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First report on the question of treaties concluded between States and international organizations or between two or more international organizations by Mr. Paul Reuter, Special Rapporteur

Topic:

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 4]

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CONTENTS

ABBREVIATIONS

BIRPI	United International Bureaux for the Protection of Intellectual Property
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
I.C.J. Reports	I.C.J., *Reports of Judgments, Advisory Opinions and Orders*
IDA	International Development Association
IFC	International Finance Corporation
ILO	International Labour Organisation
ITU	International Telecommunication Union
OAS	Organization of American States
UNDP	United Nations Development Programme
UPU	Universal Postal Union
WHO	World Health Organization

PREFACE

1. In accordance with the usual practice, the purpose of this first report is to sketch in the main lines of the subject and to present the guidelines for the subsequent work of the International Law Commission that emerge therefrom.

2. In the present case, the preliminary character of the report is accentuated by a fortuitous circumstance and also by a question of substance. A Special Rapporteur was appointed on 5 July 1971 [1] and as the term of office of the members of the Commission had expired in the meantime, it was necessary to await the election of new members by the General Assembly before starting work on a report on which the newly-elected Commission will have to decide its position and possibly confirm the decisions and directives previously adopted. But quite apart from the problems arising out of the expiry of the five-year term of office of the Commission members, the research and reflections in which the Special Rapporteur engaged very soon convinced him of the inherent difficulties of a subject about which little is yet known, despite the remarkable studies that have been made on it, and which is still in a state of flux, despite several decades of rapidly growing practice.

3. As to information on practice, it will not be possible to make an in-depth study, to analyse all the problems, and particularly to propose solutions for those which have matured sufficiently to permit codification, until ample information has been obtained from the organizations concerned. There have been consultations on this point between the Special Rapporteur and the United Nations Secretariat pursuant to previous decisions of the International Law Commission [2] and the research will be carried on as well as circumstances permit, but no substantial results can be expected before the twenty-fourth session.

Some useful clarifications are already possible, however. Although the question of agreements concluded by international organizations [3] has not been thoroughly studied, it has been much discussed and many positions of principle have been taken on it; it has been examined by the Commission; observations have been made on it by Governments and international organizations; and it has been discussed in the Sixth Committee and at the United Nations Conference on the Law of Treaties. Besides all the information which became available during the drafting of the Vienna Convention on the Law of Treaties, comparable data have been collected during the preparation of other conventions, such as the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space,[4] the Convention on International Liability for Damage Caused by Space Objects [5] and the draft articles on the represen-

[1] See *Yearbook of the International Law Commission, 1971*, vol. I, p. 287, 1129th meeting, para. 53.

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

[3] For the sake of brevity, the expression "agreements concluded by international organizations" will be used for the fuller expression adopted by the United Nations Conference on the Law of Treaties, i.e., "treaties concluded between States and international organizations or between two or more international organizations" (*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, resolution relating to article 1 of the Vienna Convention on the Law of Treaties).

[4] General Assembly resolution 2345 (XXII), annex.

[5] General Assembly resolution 2777 (XXVI), annex.

tation of States in their relations with international organizations,[6] adopted by the International Law Commission at its twenty-third session.

4. It is not necessary to give the whole history of the work that has been done [7] but some of the more significant data on the source and the nature of the difficulties which have made the Commission postpone the preparation of the relevant provisions must be mentioned. Of course, other problems, as yet unperceived, may emerge from the studies and the work yet to be done on treaties concluded by international organizations; but it would be surprising if a question which has been on the agenda of the International Law Commission and of the competent departments of Governments and international organizations had not been explored far enough to give an idea of most of the problems connected with it. It is therefore essential that an effort should be made to identify the trends that can be seen in the work done by the United Nations on this subject, taken as a whole. The Special Rapporteur is convinced that his and the Commission's task will be greatly facilitated by this approach. If the Commission goes through the records of the items discussed, particularly over the past 10 years, and compares the work it has done with whatever work may have been done on the subject elsewhere, it will remain entirely free to lay down guidelines for the Special Rapporteur and, if necessary and if it so wishes, to correct some of the positions already taken or some of the conclusions already reached. In some respects, at least, it may become evident that the question on which it will have to decide is not quite so new as it might seem at first sight.

5. In that spirit, the present report will first present, by way of introduction, two brief sketches of the historical development of the agreements concluded by international organizations and of the legal writings relating to them. One of the next two parts will be devoted to the Commission's work on the law of treaties up to its final report of 1966, and the other to the Conference on the Law of Treaties and its results. No attempt will be made to give a detailed account of the discussions, which has been done already in the Secretary-General's working paper mentioned above, but an effort will be made to trace, against this background, the progressive emergence of certain fundamental problems. In order to make the account more logical and cohesive, it will be necessary at times to abandon the chronological succession of events and either go back or jump forward; but the essential thing is to follow the main developments in this field—of what may be called an historical process of emergence—which, taken as a whole, cannot fail to have a strong impact on the Commission's future work. Lastly, at the end of the report, an attempt will be made to present the alternatives which are already open to the Commission.

[6] *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 284, document A/8410/Rev.1, chap. II, D.

[7] The spadework was done by the Secretary-General in the excellent working paper approved by the Commission (A/CN.4/L.161 and Add.1 and 2).

Introduction

1. Past development of agreements concluded by international organizations

6. In a remarkable study on agreements concluded by international organizations,[8] the first example of an agreement of this kind that the author could give was the agreement, signed on 4 October 1875, by which the International Bureau of Weights and Measures established by the Convention of 20 May 1875 settled with France certain administrative matters relating to the Bureau's headquarters in Paris.[9] In any case, other examples of such agreements appeared in the League of Nations days; they were still few and far between, but they were incontestably international agreements; the best known are those relating to the Seat of the League of Nations; [10] but it has been possible to cite others also, such as the agreements concluded by the Saar Basin Governing Commission, the Agreement of the International Commission of the Danube relating to the Setting up of Special Services at the Iron Gates, signed on 28 June 1932,[11] and the participation of the International Commission of the Cape Spartel Lighthouse in a regional arrangement on maritime telecommunications signed on 28 April 1934.[12]

But of course it is since 1945 that an increasing number of such agreements have been concluded—it might almost be called an "agreement explosion".

7. Figures have often been cited in this connexion. To take only those given in connexion with the work of the International Law Commission, one of its members stated in 1965 that there were about 200 agreements concluded between international organizations and over 1,000 between international organizations and States.[13] During the debate at the United Nations Conference on the Law of Treaties, the observer for IBRD recalled once again that IBRD and IDA alone were parties to more than 700 international agreements.[14] In 1969 the report of the

[8] H. Chiu, *The Capacity of International Organizations to Conclude Treaties and the Special Legal Aspects of the Treaties so Concluded* (The Hague, Nijhoff, 1966), p. 7.

[9] This information was provided on a personal basis. In view of the legal concepts of the period regarding international "bureaux", there is some doubt as to whether this really is an international agreement.

[10] Provisional *modus vivendi* of 19 July and 24 October 1921, *modus vivendi* submitted by the Secretary-General to the Council of the League of Nations on 20 September 1926, agreement of 21 May 1930 concerning the establishment of a wireless station (H. Chiu, *op. cit.*, p. 12). Other examples are sometimes cited (Ch. Rousseau, *Principes généraux de droit international public* (Paris, Pédone, 1944), vol. I, p. 148), in connexion with a declaration on a minority régime, but they have been questioned, particularly as far as the mandates were concerned; the legal régime applying to them gave rise to divided opinions in the International Court of Justice in 1962 and 1966.

[11] League of Nations, *Treaty Series*, vol. CXL, p. 191.

[12] M. Hudson, ed. *International Legislation—A Collection of the Texts of Multipartite International Instruments of General Interest* (Washington, D.C., Carnegie Endowment for International Peace, 1937), vol. VI (1932-1934), pp. 851-856.

[13] See *Yearbook of the International Law Commission, 1965*, vol. I, p. 10, 777th meeting, para. 7.

[14] A/CONF.39/7/Add.1 and Add.1/Corr.1, para. 5.

Sixth Committee indicated that agreements to which international organizations were parties amounted to about 20 per cent of the multilateral treaties in force.[15] Obviously, those figures are only approximate, and despite their greater accuracy, the figures published in the different numerical studies of treaties cannot be regarded as more than a statistical indication.[16]

8. The agreements concluded are characterized even more by their variety than by their number.

At the present stage of the study, it is impossible to give a systematic account of the range of these treaties, that is to say, to seek principles by which they may be grouped in categories, and this would, in any event, produce legal consequences. Even if it were possible or even necessary to attempt such a thing, it would obviously be premature to undertake it now.[17] On the other hand it is possible to indicate the main subjects of these agreements; they fall roughly into two groups: agreements relating to the administrative functioning of the organization, and agreements on its operational activities.

9. The former are concerned mainly with questions arising out of the territorial framework in which the organization carries on its activities, that is to say, the geographical location of its headquarters. Although there have been other solutions, nearly all the headquarters agreements, and the innumerable arrangements required for activities away from headquarters, are concluded by organizations. All questions relating to the immunities, privileges and other facilities to which the organizations are entitled to protect the international character of their activities are settled in this manner. As these agreements meet needs common to all the organizations, they vary very little from one organization to another.

Other administrative agreements may also be included in this group, although they have certain specific aspects and some of them are much wider in scope. These are succession agreements under which an organization takes over the property, responsibilities and sometimes the powers of another, by a decision of the States members; these are generally agreements between organizations. In the same category are the agreements on co-operation between international organizations.[18] Such agreements are usually dictated by a nobler principle than the settlement of routine administrative matters, namely the principle that, since international organizations all have the same ideal, they should co-ordinate their efforts the better to safeguard that ideal. But in practice, these agreements are *usually* administrative in character: harmonization of programmes, exchanges of observers and documentation, and so on. There are few agreements by which one organization takes over from another, but that is not true of co-operation agreements, which meet a need that no organization can escape.

10. There are some international organizations which have no operational function and whose activity is defined in relation to the framework they provide for meetings, studies, agreements and possible decisions. Many organizations have probably been conceived by their founders as a means of reaching administrative objectives, in the narrow sense of the term. Other organizations, on the other hand, have been established to do other tasks: to produce specific articles, offer services, provide certain benefits, in short, to carry on an activity which is rather less bureaucratic in character and more like that of an enterprise. But with the passage of time, even organizations which are essentially administrative in character have been called upon to widen their sphere of activity, particularly in order to respond to the world-wide movement of solidarity which has made all forms of aid and assistance one of the most important aims of international action. Lending and borrowing, the provision of experts, the distribution of fellowships, studies, and the financing of projects have all been added to the original administrative activities and for all or nearly all of these organizations they bring with them the need to conclude an unceasing stream of international agreements. The fact that an international agreement concluded by international organizations is the essential instrument for this operational activity has many explanations, the simplest of which is that international organizations must carry on their activities with strict respect for the sovereignty of the States concerned; it is the consent, the free commitment, of the States which provides the mainspring for all action by the organization.

The same explanation applies with even greater force to the fact that all the operations of an international

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[15] *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (*b*), document A/7746, para. 110.

[16] The studies referred to are mainly: those by an American professor, P. H. Rohn, "The United Nations Treaty Series Project", in *International Studies Quarterly* (Detroit, Mich.), vol. 12, No. 2 (June 1968), p. 174; *Treaty Profiles*, 1969; *Users Manual for Treaty Profiles*, 1969 and *Institutions in Treaties: A Global Survey of Magnitudes and Trends from 1945 to 1965*, 1970, works mentioned and used by G. Hartmann for "The capacity of international organizations to conclude treaties", in K. Zemanek, ed., *Agreements of international organizations and the Vienna Convention on the Law of Treaties* (Österreichische Zeitschrift für öffentliches Recht, Suppl. 1) (Vienna, Springer, 1971), pp. 155 *et seq.* A count through volumes 1 to 598 of the United Nations *Treaty Series* gives, for the period 1 January 1946 to 31 December 1965, a total of 1,686 agreements, 1,317 of which were bilateral with one State, 176 between organizations, 135 between a State and several organizations, 47 between several States and one organization and 10 between a State and two organizations.

[17] Those who have attempted the task have come up against great difficulties (see, for instance, K. Karuntilleke, "Essai d'une classification des accords conclus par les organisations internationales, entre elles ou avec les Etats", *Revue générale de droit international public* (Paris), 3rd series, vol. XL, No. 1 (Jan.-March 1971), p. 12. The report of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations pointed out that, since the Vienna Convention had avoided a classification of treaties concluded by States, it would not be desirable to prepare a classification of treaties concluded by international organizations (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 349, document A/8410, Rev. 1, chap. IV, annex, para. 11).

[18] C. W. Jenks, "Co-ordination: a new problem of international organizations; a preliminary survey of the law and practice of interorganizational relationship", *Recueil des cours de l'Académie de droit international de La Haye, 1950-II* (Paris, Sirey, 1951), vol. 77, p. 157.

organization in the political sector, especially for the maintenance of peace, have required the free consent of the parties concerned, leading to the conclusion of many international agreements.[19] International agreements concluded by the United Nations have produced the very complex situation which now obtains with regard to what are called "peace-keeping operations"; to launch operations on a scale as large as those undertaken in the Middle East or the Congo, it was necessary to have recourse to many different agreements, mostly in written form. In this connexion, the intervention of IAEA in the field of nuclear safety and particularly in the application of the Treaty on the Non-Proliferation of Nuclear Weapons, rests on an extensive network of treaty commitments to which the Organization is a party.[20]

11. The agreements concluded by international organizations within the field of their operational activities will therefore provide a rich mine of information and cover a wide range; depending on whether they relate to financial operations, international enterprise, economic assistance, agreed military intervention, or security supervision, the types of agreement will be extremely varied as regards both their structure and the number and nature of the partners. It is sometimes necessary for several organizations to co-operate in a joint activity; in other cases, some activities can only be successful if several States are involved. Even for agreements whose objective is roughly the same, there are sometimes important differences between the activities of one organization and another: special considerations, differing legal traditions and varying political needs, mean that differences from one organization to another are the rule.

12. In all this great host of agreements, there is an omission which was pointed out long ago by research workers:[21] international organizations are almost never parties to general multilateral treaties, i.e., to treaties laying down rules to safeguard the general interests of the international community. That is a very remarkable fact. It is not a minor point; on the contrary, it raises one of the fundamental problems in this field. Much more will be said about this point in this report, particularly at the end of part two.

2. Development of legal writing

13. The development of legal writing has paralleled the expansion of agreements concluded by international organizations; comments at first were incidental and almost accidental; later a considerable number of works, many of them of major significance, were written on the subject.

Fiore's *International Law Codified* has been quoted by Sir Hersch Lauterpacht and others; article 748 lays down that the capacity to conclude treaties may be "possessed by associations to which international personality has been attributed".[22] In his lectures on the law of treaties Professor Basdevant[23] allowed that it was possible for an international organization to be a party to a treaty, as did Anzilotti, at least implicitly, in his course of lectures.[24] In 1944 this possibility was recorded as a *fait accompli* by Charles Rousseau in regard to the International Commission of the Danube, the Reparation Commission established under the Treaty of Versailles, the Commission of the Cape Spartel Lighthouse, and of course the League of Nations, but he did not indicate what particular problems were involved in such international agreements.[25]

14. As soon as the end of the Second World War was in sight, well-documented studies quickly appeared, some concerned mainly with precedents,[26] and others with solutions for the future;[27] but all revealing the broad scope of this new source of international law. In this connexion, the text of the Charter of the United Nations opened up new possibilities and the Regulations adopted by the General Assembly in resolution 97 (I) of 14 December 1946 on the registration and publication of treaties and international agreements expressly included agreements concluded by international organizations.[28] The International Court of Justice in its opinion on reparation for injuries suffered in the service of the United Nations[29] used the agreements concluded by the United Nations to establish the principle of its international personality; that was the signal for a tremendous increase in legal writing, consisting of works of varying scope and extent, but on the whole favourable to a significant expansion

[19] Ph. Manin, *L'Organisation des Nations Unies et le maintien de la paix—Le respect du consentement de l'Etat* (Paris, Librairie générale de droit et de jurisprudence, 1971). See also the comments of Member States on the question of peace-keeping operations (*Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 101, document A/6026, annexes I and II).

[20] Like the Mandates System (see foot-note 10), the Trusteeship System has been much discussed, and cannot be cited without some reservations.

[21] K. Karunatilleke, *op. cit.*, p. 61.

