will be recalled that in the draft submitted by the Drafting Committee at the 810th meeting, what is now the opening phrase of article 3 of the Vienna Convention (but which was then sub-paragraph (*a*) of article 2) referred to "treaties concluded between subjects of international law other than States or between such subjects or international law and States". [f] Objection was taken to wording it that way round: it was suggested that really States should be mentioned first, an arrangement which would be "more consistent with the Commission's decision to limit the scope of the articles to treaties between States". [g] Behind that formal reason there were no doubt reasons of a more substantive character, which have become accentuated since 1965. At all events, even if the Special Raporteur subsequently introduced the final text on the basis that only "drafting changes" had been made, [h] it nevertheless seems that one should not proceed as though the changes had not been made. Furthermore, it is difficult to avoid an impression that some of those who call for a study of this topic are prompted by an emotional hankering after an idealistic concept of "international organizations" antipodal to the "State" as the subject not merely of international law, but of the whole international order. This cannot form the basis for useful work by the Commission which is motivated by the actual requirements of the international community as presently constituted, and not by a mere attempt to achieve abstract perfection in a given area of legal regulation.

9. One final introductory remark. It must not be thought that the topic is to be approached solely as a juridical-technical one. No doubt in very many cases, as in the case of treaties concluded between States, problems of the law of treaties are essentially juridical problems, or at all events the juridical aspects can be identified and separated from the political aspects. It is also no doubt true that for the most part the experience which has been gained of treaties concluded between States and international organizations is confined to what might be termed general juridical experience with a minimum of political additives. However, at least one instance can be given in which fundamental lack of clarity over a whole series of basic elements of an agreement said to exist between the United Nations (acting through its Secretary-General) on the one hand and a Member State on the other has given rise to major political controversy and in the view of some may have even been a contributory factor in the breakdown of international peace. The reference is to the agreement between the United Nations and the United Arab Republic regarding the United Nations Emergency Force and the controversy over the status of the so-called Dag Hammarskjöld *aide-mémoire* of 5 August 1957. [i]

II

The following more specific answers are submitted to the questions.

I. Delimitation of the scope of the Commission's work

A. *What treaties should the studies cover?*

10. The Commission's work should concentrate first and foremost on international agreements concluded between States and international organizations. Secondly it should deal with the type of treaty to which paragraph (*c*) of article 3 of the Vienna Convention relates, as far as concerns the relations of the States parties to those treaties and international organizations. The question of the agreements to which all the parties are international organizations can probably wait until the work is further advanced. In general, the Vienna Convention should be regarded as determining the broad scope of the present study. On that basis it is also suggested that the position regarding unwritten agreements should be left completely reserved, as was done in the Vienna Convention.

11. It is agreed that in so far as applicable and relevant, the rules which have been included in the Vienna Convention should not now be called into question. However, it is not to be assumed without further investigation by the Special Rapporteur that the treaties to which article 5 of the Vienna Convention relates (and this includes the treaties to which paragraph 3 of article 20 refers), which are certainly treaties concluded between States, come within the scope of the new study.

12. The question of possible distinctions between the categories of treaties to be considered probably does

[e] See *Yearbook of the International Law Commission, 1965*, vol. I, pp. 244-245, 810th meeting, paras. 12-27; *ibid.*, p. 280, 816th meeting, para. 2. These discussions are summarized in paragraphs 146-147 of document A/CN.4/L.161.

[f] *Yearbook of the International Law Commission, 1965*, vol. I, p. 244, 810th meeting, para. 12.

[g] *Ibid.*, para. 14.

[h] *Ibid.*, p. 280, 816th meeting, para. 2.