[22] P. Fiore, *International law codified and its legal sanction*, translation from the 5th Italian edition by E. M. Borchard (New York, Baker, Voorhis, 1918), p. 329. The fifth Italian edition appeared in 1915. See H. Chiu, *op. cit.*, p. 6. Article 748 is quoted in the first report by Lauterpacht (*Yearbook of the International Law Commission, 1953*, vol. II, p. 96, document A/CN.4/63, foot-note 8).

[23] J. Basdevant, "La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités", *Recueil des cours . . . 1926-V* (Paris, Hachette, 1926), vol. 15, p. 597.

[24] D. Anzilotti, *Cours de droit international*, French translation from the 3rd Italian edition by G. Gidel (Paris, Sirey, 1929). The author allows that confederations have the right to make treaties (p. 192), and regards the League of Nations as a confederation (p. 195).

[25] Ch. Rousseau, *op. cit.*

[26] J. M. Jones, "International agreements other than inter-State treaties: Modern developments", *The British Year Book of International Law, 1944* (London, 1945), p. 111.

[27] C. W. Jenks, "The legal personality of international organizations", *ibid., 1945* (London, 1946), p. 267. The author has frequently written about the role of agreements concluded by international organizations, for example, in *Corporate Personality for International Purposes* (London, 1963).

[28] In his first report on the law of treaties, Sir Humphrey Waldock used this text to put forward an argument in favour of extending the envisaged articles to agreements concluded by international organizations (*Yearbook of the International Law Commission, 1962*, vol. II, p. 32, document A/CN.4/144, para. 3 of the commentary to article 1.

[29] *I.C.J. Reports, 1949*, p. 174.

of previous perspectives. There were general works on international law,[30] books and courses of lectures on international organizations,[31] articles,[32] and monographs.[33] In general, this writing concentrated mainly on the form of agreements and the organic and constitutional problems which each organization faced in concluding international agreements; questions relating more directly to the theory of international agreements were studied less, except, perhaps, for research based directly on practice.[34]

15. Since that first proliferation of legal writing, similar problems arising from the development of certain regional organizations have no doubt helped to maintain a regular flow of very useful works on the law of international organizations and particularly on the agreements concluded by them.[35] The preparations for the United Nations Conference on the Law of Treaties and the work of the Conference itself led to the production of more studies, including those carried out under the supervision of Professors P. Cahier and K. Zemanek at the Centre for Study and Research attached to The Hague Academy of International Law.[36]

These works, a few of which are mentioned above, are merely examples selected from the vast literature on the subject; a complete bibliography will be produced later on the basis of the research carried out for the International Law Commission on the instructions of the Secretary-General of the United Nations. The existing literature shows that the subject is not a new one, and would even be well known, were it not for the fact that it sometimes develops at a faster pace than the relevant research.

16. This is not to say that the views expressed in the studies on the subject tend towards unanimous conclusions—quite the contrary. The aspects on which the authors have concentrated are those that involve principles and are to some extent of a constitutional nature: the personality and capacity of international organizations, and the development of the treaty-making power of these organizations and their organs. It is quite natural that different trends should emerge in dealing with questions that are of interest both because of the general ideas they embody and because of the immediate political issues at stake. To what extent can rules common to all international organizations be formulated in this field? How should international organizations be defined in this context? Do their nature and their functions give them inherent international personality? What powers do they have in this field as compared to their member States? These questions involve the fundamental principles of international law, but they may also lead to disagreement, even among those who entertain the same hopes for the development of international institutions, between those who prefer a cautious and steady approach and those who are not afraid to open up to these organizations a wide and undefined range of initiatives and responsibilities. The extremely interesting discussions on this question will no doubt always remain inconclusive.

It is for the Commission, fully cognizant of all the prospects opened up by legal writers, to find a reasonable and probably empirical course, and to provide simple and practical solutions to problems ripe for solution.

Part one. — The work of the International Law Commission

17. Two aspects of the history of the Commission's work since its inception are worthy of attention.

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[30] For example, P. Jessup, *A modern law of nations—An Introduction* (New York, Macmillan, 1948), p. 127; L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Stevens, 1955), vol. I, p. 26; P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1953), vol. I, p. 60; H. Kelsen, *The Law of the United Nations* (London, Stevens, 1950), p. 335; G. Tunkin, *The bases of modern international Law* (in Russian) (Moscow, 1956), p. 11, and *Droit international public* (Paris, Pédone, 1965), p. 74.

[31] S. Bastid, *Cours de droit international public—Le droit des organisations internationales* (Paris, Pédone, 1952); A. P. Sereni, *Diritto internazionale*, vol. II, *Organizzazioni internazionali* (Milan, Giuffrè, 1958); P. Reuter, *Institutions internationales* (Paris, P.U.F., 1955).

[32] C. Parry, "The treaty-making power of the United Nations", *The British Year Book of International Law, 1949* (London), vol. 26 (1950), p. 108; I. I. Lukashuk, "The international organization party to international treaties", *Soviet Yearbook of International Law, 1960* (Moscow, 1961), p. 144 (Russian text).

[33] J. Huber, *Le droit de conclure des traités internationaux* (Montreux, Ganguin et Laubscher, 1951); J. Carroz, *La personnalité juridique internationale de l'Organisation des Nations Unies* (Paris, 1952 (thesis)); J. Carroz and Y. Probst, *Personnalité juridique internationale et capacité de conclure des traités de l'Organisation des Nations Unies et des institutions spécialisées* (Paris, Pédone, 1954); K. Zemanek, *Das Vertragsrecht der internationalen Organisationen* (Vienna, Springer, 1957); P. Cahier, *Etude des accords de siège conclus entre les organisations internationales et les Etats où elles résident* (Milan, Giuffrè, 1959); J. W. Schneider, *Treaty-making Power of International Organizations* (Geneva, Droz, 1959); B. Kasme, *La capacité de l'Organisation des Nations Unies de conclure des traités* (Paris, Librairie générale de droit et de jurisprudence, 1960).

[34] For example, the numerous studies by C. W. Jenks, O. Schachter and S. Rosenne, particularly S. Rosenne's monumental work "United Nations treaty practice", *Recueil des cours... 1954-II* (Leyden, Sijthoff, 1955), vol. 86, p. 281.

[35] R. J. Dupuy, "Le droit des relations entre les organisations internationales", *Recueil des cours . . . 1960-II* (Leyden, Sijthoff, 1961), vol. 100, p. 457; P. Pescatore, "Les relations extérieures des communautés européennes—Contribution à la doctrine de la personnalité des organisations internationales", *Recueil des cours . . . 1961-II* (Leyden, Sijthoff, 1962), vol. 103, p. 1; F. Seyersted, *International personality of Intergovernmental Organizations—Its Scope and its Validity vis-à-vis Non-Members: Do the Capacities Really Depend upon the Constitutions?* Offprint from the *Indian Journal of International Law* (New Delhi), vol. IV, No. 1 (January 1964), p. 1, and No. 2 (April 1964), p. 233; and *Objective International Personality of Intergovernmental Organizations—Do their Capacities Really depend upon the Conventions Establishing Them?* (Copenhagen, Krohns, 1963), p. 3.

[36] Part of this work has been published in one volume (K. Zemanek, ed., *Agreements of International Organizations . . . (op. cit.)*) and part separately (K. Zemanek, *University of Toledo Law Review* (Toledo, Oh.), 1971, Nos. 1 and 2; T. Modeen, *The Deposit and Registration of Treaties of International Organizations*, Acta Academiae Aboensis, series A, vol. 39, No. 3 (Turku (Finland)), Åbo Akademi, 1971). As a study based on the work of the International Law Commission, we can cite L. Valki, "The juristic personality and treaty-making power of international organizations", *Questions of International Law, 1968* (Budapest), p. 285.

First, when the Commission originally took up the question of the law of treaties, and on several subsequent occasions, it hesitated between two opposing trends: the first was to include agreements concluded by international organizations in the draft articles on international treaties, while the second led the Commission, after a few tentative efforts, to restrict the immediate object of its work exclusively to treaties between States. On several occasions the Commission has hesitated between including and excluding agreements concluded by international organizations.

Secondly, perhaps because of these hesitations—and certainly because of the difficulty of establishing watertight divisions for such a subject—the International Law Commission has considered and discussed some of the most characteristic aspects of agreements concluded by international organizations.

For these two reasons it is necessary to review the work of the Commission.

1. The changing place of agreements concluded by international organizations in the draft articles on the law of treaties: from inclusion to exclusion

18. An initial expansion and restriction of the work of the International Law Commission occurred in connexion with Mr. Brierly's reports. In his first report, article 1 on the use of the term "treaty" provided that:

As the term is used in this Convention

(*a*) A treaty is an agreement recorded in writing between two or more States or international organizations which establishes a relation under international law between the parties thereto.[37]

Articles 2 and 3 likewise covered matters relating both to treaties between States and to agreements concluded by international organizations; in paragraph 26 of his report,[38] the Special Rapporteur said his opinion differed from that of the authors of the Harvard Draft Convention on the law of treaties in that he felt the difficulty of finding rules common to the treaties of States and to those of international organizations was not insuperable. After a short discussion, the Commission decided by a large majority to include agreements concluded by international organizations in its draft.[39] In its report the Commission referred to its decision;[40] the following year Mr. Brierly, in his second report,[41] restricted his study to treaties between States. At the Commission's 98th meeting, on 7 June 1951, he proposed, without any explanation:

that [the Commission] should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modification.[42]

The Commission adopted Mr. Brierly's proposal without discussion. There are two reasons that could justify that decision: the desire to facilitate the drafting, and the fear of coming up against difficulties of substance prematurely, if it turned out that the two kinds of treaties did not follow the same rules. In this situation the first reason seems to have been the main one; in any case on 7 June 1951 the previous decision to include forthwith agreements concluded by international organizations was reversed.

19. In article 1 of his first report[43] Sir Hersch Lauterpacht defined treaties so as to include agreements concluded by international organizations. The Special Rapporteur intended to draft the most general rules that could be applied equally to the two groups of treaties; however he also intended to write a part VII entitled "Rules and principles applicable to particular types of treaties",[44] containing any modifications that proved necessary. He saw no reason for treating the two separately and he was much impressed by the number and volume of agreements concluded by international organizations. However, it cannot be said that his position was different from that the International Law Commission was to adopt later, for the real scope of his intentions could have been revealed only if he had written part VII of his draft, which he never did.

20. The same development described above appeared for a second time in the work of the Special Rapporteur who succeeded Sir Hersch Lauterpacht, namely Sir Gerald Fitzmaurice. In his first report, submitted in 1956,[45] he stated that the provisions relating to treaties between States would be applicable, *mutatis mutandis*, to agreements concluded by international organizations unless the contrary was indicated or resulted necessarily from the context;[46] but that solution was regarded as a provisional one. A debate on this point at the 368th and 369th meetings[47] revealed that members of the Commission were more divided on the question of procedure than on the substance of the issue. The Commission eventually confirmed the position it had taken on 7 June 1951 by deciding:

first to deal with treaties among States and then to examine to what extent the articles were applicable to treaties concluded between international organizations and between them and States.[48]

21. The same situation developed for a third time in connexion with Sir Humphrey Waldock's reports. The initial definition given by the new Special Rapporteur in article 1 of his first report was very broad and applied to agreements between subjects of international law,[49] which covered *inter alia* agreements concluded by international organizations but he did not discard the idea of dealing with them in a separate chapter[50] although he did include

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[37] *Yearbook of the International Law Commission, 1950*, vol. II, p. 223, document A/CN.4/23.

[38] *Ibid.*, p. 228.

[39] *Ibid. 1950*, vol. I, p. 80, 51st meeting, para. 75.

[40] *Ibid., 1950*, vol. II, p. 381, document A/1316, para. 162.

[41] *Ibid., 1951*, vol. II, p. 70, document A/CN.4/43.

[42] *Ibid.*, vol. I, p. 136, 98th meeting, para. 1.

[43] *Ibid., 1953*, vol. II, p. 90, document A/CN.4/63.

[44] *Ibid.*, para. 1.

[45] *Ibid., 1956*, vol. II, p. 104, document A/CN.4/101.

[46] *Ibid.*, p. 107, document A/CN.4/101, article 1, para. 3.

[47] *Ibid.*, vol. I, p. 216, 368th meeting, para. 47 and pp. 219 *et seq.*; 369th meeting, paras. 6, 16, 23, 27, 32, 48, 57 and 66.

[48] *Ibid., 1959*, vol. I, p. 9, 481st meeting, para. 28.

[49] *Ibid., 1962*, vol. II, p. 31, document A/CN.4/144, article 1 (*a*).

[50] *Ibid.*, document A/CN.4/144, para. 11.

the definitions and the question of capacity in the provisions common to all agreements.[51] The International Law Commission approved this position at its meeting on 7 May 1962 [52] and in its report reaffirmed its previous decisions of 1951 and 1959:

To defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States.[53]

The Commission then discussed the articles on definitions and capacity, highlighting problems which will be considered later. After considering Sir Humphrey Waldock's second [54] and third [55] reports, the International Law Commission found itself faced with articles which, as the Secretary-General very pertinently remarked in the working paper already mentioned, could be divided into two categories: those which, if interpreted literally, could be applied to treaties concluded by any subject of international law having treaty-making capacity, and those—more numerous—which on account of their wording could be applied only to treaties concluded between States.[56]

22. Governments, however, in written observations (Finland and Netherlands) and orally in the Sixth Committee suggested that the last links connecting agreements concluded by international organizations with the draft articles, namely the provisions on definitions and capacity, should be severed.[57] In his fourth report,[58] Sir Humphrey Waldock interpreted the Commission's previous attitude in a very restrictive way and proposed that the last references to agreements concluded by international organizations still to be found in articles 1 and 3 should be deleted. The International Law Commission accepted the Special Rapporteur's suggestion without much comment; the basic point is that these agreements were not studied.[59]

23. That was the Commission's final decision; it had always entertained the same hopes and doubts and in the last resort decided, not without veiled regrets, to be cautious. But why did the Commission disregard its Special Rapporteur's proposal that a special chapter be devoted to the subject? Was it purely a question of time? Or was it the result of an undefined feeling that the problems were more extensive than they seemed at first sight and that on the whole they were not ready to be dealt with? It may be difficult to answer these questions, but the doubts that prompted them were voiced during the Sixth Committee's debates in 1966 [60] and 1967,[61] and the written observations submitted by some Governments on the final draft articles also referred to them.[62] In 1967 the Special Rapporteur gave the Sixth Committee an explanation of the International Law Commission's position based on drafting considerations: the draft articles should not be unnecessarily long or complicated; once the main section of the law of treaties, relating to treaties between States, was codified it would be simple to expand the text and amend it so that it could be extended to agreements concluded by international organizations.[63] However, some substantive difficulties have already arisen during the Commission's work.

2. Emergence of basic problems

24. Without claiming to exhaust the examples that could be drawn from the work of the International Law Commission, it must be pointed out that the Commission had on several occasions come up against difficult problems of substance relating to agreements concluded by international organizations; an account will be given here of two interesting cases dealing respectively with the treaty-making capacity of international organizations and with representation in the conclusion of treaties.

(a) *The capacity of international organizations*

25. This was discussed widely by the International Law Commission because Sir Humphrey Waldock, in his first report, proposed an article 3 on the capacity to become a party to treaties, reading as follows:

1. Capacity in international law (hereafter referred to as international capacity) to become party to treaties is possessed by every independent State, whether a unitary State, a federation or other form of union of States, and by other subjects of international law invested with such capacity by treaty or by international custom.

...

4. International capacity to become a party to treaties is also possessed by international organizations and agencies which have a separate legal personality under international law if, and to the extent that, such treaty-making capacity is expressly created, or necessarily implied, in the instrument prescribing the constitution and functions of the organization or agency in question.[64]

The Drafting Committee amended the text to read:

1. Capacity to conclude treaties under international law is possessed by States and by other subjects of international law.

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[51] *Ibid.*, p. 37, document A/CN.4/144, para. 6 of the commentary to article 3.

[52] *Ibid.*, vol. I, p. 47, 637th meeting, para. 28.

[53] *Ibid.*, vol. II, p. 161, document A/5209, para. 21.

[54] *Ibid.*, *1963*, vol. II, p. 36, document A/CN.4/156 and Add. 1-3.

[55] *Ibid.*, *1964*, vol. II, p. 5, document A/CN.4/167 and Add. 1-3.

[56] See A/CN.4/L.161, paras. 99 and 112.

[57] *Yearbook of the International Law Commission, 1966*, vol. II, pp. 291 and 313, document A/6309/Rev.1, part II, annex, sections 10 and 19; and *Official Records of the General Assembly, Seventeenth Session, Sixth Committee*, 741st meeting, para. 5.

[58] *Yearbook of the International Law Commission, 1965*, vol. II, p. 3, document A/CN.4/177 and Add.1 and 2.

[59] *Ibid.*, vol. I, pp. 3 *et seq.*, 776th and 777th meetings, and the final decision made at the 811th meeting (*ibid.*, p. 256, 811th meeting, para. 104). See also the report of the Commission (*ibid.*, *1966*, vol. II, p. 177, document A/6309/Rev.1, part II, chap. II, article 1).

[60] See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 84, document A/6516, paras. 43, 51 and 52.

[61] *Ibid., Twenty-second Session, Annexes*, agenda item 86, document A/6913, para. 16 *et seq.*

[62] See A/CONF.39/5 (Vol. I).

[63] See *Official Records of the General Assembly, Twenty-secon Session, Sixth Committee*, 964th meeting, paras. 1-14.

[64] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 35 and 36, document A/CN.4/144, article 3.

...

4. In the case of international organizations, the capacity to conclude treaties depends on the instrument by which the organization concerned was constituted.[65]

The Drafting Committee subsequently further amended paragraph 4 to read:

4. In the case of international organizations capacity to conclude treaties depends on the constitution of the organization concerned.[66]

26. The Commission's discussion covered several important problems: the need to define the term "international organization", the extent to which third States were obliged to recognize the capacity of the international organization, and, above all, the sources of this capacity; this last topic will require more detailed consideration.

The problem of defining international organizations arose as a direct result of the view expressed by several members of the Commission that international organizations did not all have the same degree of international capacity, and that it was not even certain that all organizations had that capacity.[67] Accordingly, it was necessary to select a specific level of capacity and to define the organizations which possessed capacity at that level.

The question of the extent to which third States were obliged to recognize the capacity of an organization arose because the International Court of Justice had given an opinion stating that the United Nations possessed *objective* international personality.[68] According to that opinion the United Nations was an international person and could bring an international claim against States which were not Members. But could that conclusion be extended to cover any international organization and any field? The validity of such extension, particularly to organizations composed of only a few States, was denied in the Commission.[69] It was difficult to dismiss that problem, for States incontestably have a much more definite and more extensive international capacity than international organizations, and yet it has never been acknowledged in international practice that a State possesses international personality with regard to other States unless it has been recognized by them.

27. However, the International Law Commission naturally spent the most time on the question of the *sources* of the international capacity of organizations. The question was put the following way: is the right of an international organization to conclude a treaty inherent in its status as an international organization, or must it derive from a special legal rule for each international organization? It was tempting to choose the first alternative; but, as has been said, that meant taking an approach requiring great precision. Since it can hardly be denied that there are entities called "intergovernmental international organizations" which do not possess international personality, the term "international organization" must be defined in the terms of the rule being laid down. If, furthermore, it is agreed that all organizations with treaty-making capacity do not have it to the same degree, it will be necessary to define at least a "minimum capacity" which will be possessed by all organizations thus defined, even if it is also established that some have more capacity than others.[70] From the very beginning of its work the Commission tended to have reservations about any formula which was unduly broad in scope. The first formula, in Mr. Brierly's first report (article 3, entitled "Capacity in general") read:

All States and international organizations have capacity to make treaties, but the capacity of some States or organizations to enter into certain treaties may be limited.[71]

This was changed as follows when an amendment submitted by Mr. Hudson was adopted without discussion:

An international organization may be endowed with the capacity to make treaties.[72]

In its report on its second session, the Commission summarized its position on this issue as follows:

There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration.[73]

28. In his first report, however, Sir Hersch Lauterpacht adopted a wider concept of the treaty-making capacity of international organizations,[74] although this attitude was perhaps qualified by his view that the international organization is simply a means of collective action by States; this view will be referred to later.[75] These doubts were again expressed in the International Law Commission when it was considering Sir Humphrey Waldock's draft article 3, and seeking in vain to agree on the versions

[65] *Ibid.*, vol. I, p. 193, 658th meeting, para. 87.

[66] *Ibid.*, p. 240, 666th meeting, para. 16.

[67] *Ibid.*, p. 193, 658th meeting, para. 90 and pp. 240 and 241, 666th meeting, paras. 17 and 20.

[68] See para. 14 above.

[69] *Yearbook of the International Law Commission, 1962*, vol. I, p. 58, 639th meeting, para. 17. Mr. Jiménez de Aréchaga spoke of the problem of recognition, and Mr. Tunkin and Mr. Bartoš (*ibid.*, p. 60, 639th meeting, para. 47), felt that they had to stress that point, deriving from the fact that treaties, even if they were constituent instruments, had no effect as far as third parties were concerned (*ibid.*, p. 241, 666th meeting, paras. 24, 25 and 31). Moreover, the Japanese Government in its observations also pointed out that article 3 "does not refer to the other element of international capacity to conclude international agreements—the requirement of recognition of such constitutional capacity by the other contracting party or parties concerned" (*ibid., 1966*, vol. II, p. 302, document A/6309/Rev.1, part II, annex, section 14, observations on article 3).

[70] In any case the provisions of the treaty, which have decisive force in establishing who can become party to it, must also be taken into account; this point was highlighted in Sir Hersch Lauterpacht's first report: article 7, para. 2 provides that: "Accession is admissible only subject to the provisions of the treaty" (*Yearbook of the International Law Commission, 1953*, vol. II, p. 91, document A/CN.4/63).

[71] *Ibid., 1950*, vol. II, p. 223, document A/CN.4/23.

[72] *Ibid., 1950*, vol. I, p. 88, 52nd meeting, para. 72.

[73] *Ibid.*, vol. II, p. 381, document A/1316, para. 162.

[74] Sir Hersch Lauterpacht was apparently in favour of considerably extending the conclusions of the analysis of the International Court of Justice regarding the United Nations: "The capacity to conclude treaties is both a corollary of international personality and a condition of the effective fulfilment of their functions on the part of the international organizations." (Quoted in A/CN.4/L.161, p. 28, para. 32.)

[75] See para. 39 below.

quoted above.[76] The problem of the sources of the international capacity of international organizations was for a long time a stumbling block for the Commission. From the very beginning the Special Rapporteur had linked the capacity of the organization to its constitution, whether the capacity was expressly created or necessarily implied in that instrument. He thus rejected the concept of an inherent right, and although the terms "constitution", "constituent instrument" and "statute" implied slight differences in meaning, they did not affect the basic conclusion.

The various formulations used in the Commission reflected an attempt to describe a situation which, in the view of all members, was characterized by two elements:

The competence of an international organization to conclude international agreements was limited, in principle by its constitutional rules.

This competence was not necessarily limited by its written constitutional rules.

The aim was to find a formulation that would embody, in the most felicitous way, the results of a practice which had often enlarged the provisions of the constituent instruments, but to do so without being arbitrary or controversial. However, the long discussions during the meetings at which the problems of federalism and international organizations were considered together did not give any great impression of unanimity or even of clarity.[77] The members of the Commission could not decide whether to adopt precise wording or simply to use a very general formula. The Special Rapporteur's justification of the version finally adopted was reported as follows in the summary record of the 666th meeting:

The expression "the constitution of the organization concerned" had been chosen because it was broader than "constituent instrument"; it covered also the rules in force in the organization. In most organizations, the treaty-making capacity had been limited by the practice instituted by those who had operated the organization under its constitution.[78]

29. The Commission's doubts were reflected in the vote on draft article 3, paragraph 4, relating specifically to international organizations: it was adopted by 9 votes to 8. The Commission's report, while devoting considerable attention to the 1949 advisory opinion of the International Court of Justice and stressing, in accordance with a formula used throughout the draft, the importance of the subject and aim of the treaty establishing the organization, none the less summarized the Commission's position in the following terms:

Accordingly, important although the provisions of the constituent treaty of an organization may be in determining the proper limits of its treaty-making activity, it is the constitution as a whole—the constituent treaty together with the rules in force in the organization—that determine the capacity of an international organization to conclude treaties.[79]

30. The question of the treaty-making capacity of international organizations was considered by several Governments in their observations in 1965, and Austria, in a rather liberal spirit, took a position in favour of very broad competence for international organizations, as the following extracts show:

... capacity to conclude treaties must be an inherent right of any international organization, if it is at the same time a subject of international law.

... the constitutions of many international organizations do not mention the question of the capacity of the organization in question to conclude treaties. In most of these cases, however, the organs of the organization in question have considered themselves competent to conclude treaties on behalf of the organization ... If, on the other hand, the constitutions do contain provisions concerning the conclusion of treaties, they either relate to the question which organs are competent for the purpose—in which case they are of a procedural nature—or limit the extent of *freedom* to conclude treaties, which in principle is all-embracing, by stipulating that only treaties on certain subjects are permitted.[80]

31. The United States, more cautious, likewise quoted the 1949 opinion of the ICJ; but its main request was for a change in wording whereby "constitution" would be replaced by a less limiting word, for example "authority"; the United States Government also suggested that article 3, paragraph 3, should be worded "so that its meaning would be clear without reference to the commentary. It would be desirable, for example, to be more specific as to what 'international organizations' are being referred to".[81]

32. Following these comments, the Special Rapporteur proposed that the article on capacity to conclude treaties should be deleted.[82] That proposal quickly won general support without giving rise to any important comments, with the exception of those made by Mr. Lachs, who expressed opposition to the concept of an inherent right of international organizations to conclude treaties but seemed to be in favour of a flexible interpretation of the source of the capacity of organizations.[83] The question

[76] See para. 25 above.

[77] The discussion took place at the 639th, 640th, 658th and 666th meetings (see *Yearbook of the International Law Commission, 1962*, vol. I, pp. 57 *et seq.*, 64 *et seq.*, 187 *et seq.* and 239 *et seq.*); the theory of the functional competence of the organization was shown to be a basis both for extending and restricting the competence of the organization.

[78] *Ibid.*, p. 242, 666th meeting, para. 39.

[79] *Ibid.*, *1962*, vol. II, p. 164, document A/5209, chap. II, II, para. 4 of the commentary to article 3.

[80] *Ibid.*, *1966*, vol. II, p. 281, document A/6309/Rev.1, part II, annex, section 3, 3.

[81] *Ibid.*, pp. 346 and 347, document A/6309/Rev.1, part II, annex, section 9, comments on article 3.

[82] *Ibid.*, *1965*, p. 18, document A/CN.4/177 and Add.1 and 2, observations and proposals of the Special Rapporteur on article 3; and *ibid.*, vol. I, p. 23, 779th meeting, paras. 3 and 7.

[83] *Ibid.*, vol. I, p. 24, 779th meeting, paras. 23 and 26. The comments of Mr. Lachs are summarized as follows in the summary record of the meeting:

"The right to conclude treaties could be an inherent right or a delegated right. States had an inherent right; an international organization could have the right to conclude treaties conferred upon it by States." (*Ibid.*, para. 26).

"the ... treaty-making power of an international organization could be derived from any of three sources. The first, which was the only one mentioned in paragraph 3, was the constitution of the organization. The second was interpretation and practice, which gave rise to a customary rule; capacity was in that case acquired by virtue of the development of the law of an international organization, even if there was no constitutional provision on the subject. The third possibility was that the organization could acquire treaty-making power by virtue of a decision of one of its organs." (*Ibid.*, para. 23.)

of the capacity of international organizations to conclude treaties was thus definitively dropped from the draft articles and the Commission's debates.[84]

33. The discussion had, however, brought to the fore a problem, of even greater magnitude than that of capacity, which by reason of its capital importance deserves further consideration at this point: namely the problem of the law of each international organization.

The Commission came up against this problem on several occasions, in particular when seeking to determine the place to be accorded in the draft articles to treaties between States establishing an international organization or treaties between States adopted in or under the auspices of an international organization, a question to which we shall revert later. However, this problem arose directly with regard to the capacity of organizations in connexion with the choice between the theory that organizations possess inherent rights and the theory that they possess only the powers delegated to them by States.

If the concept of inherent rights had been chosen, it would nevertheless have been necessary to formulate a *general* rule on that subject. If, on the contrary, that concept had been rejected in favour of the view that the capacity of international organizations derives from delegation by the States members of the organization, it follows that this delegation is variable and has a content proper to each international organization. Hence, international capacity, like the other powers of the organization, involves a law which is proper to the organization concerned, no matter what term is used to designate it—special international law, internal law of the organization and so on—and at first sight, at least, there are no rules common to all organizations on international capacity or any other subject.[85]

34. At that point the scope and great practical importance of the problem became apparent: how could a general rule on a question concerning international organizations be formulated when each organization has its own special set of rules? The Commission is now thoroughly familiar with this problem, which arises as soon as an attempt is made to codify the rules which call in question on any point the juridical régime of international organizations. At the time of the discussion the problem was perhaps made even more sensitive by the concurrent debate on federal structures at the seventeenth session of the Commission.[86] In seeking to formulate a rule on treaty-making capacity within a federal structure which would make it possible to distinguish between the elements which derive from the constitutional law of that structure and those which derive from general international law, the Commission was faced with a problem similar to that relating to the international capacity of organizations. With regard to federal structures, the Commission finally lent its support to the idea that there was indeed a rule of general public international law on that subject, but that under that rule each federal constitution had full competence to distribute capacity to conclude international treaties between the federation and its member States.[87] This rule of general public international law became article 5, paragraph 2 of the final version of the draft articles; the Vienna Conference deleted the provision at its second session after a long and difficult discussion.[88] But the position defined in article 5, paragraph 2 implied *a fortiori* that the provision was also applicable to international organizations and that it was the law of each organization which governed the question of international capacity; that consequence was stressed during the debate.[89]

35. Nevertheless, the wording of article 3 relating to the capacity of international organizations remains somewhat awkward, since the term "the constitution of the organization" [90] did not seem clear to all Governments. The Commission would certainly have had to remedy that defect if it had not decided to omit the question of the international capacity of organizations from the draft articles. As already noted, it did in fact come up against the problem of the law of the organization when seeking to safeguard that law while at the same time subjecting it to the rules of the draft treaties which are constituent instruments of international organizations or which are adopted within international organizations. As is well known, such treaties were brought within the scope of the draft articles by article 4 (which became article 5 in the Vienna Convention) "subject to any relevant rules of the organization".[91]

It was this sober and elegant expression which was finally used to designate the law of each organization. If the reservation thus formulated applies to a special type of treaty between States (treaties which are constituent instruments of international organizations or which are adopted within international organizations) it is applicable *a fortiori* to agreements to which an organization is a party, for the law of the organization is clearly more directly involved in such a treaty than in treaties adopted by States within the organization. It may thus be concluded from this long analysis that the reservation "subject to any relevant rules of the organization" is a minimum requirement for any general provision designed to codify the law of international organizations.[92]

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[84] *Ibid.*, p. 31, 780th meeting, para. 16.

[85] The term "internal law" was used, concurrently with other terms, in the course of the Commission's work, seemingly without any particular import being attached to it.

[86] In particular at the 778th, 779th and 780th meetings (see *Yearbook of the International Law Commission, 1965*, vol. I, pp. 16 *et seq.*

[87] This point was explained very clearly by Mr. Bartoš (*ibid.*, p. 29, 779th meeting, para. 83).

[88] 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), pp. 6-10, 7th meeting, paras. 34-80, and pp. 10-16, paras. 1-55.

[89] *Yearbook of the International Law Commission, 1965*, vol. I, p. 25, 779th meeting, para. 34.

[90] *Ibid., 1962*, vol. II, p. 164, document A/5209, chap. II, II, article 2.

[91] *Ibid., 1966*, vol. II, p. 178, document A/6309/Rev.1, part II, chap. II, article 4.

[92] We shall revert later to the explanation given on this point in connexion with the draft articles on the representation of States in their relations with international organizations. Article 3

(Continued on next page.)

36. The wording of this reservation, i.e. "subject to any relevant rules of the organization", seems to have been accepted at the time by the International Law Commission without any real difficulties, for it was proposed by the Drafting Committee and was neither explained nor discussed.[93] Not until later, following the observations of the organizations concerned, did the question arise whether a reservation encompassing only the pertinent *rules* of the organization would suffice to safeguard the autonomy of the organizations in question; this is an important point which we shall examine in connexion with the Conference on the Law of Treaties.