[i] See *The New York Times*, 19 June 1967, p. 12. See also the letter of Mr. (formerly Ambassador) Ernest Gross in *ibid.*, 26 May 1967, p. 44. For the views of Secretary-General U Thant, see *Official Records of the General Assembly, Fifth Emergency Special Session, Annexes*, agenda item 5, in particular document A/6730/Add.3, paras 71-73; Press Release EMF/449 of 3 June 1967, p. 19; and statement by the Secretary-General in *The New York Times*, 20 June 1967, p. 19. All this material is reproduced in *International Legal Materials* (Washington D.C., The American Society of International Law, 1967), vol. VI, No. 3 (May-June 1967), pp. 581 *et seq.*

not have to be raised in a form which is different from that in which it was treated by the Commission and in the Vienna Convention, with perhaps one addition. The questions which have arisen about the relationship of an international organization with treaties (*a*) concluded under its auspices, (*b*) concluded between it and one of its members, and (*c*) concluded between it and another international organization, as far as concerns the *pacta tertiis* rule, are extremely complex. As regards the first type of treaty, we have already in our Hague lectures of 1954 [j] hesitatingly drawn attention to the possibility that United Nations practice was moving in the direction of producing quite a fundamental restructuring of the law on this matter. As far as the second and third categories of treaties are concerned, the fundamental question which is posed is not really that of the treaty law aspect itself but the quite different one of the real nature and practical consequences of the international personality of an international organization. On this, some preliminary observations must be made.

13. Does the international personality of an international organization resemble the concept of the juridical personality of an incorporated body in domestic law, as being something quite distinct from the personality of its individual members (a concept which we understand is not so rigidly held in contemporary law as it might have been in an earlier period), or is it something else? In one case the *pacta tertiis* rules would be aplicable in all the particularity of their exposition in articles 34 to 37 of the Vienna Convention. In other cases this would not be so, for reasons at which the questionnaire hints. Consequently it seems to us that it would not be profitable to plunge too early into this type of issue which, incidentally, it might be noted, has been little touched upon by the publicists, at all events to judge from a quick perusal of the literature listed in the Secretary-General's working paper (A/CN.4/L.161 and Add.1-2).

14. In addition to the categories of treaty mentioned in paragraph 13, there is also the problem of treaties concluded by an international organization not in its own right and interest, so to speak, but more directly in a representative capacity on behalf of the States which are members of that international organization. That issue was raised at the Commission's sixteenth session (1964) in article 60 of the draft articles on the law of treaties submitted in Sir Humphrey Waldock's third report [k] and a year later in "Question A" in his fourth report. [l] The debates in the Commission are described in the Secretary-General's working paper (A/CN.4/L.161, paras. 101-110, 124-125, and 129). In practice, a closely related question has arisen with regard to the participation in commodity conferences convened under United Nations auspices of certain international economic organizations. [m] The problem may arise both for multilateral and for bilateral treaties. This aspect, which does not have to be limited to the participation of international economic organizations in commodity conferences leading possibly to their participation in the commodity agreements issuing therefrom, whether participating in their own right and interest or in a representative capacity, is believed to be growing in importance. From the practical point of view it may well turn out to be the case that study of this relatively novel development may become the most signal contribution which the International Law Commission could make to the legal regulation of the international relations of States in this sphere.

15. The general conclusion therefore would be that the first stage of the examination might well be limited to the issues of the rules relating to the formation and the expression of the consent of the international organizations to be a party to a treaty with a State, and the concomitant question of whether, as far as the consent of the State is concerned, the rules of the Vienna Convention can be applied as they are. In the words of the questionnaire, the first aspect to be studied should be limited to the conclusion of the agreement itself, including the participation of an international organization in an already existing international treaty where such participation is possible under the terms of that treaty itself or by virtue of ancillary instruments.

B. *To what international organization with the Commission's proposals apply?*

16. Here again, and with the reservation occasioned by the particular problem raised in paragraph 14 above, it is believed that in the initial phase of the examination the question ought primarily to be answered by reference to the Vienna Convention itself. This should occasion no real difficulty when the broad scope of the invitations to international organizations to send observers to the Conference on the Law of Treaties is recalled, and contrasted with the actual participation of the international organizations, whether by writing [n] or physically. [o] At the same time, since the Commission, through its examination of the topic of the relations between States and international organizations, is now better informed of the difficulties of this aspect, it seems that it might well base itself in due course on the final conclusions to be reached as regards that aspect of that topic. However, under no circumstances should the Commission adopt the extremely limitative approach which is suggested in the initial part of paragraph 15 of the Secretary-General's working paper (A/CN.4/L.161).