(b) *The question of representation*

37. As has already been noted on several occasions, the International Law Commission, in its codification work, cannot include unduly theoretical notions in the texts it prepares for the use of Governments, judges, administrators and practitioners. Concepts such as "subject of law", "juridical personality" or "representation" are undoubtedly highly abstract and hence give rise to recurring controversy.[94] However, the importance attached both by the Commission and by Governments to the advisory opinion given in 1949 by the International Court of Justice on reparation for injuries suffered in the service of the United Nations is a good example of the role played by certain principles, which exert a decisive influence on the development of practice. The question whether an international organization, in concluding, treaties really acts as an entity distinct from its States member is one such principle.

38. At first sight, the question appears to have been settled very clearly by legal writers, by court decisions and by practice. When, for example, the United Nations concludes an agreement, it does so in its own name and not in the name and on behalf of another entity. This is, however, a formal and abstract view of the matter. It would be difficult to imagine an absolute separation between the juridical personality of the organization and the personalities of its members, whatever the circumstances. No legal system in the world provides for such separation between the personality of commercial companies and the personalities of their members; why should the situation be different for international organizations, whose sociological foundations are still rather superficial? International law cannot separate the juridical personality of an organization from the personalities of its members in a general and absolute manner. This is a very general observation and we shall subsequently have occasion to refer to some of its consequences, which are recognized by the law currently in force.

This problem, which the Commission has already encountered several times in the course of its existence, may be posed in many ways. One of the most interesting is to place it within the context of representation: to what extent does an international organization, in concluding a treaty, represent its member States? In order to retain the relative unity of the matter as a whole, and subject to the essential distinctions which will be introduced subsequently, it must be understood that in this formulation of the question the term "represent" should be interpreted in the broadest possible sense.

39. The International Law Commission seems to have been seized of this problem twice, in very different conditions: first in a report by Sir Hersch Lauterpacht, which it did not consider, and secondly in a proposal by Sir Humphrey Waldock, which it did not adopt.

In his first report, Sir Hersch Lauterpacht used the following wording: "Treaties are agreements between States including organizations of States . . .".[95] This wording is somewhat unusual,[96] but when used by such an eminent jurist it cannot be the result of improvisation; elsewhere in the same report he classified treaties between States and the agreements concluded by international organizations in a more general category which he termed "the collective activities of States", using this as an argument in favour of submitting them to the same rules.[97] Although the Special Rapporteur gave no explanation on this point, there is no indication that he was unaware of the fact that above and beyond juridical forms, all treaty commitments are governed by the same political reality, that of States, and that there is nothing to prevent formal juridical concepts from being tempered, where appropriate, by social realities.

40. However, Sir Hersch Lauterpacht was not the only person to express himself in this way; similar views were for a long time expressed by many writers and in parti-

(Foot-note 92 continued.)

of this text deals with the reservation concerning the relevant rules of the organization, while article 4 adds a reservation relating to international agreements which have already been concluded or may be concluded in the future, including agreements between States and international organizations. (*Ibid., 1971*, vol. II (Part One), p. 284, document A/8410/Rev. I, chap. II, D.)

[93] The expression "established rules of the organization concerned" (*ibid., 1963*, vol. II, p. 213, document A/5509, chap. II, B, article 48) was thus replaced successively by "rules of the organization in question" (*ibid., 1965*, vol. II, p. 160, document A/6009, chap. II, B, article 3 *bis*) and by "any relevant rules of the organization" (*ibid., 1966*, vol. II, p. 178, document A/6309/Rev.1, part II, chap. II, article 4), although these changes of wording do not seem to imply any weakening of the idea of the "*established* rules". At the 887th meeting it was merely observed that "it would be noted that the new formulation provided the necessary saving clause to cover cases when there was no relevant rule". (*Ibid., 1966*, vol. I, part II, p. 294, 887th meeting, para. 80.)

[94] See in this connexion the comments of the Secretary of the Commission at the 639th meeting (*ibid., 1962*, vol. I, p. 63, 639th meeting, para. 70).

[95] *Ibid., 1953*, vol. II, p. 90, document A/CN.4/63, article 1.

[96] In 1956, the Secretary of the Commission expressed reservations about a form of wording which in his view did not draw a sufficient distinction between distinct entities (*ibid., 1956*, vol. I, pp. 225-226, 369th meeting, para. 66).

[97] " . . . it would seem desirable to direct political and juristic effort to making available, in the interest of the progressive integration of international society on a functional basis, the experience of the law of treaties to the collective activities of States in their manifold manifestations." (*Ibid., 1953*, vol. II, p. 96, document A/CN.4/63, para. 3 of the comment on article 1). In his edition of L. Oppenheim (*op. cit.*, para. 494 *a*), p. 883) Lauterpacht observed "States can exercise their capacity to conclude treaties either individually or, when acting collectively, through public international organizations—i.e. organizations of States created by treaty".

cular, until about 1958, by most Soviet writers.[98] This view may have important consequences, particularly with regard to the effect of an international agreement concluded by an organization on the latter's member States, a question to which the Commission subsequently devoted its attention.

Since the Commission did not consider the report by Sir Hersch Lauterpacht it did not express any view on the formulation he used to qualify the agreements concluded by international organizations. However, it subsequently faced the same question in a very technical and concrete form in connexion with the proposals submitted by Sir Humphrey Waldock in his third report.[99]

41. The Special Rapporteur had observed, first, that a treaty could become applicable to a territory of a State even if the latter was not itself a party to the treaty and he had tried to establish in his draft article 59 the conditions in which such a result might occur. In the first case, according to the Special Rapporteur, the operation was based on the principle of the territorial extension of the treaty. The examples given in the commentary involved international organizations. Secondly, the Special Rapporteur changed to a slightly different ground in considering cases involving a problem of representation; according to him, this problem arose when a State concluded a treaty on behalf and in the name of another State and when an international organization concluded a treaty with a non-member State in the name both of the organization and of its member States; those cases were dealt with in draft article 60.[100]

Technical and political considerations prevented the International Law Commission from considering the cases dealt with in draft articles 59 and 60 proposed by the Special Rapporteur, and the problems raised by those draft articles were not dealt with in the final version of the draft articles or in the 1969 Convention on the Law of Treaties. However, the Special Rapporteur's proposals and the discussion to which they gave rise touched upon—sometimes almost in a prophetic manner—some of the basic problems concerning agreements concluded by international organizations.

42. A.—First of all, in draft article 29, the Special Rapporteur posed the principle that provision should be made for cases in which a treaty could be applied to the territory of a State without the latter being a party to the treaty in question. In addition to the political considerations which prompted some members of the Commission to adopt the view that it would be inadvisable to retain such a principle, a technical objection was raised, namely how could a State be bound by a treaty without becoming a party to it?[101] Since this discussion took place it has become clear that it would be possible and useful to consider that a subject of international law might be bound by a treaty without being a party to it; this is particularly true in the case where the subject of international law concerned is an international organization. The organization would be bound by the rules laid down in a treaty without being a party to it if it agreed, in a capacity other than that of party, to be bound by those rules. This was the machinery provided for in various conventions concerning space law, including the Agreement of 19 December 1967 on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space[102] and the Convention of 29 November 1971 on International Liability For Damage Caused by Space Objects.[103] These texts provide that the rules which they formulate shall be extended to international organizations which fulfil certain conditions and declare their acceptance of the rules, without becoming parties to the treaty. This is only one of the devices which makes it possible to extend to international organizations the rules laid down in a treaty to which they are not parties. Such a system, however, has important implications: it opens up new prospects concerning the position of subjects of international law with regard to a treaty. There is traditional concept of the "party" to a treaty which was retained in the draft articles and subsequently in the Vienna Convention on the Law of Treaties (article 2, paragraph 1 (*g*)). This concept is no doubt suitable for normal situations in relations between States, although even there it has not been shown that it is appropriate in every case, but it has already been demonstrated that it does not permit the successful solution of all problems raised by the relations between international organizations and treaties. Draft article 59 proposed by Sir Humphrey Waldock had the merit of opening up—perhaps prematurely—new and practical prospects.

43. B.—One point emerged clearly from the texts proposed and the discussions to which they gave rise: a subject of international law many enter into a commitment on behalf and in the name of a person. Various examples were cited. Even if the juridical machinery brought into play by such an operation is somewhat uncertain, even if the analyses of it retain the imprint of the great diversity which reigns among the municipal laws of the various countries with regard to similar institutions, it must be acknowledged that there is room in international law for wide recourse to *representation*. What is the relationship between representation and the agreements con-

[98] This was the view held by D. Anzilotti (*op. cit.*, pp. 190 and 283). Soviet writers such as L. A. Modzhoryan, (*Subyekty mezhdunarodnogo prava* (Moscow, Gossudarstvenoye Izdatelstvo Yuridicheskoï Literatury, 1958)) and V. M. Shurshalov (*Osnovnye voprosy teorii mezhdunarodnogo dogovora* (Moscow, 1959), have analysed agreements concluded by international organizations as being concluded by delegation by States. See also L. Valki, *loc. cit.*, p. 255.

[99] *Yearbook of the International Law Commission, 1964*, vol. II, p. 5, document A/CN.4/167 and Add.1-3.

[100] *Ibid.*, pp. 15 and 16, document A/CN.4/167 and Add.1-3 (article 59 and commentary) and pp. 16 and 17 (article 60 and commentary).

[101] "Thus the concept of being bound by a treaty was an integral part of the concept of being a party to a treaty." (*Ibid.*, vol. I, p. 55, 732nd meeting, para. 24.)

[102] General Assembly resolution 2345 (XXII), annex.

[103] General Assembly resolution 2777 (XXVI), annex. At the 733rd meeting of the Commission, Professor Tunkin alluded to the work which finally resulted in the Convention (*Yearbook of the International Law Commission, 1964*, vol. I, p. 62, 733rd meeting, para. 21).

cluded by international organizations? The Commission's debates do not, perhaps, permit a precise answer to this question, but they have at least posed the problem. Now that treaties between States are governed by the Vienna Convention on the law of Treaties, a simple question immediately comes to mind: which system of rules, those of the Vienna Convention or the rules relating to agreements concluded by international organizations, would govern a treaty concluded between a State and an international organization acting on behalf and in the name of another State? The problem of the juridical nature of such treaties was raised in 1964 in the International Law Commission; these treaties are not figments of the imagination, for examples do exist, and the Commission should once again turn its attention to this question.

44. C.—What obligations are imposed on the States members of an international organization by reason of the agreements concluded by that organization? This difficult and important question, which has already been mentioned several times, was raised expressly during the debate on articles 59 and 60.[104] The adoption of a very formal position with regard to the distinction between the personality of the States members of an organization and the personality of the organization itself would at this point entail the application of a fundamental principle of the law of treaties, according to which treaties have no effect on third parties. But how could this principle be applied, generally and strictly, to the relations between the organizations and its own members? This question, which probably requires qualified answers, has not attracted much notice; the discussion in the International Law Commission performed a service by drawing attention to it.

45. These are some of the aspects of the problem of agreements concluded by the international organizations which have already been mentioned in the Commission. They are difficult, and there are others which we shall have occasion to mention later. Those which have just been outlined will suffice to show that the Commission and its Special Rapporteur perceived from the beginning that bringing international organizations within the scope of the law of treaties would entail not only drafting problems but also entirely new difficulties. This demonstrates both the wisdom of the Commission to defer consideration of the régime applicable to such agreements and the scope of the work still to be done by the Commission.

Part II. — The United Nations Conference on the Law of Treaties and its results

1. Basics facts

46. The Commission's report on the work of its eighteenth session was considered by the Sixth Committee of the General Assembly at two sessions and led the General Assembly to adopt, in 1966 and 1967, two resolutions which gradually established the manchinery for the United Nations Conference on the Law of Treaties.[105] Governments thus had the opportunity to express their opinions orally during the debates in the Sixth Committee. Furthermore, they were invited, in paragraph 9 of General Assembly resolution 2166 (XXI), to submit written comments not later than 1 July 1967. In the following year, the General Assembly in resolution 2287 (XXII), invited States participating in the Conference to submit their additional comments and draft amendments not later than 15 February 1968. In resolution 2166 (XXI), the Assembly also invited the Secretary-General and the Directors-General of those specialized agencies which acts as depositaries of treaties to submit their written comments. In fact, in addition to comments from States, observations were received from the Secretary-General of the United Nations, the ILO, FAO, WHO, ITU and IAEA,[106] and later from ICAO and (in two parts) from IBRD, as well as from BIRPI, the Asian-African Legal Consultative Committee, the Council of Europe and OAS.[107]

In accordance with paragraph 6 of resolution 2166 (XXI), in which the Assembly invited the specialized agencies and the interested intergovernmental organizations to send observers to the Conference, the debates at the Conference gave an opportunity to hear, in addition to the government delegates, the observers for the international agencies and, in particular, those for ILO and IBRD.[108] It is well known that the highlight of the debates so far as the subject matter of this report is concerned was the taking of a definitive decision on the scope of the articles submitted to the Conference. By deciding that the Convention under discussion would apply to treaties which were the constituent instrument of an international organization and to those adopted within an organization, but only "without prejudice to any relevant rules of the organization" (article 5 of the Vienna Convention on the Law of Treaties),[109] the Conference adopted a decision of considerable importance, not only because it allayed the strongest apprehensions of the international organizations, which had prompted most of their comments, but also because it represented a solemn undertaking for the future in respect of agreements concluded by the international organizations

[104] At the 733rd meeting of the Commission, Professor Tunkin stated: "Where an international organization entered into a treaty, there would always be the problem of responsibility for the treaty with regard to both the organization and the member States" *(ibid.)*.

[105] *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 84, document A/6516 and *ibid., Twenty-second Session, Annexes*, agenda item 86, document A/6913.

[106] *Ibid.*, agenda item 86, pp. 13 *et seq.*, document A/6827 and Add.1 and 2.

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

[108] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No.E.68.V.7), p. 33, 6th meeting of the Committee of the Whole, para. 24 (IBRD); p. 36, 7th meeting, para. 2 (ILO); p. 42, 8th meeting, para. 1 (FAO); p. 47, 9th meeting, para. 11 (Council of Europe); p. 48, 9th meeting, para. 22 (League of Arab States) and para. 25 (BIRPI).

[109] Hereafter referred to as the "1969 Convention" (*ibid., First and second sessions, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 290.

themselves. It is worth repeating that it would hardly be acceptable to establish for agreements concluded by the organizations themselves a régime less liberal than that applying to treaties which are the constitutent instruments of organizations or to treaties adopted within organizations. Similarly, the provisions of the 1969 Convention on treaties establishing an international organization or treaties adopted within international organizations concern, in relation to points of detail, questions of principle which also arise in respect of agreements concluded by such organizations.

47. With regard to these agreements, the discussion was based principally on amendments to the effect that the Committee's final proposals should be rejected and that such agreements should be made subject to the régime of the future Convention by revising its text and adding the necessary special provisions.[110] Although those amendments were finally rejected, they none the less had two results: they gave an opportunity for further discussion of the matter, and, following a compromise, they led to the adoption of a resolution of the Conference in which it:

... *Recommends* to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the questions of treaties concluded between States and international organizations or between two or more international organizations.[111]

It was on this basis that the Sixth Committee studied the above-mentioned resolution [112] at the twenty-fourth session of the General Assembly and adopted a draft resolution to the same end which the General Assembly adopted as resolution 2501 (XXIV).[113] Pursuant to that resolution, the International Law Commission, at its twenty-second session, included the question in its general programme of work and set up a Sub-Committee to consider preliminary problems involved in the study of this new topic. After considering and adopting at its twenty-second session a preliminary report by this Sub-Committee,[114] the Commission at its twenty-third session took note of a working paper, prepared by the Secretary-General at the Commission's request, which contained a short bibliography, a historical survey of the question, and a preliminary list of the relevant treaties published in the United Nations *Treaty Series*.[115] During the same session, the Sub-Committee met twice and submitted to the Committee a report containing a summary of the views expressed by members of the Sub-Committee in response to the questionnaire prepared by its Chairman, to which were annexed the questionnaire and the complete texts of the individual replies.[116] The report was studied and adopted without change by the International Law Commission.[117] General trends became clear on certain important points and they remain valid today: they will serve to guide the work of the Commission and its Special Rapporteur. The Sixth Committee approved the work of the International Law Commission on this item. In particular, the Committee, in the draft resolution it approved, invited the Assembly to recommend that the International Law Commission:

Continue its consideration of the question of treaties concluded between States and international organizations or between two or more international organizations.