[j] *Recueil des cours de l'Académie de droit international de La Haye, 1954-II* (Leyden, Sijthoff, 1955), t. 86, pp. 330-346.

[k] *Yearbook of the International Law Commission, 1965*, vol. II, pp. 22-23, document A/CN.4/177 and Add.1-2.

[l] *Ibid., 1964*, vol. II, pp. 16-17, document A/CN.4/167 and Add.1-3.

[m] An illustration of this problem can be seen in the legal opinion of the United Nations Secretariat of 24 May 1968, published in United Nations, *Juridical Yearbook, 1968* (United Nations publication, Sales No. E.70.V.2), pp. 201-202.

[n] See A/CONF.39/7 and Add. 1-2 and Add.1/Corr.1.

[o] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 283, document A/CONF.39/26 para. 4.

II. How to deal with the subject

A. *How to determine the subject-matter*

17. While of course a very careful reading of the articles of the Vienna Convention would be required in order to determine their applicability to the agreements now under consideration, it hardly seems appropriate to take the articles of the Convention as the starting point, for that would imply a mechanical approach and overlook the nature of things. As a formal matter, to take the Convention as the starting point has its attractions. However, as has been indicated in the introductory part of this paper, it is precisely because of the material difference in the nature of the consent of an international organization in comparison with the consent of a State to be bound by a treaty that it becomes essential to proceed much more analytically. The Vienna Convention, when the matter is worked out this way, may be seen more as a point of arrival than as the point of departure.

18. For this reason it is not possible at this stage to give any firm answer to the question what are the points of the Vienna Convention which call for modifications or major additions. The Chairman of the Sub-Committee has indicated a whole series of questions which will have to be studied in depth by the Special Rapporteur and any further examination will have to await the proposals of the Special Rapporteur.

19. One exception to the generality of this argument can be made. The Commission has in several different contexts since 1950 been faced with the problem of determining rules on the subject of the capacity of international organizations to conclude treaties or to perform other acts having relevance on the plane of international law, and this in turn cannot be separated from the question of a definition of "international organization". The experience of the Commission seems to suggest that these are doctrinal matters on which agreement is well-nigh impossible. Personally we have always had doubts as to the real relevance of the capacity issue in the law of treaties, for in practice "capacity" will depend on the position taken by the parties to the agreement in question, subjectively. The reference in the questionnaire to article 46 of the Vienna Convention really seems to us decisive. Similar considerations apply in regard to the definition of "international organization", and in this connexion, and generally, we permit ourselves to refer to our statement at the fifteenth session of the Commission (1963) [p] and more generally to the Commission's debate during its twentieth session (1968). [q]

20. With regard to the reservations flowing from articles 73, 74 and 75 of the Vienna Convention, it seems that the same reservations should be made in the present case. However, in view of the illustration which is given in the questionnaire regarding the effect of hostilities on a headquarters agreement, it is to be hoped that, as forecast in its report on its twenty-first session, [r] the Commission will reach practical conclusions in the course of its examination of the topic of relations between States and international organizations, and that this will make it unnecessary to take the matter further in connexion with the further study of the present topic.

B. *Participation of international organizations in the work*

21. It is believed that for the time being the Commission may rest on the measures which it proposed at its twenty-second session which, it is understood, have since been endorsed in principle by the General Assembly in its resolution 2634 (XXV) of 12 November 1970. The report which this Sub-Committee is to submit to the International Law Commission may furnish indications of the type of information which, subject to the guidance of the Special Rapporteur, the interested international organizations may be asked to supply. If we recall the hesitations expressed at the United Nations Conference on the Law of Treaties by the representatives of the States called upon to express themselves on the matter, [s] it seems that much more must be known about the realities of this problem before further progress can be made, and that it behoves the international organizations concerned to participate in assembling the factual data on the basis of which viable decisions can later be made.