The General Assembly adopted this recommendation.[118]

48. The above remarks constitute the background to the present report. It none the less seems necessary to add details of the results of the work which preceded the preparation of *the draft articles on the representation of States in their relations with international organizations.* Those articles constitute the first draft prepared by the International Law Commission in which the law of international organizations is the principal subject. On that occasion the Commission had of necessity to take a position on certain very general matters, such as the scope of the draft, the notion of an international organization, and the relationship between the rules in the draft and the internal rules of each organizations concerned. Questions of a similar nature will inevitably arise in connexion with any draft on agreements concluded by international organizations. But the main question raised and discussed was that of the form under which the draft articles on representation of States could be binding upon the organizations to which they refer; that is a question which is *very closely linked with that of the agreements concluded by international organizations.* Thus subsequent work on the latter subject will have to include mention of certain comments made on the first point.

2. The opinion of Governments and international organizations

49. As early as 1966, again in 1967 the representatives of Governments became divided into two groups, both influenced by a complex of contradictory considerations; but differing in the importance which they attached to each individual consideration. It was felt on the one hand that it would be wise to limit the Convention to treaties between States, and on the other that it would be regrettable not to include international agreements which were continually increasing in both numbers and importance in the régime of a future convention. The

[110] *Ibid.*, p. 110, document A/CONF.39/14, para. 24 (*b*), (*d*) and (*e*).

[111] *Ibid.*, p. 285, document A/CONF.39/26, annex, resolution relating to article 1 of the Vienna Convention on the Law of Treaties.

[112] *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1103rd to 1111th and 1119th meetings, and *ibid., Annexes*, agenda items 86 and 94 (*b*), document A/7746, paras. 109-115.

[113] *Ibid.*, para. 118.

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

[115] A/CN.4/L.161 and Add.1 and 2.

[116] See *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 185, document A/CN.4/250.

[117] *Ibid.*, vol. I, p. 287, 1129th meeting, para. 52.

[118] General Assembly resolution 2780 (XXVI). See also *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1255th to 1265th to 1280th meetings, and *ibid., Annexes*, agenda item 88, document A/8537.

developing countries were alert to the importance of such agreements in the sphere of assistance; the United States was concerned about agreements concluded by IAEA for the control of fissionable products.[119]

50. The problem was to recur for the last time in 1968 in the Committee of the Whole of the Conference on the Law of Treaties with the amendments of the United States and Viet-Nam, which sought to extend the scope of the draft Convention to all agreements concluded between two or more States or other subjects of international law; this was aimed specifically at agreements concluded by international organizations.[120] Before being withdrawn, the amendments were the subject of a long discussion in the Committee of the Whole.[121] A great many views were submitted on that occasion by the various Governments.[122] The most interesting question raised related to the following point: does the adaptation of the text of the draft articles to cover agreements concluded by international organizations involve merely questions of drafting, or more delicate questions of substance, which require thorough investigation? To answer that question the United States proposed the establishment of a working group which would comprise, in addition to delegates, representatives of selected international organizations, and would operate within the framework of the Conference. The United States felt, however, together with the States which supported its proposal, that the question was mainly one of drafting. Those who were opposed to the extension of the scope of the draft articles made certain detailed comments which is of interest to note here. Some representatives asserted that the question of agreements concluded by international organizations was not ripe for codification.[123] For others, agreements concluded by international organizations had many special characteristics:[124] not only was the process by which they were drawn up different, but they were not of the same nature.[125] A further source of difficulty lay in the profound differences that existed between one organization and another;[126] moreover, the changing practice of organizations tended to depart from the traditional rules applicable to relations between States.[127] Going further into the technical problems, some speakers pointed out that the juridical personality of international organizations was involved; their competence and their power to conclude international agreements were always confined to and depended closely, on their purpose and functions as set out in their constituent instruments.[128] Moreover, the question of the procedures by which rules relating to agreements concluded by international organizations could be implemented in such a manner as to be binding on those organizations raised difficult problems.[129] Reference was made to a question which had already been raised in the International Law Commission and which, as will be seen below, was to lead to an amendment of the draft articles, namely the question of agreements known as "trilateral" agreements because they are concluded between two States A and B and an organization C.

51. The most valuable comments, were however, those submitted by the international organizations and they deserve careful study. The international organizations had in mind two contradictory concerns: on the one hand, a strong desire to see the same juridical régime applied to treaties between States and to agreements concluded by international organizations, and on the other hand the desire to avoid confining the creative freedom of international organizations within rules which would not be fully adapted to their needs as those needs became progressively clearer with the development of their activities. There is no lack of justification for the first point: when rules are too diversified, their authority is diminished by their very multiplicity, and in many cases it is difficult to distinguish between their respective areas in which they apply; for example that is the case when one attempts to determine the régime to be applied to treaties concluded between more than one State and an international organization.[130] But the dominant feeling was one of fear lest a process of change essential for the future of the organizations be interrupted. This last concern was forcefully revealed in connexion with a question which the Conference settled by deciding to make the draft article under discussion applicable to the constituent treaties of an international organization and to treaties concluded within such an organization. As is known, the rules drawn up the International Law Commission and confirmed by the Conference apply to such treaties only in so far as that is possible "without prejudice to any relevant rules of the organization".

The representatives of the international organizations showed keen concern about this matter. They either tried to make the wording less restrictive,[131] or specified

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[119] See A/CONF.39/5 (Vol. I) and A/CONF.39/5 (Vol. II). It does not seem that agreements concluded by organizations were mentioned in the comments on and amendments to the final draft articles on the law of treaties which were submitted in 1968 in advance of the Conference (A/CONF.39/6 and Add.1 and 2).

[120] See *Official Records of the United Nations Conference on the Law of Treaties, First and second sessions; Documents of the Conference (op. cit.)*, p. 110, document E/CONF.39/14, para. 24 (*b*) and (*d*).

[121] *Ibid., First Session (op. cit.)*, pp. 11 *et seq.*, 2nd and 3rd meetings of the Committee of the Whole.

[122] See A/CN.4/L.161/Add.1, paras. 29-59.

[123] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, ... (op. cit.)*, p. 12, 2nd meeting of the Committee of the Whole, para. 16 (Ceylon); p. 15, 3rd meeting, para. 12 (Uruguay); p. 19, para. 62 (Japan).

[124] *Ibid.*, p. 11, 2nd meeting, para. 7 (India); p. 12, para. 17 (Ceylon); p. 13, para. 26 (USSR); p. 16, 3rd meeting, para. 18 (Czechoslovakia); p. 18, para. 38 (Finland).

[125] *Ibid.*, p. 17, 3rd meeting, para. 29 (Afghanistan).

[126] *Ibid.*, pp. 16-17, 3rd meeting, para. 22 (Ghana); p. 18, para. 43 (Switzerland).

[127] *Ibid.*, p. 12, 2nd meeting, paras. 15 and 18 (Ceylon).

[128] *Ibid.*, p. 17, 3rd meeting, para. 30 (Poland); p. 18, para. 43 (Switzerland).

[129] *Ibid.*, p. 13, 2nd meeting, para. 22 (Jamaica); p. 15, 3rd meeting, para. 12 (Uruguay).

[130] On this point see the position of FAO (A/CONF.39/5 (Vol. I), p. 62), and especially that of IBRD (A/CONF.39/7/Add.1 and Corr.1, para. 3 and A/CONF.39/7/Add.2, para. 3).

[131] From the outset, the Secretary-General of the United Nations requested that, in draft article 4 (article 5 of the 1969 Convention) the words "are adopted within an international

(Continued on next page.)

that they interpreted it very liberally,[132] or else declared that the reservation would be very hard to apply.[133] Their efforts, were above all directed towards determining what were the relevant rules of the organization: in their view the phrase applied not only to the existing rules, but also to those which might be established in the future.[134] For some the main difficulty was to determine what constituted the "practice" of international organizations; was "practice" contained in the notion of "relevant rules of the organization"? There was no doubt about the reply in respect of "established practice", i.e. "practice" which had given rise to a customary rule which thereby became one of the "relevant rules of the organization".[135] However, there was likewise no doubt that the representatives of the organizations also wished to reserve their right to institute new practices, i.e. to follow certain procedures which, prior to their acceptance as custom, were not "established rules" but would mean that the organization had departed from the terms of the proposed articles.[136] To refuse to accord this last concession to the organization would lead to a distressing situation where the provisions of the 1969 Convention could be set aside by a formal legal act in written form constituting a "relevant rule of the organization", but not by a customary process. It is probably for this reason that the international organizations made far more precise and demanding claims in respect of the draft articles on the representation of States in their relations with international organizations than in respect of the 1969 Convention on the Law of Treaties.[137]

52. This matter will be discussed further below, but the preceding brief remarks show that all the international organizations which submitted observations concerning the draft articles on the law of treaties were fully aware of what was at stake and of the difficulties caused by many questions of principle, one of the most important of which was that of determining how rules drawn up during a process of codification could become binding upon the organizations.[138] Furthermore, there can be no doubt that at the time of the Conference on the Law of Treaties, and in respect of the possible extension of the draft articles to agreements concluded by international organizations, it was the rules for forms of conclusion which gave rise to the greatest number of reservations; on the other hand, generally speaking, the rules for the basic régime of treaties did not attract the same attention. None the less, the international organizations were extremely cautious on this point, as is shown by the following statement from an organization which showed particular concern about this matter:

> In addition to these "procedural" points, due consideration should be given the application of many of the even more important "substantive" provisions of the Draft Articles to the agreements of international organizations. While in the event it may be determined that no more than an adaptation of the text of the Articles as they relate to States will be required no such determination can be made until a careful examination of the character and subjects of the agreements of international organizations has been undertaken.[139]

3. Consideration of the problems in depth

53. There has been little technical comment on specific aspects of agreements concluded by international organizations, since such comment would have immediately and unnecessarily obliged those making it to go deeply into the subject. A few points are worthy of note, however, since they add to or correct some of the analyses advanced in the International Law Commission. This further study shows that the international organizations most concerned already had access to a considerable body of thought on the problems that the Commission will now have to resolve. This report will examine three

(Foot-note 131 continued.)

organization" should be replaced by "concluded under the auspices of or deposited with an international organization" (A/CONF.39/5 (Vol. I), p. 83, and *Official Records of the Conference on the Law of Treaties, First Session ... (op. cit.)*, p. 56, Committee of the Whole, 10th meeting, para. 32; see also comments by FAO (A/CONF.39/5 (Vol. I), p. 88).)

[132] See the ILO (A/CONF.39/5 (Vol. I), p. 89) and *Official Records of the Conference on the Law of Treaties, First Session ... (op. cit.)*, p. 37, Committee of the Whole, 7th meeting, para. 17: "an international organization might have a *lex specialis* that could be modified by regular procedures in accordance with established constitutional process". IBRD (A/CONF.39/7/Add.1, para. 2) agreed that treaties concluded under the auspices of an organization should be subject to the above-mentioned reservation.

[133] See Council of Europe (A/CONF.39/7, p. 15).

[134] See FAO (A/CONF.39/5 (Vol. I), p. 88); Council of Europe (A/CONF.39/7, p. 17); the ILO (*Official Records of the Conference on the Law of Treaties, First Session* (p. 37), Committee of the Whole, 7th meeting, (para. 17).

[135] See Sir H. Waldock: "With regard to the established practices of international organizations, the International Law Commission had considered that the words 'any relevant rules', covered that aspect of the matter. That phrase was intended to include both rules laid down in the constituent instrument and rules established in the practice of the organization as binding." (*Official Records of the United Nations Conference on the Law Treaties, First Session ... (op. cit.)*, p. 57, Committee of the Whole, 10th meeting, para. 40); see also the statement by the Chairman of the Drafting Committee: "... article 4 did not apply to mere procedures which had not reached the stage of mandatory legal rules". (*Ibid.*, p. 147, 28th meeting, para. 15.)

[136] Council of Europe (A/CONF.39/7, p. 17, para. 2 (*b*)); FAO proposed extending the notion of relevant rules to include "the practice of the organization" (*Official Records of the United Nations Conference on the Law of Treaties, First Session ... (op. cit.)*, p. 43, Committee of the Whole, 8th meeting, para. 8).

[137] With regard to the "relevant rules of the organization", UPU calls for respect for its "autonomous development", and for the "*de jure* and *de facto* situation" (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 424, document A/8410/Rev.1, annex I,C, sect. 10) and refers to "paragraph 20 *in fine* of the report of the Sixth Committee to the General Assembly" (*Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147); see also the observations of the ILO (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 413, document A/8410/Rev.1, annex I,C, sect. 2).

[138] The ILO (*Official Records of the United Nations Conference of the Law of Treaties, First Session, ..., (op. cit.)*, p. 36, Committee of the Whole, 7th meeting, para. 2) was particularly anxious that a solution be found to the question of "how any codification of such rules was to become binding on the international organizations concerned".

[139] IBRD, in A/CONF.39/7/Add.1, para. 4 *in fine*.

questions: forms of conclusion, acceptance by an organization of functions specified in an agreement between States, and the régime of "trilateral" agreements.

(a) *Forms of conclusion*

54. When the question arose of giving examples of areas in which there were substantial differences between agreements concluded by international organizations and treaties between States, at least in respect of their régime as laid down in the draft articles on the law of treaties, it appeared that one could easily be found in:

> The entry into force of an agreement occurring directly as a consequence of the separate actions of the legislative organs of the organizations concerned, without the exchange of any signatures or ratifications.[140]

55. That observation to the Conference was quite correct at the time when it was made. Nevertheless, a new article, based on an admendment submitted by Poland and the United States of America (which became article 11), was adopted by the Conference. It reads as follows:

> The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments, constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.[141]

56. While it is not necessary to examine here the origin and all the aspects of a text which, by summarizing and, where necessary, evading them, had a radical effect on a number of other articles that were retained in the Convention, note must be taken of the fact that article 11 establishes the absence of any conditions as to form and the validity of simple agreement as principles of treaty law; consent is binding regardless of any form, or—it might be better to say—the force of mutual consent is such that it is free to choose its own manner of expression. If the text is read with the term "a State" replaced by "an international organization", the result will be a rule which provides in advance a legal basis for all the present and future practice of organizations; organizations will bind themselves by their consent as they themselves understand it.

The corollary to this is rather important: all the problems which international organizations quite legitimately thought they discerned in the draft articles on the law of treaties as prepared by the International Law Commission in 1966 have for the most part been completely eliminated from the 1969 Convention on the Law of Treaties. The work of the Special Rapporteur and the Commission has to that extent been made considerably easier.

57. The same cannot be said, however, for certain problems which are also connected with the *conclusion* of agreements, but which relate to *delegation* or to *juridical personality*. These problems have already been raised before the International Law Commission,[142] which shelved them even where treaties between States were concerned. But one international organization very rightly pointed out, at the time of the Conference on the Law of Treaties, that it was customary for one international organization to delegate to another, implicitly or explicitly, the power to sign agreements in its name.[143] Thus, a problem would seem to exist which, at least in magnitude, is peculiar to international organizations. It is true that there is nothing to prevent such delegation of powers where treaties between States are concerned, and such delegation is quite common when it is only a question of granting powers to the representative of another State for the purposes of an *individual* treaty. Perhaps for the international organizations there are special aspects to the problems which in any case need to be examined anew.

Onec stated on an investigation of this kind, however, it is difficult not to go further. A deeper study of the various aspects of the representation of international organizations brings one of necessity face to face with problems which lead, by way of the administrative arrangements, to questions of international personality. Certain organizations, for example, have created subsidiary bodies which conclude numerous international agreements in order to carry out their operational tasks; on the face of it, those agreements are concluded under the considerable autonomy enjoyed by the subsidiary body and are binding only on that body.[144] But it might be asked whether such agreements are not also binding on the organization which created the subsidiary body by a unilateral decision, particularly, if it should be dissolved by another unilateral decision of the organization which brought it into existence. Although the situation is very different from that prevailing within confederations and federations of States, there are certain similarities. The International Law Commission is aware of the great difficulties involved in submitting proposals on inter-State federalism and in getting them accepted by an international conference.[145] It is only with great caution

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[140] IBRD, in A/CONF.39/7/Add.1, para. 4 (*a*). IBRD cites as familiar examples the agreements customarily concluded by organizations to govern the relations between them (cf. ST/SG/14).

[141] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, p. 124, document A/CONF.38/14, paras. 103, 104 and 105-108; *ibid., First Session ... (op. cit.)*, pp. 83-84, Committee of the Whole, 15th meeting, paras. 42-56 and p. 344, 59th meeting, paras. 67-71; *ibid., Second Session, Summary records of plenary meetings and of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 23-24, 9th plenary meeting, paras. 55, 57 and 60-74 and p. 159, 29th plenary meeting, para. 7. Explanations concerning the amendment are given in the comments submitted in advance of the Conference by Poland (A/CONF.39/6/Add.1, p. 14) and in the statement made by the representative of Poland in the Committee of the Whole (*Official Records of the United Nations Conference on the Law of Treaties, First Session ... (op. cit.)*, p. 84, Committee of the Whole, 15th meeting, paras. 44-48).