[p] *Yearbook of the International Law Commission, 1963*, vol. I, pp. 300-301, 718th meeting, paras. 3-7.

[q] *Ibid., 1968*, vol. I, pp. 13 *et seq.*, 945th and 946th meetings.

[r] *Ibid.,1969*, vol. II, p. 206, document A/7610/Rev.1, para. 18.

[s] See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 168, 30th plenary meeting, paras. 32-35; pp. 178-179, 32nd plenary meeting, paras. 37-52.

5. Mr. Ustor (29 January 1971)

[*Original text: English*]

1. In his introduction to the questionnaire, Professor Reuter rightly points out that the field which the Commission is about to enter is fraught with difficulties. Indeed, the subject to be dealt with is one in regard to which, to use the words of article 15 of the Statute of the Commission, "the law has not yet been sufficiently developed in the practice of States" [a] and in that of their organizations. Hence the hesitation apparent in the questions submitted in the questionnaire, many of which are said to be premature. Hence a similar hesitation and uncertainty in the following answers and the desire to stress their tentative character.

[a] *Statute of the International Law Commission* (United Nations publication, Sales No. 62.V.2).

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. *What treaties should the studies cover?*

(1) *Should unwritten agreements be excluded?*

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

2. I agree with the view—for the reasons given in the questionnaire—that the study to be undertaken should deal—in harmony with the Vienna Convention on the Law of Treaties—only with treaties concluded in written form and I agree also that the substantive rules of the Vienna Convention should as far as possible not be called into question. It is of course desirable that the emerging questions should be studied in full breadth and depth and that the Commission should not in any way curtail the complete freedom of the Special Rapporteur to explore all aspects of the problem. This applies to problems such as those connected with the formula "any relevant rules of the organization", used in article 5 of the Vienna Convention. If, however, a study of the term "written agreement" led to the temptation to modify the meaning of the term "treaty" as defined in the Vienna Convention, I would have—for practical reasons—very serious doubts concerning the advisability of such action, even if on theoretical grounds a change could be substantiated.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

3. I do not think that the making of a distinction between categories of treaties could be precluded in advance. Besides the instances mentioned in the questionnaire, the category of multilateral treaties in general comes to mind, in which field international organizations have very little experience. The Commission, bearing in mind the old wisdom that the life of the law is not logic but experience, may wish to maintain its customary prudence in adopting provisions on matters not supported by extensive practice. This caution will in my view particularly apply to the problems mentioned in paragraph 7 of the questionnaire, problems which I am inclined to prefer to set aside for the time being.

B. *To what international organizations will the Commission's proposals apply?*

4. The ideal solution of the problem raised in this section of the questionnaire would obviously be to adopt draft rules governing treaties of *all* governmental international organizations, all the more so as practically all intergovernmental organizations have a certain practice in concluding treaties. It may be asked, however, whether for practical reasons it would not be advisable to begin with a more cautious approach to the problem similar to the one the Commission has chosen in regard to the topic representatives of States to international organizations. Subject to further studies on the matter I would—for the time being—opt for the second solution. This would also simplify the question of consultations with the interested organizations.

II. HOW TO DEAL WITH THE SUBJECT

5. The appointment of a Special Rapporteur and his instruction as usual would obviously be necessary.

A. *How to determine the subject-matter*

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

6. I agree with the view that the only possible answer to that question is in the affirmative, i.e. the natural point of departure for the study of the topic is the Vienna Convention. In the course of the careful reading of the Convention some of its provisions will possibly have to be tested in four ways:

Are they applicable to a State which has treaty relations not with one or more States (as in the hypothesis of the Vienna Convention) but with international organizations?

Are they applicable to an international organization which has treaty relations with one or more: (*a*) member States, (*b*) non-member States, (*c*) international organizations?

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

7. There is an obvious necessity to draft an article on the capacity of international organizations to conclude treaties. For this purpose a particularly thorough examination of practice and theory will be needed. While rejecting the extremes of the theories which would endow international organizations with unreasonably large competences, the Commission will have to proceed with great caution to ascertain the cases where the existence of treaty-making power of an organization may be established in the absence of an explicit authorization of its constitution.

8. Article 46 of the Vienna Convention is one of the rules which will have to be tested in the four ways suggested above. While it will stand the first test, a close examination of the practice, if any, will be necessary to judge the other ones. My feeling is, however, that the rule in regard to international organizations corresponding to article 46 should be stricter than the original because of the obvious difference in the nature of a constitution of a State and that of an international organization.

9. I would not challenge the view that on the methods of dealing with articles 7-17 it is too early to pronounce.

10. The question of the effect on international organizations of treaties concluded between States does not belong to the field of the present study; indeed, it belongs rather to the realm of the Vienna Convention. However, I believe that the Commission may give some thought to this problem. To the question definitely put in this connexion my tentative answer would be as follows: The effects of a treaty concluded by an inter-

national organization (with another organization or one or more non-member States) on the member States not parties to the treaty are a matter to be governed by the constitution of the organization and its other internal law. The question of such effect does not properly belong to the law of treaties but to the law of the particular organization or to that of international organizations in general.

11. I do not think that article 47 of the Vienna Convention can remain unchanged in the context of treaties of international organizations, while articles 48 and 50 will have to stand in their essence.

12. Concerning article 54, I do not feel any hesitation in accepting its general validity. The effects of the termination of a constituent treaty on the member States is in my view again a question beyond treaty law.

13. The effect of the termination of membership on the application of a treaty concluded between the organization and a member State is certainly worth a thorough examination. In this respect my feeling is that the provisions of article 62 of the Vienna Convention rather than article 63 will be relevant.

14. As to the question of the settlement of disputes, my view is that its exclusion from the study to be undertaken is preferable. The procedure of disputes settlement is a general question of international law, and it would not be advisable to deal with it piecemeal in connexion with each individual chapter of substance and adopt possibly different solutions. Moreover, a highly practical reason militates for the separation of these matters. The experience of the Conference on the Law of Treaties shows that, while it was relatively easy to reach a fairly broad agreement on matters of substance, the idea of including in the Convention rules on the settlement of disputes met with strong opposition. It seeems to me that the victory of the view that such rules have to be adopted together with the substantive ones would be a Pyrrhic one which would not bring closer the entry into force of the Convention. I think that the Commission would be well advised if it gave these points a thorough consideration.

15. I would leave it to the judgment of the Special Rapporteur whether he wishes to put forward proposals on depositaries, notifications, etc., in respect of the kind of treaties to be dealt with.

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

16. As to article 73 of the Vienna Convention, I also think that a similar course should be followed here and the study should be kept within the same limits as those of the Vienna Convention.

B. *Participation of the international organizations in the work*

17. I agree with the conclusions of this paragraph.

6. Mr. Tabibi (6 April 1971)

[*Original text: English*]

I. Delimitation of the scope of the Commission's work

A. *What treaties should the study cover?*

(1) *Should unwritten agreements be excluded?*

1. As in the case of unwritten treaties between States which was excluded by the Commission and the Conference on the Law of Treaties, here too the question of unwritten treaties should be excluded regardless of its importance in the practice of various international organizations. Therefore, the Commission should deal with written agreements only and at the same time make an attempt to define precisely what constitutes a written agreement.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

2. The rules of the Vienna Convention, although validated now by so many signatures of State representatives, in no way shut the door to a broader study particularly on the competence of organizations to conclude treaties.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

3. To explore certain distinctions between various categories of treaties based on the actual purpose and object of the treaty and in accordance with the practices and statute of the organizations of universal character seems useful.