[142] See para. 41 above.

[143] This refers to IBRD which mentions as examples the statutory delegation of powers to IBRD under the Articles of Agreement of IFC (article IV, section 7) and of IDA (article VI, section 7) and also the implicit delegation which is customary among organizations participating in UNDP (A/CONF.39/7/Add.1, para. 4 (*c*)).

[144] K. Karunatilleke, *Le Fonds des Nations Unies pour l'enfance* (Paris, Pédone, 1967), p. 145.

[145] See article 5, paragraph 2 of the draft articles on the law of treaties (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.)*, pp. 116-118, document A/CONF.39/14, paras. 58-66) which was rejected in plenary (*ibid., Second Session ... (op. cit.)*, p. 15, 8th plenary meeting, para. 50).

and reserve, therefore, that the Commission will try to explore some of the aspects of the administrative and financial federalism of international organizations.

(b) *Acceptance by an organization of functions specified in a treaty between States*

58. Reference was made to this problem in relation to draft article 31 (which became article 35 of the 1969 Convention), dealing with the effect of treaties vis-à-vis third parties.[146] Thus, the problem touched on here is one of the most serious and most delicate, namely, the effect vis-à-vis international organizations of certain treaties to which they are not parties. There is a vast, albeit somewhat confused, body of practice of such organizations with regard to functions conferred on them by a treaty between States to which they are not parties. Some comment, with the benefit of further studies that have since been made, is called for on both the theoretical problems and the practice followed by organizations.

The theoretical problem way be approached by first posing a somewhat naive question, but one which provides a good starting-point for the analysis: is an international organization a third party in relation to the treaty which created it? All the essential rights and obligations of the organization are based on the text of its constitutent charter; the organization not only *may* invoke its constitutent charter, but *must* base its every action on that text. Thus, it is not a third party in relation to its constituent charter; that, it will be said, is obvious. But once that approach is adopted, there may be some difficulty in stopping at the constituent charters. There may be other treaties which are linked to the charters and are to some extent merely instruments of execution, such as collective agreements concerning the privileges and immunities of the organizations. It may be necessary to consider later whether the formula should not be extended generally to such treaties, and whether it should not be said that, in relation to those treaties also, the organization is not a third party.

59. The hypothesis discussed above obviously relates to treaties covered by the 1969 Convention. It is necessary, however, to go a little further and consider the case of an existing organization which, as a result of a new treaty between States, has been given a new function not provided for in its constituent charter. Many variations in the modalities of the operation are possible; the States parties to the new agreement may be different from the States members of the organization; the new agreement may confer some new power on an existing organ of the organization, or it may establish a completely new organ which it attaches to the organization previously existing. Obviously many legal difficulties that might arise in such cases could be mentioned. So far as the Special Rapporteur is aware, studies on situations of that kind are few and rather summary.[147]

Reasoning on the lines of the articles of the 1969 Convention, the following conclusion might be drawn: if it were desired to ensure the implementation of such new agreements as a matter of course, the constituent charter of the organization would have to be amended in accordance with a regular procedure; for the new agreement cannot have effect vis-à-vis the organization when the latter is a third party in relation to it. However, amending the constituent charter of the organization concerned is a very laborious process; apparently it is never done. Another method, less correct procedurally but more practical, would be not to undertake such innovations without the consent of the parties concerned; where an existing organ is given new functions, that organ should be asked to give its consent; where a new organ is attached to an organization already in existence, that organization should also give its consent.

60. International practice would certainly show cases where formal consultation took place with a view to obtaining the consent of the organ or organization concerned.[148] That is not the general rule, however, since the new agreement is always one prepared and concluded under the auspices of an organization and either the organs whose powers will be modified belong to that organization or it will be the latter that will acquire a new organ. Consequently, there is no formal consultation, perhaps because it is felt that the modifications are a matter of course. Can it be said that the organ or the organization, as the case may be, implicitly accepts the functions conferred on it? And, if so, should this be looked on as a collateral act of agreement which makes the organization a party, not to the new treaty between States, but to an agreement concluded between the organization on the one hand and the States parties to the new agreement on the other hand?

There are more than purely theoretical aspects to difficulties of this kind; they may arise during the discussion of administrative or financial questions. They have arisen in connexion with the procedures of certain international

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[146] IBRD referred in this connexion to "the custom whereby international organizations frequently accept by implication (rather than expressly as foreseen in Draft Article 31) obligations or functions with respect to treaties to which they are not parties (but which they may have sponsored)", (A/CONF.39/7/Add.1, para. 4 (*b*)).

[147] The ILO presents the problem in its observations on the draft articles on representatives of States to international organizations (adopted in 1968, 1969 and 1970): "It is true that certain international conventions, such as the constitutions of international organizations, impose certain obligations on those organizations. However, in such cases the situation is different from the one we are dealing with here, for what those constitutions define is in fact the functions and purposes of the organizations, whereas in the present case the obligations imposed on the organization are not part of the latter's constitutional functions." (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 413, document A/8410/Rev.1, annex I, C, sect. 2.) UPU states even more emphatically that "in the case of an international organization for which no link has been established (in accordance with its constitutional rules) in relation to the treaty, the provisions of the treaty are *res inter alios acta*", (*ibid.*, p. 424, document A/8410/Rev.1, annex I, C, sect. 10).

[148] In 1953 the Permanent Central Opium Board, which was established by the 1925 Convention and was itself an organ "attached" to the United Nations, was consulted on whether it would agree to exercise functions the creation of which under a new treaty was being considered; that practice has not subsequently been followed.

organizations. Some of these organizations, for example, play a decisive part in the preparation of certain conventions between States and *append their signature* to draft treaties formulated in that way without, however, considering that they thereby become parties to that treaty. Is the purpose of such signature only to authenticate the text of the treaty, or does it amount to acceptance by the organization of the rights and obligations set out therein? In the latter case, is that procedure to be interpreted as a unilateral act or as acceptance of the collateral agreement which will exist between the organization and future States parties to the convention? Questions of this kind emerge naturally from the observations submitted by international organizations at the time of the Conference on the Law of Treaties.[149] What is needed, finally, is an exploration, on as wide a basis as possible, of *what the positions of an organization may be with respect to a convention to which it is not a party in the way that a State may be.*

Extensive information needs to be gathered on a subject of this nature, but a broad area of research has already been outlined in the observations collected.

(c) *"Trilateral" agreements*

61. As has already been mentioned,[150] the characteristic feature of a treaty of this kind is not simply that there are three parties to it but that the parties are two (or more) States and one or more international organizations, the positions of the three parties or groups of parties not being the same in relation to the treaty. The classic example of this is the agreements concluded for the supply of fissionable material between two States (one supplying and the other receiving) and IAEA (which supervises); those agreements played a definite part in the decision of the United States to seek extension of the scope of application of the draft articles on the law of treaties to include agreements concluded by international organizations. Such agreements pose rather a difficult problem with respect to the application of the 1969 Convention on the Law of Treaties in its final form.

In principle, agreements of that kind are indeed agreements concluded by international organizations.

The problem had not escaped the notice of the International Law Commission and it had been proposed that trilateral agreements should be subject to the rules set out in the draft articles.[151] However, the Commission opted for a more general formula which simply allowed for the possibility of applying to agreements concluded by international organizations "any of the rules set forth in the present articles to which they would be subject independently of these articles".[152] However, after the question had been raised again by the United States,[153] FAO,[154] Australia, Canada and Sweden,[155] the Expert Consultant to the Vienna Conference stated that agreements of that kind were not covered by the draft articles.[156] It was at that point, following a quite spontaneous initiative, but "in order to clarify a point, as appeared to be desired by certain delegations",[157] that the Drafting Committee added to the text of article 3 of the draft Convention a provision reading as follows:

> [The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:]
>
> ...
>
> (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.[158]

Although one representative expressed some reservations concerning an addition which went beyond a drafting change,[159] the article as a whole was approved in the plenary Conference by 102 votes to none.[160]

62. The effect of a provision of this sort is, however, open to question. How it is applied depends on the nature of the treaty concerned. To hold that relations solely between States can be dissociated from the other relations is *possible* and *useful* only under certain conditions. For

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[149] IBRD stated the following:

"Sometimes the sponsoring organization assumes such functions explicitly by signing the treaty (without, however, becoming a party to it), as the Bank did, for example, with respect to the three Agreements cited in foot-note 2 [Articles of Agreement of IFC, Articles of Agreement of IDA, Convention on the Settlement of Investment Disputes Between States and Nationals of other States]: more frequently this is not done—for example, the International Atomic Energy Agency assumed several functions under or in connexion with the Vienna Convention on Civil Liability for Nuclear Damage, without signing it or the Final Act of the Conference at which it was formulated (see IAEA Legal Series No. 2)"

(A/CONF.39/7/Add.1, foot-note 5, also reproduced in A/CN.4/L.161/Add.1, p. 12, foot-note 22). It will be noted that it is common practice for an organization to sign a text adopted within the organization, for purposes of authentication (see, for example, the Convention on the Illicit Movement of Art Treasures of 14 November 1970 (UNESCO document 16 C/17). The practice of an organization's assuming new powers without there having been explicit consent by an organ competent for the purpose is becoming general at higher and higher levels (see, for instance, the Convention of 28 September 1971 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction (General Assembly resolution 2826 (XXVI), annex), which confers powers of decision on the Security Council).

[150] See para. 50 above.

[151] *Yearbook of the International Law Commission, 1965*, vol. I, p. 12, 777th meeting, para. 24 (Mr. Reuter).

[152] *Ibid., 1966*, vol. II, p. 190, document A/6309/Rev.1, part II, chap. II, article 3.

[153] *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 86, document A/6827/Add.2; A/CONF.39/5 (vol. I), p. 61; *United Nations Conference on the Law of Treaties, First Session ... (op. cit.)*, p. 11, Committee of the Whole, 2nd meeting, para. 2.

[154] "In our opinion, it would be desirable to avoid a situation in which two different sets of rules would be applied to one and the same international instrument, the choice depending on whether a given problem arising in connexion with the instrument concerns relations between States or between States and international organizations." (A/CONF.39/5 (Vol. I), p. 62).

[155] *United Nations Conference on the Law of Treaties, First Session ... (op. cit.)*, p. 14, Committee of the Whole, 2nd meeting, para. 31, and pp. 15 and 20, 3rd meeting, paras. 4 and 66.

[156] *Ibid.*, p. 20, 3rd meeting, para. 78.

[157] *Ibid.*, p. 147, 28th meeting, para. 7.

[158] *Ibid.*, p. 146, 28th meeting, para. 4.

[159] *Ibid.*, p. 147, 28th meeting, para. 8.

[160] *Ibid., Second Session ... (op. cit.)*, p. 4, 7th plenary meeting.

such dissociation to be *possible*, the legal relations must not be interdependent, in the meaning given to this term in the law of treaties; the separation must not be contrary to the object or to the purpose of the treaty. If it is to be *useful*, the organizations must be parties to the treaty in precisely the same way as an ordinary party, i.e. a State. In fact, this second condition will seldom be fulfilled, because organizations are seldom in the same position as member States. Usually, they undertake to perform specific functions, as when they are responsible for *supervising* some transaction or when they act as intermediary in providing aid or assistance. In this case, the bonds created by a trilateral agreement could quite easily be taken separately and regrouped in two agreements: a treaty between States and a treaty between States and the international organization; in the second treaty the organization agrees to play a certain role which has been stipulated for it in the treaty between States. This really comes closer to the case previously examined of a treaty between States entrusting new functions to an international organization. The difference between the two mechanisms is based mainly on practical considerations. In the case of a multilateral treaty that is open to many States (all States members of the organization and sometimes non-member States as well), the organization will perform the functions provided for in the treaty, usually without any specific act of acceptance; this practical arrangement is accounted for by the role of the organization in the preparation of this type of convention and by the broad intersection of the two circles of States in question: the States members of the organization and the States intending to become parties to the treaty. On the other hand, where the organization is concerned with a very narrow circle of States, in principle two or a few more, and its role is precisely defined for this particular case, a specific and formal expression of its acceptance is required, and the most direct and simple way of obtaining it is for the organization to become a party to the treaty in question and thus make it a "trilateral" treaty as defined above. But in this case another solution is also possible: to conclude an inter-State treaty and then a "collateral" treaty between the States parties to the first treaty, on the one hand, and the organization, on the other, this arrangement would not be so simple, however.

63. Whatever the legal analysis of the "trilateral" agreement may be, the makeshift solution belatedly embodied in article 3 (*c*) of the 1969 Convention does not remove all the difficulties. Consequently, it would be very useful to bring the rules on treaties of international organizations into line with the rules on treaties between States adopted in the 1969 Convention. These few remarks on trilateral treaties also suggest that the positions in which international organizations may be placed with respect to treaties concluded mainly between States should be further examined.

4. Participation of international organizations in multilateral conventions

64. As we have already observed several times,[161] one of the major problems in the law of agreements of international organizations is to establish the conditions under which an international organization can become a party to a treaty open to a wide circle of States, with the intention of being treated, for the purposes of that treaty, like any other party, that is to say, like a State.

When the International Law Commission began preparing the draft articles on the law of treaties in 1962, the problem was not unknown; but there were only a few remarks on it in the literature and the practice in that connexion was very limited. As the Commission did not devote much time to the problems raised by the treaties of international organizations and finally decided to exclude this subject from its draft articles on the law of treaties as far as possible, the matter was examined, not in the course of the Commission's work, but in the observations elicited by its draft. Though the proposed convention might be silent on this point, its very existence raised the problem. For some of its articles were intended to produce effects with respect to international organizations, and how could they be effective with respect to international organizations which would not be parties to the proposed convention? Once posed in these terms, the question necessarily became broader: how, *a fortiori*, could another convention relating to the treaties of international organizations bind the international organizations concerned if they could not become parties to it? How, even more generally, could any convention dealing with an element of the law of international organizations bind international organizations which could not become parties to it?

The problem which the 1969 Convention declined to deal with as a matter of general principle thus arose in the form of a particular case in connexion with the Convention itself and with the conventions that were to follow.

65. In several of its provisions the 1969 Convention referred incidentally to questions of the law of international organizations, concerning which the express consent of the international organizations consequently appeared to be required. Examples can easily be given.

The Convention applies, "without prejudice to any relevant rules of the organization", to any treaty which is the constituent instrument of an international organization and to any treaty adopted "within an international organization" (article 5); the same reservation of "any relevant rules of the organization" does not apply to treaties concluded "under the auspices of the organization"; but how could it bind, in this respect, organizations which follow rules different from those laid down in the Convention for treaties concluded under their auspices? The representatives of the international organizations, and especially the representative of the Secretary-General of the United Nations, advanced this objection forcefully,[162] though Governments on the whole, did not give it much attention.[163]

[161] See paras. 3, 12, 42 and 58 above.

[162] See A/CONF.39/5 (Vol. I) and *Official Records of the United Nations Conference on the Law of Treaties, First Session ... (op. cit.)*, p. 56, Committee of the Whole, 10th meeting, para. 32; see also para. 51 above.

[163] From the United States reply it appears that that delegation distinguished mainly between the internal affairs of an organ-

(Continued on next page.)

66. Reference must also be made to article 20, paragraph 3 of the 1969 Convention (article 17, paragraph 3 of the draft articles) which provides that:

> When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

It appears from the Special Rapporteur's explanation that this provision originated in an observation by the Secretary-General on United Nations practice; document ST/LEG/7, quoted by the Special Rapporteur, says that:

> . . . The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions.[164]

The adoption of article 20, paragraph 3 gave rise to no discussion either in the Commission or at the Conference; but as *a treaty provision* the paragraph does raise some difficulties. For whatever the reasoning used, it seems difficult to apply as treaty law. Leaving aside the legal personality of the international organization and regarding the matter solely from the standpoint of the law of treaties, for this provision to be applicable, all States members of the organization concerned would have to have ratified the 1969 Convention. On the other hand, considering the fact that an organization is a subject of law distinct from the member States composing it, article 20, paragraph 3 cannot, as a conventional instrument, produce any effect with respect to an international organization which is not a party to the Convention. Hence the rule laid down in article 20, paragraph 3 could not have any direct conventional effect. It might therefore be maintained that this provision is no more than the recognition of a customary rule.[165] This would be a good example of extension of a treaty rule by the effect of custom—a mechanism provided for in article 38 of the Convention, but which operates here with special features: the initial recognition comes from States taking advantage of the opportunity provided by a convention, but the rule will only come into being through recognition emanating from the international organizations.