B. *To what international organizations will the Commission's proposals apply?*

4. The Commission's proposals should apply mainly to governmental organizations of a universal character, and in this regard the views of organizations concerned should be ascertained by the Commission.

II. How to deal with the subject

5. This topic should be studied by the future rapporteur thoroughly in advance, as was done by previous rapporteurs on other topics assigned by the Commission to them, and only then will the Commission be able to take a final position on the subject.

A. *How to determine the subject-matter*

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

6. Yes, it is, provided that the rapporteur makes a careful survey of the articles of the Vienna Convention.

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

7. On these two questions the future rapporteur should concentrate and make a thorough study for the final decision of the Commission next session.

B. *Participation of the international organizations in the work*

8. The explanation given in this respect by the Chairman of the Sub-Committee in paragraph 24 of his questionnaire is wise and correct. We should wait until the future rapporteur on the subject is appointed and begins his work, and only once the progress of his work has reached a certain stage should additional briefing and information be obtained.

7. Dr. Nagendra Singh (18 June 1971)

[*Original text: English*]

1. Before answering the questionnaire, may I place on record my sincere appreciation of the efforts of the Chairman of the Sub-Committee, Professor Paul Reuter, who has commenced his exploratory work in a scientific and comprehensive manner. Again, the task accomplished by the Secretary-General in preparing the working paper contained in document A/CN.4/L.161 and Add.1 and 2 deserves all praise. My answers to the various questions are as follows.

I. Delimitation of the scope of the Commission's work

A. *What treaties should the studies cover?*

(1) *Should unwritten agreements be excluded?*

2. The Vienna Convention on the Law of Treaties has excluded unwritten agreements from its purview. Again, in regard to the definition of what constitutes a written agreement it is submitted that the stand taken in article 2, paragraph 1 (*a*), of the Vienna Convention should be considered as acceptable. We may at least work on that basis in any exercise that the Commission undertakes now. The unwritten agreements should therefore be excluded.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

3. As the Vienna Convention represents settled law on the subject, it would be dangerous to call in question the rules of the Vienna Convention in any exercise. What is possible, however, is to elucidate some of these rules and expressions which have special significance in the context of international organizations, but in no circumstances should any attempt be made to modify the settled principles of the Convention.

4. In fact, our objective will be fully served if all those aspects which are not covered by the Vienna Convention and are of importance from the viewpoint of international organizations when they are parties to a treaty are now fully dealt with. Again, we should examine the articles of the Vienna Convention with a view to further development of the law on the subject in so far as it affects international organizations. Thus apart from uncovered, developmental and elucidatory aspects vital to our subject, the basic fundamentals of the Convention should not be called in question.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

5. The usual distinction between bilateral and multilateral treaties could be considered in the context of international organizations being a party. This problem will perhaps arise when the study reaches an advanced stage. It could perhaps be stated that treaties cannot be classified in categories and divided into water-tight compartments. However, it is true that, based on the competence of international organizations, some classification may seem to be possible when the problem is studied in greater detail. For example, some organizations may have limited competence to conclude agreements of the "traité-loi" type. There may also be some organizations that could be parties to a treaty of the "traité-contrat" type only.

6. Again, on the basis of who are parties to a treaty, further distinction could be made on the following lines:

(*a*) Treaties having exclusively international organizations as parties;

(*b*) Treaties having exclusively member States as parties, the international organization furnishing its auspices only;

(*c*) Treaties having an international organization as a party and a member State as the other party;

(*d*) Treaties having an international organization as one party and several member States as other parties.

7. Apart from these bilateral and multilateral distinctions between treaties, there may be a distinction to be made on the nature and type of international organizations. For example, international organizations, depending on their nature and functions, may be parties to a treaty which may possibly be different from treaties concluded by international organizations which do not have similar functions to perform. This aspect will have to await a more detailed study, as has already been stated.