67. Other examples of similar problems are to be found in the text of the articles adopted by the Conference, and the question of principle was raised in the observations of the international organizations.[166] But these problems were to come even more to the fore in connexion with the draft articles on the representation of States in their relations with international organizations, the final text of which was to be adopted by the Commission at its twenty-third session, in 1971. In their observations, several international organizations directly asked the question by what process the proposed rules could become binding on them; here we shall only quote a passage from the observations of IBRD:[167]

> Even more important than any arrangements for the effective participation of international organizations in the formulation of the proposed instrument, is to devise some procedure whereby each organizations (i.e. its member States) could choose whether or not, or how, it should be covered by such instrument—which, as now formulated, would place several direct obligations on the organization covered (see, for example, draft articles 22-24). While various means to this end could be proposed, it would seem that the pertinent provisions of the Convention on the Privileges and Immunities of the Specialized Agencies present the most useful model, which, with minor changes, could be incorporated into the proposed instrument as well as into subsequent ones having a similar scope . . .

68. This problem was considered by the Sixth Committee in the same connexion. Like IBRD, speakers made a distinction between the preparation and the acceptance of the texts; as to preparation, the right of the organizations to be heard was accepted in the broadest sense;[168] as to bringing the text into force, the idea was again put forward of taking as a model the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,[169] so that organizations could participate in the preparatory work and become associated with States Parties to the convention by means of a procedure based on article X of the 1947 Convention.[170]

(Foot-note 163 continued)

ization, such as the procedure for the formation of agreements, which should be subject to its own rule-making, and treaty relations between States, which involved matters such as the principles relating to invalidity and were beyond the rule-making competence of international organizations (*Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 43, Committee of the Whole, 8th meeting, para. 20). The representative of Sweden adopted a very liberal interpretation of the organizations' freedom to develop autonomous practices (*ibid.*, p. 45, para. 35). The Expert Consultant replied to the Secretary-General's objections that "The problems raised in that connexion had a different legal explanation and should not be dealt with in connexion with article 4" (*Ibid.*, p. 57, 10th meeting, para. 39).

[164] *Yearbook of the International Law Commission, 1962*, vol. II, p. 66, document A/CN.4/144, para. 12 of the commentary to articles 17, 18 and 19.

[165] A number of Governments intimated, in or outside the Conference, that the provisions of the Convention had, in any case, an assured future as customary rules.

[166] See foot-note 137 above. Several provisions of the 1969 Convention concerning depositaries directly concern international organizations when they perform the functions of a depositary (e.g. article 77 and article 80, para. 2). Where the depositary is an international organization, how can the text become applicable to it? Some government representatives, strange to say, argue as though organizations had no legal personality of their own; thus the representative of the United States of America said that "the United Nations Secretariat was in favour of the registration of treaties by depositaries, but in some instances certain technical difficulties stood in the way of such a procedure. For example, many treaties for which the Organization of American States (OAS) was depositary did not contain any provision regarding their registration, and in order for them to be registered with the United Nations, the OAS had first to obtain the agreement of all parties". (*Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 470, Committee of the Whole, 79th meeting, para. 4.) How could the proposed rule affect OAS, which is not a party to the 1969 Convention, except by a process of customary law?

[167] The point was also raised by the ILO and UPU. The observations quoted were published in the report of the International Law Commission on the work of its twenty-third session (*Yearbook of the International Law Commission, 1970*, vol. II (Part One), para. 421, document A/8410/Rev.1, annex I, C, sect. 6).

[168] Israel: *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1256th meeting, para. 15.

[169] Netherlands: *ibid.*, 1256th meeting, para. 31 and India: *ibid.*, 1261st meeting, para. 33. For the text of the Convention, see United Nations, *Treaty Series*, vol. 33, p. 261.

[170] Ceylon: *ibid.*, 1257th meeting, para. 26.

69. The question whether an international organization can become a party to a multilateral treaty between States was thus raised in connexion with treaties codifying the law of international organizations in a far more direct way than before.[171] Previously, it had only been noted that certain international organizations had been allowed to participate in some of these treaties, in particular on behalf of territories administered by them; there had been discussion, but no settlement, of the question whether certain organizations should not be permitted to become parties to certain treaties when they had interests to protect which were comparable in every respect to those of a State, such as patrimonial rights (copyright) or moral rights (application of the Geneva Conventions and other conventions to actions by contingents placed under the responsibility of the United Nations) [172] and economic interests.[173]

70. The starting point of the principles applicable at present is simple: hitherto there has been no rule of general international law determining what subjects of law may become parties to a multilateral treaty between States, and every treaty determines the subjects of law which may become parties to it.[174] The reason why international organizations are not parties to such treaties is that hardly any treaties grant them this right, but it is technically possible to conceive that a treaty might grant it to certain organizations. If this approach were adopted, the question would arise whether any special difficulties would be encountered; such difficulties were mentioned, but not specified, during the debates at the Conference on the Law of Treaties.[175] From the purely legal standpoint, the importance of the following comment might perhaps be stressed. If the personality of organizations was fully recognized and if their capacities were clearly defined and quite separate from those of States, there would be no major obstacles; but this condition is not fulfilled in practice. States are often inclined to regard an organization as a framework for collective action rather than as a legal person distinct from its member States; the dividing line between the capacities of organizations and those of States is often uncertain and even unstable, and the member States play a fundamental role in the pursuit of an organization's purposes and the execution of its resolutions. Perhaps these considerations make States reluctant to recognize that an organization can become a party to a treaty between States, when they themselves would refuse to do so. Some States also wish to exercise their right not to recognize certain organizations, and in order to safeguard that right more effectively, refuse to open treaties too widely to accession. Lastly, organizations are not always in fact in a position to assume the responsiblities likely to result from their activities. These seem to be the reasons why States have hitherto strictly limited access to the multilateral treaties they intend to draw up and to revise, by exercising the monopoly of their sovereign rights. The International Law Commission can only note this situation which may change at any time.

71. So long as this is so, and it is felt at the same time that there is a pressing need to extend certain rules laid down in multilateral treaties between States to the activities of international organizations, indirect procedures will have to be adopted to achieve this result. What are these procedures? Some of them have already been mentioned incidentally, but it is not certain that full information is yet available or that the use of these means is sufficiently well established for reliable legal conclusions to be drawn from them. However, some provisional observations on them can nevertheless be submitted to the members of the Commission for their consideration and for the Commission to work on later.

72. We must first set aside the case already presented in connexion with an example,[176] in which the rule laid down in a treaty between States subsequently acquires the character of a customary rule and thus becomes applicable to an international organization. This is a mechanism of ordinary law; it has the disadvantage, among others, of being a process which may sometimes be uncertain and slow.

73. The other mechanisms on which we must dwell for a moment have one general feature in common: they confer on the organization concerned a status which differs, more or less radically, from that of a "party" to a treaty as generally defined in the law of treaties between States. According to the 1969 Convention (art. 2, para. 1 (*g*)):

> "party" means a State which has consented to be bound by the treaty and for which the treaty is in force.

But it is not enough to consider the definition; we must also take into account all the rights and obligations attached to the status of a party by all the other articles of the 1969 Convention. It is through the enjoyment of all these rights and obligations that a State possesses the full status of a "party to a treaty". It is conceivable that for some States some of these rights and obligations

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[171] See para. 12 above.

[172] The International Committee of the Red Cross has tried several times (most recently in 1972) to strengthen the position of the United Nations with regard to the Geneva Conventions by securing its accession to the Conventions (P. de Visscher, "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies", *Annuaire de l'Institut de droit international, 1971* (Basle), vol. 54, t. I).

[173] The question of the eligibility of an organization for technical assistance under United Nations programmes is discussed in a memorandum by the United Nations Office of Legal Affairs, dated 25 August 1969, reproduced in the *United Nations Juridical Yearbook, 1969* (United Nations publication, Sales No. E.71.V.4) the problems raised by the participation of an organization in commodity conferences and agreements have given rise to numerous discussions and are evolving fast: see the opinion of the United Nations Office of Legal Affairs (*ibid., 1968* (United Nations publication, Sales No. E.70.V.2), p. 201), references in the economic law reports published in the *Annuaire français de droit international, 1969* (Paris), vol. XV, 1970, pp. 617-619, and *ibid., 1970* (Paris), vol. XVI, 1971, p. 695, and in the study by R. Kovar, "La mise en place d'une politique commerciale et les compétences des Etats membres de la Communauté économique européenne en matière de relations internationales et de conclusion des traités" (*ibid.*, p. 783).

[174] See foot-note 70.

[175] See para. 66 above.

[176] *Ibid.*

may be attenuated; without losing, the status of a "party" in all respects, such States have looser ties with the régime established by the treaty. Does this situation often arise? At first sight, the temptation is to reply in the negative, because such a situation is incompatible with the sovereign equality of States and is reminiscent of colonial situations which have now disappeared. But, as has been observed in a remarkable study, which refers to many kinds of situation other than those connected with colonization —in particular, federal structures—there are many cases in which the status of a "party to a treaty" is less strictly defined than usual.[177] Whatever the position may be with regard to treaties between States, this is the technical device which appears to be favoured in the case of international organizations. By alterning, to a greater or lesser extent, the rights and obligations which constitute the status of a "party to a treaty", it is possible to define a status for an organization which allows it some degree of "participation" in a treaty, without being on the same footing as a State which is a full party. And this is how a place has been found for international organizations in some general treaties.[178] Should it then be said that the organization is a "party" to the treaty or, more cautiously, that it is "associated" with or "participates" in the treaty? There is no need to settle this question of terminology; the important point is to use an expression which does not cause misunderstanding; in any event, the organization is in a special situation.

74. But this observation, which, intellectually at least, connects the status of an organization in regard to a treaty with that of a party to a treaty by comparison and differentiation, is not sufficient to cover all the facts. There are cases in which a very different procedure is used to give an organization some of the rights and some of the obligations of a party to a treaty, the purpose being to keep the organization even more definitely outside the treaty. Such is the case when the States parties to a treaty and the organization conclude an *agreement collateral* to the inter-State treaty, whereby the benefits and the obligations of the substantive rules contained in the treaty are extended to the organization. Subject to more thorough study, this certainly seems to be the solution adopted in some recent conventions concerning space law.[179] In these cases the mechanism appears to be similar to that provided for in articles 35 and 36 of the 1969 Convention on the Law of Treaties with respect to third States.[180]

75. It may be questioned whether practice will consolidate and define formulations such as those outlined above. It might also be held that these are transitional solutions.[181] Be that as it may, the Commission may have to consider whether it would be useful or feasible to pursue studies in this field in order to define the various positions in which an international organization may be placed in regard to a multilateral treaty between States, the rules of which are extended to it as the result of an expression of its will, although it does not enjoy the status of a party in the ordinary and full sense of the term. As we have briefly shown, this is a practical question which in fact conditions the whole development of the codification of the law of international organizations and increasingly concerns all general multilateral treaties.

Conclusion

76. From the studies and discussions of the United Nations, and more particularly of the International Law Commission, it is possible to draw useful lessons concerning the régime of agreements of international organizations and even to deduce some general tendencies.

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[177] O. J. Lissitzyn, "Territorial entities other than independent States in the law of treaties", *Recueil des cours... 1968-III* (Leyden, Sijthoff, 1970), vol. 125, pp. 83 and 84: "The very term 'party' needs more analysis. It is, after all, but a shorthand expression to describe a number of different legal phenomena. These phenomena do not always come in neat packages. The suggestion may be ventured that it is not inconceivable for an entity to be a 'party' for one purpose but not for another. It is dangerous to assume that by characterizing an entity as a 'party' we can escape the necessity of analysing the various specific legal consequences of its seeming participation in treaty relations."

[178] It would be easy to give examples of treaties in which it seems that the position of an organization can be defined as an attenuation of the rights of a full party; for instance, the position of the United Nations in ITU (article 1, para. 3 (*c*) and articles 21 and 29 of the International Telecommunication Convention (Montreux, 1965) (United Nations, *Juridical Yearbook, 1965* (United Nations publication, Sales No. 67.V.3), p. 173)), which is the constituent instrument of ITU, and article XVI of the Agreement between the United Nations and ITU approved by the ITU Plenipotentiary Conference on 4 September 1947 and by the United Nations General Assembly on 15 November 1947 (United Nations, *Treaty Series*, vol. 30, p. 315). Examples are also to be found in the commodity agreements mentioned in foot-note 173 above: thus, in article 50 of the Fourth International Tin Agreement, 1971:

> An intergovernmental organization having responsibilities in respect of the negotiation of international Agreements may participate in the International Tin Agreement. Such an organization shall not itself have the right to vote. On matters within its competence the voting rights of its member States may be exercised collectively. (*United Nations Tin Conference 1970: Summary of Proceedings* (United Nations publication, Sales No. E.70.II.D.10), pp. 21-22.)

[179] See paras. 3 and 42 above.

[180] The Agreement of 19 December 1967 provides (article 6) that the organization may declare "its acceptance of the rights and obligations provided for in this Agreement". The Convention of 29 November 1971 (article XXII) reproduces this wording, but provides that organizations accept only the substantive rules and have no part in the legislative procedures (final clauses), which are reserved to the States Parties.

[181] Reference to the very special mechanism of the Convention on the Privileges and Immunities of the Specialized Agencies, of 21 November 1947 (see foot-note 169) shows that it did not appreciably diminish the rights of international organizations as "parties". True, the organizations do not seem to be designated as parties to the Convention itself, and hence would not participate, like States, in the revision of the Convention (article XI, section 48). But the Convention is only a framework; its provisions take effect for an organization only if it accepts them, with any necessary amendments, and States on their side accept the Convention, with reservations regarding specified organizations, if necessary, so that bilateral agreements are concluded between each State and each organization, to which the international organizations are full parties. This analysis is confirmed by the arrangement subsequently adopted for IAEA on 12 February 1959 (United Nations, *Treaty Series*, vol. 374, p. 147). In this Agreement, based on the 1947 Convention, all ambiguity has disappeared: the Agreement is in force as between IAEA and every State that has accepted the Agreement (article XII, section 39); amendments are made by the Board of Governors of IAEA and are accepted or are not accepted by each State, with or without reservations (section 40).

Although this matter is now being raised in connexion with a great deal of legislative work, the main source material remains the work of the International Law Commission on the law of treaties and the debates of the Conference on the Law of Treaties in which that work culminated. Practically and historically, a study of the law of the treaties of international organizations takes the form of a complement to, and continuation of, the 1969 Convention, which provides the basis and starting point for research. An important consequence, which must be presented as a preliminary, naturally follows: we must be reluctant to follow any course which is not in line with the 1969 Convention and would not form a harmonious whole with it. Where the treaties of international organizations call for special provisions or adjustments of the articles of the 1969 Convention, it is desirable that such provisions and adjustments should be few in number and as simple as possible, and that they should not create more problems than they solve. In particular, the field of application of new articles must be clearly delimited and the number of special régimes must not be increased unduly.

The survey made in this report confirms, in this respect, the conclusions of the Sub-Committee previously set up by the International Law Commission.[182]

77. Perhaps the practical consequences of this general position now appear more clearly on some points. To give an immediate example (it relates to the field of application of the future draft articles on our subject): to which international organizations will the Commission's proposals apply? It is certainly not possible to say at present whether they will apply to all international organizations, or to a small group of them. But two points stand out fairly clearly. First, it is to be hoped that the proposals will be applicable to all international organizations, so as to avoid creating, in connexion with the law of treaties, three different régimes: that of the 1969 Convention, that of the new proposals and that which will be left to the spontaneous formation of customary rules, not to mention the rules needed to settle any conflicts which may arise between the three régimes. If this view is accepted, it will be necessary to eliminate problems which can be solved only for one particular group of organizations, and the whole set of proposals will have to be kept very general. Secondly, there will be a temptation to answer the question whether a more precise definition, of an "international organization" should be sought than the definition in article 2, paragraph 1 (*i*) of the 1969 Convention, which merely specifies the intergovernmental character of such organizations. It is clearly desirable that no new definition should be drafted unless it is necessary for other reasons. In the various drafts of articles it has prepared so far, the Commission has, indeed, always felt able to avoid such a definition and its reasons for so doing are still valid; moreover, it is of the highest importance to use the same terminology as the 1969 Convention itself, so as to avoid increasing the number of régimes which would take away the chief value of the codification.