B. *To what international organizations will the Commission's proposals apply?*

8. I would be prepared to stretch the scope of the study to include all intergovernmental international organizations which would have the necessary competence to enter into treaties. It would be wrong to limit the scope of the subject to international organizations of the universal or global type only. The reason is simple and straightforward. If an international organization is

competent to conclude treaties, we cannot allow such treaties to escape our attention when we are codifying the law relating to those treaties which are concluded between States and international organizations or between two or more international organizations. Our study must be exhaustive and complete and not, therefore, be restricted to a limited study of international organizations of the universal type alone. There should also be no limitation imposed such as to include important international organizations, and exclude the less important ones. Such a study would be faulty in as much as it is impossible to distinguish between what is important and not important. A distinction could be made on the basis of universal international organizations and those which are not universal. However, such a distinction would be unnecessary for our purpose if we have to codify the law relating to treaties concluded between international organizations or by international organizations. As long as they are treaties to which an international organization is a party, it would be imperative for us to legislate or regulate in respect of them and not to exclude them from our purview.

II. How to deal with the subject

A. *How to determine the subject-matter*

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

9. I agree with Professor Reuter and feel that the Commission should tackle the subject by accepting the provisions of the Vienna Convention as the basis. It would then be easy to apply the problems of international organizations to the codified articles of the Convention, in order to locate what changes are necessary or what additions are required to meet the special problems of international organizations.

(2) *As we read the articles on the Vienna Convention, which are the points which call for modifications or major additions?*

10. The main factor demanding modification or major addition would be the competence of international organizations to conclude treaties. For example, it will depend upon the constituent instrument of the international organization whether or not treaties may be concluded by the organization. If the instrument so permits, does it in any way circumscribe or limit the power of the organization to enter into treaties? The existence of the constituent instrument as against the inherent right of the sovereign State to conclude treaties is the most important differential factor which will have to be examined by the special rapporteur in drafting the articles for the purpose of codifying this particular subject.

11. Another point of importance would be the *modus operandi* for conclusion of treaties by international organizations. This may require careful study.

12. Another important factor relates to the position of an international organization where it may often find itself assimilated to that of a third party. The basic question also arises as to how an international organization is to be bound by a treaty and how it is to express its consent? A very careful research of the constituent instrument will have to be made to codify the law pertaining to problems like giving of consent, ratification, etc.

13. It may not be necessary here to list the articles of the Vienna Convention which would be *ipso facto* applicable to international organizations and those that would have to be expanded and developed to meet the special viewpoint of the treaties concluded by international organizations.

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

14. I am in entire agreement with the proposal that in the early stage of our examination we exclude those aspects of treaty law which were intentionally omitted by the Vienna Convention. For example, questions relating to State succession, international responsibility, outbreak of hostilities, etc., are separate subjects which require separate examination. It would make our codification cumbersome. However, if the scope of the addition to be made was very much limited and could be comprehensively dealt with in a few articles, the study could perhaps include all those excluded subjects if possible and a decision could then be taken which could be incorporated in our codification without disturbing the balance. I would agree *prima facie* with the view that the subjects omitted by the Vienna Convention would not lend themselves to codification in our exercise unless it was intended to complete the entire subject of international organizations and there were not many articles which were needed to complete the entire study in all its aspects.

B. *Participation of the international organizations in the work*

15. I am in entire agreement with the view expressed by Professor Reuter that we take those measures which the Commission adopted at its twenty-second session. However, we must not close the door to any international organization expressing special keenness to attend. In that event there may be a danger of a large number of international organizations jeopardizing the promptness and efficiency with which this work could be completed. However, we should have an open door policy on the subject and not shut out any particular international organization which shows special keenness to help and assist. Subject to this observation, I would endorse the adoption of the measures approved by the Commission at its twenty-second session.

Conclusion

16. This subject is of vital importance today owing to the ever-increasing role of international organizations in the life of the world community, and the Commission should lose no time in making further progress with its codification. A special rapporteur should, therefore, be appointed as soon as possible to endeavour to fill the gap which at present exists in the codified law on the subject.