78. In the light of these preliminary observations, the work to be undertaken falls into two parts. First, all the provisions of the 1969 Convention must be examined article by article, in order to determine which of them would require drafting changes to adapt them to the agreements of international organizations. Secondly, bases must be sought on which the substantial difficulties characteristic of the régime of agreements of international organizations can be overcome. This report contains no systematic list of the drafting changes required to adapt the 1969 Convention to its new purpose; to prepare one is a delicate task involving great attention to detail, but by its very nature it is not likely to give rise to any formidable information problems or fundamental difficulties of principle; moreover, recent studies are bound to be helpful;[183] this work has therefore been deferred to a later stage. It is, however, the purpose of this report to make a preliminary examination of the *essential* problems, drawing on the work already done by the United Nations and more particularly by the Commission. Has any essential difficulty escaped those who have worked on this subject for many years? That possibility cannot be discarded with certainty: but it is reasonable to assume that the inventory already made is fairly complete and provides a sound starting-point for the Commission's future work.

79. To summarize the report from this point of view, we may take the following points from among the matters discussed: the forms of consent, the capacity of organizations, representation, the effect of treaties and the law of each organization. These matters will be considered in succession.

Form of consent

80. Nothing in the study which the Special Rapporteur has had to make challenges one of the conclusions previously reached by the Sub-Committee and approved by the International Law Commission, namely, that the study should be confined to the written agreements of international organizations and should not cover oral or tacit agreements;[184] in addition to all the reasons already given, there is the need to follow the provisions of the 1969 Convention as closely as possible. It is true that that Convention does not give a strict definition of "written form".[185] It does not seem advisable to open

[182] Reproduced in the report of the International Law Commission on the work of its twenty-third session (*Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 348-349, document A/8410/Rev.1, chap. IV, annex).

[183] e.g., K. Zemanek, "Agreements concluded by international organizations and the Vienna Convention on the Law of Treaties", *University of Toledo, Law Review* (Toledo, Oh.), 1971, Nos. 1 and 2, p. 145.

[184] See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 7.

[185] The problem of the distinction between a treaty concluded "in written form" and a treaty merely "expressed" in writing has been referred to on several occasions by special rapporteurs, including particularly Sir Gerald Fitzmaurice and Sir Humphrey Waldock; at the Conference on the Law of Treaties it was referred to by the USSR representative (*Official Records of the United Nations Conference on the Law of Treaties, First Session . . . (op. cit.)*, p. 41, Committee of the Whole, 7th meeting, para. 69).

now, in connexion with the agreements of international organizations, a debate on a matter with which the International Law Commission did not deal in its work on treaties between States, when the Commission was perhaps less flexible in its definition of the forms of consent than the Conference on the Law of Treaties, which adopted aticle II in the very broad terms now familiar to us. There is no need to propose, for the relevant articles of the 1969 Convention, an interpretation which it is no longer for the Commission to provide; but the Commission may perhaps recognize that article II, in its present form, authorizes all forms of consent for treaties between States. The rule laid down by that article gives full freedom to international organizations, which seems to meet needs strongly felt by them. Subject to any observations which the organizations may wish to submit on this point, the problem of the forms of consent in the conclusion of treaties is therefore no longer acute: many obstacles which might have impeded assimilation of the agreements of international organizations to treaties between States if the Commission's original drafting had been adopted at the Conference on the Law of Treaties, have now disappeared.

81. But this observation goes beyond the question of *forms of consent*. For the 1969 Convention, endorsing international practice, is entirely built on an essential general principle: the value of pure consensus. When put with such force at such a general level, the principle here goes beyond the characteristics of a particular subject of law; it is as valid for organizations as for States. But in that case there is no *a priori* valid reason not to think that the definitions and elucidations of that principle provided by the 1969 Convention, particularly in regard to the validity of consent, must in theory be as valid for international organizations as for States. *A priori* it is difficult to see, in view of the content and basis of these provisions, what is to prevent articles 42-65 of the 1969 Convention, in particular, from being applicable to the agreements of international organizations.[186]

Capacity of international organizations

82. The difficulties previously encountered by the International Law Commission in this connexion enjoin caution. Just as it was easy to declare that States have the capacity to conclude treaties (1969 Convention, article 6), because that capacity is merely the expression of their "sovereign equality", so it is difficult to deal with the same question in relation to international organizations, which are characterized by a fundamental inequality. If it had been decided to consider only the large international organizations of the United Nations family, it would have been relatively easy to lay down a few general principles recognizing, in fairly broad terms, their capacity to conclude certain treaties. But if it is intended to consider all organizations and to retain the definition of them given, after the Charter, by the 1969 Convention, is it possible to propose texts which accord the same rights as those of the United Nations to organizations which are not qualified for such facilities either by the intentions of their founders or even by their present needs? A problem of definition would then arise and it would be necessary to deny the status of an international organization to all entities which do not possess some capacity to conclude treaties. In fact, however, international practice in the matter is very flexible, and this has great advantages; in particular, the term "international organization" is used extremely freely. Does this not make it easier for some entities to claim certain rights of international organizations without, however, enjoying the right to conclude treaties? Does it not even make it easier to expect an extension of the practice which will recognize this capacity to negotiate when it has become necessary, provided that no doubt has been cast on the status of the entity in question as an international organization?

Although insufficient to justify adoption of a final position, these considerations point in the following direction. International law refers to the rules of each organization not only for the distribution of powers between its various organs, but also for the nature and extent of those powers. Just as the 1969 Convention did not seek to encroach on the freedom of each State's constitution, there is no need to encroach on the freedom of the States which set up organizations or on the freedom of the practice which adjusts the status of such organizations, with the consent of their member States, to their emerging needs. Even if we cannot recognize the sovereignty of organizations, why should we deny them the freedom which counters uniformity? If these arguments were endorsed by the Commission, it would be possible to avoid dealing with the capacity of international organizations by general formulas, which it is very difficult to make adequate to varied and changing situations.

Representation

83. The question of representation may be considered at two very different levels. First, it may be asked how the status which authorizes a natural person to negotiate on behalf of the organization is established and proved vis-à-vis other contracting parties. In the 1969 Convention, article 2, paragraph 1 (*c*), and articles 7, 8 and 47 settle this question as regards the representation of States; it is not certain that symmetrical texts for international organizations can be prepared by a simple drafting transposition—only more thorough study of the practice would provide an answer to that question. But there is a problem of representation at a different level, which is less common but more delicate: it has to be considered whether an organization as such can represent another organization or a State, and whether a State can represent an organization. The International Law Commission tried unsuccessfully to deal with this problem when preparing the draft articles on the law of treaties; will it be necessary to revert to it in connexion with the agreements of international organizations? No absolute answer can be given. If there were an abundant practice in the matter, it would show both the extent of the needs met and the possibility of working out certain formulas which would consolidate the practice. In the

[186] Of course, article 63 concerning the severance of diplomatic or consular relations must be excepted and certain special considerations might have to be introduced into articles 46 and 47.

absence of any substantial practice and despite the existence of certain well-known cases, however, it would perhaps be better not to deal with this problem for the time being, despite its theoretical interest.

Effects of treaties

84. The agreements of international organizations have effects some of which are specific and merit special attention. Among these, two have been noted which involve the concept of a "party and of a "third party" in relation to a treaty. There are many examples of treaties in which an international organization is called upon to "participate" without being exactly in the position of a "party": the organization is bound by some of the rules set out in the treaty and hence enjoys certain rights and assumes certain obligations, but it does not enjoy all the rights of States "parties" to the treaty; in most cases, the substantive rules laid down in the treaty apply to it, but it has no part in the procedures for entry into force and revision of the treaty. Various technical procedures have been applied in practice to arrange "participation" by organizations; the legal problems raised by these procedures have not, as a whole, been dealt with in published studies. The question for the Commission is to decide, after having obtained more information, whether it is possible and advisable to specify the legal régime of some of the procedures used.

85. Another question has arisen: there is no reason, in dealing with the agreements of international organizations to set aside the basic rule laid down by article 34 of the 1969 Convention:

> A treaty does not create either obligations or rights for a third State without its consent.

However, the determination of the status of a "third" party or State in relation to a treaty does not always go unchallenged, particularly in a case relevant to the subject now under study: are the States members of an international organization "third States" in relation to the treaties to which the organization is a party? One would be tempted to say that the States members of an organization may be "more or less" third States in relation to the treaties concluded by the organization, just as we have explained that there are treaties to which organizations are "more or less" parties. In other words, more flexibility must be introduced into the concept of "third", as into the concept of "party". International practice has certainly felt these problems rather acutely, since it has had recourse to various technical mechanisms to solve them.[187]

The whole question of the effects of the agreements of international organizations is one of the matters which would be studied by the Special Rapporteur and the International Law Commission in the hope of finding at least some general directives.

The law of each organization

86. In the International Law Commission and at the Conference on the Law of Treaties, the question of the law of each international organization has been examined and discussed at length. This question is absolutely fundamental, since the very possibility of establishing any general rules in the law of international organizations ultimately depends on it. The desire to safeguard the original individuality of each organization in accordance with its own needs led, in the 1969 Convention, to the adoption of a form of words reserving the application of "any relevant rules of the organization" for certain kinds of treaty which, although concluded between States, concern certain international organizations in a special way, namely, treaties establishing an organization and treaties concluded within an organization. It is clear that for treaties to which one or more international organizations are parties *at least* the same reservation must be made, since such treaties concern the organization more directly than treaties between States concluded within one of its organs. But it will probably be necessary to go still further, or at least elucidate the exact meaning of the formula "any relevant rules of the organization".

87. The question has been examined and discussed both in the International Law Commission and at the Conference on the Law of Treaties. It was considered afresh when the Commission was drafting article 3 of the draft articles on the representation of States in their relations with international organizations.[188] All this work gives some indication, not only of the meaning to be ascribed to an identical formula inserted in draft articles on the law of treaties of international organizations, but also of the actual scope of the problem raised. There can be no doubt, however, that the scope varies according to the subject-matter of each convention. When, in the 1969 Convention on the Law of Treaties, a reservation regarding "any relevant rules of the organization" was made for certain treaties, it was mainly the formal rules relating to the conclusion of treaties that were being considered; in the draft articles on the representation of States in their relations with international organizations, the scope of the reservation is clearly wider: there may, indeed, be specific provisions for each organizations regarding *all* the provisions of the draft articles; this is so particularly in view of the fact that these provisions may not be only in the "relevant rules of the organization", but also in "other international agreements in force between States or between States and international organizations", since article 4 of the draft contains a reservation concerning them too.[189] Hence an attempt must first be made to determine what might be the *field of application* of such a reservation. Then it will be necessary to define, perhaps in the light of the earlier debates, the *content* of the notion of "relevant rules of the organization", in particular, having regard to the "practice of the organization".

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[187] Thus, to the procedures, already mentioned, we should add that of listing an international organization and its member States jointly as parties ("mixed agreements" of certain regional organizations) in relation to the other contracting party.

[188] See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), pp. 287-288, document A/8410/Rev.1, chap. II, D, article 3 and commentary, in particular para. 5 of the commentary. See also para. 48 above.

[189] *Ibid.*, p. 288, document A/8410/Rev.1, chap. II, D, article 4.

88. The "relevant rules" of each organization will probably deal exclusively with the procedure governing the conclusion of treaties; this will simplify the problem, especially as the rules of the 1969 Convention on the conclusion of treaties are extremely flexible for all treaties without exception, in particular by reason of article 11.[190] But it is not possible to be absolutely certain that questions other than those relating to the conclusion of treaties will not be involved; they may be, if the rules of an international organization form a sufficiently systematic whole to constitute what has sometimes been called, rightly or wrongly, an "internal law of the organization". That situation might, for example, give rise to questions of the same kind as those covered by article 30 of the 1969 Convention, if certain treaties between the organization and its member States (or even between its member States) are considered to form part of the organization's internal law" and merely constitute measures giving effect to other treaties. The Special Rapporteur is therefore obliged to reserve these hypotheses but naturally in the hope that they can be left out of account if they prove to be too theoretical and confined to very special cases.[191]

89. Another more important problem relates to the content of the notion of "relevant rules of the organization". It obviously includes the constituent instrument of the organization and the various unilateral regulations which the organizations draws up if it has obtained authority to do so.[192] As regards the "practice of the organization", the International Law Commission, in the course of its previous work, has taken the view that only an "established practice" was part of the "relevant rules of the organization". This clarification would certainly seem to suggest that the "practice" thus recognized must be the subject of a *rule*, either because it is considered that in this case the rule is the subject of a tacit agreement.[193] or because the practice has become consolidated as a customary rule. But if this so, there is room for "practices" which are not sufficiently "established" to constitute a "relevant rule of the organization". If general rules are in any way established which will be valid for the agreements of organizations, reserving only the "relevant rules of the organization", these general rules will take precedence over "unestablished practices"; in other words, the organization will lose the right to seek, by new practices, to change the law applicable to it when the matter has been the subject of a formal rule; as to the rules which would be established by draft articles on the law of the treaties of international organizations, the organization will have lost the right to change them by a customary process, but will still be free to amend them by a legal process in writing. It may be desired to preclude such a consequence and to decide, as some organizations have requested, that the practice to be included in the notion of "relevant rules of the organization" should comprise any practice, even if it is not "established".[194] It may indeed, be preferred to keep intact in all its forms the creative power of the international organizations with respect to the legal rules relating to them. But the consequences of this choice must be carefully weighed: it means that even as residuary rules the provisions of a draft of articles would no longer be in any way mandatory for international organizations; they would merely be guidelines for the organizations or, at best, principles so general that their binding force would be very limited in practice. But draft articles thus conceived would still be very valuable because they would help, although by a very flexible process, to bring a little clarity (and perhaps order) into a sphere where they are lacking. This is the alternative which must be clearly understood today; both possibilities are equally worthy of consideration; moreover, they are valid for the whole of the law of international organizations, and any preferences which may be felt for either of them should be based on practical considerations; it may change according to the subject-matter to be covered in draft articles. Thus, for the representation of States in their relations with international organizations, a subject which is covered by precise and detailed provisions in the proposals of the International Law Commission, the possibility of subsequent development through mere practice has been ruled out, although a reservation has been made not only for already established practices, but also for the possibility of subsequent change by a legal process in writing (express conventions, other relevant rules of the organization); this really means that after an attempt at codification such as that represented by these draft articles, the subject should be regarded as having gone beyond an experimental stage

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[190] See para. 79 above.

[191] We have no intention of starting a theoretical controversy here, which would be both out of place and premature; but the special rapporteurs of the International Law Commission have used the expression "internal law of the organization" on several occasions. There is all the more reason to question the possible consequences of using this expression because a rule is being prepared which is to apply both to an organization and to a State, for which the expression "internal law" has a precise meaning (1969 Convention, article 2, paragraph 2 and article 27) and because certain States have made declarations which are summarized as follows in the report of the Sixth Committee to the General Assembly at its twenty-fourth session on the resolution relating to article 1 of the Vienna Convention on the Law of Treaties "... it should be acknowledged from the outset that fundamental differences existed between treaties in the sense of the Vienna Convention and the agreements to which international organizations were parties. The matter related to both international law and domestic law and in both contexts raised extremely difficult and delicate questions." (See *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda items 86 and 94* (b), document A/7746, paras. 109-115.)

[192] It might also be accepted that the "relevant rules of the organization" include all agreements and treaties concluded by the organization or by member States on matters concerning the organization, unless, in order to avoid all ambiguity, it is preferred to mention them separately from the "relevant rules", as is done in the draft articles on the representation of States in their relations with international organizations (see para. 86 above). Of course, if the "internal" aspect of the law of each organization is to be considered, perhaps only certain kinds of treaty will be taken into account, as has been suggested.

[193] It may be recalled that the conclusion of a tacit agreement through "practice" is expressly provided for in article 31, paragraph 3 (*b*) of the 1969 Convention.

[194] See the very interesting discussion which took place in the International Law Commission on 15 June 1971 (*Yearbook of the International Law Commission, 1971*, vol. I, pp. 211 *et seq.*, 1118th meeting).

of tentative effort and spontaneous creation by way of "practice". It is not certain that the same solution is needed for draft articles on the treaties of international organizations. If it were considered that for the treaties of international organizations it is necessary to extend the present period and maintain the great freedom of action of the international organizations, even at the risk of some uncertainty and confusion, the work of the Commission would have to be arranged accordingly. While retaining the final objective of the proposal for draft articles, with all the characteristics of legislative work, the Commission would have to accept that such a draft would be merely a guide for subsequent developments. This is an eventuality which, at the present stage of the Commission's work, the Special Rapporteur cannot regard as probable, still less as inevitable, but which, together with others, should henceforth be borne in mind by the members of the Commission.